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

Reply Brief

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SUMMARY OF THE ARGUMENT

All agree that the Tax Injunction Act ("TIA") contains two tests that both must be satisfied before the jurisdictional bar applies. Opening Br. at 15; Parishes Br. at 10; *see* Richard Br. at 12-13 (discussing elements). First, the TIA 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 test is satisfied here. Halstead *wants* to remit the taxes (and increase Louisiana tax collections)—it simply cannot do so when it must check with each parish for each delivery of each item to know if an exemption applies, what rate to apply, and the like. Furthermore, even if Halstead's challenge touched on "collection" for TIA purposes, there is no state forum for Halstead to bring its challenge because Louisiana requires suits for refunds—impossible to do when all agree the taxes would be due. Related comity principles do not apply when there is no state forum. Therefore, the TIA is no bar to Halstead's challenge.

Nor are the governments' other procedural arguments availing. Halstead, in not being able to sell beyond a *de minimis* amount lest it become entangled in Louisiana's tax regulation system, is injured by the state's and parishes' refusal to not burden interstate commerce. Further, Secretary of Revenue Kevin Richard

("Secretary") recycles groundless arguments citing the Eleventh Amendment or claiming that he plays no role in Halstead's injuries.

The extensive merits arguments between the parties shows this Court two important issues. First, there is fundamental disagreement about the burdens Louisiana places on interstate commerce—which means trial in the District Court is essential. Second, the merits arguments highlight that this case is not about stopping tax collection, but enabling remote sellers to remit taxes in the way the Supreme Court prescribed in *South Dakota v. Wayfair*, 585 U.S. ___, 138 S. Ct. 2080 (2018).

Halstead's challenge should therefore be allowed to procced. The TIA and comity do not apply when a challenge is *how* to pay, not *how much*, and the state provides no place to bring these claims.

ARGUMENT

I. THE GOVERNMENTS HAVE NOT SHOWN THAT THE TAX INJUNCTION ACT APPLIES.

A. This Case is Not About Stopping Collection Because Halstead is Willing to Remit the Taxes.

The Secretary of Revenue admits "Halstead does not contest the underlying taxes are valid or appropriate in amount," Richard Brief at 35, and that "[a]s Halstead correctly notes, the parishes in the state contain multiple districts and local bodies that impose different tax rates," *id*. at 30. It is the myriad of governmental actors involved in the remittance process that burdens interstate commerce.

Nevertheless, the Secretary and Parishes worry that collection will cease if Halstead succeeds in its challenge. *Id*. at 21; Parishes' Br. at 10.[1] But that's not quite right. Only the power of the local parishes—jealously guarded—to control local registration and audit control of interstate commerce is at stake.

The Secretary relies upon the *state statutory* definition of "level, collection, and assessment." Richard Br. at 12-13. But the Supreme Court has narrowly defined those words as they are used in the TIA and the related Anti Injunction Act, ("AIA," 26 U.S.C. § 7421). *Regulatory* challenges such as Halstead's case—which are about the means of regulating business, not stopping tax collection—are *not* subject to the jurisdictional bar. *See, e.g., CIC Servs., LLC v. Internal Rev. Serv.*, 593 U.S. ___, 141 S. Ct. 1582, 1588-89 (2021).

In *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015) ("*DMA*"), the Court made clear that a regulatory challenge like Halstead's is distinct from challenges to the "assessment" of taxes. Indeed, *DMA* defined collection as "the *act*

[1] The Parishes focus on their "collection" argument, not discussing if Halstead's challenge is to an "assessment" or "levy" in the alternative. The Parishes merely promise additional unspecified arguments "not solely limited to the assertion that the 'collection' of taxes would be enjoined, suspended, or restrained." Parishes Br. at 17 n.13. This Court should count these reserved arguments waived. *McDonald v. Longley*, 4 F.4th 229, 252 n.38 (5th Cir. 2021) ("It is not enough to merely mention or allude to a legal theory": "[A] party must 'press' its claims," which means, at a minimum, "clearly identifying a theory as a proposed basis for deciding the case.") (quoting *United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010)).

of obtaining payment of taxes due." *Id*. at 10 (emphasis added). And *DMA* made clear that, since information gathering is a step before "assessment," much less before "collection," 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 lawsuit "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. 141 S. Ct. at 1588-89.

