No. 21-

In the

Supreme Court of the United States

OOMA, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In its landmark decision of *South Dakota v. Wayfair, Inc.*, this Court held that a nonresident taxpayer has substantial nexus with the taxing State for Commerce Clause purposes only if the taxpayer "avails itself of the substantial privilege of carrying on business" in the taxing State. The "availment" inquiry is met, the Court explained, through a showing of both "economic and virtual contacts."

In this case, Oregon issued an assessment to Ooma, Inc. ("Ooma") for E911 taxes. Ooma argued to the Supreme Court of Oregon that it lacked the requisite virtual contacts with the State to support an assessment of E911 taxes. The lower court, purporting to apply the holding in *Wayfair*, determined that an inquiry into Ooma's virtual contacts was unnecessary because this Court "did not articulate [virtual contacts] as a requirement" for substantial nexus.

The question presented is: does the Commerce Clause prevent the imposition of Oregon's E911 tax in this case where the lower court wholly dismissed the "virtual contacts" inquiry as irrelevant to the determination of substantial nexus?

PARTIES TO THE PROCEEDING

Ooma is petitioner here and was plaintiff-appellant below.

The Department of Revenue, State of Oregon (the "Department"), is respondent here and was defendant-appellee below. The Department has authority under Oregon law to administer the E911 tax that is the subject of this case.

CORPORATE DISCLOSURE STATEMENT

Ooma is a publicly traded corporation and has no parent corporation. No publicly held corporation owns 10% or more of Ooma's stock

STATEMENT OF RELATED PROCEEDINGS

- *Ooma, Inc. v. Department of Revenue, State of Oregon*, Docket No. SC S067581, Supreme Court of Oregon. Judgment entered Dec. 23, 2021.

- *Ooma, Inc. v. Department of Revenue, State of Oregon*, Docket No. TC 5331, Oregon Tax Court, Regular Division. Judgment entered Mar. 2, 2020.

- *Ooma, Inc. v. Department of Revenue, State of Oregon*, Docket No. TC-MD 160375G, Oregon Tax Court, Magistrate Division. Judgment entered April 13, 2018.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

STATEMENT OF RELATED PROCEEDINGS iv

TABLE OF CONTENTS. v

TABLE OF APPENDICES viii

TABLE OF CITED AUTHORITIES ix

PETITION FOR WRIT OF CERTIORARI. 1

OPINIONS BELOW. 4

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE .5

A. Factual Background 5

1. Oregon Law Relating to the Imposition of Tax on VOIP Providers 5

Page

2. Ooma's Economic and Virtual Contacts with Oregon 6

B. Procedural History 7

REASONS FOR GRANTING THE PETITION 9

I. This Court's Commerce Clause jurisprudence is marked by a clear shift from rigid formalism to more flexible interpretations 9

II. The *Wayfair* Court's rejection the bright-line rule in *Quill* was premised on the existence of virtual contacts in our "increasingly interconnected economy" that make remote sellers present in a taxing State 11

III. State economic nexus laws fail to take into account the significance of a remote seller's virtual contacts with the taxing State 13

IV. This Court's holding in *Wayfair* did not replace one bright-line rule for another 15

V. It is important to resolve the confusion over the significance of the "virtual contacts" component of this Court's test for substantial nexus under the Commerce Clause, because, with one exception, every State that imposes a sales tax has linked substantial nexus solely to economic contacts 16

Page

VI. This case is a good vehicle for this Court to resolve the confusion regarding the concept of virtual contacts as explained in *Wayfair* 20

CONCLUSION 23

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE SUPREME COURT OF OREGON, FILED DECEMBER 23, 2021 . . . . 1a

APPENDIX B — OPINION OF THE OREGON TAX COURT, REGULAR DIVISION, FILED MARCH 2, 2020 . . . . 21a

APPENDIX C — OPINION OF THE OREGON TAX COURT, MAGISTRATE DIVISION, FILED MARCH 27, 2018 . . . . 67a

TABLE OF CITED AUTHORITIES

Page

CASES

American Manufacturing Co. v. St. Louis,
250 U.S. 459 (1919) 9

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) . . . . *passim*

Direct Marketing Assn. v. Brohl,
575 U.S. 1 (2015) 1, 10, 11, 12

Freeman v. Hewit,
329 U.S. 249 (1946) 9

J. McIntyre Machinery Ltd. v. Nicastro,
564 U.S. 783 (2011) 7

Leloup v. Port of Mobile,
127 U.S. 640 (1888) 9

National Bellas Hess, Inc. v. Dep't of Revenue of Ill.,
386 U.S. 753 (1967) 1, 10, 22

Philadelphia v. New York,
437 U.S. 617 (1917) 12

Polar Tankers, Inc. v. City of Valdez,
557 U.S. 1 (2009) 2

Page

Quill Corp. v. North Dakota,
504 U.S. 298 (1992). . . . . *passim*

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138 S. Ct. 2080 (2018). . . . . *passim*

Spector Motor Service v. O'Connor,
340 U.S. 602 (1951) 9

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 12, 16

STATUTES AND OTHER AUTHORITIES

U.S. Const., art. I, § 8, cl. 3 5

28 U.S.C. § 1257(a). 4

47 C.F.R. § 9.5 5

Ala. Admin. Code § 810-6-2-.90.03(1) 20

Alaska Remote Sellers Tax Code, Alaska Remote
Sellers Tax Commission (Jan. 6, 2020) 17

Ariz. Rev. Stat. Ann. § 42-5044(A)(1) 18

Ark. Code Ann. § 26-52-111(a) 17

Cal. Rev. & Tax Cd. § 6203(c)(4) 18

Page

Colo. Rev. Stat. § 39-26-102(3)(c)(I)(A) 18

Conn. Gen. Stat. § 212-40(a)(12(G) 17

D.C. Code Ann. § 47-2001(w) 17

Fla. Stat. § 212.0596 18

Ga. Code Ann. § 48-8-2(8)(M.1) 15, 17

Haw. Rev. Stat. § 237-2.5 17

Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 Harv. J.L. Tech. 549 (2000) 1

Idaho Code § 63-3611(3)(h) 18

ILCS Chapter 35 § 120/2(b) 17

Ind. Code § 6-2.5-2-1(d) 17

Iowa Code § 423.14A(3)(a) 18

Jay Calhoun & William J. Kolarik II, *Implications of the Supreme Court's Historic Decision in* Wayfair, 89 State Tax Notes 125 (2018) 19

Page

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Kan. Stat. Ann. § 79-3702(h)(1) 18

Ky. Rev. Stat. Ann. § 139-340(2)(g) 17

La. Rev. Stat. Ann. § 47:301(4)(m)(i) 17

Mass. G. L. Chapter 64H § 34 18

Md. Code Ann. Tax-Gen. § 11-701(b)(2) 17

Me. Rev. Stat. Ann. 36 § 1754-B(1-B)(B). 17

Mich. Comp. Laws Ann. § 205.52c(1) 17

Minn. Stat. § 297A.66 17

Miss. Code Ann. § 27-67-4(2)(e) 18

Mo. Rev. Stat. § 144.635 18

N.C. Gen. Stat. § 105-164.8(b)(9) 17

N.D. Cent. Code § 57-39.2-02.2 18

Page

N.J. Rev. Stat. § 54:32B-2(i) 17

N.M. Admin. Code § 3.2.1.12(A) 18

N.Y. Tax Law § 1101(b)(8)(vi) 17

Neb. Rev. Stat. § 77-2701-13(2) 17

Nev. Admin. Code § 372.856 17

Ohio Rev. Code § 5741.01(I) 18

Okla. Stat. 68 § 1392(G) 18

ORS 403.200(1) 5

ORS 403.215(1) 5

ORS 403.215(2) 5

ORS 403.245(1) 5

Pa. Stat. Ann. 72 § 7201(b) 18

R.I. Gen. Laws § 44-18.2-3(E) 18

Richard D. Pomp, Wayfair: *Its Implications and Missed Opportunities*, 58 Wash. U.J.L. & Pol'y 1 (2019) 22

Page

S. 106, 2016 Leg. Assembly, 91st sess. (S.D. 2016). 11

S.C. Code Ann. § 12-36-70 18

S.D. Codified Laws § 10-64-2. 18

Tenn. Code Ann. § 67-6-524. 18

Tex. Admin. Code § 3.286(b)(2)(B)(i). 18

Utah Code Ann. § 59-12-107(2)(c) 18

Va. Code Ann. § 58.1-612 18

Vt. Stat. Ann. § 9701(F) 18

W. Va. Code § 11-15A-6 18

Wash. Rev. Code § 82.04.067(1)(c)(i) 18

Wis. Stat. § 77.51(13gm) 18

Wyo. Stat. § 39-15-501(a) 18

PETITION FOR WRIT OF CERTIORARI

Under this Court's Commerce Clause jurisprudence, a state tax survives scrutiny as long as it applies to an activity with a substantial nexus with the taxing State. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In *Quill Corp. v. North Dakota*, this Court reaffirmed its prior holding in *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967), that the Commerce Clause requirement of substantial nexus is met only in cases where the taxpayer is physically present in the taxing state. 504 U.S. 298, 317-318 (1992). The Court in *Quill* readily acknowledged the fact that the bright-line physical presence rule was "artificial at its edges." *Id*. at 315. Despite its accepted faults, however, the *Quill* Court recommitted its faithfulness to the bright-line test.

In the decades that followed *Quill*, this Court's bright-line physical presence rule was roundly criticized by courts and scholars alike. *See e.g.*, Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 Harv. J.L. Tech. 549, 553 (2000) (stating that the Court's nexus rules "should focus on rules that are appropriate to the twenty-first century, not the nineteenth"). In *South Dakota v. Wayfair, Inc.*, this Court renounced the bright-line physical presence rule articulated in *Quill*. 138 S. Ct. 2080 (2018). Motivating this doctrinal reversal was the concern that "[m]odern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*." *Id*. at 2095. Remote sellers, although not physically present, possess the virtual capabilities to be "present in a State in a meaningful way" in direct competition for customers with brick-and-mortar sellers. *Direct Marketing Assn. v. Brohl*, 575 U.S. 1, 18

(2015) (Kennedy, J., concurring). Despite competing on the same playing field for sales, remote sellers relied on the holding in *Quill* to avoid collecting and remitting sales and use tax to the taxing State. Such arbitrary results persisted in the face of "dramatic technological social changes" in the "increasingly interconnected economy." *Id.*

In place of the inflexible bright-line rule in *Quill*, this Court adopted a more flexible approach consistent with the development of its Commerce Clause precedent dating back to *Complete Auto*. After disposing of the *Quill* physical presence rule, this Court determined that substantial nexus is established "when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Wayfair*, 138 S. Ct. at 2099 (citing *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). The Court held that the taxpayers in *Wayfair* had substantial nexus with South Dakota "based on both economic and virtual contacts." *Id.*

Following this Court's decision in *Wayfair*, many States raced to enact economic nexus laws. It is clear from the face of these laws, however, that the States have adopted the exact Commerce Clause formalism rejected by this Court in *Wayfair*. Each such state law outlines inflexible bright-line sales and/or transaction thresholds to determine substantial nexus. Consideration of a taxpayer's "virtual contacts" is deemed wholly-irrelevant to the analysis. In this case, the State of Oregon – irrespective of the fact that there is no applicable economic nexus statute at issue – has relied solely on sales revenue and customer count to resolve the substantial nexus question. In so doing, Oregon has flatly ignored the thoughtful instruction of this

Court requiring a consideration of "virtual contacts" to support a finding of substantial nexus.

As explained in *Wayfair*, the presence of "virtual contacts" is a critical component of the Commerce Clause analysis. The Commerce Clause acts as a bar to the "creat[ion] of market distortions." 238 S. Ct. at 2094. The existence of market distortions, this Court explained, is evidenced by the fact that out-of-state businesses are not competing "on an even playing field" with in-state businesses. *Id.* (quoting *Quill*, 504 U.S. at 329). In *Wayfair*, market distortions were readily apparent as the taxpayers were able to use a "continuous and pervasive virtual presence" to compete as if they were in fact physically located in the taxing State. *Id.* at 2095. By disregarding any review of virtual contacts, States, including Oregon in this case, are only engaged in half of the required constitutional inquiry.

This Court should grant review now to make clear to the States that virtual contacts are a critical component of the Commerce Clause inquiry. Focusing solely on economic contacts will – as it has in the case – unfairly subject out-of-state taxpayers to state tax without any showing that the taxpayer was in fact – through virtual contacts with the taxing State – competing on an uneven playing field with in-state businesses. The singular focus of States on economic thresholds as a proxy for substantial nexus merely substitutes one bright-line rule for another without any thought as to the underlying purpose of the Commerce Clause. This Court must make clear to the States that the Commerce Clause demands more.

OPINIONS BELOW

The decision of the Supreme Court of the State of Oregon affirming the decision of the Oregon Tax Court, Regular Division (App., *infra*, 1a) is reported at 369 Or. 95, 501 P.3d 520 (2021). The decision of the Oregon Tax Court, Regular Division, affirming the decision of the Oregon Tax Court, Magistrate Division (App., *infra*, 21a) is reported at 2020 WL 1035995 (Or.Tax Regular Div. Mar. 2, 2020). The decision of the Oregon Tax Court, Magistrate Division, granting summary judgment to the Oregon Department of Revenue (App., *infra*, 67a) is reported at 2018 WL 1790184 (Or.Tax Magistrate Div. Apr. 13, 2018).

JURISDICTION

On December 23, 2021, the Supreme Court of Oregon issued an order affirming the decision of the Oregon Tax Court, Regular Division. (App., *infra*, 1a). On March 14, 2022, Justice Kagan granted an extension of time within which to file a petition for writ of certiorari to and including April 22, 2022. On April 14, 2022, Justice Kagan granted a second extension of time within which to file a petition for writ of certiorari to and including May 22, 2022. Pursuant to Rule 30.1, the due date to file this petition became May 23, 2022.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides, "The Congress shall have power … [t]o regulate commerce … among the several States …" U.S. Const., art. I, § 8, cl. 3.

STATEMENT OF THE CASE

A. Factual Background.

1. Oregon Law Relating to the Imposition of Tax on VOIP Providers.

Under federal law, providers of Voice of Internet Protocol ("VoIP") services are required to provide their customers with access to local emergency communications systems when calling 9-1-1. 47 CFR § 9.5 (2015). Federal law refers to these services as "E911." Pursuant to this federal mandate, Ooma provided its Oregon customers with E911 access to Oregon's emergency communications system. App. 3a.

During the period in dispute, Oregon imposed an E911 tax on each VoIP line in the amount of $0.75 per month. ORS 403.200(1) (2015). Oregon imposed this tax in return for providing access to its emergency communications system. The revenues from the imposition of the tax were designated for maintaining and improving the system. ORS 403.245(1). Oregon law requires each VoIP provider to collect and remit the E911 tax to the Department on quarterly returns. ORS 403.215(1) – (2).

Ooma neither collected nor remitted E911 taxes to the Department during the relevant period. App. 3a.

