



June 14, 2022

The Honorable Ron Wyden  
Chair, Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Mike Crapo  
Ranking Member, Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chair Wyden, Ranking Member Crapo, and Members of the Committee:

On behalf of National Taxpayers Union Foundation (NTUF), we write regarding your June 14 hearing, “Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales.”<sup>1</sup> This topic is critically important and has a measurable economic impact on hundreds of thousands of small businesses across the country, so we commend you for devoting time during a packed legislative agenda to hearing the concerns of experts and stakeholders.

NTUF wishes to offer its viewpoints and reform recommendations to the Committee as a supplement to the valuable information you will receive from witnesses today. Two separate initiatives at NTUF, our Taxpayer Defense Center and our Interstate Commerce Initiative, are engaged with the impacts of a post-*Wayfair* landscape on a regular basis. NTUF’s Interstate Commerce Initiative (ICI) has offered expert opinion on state efforts to tax remote sales since before the Supreme Court’s ruling in *South Dakota v. Wayfair*, and has published several papers on the impact of the *Wayfair* ruling and recommendations for Congress and states moving forward,<sup>2</sup> while our Taxpayer Defense Center (TDC) has litigated the significant implications for how states administer sales taxes in the post-*Wayfair* world.<sup>3</sup>

Our years of experience on these matters and our engagement with a variety of business and policymaking stakeholders have informed the recommendations we offer the Committee today. We appreciate your ongoing engagement on issues involving the taxation of remote sales.

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<sup>1</sup> Senate Committee on Finance. “Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales.” June 14, 2022. Retrieved from:

<https://www.finance.senate.gov/hearings/examining-the-impact-of-south-dakota-v-wayfair-on-small-businesses-and-remote-sales> (Accessed June 8, 2022.)

<sup>2</sup> Moylan, Andrew, and Wilford, Andrew. “*South Dakota v. Wayfair*: What It Means.” NTUF, August 22, 2018. Retrieved from: <https://www.ntu.org/foundation/detail/south-dakota-v-wayfair-what-it-means>; Moylan, Andrew, and Wilford, Andrew. “Congressional Responses to *Wayfair*.” September 26, 2018. Retrieved from: <https://www.ntu.org/foundation/detail/congressional-responses-to-wayfair>

<sup>3</sup> NTUF. “NTUF Files Landmark Federal Lawsuit To End Sales Tax Nightmare for Small Businesses.” November 15, 2021. Retrieved from: <https://www.ntu.org/foundation/detail/ntuf-files-landmark-federal-lawsuit-to-end-sales-tax-nightmare-for-small-businesses>

## **Problems That Small Businesses Face Following the *South Dakota v. Wayfair* Ruling**

### ***The Wayfair Ruling and Small Business Compliance in the 50 States***

The internet has proved to be a great equalizer in terms of enabling businesses with smaller operations to access a far broader market than they once could. With the *Wayfair* decision, new compliance burdens threaten to constrain smaller operations' ability to reach a national market.

E-retail businesses with employees and property in just one or two states previously had a far more manageable tax compliance burden, having to collect and remit sales taxes on behalf of just those states. Now, the smallest of small businesses find themselves having to navigate the differences in tax definitions, exemptions, rules, and rates for states all around the country.

While the largest retailers already had physical presence or had entered into voluntary collection agreements with states nationwide prior to *Wayfair*, the biggest change came for these smaller businesses. Research has long established that tax compliance costs are regressive, causing greater relative harm to smaller businesses without the accounting resources of larger businesses, which have the advantage of economies of scale.<sup>4</sup> Thomson Reuters estimated soon after the *Wayfair* decision that just eight percent of mid-sized firms were prepared to handle the increased compliance burdens.<sup>5</sup>

Lacking Congressional guidelines, states have not done enough to limit these compliance burdens. Features of the South Dakota law at issue in *Wayfair* that the Supreme Court specifically cited as reducing compliance burdens on small businesses, including a sizeable *de minimis* threshold, a statutory ban on retroactive enforcement, state-level sales tax administration, uniform definitions of products and services, a simplified tax rate structure, access to sales tax compliance software provided by the state, and immunity from liability for errors made by the software or state,<sup>6</sup> have been interpreted by many states as suggestions rather than requirements.