This is not just Halstead's reading of the Supreme Court case law. The Opening Brief explained *Harper v. Rettig*, 46 F.4th 1, 7 (1st Cir. 2022), at length and showed how the First Circuit applied these principles to a challenge to IRS regulations. Yet the opposing parties ignore *Harper*.

DMA's use of the term "collection" was to narrow it only to the point of actually handing the money, which Halstead does not object to doing,[2] and *DMA* used the term to mean something different from "assessment." *DMA*, 575 U.S. at 10. Furthermore, there is a use tax provision in Louisiana law, requiring citizens to pay when a business does not collect on behalf of the state. La. Rev. Stat. § 47:302(K). The Parishes object to the use tax as a viable alternative, Parishes' Brief at 12,

[2] If the concern is for slowing in-state collection of sales taxes, relief could be cabined to out-of-state sellers like Halstead, which was suggested by the Complaint, citing to Texas. ROA at 28 ¶63. Texas' system allows for local variety in rates while simplifying collection for out-of-state sellers.

arguing that it would be more difficult for the government to collect via a use tax, and preferring that Halstead spend thousands of dollars in compliance costs to ease the burden on the government. *See* Opening Br. at 56 ("Halstead estimates the costs of compliance at $11,000 over three years") (citing ROA.25 ¶45).

This idea—exporting the burdens to make local life easier—is the textbook example of a Dormant Commerce Clause violation. *See*, *e.g.*, *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (asking whether the local interest could be accomplished by means that do not export undue costs on out-of-state commerce). If the state can accomplish its goals by more reasonable means, such as by complying with *Wayfair* and/or relying on a use tax in the interim, then the burden on interstate commerce violates the Commerce Clause. The fact that the Governments prefer not to go the use tax route does not mean that a ruling in favor of Halstead would stop tax collection in the state.

Indeed, if Halstead is successful, the case will generate *more* revenue to the state and parishes because 1) Halstead will no longer monitor and cease selling to Louisiana buyers in order to keep under the *de minimis* threshold, and 2) it will allow the state legislature to reform Louisiana's system to comply with *Wayfair*—something it has tried to do since 2018. This Court has already found that challenges to the validity of state tax schemes fall outside the TIA's prohibitions if those challenges would, if successful, actually enrich the state. *Tx. Div., Sons of*

Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 392 (5th Cir. 2014) *rev'd on other grounds sub. nom. Walker v. Tx. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). This view is held by many sister circuits. *See, e.g., I.L. v. Alabama*, 739 F.3d 1273, 1283 (11th Cir. 2014) (collecting cases from this Circuit as well as the Seventh, Eighth, Ninth, and Tenth Circuits). If the result is more revenue, that removes the TIA's jurisdictional bar. All that Louisiana and the Parishes need do here is operate like nearly all of the other 45 states that centralize administration, reporting, and remitting.

Halstead will happily pay whatever taxes are due in a system that does not burden interstate commerce. But Louisiana's record-keeping, calculation, and reporting system is so complex as to burden interstate commerce and deprive sellers due process of law and cannot be squared with the Constitution.

B. There is No State Forum to Bring this Challenge Because Suits for Refund Are Required.

Even if, *arguendo*, Halstead's challenge were about the "collection" of state taxes, key admissions from the opposing briefs show that Halstead is correct when it says it cannot bring its challenge in a state forum. Neither the state courts nor the Louisiana Board of Tax Appeals provides a route to revolve Halstead's claims. Absent a state forum, the TIA does not apply.

The Parishes admit that the TIA does not apply "when state remedies could prevent a taxpayer from asserting a federal right." Parishes' Br. at 9 (quoting *Smith v. Travis County Educ. Dist.*, 968 F.2d 453, 455 (5th Cir. 1992)). The Parishes also admit that "Halstead has no legal requirement to pay under protest" and that "payment under protest" is one of the "various procedural requirements" of access to state courts. *Id*. at 23 (discussing *Jackson v. City of New Orleans*, 144 So.3d 876, 896 (La. 2014)). And the Secretary admits that "Halstead does not contest the underlying taxes are valid or appropriate in amount." Richard Br. at 35. Further, the Secretary recognizes that the Louisiana Board of Tax Appeal's authority is "concurrent with the state district courts," *id*. at 14, and therefore the same exclusions apply: only suits for refunds are available. But since Halstead seeks no refund, it has no "plain, speedy, or efficient remedy" in a state forum.

