

**CASE NO. 22-30373**

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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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*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF LOUISIANA, NO. 2:21-CV-2106

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**MOTION FOR LEAVE TO FILE BRIEF FOR AMICI CURIAE NATIONAL  
FEDERATION OF INDEPENDENT BUSINESS, MANHATTAN INSTITUTE,  
LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY, AND STATE  
CHAMBER OF OKLAHOMA RESEARCH FOUNDATION LEGAL CENTER,  
IN SUPPORT OF PLAINTIFF-APPELLANT, HALSTEAD BEAD, INC.**

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RESEARCH FOUNDATION LEGAL CENTER

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE**

NOW INTO COURT, through undersigned counsel, come the National Federation of Independent Business (“NFIB”), Manhattan Institute, Louisiana Association of Business and Industry (“LABI”), and State Chamber of Oklahoma Research Foundation Legal Center (“SCRF Legal Center”), collectively “*Amici*,” who respectfully request that, pursuant to Federal Rule of Appellate Procedure 29(a)(3), they be granted leave of Court to file an amicus brief in support of Plaintiff-Appellant, Halstead Bead, Incorporated, and who further show:

1.

*Amici* each have a significant interest in the resolution of this case, as it involves the impact of Louisiana’s sales tax regime on businesses and sellers across the United States that do business in Louisiana (or seek to do business in Louisiana).

2.

Specifically, *amicus* National Federation of Independent Business represents both brick-and-mortar businesses subject to Louisiana’s parish-based sales tax regime and out-of-state sellers subject to its remote seller requirements. The outcome of this case will directly impact the businesses that NFIB represents.

3.

Moreover, *amicus* Manhattan Institute serves as a leading voice for free-market ideas and seeks to foster greater economic choice, including through state

tax policy. Likewise, *amicus* SCRF Legal Center seeks to advance free market ideals and increase prosperity, including in Oklahoma, where remote sellers may be subject to Louisiana’s complex remote seller requirements.

4.

*Amicus* Louisiana Association of Business and Industry is a non-profit trade association with over 2,500 business and industry members that, for over forty years, has represented the interests of the business community across the state of Louisiana.

5.

As a coalition, *amici* have a shared interest in the outcome of this case due to the consequential implications of the Court’s decision. If the district court correctly interpreted and applied the Tax Injunction Act, remote sellers are left with one judicial forum to challenge a state sales tax—the courts of the tax-imposing state.

6.

However, many states, including Louisiana, elect judicial officers through direct, and sometimes partisan, elections. This electoral method, combined with the direct pecuniary interest involved, presents serious due process concerns in the context of sales tax. *Amici* offer the accompanying brief to provide the Court with more context on these concerns and Louisiana’s notoriously difficult sales tax regime.

7.

*Amici* state that they have contacted counsel for Appellant and Appellees regarding whether they oppose this Motion for Leave. Counsel for Halstead Bead, Inc. indicated that it has no opposition. No response was received from counsel for Appellees, and therefore it is assumed that they oppose the request.

WHEREFORE, Movants herein, National Federation of Independent Business, Manhattan Institute, Louisiana Association of Business and Industry, and State Chamber of Oklahoma Research Foundation Legal Center, respectfully request that they be granted leave of Court to file an amicus brief in support of Plaintiff-Appellant, Halstead Bead, Incorporated, in this matter.

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***Attorneys for National Federation of Independent  
Business, Manhattan Institute, Louisiana  
Association of Business and Industry, and State  
Chamber of Oklahoma Research Foundation  
Legal Center***

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*Defendants - Appellees*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 18th, 2022, a copy of the foregoing has this date been served upon all parties through their respective counsel of record by operation of the Court's electronic filing system and has been filed electronically with the Clerk of the Court using the CM/ECF system.

