

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ONLINE MERCHANTS GUILD,)
)
 Plaintiff,)
)
 vs.) No. _____
)
 C. DANIEL HASSELL,)
 in his official capacity as)
 SECRETARY OF REVENUE,)
 DEPARTMENT OF REVENUE,)
)
 Defendant.)

**The Online Merchants Guild’s
Emergency Motion for Temporary Restraining Order and Preliminary Injunction**

Overview

This case arises out of litigation in federal court, which was recently dismissed at the Department of Revenue’s urging in favor of litigation in this Court.

The backstory is that the Department has targeted thousands of small non-resident businesses with constitutionally dubious registration demands. The Online Merchants Guild is a trade association for affected merchants. The Guild brings this case to vindicate its members’ federal rights.

At present, the operative compliance deadline is June 8, 2021—although the Department agreed to several extensions of that deadline during the federal litigation at the federal court’s suggestion. The Guild requests an emergency hearing and a temporary restraining order, to allow the parties and the Court time to brief and consider whether a

preliminary injunction is warranted. The Guild will give notice to the Department concurrently with this filing.

Statement of Jurisdiction

This Court has original jurisdiction over this action for declaratory and injunctive relief pursuant to 42 Pa.C.S. § 7531 *et seq.*

Determination in Question

This case arises from registration demands the Department sent to at least 11,000 non-resident merchants who supply goods to Amazon for Amazon to sell in its ubiquitous store.¹ In context, those letters reflect the Department's position that it has authority over non-resident merchants based solely on their participation Amazon's Fulfilled by Amazon program, and in particular based on Amazon's unilateral choice to store FBA goods in Amazon's Pennsylvania warehouses. The Guild challenges the Department's legal positions reflected in the registration letters.

Statement of Questions Involved

1. The threshold question is whether federal guarantees—chiefly the Due Process Clause and the Commerce Clause—preclude the Department of Revenue from asserting authority over small non-resident merchants based on their participation in Amazon's FBA program and Amazon's unilateral warehousing choices. In essence, Amazon takes custody of goods from Guild members and sometimes chooses to store them in Pennsylvania, as opposed to in hundreds of warehouses elsewhere. The Department contends that it acquires power over non-residents as a result of Amazon's actions. The

¹ See exemplar registration demand attached to Moody Declaration (Exhibit 1).

question for this Court is whether the Department's legal position complies with the Constitution.

The answer to that question is no. Under the Due Process Clause, the Department cannot base its assertion of jurisdiction on Amazon's unilateral storage choices. Likewise, under the Commerce Clause, the Department cannot impose undue burdens on small non-resident merchants, and cannot unilaterally re-define merchants' federal status to evade those protections.

2. Secondly, although no less importantly, the question is whether—even if the Department has authority over the Guild's members—the Internet Tax Freedom Act precludes the Department from imposing discriminatory obligations on the Guild's members.

The answer to that question is no. The ITFA requires the Department to treat the Guild's members like comparable suppliers of brick-and-mortar businesses. The Department is treating the Guild's members differently from comparable merchants by requiring the Guild's members to register and collect taxes for Amazon's consignment operation when the Department apparently does not do the same to upstream suppliers of brick-and-mortar (and less politically powerful) consignment operations.

Statement of the Case

The Online Merchants Guild is a nonprofit trade association for online merchants, primarily small businesses who supply goods for e-commerce stores like Amazon.com. Through this case, the Guild seeks to protect the interests of its members, whom the Pennsylvania Department of Revenue has begun targeting to clean up a problem of the

agency's own making—the hundreds of millions or billions of dollars in tax revenue that the Department let Amazon refuse to collect, but which the Department now wants from someone. Since Amazon is influential, while the Guild's members are not, the Department has decided to pursue them. The same thing is playing out across the country as governments start to tally up the cost of subsidizing Amazon's growth by looking the other way on sales tax collection.²

A brief explanation of Amazon's ecosystem is in order. The majority of items Amazon sells are sourced from third-party merchants who supply the Fulfilled by Amazon ("FBA") program.³ By contrast, Amazon directly sources a smaller share of goods, which the company deems "first-party sales." From the consumer perspective, there is no difference between the two in Amazon's "store."⁴ And make no mistake about it—it is Amazon's store, as the company insists under oath and in the media.⁵

Amazon keeps both categories of items in the same warehouses around the country; offers both categories to consumers on equal "Amazon Prime" terms in adjacent

² See, e.g., Harold Brubaker, "California Hits Philly-Area Amazon Seller with \$1.6 Million Sales-Tax Bill," *The Philadelphia Inquirer* (November 5, 2019), <https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html> (emphasis added).

