

IN THE SUPREME COURT OF THE STATE OF OREGON

OOMA, INC., a foreign corporation,
Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Oregon Tax Court Regular Division Case No. 5331

Supreme Court No. S067581

**OOMA, INC.'S AMENDED OPENING BRIEF AND
EXCERPTS OF RECORD**

On appeal from a Judgment of the Oregon Tax Court
Honorable Robert T. Manicke, Judge
Date of Opinion: March 2, 2020
Author of Opinion: Manicke, J.

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

Respondent, Oregon Department of Revenue (the “Department”), issued Notices of Deficiency Assessment dated August 30, 2016 (collectively, the “Assessment”), upon Appellant, Ooma, Inc. (“Ooma”), for emergency communication taxes (“E911 Taxes”) for the quarters ending March 2013 through March 2016 (the “Period”). Ooma appealed the Assessment to the Magistrate Division of Oregon Tax Court.

On April 12, 2018, the Magistrate Division of the Oregon Tax Court issued a Final Order granting the Department's Motion for Summary Judgment, holding that Ooma was liable for E911 Taxes under ORS 403.200¹ and that neither the Due Process Clause nor the Commerce Clause of the United States Constitution were a bar to the imposition of such taxes. Ooma appealed to the Regular Division of the Oregon Tax Court.

On March 2, 2020, the Regular Division of the Oregon Tax Court (the “Tax Court”) granted the Department's Motion for Summary Judgment on the same basis.

¹ All references to the Oregon Revised Statutes are to the editions applicable to the Period unless otherwise noted.

B. Nature of Judgment Sought to Be Reviewed

The Tax Court held that Ooma is subject to E911 taxes for the Period pursuant to ORS 403.200 because Ooma, a provider of Voice over Internet Protocol (“VoIP”), was a provider of telecommunication services or of equipment with access to Oregon's emergency communications system under ORS 403.200(1) it was required by ORS 403.215 to collect, remit, and report E911 Taxes to the Department for the Period. For purposes of its appeal to this Court, Ooma concedes the statutory basis of the Assessment.

The Tax Court further held that the Due Process Clause of the United States Constitution was not a bar to the imposition of E911 Taxes because the quality and quantity of Ooma’s business activities reflected a sufficient targeting of Oregon residents. Ooma contends that the holding of the Tax Court must be reversed because it is at odds with recent instruction from the U.S. Supreme Court on the nature of the contacts required to survive a challenge under the Due Process Clause.

Finally, the Tax Court determined that the Commerce Clause was not a bar to the issuance of the Assessment. The Tax Court concluded that Ooma had “substantial nexus” with Oregon and that the measure of the tax was “fairly related” to the services provided by Oregon to Ooma for the Period. For purposes of its appeal to this Court, Ooma concedes that the measure of the tax was “fairly

related” to the services provided by Oregon to Ooma. However, Ooma maintains that the holding of the Tax Court regarding “substantial nexus” must be reversed because is inconsistent with the contemporary Commerce Clause jurisprudence.

C. Statutory Basis of Appellate Jurisdiction

This case is on appeal, pursuant to ORS 305.445, to this Court from a final order of the Tax Court.

D. Timeliness of Appeal

The Tax Court's Final Order was entered in the Tax Court's register on March 2, 2020. Ooma filed and served its Notice of Appeal on March 31, 2020, which was filed within 30 days of March 2, 2020, the prescribed time period for filing an appeal under ORS 19.255.

E. Questions Presented on Appeal

1. Did Ooma have sufficient “minimum contacts” with Oregon under the Due Process Clause for purposes of E911 Taxes where it does not develop or pursue Oregon-specific marketing or business plans for the sale of its product and services?
2. Were Ooma’s economic and virtual contacts with the state sufficient to support a finding of “substantial nexus” under the Commerce Clause for purposes of E911 Taxes?

3. Did the Tax Court err in granting the Department's motion for summary judgment in light of the genuine issues of material fact raised by Ooma?

F. Summary of Arguments

A state tax law survives scrutiny under Due Process Clause of the United States Constitution only if the taxpayer has "purposefully availed" itself of the forum state's economic market. Under recent precedent from the U.S. Supreme Court, "purposefully availment" is defined by reference to whether the taxpayer specifically targeted the forum state for its sales. A taxpayer specifically targets a forum state, *inter alia*, by adopting a marketing or business plan unique to the state. In this case, the undisputed facts are that Ooma did not specifically target the Oregon market for its VoIP services. Ooma had no employees or representatives in Oregon and did not own real or tangible personal property in the state. In addition, Ooma adopted a national marketing and business plan. For these reasons, ORS 403.200 is unconstitutional under the Due Process Clause as applied to the facts of this case.

The Commerce Clause of the United States constitution requires that a taxpayer have "substantial nexus" with a state before it can be held liable for tax. Under recent precedent from the U.S. Supreme Court, the "substantial nexus" inquiry requires consideration of a taxpayer's economic returns from a state and the taxpayer's commercial activities directed toward the state. In this case, the

economic returns derived from Oregon by Ooma coupled with a review of Ooma's commercial activities directed toward the state, fall short of the "substantial nexus" required by the Commerce Clause. For these reasons, ORS 403.200 is unconstitutional under the Commerce Clause as applied to the facts of this case.

The nexus determination under both the Due Process Clause and the Commerce Clause is fact-intensive. The test for nexus under the Due Process Clause requires a review of the quantity and quality of the taxpayer's contacts with a forum state. In support of its Due Process Clause holding, the Tax Court relied on a chart that purportedly quantified Ooma's economic connections with Oregon for the Period. Ooma raised several issues of material fact that called into question the significance of these economic connections. The Trial Court erred by turning a blind eye to these genuine issues of material fact.

A taxpayer has "substantial nexus" for purposes of the Commerce Clause based on a review of its economic returns from and commercial activity directed toward a taxing state. Ooma raised genuine issues of material fact regarding the quantification of its economic returns from Oregon for the Period. The Trial Court erred by refusing to address these issues. Ooma also raised genuine issues of material fact regarding the significance of its commercial activities directed toward Oregon during the Period. The Trial Court erred by relying on Ooma's economic

presence as a proxy for the required analysis into what commercial activities Ooma directed toward Oregon.

G. Material Facts of Case

Ooma is a foreign corporation with its commercial domicile and principal place of business in Palo Alto, California. Excerpt of Record (“ER”) 2 at ¶¶ 1, 6. Ooma is a telecommunications company that provides VoIP services to customers across the United States, including residents of the State of Oregon. ER 2 at ¶ 7. VoIP technology enables customers to conduct voice communications via a high-speed (broadband) internet connection. ER 2 at ¶ 7. Ooma also provides additional telecommunications services to residents of the State of Oregon that include voicemail, call waiting, call forwarding, and caller identification. ER 2 at ¶ 8.