2. Ooma's Economic and Virtual Contacts with Oregon.

During the relevant period, Ooma was headquartered in Palo Alto, California. App. 68a. Ooma provides VoIP services to customers across the United States, including Oregon. *Id.* VoIP technology permits users to communicate through a broadband internet connection. *Id.* VoIP customers purchased the broadband connections necessary to use Ooma's services through unaffiliated third parties. *Id.* In order to access Ooma's VoIP services, a customer is required to purchase an Ooma hardware device. *Id.* These devices could be purchased from independent third party retail stores, from Ooma's website, and from online retailers. *Id.* Ooma sold its hardware device to independent third party retailers for resale to residents of Oregon. *Id.* Ooma retained no ownership interest in the hardware devices purchased by Oregon residents. App. 4a.

Ooma had no direct physical connection with Oregon during the periods at issue. Ooma owned no real or tangible property in Oregon and none of Ooma's employees visited the State. App. 69a-70a. Ooma did not hire independent sales representatives to act on its behalf to promote, advertise, solicit, or sell its VoIP services to Oregon residents. App. 69a. Ooma did not secure licenses or permits from any government agency in Oregon. App. 4a. Ooma prepared and implemented national marketing plans and business strategies. App. 70a. Ooma did not prepare or implement a marketing plan or business

strategy that specifically targeted Oregon residents.[1] App. 5a.

During the period in dispute, Ooma had revenue from the provision of VoIP services to Oregon residents in the amount of $2.2 million. *Id.* The number of Oregon residents that contracted with Ooma for VoIP services during the period ranged from 6,663 to 13,467. *Id.*

B. Procedural History.

The Department audited Ooma for E911 taxes for the periods January 1, 2013 through March 31, 2016. App. 3a. Following the audit, the Department issued assessments to Ooma for E911 taxes in the aggregate amount of $299,175.75. App. 71a.

Ooma appealed the assessments to the Oregon Tax Court, Magistrate Division. App. 67a. Ooma argued to the lower court that the Due Process Clause and the Commerce Clause prevented Oregon from imposing the E911 tax. App. 72a, 76a. Ooma's argument under the Due Process Clause was premised on this Court's decision in *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 783 (2011). Ooma contended that since its marketing and business plans did not specifically target Oregon residents, the Due Process Clause barred taxation. With respect to the Commerce Clause, Ooma contended that because it lacked

1. The parties entered into a stipulation of facts in this case prior to this Court's ruling in *Wayfair*. As a result, neither the stipulation of facts nor the findings of fact of the lower court contemplated the importance of facts relating to Ooma's virtual contacts with Oregon.

any physical presence in Oregon, the holding in *Quill* prevented imposition of the E911 tax.[2] After a hearing on cross motions for summary judgment, the lower court granted the Department's motion and denied Ooma's motion. App. 88a.

Ooma appealed the decision of the Oregon Tax Court, Magistrate Division, to the Oregon Tax Court, Regular Division, which affirmed the decision of the lower court. App. 66a. In its analysis of the Commerce Clause, the lower court correctly cited to *Wayfair*'s requirement of a showing of "economic and virtual contacts." App. 47a. However, the lower court upheld the assessment solely because "[Ooma's] sales revenue, greatly exceeds the minimum sales revenue under South Dakota law that the Court approved in *Wayfair*." App. 48a.

Ooma appealed this ruling to the Supreme Court of Oregon which affirmed the judgment of the lower court. App. 20a. In so holding, the court acknowledged the discussion of "virtual contacts" in *Wayfair*, but concluded that "[this] Court did not articulate that as a requirement." *Id*.

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2. The appeal to the Oregon Tax Court, Magistrate Division, was briefed and argued prior to *Wayfair*.

REASONS FOR GRANTING THE PETITION

I. This Court's Commerce Clause jurisprudence is marked by a clear shift from rigid formalism to more flexible interpretations.

Early Commerce Clause decisions from the Court took a hard line on when States could tax interstate commerce. In *Leloup* v. *Port of Mobile*, 127 U.S. 640, 648 (1888), the Court held that "no State has the right to lay a tax on interstate commerce in any form." However, not long after *Leloup*, the Court's position softened slightly as it distinguished between "direct" and "indirect" burdens on interstate commerce. The Court struck down State laws that "directly" burdened interstate commerce, but "indirect" burdens were generally acceptable. *See American Manufacturing Co. v. St. Louis*, 250 U.S. 459 (1919) (upholding as valid a tax imposed a condition of obtaining a business license as an "indirect tax" on interstate commerce) and *Freeman v. Hewit*, 329 U.S. 249 (1946) (striking down a state tax on gross receipts from the sale of securities as a "direct" tax on interstate commerce).

In *Complete Auto*, this Court reflected on its prior Commerce Clause decisions and concluded that the results were ultimately controlled by "the formal language of the tax statute rather than its practical effect." 430 U.S. at 279. The Court criticized its approach to the Commerce Clause as having "no relationship to economic realities." *Id*. Referring directly to its prior rulings in *Freeman* and *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), the Court noted that its rigid interpretation reflected "a triumph of formalism over substance" and "served only

to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause." *Id.*

The Court in *Complete Auto* changed the course of its Commerce Clause jurisprudence by adopting a more "practical analysis." *Id*. The Court held that a state tax survives a Commerce Clause challenge only 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." *Id*. This four-part test is focused on the "economic consequences" of a State tax and whether the imposition "produces a forbidden effect" on interstate commerce. *Id.* at 288.

In *Quill*, this Court acknowledged the application of the *Complete Auto* four-part test. 504 U.S. at 311. Critical to the outcome in *Quill* was the scope of the substantial nexus prong of *Complete Auto*. The Court, relying on its pre-*Complete Auto* holding in *National Bellas Hess*, determined that for purposes of the Commerce Clause, the requirement of substantial nexus is met only where the taxpayer is physically present in the taxing State. *Id*. at 314. Even at the time it decided *Quill*, this Court noted that the bright-line physical presence rule was "artificial at its edges." *Id*. at 315. However, the Court determined that such concerns were "more than offset by the benefits of a clear rule." *Id*.

In *Direct Marketing Assn.*, Justice Kennedy questioned the holding in *Quill* noting the "far-reaching systemic and structural changes in the economy" caused by the ubiquitous use of the Internet to sell goods and

services. 575 U.S. at 18 (Kennedy, J., concurring). Justice Kennedy further stated that the *Quill* holding was "tenuous" in light of the fact that today "a business may be present in a State in meaningful way without that presence being physical in the traditional sense of the term." *Id.* at 17-18. In the view of Justice Kennedy, the holding in *Quill* was emblematic of the formalism that the Court had seemingly rejected with when it decided *Complete Auto*. Changes to modern commercial life since *Quill* only served to highlight the artificiality of its holding.

The South Dakota legislature responded to Justice Kennedy's invitation in *Direct Marketing Assn.* by enacting a law that required out-of-state sellers to collect and remit sales tax irrespective of any physical presence in the State. S. 106, 2016 Leg. Assembly, 91st sess. (S.D. 2016) (S.B. 106). Under the new law, sellers were responsible to collect and remit sales tax if, on an annual basis, they deliver more than $100,000.00 of goods or services into the State or engage in 200 or more transactions for the delivery of goods or services into the State. This Court granted South Dakota's petition for writ of certiorari to reassess its *Quill* precedent.

II. The *Wayfair* Court's rejection the bright-line rule in *Quill* was premised on the existence of virtual contacts in our "increasingly interconnected economy" that make remote sellers present in a taxing State.

In *Wayfair*, this Court explained that the bright-line physical presence rule in *Quill* was inconsistent with the Court's Commerce Clause jurisprudence that "eschew[s] formalism for a sensitive, case-by-case analysis

of purposes and effects." 138 S. Ct. at 2094 (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). This was so, according to the Court, because the holding in *Quill* "treats economically identical actors differently." *Id.* The Court supported its holding by noting that advances in modern e-commerce had made *Quill* obsolete. *See id.* at 2094-2095.

Beginning with first principles, the Court in *Wayfair* stated that the fundamental purpose of the Commerce Clause is to even the "playing field" between in-state and remote sellers. *Id.* at 2093-2094 (citing *Philadelphia v. New York*, 437 U.S. 617 (1917) ("Commerce Clause was designed to prevent … economic discrimination")). The holding in *Quill* was inconsistent with this fundamental purpose, the Court observed, because it placed in-state businesses at a "competitive disadvantage relative to remote sellers." *Id.* at 2094. This is so, the Court explained, because our "increasingly interconnected economy" brings buyers and remote sellers closer together through the use of "targeted advertising" and communications facilitated through "internet-enabled device[s]." *Id.* at 2095 (citing *Direct Marketing Assn.*, 575 U.S. at 17).

According to the Court, a remote seller's use the Internet can "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.* As a result, these pervasive virtual connections underscore the fact that a remote seller can be "present" in a taxing State without the physical presence mandated by *Quill*. However, under *Quill* the remote seller – lacking physical presence in the taxing State – avoids having to collect sales tax on its sales to in-state buyers. The bright-line test

in *Quill* functioned to promote a "judicially created tax shelter" for remote sellers. *Id*. Because *Quill* "ignore[d] these substantial virtu al connections" between remote sellers and buyers, the Court in *Wayfair* rejected the physical presence rule. *Id*. at 2095.

In this case, the Supreme Court of Oregon held that Ooma had substantial nexus with the State based solely on its sales volume and customer count. According to the lower court, this Court "did not articulate [virtual contacts] as a requirement." App. 20a. This statement by the lower court is patently incorrect. As explained *supra*, however, not only is the existence of virtual contacts a constitutional requirement, it is the focal point for the constitutional analysis.

III. State economic nexus laws fail to take into account the significance of a remote seller's virtual contacts with the taxing State.

In *Wayfair*, this Court overruled its prior holding in *Quill* because the bright-line physical presence rule had become outdated. The Court demonstrated this fact by explaining that a remote seller could be virtually present in a taxing State without the need for in-state brick-and-mortar locations. S.B. 106, the South Dakota law at issue in *Wayfair*, did not require an analysis of a remote seller's virtual contacts. Substantial nexus existed under the South Dakota law solely based on the remote seller's economic contacts with the State – *i.e.*, delivery of $100,000.00 of goods or services into South Dakota or engaging in 200 or more transactions for delivery of goods or services into the State. In *Wayfair*, this Court, on its own volition, made clear that virtual contacts are

a critical component regarding whether a remote seller has substantial nexus under the Commerce Clause. This Court determined that the remote sellers in *Wayfair* had substantial nexus with South Dakota based on the fact that they were "large, national companies that undoubtedly maintain an extensive virtual presence." *Id*. at 2099.

Despite this clear instruction from the Court, States have rushed to adopt economic nexus laws mirroring S.B. 106. Each such State law is narrowly-focused on bright-line economic thresholds for substantial nexus. These State laws do not require any consideration of a remote seller's virtual contacts with the State.

It was the existence of virtual contacts in our modern economy that exposed the *Quill* physical presence rule as creating an uneven playing field between remote and in-state sellers. In *Wayfair*, it was readily-apparent that the remote sellers took advantage of the use of virtual contacts to make sales. *See* 138 S. Ct. at 2099. However, the States are incorrect to think that every remote has the requisite size and sophistication to do so. By limiting the substantial nexus inquiry to economic thresholds such as sales volume and/or the number of transactions, States at best wrongly assume that every remote seller utilizes virtual connections to the same extent as the taxpayers in *Wayfair*, and at worst completely ignore the clear instruction from this Court regarding the fundamental purpose of the Commerce Clause.

The constitutional shortcomings of the State's economic nexus statutes can be easily demonstrated by way of example. ABC, Inc. is a seller of high-end restaurant appliances with its only physical location in Jacksonville, Florida. ABC, Inc. has no internet presence. ABC, Inc.

receives a telephone order for five new stoves from a new restaurant opening in Savannah, Georgia. The purchase price of the stoves is $101,000.00. Under Georgia law, ABC, Inc. would have substantial nexus with the State because the sale of stoves eclipsed the $100,000.00 sales threshold. *See* Ga. Code Ann. § 48-8-2(8)(M.1). This determination of substantial nexus is made irrespective of the fact that there is no evidence that ABC, Inc. is virtually "present" in Georgia. Lacking any virtual presence in the State, there can also be no showing that ABC, Inc. competes on an unfair "playing field" with Georgia sellers.

Post-*Wayfair*, the Commerce Clause demands a review of virtual contacts on a case-by-case basis to determine if substantial nexus exists under the Commerce Clause. The failure to do so by the States is inexcusable in light of the unambiguous holding in *Wayfair*.

IV. This Court's holding in *Wayfair* did not replace one bright-line rule for another.

This Court's Commerce Clause jurisprudence over the past century reflects a movement away from inflexible, bright-line tests toward approaches requiring a balancing of the quality and nature of a taxpayer's contacts with a taxing State. In *Wayfair*, the Court faulted the *Quill* physical presence rule as being artificial because it "prevented market participants from competing on an even playing field." 138 S. Ct. at 2096. Although the Court blessed the economic thresholds of S.B. 106 as being consistent with constitutional principles, it did so only in conjunction with its conclusion that the remote sellers "undoubtedly maintain an extensive virtual presence." *Id*. at 2099. In sum, the facts of *Wayfair* made the determination of substantial nexus a foregone conclusion.

In *Wayfair*, this Court most certainly did not adopt bright-line test based on economic thresholds as a replacement for the rejected bright line physical presence rule in *Quill*. In *Wayfair*, the Court overturned *Quill* because it represented the very rigid formalism that its modern interpretation of the Commerce Clause had repeatedly rejected. Indeed, the Court explained that its Commerce Clause jurisprudence "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." 138 S. Ct. at 2094 (citing *West Lynn Creamery, Inc.*, 512 U.S. at 201). In *Wayfair*, the Court was not required to engage in a "sensitive, case-by-case analysis of purposes and effects" because of the "undoubted[ ] … virtual presence" of the remote sellers. *Id.* at 2099. Given its reasons for rejecting the physical presence rule in *Quill*, this Court most certainly did not accept the economic thresholds in S.B. 106 as a bright-line litmus test for substantial nexus.

V. It is important to resolve the confusion over the significance of the "virtual contacts" component of this Court's test for substantial nexus under the Commerce Clause, because, with one exception, every State that imposes a sales tax has linked substantial nexus solely to economic contacts.

While it is most certainly true that the States secured a victory in *Wayfair*, the language of their economic nexus laws link a finding of substantial nexus uniquely to sales and/or transaction thresholds. To date, forty-five States and the District of Columbia have adopted economic nexus laws.[3] Of the forty-six total jurisdictions that have adopted

3. The only States that have not adopted economic nexus are those that do not impose a sales tax – Alaska, Delaware, Montana,

economic nexus laws, twenty-five use some combination of sales and/or transaction thresholds as a bright-line test.[4] The remaining twenty States exclusively use a

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New Hampshire, and Oregon. It is important note, however, that Alaska enacted a law permitting its localities to adopt economic nexus. *See* Alaska Remote Sellers Tax Code, Alaska Remote Sellers Tax Commission (Jan. 6, 2020) (permitting localities to adopt economic nexus based on sales of $100,000.00 or more or 200 or more sales transactions).