### ***Outlier States and the Halstead Bead Case***

Bad policy in one state can create outsized impacts on compliance burdens. Kansas, for instance, implemented economic nexus rules via a Department of Revenue guidance that neglected to include a safe harbor for small sellers — an oversight that was only corrected in 2019.<sup>7</sup> California, meanwhile, has pursued effectively retroactive enforcement of economic nexus rules by attempting to apply a voluntary agreement made with Amazon to third-party sellers on the platform going back to 2012. These outlier states create magnified compliance burdens as every seller in the country now has an obligation to meet what they require.

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<sup>4</sup> Donald B. Marron. "Tax Issues Facing Small Business." Urban Institute & Urban-Brookings Tax Policy Center, April 9, 2014. Retrieved from:

<https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/904621-Tax-Issues-Facing-Small-Business.PDF>

(Accessed June 8, 2022.)

<sup>5</sup> Thomson Reuters. "Tax day of reckoning comes for e-commerce companies." August 2018. Retrieved from:

<https://www.thomsonreuters.com/en-us/posts/news-and-media/tax-day-of-reckoning-comes-for-e-commerce-companies/> (Accessed June 8, 2022.)

<sup>6</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–2100 (2018).

<sup>7</sup> Moylan, Andrew and Wilford, Andrew. "Kansas Must Act to Protect Small Sellers from Remote Sales Tax Law." National Taxpayers Union Foundation, March 22, 2021.

<https://www.ntu.org/foundation/detail/kansas-must-act-to-protect-small-sellers-from-remote-sales-tax-law>

Most harmful, however, have been cases where states failed to provide state-level administration of sales taxes. For example, Louisiana’s sales tax system is uniquely difficult to use due to a parish-by-parish registration and reporting requirement, distinct exclusions and exemptions adopted by local ordinance, taxing jurisdictions within parishes that do not align with zip code lines, and other burdens to out-of-state sellers. Sellers need to register and file with the state and any of the 63 parishes in the state that collect their own sales tax and the parishes can be aggressive in auditing any wayward sellers. Unlike South Dakota, Louisiana is not part of the Streamlined Sales and Use Tax Agreement.

Louisiana’s system is so onerous that it generated the first post-*Wayfair* challenge to a state’s sales tax registration and remitting system. *Halstead Bead v. Richard*, filed by NTUF’s Taxpayer Defense Center alongside the Goldwater Institute and the Pelican Institute, is a constitutional challenge to the burdens of Louisiana’s tax compliance system.

Halstead Bead is a family owned and operated jewelry and craft supplier based in Arizona. The company’s nationwide sales are online or via catalog. Married couple Hillary Halstead Scott and Robert (“Brad”) Scott are the company’s principal officers, serving as President and Treasurer, respectively. Hillary oversees many aspects of the business founded by her parents. Brad, who married into the family business, is the one-man compliance and finance department: he handles payroll and employee benefits, company finances, and tax compliance. But Louisiana’s system is too complicated — Brad estimates that it will cost about \$11,000 to register and comply with Louisiana’s system over the next three years, all to only remit a few hundred dollars in sales tax revenue that will be split among the various local parishes.

This situation violates the Commerce Clause of the Constitution and deprives the family-operated supplier of their Due Process rights under the Fourteenth Amendment. The federal court in the Eastern District of Louisiana ruled against Halstead Bead on technical grounds under the Tax Injunction Act; appeal of that decision will be before the United States Court of Appeals for the Fifth Circuit.

### ***States’ Revenue Estimates Since Wayfair***

What’s more, these added burdens on e-retail businesses have not yielded the revenue windfalls that advocates of economic nexus rules claimed they would prior to *Wayfair* — estimates that played a major part in the Court deciding how it did in *Wayfair*. A year after *Wayfair*, NTUF conducted a study of official state estimates of post-*Wayfair* revenue collections from economic nexus rules and found that they were far lower than were estimated prior to *Wayfair*.

The 32 official post-*Wayfair* state estimates of added revenue that NTUF found totaled just \$3.6 billion. In those same 32 states, the National Conference of State Legislatures had estimated that additional revenues would total \$19 billion, while the Government Accountability Office’s more moderate estimate was still far too high at \$8.6 billion. In those 32 states, \$3.6 billion represented an average of less than a percent of general fund revenue.<sup>8</sup>

In short, compared to the assumptions underlying the *Wayfair* decision, compliance burdens for small businesses have been higher and the increase to state revenue has been lower. As such, it now falls to Congress to rectify this imbalance in priorities and reduce the burden on interstate commerce and small businesses.