/s/ Kelsey Clark Lockett

Kelsey Clark Lockett (La. Bar Roll #36413)

Nicole Gould Frey (La. Bar Roll #26900)

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*Defendants - Appellees*

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**CERTIFICATE OF COMPLIANCE**

I certify the foregoing Motion for Leave to File Amicus Brief complies with the type-volume limitation contained in Fed. R. App. Proc. 27(d)(2). I used Times New Roman, 14-point font to prepare the Motion. The Motion consists of 468 total words. I relied upon the word count of Microsoft Office Word 2010 in determining the count.

*/s/ Kelsey Clark Lockett*

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Nicole Gould Frey (La. Bar Roll #26900)

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*Defendants - Appellees*

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**ORDER**

Considering the foregoing Motion:

IT IS ORDERED that the National Federation of Independent Business, Manhattan Institute, Louisiana Association of Business and Industry, and State Chamber of Oklahoma Research Foundation Legal Center are hereby granted leave to file an amicus brief in support of Plaintiff-Appellant, Halstead Bead, Incorporated.

New Orleans, Louisiana, this \_\_\_\_ day of \_\_\_\_\_, 2022.

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CLERK, UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF LOUISIANA, NO. 2:21-CV-2106

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**BRIEF OF AMICI CURIAE NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS, MANHATTAN INSTITUTE, LOUISIANA ASSOCIATION OF BUSINESS  
AND INDUSTRY, AND STATE CHAMBER OF OKLAHOMA RESEARCH  
FOUNDATION LEGAL CENTER IN SUPPORT OF PLAINTIFF-APPELLANT,  
HALSTEAD BEAD, INC., SUPPORTING REVERSAL OF THE DISTRICT COURT**

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OKLAHOMA RESEARCH FOUNDATION LEGAL CENTER



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**INTEREST OF AMICI CURIAE<sup>1</sup>**

The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center (“Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.<sup>2</sup>

The Manhattan Institute (“MI”) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> Since the Supreme Court’s decision in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), the expansion of “nexus” for sales tax obligations has been subject to the policy choices of each state, producing a national picture of inconsistent, confusing, and controversial requirements. The debate continues in legislatures across the country. The filing of this brief does not, and should not be read to, indicate an official position or statement by NFIB on any *Wayfair*, sales tax, or nexus issue, other than those expressly contained herein.

sponsored scholarship supporting economic freedom and opposing arbitrary regulations. MI recently hired Ilya Shapiro to direct its constitutional studies program, which aims to restore individual liberty and limited government.<sup>3</sup>

The State Chamber of Oklahoma Research Foundation Legal Center (“SCRF Legal Center”) is a nonprofit, nonpartisan research and education organization dedicated to advancing free markets, increasing opportunity, and growing prosperity through quality research. The SCRF Legal Center frequently intervenes or files *amicus* briefs in cases of importance to the business community and the legal system in which businesses operate. The SCRF Legal Center is troubled by the lower court’s ruling, the effects of which will be felt by businesses outside of Louisiana.

The Louisiana Association of Business and Industry (“LABI”) is a non-profit trade association representing over 2,500 business and industry members that works to foster economic growth by championing the principles of the free enterprise system and to represent the general interest of the business community through active involvement in the legislative, regulatory, and judicial process. LABI’s membership includes both large and small businesses responsible for collecting and remitting sales taxes across multiple parishes throughout the state and tasked with navigating the state’s complex sales tax system.

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<sup>3</sup> MI has previously written on states attempting to increase their revenues at the expense of out-of-state entities and residents. *See, e.g.*, Steven Malanga, *The State Tax Grab*, CITY JOURNAL (Winter 2014), <https://www.city-journal.org/html/state-tax-grab-13628.html>.

*Amici* file this brief to highlight the lack of a viable venue for remote sellers to seek neutral judicial review of state sales tax regimes and the immense burden that Louisiana’s sales tax system imposes on all businesses.

