COMMONWEATLH OF MASSACHUSETTS

Suffolk, ss.	**Superior Court** **Civil Action No. 1784-cv-01772-BLSI**

AMERICAN CATALOG MAILERS ASSOCIATION and **NETCHOICE**,	)
Plaintiffs,	)
v.	)
MICHAEL J. HEFFERNAN, in his capacity as the Commissioner of the **MASSACHUSETTS DEPARTMENT OF REVENUE**,	)
Defendant.	)

BRIEF OF AMICUS CURIAE THE RETAILERS ASSOCIATION OF MASSACHUSETTS AND THE RETAIL LITIGATION CENTER IN SUPPORT OF DEFENDANT MICHAEL J. HEFFERNAN'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In response to Plaintiffs American Catalog Mailers Association and NetChoice's Motion for a Preliminary Injunction pursuant to Mass. R. Civ. P. 65(b), *Amici Curiae* the Retailers Association of Massachusetts and the Retail Litigation Center have filed a Motion Seeking Leave to File an Amicus Brief in Support of Defendant Michael J. Heffernan's Opposition to Plaintiffs' Motion for Preliminary Injunction. In support of their Motion, *Amici* submit this brief.

INTEREST OF AMICI

The Retailers Association of Massachusetts ("RAM") is a 26 U.S.C. §501(c)(6), nonprofit employer association that is supported primarily by membership dues and fees. RAM's mission is to advocate on behalf of the retail industry before the Massachusetts Legislature, executive branch agencies, and the courts, to support fair and equitable conditions for the retail industry to operate in Massachusetts, and to promote the overall economic competitiveness of the Commonwealth. RAM's membership consists of thousands of retail businesses throughout the Commonwealth, ranging in size from large national retailers operating in Massachusetts to small and purely local family businesses. According to data available from the U.S. Census Bureau, well over half of the retail establishments in Massachusetts are considered small firms, including 31,400 sole proprietors, 14,900 firms employing fewer than 19 employees, and 16,500 firms employing fewer than 499 employees. These small employers comply with their obligations to collect and remit Massachusetts sales taxes, and they believe that their large online competitors ought to do the same.

The Retail Litigation Center ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

This case, which addresses the applicability of the Massachusetts sales tax to out-of-state Internet vendors, is of critical interest to *amici*, their members large and small, and persons seeking to establish and develop a retail business in the Commonwealth. All brick and mortar retailers operating within the borders of the Commonwealth of Massachusetts are currently required to collect and remit the state sales tax on all applicable transactions, regardless of whether the transaction is conducted in store or over the internet. *Amici* thus have a special interest in the propriety of applying the state sales tax to similar transactions conducted over the Internet by their out-of-state competitors. *Amici* believe that the application of the Massachusetts sales tax to out-of-state Internet vendors, as required by Department of Revenue Directive 17-1, "Requirement that Out-of-State Internet Vendors with Significant Massachusetts Sales Must Collect Sales and Use Tax," is proper and should be permitted to ensure fairness and equity within the retail industry. And because the Retail Litigation Center has participated as an *amicus* in other similar cases around the country—and has closely monitored the ongoing litigation in other jurisdictions—it hopes that this brief will add essential nationwide context to plaintiffs' motion.

SUMMARY OF ARGUMENT

Recently, in response to a call from Justice Kennedy of the U.S. Supreme Court, jurisdictions around the country have been implementing various rules, regulations, and legislation aimed at ameliorating the harms caused to state revenues by the rule set out in *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and grudgingly retained by the U.S. Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In many of these jurisdictions, the plaintiffs here—American Catalog Mailers Association (ACMA) and NetChoice—have sought to stymie those efforts with pre-

enforcement challenges like this one. In many other jurisdictions, however, taxpayers are barred by State procedural rules from seeking pre-enforcement review, and must pursue one of the *ordinary* courses for tax challenges—namely, paying the tax and suing for a refund, or refusing to comply and suffering an audit and assessment. This scenario, combined with basic factual realities left unaddressed in plaintiffs' motion, provides an easy basis on which this Court can resolve plaintiffs' request for a preliminary injunction. There is simply no case to be made for irreparable harm.

