NO. 16-567

In the Supreme Court of the United States

AMERICAN BUSINESS USA CORP.,

Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner American Business USA Corp. ("American Business") states the following:

American Business is a privately-held corporation and it has no parent company or any publicly held company that owns 10% or more of its stock.

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REPLY BRIEF OF PETITIONER

At its core, this is not a complicated case. The Florida Department of Revenue agrees that the flower sales for which American Business was assessed sales tax liability involved flowers that were grown, stored, and delivered entirely within other States or Nations. (BIO.3).

This Court's precedents have repeatedly held that only one State may impose a sales tax: the State where a sale is "consummated." The decision below conflicts with those precedents and presents exactly the type of conflict the Court considers in granting certiorari. Rule 10(c).

This case comes down to how the Court defines the "consummation" of a sale. Consistent with the Court's precedents, American Business argues that a sale of goods is consummated in the State where the transfer of goods occurs. The Department of Revenue, however, argues that the sale of goods is consummated in the State where the company who accepts an internet order is located.

The Department's argument is both wrong and dangerous. It is wrong because it ignores precedent and the meanings of the words "consummate" and "sale." It is dangerous because it would effectively place a Florida toll on the internet.

The Department's reasoning would allow the State of Washington—to the exclusion of all other States—to impose a Washington sales tax on every item of tangible personal property ordered over Amazon.com.

The Department makes no attempt to dispute this on its merits. As a result, the Department's argument reduces to absurdity.

States continuously seek methods to collect sales tax on the *multi-trillion* dollar[1] e-commerce market. The power approved in the decision below—to tax sales in the State where an online company is located—will present a powerful incentive for States to spread their flower taxing systems to other types of property. The decision below contains no limiting principle to stop this contagion.

The result would be chaos, as States claim both the sole authority to tax transfers of property that occur within their borders, and the simultaneous authority to tax transfers of property that occur anywhere in the world.

In very real terms, Florida has claimed the power to collect a worldwide sales tax. The Department's assertion that Florida (and other States) will exercise this power responsibly is entirely insufficient.

Certiorari is necessary to reaffirm the limits of State authority to collect sales tax *before* the power announced below spreads to all e-commerce.

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[1] *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

A. Florida Violated the Limits of State Authority by Taxing and Regulating Out-of-State Activity

In *Oklahoma Tax Commn. v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), this Court held that a sale is "consummated in only one State." *Id.* at 187. And "[i]t has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Id.* at 184.

This Court also held that "a necessary condition for imposing the [sales] tax was the occurrence of 'a local activity, delivery of goods within the State upon their purchase for consumption.'" *Id.* at 187 (quoting *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940)).

These precedents demonstrate that only <u>one</u> State may tax a sale of goods: the State where the goods are transferred. The decision below conflicts with these precedents and presents circumstances appropriate for review. Rule 10(c).[2]

Nonetheless, the Department argues that American Business "consummates flower sales in Florida" and that its "sales are Florida sales." (BIO.14). The Department's argument reflects a fundamental misunderstanding of the words "consummate" and "sale."

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[2] This case also independently presents an important question of federal law that should be settled by this Court. Rule 10(c).

The word "consummate" is defined, in part, as to "finish, complete." Merriam-Webster's Collegiate Dictionary 249 (10th ed. 1995); Black's Law Dictionary (10th ed. 2014) (defining "consummate" as "[c]ompleted; fully accomplished").

The word "sale" is defined, in part, as "the transfer of ownership of and title to property from one person to another for a price." Merriam-Webster's Collegiate Dictionary 1031 (10th ed. 1995); Black's Law Dictionary (10th ed. 2014) (defining "sale" as "the transfer of property or title for a price").

American Business cannot consummate a sale of flowers in Florida when the flowers never enter Florida. No one shops on the internet for the privilege of typing their credit card information into a website. Consumers shop on the internet to purchase items. Consistent with the relevant law, language, and logic, the receipt of those items is the consummation of the sale.[3]

The Department argues that none of the cases cited by American Business holds that a State exceeds its jurisdiction and sovereignty "by imposing a sales tax on transactions effectuated by a business located and operating *within* that state's territorial jurisdiction." (BIO.9-10) (citation and quotation omitted; emphasis in original).

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[3] The Department's attempt to distinguish the "transaction" from the "sale" above borders on the nonsensical. (BIO.16) ("Florida's sales tax is imposed on retail sales transactions, not the tangible personal property which is the subject of those transactions.").

The Department's argument misunderstands this Court's precedents. The relevant inquiry is the location of the "sale," not the location of the "seller." Especially on the internet, that distinction makes a difference.

And contrary to the Department's contention, at least one court has struck down an extraterritorial sales tax in the present context—Florida's Fourth District Court of Appeal below. (App.22a-35a).

The Department fails to address *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944), which held that the Court would have to "destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee." *Id.* at 330 (emphasis added); (Pet.21). The vendor in *McLeod* was from Tennessee, but that was not the Court's focus. The Court focused on the site where the property was transferred.