The Governments cite three federal cases from four decades ago (two written by the same judge), which allegedly found a general right to declaratory judgments[3] under a general jurisdictional statute in state court. Parishes' Br. at 20-22 (*citing Archer Daniels Midland v. McNamara*, 544 F. Supp. 99 (M.D. La. 1982) and *ERA*

[3] Secretary Richard's Brief, at 15, also relies upon *Louisiana Independent Auto Dealers Association v. State*, 295 So. 2d 796 (La. 1974), to say declaratory relief is available. But that case was brought "to test the constitutionality of a provision (Section 15) of the Louisiana Consumer Credit Law (Act 454 of 1972), regulating motor vehicle credit transactions," *id*. at 798, and was not a challenge of regulatory burdens placed on remitting taxes.

Helicopters, Inc. v. State of La. Through Dept. of Rev. & Tax'n, 651 F. Supp. 448 (M.D. La. 1987)).[4] There are four major problems with this novel theory. First, this Court has never approved it. Second, age of these cases matters because at that time, out-of-state companies like Halstead were protected completely from state tax collection obligations by *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), which required physical presence—property or employees in the state—in order for sales tax collection obligations to attach. *National Bellas Hess* was overturned in 2018 by *Wayfair*, 138 S. Ct. at 2099, so today, Halstead depends on the state implementing the guardrails featured in the South Dakota law. *Id*. at 2099-2100.

Third, *ERA Helicopters* and *Archer Daniels Midland* relied on "implicit" approval by the state courts that this declaratory-judgment-path was available, each citing a state court ruling authorizing jurisdiction. *See, e.g.*, *ERA Helicopters*, 651 F. Supp. at 451 n.1 (relying on a state supreme court case "implicitly uph[olding] the appellate court's ruling that La. Rev. Stat. § 47:1576 is not the exclusive method of challenging the validity of a state tax in all fact situations"); *Archer Daniels Midland*, 544 F. Supp. at 104 n.10 (same).

[4] *Edwards v. Transcontinental Gas Pipe Line Corp.*, 464 F. Supp. 654, 656-57 (M.D. La. 1979) is inapposite because it was the *removal action* from an active state court case. State court jurisdiction was plainly available there. It was decided by a different judge. *Id*. at 654.

Fourth, whatever federal district courts in the 1980s might have concluded about whether Louisiana would provide a remedy to taxpayers seeking a pre-payment declaratory judgment in state courts,[5] we now know that suing for refund is required. *See, e.g., Jackson*, 144 So. 3d at 895; *Bridges v. Smith*, 832 So. 2d 307 (La. App. 1st Cir. 2002)).[6] The same is true for the Board of Tax Appeals. *See United Parcel Service of America, Inc. v. Robinson*, No. 12592D, 2021 WL 4296492 at *4 (La. Bd. Tax. App. July 14, 2021) (holding that only until "the Department [of Revenue] has issued an assessment [that] the case is before the Board" and "has full jurisdiction to resolve the Constitutional questions raised."). Where, as here, 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.*

The statute commands that Halstead act as the agent of the state—and it is the family that owns and runs Halstead that will bear *personal* liability for remitting the exact right taxes. Brad Scott wants to file the sales tax reports, but cannot be made

[5] And neither the 1980s district court cases, nor the Secretary nor the Parishes addressed Halstead's *lex generalis* argument, that the specific state jurisdictional law controls access to the courts over a general declaratory judgment statute. Opening Br. at 39 (applying *Lewis v. Intermedics Intraocular, Inc.*, 56 F.3d 703, 707 (5th Cir. 1995)).

[6] At one point, the Parishes seem to admit that Halstead's reading of the case law is correct: only suits for refunds are available in state courts for Halstead, but argue only consumers (*i.e.*, the actual taxpayers) can bring a suit. Parishes Br. at 22-24. The problem is that neither Halstead nor a consumer would believe the taxes themselves are not owed, so they cannot ask for a refund.

to call *each* parish, *each* time, to find out about *each* sale. That is the crux of this case, not a dispute about how much to remit. No refund can be issued, so no state forum has jurisdiction.

C. With No State Forum, Principles of Comity Do Not Apply.

Comity "is applied to prevent conflicts between state and federal courts with *concurrent jurisdiction* on the same issue." *Landry v. Latter*, 780 So. 2d 450, 453 (La. App. 4 Cir. 2000) (emphasis added). If there is no state jurisdiction to defer to, there can be no comity. Doing so in the absence of a state forum would be to let constitutional rights lie at the whim of a state.

