SJC-13283

In the Commonwealth of Massachusetts

Supreme Judicial Court

U.S. AUTO PARTS NETWORK, INC.

Appellee,

v.

COMMISSIONER OF REVENUE,

Appellant.

ON APPEAL FROM A JUDGMENT OF THE APPELLATE TAX BOARD

BRIEF OF *AMICUS CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF APPELLEE U.S. AUTO PARTS NETWORK, INC.

Karen A. Pickett (BBO # 633801)
PICKETT LAW OFFICES, P.C.
125 High Street, 26th Floor
Boston, MA 02110
Telephone (617) 423-0485
kpickett@pickettlegal.com

Tyler Martinez*
Counsel of Record
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street NW, Suite 650
Washington, DC 20001
Telephone: (703) 683-5700
tmartinez@ntu.org

* *Admission* Pro Hac Vice *pending*

Counsel for Amicus Curiae

October 14, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to SJC Rule 1:21, *Amicus Curiae* National Taxpayers Union Foundation (NTUF) states, that it is a nonprofit, nonpartisan organization incorporated in the District of Columbia. *Amicus* further states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ISSUE PRESENTED 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The Commissioner's 2017 Regulation Went Beyond Settled Caselaw at the Time of Promulgation. 5

II. Wayfair Prohibits Retroactive Sales Taxes on Remote Sellers. 8

III. Chevron Oil's Factors Control This Case. 13

IV. Retroactive Application of Wayfair Opens Massachusetts to Commerce Clause and Due Process Clause Challenges. 17

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Cases

Agostini v. Felton,
521 U.S. 203 (1997).....17

Allied-Signal, Inc. v. Director, Div. of Tax'n,
504 U.S. 768 (1992).....6

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984).....16

D&H Distributing Co. v. Comm'r of Revenue,
477 Mass. 538 (2017) 7

Davis v. Mich. Dept. of Treasury,
489 U.S. 803 (1989).....15

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998).....12

General Motors Corp. v. Romein,
503 U.S. 181 (1992).....12

James B. Beam Distilling Co. v. Georgia,
601 U.S. 529 (1991)..... 3, 15, 16

Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.,
386 U.S. 753 (1967)..... 5, 6, 7

Nunez-Reyes v. Holder,
646 F.3d 684 (9th Cir. 2011) 17

Quill Corp. v. N. Dakota,
504 U.S. 298(1992)..... 5, 6, 7

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995)..... 3, 5, 17, 19

S. Dakota v. Wayfair, Inc.,
585 U.S. ___, 138 S. Ct. 2080 (2018)..... *passim*

United States v. Carlton,
512 U.S. 26 (1994).....11

Wis. v. J.C. Penney Co.,
311 U.S. 435 (1940).....6

Statutes

47 U.S.C. § 151 note.....1, 20

Ala. Code § 40-23-190.....18

Cal. Rev. & Tax Code § 6203(c)(4)(A).....18

Mass. Gen. Laws ch. 64I, § 2.....4

Miss. Code § 27-67-3(j).....19

N.Y. Tax Law § 1134(a)(1)(i).....18

Tex. Admin. Code § 3.286(b)(2)(B)(i).....18

Rules

Mass. R. App. P. 17(a)(1)(5).....1

Mass. R. App. P. 17(c)(5)(D).....2

Regulations

830 C.M.R. § 64H.1.7..... passim

830 C.M.R. § 64H.1.7(3)..... 17, 18

830 C.M.R. § 64H1.7(1)(b)(2)(a and b). 7

Other Authorities

Announcement, *U.S. Auto Parts Net., Inc. v. Comm'r of Rev.*, No. SJC-13283
(May 16, 2022) (Dkt. 2).....1

Br. for Colorado and 40 Other States, Two United States Territories, and the District of Columbia as *Amici Curiae* Supporting Petitioner, (U.S. No. 17-494) http://www.supremecourt.gov/DocketPDF/17/17-494/37674/20180305153329994_17-494%20Amici%20Brief%20States%20PDFA.pdf.....10

Br. of National Taxpayers Union Foundation as *Amicus Curiae* in Support of Respondents, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (U.S. No. 17-494) http://www.supremecourt.gov/DocketPDF/17/17-494/22975/20171207121714321_17-494acNationalTaxpayersUnionFoundation%20PDFA.pdf 9