4. Ark. Code Ann. § 26-52-111(a) (more than $100,000.00 in sales or more than 200 sales transactions); Conn. Gen. Stat. § 212-40(a)(12(G) ($100,000.00 or more in sales or 200 or more sales transactions); D.C. Code Ann. § 47-2001(w) (more than $100,000.00 in sales or more than 200 sales transactions); Ga. Code Ann. § 48-8-2(8)(M.1) (more than $100,000.00 in sales or 200 or more sales transactions); Haw. Rev. Stat. § 237-2.5 ($100,000.00 or more in sales or 200 or more sales transactions); ILCS Chapter 35 § 120/2(b) ($100,000.00 or more in sales or 200 or more sales transactions); Ind. Code § 6-2.5-2-1(d) (more than $100,000.00 in sales or 200 or more sales transactions); Ky. Rev. Stat. Ann. § 139-340(2)(g) (more than $100,000.00 in sales or 200 or more sales transactions); La. Rev. Stat. Ann. § 47:301(4)(m)(i) (more than $100,000.00 in sales or 200 or more sales transactions); Me. Rev. Stat. Ann. 36 § 1754-B(1-B)(B) (more than $100,000.00 in sales or 200 or more sales transactions); Md. Code Ann. Tax-Gen. § 11-701(b)(2) (more than $100,000.00 in sales or 200 or more sales transactions); Mich. Comp. Laws Ann. § 205.52c(1) (more than $100,000.00 in sales or 200 or more sales transactions); Minn. Stat. § 297A.66 (more than $100,000.00 in sales or 200 or more sales transactions); Neb. Rev. Stat. § 77-2701-13(2) (more than $100,000.00 in sales or 200 or more sales transactions); Nev. Admin. Code § 372.856 (more than $100,000.00 in sales or 200 or more sales transactions); N.J. Rev. Stat. § 54:32B-2(i) (more than $100,000.00 in sales or 200 or more sales transactions); N.Y. Tax Law § 1101(b)(8)(vi) (more than $500,000.00 in sales and more than 100 sales transactions); N.C. Gen. Stat. § 105-164.8(b)(9) (more than

sales threshold.[5] The manner in which the overwhelming number of taxing jurisdictions have responded to *Wayfair* is likely explained by their decision to resolve confusion regarding the scope of the decision in favor of the public fisc.

$100,000.00 in sales or 200 or more sales transactions); Ohio Rev. Code § 5741.01(I) (more than $100,000.00 in sales or 200 or more sales transactions); R.I. Gen. Laws § 44-18.2-3(E) ($100,000.00 or more in sales or 200 or more sales transactions); S.D. Codified Laws § 10-64-2 (more than $100,000.00 in sales or 200 or more sales transactions); Utah Code Ann. § 59-12-107(2)(c) (more than $100,000.00 in sales or 200 or more sales transactions); Vt. Stat. Ann. § 9701(F) ($100,000.00 or more in sales or 200 or more sales transactions); Va. Code Ann. § 58.1-612 (more than $100,000.00 in sales or 200 or more sales transactions); W. Va. Code § 11-15A-6 (more than $100,000.00 in sales or 200 or more sales transactions); Wyo. Stat. § 39-15-501(a) (more than $100,000.00 in sales or 200 or more sales transactions).

5. Ariz. Rev. Stat. Ann. § 42-5044(A)(1) (more than $100,000.00 in sales); Cal. Rev. & Tax Cd. § 6203(c)(4) (more than $500,000.00 in sales); Colo. Rev. Stat. § 39-26-102(3)(c)(I)(A) (more than $100,000.00 in sales); Fla. Stat. § 212.0596 (more than $100,000.00 in sales); Idaho Code § 63-3611(3)(h) (more than $100,000.00 in sales); (Iowa Code § 423.14A(3)(a) ($100,000.00 or more in sales); Kan. Stat. Ann. § 79-3702(h)(1) (more than $100,000.00 in sales); Mass. G. L. Chapter 64H § 34 (more than $100,000.00 in sales); Miss. Code Ann. § 27-67-4(2)(e) (more than $250,000.00 in sales); Mo. Rev. Stat. § 144.635 ($100,000.00 or more in sales); N.M. Admin. Code § 3.2.1.12(A) ($100,000.00 or more in sales); N.D. Cent. Code § 57-39.2-02.2 (more than $100,000.00 in sales); Okla. Stat. 68 § 1392(G) ($100,000.00 or more in sales); Pa. Stat. Ann. 72 § 7201(b) ($100,000.00 or more in sales); S.C. Code Ann. § 12-36-70 (more than $100,000.00 in sales); Tenn. Code Ann. § 67-6-524 (more than $100,000.00 in sales); Tex. Admin. Code § 3.286(b)(2)(B)(i) ($500,000.00 or more in sales); Wash. Rev. Code § 82.04.067(1)(c)(i) (more than $100,000.00 in gross receipts); Wis. Stat. § 77.51(13gm) (more than $100,000.00 in sales).

Several commentators have correctly recognized and highlighted *Wayfair*'s requirement of virtual contacts to satisfy substantial nexus. Referring to this Court's substantial nexus holding in *Wayfair*, one commentator noted that "the only conclusion that can be drawn with certainty, is that a business with an 'extensive virtual presence' (whatever that means) has availed itself of the substantial privilege of carrying on business in a taxing jurisdiction."[6] Yet another commentator explained that the virtual contacts component of this Court's *Wayfair* nexus holding raises more questions than it answers.[7] The commentator questioned how the *Wayfair* decision applies to a remote seller lacking an "extensive virtual presence." In the end, commentators agree that virtual contacts are part of the substantial nexus analysis under the Commerce Clause, but acknowledge confusion regarding how it is to be applied.

Judging by the statutory language of the economic nexus laws adopted by almost every taxing jurisdiction imposing a sales tax, confusion regarding the application of the virtual contacts requirement in *Wayfair* has been resolved in favor of wholly excluding it from the substantial nexus analysis.[8] The decision of the lower court in this

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6. Jay Calhoun & William J. Kolarik II, *Implications of the Supreme Court's Historic Decision in* Wayfair, 89 State Tax Notes 125 (2018).

7. Jonathan Maddison, *Life and Litigation after* Wayfair*: Did Wayfair Establish South Dakota SB 106 as the New Bright-Line Rule?*, Tax Executive, Vol. 72, Issue 2 (March/April 2020), pp. 44-51.

8. The economic nexus law of the State of Georgia does require a showing of additional contacts – certain of which are

case makes this point. The Supreme Court of Oregon dispensed with Ooma's argument relating to virtual contacts by stating that "the Court did not articulate that as a requirement, and Ooma offers no explanation as to why it would make sense to impose such a requirement[.]" App. 20a. Since almost every State law adopting economic nexus similarly ignores virtual contacts, we should expect many State court's to mirror the analysis by the lower court in this case.

VI. This case is a good vehicle for this Court to resolve the confusion regarding the concept of virtual contacts as explained in *Wayfair*.

In *Wayfair*, the Court made clear that a taxpayer has substantial nexus for Commerce Clause purposes through an examination of both economic and virtual contacts. The comparative significance of the presence of virtual contacts in *Wayfair* was blurred, however, because it was determined that the remote sellers in the case generated billions of dollars in sales nationwide. 138 S. Ct. at 2089. Based on this sales volume, the Court was easily able to conclude that the virtual contacts requirement was satisfied noting that the "[taxpayers] are large, national companies that undoubtedly maintain an extensive virtual presence." *Id.* at 2099. This case presents a decidedly different set of facts relating to sales volume and, therefore, demands a careful consideration of Ooma's virtual contacts with Oregon.

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virtual contacts – to meet substantial nexus for sales tax purposes. The law provides that substantial nexus is established if sales exceed $250,000.00 and the taxpayer engages in certain additional specific activities directed toward the State. *See* Ala. Admin. Code § 810-6-2-.90.03(1).

In this case, Ooma received $2.2 million in sales revenue from Oregon residents over the course of thirty-nine months. App. 5a. The annualized revenue earned by Ooma for providing VoIP services pales in comparison to that of the taxpayers in *Wayfair*. Ooma argued to the lower court that, based on its sales revenue, *Wayfair* required an analysis of its virtual contacts with Oregon. It could not be assumed, Ooma contended, that it had the requisite virtual contacts with Oregon based on this level of sales revenue.

It cannot be doubted that countless small and medium sized businesses have a similar state-by-state amount of sales revenue to that of Ooma in this case. As previously explained, *supra*, with one exception, State economic nexus laws define substantial nexus by excluding any consideration of virtual contacts. The confluence of these facts presents this Court with a unique opportunity to set the record straight on the existence and significance of virtual contacts in its Commerce Clause analysis.

In *Wayfair*, this Court referenced the need for virtual contacts on its own accord. The challenged South Dakota law made no reference to the existence of review of virtual contacts to support the imposition of sales tax. The Court's use of virtual contacts was necessitated by the fact that the holding in *Wayfair* requires a taxpayer "'avail[ ] itself of the substantial privilege of carrying on business' in that jurisdiction" to satisfy the Commerce Clause requirement of substantial nexus. This Court understood in *Wayfair* that virtual contacts reflect a purposeful act by a taxpayer to "avail itself of the substantial privilege of carrying on business" in a State. This Court should act now to clarify the significance of virtual contacts in the Commerce

Clause analysis in order to avoid what will surely be years of litigation in State courts on the issue.[9]

A quarter century elapsed between this Court's decisions in *National Bellas Hess* and *Quill*. This Court's *Wayfair* decision was issued slightly more than a quarter century after *Quill*. It is important that the Court not wait another quarter century to resolve an issue that is readily-apparent from the statutory language of economic nexus laws of almost every taxing jurisdiction imposing a sales tax on remote sellers.

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9. *See* Richard D. Pomp, Wayfair: *Its Implications and Missed Opportunities*, 58 Wash. U.J.L. & Pol'y 1, 22 (2019) (referring to the dual requirement of economic and virtual contacts and concluding that "*Wayfair* opened the door to potential litigation over when a privilege might be substantial enough for nexus").

CONCLUSION

The Court should grant this petition for writ of certiorari.

Respectfully submitted,

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May 23, 2022

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF OREGON, FILED DECEMBER 23, 2021

IN THE SUPREME COURT OF OREGON

SC S067581

OOMA, INC., A FOREIGN CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Defendant-Respondent.

May 6, 2021, Argued and Submitted
December 23, 2021, Decided

En Banc

On appeal from the Oregon Tax Court.*

Robert T. Manicke, Judge.

GARRETT, J.

The judgment of the Tax Court is affirmed.

*Unpublished Tax Court opinion, issued March 2, 2020.

* Unpublished Tax Court opinion, issued March 2, 2020.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent.

[ ] No costs allowed.

[X] Costs allowed, payable by: Appellant.

[ ] Costs allowed, to abide the outcome on remand, payable by:

GARRETT, J.

The Due Process Clause and the Commerce Clause of the United States Constitution limit the authority of states to impose tax obligations on out-of-state residents. US Const, Amend XIV (Due Process Clause); U.S. Const, Art I, § 8, cl 3 (Commerce Clause). This case requires us to determine whether taxpayer, Ooma, Inc., a California company, had sufficient contacts or nexus with Oregon to satisfy those constitutional standards. The Tax Court concluded that Ooma's contacts and nexus with Oregon were sufficient to satisfy those standards and granted summary judgment to the Department of Revenue. For the reasons explained below, we affirm the judgment of the Tax Court.

I. BACKGROUND

We take the following undisputed facts from the record on summary judgment, viewing the evidence and

all reasonable inferences from that evidence in the light most favorable to Ooma, as the nonmoving party. *Portfolio Recovery Associates, LLC v. Sanders*, 366 Ore. 355, 357, 462 P3d 263 (2020). The relevant tax period covers 39 months, from January 2013 through March 2016. During that time, Ooma provided Voice over Internet Protocol ("VoIP") services to customers nationwide, including in Oregon. VoIP services allow customers to make phone calls using a broadband internet connection.

Federal law requires VoIP providers to ensure that their customers have access to local emergency communication systems when calling 9-1-1. 47 CFR § 9.5 (2015). That access is provided through something called "E911." Ooma complied with the federal requirement and provided its Oregon customers with E911 access to Oregon's emergency communication system.

In exchange for access to its emergency communication system, Oregon imposes a tax on VoIP lines, the revenues from which are used solely to maintain and improve the system. ORS 403.245(1) (2015). The VoIP provider is required to collect the E911 tax from its customers and remit the collected amounts to the department with a quarterly tax return. ORS 403.215(1) - (2) (2015). During the time period at issue, the tax for each VoIP line was $0.75 per month. ORS 403.200(1) (2015). Ooma neither collected nor remitted the E911 tax during the relevant time period.

The department issued Ooma notices of assessment regarding the unpaid E911 taxes. Ooma appealed those

notices. Ooma concedes, for the purposes of this appeal, that ORS 403.215 required it to collect and remit the E911 tax. But Ooma argued to the Tax Court that subjecting Ooma to ORS 403.215 violated the Due Process Clause and the Commerce Clause. According to Ooma, it had neither sufficient contacts with Oregon to satisfy due process standards nor a sufficient nexus with Oregon to satisfy Commerce Clause standards.

With regard to those constitutional challenges, Ooma and the department filed competing motions for summary judgment based on a stipulated factual record. That record reveals that Ooma is headquartered in California. During the relevant time, Ooma had no physical presence and owned no property in Oregon. Ooma also had no employees in Oregon and hired no independent agents in Oregon. It did not seek or otherwise have any license or permits from any government entity in Oregon.

To access Ooma's VoIP services, customers entered a service contract with Ooma and had to use Ooma's equipment, which they could acquire directly from Ooma's website or through third-party retailers, including brick-and-mortar retailers in Oregon. Ooma retained no ownership interest in the purchased equipment. In addition to Ooma's equipment, customers were also required to have broadband internet service through an independent internet service provider. Ooma did not provide internet access.

The parties stipulated to these facts about Ooma's conduct soliciting and otherwise attempting to acquire customers in Oregon:

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

The number of Ooma's VoIP lines provided to Oregon customers during the relevant time period ranged from 6,633 to 13,467. The service billings for those lines generated $2.2 million in revenue for Ooma.

The Tax Court granted the department's summary judgment motion, and denied Ooma's summary judgment motion, after concluding that Ooma's contacts and nexus with Oregon were sufficient to satisfy federal constitutional standards. Ooma appeals that decision to this court.

II. ANALYSIS

On appeal from a grant of summary judgment, we consider whether the Tax Court erred in concluding that there was no genuine issue of material fact and that the department was entitled to summary judgment as a matter of law. *Tektronix, Inc. v. Dept. of Rev.*, 354 Ore. 531, 533, 316 P3d 276 (2013). The question is whether the undisputed facts establish that Ooma's contacts and nexus with Oregon were sufficient to satisfy the constitutional standards imposed by the Due Process Clause and the Commerce Clause.