The broadband connection necessary for Oregon residents to obtain Ooma’s services is purchased from an unaffiliated independent third party. ER 2 at ¶ 9. Ooma did not sell the broadband connection necessary for Oregon residents to obtain Ooma’s services. ER 2 at ¶ 10. In order to access the VoIP services provided by Ooma, an Oregon resident must first purchase an Ooma “Telo” or “Office” VoIP device which can be purchased from independent retail stores, directly from Ooma’s website, or from one of several independent online retailers, including Amazon. ER 3-4 at ¶¶ 11, 15, 16. The equipment used to access Ooma's

VoIP services was owned by each Oregon resident. ER 4 at ¶ 17. Ooma retained no ownership interest in the equipment used by Oregon residents to access Ooma's VoIP services. ER 4 at ¶ 17. More broadly, Ooma owned no real or tangible personal property in the State of Oregon during the relevant periods. ER 5 at ¶ 19.i.

Once an Oregon resident has purchased the necessary equipment to access Ooma's services, the transmission of calls will take on one of two different fact patterns. ER 3 at ¶ 12. If an Ooma customer makes a call to another Ooma customer, the digital data relating to the call is transmitted through the broadband connection of the call initiator to the recipient's Ooma VoIP device. ER 3 at ¶ 13. If the recipient of a call is not an Ooma customer, the digital data sent from the Ooma call initiator is processed through one of several regional data centers. ER 3 at ¶ 14. These digital data centers convert the digital data into an analog audio signal, which is then directed to the Public Switched Telephone Network (PSTN). Such digital data centers – and the telecommunications lines and other equipment relevant to the transmission of calls on the PSTN – are owned and operated by unrelated third parties. *Id.* Irrespective of the fact pattern of the call, Ooma made no direct or indirect representation to Oregon residents that it would pay or had paid Oregon taxes – including the E911 Tax – on VoIP services purchased from Ooma. ER 5 at ¶ 19.h.

For all periods relevant to this dispute, no employees of Ooma visited the State of Oregon. ER 4 at ¶ 19.a. Ooma did not hire or compensate independent sales representatives, agents or anyone of similar role or function to act on its behalf to promote, advertise, solicit, or sell its VoIP services to Oregon residents. ER 4 at ¶ 19.b. Further, Ooma did not hire or compensate independent third parties, agents or anyone of similar role or function to act on its behalf in the State of Oregon to pursue an action to enforce or defend rights regarding tangible or intangible property or contractual rights. ER 4 at ¶ 19.c.

Ooma did not participate in any court proceeding, mediation or arbitration in the State of Oregon nor did it participate in any other legal or collection action in the State of Oregon. ER 4-5 at ¶ 19.d., e. One consumer complaint was filed with the Oregon Department of Justice during the Period regarding Ooma's services provided to Oregon residents. ER 5 at ¶ 20. The complaint alleged that Ooma collected or attempted to collect for goods or services the complainant never ordered. *Id.* The complaint was voluntarily resolved. *Id.*

Ooma did not possess any license, permit, registration, or authorization issued by any entity, government, or organization in the State of Oregon during the periods at issue. ER 5 at ¶ 19.f. Moreover, Ooma did not communicate with any entity, government or organization in the State of Oregon regarding whether any

license, permit, registration, or authorization was required relating to the provision of Ooma's VoIP services to Oregon residents. ER 5 at ¶ 19.g.

Ooma prepared marketing plans and employed business strategies that targeted customers nationwide, including Oregon residents. ER 5 at ¶ 21, 22. Ooma provided promotional and marketing materials to select national retailers for use in their retail locations, including retail locations in Oregon. ER 6 at ¶ 23. In these instances, the national retailer decided where and when to use the Ooma promotional and marketing materials. *Id.* On certain occasions, at the direction of a national retailer, Ooma shipped promotional and marketing materials to the retailer's location(s) in the State of Oregon. ER 6 at ¶ 24.

H. Significant Motions Filed

Ooma and the Department filed cross Motions for Summary Judgment with the Tax Court on October 12, 2018. On March 2, 2020, the Tax Court issued an order granting the Department's Motion for Summary Judgment and denying Ooma's Motion for Summary Judgment holding that there was no statutory or constitutional bar to the Assessment for E911 Taxes.

II. ASSIGNMENT OF ERROR

The Tax Court erred in holding that there was no Due Process Clause violation and, in support, concluding that Ooma's contacts with Oregon were sufficient to uphold the Assessment for E911 Taxes. The Tax Court further erred

by holding that Ooma had “substantial nexus” with Oregon and, therefore, the Commerce Clause was not a bar to the Assessment of E911 Taxes. Finally, the Tax Court erred by granting summary judgment to the Department in the face of genuine issues of material fact impacting the required analyses under both the Due Process Clause and the Commerce Clause.

A. Preservation of Error

Ooma asserted that it lacked the requisite minimum contacts with Oregon under the Due Process Clause and that it lacked “substantial nexus” under the Commerce Clause necessary to sustain the Assessment of E911 Taxes in its Motion for Summary Judgment and in its opposition to the Department's motion filed with the Tax Court. Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, docket entry date 10/12/2018, at 5-21, 40-54; Plaintiff's Response to Defendant's Cross Motion for Summary Judgment and Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment, docket entry date 12/7/2018, at 4-12, 12-18. Ooma asserted the same contentions in oral argument before the Tax Court on January 17, 2019. Tr. 36-54, 76-91. Ooma argued on brief to the Tax Court that there were genuine issues of material fact that precluded the grant of summary judgment to the Department under either the Due Process Clause or the Commerce Clause.

B. Standard of Review

The scope of the review of either a decision or order of the Tax Court is limited to errors or questions of law or lack of substantial evidence in the record to support the Tax Court's decision or order. ORS 305.445. On appeal from a grant of summary judgment when there are no disputed issues of fact, this Court reviews for errors of law. *Ibid.*; see also *Tektronix, Inc. v. Dep't of Revenue*, 354 Or. 531, 533, 316 P3d 276 (2013).

III. ARGUMENT

The crux of this dispute relates to whether ORS 403.200 is unconstitutional as applied to the facts of this case under either the Due Process Clause or the Commerce Clause of the United States Constitution. For the foregoing reasons, Ooma contends that Oregon lacks the constitutional authority to impose E911 Taxes pursuant to ORS 403.200 for the Period.