Br. of Tax Foundation as *Amicus Curiae* in Support of Neither Party, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (U.S. No. 17-494) http://www.supremecourt.gov/DocketPDF/17/17-494/37597/20180305130816353_17-494%20Tax%20Foundation%20amicus%20South%20Dakota%20v%20Wayfair.pdf 9

Joe Bishop-Henchman, Andrew Moylan, Andrew Wilford, *Digital Tax Legislation is a Road to Ruin for States*, National Taxpayers Union Foundation (Feb. 18, 2021) https://www.ntu.org/library/doclib/2021/02/Digital-Tax-Legislation-is-a-Road-to-Ruin-for-States-1-.pdf 20

Joseph Henchman & Kavya Rajasekar, *The Bounds of Retroactive State Taxes Skadden, Arps, Slate, Meagher & Flom LLP v. Michigan Dept. of Treasury*, Tax Foundation (Feb. 9, 2017) https://taxfoundation.org/retroactive-tax-skadden-michigan/.....12

Mass. Dept. of Rev. "Individual Use Tax," https://www.mass.gov/service-details/individual-use-tax.....4

Paul Calvano, *An Analysis of Cookie Sizes on the Web* (July 13, 2020) https://paulcalvano.com/2020-07-13-an-analysis-of-cookie-sizes-on-the-web/ 4

Paul H. Frankel & Amy L. Nogid, *The Manifest Justice to the Manifest Injustice Doctrine: The Time Has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases* https://www.jdsupra.com/legalnews/the-manifest-justice-of-the-manifest-inj-11871/.....12

Robert Krulwich, *Let's Weigh the Internet (or Maybe Let's Not)*, National Public Radio (Dec. 21, 2011) https://www.npr.org/sections/krulwich/2011/12/21/144066248/lets-weigh-the-internet-or-maybe-lets-not 3

Streamlined Sales Tax Governing Board, Inc., *State Information*, https://www.streamlinedsalestax.org/Shared-Pages/State-Detail.....19

U.S. Census Bureau, *State Population Totals and Components of Change: 2020-2021* ttps://www2.census.gov/programs-surveys/popest/tables/2020-2021/state/totals/NST-EST2021-POP.xlsx.....18

U.S. Dept. of Commerce, Bureau of Economic Analysis, GDP by State https://www.bea.gov/sites/default/files/2022-09/stgdppi2q22-a2021.pdf 18

ISSUE PRESENTED

Amicus Curiae addresses the following request from this Court:

> The Justices are soliciting amicus briefs. Whether the Commissioner of Revenue had the authority to require the taxpayer, an internet vendor with no traditional physical presence in Massachusetts, to collect sales taxes on internet sales to Massachusetts customers, based on the taxpayer's internet contacts in Massachusetts such as a mobile application, "cookies," and third-party content distribution networks; whether such requirement violates the Commerce Clause or the Internet Tax Freedom Act, 47 U.S.C. § 151 note.

Announcement, *U.S. Auto Parts Net., Inc. v. Comm'r of Rev.*, No. SJC-13283 (May 16, 2022) (Dkt. 2).

INTEREST OF AMICUS CURIAE

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.[1]

[1] *Amicus* states that no party, nor any party's counsel, nor any individual or entity other than *Amicus*, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Mass. R. App. P. 17(a)(1)(5). *Amicus* also states that neither it nor its counsel has ever represented any party to

SUMMARY OF THE ARGUMENT

Underlying this case is the internet, "cookies" on computers, and similar technology. But reaching into a state to advertise is not new: mail order businesses have used the U.S. Mail and common carriers to distribute catalogues and fulfill orders for years since the Sears Roebuck catalogues. For fifty years before the Commissioner's regulation, the U.S. Supreme Court consistently protected mail order businesses from the burdens of sales tax collection and remittance. There was no ambiguity in the law requiring expert promulgation of a new rule: instead, the new rule was directly opposite of then-current case law.

Even when the Supreme Court did allow states to begin requiring businesses to collect and remit sales taxes, it upheld the South Dakota law specifically because the state law had no retroactive effect. *South Dakota v. Wayfair*, 585 U.S. ___, 138 S. Ct. 2080, 2099 (2018). Yet the Commissioner's rule *is* retroactive. The regulation, if left in effect, would leave the Commonwealth's tax system vulnerable to challenges under the federal Commerce and Due Process Clauses.