A. Due Process Clause

"In the context of state taxation, the Due Process Clause limits States to imposing only taxes that bear fiscal relation to protection, opportunities and benefits given by the state." *North Carolina Dept. of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, U.S. __,-__, 139 S Ct 2213, 2219, 204 L Ed 2d 621 (2019) (internal quotation marks and citation omitted). There are two steps in that analysis. First, "there must be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at __, 139 S Ct at 2220 (internal citation and quotation marks omitted). Second, "the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Id.* at __, 139 S Ct at 2220 (internal citation and quotation marks omitted).

In this appeal, Ooma takes issue only with the first step, whether Ooma had a sufficient connection to Oregon. Under United States Supreme Court case law, the test for assessing a taxpayer's minimum connection to a taxing state is "borrow[ed] from the familiar test" for establishing specific personal jurisdiction under the Due Process Clause. *Id.* at __, 139 S Ct at 2220. Thus, "[a] State has the power to impose a tax only when the taxed entity has 'certain minimum contacts' with the State such that the tax 'does not offend traditional notions of fair play and substantial justice.'" *Id.* at __, 139 S Ct at 2220 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S Ct 154, 90 L Ed 95 (1945)).

"The minimum contacts inquiry is flexible and focuses on the reasonableness of the government's action. Ultimately, only those who derive benefits and protection from associating with a State should have obligations to the State in question." *Id.* at __, 139 S Ct at 2220 (internal quotation marks and citation omitted). The test for minimum contacts may be satisfied by establishing that the taxed party "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S Ct 1228, 2 L Ed 2d 1283 (1958). The purposeful availment standard is intended to ensure that "individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," thus allowing them "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them" subject to another jurisdiction. *Burger King Corp. v. Rudzewicz*,

471 U.S. 462, 472, 105 S Ct 2174, 85 L Ed 2d 528 (1985) (internal citations and quotation marks omitted). A party may not be subject to the jurisdiction of a state based on contacts that are "random, isolated, or fortuitous." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S Ct 1473, 79 L Ed 2d 790 (1984).

Ooma argues that the undisputed facts in this case fail to establish that it purposefully availed itself of the Oregon market. We reject that argument. As described above, the facts demonstrate that Ooma's contacts with Oregon were not random, isolated, or fortuitous but were, instead, the result of its intentional efforts to serve the Oregon market. Ooma developed marketing plans and employed business strategies intended to reach Oregon residents (along with residents of other states), shipped products directly into Oregon, and engaged retailers to sell its products in Oregon. As a result of those efforts, Ooma established thousands of VoIP lines for Oregon customers and entered into ongoing commercial relationships with those customers requiring Ooma to provide services to those customers in Oregon. The services that Ooma provided included the conduct triggering the tax obligations at issue in this case—namely, providing access to Oregon's emergency communication system.[1]

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1. Ooma suggests that, because federal law requires it to provide its customers in Oregon with access to Oregon's emergency communication systems, the provision of that service cannot be considered as part of the purposeful availment analysis. Ooma cites no authority establishing the constitutional significance of that fact.

That cumulative conduct—the efforts to attract Oregon customers and the services provided in Oregon to those customers—establishes Ooma's purposeful availment of the Oregon market. *See Walden v. Fiore*, 571 U.S. 277, 285, 134 S Ct 1115, 188 L Ed 2d 12 (2014) ("[W]e have upheld the assertion of jurisdiction over defendants who have purposefully reach[ed] out beyond their State and into another by, for example, entering a contractual relationship that envisioned continuing and wide-reaching contacts in the forum State." (Internal citation and quotation marks omitted.)).

Ooma cites no decision from any jurisdiction concluding that such extensive contacts fail to establish purposeful availment. And, as the department points out, Ooma's contacts with Oregon far exceed what this court held sufficient to establish purposeful availment in *Willemsen v. Invacare Corp.*, 352 Ore. 191, 282 P3d 867 (2012). In that case, the manufacturer of wheelchair battery chargers, CTE, was sued in Oregon for injuries resulting from an alleged defect in its product. *Id.* at 195. This court concluded that CTE had purposefully availed itself of the Oregon market, and therefore could be subject to jurisdiction here, based largely on the regularity with which wheelchairs containing its battery chargers were sold in Oregon. Over a two-year span preceding the injuries, more than 1,100 wheelchairs were sold in Oregon containing CTE's battery chargers. *Id.* at 203. CTE was paid $30,929 for those battery chargers, which were built to the specifications of the wheelchair manufacturer. *Id.* at 195-96. Ooma's contacts with Oregon were more extensive than CTE's contacts. Unlike Ooma, CTE had no direct

contacts with the Oregon market, either in soliciting customers or providing ongoing services to customers. During the relevant 39 months at issue, Ooma earned $2.2 million in revenue directly from Oregon purchasers of its VoIP services.[2]

In attempting to avoid the conclusion that it purposefully availed itself of the Oregon market, Ooma does not contend that *Willemsen*, as a products liability case, is inapt or that the department's argument misapplies *Willemsen* or misrepresents the extent of Ooma's contacts in Oregon. Instead, Ooma presents its own argument based on another products liability case, *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 131 S Ct 2780, 180 L Ed 2d 765 (2011). That argument has two steps. First, Ooma argues that this case presents novel facts that require us to apply a test for purposeful availment articulated in Justice Kennedy's non-controlling plurality opinion in *Nicastro*.[3] Second, according to Ooma, applying Justice Kennedy's *Nicastro* opinion to the facts of this case requires concluding that Ooma did not purposefully

2. Ooma also generated additional revenue from the direct sale of its equipment to Oregon consumers, although the record is unclear as to the extent or value of those sales.

3. On this point, Ooma notes that Justice Breyer's controlling opinion in *Nicastro* concluded that, because the facts of that case did "not implicate modern concerns," the case was "an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules." *Nicastro*, 564 U.S. at 890 (Breyer, J., concurring). Ooma argues that this case implicates those modern concerns and that only the test articulated by Justice Kennedy properly accounts for those concerns.

avail itself of Oregon's market. We need not address the first step in Ooma's argument because we conclude that the argument fails at the second step. That is, even under the test described in that plurality opinion (assuming that it is both controlling and applicable here), Ooma still purposefully availed itself of the Oregon market.

The plaintiff in *Nicastro* was injured in New Jersey while using a large industrial metal shearing machine made by the defendant, J. McIntyre Machinery. *Id.* at 878. The plaintiff sued McIntyre in a New Jersey court. McIntyre was a British company with no direct contacts in New Jersey and no direct sales to customers in the United States. Instead, McIntyre engaged an independent distributor to sell its products in the United States. *Id.* Other than the marketing efforts of the distributor, McIntyre's own marketing efforts in the United States were limited to sending its executives to an annual trade show in the United States to present their products. Those trade shows were never held in New Jersey, and the record contained no evidence as to whether those executives were aware of New Jersey residents attending the trade shows. The volume of sales was small. No more than four (possibly as few as one) of McIntyre's products ended up in New Jersey. *Id.*

Although a majority of the Court agreed that the record failed to establish that McIntyre purposefully availed itself of the New Jersey market, a majority did not agree on the reasoning that supported that conclusion. Justice Breyer wrote a narrow concurring opinion, joined by Justice Alito, which represents the controlling opinion

in the case. *See Willemsen*, 352 Ore. at 201 ("[W]e look to Justice Breyer's opinion concurring in the judgment for the 'holding' in *Nicastro* that guides our resolution of this case[.]"). Justice Breyer concluded that the facts of *Nicastro* did not present an opportunity to announce new law, because the conclusion that McIntyre did not purposefully avail itself of the New Jersey market was compelled by existing case law: "None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient." *Nicastro*, 564 U.S. at 888 (Breyer, J., concurring).

Justice Kennedy wrote a plurality opinion joined by three other members of the Court, which provides the grounds for Ooma's argument in this case. Justice Kennedy wrote that he would have used *Nicastro* to resolve a conflict between competing nonmajority opinions by Justice Brennan and Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S Ct 1026, 94 L Ed 2d 92 (1987).

In *Asahi*, Justice Brennan had reasoned that a manufacturer with no direct contact to the forum state purposefully avails itself of that state's market when the manufacturer knows that "the regular and anticipated flow" of commerce brings the manufacturer's products into that state, thus establishing the manufacturer's reasonable expectation that its products will end up there. *Id.* at 117 (Brennan, J., concurring). Justice O'Connor had rejected that standard as too permissive. According to Justice O'Connor, "[t]he placement of a product into the stream of commerce, without more, is not an act of the

defendant purposefully directed toward the forum State." *Id.* at 112 (O'Connor, J., plurality opinion). She would have required that the out-of-state party engage in some "[a]dditional conduct * * * [that] indicate[s] an intent or purpose to serve the market in the forum State." *Id.* In Justice O'Connor's view, such additional conduct might include "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." *Id.*

Justice Kennedy's opinion in *Nicastro* would have rejected Justice Brennan's test in favor of Justice O'Connor's. *Nicastro*, 564 U.S. at 883 (Kennedy, J., plurality opinion) (concluding, after describing the competing tests, that "Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power"). Echoing Justice O'Connor's emphasis on the defendant's intent and purpose, Justice Kennedy wrote that "[t]he principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign." *Id.* at 882. Further, according to Justice Kennedy, "[t]he 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.*

Justice Kennedy then explained that assessing the sufficiency of a party's contact "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *Id.* at 884. As a result, "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State," although Justice Kennedy thought that that "would be an exceptional case." *Id.* Justice Kennedy concluded that, by engaging a United States distributor and attending national trade shows in the United States, McIntyre merely "directed marketing and sales efforts at the United States," thus subjecting itself to the potential jurisdiction of the federal government, if a federal law applied. *Id.* at 885. But, according to Justice Kennedy, McIntyre had not "engaged in conduct purposefully directed at New Jersey." *Id.* at 886.

Ooma argues that it is like McIntyre, in that Ooma targeted its marketing and sales efforts at the entire country but not at Oregon or any other particular state. Ooma relies on the stipulated facts that Ooma "prepared marketing plans that targeted customers nationwide, including Oregon residents" and "employed business strategies that targeted customers nationwide, including Oregon residents." In its briefing to this court, Ooma argues that those facts do not establish that it purposefully availed itself of Oregon's market because "Ooma did not tailor its business plans, advertising, or online presence to focus its solicitation efforts on Oregon residents."

Ooma's argument appears to take Justice Kennedy's opinion to mean that conduct "targeting a forum" means

conduct targeting that forum to the exclusion of other forums. However, that opinion did not suggest that a party's single course of conduct cannot target multiple forums at the same time. As we understand it, Justice Kennedy's conclusion that McIntyre targeted "the United States" rather than New Jersey was based on the fact that McIntyre's effort to reach customers in New Jersey was so limited, not because its effort to reach customers in other states was so widespread. Nothing in Justice Kennedy's opinion indicates that, if a court finds contacts sufficient to support a conclusion that a company *has* targeted a state, the court should nonetheless avoid that conclusion based on a finding that the company's efforts targeted other states as well. As a result, Ooma's effort to target customers in other states does not affect or diminish the constitutional significance of its effort to target customers in Oregon.[4]

4. In an effort to buttress its argument that purposeful availment can be satisfied only through conduct specific to each state, Ooma cites *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S Ct 1904, 119 L Ed 2d 91 (1992), *overruled on other grounds by South Dakota v. Wayfair, Inc.*, U.S. __, 138 S Ct 2080, 201 L Ed 2d 403 (2018). In *Quill*, the Court concluded that a state did not violate the Due Process Clause by imposing a duty to collect use taxes on an out-of-state mail-order company that annually delivered 24 tons of catalogs and flyers into the state, which generated almost $1 million in annual sales made to about 3,000 customers. *Id.* at 302, 304, 308. Ooma maintains that, "[u]nlike the taxpayer in *Quill*, Ooma did not pursue Oregon sales by pinpointing individual Oregon residents or businesses."

But the Court in *Quill* never identified the manner of solicitation—that is, whether the solicitation was sent to an individual or broadcast to many individuals—as relevant to its analysis. In fact, the Court suggested that the manner of

Additionally, by focusing only on its conduct to attract customers and ignoring its conduct providing services in Oregon, Ooma takes an unduly narrow view of what constitutes "targeting" in Justice Kennedy's opinion. Justice Kennedy referred to McIntyre's "marketing and sales activities," *id.* at 885, because that was the only conduct that McIntyre engaged in that arguably constituted targeting. It does not follow that other types of activities are irrelevant to the analysis, so long as they inform the question of whether the party (in Justice Kennedy's words) "manifest[ed] an intention to submit to the power of a sovereign." *Id.* at 882. Here, Ooma not only engaged in marketing and sales activities, it actually entered into contracts and provided services to Oregon residents, in Oregon. We readily conclude that, even under the test that Justice Kennedy articulated, Ooma purposefully availed itself of Oregon's market.[5]

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solicitation was not relevant. After noting that the mail-order company "engaged in continuous and widespread solicitation of business" within the taxing state, the Court held that, "[i]n 'modern commercial life[,]' it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers." *Id.* at 308. Further, such a distinction based on the manner of solicitation would be in tension with the Court's effort to "abandon[ ] more formalistic tests * * * in favor of a more flexible inquiry" into the reasonableness of the government action. *Id.* at 307.

5. Ooma separately argues that requiring it to comply with the E911 tax obligations violates traditional notions of "fair play and substantial justice." *See Burger King*, 471 U.S. at 476. We reject that argument, which largely overlaps with Ooma's arguments about minimum contacts and purposeful availment.

B. Commerce Clause

Under the Commerce Clause, a state tax will be sustained so long as it "applie[s] to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S Ct 1076, 51 L Ed 2d 326 (1977). In this case, Ooma challenges only the "substantial nexus" part of the test. The parties agree that "'[s]uch a nexus is established when the taxpayer [or collector] avails itself of the substantial privilege of carrying on business in that jurisdiction.'" *South Dakota v. Wayfair, Inc.*, U.S. __, __, 138 S Ct 2080, 2099, 201 L Ed 2d 403 (2018) (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11, 129 S Ct 2277, 174 L Ed 2d 1 (2009)). The parties disagree, however, as to the facts necessary to satisfy that standard.

Both parties ground their arguments in the Court's analysis of the nexus issue in *Wayfair*. In that case, the taxing state, South Dakota, enacted a statute requiring out-of-state retailers—those without a physical presence in the state—to collect and remit sales taxes. The statute applied only to those retailers that annually delivered more than $100,000 of goods or services into South Dakota or engaged in 200 or more separate transactions for the delivery of goods or services into South Dakota. *Id.* at __, 138 S Ct at 2089.

The primary question for the Court in *Wayfair* was whether to affirm or abandon precedent holding that a

state violates the Commerce Clause by imposing a sales tax on retailers without a physical presence in the state. *See Quill*, 504 U.S. at 317-18 (applying the physical-presence rule); *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 758, 87 S Ct 1389, 18 L Ed 2d 505 (1967) (same). After deciding to abandon the physical-presence rule by overruling its prior cases, the Court had no trouble concluding that the out-of-state retailers challenging the tax had availed themselves of the substantial privilege of carrying on business in that state, thus satisfying the substantial nexus requirement:

> "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. 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."