The Department also fails to address *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), in which the Court reviewed an Indiana gross income tax as applied to an Indiana company that sold 80 percent of its products to customers in other states and countries, and where orders were subject to approval by the home office. *Id.* at 308-09; (Pet.21). The Court noted that the State relied on *Am. Mfg. Co. v. City of St. Louis*, 250 U.S. 459 (1919) to support the tax. *J.D. Adams*, 304 U.S. at 312. The Court explained that *City of St. Louis* dealt with a municipal license fee for manufacturing, but that "[i]f the tax there under consideration had been a sales tax

the city could not have measured it by sales consummated in another state." *Id.* at 313.[4]

The Court's jurisprudence on the permissible collection of sales tax is quite clear. It is a map. The Department does its best to muddy this landscape.

The Court should grant certiorari to reaffirm the territorial limits on States' authority to collect sales tax.

B. Florida Does Not Hold a Sufficient Nexus to Tax All Sales Arranged by One of Its Domestic Corporations

The Department does not cite a single decision—other than the Florida Supreme Court's decision below—that has allowed a State to impose a sales tax on a transfer of property that occurred wholly within another State or Nation.

However, as it did in its Initial Brief before the Florida Supreme Court, the Department quotes *Goldberg v. Sweet*, 488 U.S. 252 (1989) for the proposition that "'[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes.'" (BIO.12) (quoting *Goldberg*, 488 U.S. at 266).

And as it did in its Answer Brief before the Florida Supreme Court, American Business responds to note that this Court has expressly repudiated that quote from *Goldberg*. *See Comptroller of Treasury of Mary-*

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[4] The Department fails to engage with other decisions that undercut its arguments. *State Tax Commn. of Utah v. P. State Cast Iron Pipe Co.*, 372 U.S. 605, 606 (1963); *Intl. Harvester Co. v. Dept. of Treas. of State of Ind.*, 322 U.S. 340, 345 (1944); (Pet.20-21).

land v. Wynne, 135 S.Ct. 1787, 1798 (2015) (holding that the Court "repudiated that dictum").

Nonetheless, the Department argues that Florida holds a substantial nexus to tax out-of-state and international flower sales. In support of this argument, the Department relies, in part, on the Court's decisions in *Jefferson Lines* and *McGoldrick*. (BIO.12, 14-15). The Department contends these decisions support its argument that American Business's sales took place in Florida.

Taken to its logical conclusion, this reasoning would have allowed the State of Minnesota, the seller's State of incorporation in *Jefferson Lines*, to tax the bus tickets transferred in Oklahoma if the seller had only accepted the order in Minnesota.

Similarly, in *McGoldrick*, this reasoning would have allowed the seller's State of incorporation (Pennsylvania) to tax the coal transferred in New York if the seller had only accepted the order in Pennsylvania.

That runs contrary to the actual holding in both cases. Only the State where the transfer of property occurs can collect sales tax. By deciding that only one State can collect sales tax, and that Oklahoma and New York were those States in *Jefferson Lines* and *McGoldrick* because they housed the transfers, the Court necessarily foreclosed the Department's arguments.

The Department goes on to cite other cases that reinforce American Business's position. (BIO.12-14) (citing *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24 (1988) (shipment to customers within Louisiana);

Wardair Canada, Inc. v. Fla. Dep't of Revenue, 477 U.S. 1 (1986) (transfer of fuel in Florida; nexus conceded); *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization,* 430 U.S. 551 (1977) (delivery in California); *TA Operating Corp. v. State, Dep't of Revenue*, 767 So. 2d 1270 (Fla. Dist. Ct. App. 2000) (transfer in Florida)).

Each of these cases involved a State's physical connection to the activity it was taxing. They offer nothing to support an extraterritorial sales tax.

The required "local activity" in this Court's sales tax precedents has never been the mere placement of an order or a company's role in "effectuating the sale[.]" (BIO.9-11). For good reason, the required "local activity" has been the actual transfer of goods. *Jefferson Lines*, 514 U.S. at 187 (explaining that the single location of a sale insulates "the buyer from any threat of further taxation of the transaction." (emphasis added)).

The Department's muddled test would allow Florida to impose a sales tax on buyers for their purchase of flowers that bear no physical connection to Florida. At the same time, Florida would still claim the sole authority to tax transfers of non-floral property within its jurisdiction.

The Department does not contest that the incidence of Florida's sales tax falls upon consumers; nor could it. (Pet.23-24).

The Department also does not explain how Florida can justify a tax on a consumer, based on Florida's connection to a corporation.[5]

The same justifications offered here by the Department would allow the State of Washington to tax every order placed over Amazon.com anywhere in the world, regardless of where the goods were actually produced, stored, or delivered. These justifications would also render States like Florida unable to continue requiring Amazon.com to collect sales tax for its Florida deliveries.

The Department offers no response to these arguments on the merits; nor could it, given American Business's method of operations and its sales to customers in Latin America and Spain. (BIO.3); (Pet.7,8,11,18 & n.5).

The Department responds simply that "practical and political reasons" would limit States from exercising this authority. (BIO.21).