³ Declaration of Paul S. Rafelson ¶ 5 (Exhibit 2).

⁴ See Written Testimony of Jeffrey P. Bezos, U.S. House of Representatives (July 29, 2020), <https://assets.documentcloud.org/documents/7009139/Jeff-Bezos-Written-Testimony.pdf> (testifying that Amazon.com is "our store" and consumers are the company's "customers").

⁵ *Id.*; see also, e.g., Laura Feiner, "D.C. Attorney General Sues Amazon on Antitrust Grounds, Alleges It Illegally Raises Prices," CNBC (May 25, 2021), <https://www.cnbc.com/2021/05/25/dc-attorney-general-sues-amazon-on-antitrust-grounds-alleges-it-illegally-raises-prices.html> (quoting Amazon's spokesperson's description of "our store").

listings on Amazon.com; controls the sale and delivery of both; profits from both; and delivers both in the same Amazon boxes on Amazon trucks.⁶

To fulfill orders from its online store, Amazon maintains a network of nearly 200 warehouses around North America.⁷ When merchants supply Amazon with FBA goods, Amazon takes possession of the goods at an Amazon warehouse of the company's choosing, and will typically reposition goods around the country.⁸ Amazon then chooses which warehouse to ship customer orders from.⁹

The difference between Amazon's first-party and FBA sales is not substance but tax and liability positioning.¹⁰ Starting in 2012, Amazon agreed to collect Pennsylvania sales tax on first-party sales,¹¹ but refused to collect tax on FBA sales. Why? Well, offering

⁶ Rafelson Dec. ¶¶ 3–17. Through FBA, Amazon largely takes suppliers out of the equation as far as consumers are concerned.

⁷ Seller Essentials, “Amazon Warehouse Locations,” <https://selleressentials.com/amazon/amazon-fulfillment-center-locations/>; Rafelson Dec. ¶ 7.

⁸ Rafelson Dec. ¶ 7; Declaration of J. Scott Moody ¶ 4.

⁹ See n. 7, *supra*.

¹⁰ See, e.g., *Oberdorf v. Amazon.com Inc.*, 818 F. App'x 138 (3d Cir. 2020) (*en banc*) (certifying to Pennsylvania Supreme Court question regarding Amazon's defense that the company was not liable for FBA sales in its store); *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 450 (2020) (rejecting Amazon's liability defense because of Amazon's control over sales in its store and role as an “intermediary between an upstream supplier and the ultimate consumer”); *Amazon Services, LLC v. S.C. Dep't of Rev.*, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. Sept. 10, 2019) (rejecting Amazon's argument that it did not have to collect sales taxes on its FBA sales), <https://src.bna.com/Leb>.

¹¹ AP, “Amazon.com to Begin Collecting Pennsylvania Sales Tax,” *PennLive.com* (August 29, 2012), https://www.pennlive.com/midstate/2012/08/amazoncom_to_begin_collecting.html.

most items in Amazon’s store tax-free allowed Amazon to charge lower prices than competitors who did collect taxes.¹²

Amazon’s tax posture was not a secret, but something the Department knowingly accepted until 2018.¹³ Meanwhile, the Commonwealth has been giving Amazon millions—and offering billions more—in affirmative subsidies to entice Amazon to develop projects in the state.¹⁴ That was all of a piece with Amazon’s nationwide strategy. As the House Antitrust Subcommittee concluded after a sixteen-month investigation, “Amazon expanded its market power through avoiding taxes [and] extracting state subsidies.”¹⁵

If that is as far as things went, it might just be a questionable deal for the Commonwealth’s citizens and Amazon’s competitors whom the Department made play

¹² David Dayen, “The ‘Amazon Tax’ Ruling: Disrupting the Disruptors?,” *Capital & Main* (July 10, 2018), <https://capitalandmain.com/the-amazon-tax-ruling-disrupting-the-disruptors-0710>.