Wayfair, U.S. at __, 138 S Ct at 2099 (internal citation omitted).

Both parties contend that the quoted paragraph supports their respective positions. The department reads that paragraph to mean that retailers that annually do more than $100,000 worth of business in a state, or engage in more than 200 transactions, meet the substantial nexus requirement as set out in *Wayfair*. Because Ooma did more than $2.2 million in business in 39 months[6] and provided thousands of lines of VoIP service, the department reasons, the substantial nexus test is easily satisfied.

Ooma argues that the quoted paragraph indicates that a court assessing whether the substantial nexus requirement has been satisfied must determine the extent of the company's economic activity in the state. It is not enough, according to Ooma, to simply establish that a company did more than $100,000 worth of business in a state or engaged in more than 200 transactions. And Ooma argues that a court may not conclude that an out-of-state company satisfies the substantial nexus requirement without finding that the company maintains an "extensive virtual presence." *Id.* at __, 138 S Ct at 2099.

Ooma's reading is unpersuasive. The Court explained in *Wayfair* that the sales in excess of South Dakota's thresholds "could not have occurred unless the seller availed itself of the substantial privilege of carrying on business" in the state. *Id.* at __, 138 S Ct at 2099. It necessarily follows that a company that earned far greater revenue and engaged in far more transactions than

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6. Ooma's services to Oregon customers generated monthly revenue ranging from $32,222.04 to $102,096.87.

involved in *Wayfair* must be deemed to have also availed itself of the substantial privilege of carrying on business in Oregon. And, while the Court noted that the taxpayers in *Wayfair* undoubtedly had an extensive virtual presence, the Court did not articulate that as a requirement, and Ooma offers no explanation as to why it would make sense to impose such a requirement when a nexus is otherwise established through sales, marketing, and service delivery efforts. *See* Jerome R. Hellerstein & Walter Hellerstein, 2 *State Taxation* ¶ 19.02[2][c][i], 19-30 n 142 (3rd ed Supp 2018) ("Clearly, a virtual presence (in the modern sense of having a website) is not required to establish substantial nexus. For example, a traditional mail-order company like National Bellas Hess, Inc. or Quill Corporation would have substantial nexus with South Dakota if its in-state sales or transactions exceeded the minimum thresholds prescribed by the South Dakota statute."). As a result, the lack of record evidence as to Ooma's virtual presence does not establish a genuine issue of material fact that precludes the grant of summary judgment to the department.

The judgment of the Tax Court is affirmed.

APPENDIX B — OPINION OF THE OREGON TAX COURT, REGULAR DIVISION, FILED MARCH 2, 2020

IN THE OREGON TAX COURT,
REGULAR DIVISION
E911 Tax

March 2, 2020, Decided;
March 2, 2020, Filed

OOMA, INC., A FOREIGN CORPORATION,

Plaintiff,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Defendant.

TC 5331

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Ooma, Inc., ("Taxpayer") provides national interconnected Voice over Internet Protocol ("VoIP") services, including to customers in Oregon. Defendant

Department of Revenue (the "Department") has issued to Taxpayer notices of assessment of the tax imposed under ORS 403.200 (the "E911 Tax") in amounts totaling $677,444.88, including penalties and interest as of August 30, 2016. Taxpayer appeals from an adverse decision in the Magistrate Division, and the parties have filed cross-motions for summary judgment on largely stipulated facts. The periods at issue are the quarters ending March 2013 through March 2016.

II. ISSUES

(1) Is Taxpayer subject to the E911 Tax under Oregon law?

(2) Does the Due Process Clause of the United States Constitution prohibit the Department from subjecting Taxpayer to the E911 Tax?

(3) Does the Commerce Clause of the United States Constitution prevent the Department from subjecting Taxpayer to the E911 Tax?

III. FACTS

The following facts are not in dispute. Taxpayer is a foreign corporation with its commercial domicile and principal place of business in Palo Alto, California. (Stip Facts at 2, ¶ 1.) Taxpayer provides VoIP services to customers across the United States, including to residents of Oregon. (*Id.* at ¶ 7.) Taxpayer also provides additional telecommunications services to Oregon customers that

include voicemail, call waiting, call forwarding and caller identification. (*Id.* at ¶ 8.)

Taxpayer's VoIP equipment allows Oregon customers to conduct voice communications via a high-speed (broadband) internet connection. (Stip Facts at 2, ¶ 7.) In order to access Taxpayer's VoIP services, Oregon residents must first purchase Taxpayer's equipment ("VoIP Equipment") either directly from Taxpayer via Taxpayer's website, through independent third-party retailers with locations in Oregon, or through independent online retailers, including Amazon. (Stip Facts at 3, ¶¶ 11, 15.) When Taxpayer's customers use the VoIP Equipment to make a call, the digital data sent from Taxpayer's call initiator is processed through one of several regional data centers; otherwise the call is sent via broadband internet connection. (Stip Facts at 2-3, ¶¶ 7, 14.)

During the periods at issue, Oregon customers were required to enter into a contract ("Terms and Conditions") as a condition of accessing Taxpayer's VoIP services. (Stip Facts at 4, ¶ 18; Stip Ex C). Taxpayer prepared marketing plans that targeted customers nationwide, including Oregon residents. (Stip Facts at 5, ¶ 21.) Taxpayer also provided promotional and marketing materials to select national retailers for use in their retail locations, including retail locations in Oregon. (*Id.* at ¶ 22.) During the periods at issue, Taxpayer made recurring billings to Oregon customers. (*Id.* at 6, ¶ 27; Stip Ex E.) Taxpayer did not file returns for the E911 Tax with the Department for the periods at issue. (Stip Facts at 2, ¶ 4.)

Solely for purposes of the parties' cross-motions for summary judgment, the Department does not dispute Taxpayer's assertions that during the periods at issue: (1) none of Taxpayer's employees visited Oregon; (2) Taxpayer did not hire or compensate anyone to act on its behalf to promote or sell its VoIP services to Oregon residents; (3) Taxpayer did not participate in any court proceeding or any legal or collection action in Oregon; (4) Taxpayer owned no real or tangible personal property in Oregon; and (5) Taxpayer did not possess any license, permit, registration, or authorization issued by any entity, government or organization in the State of Oregon. (Stip Facts at 4-5, ¶ 19.) The court will discuss additional facts as relevant.

IV. ANALYSIS

A. *Summary Judgment Standard*

The court grants a motion for summary judgment only if "the pleadings * * * 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." Tax Court Rule ("TCR") 47 C. *See Christensen v. Dept. of Rev.*, OTR , 2018 Ore. Tax LEXIS 105, at *11 (Sept 7, 2018) (citing *Two Two v. Fujitec Am., Inc.*, 355 Ore. 319, 331, 325 P3d 707 (2014)). "No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable [factfinder] could [find] for the adverse party on the matter that is the subject of the motion for summary judgment." TCR 47 C. The adverse

party has the burden of producing evidence on any issue raised in the motions as to which the adverse party would have the burden of persuasion at trial. *Id.*

B. ***Statutory Background***

Oregon imposes the E911 Tax on each person with access to Oregon's emergency communications system (commonly known as the "911" system), whether through VoIP or through a wired or wireless telecommunications service. *See* ORS 403.200(1) (imposing tax), ORS 403.105 (definitions).[1] As discussed below, ORS 403.215(1) requires a provider[2] of a telecommunication service or of equipment

1. For the reasons discussed below, unless otherwise noted, all references to the Oregon Revised Statutes ("ORS") are to the 2015 edition. ORS 403.105(8) defines the "emergency communications system" as the network, database, servers, other equipment and services that provide the means to communicate with a primary public safety answering point to request and provide assistance to preserve human life or property.

2. As amended by Or Laws 2014, ch 59, § 1a, the statutes distinguish between, on the one hand, "sellers" and "consumers" of *prepaid wireless* telecommunications service, and on the other hand "providers" and "subscribers" of all other kinds of telecommunications service. *See* ORS 403.105 (definitions). Taxpayer does not sell prepaid wireless service and therefore is a "provider," and its customers are "subscribers." Unless expressly stated, this order does not further address "sellers" or "consumers." The same 2014 act also specified that the E911 Tax is imposed on subscribers who have VoIP service, and those amendments "apply to telecommunications service or interconnected Voice over Internet Protocol service, as defined in ORS 403.105, provided on or after October 1, 2015." Or Laws 2014, ch 59, § 8a. However, Taxpayer does not argue that the omission of a specific reference to VoIP providers before the 2014 act, or any of

with access to the system to collect the E911 Tax from customers and remit the payment to the Department. The E911 Tax is codified in ORS chapter 403, which begins with a policy statement that reflects the role of the emergency communications system in public safety.[3] Revenue from the E911 Tax is used solely to maintain and improve the system. *See* ORS 403.245(1).[4]

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the later changes to the statutes, affects its obligations with respect to any part of the periods at issue. (Statements of Bowen and Strong, Oral Argument, January 17, 2019, 9:31-32). *See* Or Laws 2015, ch 247, § 1 (amending, *inter alia*, policy statement in ORS 403.100); Or Laws 2017, ch 27, § 1 (interest computation); Or Laws 2019, ch 653, § 1 (increasing tax rate).

3. ORS 403.100 provides: "It is the policy of the State of Oregon to:

> "(1) Encourage and support the development of public safety networks and an emergency communications system and the rapid deployment of broadband or other communications services in areas of the state in which the services do not exist;
>
> "(2) Support redundancy of critical communications assets in order to ensure homeland security protections in the state; and
>
> "(3) Ensure that a secure conduit is available for the emergency communications system and public safety networks in all Oregon communities."

4. ORS 403.245(1) provides, in part:

> "[M]oneys received under ORS 403.240(8) may be used only to pay for planning, installation, maintenance, operation and improvement of the emergency communications system as it relates to getting an emergency call from a member of the public to

In 2005, the Federal Communications Commission ("FCC") adopted regulations requiring all VoIP providers to ensure that their users have access to local emergency services when making 911 calls.[5] *See* E911 Requirements for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R 10245, 10266, ¶ 37 (2005), https://transition.fcc.gov/cgb/voip911order.pdf (accessed January 29, 2020), 70 Fed Reg 43323-01, 2005 WL 1749493 (F.R.) (July 27, 2005), *codified as* 47 CFR § 9.5. The 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.[6]

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the primary public safety answering point and in transmitting the information from the primary public safety answering point to the secondary public safety answering point or responding police, fire, medical or other emergency unit by telephone, radio or computerized means."

5. *See generally Nuvio Corp. v. F.C.C.*, 473 F3d 302, 303, 374 U.S. App. D.C. 162 (DC Cir 2006) (describing the difficulties associated with "nomadic" service provide by interconnected VoIP providers; noting the "tragedies" that gave rise to the FCC's 2005 Order requiring VoIP service companies to provide their subscribers access to local emergency communication systems).

6. (Statement of Michael Bowen, Oral Argument, Jan 17, 2019, 11:25:30-47.); (*see* Ptf's Resp to Def's Cross-Mot Summ J and Rep to Def's Resp at 1, 18.); (Def's Cross-Mot Summ J and Resp to Ptf's Mot Summ J at 21.); (Def's Rep to Ptf's Resp to Def's Cross-Mot Summ J at 1, 11 n 4.).

C. *Discussion of Arguments*

1. *Taxpayer's Statutory Argument*

Taxpayer first argues that it owes no E911 Tax because the statute "imposes" the charge only on a "subscriber" of VoIP services, *i.e.* Taxpayer's customers. *See* ORS 403.200(1)-(2). This argument asks the court to ignore numerous statutes that require a "provider" such as Taxpayer to "*collect*" the tax from customers, "*remit*" the tax to the Department, keep "*records*" of the tax, and file "*returns*" with the Department, all while holding the proceeds "*in trust*" for the benefit of the State of Oregon. *See* ORS 403.215(1)-(2); ORS 403.225(1)-(2). Applying the analytical approach in *State v. Gaines*, 346 Ore. 160, 171-72, 206 P3d 1042 (2009), the court is not aware of a dispute about the meaning of any part of the statutory text in isolation.[7] Rather, the dispute is about the meaning of the text in its context. A brief examination of the foregoing statutes shows that the legislature has elected to deputize providers to administer the E911 Tax, much as the legislature for decades has required employers to collect and remit tax, and file reports on their employees' wages, for purposes of the personal income tax, which provides the overwhelming majority of this state's general fund. *Cf.* ORS 316.167 (requiring employer to withhold tax from wages); ORS 316.197 (requiring employer to remit withheld tax); ORS 316.168 (requiring employer to file returns); ORS 316.207(1) (employer holds withheld

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7. Nor has either party proffered any legislative history regarding Taxpayer's statutory argument.

tax in trust for State of Oregon). In fact, a provider plays an even more central role with respect to the E911 Tax: while individuals, including those whose personal income tax liability is fully satisfied by wage withholding, still must file annual tax returns, in the case of the E911 Tax no statute requires a provider's customer to file a return. Instead, a "return made by the provider or seller collecting the tax must be accepted by the Department of Revenue as evidence of payments by the consumer or subscriber * * *." ORS 403.200(6).[8]

Taxpayer's main statutory argument distills to the notion that Oregon law allows it to disregard without consequence its express statutory duty to collect and remit the E911 Tax, simply because the legislature has chosen to *also* tag customers with liability if Taxpayer fails to perform its duty.[9] Taxpayer's statutory argument fails.

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8. In the case of prepaid wireless telecommunications service, only a consumer "from whom the tax has not been collected" is required to file a return. *See* ORS 403.217.

9. Taxpayer also argues that ORS 403.230(1) confirms that it owes nothing because it has not collected the E911 Tax from its customers. Taxpayer relies on the closing sentence: "As to any amount *collected* and required to be remitted to the Department of Revenue, the tax is considered a tax upon the provider or seller required to collect the tax and that provider or seller is considered a taxpayer." ORS 403.230(1) (emphasis added). Contrary to Taxpayer's argument, this sentence does not excuse a provider from its positive, unambiguous duty to collect the tax as stated in ORS 403.215(1). Rather, this sentence *presumes the provider will comply* with that duty.

2. *Does the Due Process Clause Prohibit the Department from Subjecting Taxpayer to the E911 Tax?*

Having concluded that Oregon law purports to require Taxpayer to pay over any amounts of E911 Tax it should have collected from its customers, the court turns to Taxpayer's argument that the requirement violates the Due Process Clause of the United States Constitution. *See* US Const, Amend XIV. Taxpayer acknowledges that its marketing plans and business strategies "targeted customers nationwide, including Oregon residents." (Stip Facts at 5, ¶¶ 21-22.) However, Taxpayer contends that, because its efforts did not "intentionally or specifically target[] Oregon residents," the Due Process Clause prevented Oregon from acquiring jurisdiction to impose tax on Taxpayer. (Ptf's Memo Supp Mot Summ J at 12.) Essentially, Taxpayer argues that, because it targeted everyone in the nation, it did not target anyone in Oregon-

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Taxpayer asks the court to ignore the context of ORS 403.230(1) as a whole. Like similar provisions in other excise tax statutes, ORS 403.230(1) simply imports by reference the established and well-developed administrative provisions of income tax law rather than inventing new such provisions. *Cf.* ORS 320.330 (statewide lodging tax); ORS 320.405 (privilege tax on vehicle dealers); ORS 320.555 (transportation tax on employers and certain payers). In order to apply those personal income tax provisions to an excise tax such as the E911 Tax, it is necessary to specially define the term "taxpayer." Otherwise, the narrow definition in ORS 316.022(7) (essentially, one who owes *personal income tax*) would apply by default, sowing confusion. In other words, the true purpose of the sentence Taxpayer seizes on is simply to clarify that the term "taxpayer" as used in the imported administrative provisions includes a "provider."