Historically, comity has only barred federal relief when the plaintiff otherwise has an adequate remedy at state law. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981) (holding that prior to the enactment of the Tax Injunction Act, "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"). Comity only applies if a plaintiff could otherwise get adequate relief in state forums. This is not the situation for Halstead.

It is true that *McNary* contains general statements about comity. *See id.* at 110, 112. But a plain reading of the TIA's text indicates that Congress enacted it to protect states more than comity as it was understood at the time: "federal-court determinations that available state remedies did not adequately protect the federal

rights asserted" was the reason for the TIA's passage. *Id.* at 109; *see also id.* at 119-21 (Brennan, J., concurring) (explaining that comity is limited to only those suits where injunctive relief is sought *and* there is an adequate remedy at state court).[7]

Halstead's case is remarkably different from *Levin*, which applies to cases "about allegedly discriminatory state taxation framed as a request to increase a competitor's tax burden." *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 426 (2010). In *Levin*, Commerce Energy could have sued for refund, since its desired remedy was a refund of the difference between the taxes it paid and the taxes others paid. *Id*. at 431 n.12 ("Respondents here, however, could have asserted their federal rights by seeking a reduction in their tax bill in an Ohio refund suit"). Halstead cannot sue for refund.

The Secretary additionally argues that *Levin* urged deference to the Ohio Legislature to "weigh[] in" to correct any issues. Richard Br. at 26 (quoting *Levin*, 560 U.S. at 429). Louisiana's Legislature has repeatedly tried to "weigh in" and correct the issues Halstead raises, but has been stopped by the state constitutional

[7] Nor is the Parishes' reliance on *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582 (1995), to the contrary. Parishes' Br. at 31. That decision stands only for the familiar proposition that neither federal nor state courts may use § 1983 to "award damages or declaratory or injunctive relief in state tax cases *when an adequate state remedy exists*." *Id*. at 588 (emphasis added). That no state remedy exists means the TIA does not apply and there is no TIA-style comity. *National Private Truck* featured the U.S. Supreme Court and the Oklahoma Supreme Court agreeing there were state remedies. *Id*. at 585.

provision Halstead challenges here. Opening Br. at 49 (discussing Amendment 1, put to the voters in 2021); ROA.26 ¶54; La. H.B. 681 (2022 Regular Session).[8] The parishes have fought these attempts to comply with the *Wayfair* Court's mandates. *See, e.g.*, Paul Williams, *La. Lawmakers Fail To Pass Centralized Sales Tax Referendum*, Law360 Tax Authority (June 7, 2022)[9] ("A Louisiana constitutional amendment that would have asked voters to sign off on a centralized sales tax commission failed to clear the Legislature this year because local government groups opposed the measure's wording"); Jessica Williams, *LaToya Cantrell slams Amendment 1, says New Orleans should retain its own tax revenue*, Nola.com (Oct. 29, 2021)[10] ("'I urge you to vote no on Constitutional Amendment 1 on November 13,' [New Orleans Mayor] Cantrell said. 'Let's keep New Orleans in control of her own destiny.'").

Halstead cannot bring its case in a state tribunal, because Louisiana law only allows suits for refunds, but there is no refund to issue. And this case does not involve Halstead trying to invalidate a competitor's preferential tax exemptions. With the Parishes lobbying and electioneering against any reform, Halstead has no

[8] https://www.legis.la.gov/Legis/ViewDocument.aspx?d=1274047.
[9] https://www.law360.com/tax-authority/articles/1499481.
[10] https://www.nola.com/news/politics/elections/latoya-cantrell-slams-amendment-1-says-new-orleans-should-retain-its-own-tax-revenue/article_f96bd7b8-35c8-11ec-8c04-ef3d38b4067e.html.

recourse but to ask the courts to protect interstate commerce. There is no comity to apply when all state avenues are closed.

II. APPELLEES' OTHER LEGAL ARGUMENTS ARE UNAVAILING.

A. Halstead Has Standing to Bring This Challenge.

The Parishes arguments that Halstead lacks standing center on their mistaken belief that because Halstead has not yet registered, it cannot challenge the burdens of registering. *See, e.g.*, Parishes Br. at 32; Richard Br. at 29-30. But Louisiana's filing and registration requirements injure Halstead because they have caused it to stop selling to Louisiana customers.