¹³ See Tom Knapp, “Amazon Will Begin Collecting Sales Tax on Shipments to Pennsylvania,” *Lancaster Online* (March 6, 2018), https://lancasteronline.com/news/local/amazon-will-begin-collecting-sales-tax-on-shipments-to-pennsylvania/article_0d380ee6-215b-11e8-a5ed-4b0228b0798f.html.

¹⁴ See, e.g., David M. Kall, “Pennsylvania: Amazon.com to Receive \$22.5 Million in State Funding,” *McDonald Hopkins* (August 4, 2016), <https://mcdonaldhopkins.com/Insights/August-2016/Pennsylvania-Amazon-com-to-receive-22-5-million-in>; Andrew Wagaman, “Pennsylvania Offered Amazon up to \$4.6 Billion over 25 Years,” *The Morning Call* (describing the Commonwealth’s October 2017 proposal to Amazon), <https://www.mcall.com/business/mc-biz-amazon-hq2-proposal-lehigh-pennsylvania-sidebar-20181113-story.html>; Office of Governor Tom Wolf, “Governor Wolf: Amazon Expansion to Bring 800 Jobs to Allegheny County,” (July 30, 2019), <https://www.governor.pa.gov/newsroom/governor-wolf-amazon-expansion-to-bring-800-jobs-to-allegheny-county/>.

¹⁵ U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations” at 261, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

by the rules. But recently the Department has tried to dig out of the hole. Not by pursuing Amazon for the company's back taxes, but by pursuing Amazon's suppliers—non-resident small businesses who lack Amazon's power.

The Department has begun demanding that Guild members register with the agency (as a seeming prelude to tax assessments).¹⁶ The agency warns those who do not comply that the Department will increase the lookback period from *just* January 1, 2019—forward to some earlier start date. According to the Department, Amazon's suppliers are within the agency's jurisdictional reach because storing “inventory [] at a distribution or fulfillment center . . . constitutes physical presence that creates certain tax obligations with Pennsylvania.”¹⁷

“[B]y the letters' own terms, those who fail to comply voluntarily may suffer adverse consequences; namely, they will be subject to enforcement proceedings and forfeit the tax break and penalty protection offered to those who voluntarily comply.” D. Ct. Order at 3 (Exhibit 3). The threatened enforcement proceedings can apparently result in jail time and financial penalties.¹⁸

¹⁶ Moody Dec. ¶ 8.

¹⁷ Moody Dec. at 6 (Letter from DOR). Merchants in at least the following states have reported receiving similar letters: California, New Jersey, New York, Georgia, Michigan, Florida, South Carolina, and Oklahoma.

¹⁸ Pa. Dep't of Rev., Can vendors who sell merchandise without a sales tax license be cited and fined? (“Yes. . . . The penalties for making such sales can include a fine between \$300 and \$1,500 for each violation. If the person maintaining the business fails to pay the fines, he/she could be imprisoned for five to 30 days.”), https://revenue-pa.custhelp.com/app/answers/detail/a_id/1824/~can-vendors-who-sell-merchandise-without-a-sales-tax-license-be-cited-and-fined%3F.

There are also consequences for those who *do* comply with the Department's registration demands. One condition of voluntarily compliance is that the "taxpayer must agree not to petition any reported liabilities."¹⁹ In essence, acceding to the Department's demands means waiving some or all of one's rights to contest those demands.

The Guild's members thus face an impossible choice: either resist the Department's arguably unconstitutional demands on pain of prison and penalties, or give in and forgo the right to challenge those demands. In our society, government cannot put people in that position.

Initially, the letters demanded compliance within fifteen days of mailing. But during the federal litigation, the Department twice agreed to extend the deadline by several weeks to allow the District Court to consider the matter.²⁰

The Pennsylvania Department of Revenue is not the only state tax office pursuing a similar strategy. California has taken the lead, and its most notable target is a Pennsylvanian, who received a surprise retroactive tax bill for \$1.6 million (which California later reduced to "merely" several tens of thousands of dollars).²¹ Other states are following suit, which is creating havoc for online merchants and creating a zero-sum game as states target one another's citizens.²²

¹⁹ Pa. Dep't of Rev., Information and Participation Guidelines, <https://www.revenue.pa.gov/FormsandPublications/otherforms/Documents/rev-610.pdf> (Doc. 30-15 at 2).