-at least not sufficiently to create nexus under the Due Process Clause. The court easily concludes that Oregon's imposition of the E911 Tax on Taxpayer is consistent with the guarantee of due process. As the United States Supreme Court recently summarized, "[i]n the context of state taxation, the Due Process Clause limits States to imposing only taxes that 'bea[r] fiscal relation to protection, opportunities and benefits given by the state.'" *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, ____ US ____, 139 S Ct 2213, 2220, 204 L. Ed. 2d 621, 19 Cal Daily Op Serv 5832 (2019) (quoting *Wisconsin v. J. C. Penney Co.*, 311 US 435, 444, 61 S Ct 246, 85 L Ed 267 (1940)).[10] The controlling question is "whether the state has given anything for which it can ask return." *Id.* at 2220; *see also Quill Corp. v. North Dakota*, 504 US 298, 312, 112 S Ct 1904, 119 L Ed 2d 91 (1992), *overruled on other grounds, South Dakota v. Wayfair, Inc.*, ____ US ____, 138 S Ct 2080, 2092-93, 201 L Ed 2d 403 (2018)) ("[u]ltimately, only those who derive 'benefits and protection' from associating with a State should have obligations to the State in question.") *Kaestner*, 139 S Ct at 2220 (citation omitted).

Kaestner reiterated the Court's longstanding two-step analysis to decide whether a state tax abides by the Due Process Clause. First, a court must test for "minimum contacts," *i.e.* "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax * * * such that the tax does

10. *Kaestner*, decided after oral argument in this case, provides a helpful summary of the due process analysis but is otherwise inapposite due to its factual dissimilarity.

not offend traditional notions of fair play and substantial justice." *Kaestner*, 139 S Ct at 2220 (citations and internal quotation marks omitted); *see also Quill*, 504 U.S. at 312 ("Due process centrally concerns the fundamental fairness of governmental activity. * * * We have, therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis."). Second, "the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Kaestner*, 139 S Ct at 2220. The court now applies this analysis.

The first step, the minimum contacts inquiry, "is flexible and focuses on the reasonableness of the government's action." *Id.* at 2220. The approach used to determine whether *in personam* jurisdiction lies also applies in cases involving a state's jurisdiction to tax. *Quill*, 504 US at 308-09. Under that approach, "[i]t is settled law that a business need not have a physical presence in a State to satisfy the demands of due process." *Wayfair*, 138 S Ct at 2093 (citation omitted). Rather, the required minimum contacts may be present if the taxpayer "purposefully avails itself" of the state's market and thereby of the benefits and protections that a state provides by its laws and other infrastructure. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 US 873, 877, 131 S Ct 2780, 180 L Ed 2d 765 (2011) (plurality opinion) (quoting *Hanson v. Denckla*, 357 US 235, 253, 78 S Ct 1228, 2 L Ed 2d 1283 (1958)). However, the United States Supreme Court opinions on the meaning of "purposeful availment" have been fragmented. Justice Brennan, writing for himself and three other Justices concurring in the judgment in a 1987

products liability case, would have held that the "regular and anticipated flow of products from manufacture to distribution to retail sale" that he found in that case sufficed to establish minimum contacts with California. *See Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 US 102, 116-17, 107 S Ct 1026, 94 L Ed 2d 92 (1987) (Brennan, J, concurring in part and concurring in the judgment). Justice O'Connor, writing for a different plurality, would have required "something more" than a manufacturer's mere awareness that its product would enter the forum state through the stream of commerce. *Id.* at 111-12 (O'Connor, J., plurality opinion).

More recently, the plurality opinion in *Nicastro*, authored by Justice Kennedy, would have looked to "whether the [foreign manufacturer's] activities manifest an intention to submit to the power of a sovereign." *Nicastro*, 564 US at 882. The plurality also stated its test as whether the defendant's actions "target[] the forum" and as "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign * * *." *Id.* at 882-84. As examples of conduct that would evince such an intention, the Court cited "direct[ing] marketing and sales efforts at" the state and advertising in the state, as well as having an office within the state, paying taxes in the state, or owning property there. *Id.* at 885-86. Justice Breyer's opinion concurring in the judgment in *Nicastro* concluded that the foreign manufacturer's sale of only one item into New Jersey negated either any "regular * * * flow" or the "something more" referred to in the competing plurality opinions in *Asahi. See id.* at 888-89 (citations omitted) (Breyer, J., concurring). Justice Breyer declined to join

the plurality opinion in *Nicastro* and instead would have decided that case in favor of the manufacturer without "announc[ing] a rule of broad applicability * * *." *Id.* at 887.

Taxpayer devotes much of its argument to explaining why three of the four opinions discussed above[11] do not apply, and why one of them (the Kennedy plurality opinion in *Nicastro*) should control.[12] The court concludes that under any of the tests articulated in *Asahi* or *Nicastro*, Taxpayer purposefully availed itself of Oregon's market. The nature of Taxpayer's business as a seller of ongoing services, the number and dollar volume of Taxpayer's Oregon sales, and the pattern of their growth, show contacts that were sufficiently targeted to Oregon to satisfy any of the tests. During the three years at issue, Taxpayer billed its Oregon subscribers a total of $2,807,135.90 on recurring cycles. (Stip Facts at 6, ¶ 27; Stip Ex E at 1.) Taxpayer's "total * * * product orders made by Oregon

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11. There are others. Justice Stevens wrote separately in *Asahi* and would have declined to reach the minimum contacts issue. 480 US at 121. Justice Ginsburg wrote a dissenting opinion in *Nicastro* and would have allowed jurisdiction in any state where a product is sold and caused injury. 564 US at 893-910.

12. Taxpayer also criticizes the Oregon Supreme Court's decision in *Willemsen v. Invacare Corp.*, 352 Ore. 191, 282 P3d 867 (2012), *cert den* , 568 US 1143, 133 S. Ct. 984, 184 L. Ed. 2d 762 (2013), for applying a "regular flow" or "regular course of sales" standard. (Ptf's Memo Supp Mot Summ J at 11.) The court sees no need to address this argument because the court concludes that Taxpayer's contact satisfies any of the United States Supreme Court's minimum contacts tests and because Taxpayer's contact far exceeds that of the defendant in *Willemsen*.

customers * * * during the Period" were "$758,094.96", and its total "recurring billings *and* product orders for Oregon residents during the Period" were "$2,768,405.78." (*Id.*; Stip Ex E at 2-4.) (Emphasis added.) During the same period, Taxpayer had thousands of VoIP lines in Oregon and its revenue from Oregon customers increased from $601,112.19 in 2013 to $1,152,233.39 in 2015.[13] (Def's

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13. The Department provided a chart, recapitulated below, with four columns showing the "Number of VoIP Lines in Oregon, Product Sales to Oregon customers, Recurring Service Billings to Oregon customers," and "Total Monthly Revenue from Oregon customers" ("Chart"). (Def's Cross-Mot Summ J Resp to Ptf's Mot Summ J at 4-5.) The Department determined the amount of VoIP lines in Oregon by dividing the "per month tax" by $0.75. (*Id.* at 4 n 3 (citing Stip Ex D.).) In its response brief, Taxpayer takes issue with statements in the Department's cross-motion, asserting in part that the Department failed to note in its reference to the Chart that "one customer may use multiple lines for VoIP service." (Ptf's Resp to Def's Cross-Mot Summ J and Rep to Def's Resp at 1-2.) Taxpayer contends that one VoIP line does not equal one customer. (*Id.* at 2.) Taxpayer also notes that the portion of the Chart listing the dollar value of equipment sales to Oregon customers lacks a frame of reference and does not reflect the parties' stipulation that Oregon customers can purchase Taxpayer's VoIP Equipment from several sources; nor does it explain the price of the VoIP Equipment purchases on a per unit basis. (*Id.* (citing Stip Facts at 3-4, ¶¶ 11, 15-16.).) Taxpayer then notes, without explanation, that the "issue of lines v. customers and the average price of equipment sold to Oregon customers is important in light of the Department's reliance on the holding in *South Dakota v. Wayfair, Inc.*, 138 S Ct 2080, 201 L. Ed. 2d 403." (*Id.* at 2 n 1.) As will be explained further below, given the extent of Taxpayer's overall connection to Oregon during the periods at issue, the court concludes that none of these points creates a genuine issue of material fact sufficient to preclude summary judgment in the Department's favor. *See, e.g., Jones v. GMC*, 325 Ore. 404, 413,

Cross-Mot Summ J and Resp Ptf's Mot Summ J at 4-5; Ptf's Resp and Rep at 2); (*see also* Stip Facts at 6, ¶ 26; Stip Ex D). These amounts far exceed those at issue in *Nicastro*, which involved a single sale[14] (or, at most, four sales[15]) into New Jersey at a price of $24,900[16] per unit. In this case, Taxpayer's thousands of lines and its revenue from Oregon customers of nearly $1 million per year dwarf the in-state activity of the manufacturer in *Nicastro*.[17]

Applying the test Justice Brennan articulated in *Asahi*, not only was the "flow" of products and services "regular and anticipated," but most of the revenues as well were based on regular monthly subscriptions and actually increased from one quarter to the next. Turning to Justice Breyer's reasoning in *Nicastro*, Taxpayer's sales and revenues also vastly exceeded the "single sale" of $24,900 on which Justice Breyer relied in seeking to apply

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939 P.2d 608 (1997) ("In deciding whether a genuine issue of fact exists, courts generally read 'genuine issue' to mean 'triable issue.") (internal quotation marks and citations omitted).

14. *See Nicastro*, 564 US at 889 (Breyer, J., concurring in the judgment) (referring repeatedly to a "single sale").

15. *See id.* at 878 (plurality opinion) (one to four machines).

16. *See id.* at 894 (Ginsburg, J., dissenting) (stating sales price per unit).

17. The quantities and dollar amounts at issue in *Asahi* are less clear, but between 20,000 and 100,000 of the Department's tire valve stems appear to have ended up in California stores per year. *See id.*, 480 US at 106 (Asahi sold 100,000 to 500,000 valve stems to distributor, which sold 20 percent of that stock into California).

precedent involving isolated sales.[18] And to the extent that "purposeful availment" might require "something more" than Taxpayer's awareness that its goods or services were entering Oregon through the stream of commerce, as Justice O'Connor posited in *Asahi*, Taxpayer's exclusively direct interactions with its Oregon customers fulfill that requirement. (There is no evidence that Taxpayer used a distributor or other intermediary.)

Finally, to the extent that Taxpayer accurately declares that the most restrictive test, Justice Kennedy's opinion in *Nicastro*, controls here, the evidence of Taxpayer's business model as a service provider clearly shows that Taxpayer has "targeted" Oregon as a market through a "course of conduct." Taxpayer earned the great majority of its Oregon income from *recurring billings* for telephone service and related services. (*See* Def's Cross-Mot Summ J and Resp Ptf's Mot Summ J at 4-5 (summarizing data in Stip Facts at 6, ¶¶ 26-27).) At a minimum, Taxpayer's periodic billing of customers proves that Taxpayer had "fair warning" that revenue was coming from existing customers in Oregon.[19] Nor is that revenue stream

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18. Taxpayer's sales also dramatically exceeded the approximately $30,929 that defendant China Terminal & Electric Corp. received from selling 1,102 battery chargers into Oregon over a two-year period, amounts that the Oregon Supreme Court found sufficient to satisfy the minimum contacts requirement in *Willemsen. See* 352 Or at 196 (citing Justice Breyer's opinion concurring in the judgment in *Nicastro*).

19. The facts here leave no doubt that Taxpayer specifically had "fair warning" that Oregon's E911 Tax would apply as well. Taxpayer's Terms and Conditions included language notifying its subscribers that they would be subject to "911 fees." (Stip Ex C at 9) (listing service charges and fees, including "911 Service Fee * * *

purely the product of blindly casting a wide net through generic broadcast or Internet advertisements. Unlike the remote sellers in *Asahi* or *Nicastro*, Taxpayer's business model depends in large part on cultivating an *ongoing* relationship with its customers, each of which provides a stream of monthly revenue and the prospect to increase that stream. Taxpayer's standard form of contract indicates that customers are not "locked in" to receiving their phone service from Taxpayer, except to the extent that Taxpayer's contract with a particular customer may specify a minimum initial term. (*See* Stip Ex C at 4 ("The term for each Service will begin on the date it is activated and will continue until the Service is terminated by you or by us, as is more fully set forth herein. Notwithstanding the preceding sentence, in some cases, the description of the Services or the pricing for the Services may provide for or require an initial minimum term. Likewise, the sale of an item of Equipment at a particular price may require as a condition a minimum initial term for a Service."); *id.* at 10 (customer generally may terminate with five days' notice and is liable for charges for service through date of termination).) If Taxpayer fails to satisfy a customer, therefore, Taxpayer risks losing the customer's monthly revenue to a competitor. Yet, as shown in the Chart below, over the course of the periods at issue Taxpayer not only doubled the number of lines in Oregon, from 6,633 in January 2013 to 13,467 in March 2016, it also increased the average monthly service revenue it derived from *each* line substantially, by around 30 percent:

[and] 911 fees."); (*Id.* at 18 ("[Taxpayer] may be required to bill you certain fees, which may include * * * Emergency 911 Cost Recovery Fee; 911 Fees[.]").