Refraining from an activity to avoid the legal consequences that imposes for engaging in it constitutes a sufficient injury to give a party standing to challenge that statute. The Supreme Court has repeatedly held "that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). All a plaintiff need be is subject to a law and under threat of enforcement. *See id*. at 158. No "actual arrest, prosecution, or other enforcement action" is needed for a preenforcement challenge. *Id*. (collecting cases).

While *Susan B. Anthony List* was a case about the freedom of speech, this Circuit has applied it to regulatory challenges, finding it "is unnecessary to wait for the [Regulation] to be applied in order to determine its legality." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 267 (5th Cir. 2015); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2010) (finding standing where plaintiffs identified specific projects that were put on hold or curtailed in response to a law); *see also Nat'l Press Photographers Ass'n v. McCraw*, 504 F.Supp.3d 568, 579 (W.D. Tex. 2020) (finding standing where plaintiff alleged that he stopped drone photography to avoid "risk[ing] liability for criminal and civil penalties").

The Eighth Circuit held similarly in a Commerce Clause case, *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006), where the plaintiffs challenged a Nebraska law that prohibited corporations or syndicates from buying Nebraska farms and ranches, *id.* at 1264. The court rejected the state's argument that an owner of Nebraska farmland would only have standing to challenge the law under the Commerce Clause if he actually "contracted with an out-of-state corporation" to sell the land. *Id.* at 1267. Instead, it was enough that the rule "negatively affected [the owner's] ability to earn income, borrow, and plan for [his] financial future" that created a "concrete and actual injury" that a favorable ruling would redress. *Id*.

Here, similarly, Halstead challenges state laws that negatively affect its ability to operate its business as it sees fit by forcing it to choose between two undesirable

options: (1) declining to make sales to Louisiana customers to avoid reaching the 200-transaction threshold; or (2) reaching the 200-transaction threshold and incurring compliance burdens that far exceed the likely value of those transactions. ROA.25 ¶¶47-48; ROA.1706 (Supplemental Declaration of Brad Scott noting the stoppage in sales in 2021 and plans to do so in future years). A ruling enjoining enforcement of the filing and reporting requirements would redress this injury, because Halstead would no longer have to cut off sales to Louisiana customers to avoid unconstitutional compliance burdens.

The Secretary and the Parishes enforce the filing and reporting requirements Halstead challenges, and are therefore responsible for the consequences Halstead would face if it did not limit sales to Louisiana customers. *See* ROA.21-22 ¶¶ 6-12. Further, Halstead has *already* been injured by its need to stop selling to Louisiana customers to avoid the burdens of the state laws it is challenging. *Cf. Lac Du Blambeau of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 499 (7th Cir. 2005) (find standing where a rule might prevent plaintiff from operating a casino, though it had no application pending, because the constraint caused current financial harm); *Jones*, 470 F.3d at 1267 (finding injury because challenged law affected, plaintiff's "future plans"). Halstead had to stop sales in 2021 and will have to do so each year. ROA.1706 ¶¶5-7 (detailing stopping sales and declining new

orders); ROA.1707 ¶8 (plans to do turn down sales in subsequent years as Halstead's activity approaches the thresholds).

B. The Secretary Is Properly a Party.

The Secretary makes two arguments that he is not properly a party to this challenge: an Eleventh Amendment argument and a claim of misjoinder because the parishes control sales tax collection. Both arguments fail.

First the Secretary argues the Eleventh Amendment bars Halstead from obtaining an award of damages against him. Richard Br. at 36. But Halstead can, and does, seek declaratory and injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), which says the Eleventh Amendment does not bar suits for prospective injunctive and declaratory relief "brought against individual persons in their official capacities as agents of the state." *Saltz v. Tenn. Dep't of Emp't Sec.*, 976 F.2d 966, 968 (5th Cir. 1992). Determining whether *Ex parte Young* applies is not difficult: "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation and quotation marks and brackets omitted).

Ex parte Young applies here. Halstead alleges that Secretary Richard is engaging in an ongoing violation of federal law by enforcing the filing and reporting requirements Halstead challenges. ROA.21 ¶6. And the relief Halstead seeks (apart

from nominal damages) is prospective: a declaration that these requirements violate the Commerce and Due Process Clauses and an injunction against their further enforcement. ROA.32-33 ¶¶91-92, 35 ¶¶107-08.