A. THE IMPOSITION OF E911 TAXES IN THIS CASE VIOLATES THE DUE PROCESS CLAUSE BECAUSE OOMA LACKED SUFFICIENT MINIMUM CONTACTS WITH OREGON AND THE ASSESSMENT OFFENDS TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. In the context of state and local taxation, the U.S. Supreme Court has made clear that the Due

Process Clause requires “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax[.]” *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954)).² The requisite “minimum contacts” exist only where the taxpayer “purposefully avails itself” of the privilege of conducting activities in the state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Moreover, under the Due Process Clause, jurisdiction over a nonresident is proper only in circumstances where “the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Because the requisite “minimum connection” between Ooma and Oregon is lacking in this case, the assessments of E911 Taxes are invalid. In addition, and independent of the “minimum contacts” analysis, Oregon’s exercise of tax jurisdiction over Ooma offends “traditional notions of fair play and substantial justice.”

² The required analysis for tax jurisdiction is substantially similar to that used in challenges to *in personam* jurisdiction under the Due Process Clause. See *Quill*, 504 U.S. at 307.

1. The Tax Court Incorrectly Interpreted and Applied the Due Process Clause jurisprudence of the U.S. Supreme Court

The Tax Court began its Due Process Clause analysis by reviewing two contemporary cases from the U.S. Supreme Court that provided guidance on the issue of jurisdiction – *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), and *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873 (2011). The Tax Court concluded based on the stipulated facts of this case, that “under any of the tests articulated in *Asahi* or *Nicastro* [Ooma] purposefully availed itself of the Oregon market.” Order, docket entry date 03/02/2020, at 10.

In reaching this sweeping conclusion, however, the Tax Court failed to note the critical distinctions between the facts of this case and those in *Asahi* and *Nicastro*. Moreover, the Tax Court erred by ignoring the concerns of Justice Breyer in *Nicastro* – concerns that provide crucial guidance on the proper Due Process Clause test to apply in this case. A proper interpretation and application of U.S. Supreme Court precedent under the Due Process Clause clearly demonstrates that the imposition of E911 Taxes against Ooma pursuant to ORS 403.200 is unconstitutional.

a. Review of the Court's Diverging Opinions in *Asahi*

Asahi involved a products liability lawsuit resulting from a fatal motorcycle crash in California. The plaintiff, a California resident, alleged that a defective tire tube caused the accident. 480 U.S. at 105-106. The plaintiff sued the Taiwanese

distributor of the tire tube and the Japanese manufacturer of the tire tube's valve assembly, Asahi Metal Industry Company ("Asahi"). *Id.* at 106. Asahi challenged the California court's exercise of personal jurisdiction arguing that because the valve assemblies were sold to a distributor, it could not expect to be hauled into court in California. *Id.* at 106-107. The trial court determined that it could exercise jurisdiction over Asahi because it was foreseeable that the manufacturer's product would eventually be sold in California. *Id.* at 108.

The decision of the U.S. Supreme Court in *Asahi* elicited two divergent theories of personal jurisdiction under the Due Process Clause. Justice O'Connor authored the plurality opinion holding that Asahi's contacts with California were insufficient to support jurisdiction considering the burden associated with defending suit in the state. *Id.* at 114-116. The Due Process Clause, according to the plurality, requires that the defendant intentionally target the forum state. *Id.* at 112. Merely introducing a product into the stream of commerce, absent other facts demonstrating a specific targeting of the forum state, were deemed insufficient to support jurisdiction under the Due Process Clause. *Id.* In other words, the plurality in *Asahi* reasoned that foreseeability was not the touchstone of the required constitutional analysis. *Id.* at 112-113. Because Asahi took no action to purposefully avail itself of the benefits and protections of California law, the

plurality determined that the Due Process Clause was a bar to the exercise of personal jurisdiction. *Id.* at 114-116.

Justice Brennan authored a concurring opinion in *Asahi* in which he articulated a wholly-different perspective of purposeful availment.³ Justice Brennan believed that the mere act of placing a product into the stream of commerce was sufficient for a forum state to assert jurisdiction over a defendant. *Id.* at 117. In support of his position, Justice Brennan stated that the stream of commerce reflected a predictable path from manufacturer to consumer. *Id.* According to Justice Brennan, once a product makes its way through the stream of commerce to a forum state, the defendant receives the benefits and protections of the state's laws the receipt of which are sufficient to support personal jurisdiction. *Id.* This is true, Justice Brennan continued, whether or not the defendant specifically targeted the forum state. *Id.* In reaching this conclusion, Justice Brennan made a point to distinguish the holding in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and stated that there was a crucial distinction between jurisdiction premised on placing a product in the stream of commerce

³ Justice Brennan concurred with the judgment of the plurality that California lacked jurisdiction over *Asahi* based on the burdens associated with the Japanese manufacturer having to defend suit in the state. *Id.* at 116.

(*Asahi*) and jurisdiction founded on acts of the consumer (*World-Wide Volkswagen*). *Id.* at 120.

A majority of the court failed to join the opinion of Justice O'Connor or Justice Brennan. As a result, *Asahi* failed to provide clear guidance to the lower courts on the proper analytical test for jurisdiction under the Due Process Clause.

b. The Court's Failure to Resolve Ambiguity in *Nicastro*

In *Nicastro*, the most significant case to address personal jurisdiction under the Due Process Clause since *Asahi*, the stage was set for the Court to provide much-needed instruction to lower courts.

Robert Nicastro sustained a serious injury to his hand while operating a metal-shearing machine in New Jersey. *Nicastro*, 564 U.S. at 878. The metal-shearing machine was manufactured in England by J. McIntyre Machinery, Ltd. (“J. McIntyre”). *Id.* J. McIntyre contracted with an independent distributor to sell its metal-shearing machines in the United States. *Id.* J. McIntyre did not directly sell its metal-shearing machines to buyers in the United States. *Id.* During the relevant period, no more than four machines manufactured by J. McIntyre and sold through the independent distributor ended up in New Jersey. *Id.* The question for the Court was whether the Due Process Clause prevented the courts of New Jersey from exercising personal jurisdiction over J. McIntyre. The Supreme Court of New Jersey ruled that the Due Process Clause was not a bar to the exercise of

jurisdiction over J. McIntyre. *Id.* at 879. In so holding, the court relied heavily of Justice Brennan's stream of commerce theory of personal jurisdiction in *Asahi*. *Id.*

Justice Kennedy authored the plurality opinion in *Nicastro* and reversed the holding of the Supreme Court of New Jersey. At the outset, Justice Kennedy readily acknowledged that “[t]he rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of the decades-old questions left open in *Asahi*[.]” *Id.* at 877. Justice Kennedy next turned his attention to the two contrasting opinions in *Asahi* – Justice Brennan's stream of commerce theory premised on foreseeability and Justice O'Connor's requirement of specific targeting. Justice Kennedy rejected Justice Brennan's stream of commerce approach stating that it was “inconsistent with the premises of lawful judicial power.” *Id.* at 883.