²⁰ See stipulations regarding compliance deadlines (Exhibit 4).

²¹ Harold Brubaker, "California Hits Philly-Area Amazon Seller with \$1.6 Million Sales-Tax Bill," *The Philadelphia Inquirer* (November 5, 2019),

<https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html>.

²² Rafelson Dec. ¶¶ 26-27.

On behalf of itself and its members, the Online Merchants Guild filed suit in the U.S. District Court for the Middle District of Pennsylvania on February 26, 2021 and promptly sought injunctive and declaratory relief. As the Guild explained, Guild members who supply Amazon’s FBA program do not decide whether to store FBA goods in Amazon’s Pennsylvania Warehouses; Amazon does. From Guild members’ perspective, Amazon could—and does—store the goods they supply in any of more than a hundred locations around North America. Because affected Guild members do not purposefully avail themselves of Pennsylvania law, and because their connections with the Commonwealth depend on Amazon’s unilateral choices, the Department of Revenue lacks personal jurisdiction over them under the Supreme Court’s Due Process Clause precedents.

The Department of Revenue opposed the Guild’s request for injunctive relief and sought dismissal of the case in favor of adjudication in Pennsylvania courts. Relevant here, the Department’s emphasized that this Court may—and historically has—enjoined the Department from seeking information or imposing collection obligations that violate the federal Constitution or Pennsylvania law. *See Bloomingdale’s by Mail, Ltd. v. Commonwealth*, 567 A.2d 773, 776 (Pa. Commw. Ct. 1989) (holding that the Constitution forbade the Department from imposing tax collection obligations on non-resident retailer), *aff’d* 591 A.2d 1047 (Pa. 1991); *Bloomingdale’s by Mail, Ltd. v. Commonwealth*, 516 A.2d 827, 828–29 (Pa. Commw. Ct. 1986) (holding that Pennsylvania law forbade the Department from demanding information from non-resident retailer); *L.L. Bean, Inc. v. Commonwealth*, 516 A.2d 820, 826–27 (Pa. Commw. 1986) (holding that the Constitution

forbade the Department from imposing tax collection or reporting obligations on non-resident retailer).

The District Court held an evidentiary hearing on April 29. D. Ct. Order at 4. The Guild presented the testimony of its executive director and a Guild member from New Hampshire who had received the Department's letters and described how compliance with the Department's demands would disrupt his business and interfere with his participation in the interstate economy.²³

On May 28, the District Court ruled that the Guild had standing and that the Guild's claims are ripe, but declined to exercise federal jurisdiction on comity grounds. D. Ct. Order at 1. As the District Court reasoned, "litigants challenging certain tax-collection obligations and informational requests have historically obtained meaningful review in the Commonwealth's courts." D. Ct. Order at 18 (citing this Court's *Bloomington's* and *L.L. Bean* cases, *supra*). There being "no reason to believe the avenues described in the relevant state case law are now unavailable," among other considerations, the District Court concluded that abstention was warranted. D. Ct. Order at 17-19; *see also id.* at 21 (summarizing the District Court's reasoning, including the "available state procedures").

This case follows. Through it, the Guild seeks to employ the procedures that the Department invited, and that the District Court concluded were adequate, to challenge the Department's actions.

²³ The Guild will file the transcript from the evidentiary hearing once it is received from the court reporter.

Summary of Argument

The Guild is entitled to an injunction during the pendency of this litigation to protect its members constitutional rights and to preserve the status quo ante, which cannot effectively be restored if the Department is allowed to proceed unabated.

The Department's registration demands stand on unconstitutional footing. The Due Process Clause, and associated personal jurisdiction requirements, constrain the Department's authority over non-residents like the Guild's members. Jurisdiction cannot rest on the unilateral actions of third parties directed toward a forum state. Yet the Department's putative basis for claiming jurisdiction over the Guild's non-resident members is that Amazon unilaterally decided to store in Pennsylvania—as opposed to in a large number of warehouses in other states—goods those members supplied to Amazon. The Department's position is contrary to a number of controlling and persuasive due process precedents.