When examining the retroactive effect of taxes under the Commissioner's rule, this Court should look to the three-factor test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and find all three factors counsel against allowing Massachusetts to

---

this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal. Mass. R. App. P. 17(c)(5)(D).

retroactively apply tax liability. Contrary to the Commissioner's protestations, *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), and *James B. Beam Distilling Co. v. Georgia*, 601 U.S. 529 (1991) did not remove *Chevron Oil*'s test.

A novel basis for "physical presence" and retroactive application are the most obvious problems with 830 C.M.R. § 64H.1.7. But alternatively, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), provides this Court with the ability to set aside a rule that so meaningfully impacts interstate commerce beyond what has been allowed by the U.S. Supreme Court. That is the situation here. Massachusetts wishes to gain all the tax revenue from remote sellers allowed by *Wayfair*, but institutes almost none of the protections the *Wayfair* Court relied upon in upholding South Dakota's law to Commerce Clause analysis. In doing so 830 C.M.R. § 64H.1.7 runs afoul of the Commerce Clause and the Permanent Internet Tax Freedom Act.

ARGUMENT

The data contained on the internet is vast, but its physical footprint is tiny. In 2011, National Public Radio ran a story estimating the entire internet weighed about the same as a strawberry. Robert Krulwich, *Let's Weigh the Internet (or Maybe Let's Not)*, National Public Radio (Dec. 21, 2011).[2] A single email, about 50 KB, would weigh about "two ten thousandths of a quadrillionth of an ounce." *Id*. Cookies are

[2] https://www.npr.org/sections/krulwich/2011/12/21/144066248/lets-weigh-the-internet-or-maybe-lets-not.

even smaller: while the maximum size of a cookie is 4 KB for most browsers, the median cookie size is just 36 bytes. Paul Calvano, *An Analysis of Cookie Sizes on the Web* (July 13, 2020).[3] Upon these tiny cookies the Commissioner of Revenue rests the entire weight of Massachusetts tax compliance obligations upon out-of-state sellers.

After the Commissioner promulgated the cookie nexus theory of physical presence in Massachusetts, the U.S. Supreme Court handed down its decision in *Wayfair*. But while the *Wayfair* Court removed the bright line test of physical presence for sales tax collection, it did so with important safeguards: the state law had a *de minimis* threshold, no retroactivity, and the simplifications that come with a state joining the Streamlined Sales and Use Tax Agreement. 138 S. Ct. at 2099-2100. Most importantly for the case at bar: *Wayfair* specifically upheld South Dakota's taxing regime *precisely because* it would not be applied retroactively. *Id*. at 2089.

Wayfair upended decades of clear precedent that remote sellers without physical presence in a state did not need to collect sales taxes.[4] The reliance interests

[3] https://paulcalvano.com/2020-07-13-an-analysis-of-cookie-sizes-on-the-web/.

[4] Even if a business does not collect sales tax on behalf of the Commonwealth, Massachusetts requires individuals to pay a use tax (currently 6.25%) on the value of the item consumed or stored in the jurisdiction. *See generally*, Mass. Gen. Laws ch. 64I, § 2. The Department of Revenue has forms and instructions on how to pay use tax. Mass. Dept. of Rev. "Individual Use Tax," https://www.mass.gov/service-details/individual-use-tax (updated June 9, 2022).

in this case indicate that this Court should apply *Chevron Oil's* three factor test for determining whether a new legal decision should apply retroactively. All three factors favor nonretroactivity because *Wayfair* overruled 50 years of precedent, the *Wayfair* decision carefully proscribes rules such as nonretroactivity to protect online sellers, and Appellee is suffering a major financial hardship by having to pay this sales tax retroactively.

Alternatively, if this Court does not want to apply the *Chevron Oil* test, it should apply the framework outlined in *Reynoldsville* and rule there is an independent legal basis for not applying the regulation retroactively because the regulation is unconstitutional for unduly burdening interstate commerce and violating the Permanent Internet Tax Freedom Act. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995).

I. The Commissioner's 2017 Regulation Went Beyond Settled Caselaw at the Time of Promulgation.

At the time of the promulgation of 830 C.M.R. § 64H.1.7, no taxpayer ever thought that any presence other than a physical presence—via employees in the state, real estate ownership (such as a warehouse), or any other type of *tangible* presence—would subject a seller to a state's sales tax collection requirement. Indeed, fifty years of Supreme Court Commerce Clause precedent had said otherwise. *See, e.g., Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753, 759 (1967); *Quill Corp. v. N. Dakota*, 504 U.S. 298, 317-19 (1992). It was therefore reasonable to believe the

Commissioner's regulation was unconstitutional at the time it was announced and went too far in equating computer cookies to actual physical presence in the Commonwealth.