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<sup>8</sup> Moylan, Andrew and Wilford, Andrew. “Wayfair Revenue Estimates Come Up Short.” National Taxpayers Union Foundation, August 19, 2021. <https://www.ntu.org/foundation/detail/wayfair-revenue-estimates-come-up-short>

## Policy Recommendations for States and Congress

### *Streamlined Sales and Use Tax Agreement (SSUTA) Membership and Economic Nexus*

The most frictionless path forward for Congress and the states would be to mandate or incentivize states to join the Streamlined Sales and Use Tax Agreement (SSUTA), which has existed for decades to “simplify and make more uniform the sales and use tax collection and administration for retailers and states.”<sup>9</sup> The Supreme Court’s ruling in *South Dakota v. Wayfair* cited South Dakota’s membership in SSUTA as a “feature” of South Dakota’s tax system “that appear[s] designed to prevent discrimination against or undue burdens upon interstate commerce.”<sup>10</sup> The Court wrote:

“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.”<sup>11</sup>

However, even as each state with a sales tax has adopted economic nexus rules since the *Wayfair* ruling, no new states have joined the SSUTA since *Wayfair*.<sup>12</sup>

Congress should either require states to become SSUTA members or to adopt substantially similar protections by a given date in order to continue to enforce economic nexus rules against sellers out of state. Congress could provide two options: membership in the SSUTA, or adoption of significant tax simplification efforts for out-of-state sellers.

For the latter track, Congress should require the following:

- **One-Step State-Level Tax Administration**: While the vast majority of states do this now, administering their sales tax registration, filing, rulemaking, and auditing at the state level, the few states that do not represent a disproportionately large sales tax compliance burden for out-of-state businesses.<sup>13</sup> Louisiana is currently the greatest offender in this regard, requiring out-of-state businesses to comply with not only the state sales tax regime, but also those of 63 local parishes.<sup>14</sup> Some “home rule” states have made efforts to reduce the compliance burden for out-of-state sellers already, such as Alabama and

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<sup>9</sup> Streamlined Sales Tax Governing Board, Inc. “FAQs - General Information About Streamlined.” June 2022. Retrieved from: <https://www.streamlinedsalestax.org/Shared-Pages/faqs/faqs---about-streamlined> (Accessed June 8, 2022.)

<sup>10</sup> *Wayfair*, 138 S. Ct. at 2099.

<sup>11</sup> *Id.* at 2099-2100.

<sup>12</sup> There were 23 full member states in SSUTA as of the Supreme Court’s *Wayfair* ruling in 2018. There are still 23 member states as of this writing. See: Chamseddine, Jad. “Streamlined States Emerge as Winners After Wayfair Ruling.” *Tax Analysts*, June 26, 2018. Retrieved from: <https://www.sullivanlaw.com/assets/htmldocuments/B2297988.pdf> (Accessed June 8, 2022.); see also: *supra* note 10.

<sup>13</sup> As the Sales Tax Institute, a witness at this hearing, has written: “some states permit local administration of these taxes, which requires the taxpayer to register with the locality and remit the tax directly to it. We refer to these states as ‘Home Rule’ states. The primary home rule states that allow local authorities to enact and administer their own general sales and use taxes are Alabama, Alaska, Arizona, Colorado and Louisiana.” See: “What states impose sales/use tax?” Sales Tax Institute. June 2022. Retrieved from: [https://www.salestaxinstitute.com/sales\\_tax\\_faqs/what\\_states\\_impose\\_sales\\_use\\_tax](https://www.salestaxinstitute.com/sales_tax_faqs/what_states_impose_sales_use_tax) (Accessed June 8, 2022.)

<sup>14</sup> Verified Complaint ¶¶ 49-65, *Halstead Bead v. Richard et al.*, No. 2:21-cv-02106-JTM-KWR (E.D. La. Nov. 15, 2021) available at: <https://www.ntu.org/library/doclib/2021/11/Halstead-Verified-Complaint.pdf>.

Colorado. Nevertheless, federal legislation should require state-level tax administration – which should include state-level uniformity in tax definitions, exemptions, and rates, and a single point of contact for collection and audit procedures – as a requirement for enforcing economic nexus rules.