Appendix B

Month/ Year	Number of VoIP Lines in Oregon	Product Sales to Oregon customers	Recurring Service Billings to Oregon customers	Total Monthly Revenue from Oregon customers
Jan 2013	6,633	$16,082.01	$33,507.64	$49,589.65
Feb 2013	6,790	$14,224.46	$32,967.47	$47,191.93
Mar 2013	6,987	$13,210.67	$33,843.44	$47,054.11
Apr 2013	7,167	$14,821.45	$36,082.81	$50,904.26
May 2013	7,334	$14,438.36	$35,971.98	$50,410.34
Jun 2013	7,549	$11,669.15	$35,253.42	$46,922.57
Jul 2013	7,747	$15,248.11	$33,887.25	$49,135.36
Aug 2013	7,985	$13,483.38	$32,222.04	$45,705.42
Sep 2013	8,162	$12,027.78	$36,448.84	$48,476.62
Oct 2013	8,390	$20,597.43	$37,052.04	$57,649.47
Nov 2013	8,575	$14,730.82	$38,126.52	$52,857.34

Appendix B

Month/ Year	Number of VoIP Lines in Oregon	Product Sales to Oregon customers	Recurring Service Billings to Oregon customers	Total Monthly Revenue from Oregon customers
Dec 2013	8,853	$17,496.89	$37,718.23	$55,215.12
Jan 2014	9,043	$17,785.00	$42,778.21	$60,563.21
Feb 2014	9,178	$15,287.30	$43,507.99	$58,795.29
Mar 2014	9,409	$13,754.89	$42,851.97	$56,606.86
Apr 2014	9,667	$18,251.94	$45,548.31	$63,800.25
May 2014	9,891	$13,877.21	$48,731.28	$62,608.49
Jun 2014	10,052	$18,114.76	$47,207.67	$65,322.43
Jul 2014	10,229	$21,620.19	$43,763.36	$65,383.55
Aug 2014	10,383	$15,903.28	$47,055.89	$62,959.17
Sep 2014	10,537	$13,819.54	$47,794.36	$61,613.90
Oct 2014	10,711	$18,853.51	$50,180.17	$69,033.68

Appendix B

Month/ Year	Number of VoIP Lines in Oregon	Product Sales to Oregon customers	Recurring Service Billings to Oregon customers	Total Monthly Revenue from Oregon customers
Nov 2014	10,838	$16,382.39	$53,128.75	$69,511.14
Dec 2014	11,132	$15,000.29	$53,777.15	$68,777.44
Jan 2015	11,315	$19,267.37	$56,151.83	$75,419.20
Feb 2015	11,460	$17,053.34	$59,321.22	$76,374.56
Mar 2015	11,594	$20,641.42	$58,856.10	$79,497.52
Apr 2015	11,724	$16,012.18	$71,122.95	$87,135.13
May 2015	11,852	$14,080.24	$87,044.32	$101,124.56
Jun 2015	11,991	$15,403.98	$81,164.60	$96,568.58
Jul 2015	12,163	$17,176.91	$79,635.00	$96,811.91
Aug 2015	12,343	$18,305.51	$80,513.53	$98,819.04
Sep 2015	12,528	$20,892.92	$90,400.07	$111,292.99

Month/ Year	Number of VoIP Lines in Oregon	Product Sales to Oregon customers	Recurring Service Billings to Oregon customers	Total Monthly Revenue from Oregon customers
Oct 2015	12,709	$14,017.99	$95,126.27	$109,144.26
Nov 2015	12,872	$13,513.81	$93,545.67	$107,059.48
Dec 2015	13,068	$14,708.71	$98,277.45	$112,986.16
Jan 2016	13,231	$17,567.61	$102,096.87	$119,664.48
Feb 2016	13,342	$14,630.08	$101,113.77	$115,743.85
Mar 2016	13,467	$14,288.32	$97,169.72	$111,458.04

(Def's Cross-Mot Summ J and Resp Ptf's Mot Summ J at 4-5 (Chart) (footnote omitted).) Taxpayer must at least have provided adequate VoIP service to its existing customers in order to achieve that, and the court considers that ongoing service--to known, existing Oregon customers--to be a course of conduct targeting those customers.[20]

20. At least for the last two months at issue, Taxpayer's Form 10-K for the fiscal year ending January 31, 2017, eliminates any doubt that Taxpayer engaged in a course of conduct targeting its existing Oregon customers. Taxpayer introduces its business model

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.

Turning to the second step in the due process analysis, Taxpayer does not seriously contest that the E911 Tax is "related to the benefit Taxpayer receives from access to the state." State law plainly requires that the revenue from the E911 Tax be spent to maintain Oregon's emergency communication network. *See* ORS 403.235 to 403.245. Thus, the E911 Tax directly funds a service that Taxpayer's customers may urgently need. More importantly, a federal regulation *requires* Taxpayer as an "interconnected VoIP

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in Part I of its Form 10-K as follows: "We drive the *adoption* of our platform by providing communications solutions to the large and growing markets for small business, home, and mobile users *and then accelerate growth by offering new and innovative connected services to our user base*." (Decl of Darren Weirnick, Ex A at 5 (the "10-K") (emphasis added).) Later in the same public document, Taxpayer specifically states: "*We sell additional services to our existing customer base by* offering free trials and promotional offers, as well as *sending e-mail communications and leaving messages on their Ooma voicemail service*." (10-K at 10 (emphasis added).) And under the heading of "Customer Support," Taxpayer notes: "In addition to providing support to our customers, we employ an *active customer management strategy* in which we *drive incremental revenue through cross-selling of products and services*." (*Id.*) The court finds that Taxpayer, like almost any prudent service business, targeted its base of existing customers as an obvious source of potential additional profit, in addition to attending to customers' immediate need for service and support.

service provider" to assure its subscribers access to their local emergency communications system and imposes related obligations on Taxpayer. *See* 47 CFR 9.5(b), (d), and (e). Were it not for Oregon's emergency communications system that Taxpayer's payments help to fund, Taxpayer would be in conflict with federal law because Taxpayer would be unable to fulfill the requirement to connect its customers to a local system. The court readily concludes that the E911 Tax is rationally connected with value that Oregon's emergency network provides to Taxpayer.

For the foregoing reasons, the court concludes that the Department's imposition of the E911 Tax on Taxpayer does not violate the Due Process Clause of the United States Constitution.

3. *Does the Commerce Clause Prohibit the Department from Subjecting Taxpayer to the E911 Tax?*

The court turns now to Taxpayer's argument that the E911 Tax violates the Commerce Clause of the United States Constitution, which grants Congress the power "[t]o regulate Commerce * * * among the several States." US Const, Art I, § 8, cl 3. Even absent congressional action, the United States Supreme Court "has long held that in some instances [the Commerce Clause] imposes limitations on the States," including on state taxing power. *Wayfair*, 138 S Ct at 2089.[21] To reconcile those limitations

21. The Department notes that Congress has "specifically affirmed" the power of states to impose 911 taxes on VoIP providers. Under 47 USC § 615a-1(f)(1):

with the now-unquestioned rule that "interstate commerce may be made to pay its way," the Court more than 40 years ago adopted a four-part test. *See Complete Auto Transit, Inc. v. Brady*, 430 US 274, 281, 97 S. Ct. 1076, 51 L. Ed. 2d 326 & n 15 (1977). Under that test, a state tax will be sustained so long as it "applie[s] to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by

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> "Nothing in this Act, the Communications Act of 1934 (47 USC 151 et seq.), the New and Emerging Technologies 911 Improvement Act of 2008, or any [Federal Communications] Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State [or] political subdivision thereof * * * for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge."

(*See* Def's Rep to Ptf's Resp to Def's Cross-Mot Summ J at 11 n 4.) The Department states: "When Congress has expressed an intent that its own legislation and FCC regulations *not* be construed to prevent states from imposing charges on VoIP providers to support 9-1-1 services, one may not assume that Oregon's 9-1-1 tax is subject to a dormant Commerce Clause challenge based on *Quill*, even if *Quill* had not been overruled." (*Id.*) At oral argument, the Department acknowledged that it does not argue that this provision expressly preempts any Commerce Clause challenge to the E911 Tax. (Statement of Darren Weirnick, Oral Argument, Jan 17, 2019, 11:32:31).

the State." *Id.* at 279. This case raises no issues regarding fair apportionment or discrimination against interstate commerce; only the "substantial nexus" and "fairly related" parts of the *Complete Auto* test are at issue.

a. Substantial Nexus

The Court in *Wayfair* recently reexamined the substantial nexus requirement, overruling the Court's decisions in *Quill* and *National Bellas Hess v. Illinois*, 386 US 753, 758-59, 87 S Ct 1389, 18 L Ed 2d 505 (1967) (*Bellas Hess*), which had established and maintained a requirement that the taxpayer have "physical presence" in the taxing state. 138 S Ct at 2096. This case requires the court to apply the substantial nexus requirement in light of *Wayfair*, taking into account the nature of the E911 Tax compared to taxes that the United States Supreme Court has considered.

The court begins by examining the substantial nexus requirement. Before *Wayfair*, the Court's opinions on the nexus requirement in state tax cases focused on the physical presence rule and its underpinnings in the context of sales and use taxes. *See, e.g., Quill*, 504 US at 298 (reaffirming *Bellas Hess's* physical presence rule for sales and use tax obligations imposed on mail-order sellers).[22] In *Wayfair*, after rejecting the physical

22. The Court in other cases has easily found substantial nexus based on facts indicating that the taxpayer maintained a physical presence in the taxing state. *Cf., e.g., National Geographic v. Cal. Equalization Bd.*, 430 US 551, 559, 97 S Ct 1386, 51 L Ed 2d 631 (1977) (taxpayer's maintenance of office in taxing state sufficient for

presence rule, the Court restated the substantial nexus requirement as follows: "'[S]uch a nexus is established when the taxpayer [or the collector of the tax] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." 138 S Ct at 2099.[23] The Court then examined the annual "quantity of business" that South Dakota required as a threshold for application of its sales tax, namely, sales exceeding $100,000, or at least 200 transactions. The Court held that these thresholds showed a "clearly sufficient" nexus. *Id.* Because each of the *Wayfair* taxpayers had agreed that it exceeded these thresholds, the Court determined that the nexus between the taxpayers' activity and South Dakota was established based on the taxpayers' "economic and virtual[24] contacts."

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nexus); *D.H. Holmes Co. v. McNamara*, 486 US 24, 32-33, 108 S Ct 1619, 100 L Ed 2d 21 (1988) (nexus met where taxpayer distributed catalogs, maintained multiple stores in taxing state and earned over $100 million from sales in that state); *Commonwealth Edison Co. v. Montana*, 453 US 609, 617, 101 S Ct 2946, 69 L Ed 2d 884 (1981) (Montana tax on severance of coal in Montana satisfied substantial nexus requirement); *see also Capital One Auto Fin., Inc. v. Dep't of Revenue*, 22 OTR 326, 343 (2016) (noting that there is "no clear Supreme Court precedent with respect to income or excise taxes that requires a physical presence for such taxes), *aff'd on other grounds*, 363 Ore. 441, 423 P3d 80 (2018).

23. The Court here quoted *Polar Tankers, Inc. v. City of Valdez*, 557 US 1, 11, 129 S Ct 2277, 174 L Ed 2d 1 (2009), a property tax case involving the Tonnage Clause, but the "avails itself" phrase is also used in the Due Process Clause analysis in state income tax cases. *E.g., Mobil Oil Corp. v. Commissioner of Taxes*, 445 US 425, 437, 100 S Ct 1223, 1231, 63 L Ed 2d 510 (1980).

24. The Court stated that the taxpayers, as "large, national companies," "undoubtedly maintain an extensive virtual presence."

Id. Although the Court then raised the possibility that "some other principle in the Court's Commerce Clause doctrine might invalidate" the South Dakota act, the Court discussed no further principles or facts involving the concept of substantial nexus. *Id.*[25]

As recounted above, Taxpayer's "quantity of business" in Oregon, based on Taxpayer's sales revenue, greatly exceeds the minimum sales revenue under South Dakota law that the Court approved in *Wayfair*. Taxpayer had more than $600,000 in annual revenue from Oregon customers in the first 12 months at issue, and that amount grew to more than $1 million for the last 12 months at issue. (Def's Cross-Mot Summ J and Resp Ptf's Mot Summ J at 4-5.) Based on a straightforward application of *Wayfair*, then, Taxpayer's activities obviously have a substantial nexus with Oregon.

Id. However, the Court discussed no specific factual findings on this point, the case having proceeded on a spare factual record after the state conceded summary judgment in the trial court based on the application of *Quill*. *See id.* at 2089. In this case, the court finds the factual record of Taxpayer's economic presence in Oregon adequate to decide the case without considering the extent, if any, of Taxpayer's virtual presence.

25. The Court did mention three features of the South Dakota act that the Court described as "designed to prevent discrimination against or undue burdens upon interstate commerce." *Id.* at 2099. Those features do not appear to relate to the substantial nexus part of the *Complete Auto Transit* test, however, and two of the features (safe harbor thresholds and anti-retroactivity provisions) do not appear to be relevant here. The court discusses below the *Wayfair* Court's observations about the third feature, states' efforts to streamline and standardize local sales and use taxes.

Taxpayer argues that, notwithstanding *Wayfair*, this court should apply a physical presence requirement in this case. Taxpayer first seeks to distinguish *Wayfair* on the grounds that the E911 Tax, together with other states' "indirect"[26] taxes, impose administrative and compliance burdens so "crushing" that the Commerce Clause forbids laying them on companies that lack a physical presence in the taxing state. (Ptf's Memo Supp Mot Summ J at 21; Ptf's Resp to Def's Cross-Mot Summ J and Rep at 14.) Taxpayer points out that the E911 Tax has some of the burdensome features of the sales and use taxes involved in *Bellas Hess, Quill* and *Wayfair*, namely, the requirement to collect and remit tax from customers, and to determine the amount of liability immediately when making sales to customers. *Cf. Capital One*, 22 OTR at 343 (describing typical sales tax collection burdens). *Wayfair*, however, declared these burdens, by themselves, insufficient to justify a physical presence requirement. *See* 138 S Ct at 2093 (referring to seller's collection duty as a "familiar and sanctioned device"). But Taxpayer asks the court to consider these burdens in the greater context of all indirect taxes imposed on telecommunications services nationwide, which Taxpayer claims are far more numerous and varied, and require vastly greater numbers of returns,

26. Taxpayer does not define the term "indirect taxes." The court understands Taxpayer to be referring to sales taxes and other charges that Taxpayer is allowed or required to collect from its customers. *See Black's Law Dictionary*, (11th ed 2019 (defining "indirect tax" as "1. A tax on a right or privilege, such as an occupation tax or franchise tax. • An indirect tax is often presumed to be partly or wholly passed on from the nominal taxpayer to another person. 2. A tax that is added to the cost of goods or services.")

than is the case for general, non-telecommunications businesses.