The plain truth is that, compared to the millions of dollars Massachusetts loses because of uncollected sales taxes on Internet retail transactions, the harms facing ACMA and NetChoice members are slim to none. Most state courts and all federal courts are foreclosed from providing preliminary relief, so these companies already need to undertake compliance efforts in other states. And, in part because these companies thus necessarily have tax-compliance software in place already, the "extensive and expensive modifications to their websites and supporting systems" they say will result from denial of their motion are in fact illusory. Given that Internet retailers of the size necessary to do $500,000 of business in Massachusetts are huge businesses that have manifestly mastered the power of modern computing to address logistical challenges, the marginal costs to such businesses of Massachusetts sales tax compliance are relatively marginal. And they cannot complain that they will be required to pay tax they will not get back because their *customers* pay the tax, not them—retailers only *collect* the tax that consumers already owe on every sale (regardless of whether it is made in a local store or from a large online retailer) under longstanding law in Massachusetts and every other sales-tax state. Temporary compliance with the tax—which is the procedurally required norm in other states—will impose a

marginal cost on plaintiffs' members that approaches zero, and is far outweighed by the millions in revenue that will go missing from the Commonwealth's coffers each month this directive is enjoined.

ARGUMENT

As the plaintiffs recognize, showing that the balance of harms tips in their favor is an essential aspect of their request for a preliminary injunction. Accordingly, the Court need not reach the plaintiffs' various merits complaints—which, oddly, *omit* their constitutional argument under *Bellas Hess* and *Quill*—in order to reject the plaintiffs' motion. *See, e.g., GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 726 & n.8 (1993) (resolving preliminary-injunction issue by "conclud[ing] that the plaintiff has failed to show irreparable harm" without "address[ing] any other issues raised"); *see also id.* at 724 (noting that "[i]n awarding preliminary injunctive relief, a court is justified in requiring the plaintiff to bear a slightly heavier burden, given the problems of enforcing injunctions").

As an initial matter, the Court should be aware of the apparently strategic nature of plaintiffs' argument, which cuts strongly against their claim of irreparable harm. By omitting their claimed conflict with *Quill* and *Bellas Hess* from their motion,[1] plaintiffs have ensured that, even though decisions on a preliminary injunction are immediately appealable, the resolution of this motion will not provide a vehicle for either party to appeal up to the U.S. Supreme Court the question whether *Quill* should be overruled—the question

[1] Plaintiffs mention their dormant Commerce Clause issue under *Quill*, but affirmatively ask the Court not to rule on it. *See* Mem. at 3 ("[A]lthough the central weakness of the Directive is its violation of established constitutional standards, in ruling on the Plaintiff's motion for preliminary injunction, the Court need not reach the Commerce Clause issue."). Accordingly, there is no substantial argument in plaintiff's memorandum regarding this constitutional question.

Justice Kennedy asked states to present to that Court. *See Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1135 (Kennedy, J. concurring). It is accordingly hard to accept the plaintiffs' suggestion that they need a speedy determination regarding the validity of this directive to spare them from harm. Instead, it is quite clear that they would prefer to risk losing on this motion over precipitating immediate litigation on the core issue. Put otherwise, what plaintiffs seem to seek is *delay* itself, rather than a head-on challenge to the Commonwealth's actions. That is not the kind of strategy that is remotely consistent with a claim of irreparable injury.

Relatedly, it is impossible to accurately assess plaintiffs' claims of irreparable injury without placing this challenge in the broader context of the many, largely parallel actions (many that have been brought by plaintiffs here) currently proceeding in other States—context plaintiffs omit entirely. At present, plaintiffs' members currently face similar collection requirements in (at least) Massachusetts, South Dakota, Alabama, Tennessee, and Wyoming, and yet more states are considering similar steps. *See, e.g.*, https://www.multistate.us/blog/sales-tax-compliance-legislation-is-still-a-hot-topic-at-the-state-and-federal-level. Some of these states have permitted this kind of pre-enforcement, declaratory-judgment style challenge, but some have not. *See, e.g.*, Alabama case. Accordingly, plaintiffs' members are already at risk of enforcement challenges if they do not implement the kind of compliance capabilities they say are too "extensive and expensive" for them to shoulder in the case of Massachusetts. The actual, *marginal* contribution made by the Commonwealth's directive is thus likely to be vanishingly small.