The Department's position also violates Commerce Clause doctrine. In the *Wayfair* case, the Supreme Court held that non-residents who do a modest amount of business in relation to a state should be relieved of burdensome tax obligations that might make sense for large, national businesses but threaten to destroy small businesses facing potential fifty-state tax exposure. The General Assembly accordingly adopted a “*Wayfair* threshold,” pursuant to which non-residents who make less than \$100,000 in sales relating to the Commonwealth are not subject to tax obligations. The Department is undoing both *Wayfair* and the *Wayfair* threshold by re-defining non-residents' federal status, such that when Amazon stores a good in the Commonwealth, the merchant who

supplied that good to Amazon is deemed a resident and ineligible for the threshold. But the Department cannot unilaterally define federal status or rewrite Supreme Court decisions or the General Assembly's statutes.

The Department is also likely violating the federal Internet Tax Freedom Act by imposing discriminatory burdens on the Guild's members—suppliers of Amazon's consignment operation—that the Department does not place on comparable suppliers of brick-and-mortar consignment operations.

Because the Department is likely violating federal law, this is a classic case for the issuance of a preliminary injunction to preserve the status quo while the Court considers the lawfulness of the Department's actions.

Argument

There are “six essential prerequisites” to preliminary injunctive relief. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501–02 (Pa. 2014):

1. Injunctive relief is “necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages”;
2. “Greater injury would result from refusing the injunction than from granting it, and concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings”;
3. “The preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”;
4. The “party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits”;

5. Injunctive relief “is reasonably suited to abate the offending activity”;
and

6. Injunctive relief “will not adversely affect the public interest.”

SEIU Healthcare, 104 A.3d at 501–02. The Guild satisfies each requirement.

1. A preliminary injunction will prevent immediate and irreparable harm.

The Guild seeks to vindicate its members constitutional rights, which is the paradigm of immediate and irreparable harm warranting an injunction. As the Court has explained, “Pennsylvania law does not require a person to be prosecuted” under an arguably illegal law “to find that he has suffered irreparable harm.” *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Commw. Ct. 2014); accord *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) (emphasizing the settled American practice: “where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat”) (emphasis in original). This is an especially acute case for pre-enforcement review because those who do not comply are exposed to “enforcement action,” while those who do comply will waive some rights to challenge the Department’s actions. *See supra*. Accordingly, the Guild has established the first factor.

2. Greater injury will result from denying an injunction, and an injunction will not substantially harm third parties.

Absent an injunction, the Guild’s members face a difficult choice: stand on their constitutional objections and decline to register, exposing themselves to potential jail time and monetary fines. Or give in and lose their rights to challenge the Department’s actions. In addition, compliance will trigger compliance costs, which are a significant burdenn on

small businesses eying a problem of nationwide scale. See *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2098 (2018) (recognizing the “daunting” burdens of “nationwide sales tax collection” for small businesses). Those are exactly the kind of burdens preliminary injunctive relief exists to avoid.

On the other side of the scale, a temporary injunction will not harm third parties. As explained below, the relevant third parties are principally members of the public, and the requested injunction will serve the public interest. This factor favors an injunction.

3. The requested injunction will preserve the status quo.

This factor favors relief because the requested injunction will not give either side an undue advantage, but will simply preserve the status quo while the Court considers the lawfulness of the Department’s challenged conduct. By contrast, absent an injunction, members will face significant pressure to accede to the Department’s dubious demands. The Department should not be able to leverage its disproportionate power to effectively evade scrutiny of whether the Department is lawfully exercising its power.

4. The Guild has a clear right to relief and is likely to prevail on the merits.

This factor strongly favors relief. The likelihood-of-success factor does not require certainty at the outset, but rather a “reasonable likelihood of success on the merits.” *Lewis v. City of Harrisburg*, 631 A.2d 807, 810 (Pa. Commw. Ct. 1993). The Guild more than meets that standard because the Guild’s arguments are based on controlling precedent from the Supreme Court and other appellate courts, including this Court.

a. The Department’s jurisdictional position violates the Due Process Clause.

