COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13283

U.S. AUTO PARTS NETWORK, INC.,
Appellee,

v.

COMMISSIONER OF REVENUE,

Appellant.

On Appeal from a Judgment of The Appellate Tax Board

BRIEF OF PIONEERLEGAL, LLC AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLEE U.S. AUTO PARTS, INC.

/s/ *Frank J. Bailey*
Frank J. Bailey (BBO# 026485)
Selena Fitanides (BBO# 645974)
John C. La Liberte (BBO# 556046)
185 Devonshire Street
Boston, Massachusetts 02110
(617) 410-5200
frank.bailey@pioneerlegal.org
selena.fitanides@pioneerlegal.org
john.laliberte@pioneerlegal.org

Counsel for Amicus Curiae
PioneerLegal, LLC

/s/ *Matthew Schaefer*
Matthew Schaefer (BBO# 567819)
SCHAEFERLAW, LLC
1 Union Street, Suite 402
Portland, Maine 04101
(207) 400-4122
matthew@schaefer.law

/s/ *Richard L. Jones*
Richard L. Jones (BBO# 631273)
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2800
rjones@sullivanlaw.com

Co-Counsel for Amicus Curiae
PioneerLegal, LLC

Dated: October 14, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, *Amicus Curiae* PioneerLegal, LLC ("PioneerLegal") hereby discloses that it is a non-profit, non-partisan, legal research and litigation entity organized under the laws of the Commonwealth of Massachusetts that defends and promotes accountable government, economic opportunity, and educational opportunities across the country. Through legal action and public education, PioneerLegal works to preserve and enhance constitutional and civil liberties. Pioneer Institute, LLC is the parent of PioneerLegal. PioneerLegal does not have any publicly held stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

The Supreme Judicial Court has solicited amicus briefs on the following issue:

> Whether the Commissioner of Revenue had the authority to require the taxpayer, an internet vendor with no traditional physical presence in Massachusetts, to collect sales taxes on internet sales to Massachusetts customers, based on the taxpayer's internet contacts in Massachusetts such as a mobile application, "cookies," and third-party content distribution networks…

Announcement, Docket SJC-13283 (May 16, 2022).

The ruling of the Appellate Tax Board should be affirmed because the Commissioner had no statutory authority in 2017 to adopt 830 CMR 64H.1.7: *Vendors Making Internet Sales* (the "Internet Vendor Rule") or to issue assessments to online retailers based upon a retailer's Internet contacts with Massachusetts.

It is well established that the Commissioner has no power to make regulations or to assess taxes except as granted by the Legislature. See, e.g., Gillette Co. v. Comm'r, 425 Mass. 670, 674-77 (1997). Moreover, "[w]hen an agency acts beyond the scope of authority conferred to it by statute, its actions are invalid and ultra vires." Armstrong v. Sec'y of Energy & Env'tl Affairs, 490 Mass. 243, 247 (2022).

The 1988 amendment to the definition of "engaged in business in the commonwealth" in G.L. c. 64H, § 1, on which the Commissioner relies for his for the Internet Vendor Rule, did not expand the Commissioner's taxing authority beyond the prevailing physical presence test of Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 758-60 (1967) and was not intended to do so at the time, as the Commissioner's own 1988 Technical Information Release plainly stated. Technical Information Release 88-13: Sales Nexus; Amendment of G.L. c. 64H, § 1(5) (Dec. 8, 1988) ("TIR 88-13") (Brief of U.S. Auto Parts Network, Inc., Addendum at 144). TIR 88-13 states, in relevant part, that "[t]he *clear legislative intent* behind the adoption of [the 1988 amendment], however, was that the expanded Massachusetts jurisdiction would not be exercised until federal statutory or case law specifically authorizes each state to require foreign mail order vendors to collect sales and use taxes on goods delivered to that state. . . ." Id. (italics and brackets added).[1]

No change in federal statutory or case law preceded the Commissioner's attempt in 2017 to require use tax collection by online retailers whose only connection with the commonwealth were via the Internet. The Commissioner thus had no authority to require use tax collection by out-of-state retailers based on

[1] A copy of TIR 88-13 is also contained in the Addendum to the Brief of the Commissioner at 122-23).