Physical presence matters because the government's power to tax activities is justified only by the "'protection, opportunities and benefits' the State confers on those activities." *Allied-Signal, Inc. v. Director, Div. of Tax'n*, 504 U.S. 768, 777 (1992) (quoting *Wis. v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax" the law is proportional to the benefits the state gives to those conducting business. *J.C. Penney*, 311 U.S. at 443.

For fifty years, the Supreme Court drew a bright line that, without physical presence, a business could not be required to collect sales taxes on behalf of the state. In *Bellas Hess*, the Warren Court ruled that the Commerce Clause prevented Illinois from forcing a mail order company with no physical presence in the state to collect and remit sales tax. 386 U.S. at 759. *Bellas Hess* was then reaffirmed twenty-five years later by the Rehnquist Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. at 318.

"Physical presence" was defined in the sales tax case law—and importantly reaching into a state with catalogues did not create physical presence. For example, the *Quill* Court listed examples of physical presence such as a "small sales force,

plant, or office." *Quill*, 504 U.S. at 315. *Bellas Hess* likewise involved a business with no "office, distribution house, sales house, warehouse or any other place of business" nor "any agent, salesman, canvasser, solicitor or other type of representative" in Illinois. *Bellas Hess*, 386 U.S. at 754. Importantly, the mere presence of mail order catalogues in *Bellas Hess* and *Quill* were not "physical presence" enough to justify tax regulation in Illinios or North Dakota. *Id*. at 758 ("But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."); *Quill*, 504 U.S. at 312 (rejecting catalogues as a basis for taxing authority under the Commerce Clause).

The Commissioner's cookie nexus regulation challenged decades of settled case law by declaring "physical presence" was an ambiguous term that could be interpreted to include cookies and apps. *See* 830 C.M.R. § 64H1.7(1)(b)(2)(a and b). But the year the regulation was promulgated this Court ruled that an online retailer selling baseball gloves could not be forced to collect Massachusetts sales tax because it "had no *physical* business presence here". *D&H Distributing Co. v. Comm'r of Revenue*, 477 Mass. 538, 540 (2017) (emphasis added).

Perhaps the Commissioner was predicting the fall of the physical presence test that would come in *Wayfair*. But the *Wayfair* Court considered this issue and declared that it did not fall within the Court's traditional physical presence test. The

Wayfair Court, in rejecting *Quill*, found it "is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not." *Wayfair*, 138 S. Ct. 2095. The Court recognized the genesis of the Commissioner's theory of physical presence: that "[a] website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones." *Id*. Nonetheless, *Wayfair* rejected that cookies or apps could constitute "physical presence" and created a "substantial nexus" test based total sales in the state, instead. *Id*. at 2099.

II. *Wayfair* Prohibits Retroactive Sales Taxes on Remote Sellers.

Wayfair's overruling of *Bellas Hess* and *Quill* does not save the Commissioner desire to apply 830 C.M.R. § 64H.1.7 retroactively. *See, e.g.*, Comm'r's Brief at 28 (arguing for retroactive application of *Wayfair*). Retroactive sales tax obligations on internet sellers go beyond the facts of *Wayfair* and indeed require ignoring the *Wayfair* Court's repeated reliance on nonretroactivity.

When the Supreme Court upheld the sales tax law in *Wayfair* it did so because the South Dakota statute at issue did not have retroactive effect. *Wayfair*, 138 S. Ct. at 2099. It was important that South Dakota's "Act ensures that no obligation to remit the sales tax may be applied retroactively," and thus did not overly burden interstate commerce. *Id*. This was a fact repeated throughout *Wayfair*. *See, e.g.*, *id*. at 2098 ("South Dakota affords small merchants a reasonable degree of

protection…the law is not retroactive"). Indeed, South Dakota's law was not only prospective, but its enforcement was also stayed until its constitutionality was resolved. *Id*. at 2089 ("The Act also forecloses the retroactive application of this requirement and provides means for the Act to be appropriately stayed until the constitutionality of the law has been clearly established."). What was essential in *Wayfair* is sorely lacking here where the Commissioner wants retroactive application of sales taxes.