### **SUMMARY OF ARGUMENT**

*Amici* submit this brief to highlight two issues that are of extreme importance to small businesses. First, whether the district court’s Tax Injunction Act interpretation leaves a neutral and viable judicial forum for remote sellers to challenge state sales tax regimes. Second, Louisiana’s sales tax regime is unduly burdensome to both remote sellers and in-state brick-and-mortar small businesses.

The district court’s conclusion that it lacked jurisdiction leaves remote-seller small businesses in a precarious situation. The Supreme Court has already determined that states cannot be held to answer in the courts of a foreign state. If this court affirms the district court’s Tax Injunction Act interpretation, the result will be no neutral forum for judicial review. Many state judges, including those in Louisiana, are elected by popular vote. This subjects them, and possibly their decisions, to the whims of the people. Furthermore, it renders their future salary wholly dependent on whether they issue decisions with which the citizens of their state approve. In a dispute between out-of-state sellers and in-state tax collectors seeking to increase the state’s fisc, a plausible question exists whether these state judges can “hold the balance nice, clear, and true” between the parties.

Louisiana’s parish-by-parish sales tax regime is one of the most difficult in the nation. Brick-and-mortar businesses must determine the applicable rates and rules for each separate parish and file in each parish where they deliver goods to customers. For remote sellers, they must determine the boundaries and rates for each parish and ensure they don’t accidentally become physically present in the state. Small businesses of all types consistently rank tax-related issues as critical problems in running their business, and Louisiana’s system only exacerbates the difficulty.

### **ARGUMENT**

#### **I. The District Court Left No Neutral and Viable Option for Remote Sellers to Challenge State Sales Taxes.**

If upheld, the district court’s decision will leave remote sellers in a precarious position. Generally speaking, a remote seller seeking judicial review of sales tax imposed by a foreign state has three possible fora: 1) federal district courts, 2) state courts in their home state, and 3) state courts in the tax-imposing state.

The Tax Injunction Act (“TIA”) states that “[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341. The district court concluded that it “lack[ed] jurisdiction” under the TIA and “must dismiss” Plaintiff’s suit. *Halstead Bead v. Lewis*, No. 21-CV-2106, 2022 WL 1618880, at \*7 (E.D. La. May 23, 2022). According to the district court, this result was required because Articles 1871 & 1872 of the Louisiana



Code of Civil Procedure provide an “adequate remedy.” *Id.* Thus, the consequence of the district court’s TIA holding is that when state law provides for declaratory relief, a remote seller cannot challenge the constitutionality of a state sales tax, under federal law, in federal district court.

A few terms ago, the Supreme Court decided *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019). There, a Nevada resident sued the Franchise Tax Board of California in Nevada state courts for alleged torts committed by the Board during an audit. *Id.* at 1491. In a review of doctrines and sources from the pre- and post-founding era, the Court determined that states retained sovereign immunity from suits in foreign state courts. *Id.* at 1492. Accordingly, a state cannot be made to answer in the courts of a foreign state without first consenting to do so. *Hyatt*, as applied to remote sellers, prevents them from challenging a foreign state’s tax assessment in the courts of their home state.

The district court’s decision, combined with *Hyatt*, leaves only one forum for remote sellers to challenge a foreign state’s sales tax: the courts of the tax-imposing state. But this situation raises serious questions:

- 1) In the Internet age, where a California small business with no connection to Florida can easily and quickly sell products to a Florida resident over a website, is it practical to expect the business to assume the costs of bringing a lawsuit with local counsel in the courts of a state 3,000 miles away?
- 2) Does requiring a remote seller to challenge a state’s sales tax in that state’s courts provide a neutral forum for judicial review, given that many state judicial officers are directly elected, and thus accountable to the people, and

the financial incentives of increased sales taxes flowing to the state, and thereby trickling down to the people who elect those judicial officers, stack the deck against the out-of-state seller?