"cookies," apps, and content delivery networks, until the Legislature amended the definition of "engaged in business in the commonwealth" in 2019 to reference such contacts. The Court should affirm the decision of the Appellate Tax Board on that basis.

INTEREST OF THE *AMICUS CURIAE* [2]

PioneerLegal is a non-profit, non-partisan, legal research and litigation entity founded under the laws of the Commonwealth of Massachusetts that defends and promotes freedom of association, freedom of speech, accountable government, fair and equitable taxation, economic opportunity, and educational opportunities. PioneerLegal advocates for taxpayers, among others, in the courts by submitting

[2] Pursuant to Mass. R. App. P. 17(c)(5), the undersigned counsel declares that (1) no party's counsel has authored this Brief in whole or in part; and (2) no party, person or entity has contributed money to fund preparation or submission of this Brief. The undersigned counsel for the amicus curiae has prepared and submitted this Brief on a pro bono basis. Counsel and PioneerLegal, LLC do not represent any party in this case or in a proceeding or legal transaction at issue in the present appeal. Co-counsel, Matthew Schaefer, Esquire, of SchaeferLaw, LLC, previously represented U.S. Auto Parts Network, Inc. ("U.S. Auto") at the time it filed its petition with the Appellate Tax Board (the "ATB"). He withdrew from his representation and was not counsel at the time the matter was briefed, argued, and decided before the ATB and had no contact with U.S. Auto or its counsel in connection with this appeal.

Mr. Schaefer was also co-counsel to the plaintiffs, including U.S. Auto in the matter entitled Blue Nile, LLC, et al. v. Harding, Civil Act. No. CV2018-3934-BLS-1 (Mass. Super. Ct. May 13, 2019) and co-counsel to the plaintiff in the matter entitled American Catalog Mailers Ass'n v. Heffernan, Civil Act. No. CV2017-1772-BLS-1 (Mass. Super. Ct. Sept. 11, 2017).

amicus curiae briefs to protect taxpayers' rights, challenging taxing authorities on burdensome or unmerited tax policies and challenging unconstitutional burdens on interstate commerce.

ARGUMENT

I. THE COMMISSIONER HAD NO AUTHORITY TO ADOPT THE INTERNET VENDOR RULE OR TO ISSUE ASSESSMENTS BASED UPON INTERNET CONTACTS.

Before this Court embarks upon a careful analysis of the principles of due process that preclude the retroactive application of the Supreme Court's decision in South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2084 (2019),[3] it is important to recognize that this matter may be resolved on a more straightforward basis, largely separate from complex questions of federal constitutional law. The Commissioner had no statutory authority under Massachusetts law, prior to October 2019, either

[3] In 2018, the Court in Wayfair overruled the constitutional "physical presence" standard for state sales and use taxes established in Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 758 (1967) and Quill Corp. v. North Dakota, 504 U.S. 298 (1992). Wayfair, 138 S. Ct. at 2099. In doing so, the Supreme Court abrogated the law governing state use taxes that had existed for 50 years. While the ATB correctly held below that Wayfair cannot be given retroactive effect, U.S. Auto Parts Network, Inc. v. Comm'r, ATB 2021-405, the history originating first with Bellas Hess has significance to this appeal in illuminating why the Commissioner, as he acknowledged in 1988, had no statutory authority for his actions seeking to require use tax collection in 2017 based on an out-of-state retailer's Internet connections with the Commonwealth. Nat'l Bellas Hess, 386 U.S. at 757-59.

to promulgate the Internet Vendor Rule, or to issue assessments to companies, like U.S. Auto Parts, that lacked a traditional physical presence in the commonwealth.

The premise of the Internet Vendor Rule was that Commissioner had the power to require use tax collection by an out-of-state online retailer, like U.S. Auto Parts, based on the retailer's contacts with Massachusetts via the Internet, including: (a) delivering "cookies" to the computers of Massachusetts customers; (b) offering software applications for download onto the computers of Massachusetts residents; and/or (c) the use of content delivery networks ("CDNs") with servers in Massachusetts. 830 CMR 64H.1.7, §§ 2, 3.