The Secretary also argues that he is misjoined,[11] recycling arguments the District Court rejected. Richard Br. at 37; ROA.1888 (noting the "relevant state officials" require remote sellers to register and remit sales and use taxes to the Commission); ROA.1888 n.46 (noting "the Louisiana Secretary of Revenue sits on the Remote Sellers Commission, which is tasked with enforcing the registration and remitting requirements applicable to Plaintiff.").

Richard admits that the Louisiana Department of Revenue has a role in the enforcement and collection of local taxes. Richard Br. at 27 n.41. This admission defeats the protest that "[t]he Tax Provisions do not apply to the LDR." *Id*. at 27.

[11] The unreported, out-of-circuit cases on which Richard relies are inapposite. Richard Br. at 28 n.43. *Chantilly Store All, LLC v. Spear*, No. 2:09-CV-921-MEF, 2010 WL 4269131 (M.D. Ala. Oct. 22, 2010), involved a challenger who failed to show how *any* of the defendants denied her a right to trial on her tax assessment claims. *See id*. at *4. Similarly irrelevant is *Carter v. Mnuchin*, No. 1:19-CV-00450, 2019 WL 5575732 *1 (M.D.N.C. Oct. 29, 2019), in which a *pro se* litigant attempted to stop the garnishment of wages to pay taxes, sheds no light on Halstead's preenforcement challenge. *Stiriling v. Ramsey*, No. 4:17CV1206 RLW, 2018 WL 3489592 (E.D. Mo. July 19, 2018), is inapposite, focusing on the heightened pleading standards for allegations of fraud under Federal Rule of Civil Procedure 9(b). Halstead does not allege fraud, and nothing in *Stiriling* is relevant here.

And the Parishes admit that the Remote Sellers Commission, which is headed by Secretary Richard, is active in sales tax enforcement. Parishes' Br. at 4.

Louisiana law makes the Department of Revenue responsible for assuring the collection of state sales taxes. *See* La. Rev. Stat. §§ 36:458(B) and (D). Importantly, parishes may contract with the Department to collect their taxes. *See* La. Rev. Stat. § 47:337.16(A). The statutes further empower audit authority to the Secretary, "for the purpose of auditing for compliance with local sales and use tax ordinances," to examine and investigate "the place of business, if any; the tangible personal property; and the books, records, papers, vouchers, accounts, and documents of any taxpayer for the purposes of enforcement and collection of any tax imposed by that taxing authority." La. Rev. Stat. § 47:337.26(B). The Secretary even can be paid by the parishes to do this work, on an hourly basis. *See id*.; *McNamara v. Stauffer Chem. Co.*, 506 So. 2d 1252, 1253 (La. Ct. App. 1987) (Secretary enforcement on behalf of parishes). This is the "enforcement power" that makes the Secretary a proper defendant, under *Ex parte Young*. *See K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (holding delegated enforcement authority is sufficient to make an agent a proper defendant).

III. THE MERITS ARGUMENTS OF THE PARTIES SHOW A DISPUTE OF THE FACTS THAT WARRANT TRIAL.

This case is not about whether Louisiana can require collection of sales taxes, nor is it a challenge to the amount of an assessment, nor an attempt to block collection. It is about whether Louisiana must undertake the simplifications done by South Dakota in order to take advantage of the holding in *Wayfair*. Louisiana wants the ability to tax internet sales—which Halstead does not contest—but to use a 1970s system with little effort to not overly burden interstate commerce.

In response to Halstead's explanation of why the challenged regulations are so burdensome, the Parishes complain that "Halstead has not pointed to any definitions of taxable goods or services that apply to it which are not 'uniform' between the State and any Parishes," and point to a provision of law setting default definitions. Parishes' Br. at 35 (citing La. Rev. Stat. § 47:337.6(B)). But each parish has (and many have exercised) the power to change definitions as it sees fit, or when "the context clearly indicates a different meaning." *See, e.g.*, ROA.445 (Lafourche Parish Sales Tax Definitions). Some parishes have extensive definition sections. *See, e.g.*, ROA.844-847 (St. Helena Parish definitions). Counsel could not find

Washington Parish's tax code online—its website only includes individual ordinances.[12]