The Due Process Clause constrains all government power in a free society, and state tax authorities are like other state officials: they cannot regulate non-residents over whom the state lacks jurisdiction. The Supreme Court has long enforced “the due process requirement that there be ‘some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’” *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2093 (2018) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954)). Absent personal jurisdiction, “the imposition of a tax would be *ultra vires* and void.” *Miller Bros.*, 347 U.S. at 342. And “the seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law.” *Id.*

In the tax context, the Supreme Court has relied on the same due process decisions as in the familiar civil litigation context. *See, e.g., S.D. v. Wayfair*, 138 S. Ct. 2080, 2093 (2018) (relying on *Burger King v. Rudzewicz*, 471 U.S. 462 (1985)); *Quill Corp. v. N.D.*, 504 U.S. 298, 307 (1992) (relying on *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).²⁴ “Building on the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), [the Court has] framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction such that maintenance of the suit does not offend

²⁴ *Wayfair* altered the Supreme Court’s Commerce Clause jurisprudence as reflected in *Quill* and *Bellas Hess*, while affirming the Court’s longstanding Due Process jurisprudence. *Wayfair*, 138 S. Ct. at 2093.

traditional notions of fair play and substantial justice.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992).

According to the Department, Amazon’s unilateral decision to store goods in Pennsylvania gives the agency jurisdiction over third-party merchants who earlier supplied those goods to Amazon. But the Supreme Court has repeatedly held that the “unilateral activity of a third party [] cannot satisfy the requirement of contact with the forum State” necessary to establish jurisdiction. *Walden v. Fiore*, 571 U.S. 277, 291 (2014). Rather, the inquiry is whether the putative subject of jurisdiction—here, the Guild’s members—“create[d] a substantial connection with the forum state.” *Id.* at 284.

Non-resident Guild members do not deliberately create meaningful contacts with Pennsylvania by participating in Amazon’s FBA program. “Critically, Amazon has wide latitude to decide which warehouse or fulfillment center to store a supplier’s product in.” D. Ct. Order at 2 (citing the Guild’s District Court complaint). After Amazon “takes physical possession” of goods from a supplier, Amazon “stores them, markets them to consumers, and sells and delivers them without supplier involvement.” *Id.*

As Guild member J. Scott Moody—a resident of New Hampshire—explains, “I cannot tell Amazon where to warehouse, or not warehouse, goods that Amazon has accepted for sale in its store. Nor can I tell Amazon to ship items or not ship items to customers in specific states.”²⁵ Instead, “Amazon controls the storage and shipment of goods in the FBA program.”²⁶

²⁵ Moody Dec. ¶¶ 4–7.

²⁶ *Id.*

At most, participation in FBA creates the possibility that Amazon might unilaterally decide to store goods in Pennsylvania, as opposed to elsewhere among Amazon’s hundreds of facilities. But that is just the discredited “stream-of-commerce” theory of jurisdiction, which a “plurality of Supreme Court Justices has twice rejected,” and which the Third Circuit has accordingly “decline[d] to adopt.” *Shuker v. Smith & Nephew PLC*, 885 F.3d 760, 780 (3d Cir. 2018) (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877–85 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108–13 (1987); *D’Jamoos v. Pilatus Aircraft, Ltd.*, 566 F.3d 94 (3d Cir. 2009)).

Pennsylvania’s courts have likewise “rejected” the “stream of commerce argument to confer jurisdiction.” *Schlereth v. Gaf. Corp.*, 1996 Pa. Super. LEXIS 2498, *10 (Pa. Super. Ct. 1996) (citing *Kachur v. Yugo Am.*, 632 A.2d 1297 (Pa. 1993)); *Commonwealth v. TAP Pharm. Prods.*, 868 A.2d 624, 632 (Pa. Commw. Ct. 2005) (rejecting personal jurisdiction because non-resident did not control distribution of products into the Commonwealth, even though the non-resident was a 50% owner of the distributor); *Lawrence v. Robland Int’l B.V.*, 2016 Phila. Ct. Com. Pl. LEXIS 334, *11–12 (Phila. Ct. Com. Pl. 2016 (New, J.) (holding that court lacks personal jurisdiction where non-resident did not directly target the Commonwealth for business and merely placed goods into the stream of commerce)).