The Commissioner contends that the statutory authority for the Internet Vendor Rule derives from the language of G.L. c. 64H, § 1 (made applicable to the use tax through c. 64I, § 1), which defines when a retailer is "engaged in business in the commonwealth." Brief of the Commissioner at 49-53. The relevant language was adopted by the Legislature in 1988, and remained unchanged until 2019, when the Legislature amended the definition of "engaged in business" in response to the Supreme Court's decision in Wayfair. *See* St. 2019, c. 41, § 32 (adopted July 2019, effective October 1, 2019)(RA 127-37). The 1988 amendment to the definition of "engaged in business in the commonwealth" in G.L. c. 64H, § 1, on which the Commissioner relies for his authority in this case, did not expand the Commissioner's taxing authority and was not intended to do so at the time, as

the Commissioner's own TIR 88-13, plainly stated. See TIR 88-13 (RA 144). As discussed further below, under established principles of statutory construction, and the Commissioner's own evidence of legislative intent, he had no authority to require use tax collection by out-of-state retailers based on "cookies," apps, and content delivery networks, until the Legislature amended the definition of "engaged in business in the commonwealth" in 2019 to reference such contracts.

A. The Commissioner Has No Power to Regulate or to Tax, Without Statutory Authorization from the Legislature.

"An administrative agency has no inherent or common law authority to do anything." Gillette, 425 Mass. at 678 (citation omitted). With regard to rulemaking, it is settled that a "an administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes by which such board or office was created." Telles v. Comm'r of Ins., 410 Mass. 560, 564 (1991) (citation omitted). Under the relevant enabling acts, the Commissioner's power to regulate is limited to making "such reasonable regulations, *not inconsistent with law*, as may be necessary to interpret and enforce any statute imposing any tax …" G.L. c. 14, §6 (italics added); accord G.L. c. 62C, § 3. Furthermore, "[n]o method of determining tax liability is valid unless authorized by statute and assessed in conformity to its terms." VAS Holdings & Invs. LLC v. Comm'r, 489 Mass. 669, 685-86 (2022) (citing Gillette, 425 Mass. at 675). "When an agency acts beyond the scope of

authority conferred to it by statute, its actions are invalid and ultra vires." Armstrong, 490 Mass. 243 at (2022).

In this case, the Commissioner relies upon the 1988 version of G.L. c. 64H, § 1, purporting to require collection by out-of-state retailers whose only connection with the commonwealth was "exploiting the retail sales market in the commonwealth through … computer networks or in any other communications medium." Commissioner's Brief at 50.

As explained further below, this statute did not authorize or permit the Commissioner to make new tax policy by expanding the state's taxing authority beyond the traditional physical presence standard. In fact, the 1988 statutory amendment was never intended by the Legislature to grant the Commissioner authority to expand the state's taxing authority beyond the traditional physical presence standard of Nat'l Bellas Hess, 386 U.S. at 758-59, as fundamental rules of construction and TIR 88-13 itself make clear.

B. Fundamental Rules of Statutory Construction Dictate that the 1988 Statutory Amendment Did Not Broaden the Commissioner's Authority to Require Use Tax Collection Based on Remote Connections Via Computer.

It is axiomatic that an act of the Legislature must be construed, if possible, as consistent with federal constitutional requirements. Oracle USA, Inc. v. Comm'r, 487 Mass. 518, 525 (2021). This rule of construction reflects the proper presumption that the Legislature intends to act in a manner consistent with the

Constitution. Commonwealth v. Ballard, 92 Mass. App. Ct. 701, 705 (2018) ("There is every presumption that the legislative department of government always intends to act strictly within the bounds of the Constitution.") (citation omitted).

