

COMMERCIAL COURT DOCKET CASE

STATE OF INDIANA) IN MARION SUPERIOR COURT
) SS
COUNTY OF MARION) CAUSE NO. _____

AMERICAN CATALOG MAILERS)
ASSOCIATION and NETCHOICE,)
)
Plaintiffs,)

v.)

ADAM KRUPP, in his official capacity)
as the Commissioner of the Indiana)
Department of Revenue, ERIC)
HOLCOMB, in his official capacity as)
Governor of the State of Indiana, and)
INDIANA DEPARTMENT OF)
REVENUE,)
)
Defendants.)

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs American Catalog Mailers Association (“ACMA”) and NetChoice (together, the “Plaintiffs”) allege the following in support of their Complaint for Declaratory Judgment, which seeks a prospective declaration of rights and obligations under a statute in accordance with the Uniform Declaratory Judgment Act, Ind. Code § 34-14-1-1 *et seq*:

NATURE OF THE ACTION

1. This is an action for declaratory judgment by the ACMA and NetChoice challenging the constitutionality of a newly enacted statute, House Enrolled Act No. 1129 (2017) (“Act 1129”), which was adopted by the legislature with the express understanding that its terms contradict the United States Supreme Court’s decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), regarding the limitations on state taxing power under the Commerce Clause of the United States Constitution. The Supreme Court in *Quill* held that a State lacks the authority under the Commerce Clause to impose state sales and use tax collection and reporting obligations upon a seller that has no physical presence in the state, either directly or through third parties, and whose only connection with the state is communicating with customers via the instrumentalities of interstate commerce, *i.e.*, telephone, U.S. mail, common carrier, and now the Internet. *See Quill Corp.*, 504 U.S. at 313-19. The new statute, Act 1129, imposes the obligation to report Indiana gross retail tax expressly upon retail merchants and service providers that have no physical presence in the state, based solely on making sales over certain minimum thresholds to Indiana customers via telephone, mail order, email, and the Internet. Because Act 1129 violates the *Quill* physical presence requirement, usurps the role of Congress in regulating interstate commerce, and unlawfully expands the State’s taxing authority over companies, individuals, and organizations located throughout in the United States, and potentially the world, based solely on their having customers in Indiana, the law is plainly unconstitutional.

PARTIES

2. Plaintiff ACMA is incorporated in Washington, D.C. and is the leading trade association in the United States representing the interests of companies, individuals, and organizations engaged in and supporting catalog marketing.

3. Plaintiff NetChoice is incorporated in Washington, D.C., and is a leading trade association of Internet companies and organizations dedicated to advancing the interests of eCommerce businesses and online consumers.

4. Defendant Adam Krupp is the Commissioner of the Indiana Department of Revenue (“Department”) and is charged with the enforcement of Act 1129.

5. Defendant Eric Holcomb, is the Governor of the State of Indiana. It is his responsibility under Article 5, § 16 of the Indiana Constitution to “take care that the laws are faithfully executed,” and is charged with the enforcement of Act 1129. Governor Holcomb is sued in his official capacity.

6. Defendant Indiana Department of Revenue (“IDR”) is charged with the enforcement of Act 1129.

JURISDICTION AND VENUE

7. The Court has jurisdiction to adjudicate this action under the Indiana Uniform Declaratory Judgment Act, Ind. Code § 34-14-1-1 *et seq*, and 42 U.S.C. § 1983.

8. Venue is proper in this county under Ind. R. Civ. P. 75(4) because the principal office of the Defendant is located here and the Defendant will be required to take action to enforce Act 1129 from the Department’s offices in this county.

ALLEGATIONS

9. The United States Supreme Court, in *Quill*, held that sellers “who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business” lack the necessary “substantial nexus” with a State for the State to require such out-of-state sellers to collect and remit the State’s sales and use taxes. 504 U.S. at 307, 313-319.

10. The Court in *Quill* reaffirmed that in order for a State to have the authority under the “substantial nexus” standard of the Commerce Clause to require an out-of-state seller to collect or report the State’s sales and use taxes, the seller must have a “physical presence” in the state. *Id.* at 314, 317-18.

11. The United States Supreme Court has not overruled, superseded, or limited its decision in *Quill*.

12. The physical presence requirement of *Quill* currently remains the law of the land under the United States Constitution. The States, including Indiana, are bound by *Quill*.