On the first question, small business remote sellers are at a disadvantage. They are forced into a catch-22 situation of either not competing in the online marketplace or choosing to compete and subjecting themselves to the sales tax complexities and costs of other states. These businesses, like Halstead Bead, typically don't have State and Local Tax ("SALT") departments or staff to deal with the complexities of foreign-state sales tax regimes.<sup>4</sup>

Earlier this year, the Director of Tax Policy and Administration for the Government Accountability Office testified that "small businesses are reluctant to appeal state sales tax assessments for fear of the cost" involved in doing so, such as "travel[ing] to the assessing state and hiring an attorney in that state[.]" *Examining the Impact of South Dakota v. Wayfair on Small Businesses and Remote Sales: Before the S. Comm. on Finance*, 117th Cong. 18 (2022) (statement of James R. McTigue, Jr., Director, Tax Policy and Administration for the Government Accountability Office), (hereinafter "*GAO Testimony*"), <https://bit.ly/3Ds8t9z>.

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<sup>4</sup> See *South Dakota v. Wayfair, Inc.: Online Sales Taxes and Their Impact on Main Street: Before Subcomm. On Economic Growth, Tax, and Capital Access of the H. Comm. on Small Business*, 116th Cong. 2, 4 (2020) (statement of Brad Scott, Finance Director, Halstead Bead Inc.), <https://bit.ly/3RP3HqW> (explaining that his 27-employee business's SALT department consists of one part-time employee and they "diverted more than 3,800 labor hours away from operations" due to sales tax compliance); *Id.* at 2 (statement of Linda Lester, Vice President, K-Log, Inc.), <https://bit.ly/3QN0cjt> (noting that she has diverted her time away from business operations in favor of sales tax compliance and collection, totaling well over 1,500 hours and \$75,000).

Requiring remote seller small businesses to reallocate vast business operational expenses in order to challenge unlawful state sales taxes inevitably chills the challenging of those taxes.

The second question above is even more concerning. If the district court correctly interpreted and applied the TIA, then remote sellers have only one judicial forum to challenge the constitutionality of a foreign state’s sales tax—the courts in that state. This is problematic because it begs the question whether the courts of a tax-assessing state can be a neutral arbiter in a dispute between a foreign-state business and the state in which the court sits. After all, “[a] fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955).

According to the Brennan Center for Justice, 39 states use some manner of elections to select judges.<sup>5</sup> Thus, in almost four out of five states, state judges are directly accountable to the people of the state in which they sit. Twenty-one states use nonpartisan elections to select lower court judges, while eleven, including Louisiana, select their trial court judges via partisan elections.<sup>6</sup> Therefore, in two-thirds of states, a remote seller’s challenge to the state’s sales tax will be heard by a judge whose job continuance depends on the approval of that state’s citizens.

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<sup>5</sup> *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUSTICE (Oct. 4, 2021), <https://bit.ly/3xTYk1T> (last visited Sept. 26, 2022).

<sup>6</sup> *Id.*

In Federalist 78, Alexander Hamilton commented on the danger of judges being accountable to the people: The “inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice” cannot be “expected from judges who hold their offices by a temporary commission. *Periodical appointments . . . would . . . be fatal to their necessary independence. If the power of making them was committed . . . to the people, . . . there would be too great a disposition to consult popularity[.]*” The Federalist No. 78 at 526 (Easton Press ed. 1979) (Alexander Hamilton) (emphasis added).

Hamilton’s concerns about elected judges may have already been realized in state courts. According to one study on tort awards in cases between an out-of-state defendant and in-state plaintiff, state court judges elected via partisan elections gave an average award over \$350,000 higher than their counterparts in states with nonpartisan elections. Eric Hellend & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341 (2002). To account for differences in state law, the study compared partisan-elected state judges with appointed federal judges applying the same state law in diversity cases. *Id.* The results speak for themselves—“awards were higher in partisan elected states *only when cases were decided by state judges.*” *Id.* at 368 (emphasis added).