By itself, the usual presumption would require interpreting the 1988 statutory language as incorporating the traditional physical presence standard of Bellas Hess – a standard plainly at odds with the Commissioner's assertion through the Internet Vendor Rule of a sales tax collection obligation based on Internet contacts such as cookies, apps and CDNs. See Capital Bank One v. Comm'r, 453 Mass. 1, 11 (2009) (Bellas Hess "firmly established" a test of "physical presence" that prevented a state from requiring use tax collection by an out-of-state retailer whose only connection with the state was via the instrumentalities of interstate commerce). Because Bellas Hess precluded imposing a use tax collection obligation on a retailer whose only connection to a state was via remote solicitation, the 1988 amendment to c. 64H, § 1, could not be construed to expand that obligation to retailers soliciting solely via a "computer network" or "other communications medium" without indicia of traditional physical presence.[4]

[4] The precise meaning of the term "computer networks" in the 1988 amendment is not clear, although it plainly did not refer to the commercial Internet, which did not exist until the mid-1990s. One practice in retail at the time, discussed by the Supreme Court in Quill (and deemed an insufficient basis to require use tax collection) was the provision by retailers of computer diskettes with an electronic catalog that customers could use to browse product and transmit orders by computer, rather than telephone. Quill, 504 U.S. at 315 n.8. In any case,

Rather, prevailing Supreme Court precedent in 1988 compels the conclusion that "[t]he Legislature did not intend by its amendment [of the statute] to grant authority to engage in a practice that was then thought to be constitutionally impermissible." Polaroid Corp. v. Comm'r, 393 Mass. 490, 500 (1984) (brackets added).

C. The Commissioner's Own Contemporaneous Guidance, TIR 88-13, Demonstrates that the Legislature Did Not Intend to Grant the Commissioner Expanded Taxing Authority Unless and Until There Was a Fundamental Change in Controlling Federal Law.

The most telling evidence, however, of the Legislature's intent *not* to expand the definition of "engaged in business in the commonwealth" beyond the traditional physical presence standard of Bellas Hess comes from the Commissioner himself. When the Legislature adopted the amendment in 1988 referencing "computer networks or any other communications medium," the Commissioner issued TIR 88-13 to alleviate constitutional concerns about the new language. The Commissioner in TIR 88-13 did *not* claim expanded authority to require use tax collection by retailers whose only connection with the commonwealth was via computer network. To the contrary, although the new

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solicitation via "computer networks or any other communications medium" would have required, in 1988 and for the next 30 years, sufficient physical presence by a retailer (in terms of property, agents, or the like) to satisfy the Bellas Hess standard.

language on its face was inconsistent with constitutional requirements, the Commissioner explained:

> *The clear legislative intent* behind the adoption of [the new language], however, was that the expanded Massachusetts jurisdiction *would not be exercised until federal statutory or case law specifically authorizes each state to require foreign mail order vendors to collect sales and use taxes on goods delivered to that state*….
>
> *In accordance with this legislative intent*, the Department hereby announces that it will refrain from enforcing the [new] provisions … to the extent that they expand the previous taxing jurisdiction of Massachusetts.

TIR 88-13 (italics and brackets added). Notably, the Commissioner cited his own recommendations to the Legislature as establishing this intent not to expand the statute's reach before a fundamental change in federal law. Id.[5]

After Quill reaffirmed the physical presence standard of Bellas Hess in 1992, the Commissioner revoked TIR 88-13 four years later in 1996. See Technical Information Release 96-8, (Brief of U.S. Auto Parts Network, Inc., Addendum at 146). The Commissioner did not, however, begin enforcing the 1988 amendment in contravention of the physical presence standard. See

[5] Even if the Legislature's intent was not clear, the Commissioner's decision not to enforce the unconstitutional language of the 1988 statute would have effectively stricken it from the statute, leaving him unable to rely upon it decades later as support for the Internet Vendor Rule. See Textron Inc. v. Comm'r, 435 Mass. 297, 308 (2001) (guidance by the Commissioner concerning discretionary enforcement of an unconstitutional portion of a legislative enactment "effectively severs the challenged provisions from the remainder of the statute").

Commissioner's Brief at 52. Furthermore, the revocation of TIR 88-13 does not alter the Legislature's intent in adopting the 1988 amendment, as explained in TIR 88-13 and supported by the Commissioner's own recommendations to the Legislature cited therein.