13. On April 28, 2017, Governor Holcomb signed Act 1129 into law.

14. Act 1129 provides that “[a] retail merchant that does not have physical presence Indiana” is required to collect and remit gross retail tax if the retail merchant meets either of two, alternative criteria in the prior or the current calendar year: (a) the retail merchant’s gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into Indiana exceeds one hundred thousand dollars (\$100,000); or (b) the seller sold tangible

personal property, any product transferred electronically, or services for delivery into Indiana in two hundred (200) or more separate transactions. Act 1129, § 2.

15. Act 1129 takes effect on July 1, 2017.

16. Both ACMA and NetChoice have members who are directly and adversely affected by the sales tax reporting obligations imposed under Act 1129.

17. Act 1129 contains a lengthy statement of general assembly findings. The findings expressly acknowledge that “[t]he Supreme Court of the United States should reconsider its doctrine that prevents ... states from requiring remote sellers to collect gross retail tax....” *Id.* § 5(7).

18. The findings further acknowledge that “it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the gross retail tax in light of existing federal constitutional doctrine...” *Id.* § 5(8).

19. Act 1129 is modelled after a South Dakota statute that includes substantially identical provisions purporting to require sales tax collection by out-of-state retailers that have no physical presence in the State. The South Dakota statute likewise contains a substantially similar, equally lengthy statement of legislative findings.

20. The South Dakota statute was declared unlawful and its enforcement enjoined by the South Dakota Circuit Court by order dated March 6, 2017.

21. On June 21, 2017, counsel for the Plaintiffs wrote to the Defendant, Commissioner Krupp, alerting him to the Plaintiffs’ position that Act 1129 is unconstitutional.

22. Plaintiffs' counsel further noted that litigation presenting the identical federal constitutional issues is now before the South Dakota Supreme Court on a "fast track" schedule with the express understanding that the State of South Dakota will seek review by the United States Supreme Court. Plaintiffs' counsel invited Commissioner Krupp to suspend enforcement of Act 1129 pending resolution of the South Dakota appeal. Commissioner Krupp has not responded.

COUNT I – Declaratory Judgment and 42 U.S.C. § 1983
Violation of the Commerce Clause of the United States Constitution

23. Plaintiffs incorporate the allegations of paragraphs 1–22 as if fully set forth herein.

24. *Quill* bars a State from requiring sales and use tax collection and reporting by an out-of-state seller or service provider that has no physical presence in the state.

25. Act 1129 expressly requires out-of-state catalog merchants, Internet sellers, and service providers that do "not have a physical presence in the state" to report Indiana gross retail taxes.

26. Act 1129, on its face, violates the Commerce Clause under *Quill*.

27. The Defendant is the state official charged with, and liable for, the enforcement of Act 1129.

28. This Court is bound to follow and enforce Supreme Court precedent.

29. This Court is empowered under the Uniform Declaratory Judgments Act, Ind. Code § 34-14-1-1 *et seq*, to declare the rights and obligations of the parties under Act 1129.

30. This Court should declare Act 1129 unconstitutional and unenforceable, and award such further relief as is just and proper.

COUNT II – Declaratory Judgment and 42 U.S.C. § 1983
Violation of the Due Process Clause of the United States Constitution

31. Plaintiffs incorporate the allegations of paragraphs 1–30 as if fully set forth herein.

32. The Due Process Clause of the United States Constitution, made applicable to the States through the Fourteenth Amendment, requires a definite link and a minimum connection between the state and a person it seeks to tax.

33. The Supreme Court has not determined whether, for purposes of the Due Process Clause, the prescriptive jurisdiction of a state, *i.e.*, its jurisdiction to impose tax or regulatory obligations, is co-extensive with the state’s adjudicative jurisdiction.

34. The minimum thresholds in Act 1129 for asserting prescriptive jurisdiction over retail merchants that have no physical presence in the state are inconsistent with the requirements of the Due Process Clause.

35. The Defendant is the state official charged with, and liable for, the enforcement of Act 1129.

36. This Court is empowered under the Uniform Declaratory Judgments Act, Ind. Code § 34-14-1-1 *et seq*, to declare the rights and obligations of the parties under Act 1129.

37. This Court should declare Act 1129 unconstitutional and unenforceable under the Due Process Clause, and award such further relief as is just and proper.

WHEREFORE, Plaintiffs respectfully pray that the Court:

- (A) enter a declaration that Act 1129 is unconstitutional and unenforceable on its face;
- (B) enter judgment for the Plaintiffs;
- (C) enjoin enforcement of Act 1129;
- (D) award the Plaintiffs their attorneys' fees and costs; and
- (E) grant such further relief as the Court deems just and proper.

Dated this 30th day of June, 2017.

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/s/ Alice M. Morical

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*Admission *pro hac vice* forthcoming

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