If accountability to the people by direct election is not, by itself, enough to raise due process implications, then the direct pecuniary interest that this accountability causes should be. Where a judicial officer's salary depends on approval of the electorate, there exists an incentive to render judgments approvable to that electorate.<sup>7</sup> The law has long recognized that a direct financial interest in the outcome of a case fails to satisfy due process. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[I]t certainly violates the Fourteenth Amendment and deprives a defendant . . . due process of law to subject his . . . property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in a case.”); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (applying the *Tumey* “direct, personal, substantial, pecuniary interest” standard in a civil case). A party need not show that the direct financial interest would definitively produce an unfair tribunal, but *merely that it could*. *See Tumey*, 273 U.S. at 532 (denial of due process exists where “a possible temptation to the average man as a judge . . . might lead him not to hold the balance nice, clear, and true” between the two parties (emphasis added)).

Of course, not every situation where a judicial officer has a financial interest will raise due process concerns. No legal system could stand where partiality is questioned based on being a taxpayer or owning an insignificant financial stake in a

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<sup>7</sup> *See generally* 2021 La. Act No. 116 (appropriating funds for all levels of the state judiciary).

company. But remote seller sales taxes present a unique situation. Remote seller sales taxes represent a significant boon for each state's budget. *See GAO Testimony, supra*, at 13–14 (total sales tax revenue collected from remote sellers was \$23.1 billion for 33 responding states, a 700% increase from just three years prior). States use these taxes to provide a wide range of services to its residents or provide tax cuts in other areas, each of which benefit its people. Upholding remote seller sales taxes leads to more services or tax cuts for the state's residents. These increased public services and lower tax bills will produce a more satisfied electorate. A satisfied electorate is not likely to remove a judicial officer who made decisions allowing for their increased satisfaction. A judicial officer who knows his future salary depends on being reelected by the state's residents thus has an incentive to render decisions that will make them happy (compared to a federal district court judge that has no accountability to the people).

This is especially so where the happiness of the state's residents is contrasted in the legal action with an out-of-state entity to whom the jurist has no accountability. In the words of one former state supreme court justice, “[a]s long as I am allowed to *redistribute wealth from out-of-state companies to injured in-state plaintiffs*, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but *so is my job security*, because the *in-state plaintiffs, their families, and their friends will re-elect me*. Richard Neely, THE PRODUCT LIABILITY MESS: HOW

BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (New York: Free Press 1988) (emphasis added).

In sum, the district court’s interpretation of the TIA and the Supreme Court’s ruling in *Hyatt* leave only one judicial forum for remote sellers to challenge a foreign state’s sales tax. Forcing remote sellers to challenge a tax in the assessing state’s own courts raises serious due process questions about whether the remote seller receives a “necessary independen[t]” forum with a judicial officer that “hold[s] the balance nice, clear, and true.” *See* The Federalist No. 78 at 526; *Tumey*, 273 U.S. at 532. To prevent the possibility of bias or undue influence, this Court should narrow the district court’s TIA interpretation.

## **II. Louisiana’s Notoriously Complex Parish-Based Sales Tax Regime Is a Regulatory Quagmire and Compliance Burden.**

Since *Wayfair*, states have enacted differing sales tax regimes. Some are easier to navigate and comply with than others. Louisiana has distinguished itself as one of the most difficult sales tax states, both for brick-and-mortar businesses and remote sellers alike. *See GAO Testimony, supra*, at 11 (listing Louisiana as one of four states identified by tax policy experts as the most challenging); *The Tricky 10 States with the Most Complex Rules for Filing Sales Tax Returns*, AVALARA, 6, <https://bit.ly/3BRfXBH> (last visited Sept. 19, 2022).