In addition, these related actions vividly demonstrate that plaintiffs are badly off course in suggesting that *this* kind of "constitutional" claim necessarily entails irreparable

harm. To begin, plaintiffs have not even pressed their constitutional claim in this motion, and so their citations to cases about constitutional injuries are inapplicable. *See* Mem. at 18. But even if they had pressed their *Quill* claim, cases about the First Amendment and other constitutional rights are far afield from cases about tax compliance under the dormant Commerce Clause. There are a host of U.S. Supreme Court cases clarifying that, whether a claim involves a constitutional challenge or not, if it challenges a tax obligation, it is almost always inappropriate to permit an equitable action seeking an injunction or declaratory relief against the tax. *See, e.g.*, 28 U.S.C. §1341 ("Tax Injunction Act" which directs that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law"); *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2328 (2010) ("[T]he comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration."); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 129-130 (1981) (Brennan, J. concurring) (explaining that Tax Injunction Act and other limits on federal injunction were meant to parallel state-court-level restraints on injunctive relief in tax cases). The reasoning of those cases has perfect application here: The plaintiff can obtain redress for un-owed taxes or challenge the law through the ordinary channels of taxpayer relief, and permitting broad-scale injunctive challenges risks disrupting State revenue collection efforts in the meantime. *See Levin*, 130 S. Ct. at 2330 ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.") (*quoting* Dows v. Chicago, 11 Wall. 108, 110 (1871)); *Perez v. Ledesma*, 401 U.S. 82, 128 & n.17 (Brennan, J. dissenting)

(explaining the concerns for State administration associated with injunctions in tax cases). Simply put, the default rule in tax cases is that *any* form of injunctive relief is *affirmatively barred*, rather than presumptively appropriate, as plaintiffs suggest. As Justice Brandeis once wrote for the Supreme Court:

> Where . . . adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights.

Phillips v. Commissioner, 283 U.S. 589, 595-96 (1931).

These are not, however, the most critical errors and omissions in plaintiffs' motion; it is when it comes to the meat of their argument regarding the balance of harms that it becomes most obvious that plaintiffs do not have the goods. Plaintiffs suggest that, if they cannot obtain preliminary injunctive relief, they will be forced to undertake expensive and un-recoupable compliance efforts in order to be able to collect and remit Massachusetts sales tax while this challenge is pending. But their support for that proposition consists of a single footnote, citing a single study published by an aligned lobbying group, with numbers that have essentially no relevance to the question before the Court. In contrast, a more recent analysis by experts in the field unmasks plaintiffs' Chicken Little impression.

Begin with the "recent industry analyses" cited in plaintiffs' footnote. *See* Mem. at 19 n.2. This analysis suggests that the costs of "implementing new sales tax collection systems" might be between $80,000 and $270,000. *Id.* This study was published by a lobbying group called TruST ("True Simplification of Sales Taxation Coalition") which

describes itself as "[l]ed by the American Catalog Mailers Association (ACMA), … and NetChoice." *See* truesimplification.org/about. TruST's sole purpose appears to be to oppose even federal legislation that would permit collection regimes similar to the one pursued by the Commonwealth here. Plaintiffs are essentially citing themselves with respect to a document whose avowed purpose is to contest efforts like Directive 17-1.

The problems with citing this "study" go far beyond its unreliability, however; the numbers it produces in plaintiffs' footnote also lack any context. In particular, the costs identified there involve integrating *new* software to facilitate tax collection and remittance, *see* http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf at pp.2-3 (attributing the vast majority of the cost to "implementation" and "integration"). But it is undoubtedly true that most Internet retailers have *existing* software that handles these processes in the states where those retailers already have physical presence and so collect and remit sales taxes—plaintiffs' own study indicates as much, *see id.* at 3, and research by the Small Business Administration suggests that the average online retailer already collects in about 18 States. *See* https://www.sba.gov/sites/default/files/rs416tot.pdf. The natural design of any such software option is to permit collection and remittance based on the purchaser's address, while allowing the seller to select the jurisdictions in which it faces an obligation to collect. *See, e.g.*, https://www.avalara.com/smallbusiness/avatax/?referrer=&lastReferrer=www.avalara.com&sessionId=1498078275559 (website of tax software provider Avalara, promising to "*automatically* remit to every city, county, and state where you do business") (emphasis added). Thus, the real "set up" cost of collecting in Massachusetts for most members is likely to consist of toggling an option in a software

system that already exists, which hardly counts as a paper cut in the realm of "irreparable" injuries.