- **Uniform Sourcing Rules:** States should have to abide by a single, federally-specified definition of where remote sales are to be sourced: namely, the location of the address to where the product is to be delivered.
- **Single Local Sales Tax Rate Option:** Remote sellers must track over 10,000 sales tax jurisdictions nationwide, many with different rates and not aligning with zip code boundaries. Congress should require states to provide an option to remote sellers to collect a single weighted-average rate of all local rates in the state, or to collect actual rates in every jurisdiction, at the seller’s choice. Texas already does this.
- **Access to Free Tax Compliance Software:** States should certify and defray the cost of sales tax compliance software for out-of-state sellers.

### ***Beyond SSUTA***

Even beyond requiring states to either join SSUTA or conform to certain minimum requirements in enforcing economic nexus rules post-*Wayfair*, Congress should protect interstate commerce by requiring the following reforms:

- **Require a National Sales Threshold for Facing Economic Nexus Tax Collection Obligations:** Though the Supreme Court approved of a *de minimis* threshold of \$100,000 in sales or 200 transactions in *South Dakota v. Wayfair*,<sup>15</sup> this threshold applied to the 48th-largest state in the Union in terms of GDP<sup>16</sup> and 46th-largest in population.<sup>17</sup> Many states such as California and New York have recognized this and adopted larger thresholds, but many large states have followed this *de minimis* threshold with no attempt to adjust for differences in size, such as Pennsylvania, Illinois, and Florida. This trend also holds for marketplace facilitator laws. Congress should set a national threshold that businesses must reach before they can be subjected to tax collection and remittance responsibilities on the basis of economic nexus or marketplace facilitator laws, even if they reach state-level thresholds. At a minimum, Congress should also require states to maintain a state-level *de minimis* threshold that matches South Dakota’s threshold. The threshold should also be uniformly calculated on a calendar year basis.
- **Require States to Only Count Taxable Sales Towards Nexus Thresholds:** Most states do not exempt non-taxable sales from counting towards their economic nexus thresholds. This can lead to situations where out-of-state wholesalers with no taxable sales nevertheless have to file sales tax returns in a state in order to comply with that state’s economic nexus law, meaning compliance burdens for no tax collected. Congress should mandate that states count only taxable sales towards their economic nexus threshold. Should Congress adopt a national threshold as mentioned above, this likewise should exempt non-taxable sales.

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<sup>15</sup> *Wayfair*, 138 S. Ct. at 2099.

<sup>16</sup> Bureau of Economic Analysis. “SAGDP1 Gross Domestic Product (GDP) summary, annual by state.” March 31, 2022. Retrieved from: <https://apps.bea.gov/iTable/iTable.cfm?reqid=70&step=1&isuri=1&acrdn=1#reqid=70&step=1&isuri=1&acrdn=1> (Accessed June 8, 2022.)

<sup>17</sup> United States Census. “State Population Totals and Components of Change: 2020-2021.” June 2022. Retrieved from: [https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#par\\_textimage\\_1574439295](https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#par_textimage_1574439295) (Accessed June 8, 2022.)

- **Require Additional Compliance Software Provisions:** Both remote sellers and compliance software providers should be protected from liability in the case of mistakes made by the other or by the state.
- **Allow Taxpayers to Challenge State Economic Nexus Laws in Federal Court:** It is very difficult for taxpayers to challenge state tax laws in federal court even where they deal with federal constitutional or statutory matters. This is despite the fact that state economic nexus taxation has raised many issues of federal law. In effect, taxpayers must challenge state laws that raise issues of federal law in each individual state court, even if it deals with the same issue that has already been tried in other state courts. Congress should provide taxpayers with the ability to be heard in federal courts instead, when raising a federal issue.
- **Amnesty for Out-of-Compliance Sellers:** Businesses that have not been aware of or have not been able to comply with state sales tax obligations may have accumulated vast amounts of sales tax liability, liabilities for which they did not have a chance to collect from their customers. Unfortunately, states have thus far declined to provide this form of reasonable accommodation. Absent intervention from Congress, overwhelmed small business owners could be subject to personal financial ruin on top of business failure.

## **Conclusion**

NTUF appreciates the opportunity to provide our research and perspectives on how state sales tax rules affect remote and online sellers in a post-*Wayfair* landscape. Should you have any questions or wish to discuss our recommendations further, please do not hesitate to contact Andrew Lautz at [alautz@ntu.org](mailto:alautz@ntu.org).

Sincerely,

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CC: Members of the Senate Committee on Finance