That response misses the point. There is no such authority in the first place. And this Court "would not uphold an unconstitutional statute merely because the Government promised to use it respon-

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[5] The Department does, however, argue that American Business cannot point out these flaws in Florida's tax or the Department's arguments without violating the Court's third-party standing precedents. (BIO.17). Simply put, this case has nothing to do with standing. American Business is championing its own rights—namely, the right to not be held responsible for a sales tax deficiency that is unconstitutional. In doing so, American Business is demonstrating the operations and consequences of Florida's tax. That is entirely proper.

sibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

The decision below approved Florida's authority to tax out-of-state flower sales, and it did so without any limiting principle to stop the spread of this power beyond flowers.

Florida stands on the precipice of a dangerous and disturbing authority. This Court's review is necessary to draw it back.

C. Florida's Sales Tax on Out-of-State and International Flowers Violates Due Process

Florida's extraterritorial sales tax violates the Due Process Clause of the Fourteenth Amendment. Just as Florida courts cannot issue subpoenas in California, Florida agencies cannot tax transfers of flowers in California.

The basis for American Business's argument—that States are constrained by their borders in imposing sales tax—is grounded in logic. That logic is engrained throughout the Court's precedents, even those outside the sales tax context. (Pet.16-17).

While the Department takes great pains to distinguish the precedents cited by American Business, it does not affirmatively present any benefit offered by Florida that would justify the exaction of a sales tax.

For example, the Department attempts to distinguish *Treichler v. State of Wis.*, 338 U.S. 251 (1949), on the basis that it involved an inheritance tax. (BIO.10). However, the Department does not address the following:

> [T]he state of location has all but complete dominion over the physical objects sought to be measured for tax . . . A state is not equipped with the implements of power and diplomacy without its boundaries which are at the root of the Federal Government's undoubted right to measure its tax upon foreign property . . . And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce.

Treichler, 338 U.S. at 256-57.

In contrast to Florida, the State of California could clearly justify a sales tax for a dozen roses that were: (i) grown in California (using its power and water supplies); (ii) stored in California (using its police protection for private property); and (iii) delivered in California (using its roads). Here, Florida taxes such sales.

The fact that American Business was afforded the opportunity to operate within Florida is completely insufficient to make Florida the one State able to collect a sales tax.

The Department's references to a gross receipts tax similarly miss the point. (BIO.19). This case involves a sales tax, and the Department must justify it as such. § 212.05, Fla. Stat. (2012) ("Sales, storage, use tax"); *McLeod*, 322 U.S. at 331 (holding that while different taxes "may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State."); *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844,

884-85 (1997) (the Court "will not rewrite a . . . law to conform it to constitutional requirements." (citation and quotation omitted)).

Because Florida's sales tax violates due process, the Department finds no refuge in any argument relying on potential Congressional action.

II. THE DEPARTMENT RELIES ON *QUILL*'S PHYSICAL PRESENCE RULE, ONLY TO THEN CLAIM IT HAS NO APPLICATION AND CANNOT BE REVIEWED

The Department argues that this case presents no opportunity to review *Quill*. (BIO.23-26). At the same time, the Department relies on *Quill* in its arguments. (BIO.12-13); *id.* at 16 ("As the Florida Supreme Court . . . determined, the petitioner's business activities and physical presence provide a more-than-minimum contact with the State." (citing App.20a-21a)).

The Department argues that the Florida Supreme Court "in no way" relied upon *Quill*. (BIO.25).

A review of the Florida Supreme Court's decision, however, reflects otherwise. (App.12a-14a). Indeed, the Department's own brief reflects otherwise. (BIO.7) ("Of particular relevance, the Florida Supreme Court determined that the 'substantial nexus' prong of *Complete Auto* was satisfied because petitioner 'is headquartered in Wellington, Florida and has been doing business in Florida since 2001.'" (quoting App.14a)).

The Department argues, just as the Florida Supreme Court ruled below, that *Quill*'s physical presence rule is satisfied here and therefore Florida has a sufficient nexus to collect its sales tax.

That ignores the context of *Quill*, which involved a North Dakota use tax for property enjoyed within North Dakota. *Quill Corp. v. North Dakota*, 504 U.S. 298, 302 (1992).

In essence, the Department argues both that *Quill* is not relevant and that *Quill* supports the decision below.

The decision below demonstrates the need for this Court to accept review and either clarify or overturn *Quill*.

III. THE DEPARTMENT'S POLICY CONCERNS ARE IRRELEVANT

The Department argues that there is no need for review because the current system is easier and it has been done this way for a long time. (BIO.18-23).

There are a cascade of effects that flow from the decision below. They cannot be overcome by an appeal to administrative convenience. (BIO.1-2, 21). As Blackstone noted in an analogous context, "all arbitrary powers, well executed, are the most convenient[.]" 4 Commentaries on the Laws of England 343-344 (1769).

In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Court long ago explained that "the power to tax involves the power to destroy[.]" *Id.* at 431. "Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not." *Id.*

Those insights are as true today as when written. The Founders would have been aghast at a system that allowed Massachusetts to tax a Virginian for his purchase of Virginia property in Virginia.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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