When the Commissioner adopted the Internet Vendor Rule in 2017, there had been no intervening "federal statutory or case law specifically authoriz[ing] each state to required foreign mail order vendors to collect sales and use taxes on goods delivered to that state" as required by the 1988 amendment. In other words, the Legislature's intended prerequisite for expanding Massachusetts' statutory remained unsatisfied. In fact, far from the necessary federal law trigger, the Supreme Court in Quill had reaffirmed the physical presence standard in 1992. Quill Corp., 504 U.S.at 313-18. No subsequent Supreme Court decision or statute altered the traditional physical presence standard until Wayfair. Further, in 2017, only weeks before the Commissioner promulgated the Internet Vendor Rule, this Court reiterated that the Massachusetts statutory standard of "engaged in business" required that a retailer have a physical presence:

> *The statute [G.L. c. 64H] also distinguishes between a retailer that is engaged in business in Massachusetts and one that is not*. … if a retailer is not engaged in business in Massachusetts in the sense that the retailer does not have any in-State physical presence, Massachusetts cannot require the retailer to collect and remit sales tax.

D&H Distrib. Co. v. Comm'r, 477 Mass. 538, 539 (2017) (italics added).

As an executive branch official, the Commissioner's role is to enforce the law, not to make it. It is clear that the Commissioner never acted in accordance with Massachusetts (or federal) law with regard to adopting the Internet Vendor Rule and seeking to enforce it. Indeed, he had no statutory authority to promulgate the regulation or to issue assessments based upon cookies, apps, and CDNs until the Legislature amended G.L. c. 64H, § 1 in 2019.

CONCLUSION

For the reasons set forth above, the Court should find that Commissioner had no legal basis in conjunction with the adoption and enforcement of the Internet Vendor Rule. In short, the Commissioner had no statutory authority to promulgate the regulation or to issue assessments based upon cookies, apps, and CDNs until the Legislature amended G.L. c. 64H, § 1 in 2019. The Court should, therefore, affirm the decision of the Appellate Tax Board.

Respectfully submitted,

PIONEERLEGAL, LLC

By its Attorneys

Dated: October 14, 2022

/s/ *Frank J. Bailey*
Frank J. Bailey (BBO# 026485)
Selena Fitanides (BBO# 645974)
John C. La Liberte (BBO# 556046)
185 Devonshire Street
Boston, Massachusetts 02110
(617) 410-5200
frank.bailey@pioneerlegal.org
selena.fitanides@pioneerlegal.org
john.laliberte@pioneerlegal.org

Counsel for Amicus Curiae
PioneerLegal, LLC

/s/ *Matthew Schaefer*
Matthew Schaefer (BBO# 567819)
SCHAEFERLAW, LLC
1 Union Street, Suite 402
Portland, Maine 04101
(207) 400-4122
matthew@schaefer.law

/s/ *Richard L. Jones*
Richard L. Jones (BBO# 631273)
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2800
rjones@sullivanlaw.com

Co-Counsel for Amicus Curiae
PioneerLegal, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Brief complies with the rules of court that pertain to the filing of Amicus Briefs, including, but not limited to: Mass. R. App. P. 16(a)(13)(B) (appealed judgment and decision), 16(a)(13)(C) (reproduction of statutes, rules, regulations), 16(a)(13)(D) (copy of unpublished decisions cited), 16(a)(13)(E) (copy of plans or maps), 16(e) (references to the record), 17(c) (Amicus Briefs), and 20 (form and length of briefs). Rule 21 (redaction) is not applicable to this Amicus Brief.

For the purposes of the length limitation contained in Appellate Rule 20, this Amicus Brief contains 2,522 non-excluded words and uses Times New Roman 14-point font in Microsoft® Word for Office 365.

Dated: October 14, 2022

/s/ *John C. La Liberte*
John C. La Liberte (BBO# 556046)

CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing Amicus Brief of the PioneerLegal, LLC on counsel of record for the parties hereto through the Tyler-filing system, directed to their counsel of record as follows:

A. Julie E. Green, julie.green@state.ma.us;
B. Michael Fatale, fatale@dor.state.ma.us;
C. Timothy Stille, stille@dor.state.ma.us
D. Brett Goldberg, goldbergb@dor.state.ma.us;
E. George S. Isaacson, giaacson@brannlaw.com;
F. Martine I. Eisenstein, meisenstein@brannlaw.com
G. Jamie E. Szal, jszal@brannlaw.com

Dated: October 14, 2022

/s/ *John C. La Liberte*
John C. La Liberte (BBO# 556046)