Justice Kennedy agreed, however, with Justice O'Connor's “specific targeting” approach stating that “the defendant's actions, not his expectations, [] empower State court's to subject him to judgment.” *Id.* at 883. Premised on the idea that each jurisdiction is its own sovereign, the plurality believed that the concept of “purposeful availment” mandates a “sovereign-by-sovereign” analysis. *Id.* at 884. This conclusion is supported by Justice Kennedy's comments in *Nicastro* in which, after reviewing the facts of the case, he stated “[t]hese facts may reveal an intent to serve the *U.S. market*, but they do not show J. McIntyre

purposefully availed itself of the *New Jersey market*.” *Id.* at 886 (emphasis added). Justice Kennedy concluded that for a defendant to be subject to jurisdiction in a forum state, the Due Process Clause requires that the defendant voluntarily engage in activity that specifically targets the forum state. *Id.* at 884.

At the other end of the doctrinal spectrum in *Nicastro*, Justice Ginsburg authored a dissenting opinion that mirrored Justice Brennan's position in *Asahi* – *i.e.*, the foreseeability that a product will make its way through the stream of commerce to the forum state is sufficient to support jurisdiction over the defendant under the Due Process Clause. Justice Ginsburg argued that J. McIntyre purposefully availed itself of the entire United States market by selling through a distributor and, therefore, would be subject to jurisdiction in all fifty states. *See id.* at 898. Justice Ginsburg also strongly believed that it was entirely reasonable to require a foreign defendant to defend suit in a state where its products caused harm and that this is especially true where, as here, the defendant had knowledge that its products could reach a state by distribution through the stream of commerce. *Id.* at 903-904. Justice Ginsburg, citing *World-Wide Volkswagen*, agreed that jurisdiction could not be premised on a customer's unilateral acts, but *Nicastro* did not present a similar fact pattern. *Id.* at 906-907.

Perhaps the most significant opinion in *Nicaastro* was that of Justice Breyer.⁴

Justice Breyer concurred in the judgment that the New Jersey courts lacked jurisdiction over J. McIntyre, but disagreed with the diverging approaches taken by Justice Kennedy and Justice Ginsburg. Justice Breyer considered the tests advocated by Justice Kennedy and Justice Ginsburg and concluded that jurisdiction could not be sustained under either approach.

Referring to Justice Kennedy's "specific targeting" theory of jurisdiction, Justice Breyer made the following statement:

“[W]hat do those standards mean when a company targets the world by selling products from its website? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through pop-up advertisements that it knows will be viewed in the forum? Those issues have serious commercial consequences but are totally absent in this case.”

Id. at 890. Although Justice Breyer acknowledged that targeting the forum was an important component of the analysis under the Commerce Clause, he believed that Justice Kennedy's approach would have unforeseen impacts on our modern economy. For these reasons, Justice Breyer deemed it “unwise to announce a rule

⁴ Justice Breyer's opinion in *Nicaastro* represents the holding of the Court. *United States v. Marks*, 430 U.S. 188, 193 (1977) (“[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”).

of broad applicability without full consideration of modern-day consequences.” *Id.* at 887.

Turning to Justice Ginsburg’s foreseeability theory, Justice Breyer was troubled by the fact that it would permit every state to assert jurisdiction where a manufacturer sells its products through a national distributor, “no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items end up in the particular forum at issue.” *Id.* at 892.

In the end, Justice Breyer refused to endorse either of the jurisdictional standards outlined in *Nicastro*, believing that the case could easily be decided under the Court’s existing Due Process Clause precedent. *Id.* at 893. Justice Breyer specifically relied on *World-Wide Volkswagen* for the proposition that the Court has never upheld jurisdiction over a defendant based solely on the single sale of a product in a state. *See id.* at 892.

c. This Case Presents the Very Modern-Day Commercial Factors Raised by Justice Breyer in *Nicastro*

In his concurring opinion in *Nicastro*, Justice Breyer declined to agree with the broadly applicable jurisdictional theories of Justice Kennedy and Justice Ginsburg because they did not take into consideration the impact on our e-

commerce-based economy.⁵ This case raises many of the unique commercial considerations raised by Justice Breyer in *Nicastro*. For this reason, the jurisdictional approaches outlined in *Asahi* and *Nicastro* must be reconsidered in light of Ooma's Due Process Clause challenge to the imposition of E911 Taxes.

There are certain factual similarities between this case and *Asahi* and *Nicastro*. For example, consistent with connection between the forum states and the defendants in *Asahi* and *Nicastro*, Ooma did not own real or tangible personal property and did not engage employees or independent sales representatives in Oregon. Another relevant parallel is that Ooma did not have a forum-specific business or marketing plan to serve potential customers in Oregon. Despite these apparent similarities, however, there are crucial differences.

Although Ooma, like the defendants in *Asahi* and *Nicastro*, sold hardware through third party channels, it also made substantial sales of its hardware through its e-commerce website. In addition, unlike in *Asahi* and *Nicastro*, in this case

⁵ In *Willemsen v. Invacare Corp.*, 352 Or 191, 282 P3d 867 (2012), this Court recently adopted Justice Breyer's holding in *Nicastro* in response to personal jurisdiction under the Due Process Clause. However, the facts of *Willemsen* were substantively identical to those in *Nicastro*. Because the facts of *Willemsen* did not address the modern commercial concerns raised by Justice Breyer, the holding in *Willemsen* does not speak to the proper jurisdictional test to be applied in this case.

Ooma provided nomadic VoIP telecommunication services over the internet to its customers.⁶

One other crucial distinction relates to the mandate of federal laws. In *Asahi* and *Nicastro*, the defendants made a conscious and voluntary business decision to make the sale of an injury-causing product into the forum state. The assertion of jurisdiction in the cases was tied to these specific voluntary acts.

In this case, federal law required⁷ Ooma to provide the very services that triggered the imposition of E911 Taxes under Oregon law. 47 CFR §9.5.⁸ Ooma is not liable for E911 Taxes based on the fact that it sold hardware or provided telecommunication services to Oregon customers. Ooma is liable for E911 Taxes because it provides access to the Oregon emergency communication system as required by federal law. ORS 403.200 (imposing tax on "on each consumer or paying retail subscriber who has telecommunications service or interconnected Voice over Internet Protocol service, with access to the emergency

⁶ The VoIP services provided to customers were "nomadic" meaning that Ooma customers with an Oregon billing address could use Ooma's VoIP services wherever they could access a broadband internet connection.