The *Wayfair* Court knew at the time of its decision the danger of retroactive taxes, as numerous *amicus* briefs told the Supreme Court about these dangers. *See e.g.*, Br. of National Taxpayers Union Foundation as *Amicus Curiae* in Support of Respondents at 10, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (U.S. No. 17-494)[5] (warning the *Wayfair* case would "raise thorny questions concerning the retroactive application of state sales and use taxes and might trigger substantial unanticipated liability in other cases") (citation and punctuation omitted); Br. of Tax Foundation as *Amicus Curiae* in Support of Neither Party at 17, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (U.S. No. 17-494)[6] (collecting cases and scholarly

[5] http://www.supremecourt.gov/DocketPDF/17/17-494/22975/20171207121714321_17-494acNationalTaxpayersUnionFoundation%20PDFA.pdf.
[6] http://www.supremecourt.gov/DocketPDF/17/17-494/37597/20180305130816353_17-494%20Tax%20Foundation%20amicus%20South%20Dakota%20v%20Wayfair.pdf.

journals to note "numerous precedents, public sentiment, and the principles of sound tax policy look upon retroactive tax collection with disfavor.")

Indeed, Massachusetts signed onto an *amici curiae* brief along with 42 other jurisdictions implying that their states would offer protections from *Wayfair* being applied retroactively. *See* Br. for Colorado and 40 Other States, Two United States Territories, and the District of Columbia as *Amici Curiae* Supporting Petitioner at 29, (U.S. No. 17-494) (signature of Massachusetts Attorney General).[7] The State *Amici* argued that "South Dakota's law bans retroactive tax liability, eliminating that question as an issue in this case." *Id*. at 3. The brief assured that "existing regulations in many States will prevent retroactive application of a new post-*Quill* rule." *Id*. "And finally, if those safeguards do not resolve the question, this Court has the authority to craft a holding that applies prospectively only for all retailers and taxpayers." *Id*. With the states promising so much, its no wonder the *Wayfair* Court relied on South Dakota's nonretroactivity. *See, e.g.*, *Wayfair*, 138 S. Ct. at 2099.

There is no reason for the Commonwealth to now change course and try to retroactively apply *Wayfair*'s allowance of sales tax collection by remote sellers. If they are allowed to operate under the Constitution, retroactive taxes need a short

[7] http://www.supremecourt.gov/DocketPDF/17/17-494/37674/20180305153329994_17-494%20Amici%20Brief%20States%20PDFA.pdf.

period of retroactivity, and then generally only in response to legislative drafting error, which is not the case here.

For example, in *United States v. Carlton*, 512 U.S. 26, 28 (1994), the Court considered a tax deduction created by Congress as part of the substantive overhaul of the federal tax code in 1986—but the deduction was mistakenly overbroad and open to gamesmanship. Within *three months* of the original statute's passage, the "the Internal Revenue Service (IRS) announced that, '[p]ending the enactment of clarifying legislation,' it would treat" the deduction "as available only to estates of decedents who owned the securities in question immediately before death." *Id*. at 29 (brackets in *Carlton*) (citation omitted). Congress passed corrective legislation that same year. *Id*. The quick turnaround from both the IRS regulatory announcement and Congressional statutory fix made clear that the eventual "retroactivity" of the legislation was minimal, and the Court held that it did not violate the Fifth Amendment's Due Process Clause. *Id*. at 32 ("Congress acted promptly and established only a *modest* period of retroactivity.") (emphasis added); *id*. at 37 (O'Connor, J., concurring) (Noting the government does not have "unlimited power to 'readjust rights and burdens... and upset otherwise settled expectations'") (internal citations omitted).

The reason retroactivity in the *Wayfair* context is especially damaging is because of the burden it would place on out-of-state online retailers. When 830

C.M.R. § 64H.1.7 was promulgated, it was clearly unconstitutional under *Quill* and *Bellas Hess*. The purchases of the products have already been made with no sales tax collected—indeed, collecting an unconstitutional sales tax during the tax period would have subjected retailers to lawsuits for sales tax refund and the expensive legal fees that come with these suits. But now Massachusetts claims the taxes should have been collected all along. It is a no-win scenario for online retailers.[8]

Having out-of-state businesses pay the tax retroactively raises the costs for these businesses, which would have to cover the cost of the tax out of their own pockets, with no opportunity to collect from their customers. This puts them at a