The upshot of the Department’s theory is that Guild members could be subject to nationwide jurisdiction based on Amazon’s unilateral and constantly changing storage choices across the continent. But multiple courts have rejected such a grasping assertion of power: even “efforts to exploit a national market that necessarily included

Pennsylvania are insufficient” to create jurisdiction. *Shuker*, 885 F.3d at 780; *TAP Pharm. Prods.*, 868 A.2d at 632.

Thus, the Department lacks personal jurisdiction over non-resident Guild members based on their FBA participation and cannot demand that they register with the Department on pain of jail time and fines.

b. The Department cannot override *Wayfair*.

There is another constitutional deficiency with the Department’s position: it attempts to erase an element of the Supreme Court’s *Wayfair* decision, which state agencies cannot do under the Supremacy Clause.

The Commerce Clause imposes various limits on state authority over interstate commerce. *Wayfair*, 138 S. Ct. at 2089–90. There are “two primary principles” that animate Commerce Clause jurisprudence. *Id.* at 2090. States (1) “may not discriminate against interstate commerce,” and (2) states “may not impose undue burdens on interstate commerce.” *Id.*

Wayfair arose in the context of “large, national companies” with “an extensive virtual presence,” who had nonetheless been relatively immune from state taxation unless they maintained physical outlets in the state. *Id.* at 2099. *Wayfair* removed that physical presence rule, which had disproportionately benefited large businesses, while stressing that “other aspects of the Court’s Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines.” *Id.* at 2098. As the Court explained, the “daunting complexity and business-development obstacles of nationwide

sales tax collection . . . may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to consumers in many States.” *Id.* at 2098 (quoting in part the Wayfair company’s brief).

One protective element the Court identified was what has come to be known as a *Wayfair* threshold, under which a non-resident is only required “to collect the tax if does a considerable amount of business in the State” (which in that case was \$100,000). *Id.* The General Assembly adopted such a threshold in Act 13 of 2019.²⁷ The way these thresholds work is as follows. Say a merchant wants to start an online store selling widgets, either as their first online enterprise or to diversify away from Amazon’s store. Without a *Wayfair* threshold, the merchant might be obligated to register and collect various taxes in fifty states; the administrative costs could exceed the thin profit margins for e-commerce. With a threshold, however, the merchant will only be obligated to collect taxes for a state (all else being equal) if their sales are assumed to be significant enough to justify the compliance costs. In practical terms, *Wayfair* thresholds make it economical to grow and sustain small e-commerce operations. *See* 139 S. Ct. at 2098.

Despite *Wayfair*’s instructions, the Department has taken the position that it can define non-residents out of *Wayfair*’s protections. According to the Department’s registration demands, the *Wayfair* threshold does not apply if a “business has property or inventory located within Pennsylvania” —*i.e.*, in an Amazon warehouse because of

²⁷ *See* Pa. Gen’l Assembly, 2019 Act 13 (amending Section 201(n) and (p) of the Tax Reform Code of 1971, <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2019&sessInd=0&act=13>).

Amazon’s unilateral decisions.²⁸ The upshot is that the Department is trying to do the very thing the Supreme Court warned against—impose impossible burdens on small non-resident merchants. It should go without saying that state agencies cannot define a party’s federal status to evade federal constitutional protections.

For similar reasons, the Department’s position violates the *Pike* balancing test, which weighs the burdens of non-discriminatory state action on the interstate market against legitimate local benefits. *See Wayfair*, 138 S. Ct. at 2091. Amazon has (finally) started collecting taxes on first-party and third-party sales, with seemingly little difficulty—it’s the one company that controls the store and collects consumers’ money, after all. Amazon is in privity with its customers; Amazon sells them goods and collects their money; Amazon can easily collect taxes on top of those transactions; and Amazon knows what it sold to whom, when.

By contrast, any effort to collect back taxes from hundreds of thousands of small merchants—and to treat suppliers as the “store” when it is indisputably Amazon’s store—will be inefficient at best and burdensome at worst. The idea that small or micro-businesses around the country need to shoulder that burden, instead of the country’s dominant e-commerce store—bigger now than most brick-and-mortar retailers—cannot survive *Pike*.

The Guild is likely to succeed on its argument that the Department’s position violates *Wayfair* and the Commerce Clause more generally.