⁷ Ooma can hardly be said to have met the requirement of "purposeful availment" under the Due Process Clause where the impetus for its obligation to collect, remit, and report E911 Taxes comes from a mandate of federal law.

⁸ As noted by the Tax Court, "[t]he parties agree that those federal regulations required Taxpayer to provide its Oregon subscribers access to Oregon's emergency communications system during the periods at issue." Order, docket entry date 03/02/2020, at 5.

communications system"). These crucial factual distinctions and complexities require a reconsideration of the two divergent jurisdictional approaches of Justice Kennedy and Justice Ginsburg in *Nicastro*.⁹

d. Justice Kennedy's "Specific Targeting" Approach to Due Process Clause Jurisdiction in *Nicastro* Should be Applied in this Case Because it Promotes Predictability and is Consistent with the Concept of "Purposeful Availment"

Capital investments in and by businesses are based on a variety factors, not the least important of which is projected state and local tax liabilities. If an entrepreneur, investor, or business is unable to predict its potential tax liabilities, investment capital will dry up and, therefore, business growth will be stagnated. This is especially true in the context of the potential liability for indirect taxes¹⁰ such as the E911 Tax. In the context of an indirect tax, the tax is imposed on the purchaser or consumer and the business is merely a collection agent for the tax. *See e.g.*, ORS 403.200 and ORS 403.210. In such circumstances, the business is

⁹ It is also because of these modern factual complexities that the holding in *World-Wide Volkswagen* is inapplicable in this case. While it is certainly true that Ooma made more than a single isolated sale, the existence of facts relating to modern e-commerce removes this case from the framework of such cases as *World-Wide Volkswagen*.

¹⁰ An "indirect tax" is a tax owed by a third person, but collected by the taxpayer. The E911 Tax is an indirect tax because the tax is imposed on the customer. ORS 403.200. Ooma is tasked with collecting the E911 tax from customers and remitting amounts collected to the Department. ORS 403.210. A "direct tax" is a tax directly imposed on the taxpayer with respect to *its* activities. The Oregon corporate income tax, for example, is a direct tax.

almost certainly unable to reimbursement of the indirect tax from its customers for prior periods. Exposure to penalties for failing to file and/or pay a state's indirect tax further adds to the predictability risk. In many states, such as Oregon, statutorily-imposed penalties cannot be waived even if the business acted reasonably to determine its tax reporting position.¹¹

It is because of these concerns of predictability that Due Process Clause jurisdiction should be linked to a specific targeting of the forum state. Where a business can be said – based on the facts of the case – to have specifically targeted a state, concerns about "purposeful availment" and the burden of being hauled into court should be considered moot.

Justice Kennedy's approach in *Nicastro* provides for this predictable "specific targeting" rule under the Due Process Clause. As stated by Justice Kennedy, "[the] Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." 564 U.S. at 883. Speaking to the issue of targeting a specific forum, Justice Kennedy continued:

¹¹ See *Pelett v. Dep't of Revenue*, 11 OTR 364, 365-366 (1990) (court lacks the authority to review Department's decision to abate penalties) and *Pinski v. Dep't of Revenue*, 14 OTR 376, 379 (1998) (the issue of whether the Department properly denied penalty abatement is "not a question within the jurisdiction of the court.").

“The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.

[...]

Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the court of the United States but not of any particular state. This is consistent with the premises and unique genius of our Constitution.”

Id. at 884. Justice Kennedy further made clear that his approach to jurisdiction under the Due Process Clause requires a state-by-state analysis. To this point, Justice Kennedy noted:

“If the defendant is a domestic domiciliary, the courts of its home state are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.”

Id. at 884-885.

The plurality opinion in *Nicastro* noted that the mere sale of products or services to customers in a state, by itself, does not rise to the level of “purposeful availment.” To this point, Justice Kennedy remarked:

“The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum state.”

Id. at 882.

Justice Kennedy relied on Justice O'Connor's plurality opinion in *Asahi* to explain what types of activities reflect a specifically targeting of a forum state. *Id.* at 885 (stating that the scope of "purposeful availment" is consistent with Justice O'Connor's opinion in *Asahi*). In *Asahi*, after stating that merely placing a product into the stream of commerce falls short of "purposeful availment" under the Due Process Clause, Justice O'Connor provided examples of the types of activities that tend to show purposeful direction. Justice O'Connor reasoned:

“Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”

480 U.S. at 112. It is important to note that neither Justice Kennedy nor Justice O'Connor considered the volume of sales to be a critical factor for purposes of “purposeful availment.”¹²

Adopting Justice Kennedy's view of “purposeful availment” in *Nicastro* promotes much-needed predictability for businesses. Under this approach, a multistate business can more reasonably estimate its potential state and local tax

¹² In *Asahi*, the defendant sold between 20,000 and 100,000 tire valve stems per year through stores in California. *See id.* at 106.

exposure by balancing the need for forum-specific marketing and design efforts against the resulting additional state and local tax liability.

It is most certainly true that adopting Justice Ginsburg's stream of commerce – or foreseeability – approach to jurisdiction under the Due Process Clause also promotes predictability. Under this jurisdictional theory, every multistate seller of products or services consents to the taxing jurisdiction of every state in which it has a customer. This predictability, however, comes at a cost. In today's modern commercial world where product sales predominantly take place through e-commerce, the “stream of commerce” jurisdictional theory would moot any and all protections afforded by the Due Process Clause.

In *Nicastro*, Justice Breyer criticized the “stream of commerce” theory of jurisdiction advocated by Justice Ginsburg and stated:

“[T]o adopt this view would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between 'the defendant, the *forum*, and the litigation,' it is fair, in light of the defendant's contacts *with that forum*, to subject the defendant to suit there.”

564 U.S. at 891 (emphasis in original). In other words, the “stream of commerce approach” obliterates the age-old requirement under the Due Process Clause that there must exist a constitutionally sufficient connection between the defendant and the forum state. If Justice Ginsburg’s approach were to be adopted, there would be

no role to play for the Due Process Clause with respect to jurisdictional disputes in today's modern commercial world.

e. Ooma Lacked the “Purposeful Availment” Required by Justice Kennedy's Specific Targeting Approach to Due Process Clause Jurisdiction in *Nicastro*

It is most certainly the case that Justice Breyer did not endorse Justice Kennedy's “forum-by-forum” or “specific targeting” test for purposeful availment. Justice Breyer's reservations with such an approach, however, were linked to his belief that the facts of *Nicastro* were unexceptional. This case presents the unique facts contemplated by Justice Breyer in order to elicit a new jurisdictional test from the Court. 564 U.S. at 890. The “specific targeting” model outlined by Justice Kennedy should be adopted in this case.