[8] These burdens are the reasons that jurists have looked disfavorably on retroactive taxes. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) 23 (Kennedy, J., concurring in the judgment and dissenting in part) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership."); *id.* at 558 (Breyer, J., dissenting) ("[A]n unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself."); *General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) ("Retroactive legislation… can deprive citizens of legitimate expectations"). Policy experts agree. *See, e.g.*, Joseph Henchman & Kavya Rajasekar, *The Bounds of Retroactive State Taxes Skadden, Arps, Slate, Meagher & Flom LLP v. Michigan Dept. of Treasury*, Tax Foundation (Feb. 9, 2017) https://taxfoundation.org/retroactive-tax-skadden-michigan/ (noting tax retroactivity "expansion is dangerous, depriving taxpayers of reliance on the laws as they exist now"); Paul H. Frankel & Amy L. Nogid, *The Manifest Justice to the Manifest Injustice Doctrine: The Time Has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases* at 6 https://www.jdsupra.com/legalnews/the-manifest-justice-of-the-manifest-inj-11871/ (arguing retroactive taxation "is contrary to the goals of the Constitution and the great principles of eternal justice") (punctuation omitted).

competitive disadvantage compared to their in-state counterparts. The South Dakota law at issue in *Wayfair* specifically avoided going that far, to avoid this manifest unfairness and the looming Due Process concerns of changing law that had been settled for fifty years.

III. *Chevron Oil*'s Factors Control This Case.

Even in the absence of *Wayfair*'s reliance on South Dakota's bar on retroactivity, this Court has tools to assess if a civil rule should be applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), provides a three-factor test to apply to the application of 830 C.M.R. § 64H.1.7 prior to the *Wayfair* decision. The Commissioner's reliance, Comm'r's Br. at 8, on *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 91 (1993), is therefore misplaced.

Under *Chevron Oil*, a court must: (1) decide whether the new doctrine overruled clear past precedent on which litigants may have relied; (2) "weigh the merits and demerits… by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or [hinder] its operation"; and (3) determine if "there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." *Chevron Oil*, 404 U.S. at 106-07 (1971) (citation and punctuation omitted). All three *Chevron Oil* factors counsel against retroactively applying 830 C.M.R. § 64H.1.7.

First, *Wayfair* overruled fifty years of settled precedent requiring physical presence to subject a company to a state's sales tax jurisdiction. The entire system of commerce—first by mail order, then by telephone, and then by the internet—was predicated on the physical presence tests of *Bellas Hess* and *Quill*. *Wayfair*'s replacement was not "cookie nexus" but an economic nexus tied to the amount sold in the state, which would not be counted retroactively. *Wayfair*, 138 S. Ct. at 2099 (tying the *de minimis* threshold and the nonretroactivity together as important protections for businesses relying on the old law). The first *Chevron Oil* factor favors nonretroactivity.

The second *Chevron Oil* factor also favors nonretroactivity. The rule in *Bellas Hess* and *Quill* was designed to protect interstate commerce from the burdens of state tax administration. Then, the Court's decision in *Wayfair* was premised on the nonretroactivity of the South Dakota law as a bulwark protecting online sellers from not having to pay taxes they never collected. *See Wayfair*, 138 S. Ct. at 2099. Applying *Wayfair* retroactively significantly harms the very group that the Court in *Wayfair* was trying to protect.

Lastly, U.S. Auto Parts, like many businesses, relied on *Bellas Hess* and *Quill* in deciding to not collect sales tax in Massachusetts. Due to this reliance, it now faces the prospect of having to pay over $60,000 of sales tax out of its own pocket. U.S. Auto Parts Br. at 14. Forcing a company to pay thousands of dollars out of

pocket for relying on fifty-year-old precedent against a regulation that was unconstitutional at the time it was promulgated is manifestly unjust. This is in contrast to applying *Wayfair* only prospectively, which gives fair notice of the need to collect sales tax in states where more than *de minimis* sales take place. All three *Chevron Oil* factors favor a nonretroactive application of *Wayfair*.

The Commissioner's answer is to rely on a pair of cases about *tax relief* *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), and *James B. Beam Distilling Co. v. Georgia*, 601 U.S. 529 (1991), as possibly overturning *Chevron Oil*. Comm'r's Br. at 8 (asserting *Chevron Oil* was "*disapproved of by*" *Harper*) (emphasis in original). Neither *Harper* nor *Beam* overturns *Chevron Oil* because both cases feature state courts misapplying *Chevron Oil* to avoid tax *relief*.