In Louisiana, brick-and-mortar businesses face a complex parish-by-parish sales tax burden, in addition to separate state requirements. They must collect a

4.45% state sales tax and file with the Louisiana Department of Revenue.<sup>8</sup> Additionally, because Louisiana is a destination-based state, they must collect and file sales taxes in each local jurisdiction or parish where the customer is based.<sup>9</sup> Each of Louisiana's 64 parishes has a different rate, filing requirements, and definitions that brick-and-mortar businesses must be aware of to collect the proper sales taxes based on shipments to customers in that parish.<sup>10</sup>

Further complicating the issue for brick-and-mortar small businesses in Louisiana, each parish can have multiple jurisdictions within the parish, each having different sales tax rates. For example, a business shipping to a customer in the Breaux Bridge area of St. Martin Parish would need to determine whether the customer's address falls within the Breaux Bridge jurisdiction (3.5%), Breaux Bridge Northern Annex (4.5%), or Breaux Bridge Economic Development District 1 (4.5%).<sup>11</sup> Contrary to its practice for remote sellers, Louisiana fails to offer its own

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<sup>8</sup> *General Sales & Use Tax*, LA. DEP'T OF REV., <https://bit.ly/3S4DPrr> (last visited Sept. 22, 2022).

<sup>9</sup> *Louisiana: Sales Tax Handbook*, SALES TAX HANDBOOK, <https://www.salestaxhandbook.com/louisiana> (last visited Sept. 22, 2022).

<sup>10</sup> *Compare Assumption Parish*, LA. ASSOC. OF TAX ADMINISTRATORS, <https://lataonline.org/for-taxpayers/city-to-parish-index/assumption/> (last visited Sept. 22, 2022) (5% or 5.5% local parish rate depending on location, due date of the 1st day of the month after the covered period with a 20-day grace period, and the Assumption Parish Sales and Use Tax Report form) *with St. Martin Parish*, LA. ASSOC. OF TAX ADMINISTRATORS, <https://lataonline.org/for-taxpayers/city-to-parish-index/st-martin/> (last visited Sept. 22, 2022) (local parish rate between 3.5% and 6% depending on which of the 13 jurisdictions within the parish a customer resides, due date of the 1st day of the month after the covered period with a 20-day grace period, and the St. Martin's Parish School Board tax form).

<sup>11</sup> *St. Martin Parish*, LA. ASSOC. OF TAX ADMINISTRATORS, <https://lataonline.org/for-taxpayers/city-to-parish-index/st-martin/>.



businesses a centralized filing system. Forcing Louisiana’s small businesses to divert time away from business operations in favor of navigating the minutiae of parish sales taxes hurts their bottom line.

Remote sellers also face difficulties from Louisiana’s complex parish-based sales tax system. They must register with the Sales and Use Tax Commission (“Commission”). The Commission is great for remote sellers in one sense—it provides a single centralized filing point in the state for all state and local sales taxes.<sup>12</sup> But remote sellers must still spend time determining the tax rates for each parish, the vendor’s compensation rate for each parish, the boundaries for each parish, and parish-specific definitions or exemptions.<sup>13</sup> Doing so leaves them less time to focus on business operations. They also face the risk of losing their remote seller status and being classified as having substantial nexus for other reasons.

Centralized filing through the Commission is only available for remote sellers. *GAO Testimony, supra*, at 11. If a remote seller is found to have a physical presence in Louisiana,<sup>14</sup> then they lose the benefit of centralized filing. Because physical

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<sup>12</sup> Having one centralized filing point within each state eases the administrative burden of preparing and filing returns in separate jurisdictions. State preemption of local sales taxes would be a welcome reprieve for small businesses. However, if states choose to retain a model of separate state and local taxes, at a minimum there should be a centralized filing point for the collection of all, state and local, sales taxes within the state.

<sup>13</sup> Determining the parish-specific definition is sometimes extraordinarily elusive especially when a particular parish will challenge the state’s definition promulgated in a regulation interpreting a statewide exemption. *See Coastal Drilling Co., L.L.C. v. Dufrene*, 198 So.3d 108 (La. 2016).