The undisputed facts of this case are that Ooma did not prepare or adopt any business or marketing plan specifically directed at Oregon. Ooma also had no employees and owned no real or tangible personal property in the state. Ooma also had a *national* business plan to sell its hardware and services to the *United States market*. Ooma developed a *national* advertising plan to solicit sales from customers across the *United States*. Ooma owned a website that could be viewed by *anyone* with access to the internet. Ooma did not tailor its business plans, advertising, or online presence to focus its solicitation efforts on Oregon residents. In the words of Justice Kennedy in *Nicastro*, the facts of this case “may reveal an

intent to serve the U.S. market, but they do not show that [Ooma] purposefully availed itself of the [Oregon] market.” *Id.* at 886. Because Ooma did not purposefully avail itself of the Oregon market for purposes of the Due Process Clause, the assessment of E911 taxes must be abated.

f. The Tax Court Erred by Focusing on Ooma’s Sales Volume as a Critical Factor of the Due Process Clause Analysis

Under U.S. Supreme Court precedent, volume of sales into a forum state, by itself, has never been a critical determinant on the question of jurisdiction under the Due Process Clause. In this case, the Tax Court latched on to Ooma’s customer count, how many VoIP “lines” were operative, and the number of hardware units sold into Oregon as the basis for supporting Due Process Clause jurisdiction. Order, docket entry date 03/02/2020, at 11. In addition, the Tax Court repeatedly references Ooma’s “recurring billings” to its customers receiving VoIP services as supporting tax jurisdiction.¹³ Reliance on these facts,¹⁴ however, is improper in light of guiding precedent.

Reference is made to the chart outlined by the Tax Court on pages 14 and 15 of its opinion. At its height, in March 2016, the number of Ooma VoIP “lines” in Oregon was

¹³ *Id.* at p. 12.

¹⁴ As noted in footnote 13 of the Tax Court’s opinion, there is a dispute regarding the exact number of Oregon customers, the number of “lines” at issue, and the correct description of the amount of hardware sold to Oregon residents through various channels.

13,467. The Tax Court equates “lines” with customers. Yet, even at 13,467 sales to Oregon customers, this falls substantially short of the 20,000 to 100,000 sales of tire valves by the manufacturer in *Asahi*. Further, the sales volume of the manufacturer in *Asahi* was only discussed by the Court in its recitation of facts and was never again mentioned as a basis for jurisdiction.¹⁵

The chart also references “Product Sales to Oregon customers,” but these sales of hardware were accomplished through several channels. Notably, the bulk of the sales were through third party retailers with locations in Oregon. The chart does not provide a breakdown of sales of hardware directly by Ooma versus third party sales of hardware.

Perhaps of most importance to the Tax Court was the column in the chart tabulating “Recurring Service Billings to Oregon customers.” In the words of the Tax Court:

“By the time Taxpayer has established an ongoing, but readily terminable, service relationship with customers in Oregon, Taxpayer may no longer rely on its nationwide sales and marketing efforts for immunity from tax even if, as Taxpayer contends, those efforts target no one by targeting everyone.”

As an initial matter, the Tax Court does not cite a single case from Oregon, the U.S. Supreme Court, or any other jurisdiction in support of this holding. The adoption of such a standard promotes the very unpredictability that threatens the

¹⁵ See *Asahi*, 480 U.S. at 106.

continued importance of the Due Process Clause. At what point in time did Ooma “establish” a service relationship with Oregon customers? Based on the chart supporting the Tax Court's ruling, how do we know that all of this revenue came from ongoing customers?¹⁶

The Tax Court posits that Ooma “must have at least provided adequate VoIP service to its existing customers” in order to increase the number of “lines” and “recurring” billings. Order, docket entry date 03/02/2020, at 15. Based on this “ongoing service,” the Tax Court deemed Ooma to be engaged in a “course of conduct targeting [Oregon] customers.” *Id.* Again, the Tax Court provides no support for this rule of law and makes factual assumptions that are not part of the stipulated factual record. Stated simply, there is no basis for concluding that an “ongoing service” relationship to provide telecommunications services – much less nomadic VoIP service – to a defined set of customers in the forum state is sufficient to support jurisdiction under the Due Process Clause.

¹⁶ Neither the Stipulation of Facts nor the referenced chart discuss the significance of customer churn. In the context of the chart, “recurring” billings means charges to customers – whether they remained a customer for one month or a year – that are charged on a monthly basis. The chart merely denotes two revenue streams – product (hardware) sales and recurring monthly charges for VoIP services.

**g. The Assertion of Tax Jurisdiction Over Ooma Offends
“Traditional Notions of Fair Play and Substantive Justice”
Under the Due Process Clause**

Under the Tax Court's theory for asserting tax jurisdiction in this case, Ooma could never have known – with any degree of certainty – at what point during the audit period it would have been responsible for collecting the E911 Tax from Oregon customers. The Tax Court relies on customer – or “line” – growth and the increase in “recurring service billings” as supporting tax jurisdiction over Ooma for the audit period. However, based on this logic, there must have been a time that it would have been unconstitutional under the Due Process Clause to assert taxing jurisdiction over Ooma.

The Tax Court did not claim that merely having Oregon customers was sufficient to support jurisdiction. According to the Tax Court, the existence of the “ongoing” VoIP service coupled with “recurring” billings satisfied any constitutional hurdle. Yet, this standard borders on meaningless. Under such a standard, neither Ooma nor any other multistate business would be able to predict with any degree of certainty when they have tax jurisdiction with Oregon.

When a business cannot determine its tax obligations in a forum at the risk of substantial lookback periods and the imposition of interest penalties and strict penalties, “traditional notions of fair play and substantial justice” are ignored. The Tax Court’s holding, if adopted by every other state and locality imposing

E911 Taxes, would promote widespread chaos. So much so that investments in multistate businesses would be negatively impacted given the increased risk of lower returns resulting from the risk of state and local tax liabilities.

B. OREGON IS PRECLUDED FROM IMPOSING THE E911 TAX UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE OOMA LACKED SUBSTANTIAL NEXUS WITH OREGON

Article I, § 8, cl. 3 of the Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States.” It is commonly understood that this express grant of authority by the United States Constitution to Congress carries with it a negative implication with respect to state regulation of interstate commerce. The jurisprudence of the United States Supreme Court refers to this negative implication as the “dormant Commerce Clause.” *See Gibbons v. Ogden*, 9 Wheat, 1, 231-232, 239 (1824).