²⁸ Department’s registration demand (Exhibit 1).

c. The Department’s position likely violates the Internet Tax Freedom Act.

The federal Internet Tax Freedom Act prohibits states from imposing “discriminatory taxes on electronic commerce,” one form of which is imposing “an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.” ITFA § 1101(a)(2); § 1105(2)(A)(iii), codified at 47 U.S.C. § 151, Note. Essentially, states must impose the same tax-related obligations on e-commerce businesses and comparable brick-and-mortar businesses; contrary laws are preempted. *See, e.g., Performance Mktg. Ass’n v. Hamer*, 998 N.E.2d 54, 57 (Ill. 2013) (striking down tax obligation imposed on e-commerce but not brick-and-mortar retailers).

Amazon FBA operates like a consignment operation, with Amazon taking physical custody of goods, interfacing with customers, processing sales, and conveying goods to customers. *See* D. Ct. Order at 2. The Guild alleges that the Department of Revenue does not, in practice, compel suppliers of brick-and-mortar consignment stores to register as putative tax collectors.²⁹ After all, the stores, not the suppliers, are at the point of sale and actually collect money from consumers.

But, the Guild argues, the Department “has adopted a special practice by seeking to treat Amazon’s consignor-suppliers as tax agents and requiring them to register accordingly.”³⁰ The reason, the Guild alleges, is Amazon’s relative economic and political power as compared to the Guild’s non-resident members.³¹ The Department’s decision to

²⁹ Petition at ¶¶ 57.

³⁰ *Id.*

³¹ *Id.* at ¶¶ 4; 51; 57.

take the tax collection obligation from Amazon and place it upstream on Amazon's suppliers will violate the ITFA and therefore be preempted. *Cf. Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 450 (2020) (rejecting Amazon's liability defense because of Amazon's control over sales in its store and role as an "intermediary between an upstream supplier and the ultimate consumer").

The Guild is likely to succeed on its ITFA claim.

5. Injunctive relief will abate the Department's challenged activity.

The Guild proposes a targeted injunction to abate the Department's actions during the pendency of this case. Specifically, the Court should enjoin the Department from requiring that Guild members register with the Department.

The injunction would operate like a delay in the registration program while the Court adjudicates whether the program is lawful. If it is, the Department could proceed. Any delay would be relatively modest and largely of the Department's own making. The Department knew for the better part of a decade that Amazon was not collecting taxes on FBA sales, yet without public explanation decided to do something about it only in the last few months, and adopted an aggressive initial compliance deadline. The self-imposed nature of the delay and deadlines should mitigate concerns about burdening the Department's efforts.

Moreover, if the Guild prevails, a preliminary injunction would have mitigated the constitutional injuries in question and mitigated unrecoverable business complications. This factor favors relief.

6. The requested injunction will further the public interest.

It is always in the public interest to protect constitutional rights. As the Court has explained, the “argument that a violation of law can be a benefit to the public is without merit.” *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Commw. Ct. 2014). Rather, unlawful government conduct itself is “injurious to the public.” *Id.* Moreover, the Supreme Court has recognized the strong interest in protecting the ability of small businesses to participate in the interstate economy, an interest that is especially strong during challenging economic times. *See Wayfair*, 138 S. Ct. at 2098.

The Guild acknowledges that the Department has a general interest in tax collection, but that kind of interest is present in every case challenging government action, and is secondary to the rule of law. If the Department is exceeding its lawful authority, it has no legitimate interest to further. A targeted and temporary injunction will cost the Department and the public relatively little, while furthering the strong public interest in protecting constitutional rights and small business participation in the economy while this case is litigated on the merits.

Conclusion

For the foregoing reasons, the Guild respectfully requests that the Court enjoin the Department from enforcing its registration demands on the Guild’s members.

Given the exigent nature of this matter, the Guild respectfully suggests that the Court may wish to issue a temporary restraining order effectively tolling the June 8 deadline pending further review by the Court. That would preserve the status quo while providing more opportunity for the Court to consider the matter.

Respectfully submitted this second day of June, 2021.

s/ David F. Wilk

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Certificate of Service

I hereby certify that I served the foregoing via the Court's electronic filing system
this second day of June, 2021.

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