Recent experience in related actions backs this up. South Dakota recently enacted a similar provision, and sued a handful of retailers who failed to register to collect and remit State sales taxes. Within days of being sued, one retailer (Systemax, Inc.) decided that it would prefer to voluntarily comply rather than following through with its constitutional defense—even though South Dakota's legislature had voluntarily stayed any collection obligation during the lawsuit. That retailer was able to begin complying *the very next day*. *See, e.g.*, Appellant's Brief, *South Dakota v. Wayfair Inc.*, South Dakota Supreme Court No. 28160 (filed April 13, 2017) at p.29, http://stage.dor.sd.gov/Taxes/Business_Taxes/SB106/Appellants%20Brief%20to%20South%20Dakota%20Supreme%20Court.pdf. That belies the idea that set-up costs for sales tax compliance in Massachusetts are an irreparable injury of any material scale. That is particularly so because Massachusetts has a relatively easy sales tax system: It has one statewide tax rate and requires only one return. Especially given plaintiffs' effort to litigate this case in piecemeal fashion, there is no question that the attorney costs attributable to their own strategic choices will far outweigh any relative costs of tax compliance.

To that end, it is particularly notable that plaintiffs make no effort to make any *tangible* showing of irreparable harm, and instead rely only on highly abstract estimates of compliance costs for the non-parties they claim to represent through associational standing. That strategic choice makes it impossible for the Commonwealth or this Court to probe their assertions to see if they have anything behind them. Their basic view boils down to: "This is expensive, trust us." But the all-too-plausible reality is that modern computing

has made compliance relatively easy, which is why plaintiffs do not want to indulge any actual examination of the costs of compliance—an examination that would doom not only this motion, but their best argument that the *Quill* rule ought to be retained. Ultimately, the key point is that the relevant facts are within the complete control of the plaintiffs and the companies they purport to represent; the failure to bring them forward is entirely on them, and precludes their effort to secure preliminary relief.

In contrast to plaintiffs' catastrophizing, the best efforts to assess the real costs of tax compliance in the era of modern computing have demonstrated them to be relatively small and falling. The most comprehensive study on the cost of collection was published in 2006. The Joint Cost of Collection Study (JCC Study) was a public-private partnership that was conducted by PwC with assistance from the National Opinion Research Center at the University of Chicago, the Office of Tax Policy Research at the University of Michigan, and B. Erard & Associates (PricewaterhouseCoopers 2006 Retail Sales Tax Compliance Costs: A National Estimate). The JCC Study found the cost of compliance for retailers with more than $10 million in annual national sales—the only companies that would be affected by this new directive—was only 2.17% of taxes collected.

Even more relevant here, the JCC Study found that nexus in multiple states did *not* result in higher compliance costs. In fact, costs *decreased* fairly dramatically among retailers with nexus in multiple locations, likely because costs are reduced by scale effects: Larger retailers spread similar fixed costs across a larger number of transactions, resulting in lower average costs of collection. For retailers collecting in more than ten states, the cost of compliance declined to 1.94%. This strongly suggests that the marginal cost of compliance in an additional state is vanishingly small or non-existent—even though the

JCC study involved *brick and mortar* retailers who no doubt have much larger costs associated with expanding to additional states (because they need new point-of-sale systems and the like). For online-only outlets, the marginal cost should be even lower. And all of this data predates the last decade of advancements in automation and network computing, which have no doubt driven these costs down even further.

Ultimately, it is clear that the plaintiffs cannot show irreparable injury here—at least relative to the harms that delay will visit on the Commonwealth—and in fact have barely tried. But delay is all they are after; if they wanted to precipitate the fastest resolution of this issue, there would be no reason for them to omit their strongest federal constitutional claim from their motion for a preliminary injunction. The Court should not indulge this strategic gambit and, in the absence of any showing of irreparable harm, deny the motion without any need to engage with the merits of plaintiffs' arguments.

CONCLUSION

The motion should be denied.

Respectfully Submitted,

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Dated this 23rd day of June, 2017

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following attorneys of record for plaintiffs via FedEx overnight delivery on June 23, 2017.

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