And exemptions and exclusions wreak havoc on what can or cannot be taxed as well. *See, e.g.*, ROA.446-447 (Lafourche Parish exemptions). As Halstead explained in its Opening Brief at 55, disagreements between rival local jurisdictions can be devastating, as in *Coastal Drilling Co. v. Dufrene*, 198 So. 3d 108, 110 (La. 2016). No opposing party has tried to distinguish that case, which illustrates why the burden Halstead faces is so unreasonable. In another instance, even when the state law was clear on an exemption, and not one but *two* constitutional officers agreed on the exemption's application, revenue-hungry Washington Parish nonetheless haled people into court seeking thousands in taxes that were not actually owed. *See, e.g.*, Baylen Linnekin, *Louisiana Sheriff Loses Tax Lawsuit Targeting Smith Angus Farm: Multiple state agencies told Sheriff Randy 'Country' Seal that he had no right to collect taxes from a rancher in his parish. He sued anyway*, Reason (Aug. 20, 2022)[13] (detailing Washington Parish's attempt to gather $40,000 from rancher who

[12] Washington Parish, "Ordinances" http://www.washingtonparishalerts.org/Ordinances___Resolutions.html (website for all ordinances/resolutions on per-action basis). Tax administration is through the Washington Parish Sheriff's Office, but that website does not offer any further insight into the Parishes' tax code. Washington Parish Sheriff's Office, Taxes http://wpso.la.gov/page.php?id=18.

[13] https://reason.com/2022/08/20/louisiana-sheriff-loses-tax-lawsuit-targeting-smith-angus-farm/.

sold sales-tax-exempted meat despite official pronouncements from both the Louisiana Secretaries of Revenue and Agriculture & Forestry to the contrary). That the rancher ultimately won is no consolation: the process of defending baseless collection actions in court is a penalty in itself. Letting 63 parishes roam about looking for tax revenue, each under their own, often incomprehensible, rules is the epitome of an action that impedes interstate commerce.[14]

Amicus Curiae Permitted detailed this exemptions problem. Permitted Br. at 12-15 (using the Remote Seller's Commission website as well as academic and policy articles to describe the complexity of compliance in Louisiana); *see also* Opening Br. at 55 n.21 (collecting other expert analyses of Louisiana's complex tax system). Halstead's Verified Complaint includes over 1,000 pages of varying and nonuniform rules and regulations among the parishes—and that is before discovery. ROA.110-1113.

Finding the proper rates to apply is another hurdle, as the Secretary acknowledges: "As Halstead correctly notes, the parishes in the state contain

[14] *National Solid Waste v. Pine Belt Regional*, 389 F.3d 491 (5th Cir. 2004), is not to the contrary. Parishes' Br. at 37-38. *Solid Waste* dealt with trash-collection companies who were shipping all the trash in-state and the companies there did not allege they would ever ship it out of state. 389 F.3d at 499-500. All the challenged provision in that case required is that trash collected in the regional district be deposited in the district-run landfill. *Id*. at 496. This was fatal to the companies' claims because "so far as they affect BFI and Waste Management, the ordinances do not inhibit the flow of goods (or waste) interstate." *Id*. at 502.

multiple districts and local bodies that impose different tax rates." Richard Br. at 30. Louisiana, however, offers no audit and enforcement protection for using state-approved software, a core component of the South Dakota in *Wayfair*. *See Wayfair*, 138 S. Ct. at 2100 (noting that South Dakota offers free sales tax administration software and immunizers sellers who use such software from audit liability.). Without audit and enforcement protection, Brad Scott and the officers of Halstead are *personally* liable for any mistake on the tax remittances. ROA.28 ¶62 (discussing La. Rev. Stat. § 47:1561.1(A)).

The Parishes believe the online remote seller portal is a success even though it has only 7,391 *lifetime* registered remote sellers. Parishes Br. at 3 n.3. While the exact number of online sellers in the United States is difficult to ascertain, the Government Accountability Office cited a U.S. Bureau of Labor Statistics estimate of 68,000 such online businesses. U.S. Gov't Accountability Off., GAO-23-105359, Remote Sales Tax: Federal Legislation Could Resolve Some Uncertainties and Improve Overall System 16 (Nov. 2022).[15] This is probably an *undercount*, because "this figure excludes remote sellers that are classified into other categories based on businesses characteristics separate from sales channel, such as categories based on product type." *Id*. The Census Bureau estimates 70,826 "nonstore" retailers, 65,765

[15] https://www.gao.gov/assets/gao-23-105359.pdf.

of which had fewer than 20 employees, but the date probably runs into the same problem of undercounting. U.S. Census Bureau, *2019 SUSB Annual Data Tables by Establishment Industry* (Feb. 2022).[16] That Louisiana's system deters perhaps 9 out of 10 online sellers from registering shows the state is leaving money on the table.