<sup>14</sup> Physical presence includes any direct or indirect, permanent or temporary ownership or operation of retail spaces; use of an office, distribution site, sales room, warehouse, or storage facility; having

presence includes the storage of property in third-party facilities, an out-of-state small business may accidentally lose their remote seller status simply by participating in the popular Fulfillment by Amazon program—not realizing that Amazon may have a storage facility in Louisiana, rendering the business physically present and forcing them to file in each parish. *See SALES AND USE TAX COMMISSION FOR REMOTE SELLERS, Louisiana Sales and Use Tax on Remote Sales Frequently Asked Questions* (June 24, 2020), <https://bit.ly/3eqHykf> (“What is physical presence? Physical presence includes . . . storage of property in third party facility.”).<sup>15</sup>

Small businesses of all types continue to rank taxes, and the administrative burdens related to them, as a critical problem. Every four years, the NFIB Research Center surveys small businesses about their most pressing problems. In its 2020 Problem and Priorities Survey, “Tax Complexity,” “State/Local Paperwork,” and “Dealing with IRS/State Tax Agencies” ranked as the 8<sup>th</sup>, 11<sup>th</sup>, and 23<sup>rd</sup> most important small business problems, respectively. NFIB Rsch. Ctr., *Small Business*

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an agent or custodian in Louisiana; and storing property in a third-party facility. *What is physical presence?*, SALES AND USE TAX COMMISSION FOR REMOTE SELLERS, <https://remotesellers.louisiana.gov/FAQ> (last visited Sept. 23, 2022).

<sup>15</sup> For further discussion on the tax implications of Amazon’s Fulfillment by Amazon (FBA) program for remote sellers, *see* Judy Vorndran & Stacey Roberts, *New to Online Marketplace Sales? TAXOPS* (June 1, 2021), <https://bit.ly/3COJRar> (“[P]utting that inventory into a warehouse in any state is known as . . . as physical presence.”; “FBA sellers could have a duty to file a traditional non-resident income tax return or entity income tax return due to physical presence related to inventory in the state, no matter how minimal.”; “The presence of inventory alone creates income, sales and use, and property tax nexus filing requirements.”).

*Problems & Priorities*, at 9–11 (2020), <https://bit.ly/3BMLyn5>. Both the NFIB Small Business Legal Center based in Washington, D.C., and NFIB Louisiana have heard from small businesses about the complexity and burden of Louisiana’s tax system compared to other states. An NFIB member in Monroe claimed every other state they do business in has centralized collection, and Louisiana’s parish-by-parish system causes them to spend four-to-five times more time on filing than other states. A CPA and NFIB Member in Lake Charles noted that even with their background and experience, it is hard to navigate Louisiana’s system.

Louisiana’s sales tax system is well-known for all the wrong reasons. Instead of being accommodating and friendly to the business community, Louisiana’s regime renders it the New York or California of sales tax.

### **CONCLUSION**

*Amici* respectfully urge this Court to consider the above-mentioned interests of small businesses and narrow the district court’s interpretation of the TIA. For the reasons outlined herein, the judgment below should be reversed.

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**CASE NO. 22-30373**

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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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*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2022, a copy of the foregoing has this date been served upon all parties through their respective counsel of record by operation of the Court's electronic filing system and has been filed electronically with the Clerk of the Court using the CM/ECF system.

/s/ Kelsey Clark Lockett

Kelsey Clark Lockett (La. Bar Roll #36413)

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**CERTIFICATE OF COMPLIANCE**

I certify the foregoing Amicus Brief complies with the type-volume limitation contained in Fed. R. App. Proc. 27(d)(2). I used Times New Roman, 14-point font to prepare the Brief. The Brief consists of 4701 total words. I relied upon the word count of Microsoft Office Word 2010 in determining the count.

*/s/ Kelsey Clark Lockett*

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