In *Harper*, Virginia was barring suits refunds on taxes unconstitutionally collected. *Id*. at 89. At issue there was the then-recent pronouncement of *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), which "held that a State violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement benefits paid by the Federal Government but exempts from taxation all retirement benefits paid by the State." *Harper*, 509 U.S. at 89. Relying on *Chevron Oil*, the Virginia Supreme Court "twice refused to apply *Davis* to taxes imposed before *Davis* was decided." *Id*. When ruling that its decision in *Davis* should be applied retroactively to allow the Virginians to sue for refund, the *Harper* Court

made sure to stress that this decision was about tax relief and providing relief to citizens. *See id*. at 102.

Similarly, *James B. Beam Distilling Co. v. Georgia*, 601 U.S. 529, 532 (1991) involved a taxpayer trying to get relief from a discriminatory tax scheme where Georgia *doubled* the liquor tax for out-of-state suppliers. The Supreme Court had recently struck down a similar discriminatory law out of Hawaii in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984). The issue was whether *Bacchus* could be retroactively applied to give taxpayer relief. *Beam*, 601 U.S. at 532. Again, the lower court in *Beam* was misapplying *Chevron Oil* to prohibit taxpayer relief. *Id*. at 533. Ultimately, the *Beam* Court applied the prior case retroactively. *Id*. at 539. *Beam* and *Harper* are about granting taxpayers relief and the misapplication of *Chevron Oil* to withhold tax refunds due to citizens.

That lower courts misapplied *Chevron Oil* does not mean it is overturned. Many courts recognize the continued importance of *Chevron Oil*'s test. The Eleventh Circuit recognized that "The *Beam* and *Harper* Courts did not overrule *Chevron Oil*'s three-factor test." *McKinney v. Pete*, 20 F.3d 1550, 1566 (11th Cir. 1994). Furthermore, "both Justice Souter's opinion in *Beam* and Justice Thomas' opinion in *Harper* reveal that the 'general rule' of retrospective effect is just that: a general presumption that is subject to rebuttal under a *Chevron Oil* analysis." *Id*. The Ninth Circuit reached a similar conclusion. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 692

(9th Cir. 2011) ("We therefore remain bound by *Chevron Oil*. For that same reason, every court to have decided the issue has concluded that *Chevron Oil* continues to apply."). The Commissioner is inviting this Court to infer that *Chevron Oil*'s test is no longer valid, but this Court should decline do so. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[W]e do not hold that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent") (comma omitted).

IV. Retroactive Application of *Wayfair* Opens Massachusetts to Commerce Clause and Due Process Clause Challenges.

In *Reynoldsville Casket Co. v. Hyde*, the Court declared that *Harper* did not declare an absolute rule, and some legal decisions do not need to be applied retroactively if "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief." 514 U.S. at 759 (1995). This case presents such an independent legal basis for denying the retroactive application of 830 C.M.R. § 64H.1.7(3): other parts of the regulation run afoul of *Wayfair* by unduly burdening interstate commerce.

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… adopted the Streamlined Sales and Use Tax Agreement.

Wayfair, 138 S. Ct. at 2099-2100. Absent these conditions, the South Dakota law would likely have been unconstitutional. Massachusetts lacks these protections, especially under the Commissioner's regulation.

First, the regulation's *de minimis* threshold (100 transactions or $500,000 in sales) is far too restrictive. 830 CMR § 64H.1.7(3). The 100-transaction threshold is half that of South Dakota's and therefore does not adequately protect online sellers. *Compare* 830 C.M.R. § 64H.1.7(3); *with Wayfair*, 138 S. Ct. at 2089. 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 Massachusetts, which has eight times the population and an economy ten times as large. *See* U.S. Census Bureau, *State Population Totals and Components of Change: 2020-2021* (comparing population of Massachusetts and South Dakota); [9] U.S. Dept. of Commerce, Bureau of Economic Analysis, GDP by State, Table 1.[10] Several states have recognized this mismatch 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

[9] https://www2.census.gov/programs-surveys/popest/tables/2020-2021/state/totals/NST-EST2021-POP.xlsx.
[10] https://www.bea.gov/sites/default/files/2022-09/stgdppi2q22-a2021.pdf.

($250,000 and no transaction trigger); Miss. Code § 27-67-3(j) ($250,000 and no transaction trigger).

Second, the Commissioner's regulation violates *Wayfair*'*s* command of not applying the decision retroactively. *Reynoldsville*'s analysis instructs retroactivity be set aside for the "independent" legal basis. 514 U.S. at 759. And *Amicus* has already discussed the importance of nonretroactivity to the *Wayfair* rationale.