The Louisiana Uniform Local Sales Tax Board (LULSTB) appeared as *amicus curiae* and claims that it provides a free lookup tool. LULSTB Br. at 12-13.[17] But unlike South Dakota and most other states that stand behind the tool and promise liability protection for errors, LULSTB disclaims any legal reliance on the rates, exemptions or other data it provides. Appearing bold, italic, and red typeface, the lookup tool says:

> ***Disclaimer: The data available on this Tax Rate Lookup Tool was reported by local sales and use tax collectors for their respective parishes and taxing jurisdictions therein. The tax rates, exemptions, and other data posted on this Tax Rate Lookup Tool are not considered an official record of such tax rates, optional exemptions, or other data. The local sales tax collector for the applicable parish should be contacted to obtain an official record of the tax rates, exemptions, and other data posted on this Tax Rate Lookup Tool.***

[16] https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html (select Excel file "U.S. & states, 6-digit NAICS" and look for NAICS code 454).
[17] The Parishes point to this tool as well. Parishes' Br. at 35-36; *id*. at 36 n.25.

La. Uniform Local Sales Tax Bd., Sales Tax Rate Lookup.[18] Is it really a centralized lookup tool if it just tells you to contact each parish? This dire warning is far from the single-administrator and audit defense that *Wayfair* found essential.

Despite the Parishes' reliance on it, the LULSTB's funding was impeded by a parish and that puts its power in doubt to help *any taxpayer* for practical and administrative law reasons. *See, e.g.*, *W. Feliciana Par. Gov't v. State*, 286 So. 3d 987, 989 (La. 2019); Open. Br. at 52 (discussing the case); *cf. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 643 (5th Cir. 2022) (holding that even if all other aspects of administrative law were met, "unconstitutional funding" meant that the agency "lacked any other means to promulgate the rule").

The Louisiana Association of Tax Administrators ("LATA") claims to offer a lookup tool that purports to be free, but it also has a disclaimer that takes it out of *Wayfair*'s insistence on audit protection:

> **Disclaimer**: Information presented on this website is collected, maintained, and provided as guidelines and informational purposes only. All documents are provided without any warranty as to their legal effect and completeness. LATA shall under no circumstances be liable for any actions taken or omissions made from reliance on any information contained herein from whatever source or any other consequences from any such reliance.

[18] https://rates.salestaxportal.com/public.

La. Ass'n of Tax Administrators, Free Rate Lookup Tool.[19] LATA admits its purpose is to assist its "*administrator* members in ameliorating any issues encountered by all retail sellers" and not to help the public. LATA Br. at 2 (emphasis added).[20]

No one—not the third-party software offered by Remote Sellers Commission, not the LATA website, not the Louisiana Uniform Local Sales Tax Board—offers audit defense if their computer program gets the rates wrong. All say to call each individual parish, one by one, to verify each rate, one by one.

Halstead disputes the ease of any of the purported sale tax rate lookup tools, none of which are official, especially in light of the disclaimers on each website. *Amicus* Permitted, which operates a business based on tax compliance, described how particularly burdensome Louisiana's system is to use. Permitted Br. at 7-18. The National Federation of Independent Business, Manhattan Institute, Louisiana Association of Business and Industry, and the State Chamber of Oklahoma Research Foundation Legal Center also explain why Louisiana's parochial system is excessively burdensome on interstate commerce. NFIB et al. Br. at 11-15.

[19] https://lataonline.org/ (disclaimer on bottom of the webpage).
[20] Halstead consented to the filing of LATA's *amicus* brief, but notes that the docket entries say the brief was insufficient under this Court's rules and that no sufficient brief was filed on the public docket by the deadline.

This is presumably not the first case before this Court where the parties disagree on the facts. That is what trial is for. Halstead should be able to test its claims and legal theories in court. Since the state courts and Board of Tax Appeals are closed to Halstead, *only* the federal courts can protect important constitutional rights of the Arizona-based family business.

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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Dated: January 18, 2023

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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.

s/ Joseph Henchman

Dated: January 18, 2023 Joseph Henchman

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)(ii) because it contains 6,274 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: January 18, 2023 Joseph Henchman