The Court has stated that “the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The Clause ... ‘by its own force’ prohibits certain state actions that interfere with interstate commerce.” *Quill*, 504 U.S. at 309. Stated differently, the dormant Commerce Clause acts as a check on state power to regulate interstate commerce – a power expressly within the purview of Congress.

The Commerce Clause, as explained by the *Quill* Court, is primarily concerned with burdens placed on interstate commerce. *See Quill*, 504 U.S. at

309. Reviewing its prior decisions, the Court in *Quill* validated the four-part test outlined in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) as providing the proper Commerce Clause approach. *Id.* at 311. Under *Complete Auto*'s four-part test, a state tax survives scrutiny under the Commerce Clause if the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279.

Complete Auto remains the filter through which all state tax laws must pass to survive invalidation under the Commerce Clause. The goal of the Commerce Clause, as intended by our founders, was to promote the free flow of trade across state lines. *Quill*, 504 U.S. at 312-13. For this reason, the test outlined in *Complete Auto* must be applied with a view toward removing state impediments to the fluidity of the national economy.

In *Quill*, the U.S. Supreme Court made clear that in order for a taxpayer to have substantial nexus under the Commerce Clause the taxpayer must be physically present in the taxing jurisdiction. In so holding, the *Quill* Court recognized that to hold otherwise would cause an undue burden on interstate commerce and promote unsettled expectations.

The U.S. Supreme Court's most recent decision addressing the intersection of the Commerce Clause and state and local taxation is *South Dakota v. Wayfair*,

Inc., 138 S. Ct. 2080 (2018). In *Wayfair*, the Court overruled its holding in *Quill* and concluded that substantial nexus for sales and use tax purposes is not controlled by whether or not the taxpayer is physically present in the taxing jurisdiction. Post-*Wayfair*, a taxpayer has substantial nexus as long as it “'avails itself of the substantial privilege of carrying on business' in that jurisdiction.” *Id.* at 2099.

1. The Court's Post-*Wayfair* Approach to “Substantial Nexus” Requires a Review of the Quality and Nature of a Taxpayer's Economic and Virtual Contacts with a State

The Court in *Wayfair* held that substantial nexus exists under the Commerce Clause “when the taxpayer 'avails itself of the substantial privilege of carrying on business' in that jurisdiction.” *Wayfair*, slip op., at 22 (citing *Polar Tankers Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). The online retailers in *Wayfair* had “substantial nexus,” according to the Court, because of the nature and extent of their “economic and virtual contacts” with South Dakota. *Id.* The Court articulated its post-*Wayfair* nexus standard by stating:

“Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than \$100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. S.B. 106, § 1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly

maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.”

Id. at 2080. The first sentence of the paragraph makes clear that the substantial nexus inquiry is controlled by a taxpayer's *economic* returns from a state *and* the *activities* of the taxpayer directed toward the state. The second and third sentences explain that the South Dakota law requires sufficient *economic* contacts to support substantial nexus. The fourth sentence, emphasizes that the size of the taxpayer and the nature of its online marketing *activity* is a critical component of substantial nexus.

In *Wayfair*, the Court did not cite the number of transactions between the taxpayers and residents of South Dakota nor did it note the sales revenue derived from South Dakota residents. The Court did, however, make a point to note that the taxpayers were online retailers with billions in U.S. sales. *Id.* at 2089. Based on the sales revenue of the taxpayers, the Court concluded that “[e]ach easily meets the minimum sales or transactions requirement of the [South Dakota law][.]”

Turning to the activities of the online retailers directed toward the South Dakota market, the *Wayfair* Court merely noted that they were “large national companies that undoubtedly maintained an extensive virtual presence.” *Id.* at 2099. This finding of fact is arguably influenced by the Court's common understanding of e-commerce as explained by its discussion earlier in the opinion of “virtual showrooms” that “show far more inventory, in far more detail, and with

greater opportunities for consumer and seller interaction than might be possible for local stores.” *Id.* at 2095.

Although the Court in *Wayfair* held that substantial nexus under the Commerce Clause requires consideration of the taxpayer's *economic* returns from and its *activities* directed toward a taxing state, it provided no clear guidance on when a finding of substantial nexus is required in a given case. This is so because nexus determinations are fact-specific.¹⁷

2. The Tax Court Erred by Failing to Accurately Quantify Ooma’s Economic Activity in Oregon

The Tax Court concluded that the number of Oregon customers and recurring billings was sufficient to satisfy any Commerce Clause concern relating to substantial nexus. Yet, Ooma took issue with the chart provided by the Department purporting to demonstrate these facts (the “Chart”).

For the reasons articulated in Plaintiff's Response to Defendant's Cross Motion for Summary Judgment and Reply to Defendant’s Response to Plaintiff's Motion for Summary Judgment, the quantity of Ooma’s economic activity in Oregon creates a genuine issue of material fact in this case. The Department

¹⁷ Jaye Calhoun & William J. Kolarik *II*, *Implications of the Supreme Court's Historic Decision in Wayfair*, 89 ST. TAX NOTES 125 (2018) (“[b]ecause the substantial nexus analysis is fact-specific, the only existing guidance for determining the sufficiency of the economic and virtual contacts that satisfy this test are the particular South Dakota contacts of the businesses involved in the *Wayfair* litigation.”).

wrongly interprets the reference to a “Number of VoIP Lines in Oregon” as meaning one VoIP line per customer. Properly understood, one Oregon customer could have multiple VoIP lines of service. This is certainly the case in the context of business customers.¹⁸

In addition to question the number of VoIP lines in service in Oregon during the Period, Ooma questioned the quantification of hardware sales in the Chart. The Chart outlines sales of Ooma hardware by referencing “Product Sales to Oregon Customers.” However, the Department wrongly assumed that 100% of these product sales were made by Ooma. As explained in the Stipulation of Facts, the hardware necessary to receive Ooma’s VoIP services was sold through several channels. In addition to Ooma’s online sales, hardware was sold through independent retailers. The chart does not provide a breakdown of Ooma’s sales of hardware versus sales by third parties.