Third, Massachusetts is not member of the Streamlined Sales and Use Tax Agreement. Streamlined Sales Tax Governing Board, Inc., *State Information* (listing Louisiana as a non-member state).[11] 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. Twenty-three states are members of Streamlined. Streamlined Sales Tax Governing Board, *id*. Massachusetts is not a member of Streamlined, *id*., and therefore lacks many of these important protections.

Together, even setting aside retroactivity, Massachusetts is not complying with the government's obligations in *Wayfair*. But it is doing so in a way beyond sales tax: the Commissioner's rule treats a business as having *physical presence* in

[11] https://www.streamlinedsalestax.org/Shared-Pages/State-Detail.

the Commonwealth based on mere cookies on a computer—which can later trigger many other tax and regulatory obligations. This implicates grave concerns under the Permanent Internet Tax Freedom Act, 47 U.S.C. § 151 note. President Obama signed the Act into law in 2016 and it bans state taxes that discriminate against interstate commerce. The law defines a discriminatory tax as any levy imposed on internet-based goods and services that is not imposed on non-digital equivalents. *See id*.

In effect, 830 C.M.R. § 64H.1.7 treats "physical presence" based on such intangible qualities as the electrons in the internet in a way that is categorically different than a brick-and-mortar retailer that would need in-state personnel or property to trigger similar burdens. It is the quintessential example of such disparate treatment based on a retailer's use of the internet. Such taxes on internet commerce are bad policy and based on the false assumption that internet retailers do not pay their share of taxes. Joe Bishop-Henchman, Andrew Moylan, Andrew Wilford, *Digital Tax Legislation is a Road to Ruin for States*, National Taxpayers Union Foundation at 1 (Feb. 18, 2021).[12] Indeed, while the "effective tax rate of digital and traditional firms are roughly the same," the impact of internet-focused taxes falls disproportionally on small businesses and consumers. *Id*.

[12] https://www.ntu.org/library/doclib/2021/02/Digital-Tax-Legislation-is-a-Road-to-Ruin-for-States-1-.pdf.

In sum, 830 C.M.R. § 64H.1.7 has many constitutional concerns with its promulgation and application retroactively. The Commissioner of Revenue lacked the authority to promulgate a rule that required the taxpayer, an internet vendor with no traditional physical presence in Massachusetts, to retroactively collect sales taxes on internet sales to Massachusetts customers, based on the taxpayer's internet contacts in Massachusetts such as a mobile application, "cookies," and third-party content distribution networks. The Commissioner's rule breaks the bounds of *Wayfair* and violates the Commerce Clause.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the judgment of the lower court.

Respectfully submitted,

s/ Tyler Martienz

Tyler Martinez*
Counsel of Record
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street NW, Suite 650
Washington, DC 20001
Telephone: (703) 683-5700
tmartinez@ntu.org

* *Admission* Pro Hac Vice *Pending*

Counsel for Amicus Curiae

Karen A. Pickett (BBO # 633801)
PICKETT LAW OFFICES, P.C.
125 High Street, 26th Floor
Boston, MA 02110
Telephone (617) 423-0485
kpickett@pickettlegal.com

Dated: October 14, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(2)(C), by composing this brief on Microsoft Word 2010 in 14-point Times New Roman. Pursuant to Mass. R. App. P. 20(a)(2)(D), I further certify that the number of words to be counted in this brief is 4,784.

s/ Tyler Martienz
Tyler Martinez

Dated: October 14, 2022

CERTIFICATE OF SERVICE

I, Tyler Martinez, hereby certify that I served the within Brief f Amicus Curiae National Taxpayers Union Foundation In Support Of The Plaintiff-Appellee, in *U.S. Auto Parts Network, Inc. v. Commissioner of Revenue*, SJC-13283, by causing it to be delivered by eFileMA.com to counsel for the Plaintiff-Appellee, George Steven Isaacson, GIsaacson@brannlaw.com; and to counsel for the Defendant-Appellant, Julie E. Green, Assistant Attorney General, Julie.Green@mass.gov.

Signed under penalties of perjury.

s/ Karen A. Pickett
Karen A. Pickett (BBO # 633801)
PICKETT LAW OFFICES, P.C.
125 High Street, 26th Floor
Boston, MA 02110
Telephone (617) 423-0485
kpickett@pickettlegal.com

Dated: October 14, 2022