Although the Tax Court noted Ooma’s objections to the use of the Chart, it concluded that no genuine issue of material fact existed to prevent the grant of summary judgment to the Department. Order, docket entry date 03/02/2020, at 11

¹⁸ The Stipulation of Facts entered into between the parties in this case was executed before the holding in *Wayfair* made clear that the number of transactions in a state was a relevant consideration for substantial nexus purposes under the Commerce Clause.

n. 13. This is true, according to the Tax Court, based on “the extent of [Ooma’s] overall connection to Oregon during the periods at issue.” *Id.*

3. The Tax Court Erred by Failing to Consider the Extent of Ooma’s Virtual Presence in Oregon

The *Wayfair* Court made clear that a taxpayer’s activities toward a taxing state are a critical component of the substantial nexus determination. Yet, in this case, the Tax Court relegated its discussion on this point to a footnote. Order, docket entry date 03/02/2020, at 18 n. 22. The Tax Court intimated that virtual presence was not a key consideration in *Wayfair* by noting that “the Court discussed no specific factual findings on this point” and that the “case [had] proceeded on a spare factual record.” *Id.* Dismissing Ooma’s claim that it lacked the virtual presence required under *Wayfair*, the Tax Court stated “the court finds the factual record of [Ooma’s] economic presence in Oregon adequate to decide the case without considering the extent, if any, of [Ooma’s] virtual presence.” *Id.*

It is clear from the Court’s holding in *Wayfair* that “substantial nexus” requires a review of the taxpayer’s economic connections with a state *and* activities directed at the state. With respect to the taxpayer’s activities direct at the taxing state, the *Wayfair* Court considered the size and “extensive virtual presence” of the online retailers.

The Court’s conclusion in *Wayfair* that the “extensive virtual presence” of the online retailers met the “substantial nexus” requirement under the Commerce

Clause is somewhat amorphous in the absence of any discussion of what comprised this “extensive virtual presence.” However, it is clear that merely having an online marketplace is *not* an “extensive virtual presence.” If it were otherwise, there would have been no need for the *Wayfair* Court to use the word “extensive” to describe the nature of the online retailers' virtual presence in South Dakota. Any online retailer – no matter how small or sophisticated – would be deemed to have “substantial nexus” under such an interpretation.

Ooma did not use targeted advertising to reach customers in Oregon. Ooma had a national advertising campaign that was indiscriminate in soliciting sales through its online presence. The stipulated facts of this case are that Ooma did not develop a business plan or an advertising campaign unique to Oregon. Ooma did not use direct mail or cookie-driven pop-up advertisements designed to solicit sales from Oregon residents. Without such an evidentiary showing, no finding of “substantial nexus” can maintain.

The *Wayfair* Court also supported its finding of “substantial nexus” by citing to the size of the online retailers. With net revenues in the billions, the Court felt safe in its assumption that the online retailers “undoubtedly maintain[ed] an extensive virtual presence” and targeted customers in South Dakota. *Wayfair*, slip op., at 23. The same cannot be said of Ooma. From a net revenue standpoint, Ooma is a very small business when compared to the likes of Wayfair, Inc,

Overstock.com, Inc., and Newegg, Inc. The holding in *Wayfair* supports Ooma's contention that "substantial nexus" is lacking in this case and, therefore, the assessments for E911 Taxes must be abated.

C. THE TAX COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE DEPARTMENT IN THE FACE OF SEVERAL GENUINE ISSUES OF MATERIAL FACT

The Tax Court noted Ooma's contentions that there existed genuine issues of material fact that precluded the issuance of summary judgment to the Department. However, the Tax Court wrongly dismissed Ooma's concerns because they did not rise to the level of a "triable fact." Order, docket entry date 03/02/2020, at 11 n. 13.

Post-*Wayfair*, the substantial nexus inquiry involves a two-pronged approach. A court must evaluate the taxpayer's economic returns from a state and its activities directed toward a state. In this case, Ooma raised genuine concerns regarding the Department's characterization of the Chart used to summarize Ooma's economic returns from Oregon. Specifically, Ooma questioned the quantification of its customer base in Oregon and the number of hardware units actually sold by Ooma to Oregon customers. Ooma's concerns speak to a critical component of the analysis required for substantial nexus under the Commerce Clause. Yet, the Tax Court rejected Ooma's claim of a genuine issue of material fact choosing to rely on "[Ooma's] overall connection to Oregon during the periods at issue." Order, docket entry date 03/02/2020, at 11 n. 13.

Regarding the required substantial nexus inquiry into Ooma's activities directed toward Oregon, Ooma raised the concern that it lacked any significant virtual presence in Oregon. In *Wayfair*, the "extensive virtual presence" of the taxpayers was cited in support of a finding of substantial nexus. The Tax Court again noted and dismissed Ooma's claim of the existence of a genuine issue of material fact. The Tax Court stated that "the factual record of [Ooma's] economic presence in Oregon [is] adequate to decide the case without considering the extent, if any, of [Ooma's] virtual presence." Order, docket entry date 03/02/2020, at 18 n. 24.

The Tax Court's handling of Ooma's arguments is confounding. The Tax Court rejected Ooma's argument of a genuine issue of material fact on economic returns from Oregon, instead relying on "[Ooma's] overall connection to Oregon during the periods at issue." However, in dismissing Ooma's concerns of a genuine issue of material fact relating to its activities directed toward Oregon, the Tax Court found "[Ooma's] economic presence in Oregon adequate to decide the case." In sum, it appears that the Tax Court avoided Ooma's claim of a genuine issue of material fact on economic returns from Oregon by relying on Ooma's activities directed toward Oregon and avoided Ooma's claim of a genuine issue of material fact regarding its activities directed toward Oregon by relying on Ooma's economic returns from Oregon.

The Tax Court erred by granting summary judgment to the Department.

ORCP 47 C provides in pertinent part:

“The court shall grant the motion if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.”

In this case, there remain genuine issues of material fact regarding Ooma’s economic returns from Oregon and its activities directed toward the state.

The Stipulation of Facts in this case was entered into prior to the holding in *Wayfair*. Ooma’s argument to the Tax Court Magistrate Division relied on *Quill* for the position that it lacked substantial nexus for E911 Taxes because Ooma had no physical presence in Oregon. For this reason, the significance of the number of VoIP lines used by Oregon customers, how much hardware was sold by Ooma versus third parties, and the extent of Ooma’s virtual presence had not yet become relevant to the substantial nexus inquiry. It was not until after *Wayfair* that the relevance of these facts to the newly-constructed substantial nexus inquiry became critical. The Tax Court erred by granting summary judgment to the Department in these circumstances.

IV. CONCLUSION

For the foregoing reasons, Ooma respectfully requests that this Court reverse the order of the Tax Court and hold that ORS 403.200 is unconstitutional as applied to the facts of this case. In the alternative, Ooma requests that this Court hold that the Tax Court's grant of summary judgment to the Department was improper and that this case must be remanded to the Tax Court to resolve the outstanding issues of material facts.

DATED: December 29, 2020.

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