The court struggles with Taxpayer's evidence, which consists of a 2004 study addressing the telecommunications industry as a whole, including traditional wireline service providers and wireless service providers. (*See* Stip Ex F at 20-21 (stating assumptions).) The study nowhere mentions the then-nascent VoIP industry. Although the study supports Taxpayer's factual position that telecommunications providers at that time were subject to a much greater number and variety of taxes and filing obligations than imposed on other businesses, the study attributes this inequity to "outmoded statutes that originated during the era when telecommunications companies were closely regulated monopolies." (Stip Ex F at 9.) Taxpayer provides no evidence that these "outmoded" statutes actually applied to the relatively new VoIP industry.[27] The same study also reports that the number of filings required had *decreased* by about 28 percent over the five years preceding the study, due largely to efforts by five states to simplify their telecommunications tax structures. (*Id.* at 9-10 (required filings dropped from 66,918 to 47,921 from 1999 to 2004).) If that reduction were trended to the present (16 years later), it might be reasonable to suppose that the problem Taxpayer complains of has been solved--there is no evidence either way. Finally, a 2017 study that the parties introduced as a stipulated exhibit suggests that, to the

27. Recall that the Oregon legislature in 2014 felt the need to update the E911 Tax to include VoIP providers. Or Laws 2014, ch 59, § 3a.

extent a problem persists, emergency access charges are not likely a significant cause: "Most wireless 911 fees are levied at uniform rates statewide, although there are a few exceptions." (Stip Ex G at 8.) From these materials the court cannot discern anything approaching the "virtual welter of complicated obligations to local jurisdictions" that moved the Court in *Bellas Hess* to first declare a physical presence requirement for sales and use taxes. *See* 386 US at 759-60.[28]

Taxpayer's resort to the 2004 study also undermines its next argument. Taxpayer asserts that a physical presence requirement for the E911 Tax would not distort the market in which Taxpayer operates, in contrast to the market distortion that the Court found in *Wayfair*. The Court in *Wayfair* took pains to illustrate how a physical presence requirement for sales and use taxes could create market distortion by driving business away from

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28. Even if Taxpayer could show that other states unduly burden its business, the court is not persuaded that the substantial nexus requirement, as articulated in *Wayfair*, requires this court to strike down *this* state's statute. As discussed below, in concluding that substantial nexus was present, the Court described with approval South Dakota's adoption of the Streamlined Sales and Use Tax Agreement, which, among other things, requires each state to adopt a single, centralized administrative system statewide and to ensure that the tax base of all localities is identical to the tax base of the tax that the state itself imposes. *See* 138 S Ct at 2099-2100. Oregon goes providers one better, imposing the E911 Tax *solely* at the state level. The E911 Tax also is inherently straightforward, applying on a monthly basis, which enables Taxpayer to build it into its recurring billings, and it is modest in amount at 75 cents per "line," a unit that Taxpayer understands. (*See* Stip Facts at 6, at ¶ 26.)

a hypothetical company that placed its warehouse in the taxing state, and by driving business into the arms of an otherwise identical company that kept its warehouse a few miles across the state line, safe from any requirement to collect sales or use tax. *See* 138 S Ct at 2085. Taxpayer argues that the Court's distortion scenario does not apply in this case because VoIP providers do not need a substantial physical plant in any state (ignoring, for the sake of argument, any office or headquarter facility). (*See* Ptf's Memo Supp Mot Summ J at 18.) For purposes of its "no distortion" argument, Taxpayer thus posits a comparison solely among competitors *within* the VoIP industry; yet for purposes of its earlier "crushing burden" argument, Taxpayer implicitly characterizes wireline and wireless providers as among its competitors by relying on the 2004 study. The Oregon statutes make it clear that any "distortion" analysis must take non-VoIP providers into account. The Oregon collection obligation applies to any "provider" of access to the emergency communications system, which by definition includes a "telecommunications utility" that "owns, operates, manages or controls all or a part of any plant or equipment in this state." ORS 759.005(9)(a)(A) (defining "telecommunications utility"); *see* ORS 403.215; ORS 403.105(19); ORS 403.105(27). The court concludes that Taxpayer misapplies the market distortion analysis by positing a class that is artificially limited to VoIP providers, thus excluding other providers that have obvious and extensive physical presence in the state and that Taxpayer's own proffered study indicates are its competitors. Therefore, even if the court were persuaded that Taxpayer is exposed to a large number of local tax regimes, the court, following *Wayfair*, would

not adopt a physical presence requirement lest the court distort the market in favor of Taxpayer and to the detriment of utilities and other competitors with physical presence in Oregon.

Taxpayer urges the court to conclude that its activities lack substantial nexus with Oregon because its advertising does not target the Oregon market. Taxpayer claims: "It is clear from the Court's holding in *Wayfair* that 'substantial nexus' existed because the online retailers used 'targeted advertising' that provided 'instant access to most consumers via any internet-enabled device.'" (Ptf's Memo Supp Mot Summ J at 24 (quoting 138 S Ct at 2095)). This court cannot find such a holding in *Wayfair*. The quoted language appears in the Court's discussion of the artificiality of the physical presence rule in general. Nowhere does the Court "hold" that the taxpayers in that case used advertising targeted at South Dakota, nor does the Court cite any finding of fact to that effect. As noted above, the limited factual record in *Wayfair* established only that "Each [taxpayer] easily meets the minimum *sales or transactions* requirement of the Act." 138 S Ct at 2089 (emphasis added). The Court discussed ways in which online retailers generally may maintain a "virtual presence" in a state, but "targeted advertising" was only one of the methods the Court listed for doing so. Others included maintaining a "virtual showroom" and making the company's advertising available "via any internet-enabled device." *Id.* at 2095. Taxpayer's claim that the Court found substantial nexus "because" of targeted advertising by the taxpayers in that case is inaccurate, and Taxpayer's attempt to build on that incorrect claim

to construct an argument premised on Taxpayer's *lack* of Oregon-targeted advertising fails.

Finally, Taxpayer argues that it and the entire VoIP industry have "settled expectations" of a physical presence requirement, which this court should now fulfill. The court sees nothing in *Quill* that sets any reasonable expectation that a physical presence requirement would apply to Oregon's E911 Tax. *Quill* was not a unanimous decision, and even the majority cautioned that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." 504 US at 311. Taxpayer is compelled to distinguish the E911 Tax from the kind of sales or use tax at issue in *Quill* and *Bellas Hess* (because *Wayfair* overruled those opinions), yet Taxpayer also points to no instance in which the Court extended the physical presence requirement of *Quill* and *Bellas Hess* to any other kind of tax. Taxpayer has no good reason to expect that a physical presence rule would apply to it.

b. Is the E911 Tax Sufficiently Related to the Services Oregon Provides?

Taxpayer next attacks the E911 Tax on the grounds that it is insufficiently related to the services Oregon provides. Taxpayer offers two alternative tests by which to measure the degree of relationship: the test stated in *Complete Auto Transit*, and a more demanding test that the United States Supreme Court has applied to charges for the use of state-provided facilities, both in *Airport Authority v. Delta Airlines*, 405 US 707, 92 S Ct 1349,

31 L Ed 2d 620 (1972)(*Evansville-Vandenburgh*) and in *Commonwealth Edison Co. v. Montana*, 453 US 609, 101 S Ct 2946, 69 L Ed 2d 884 (1981). This court concludes that the E911 Tax satisfies either test. Therefore, the court does not wade into the murky waters of distinguishing between a "general revenue tax" covered by *Complete Auto Transit* and a "user fee" covered by *Evansville-Vandenburgh*.[29]

The *Complete Auto Transit* test asks whether the "tax * * * is fairly related to the services provided by the State." 430 US at 279. The Court stated the test more specifically in *Commonwealth Edison* as whether "the *measure* of the tax [is] reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a

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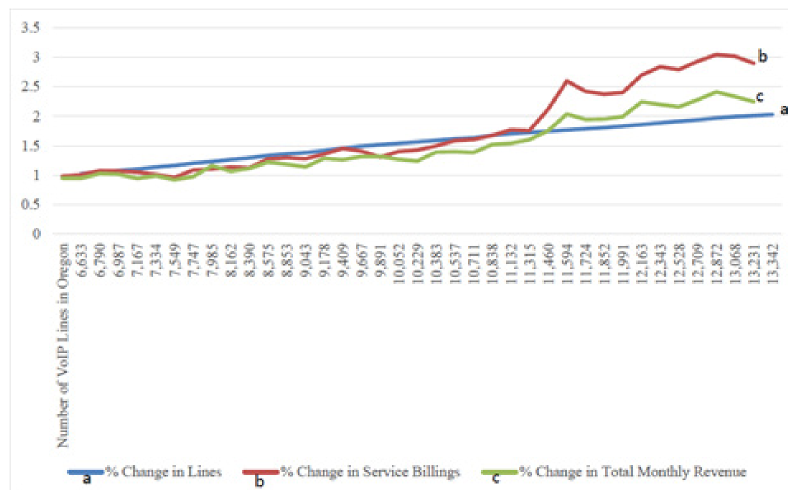
29. *See Am. Trucking Ass'ns v. DOT*, 339 Ore. 554, 562-67, 124 P3d 1210 (2005) (considering both lines of cases in determining constitutionality of per-mile charges; applying *Complete Auto Transit*). Distinctions between taxes and fees arise under various provisions of Oregon law as well. *See, e.g., AAA Oregon/Idaho Auto Source v. Dept. of Rev.*, 363 Ore. 411, 424, 423 P3d 71 (2018) (holding, in part, that voters intended Article IX, section 3a, of the Oregon Constitution to apply only to "special highway user taxes" and not to all taxes imposed on a status or activity involving motor vehicles); *Sproul v. State Tax Com.*, 234 Ore. 579, 581, 383 P2d 754 (1963) (statute levying an assessment to fund forest fire prevention held to be an exercise of the state's police power and not an exercise of the state's taxing power); *PacifiCorp v. Dept. of Energy*, 21 OTR 116, 117-18 (2013) (citing *Multnomah County v. Talbot*, 56 Ore. App. 235, 641 P2d 617 (1982) (tax court lacked subject matter jurisdiction to consider whether a charge imposed on certain energy resource suppliers under ORS 469.421(8) was a fee or a tax, and whether that charge violated the Oregon Constitution)).

'just share of State tax burden.'" 453 US at 626 (emphasis in original; citations omitted). In that case, the tax was a severance tax imposed on the mining of coal in Montana, and it was measured as a percentage of the contract sales price for the coal. The Court easily concluded that the percentage-of-value measure was in proper proportion to the taxpayer's activities within the state and caused the taxpayer to "shoulder[] its fair share of supporting the State's provision of police and fire protection, the benefit of a trained work force, and the advantages of a civilized society." *Id.* at 626 (internal quotation marks omitted).

Here, the "measure" of the E911 Tax is per month and per "line." *See* ORS 403.200(1). The parties agree that Taxpayer had a certain number of "telephone lines to Oregon customers" at any given time, and that that number grew from 6,633 in January 2013 to 13,467 in March 2016. (*See* Stip Facts at 6, ¶ 26; Stip Ex D); (Def's Cross-Mot Summ J and Resp to Ptf's Mot Summ J at 4-5.)[30] As discussed above, Taxpayer's monthly revenue from Oregon customers grew at a faster rate than its number of lines, but both grew substantially: the number of lines grew by 203 percent, while the monthly revenue grew by 290 percent. (*See* Def's Cross-Mot Summ J and

30. In response to a request by the court for clarification, the parties appear to acknowledge that the statutory references to a "line" are imprecise and potentially outdated when applied to VoIP providers. (See Ptf's Supp Rep; Def's Supp Rep.) The court accepts for purposes of this case the parties' apparent operating assumption that the number of lines is tied to the number of Oregon-resident customers, admitting the possibility that a single customer might choose to subscribe to more than one "line."

Resp Ptf's Mot Summ J at 4-5.) The graph below shows the change in the number of lines, monthly revenue from services, and total revenue, over the course of the periods at issue. The graph illustrates that Taxpayer's number of lines for Oregon customers grew steadily, while gross revenues from Oregon fluctuated moderately but also grew overall.



Considering as a baseline those taxes measured as a percentage of sales or revenue, the court finds that the per-line measure of the E911 Tax, too, is a reasonable measure of the extent of Taxpayer's contact with Oregon. In Taxpayer's business, having subscribed lines is a prerequisite to deriving service revenue from Oregon customers. Although Taxpayer obviously has managed to grow revenue faster than it adds new lines, apparently in part by contacting existing customers to sell more services

per line, the court finds a strong connection between the number of lines and revenue amounts. If anything, at least in Taxpayer's case, the charge per line is a conservative measure of Taxpayer's activity in Oregon. The court concludes that the "fairly related" requirement under *Complete Auto Transit* is satisfied.[31]

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31. Taxpayer also argues that under the "fairly related" requirement the state must confer benefits that specifically help maintain the economic market for the taxpayer's revenue-producing activity. (*See* Ptf's Resp to Def's Cross-Mot Summ J and Rep to Def's Mot Summ J at 18-19.) That is incorrect:

> "On the contrary, interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct benefit. The fourth prong of the *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue.
>
> "* * * *
>
> "The benefits that Illinois provides cannot be limited to those exact services provided to the equipment used during each interstate telephone call. Illinois telephone consumers also subscribe to telephone service in Illinois, own or rent telephone equipment at an Illinois service address, and receive police and fire protection as well as the other general services provided by the State of Illinois."

Goldberg v. Sweet, 488 U.S. 252, 267, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989) (internal quotation marks omitted; citations omitted; emphasis in original).

The court now turns to the test stated in *Evansville-Vandenburgh*. The Supreme Court considered two states' "enplaning" charges: flat fees of $1 or less imposed each time a passenger boarded an airplane for a commercial flight. The funds were dedicated to various purposes related to aeronautics or airport maintenance. The Court started its analysis by noting:

> "We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike."

405 US at 714. The Court then considered the analogous subject of tolls, summarizing the test under its extensive case law as follows:

> "At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound*, and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users."

Id. at 716-17. The Court applied this test to the enplaning fees, easily concluding that the fees did not discriminate against interstate commerce because the same fee applied

both to intrastate flights and to flights to destinations outside the state of enplanement.

The Court next found that the fees "reflect[ed] a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Id.* at 717. The Court based that finding on a review of the classes of fees and the transactions to which they applied. That analysis revealed that no fee was charged on the majority of enplanings due to numerous exemptions. However, the Court concluded that this discrepancy did not invalidate the fee because the exemptions and other classifications reflected "rational distinctions." *Id.* at 718.

Finally, the Court found that the fee revenue was not excessive in relation to the costs the taxing authorities incurred. In the Indiana case, the annual fees at issue, plus other earmarked revenue, added up to less than the annual debt service cost for capital improvements at the airport. In the New Hampshire case, the airline plaintiffs protested that 50 percent of the fee revenue went to local governments that owned the landing areas, without any requirement that the funds be spent on airport-related costs. However, the Court found that the airlines had not shown that the revenues for local governments exceeded the local governments' airport costs; therefore, the Court concluded that the lack of a restriction on the funds the localities received did not make the fees excessive. *Id.* at 720. The Court also noted that imposition of the fees did not seem to conflict with federal air transportation policies.

Applying the test in *Evansville-Vandenburgh* , the court now finds as follows with respect to the first and second criteria: First, the E911 Tax is nondiscriminatory for the same reason as in *Evansville-Vandenburgh*: each line is associated with an *Oregon* customer, and the same flat 75-cent monthly charge applies to every line, regardless of whether the customer uses the line for in-state calling or calling out of state, and regardless of where the provider is located. Second, the per-line charge is a fair approximation of use of the emergency communications system because the point of such a system is to facilitate *access* to emergency services at all times. A phone line is a prerequisite to that access; therefore, a charge that is levied periodically (monthly) on that access is a reasonable way to assign the burden among persons that receive the benefit of constant access. The E911 Tax also is subject to certain exemptions, *see, e.g.*, ORS 403.205, but Taxpayer does not assert that these, or any classifications in the statute, are irrational.

Regarding the third criterion in *Evansville-Vandenburgh*, Taxpayer asserts that the E911 Tax is excessive, but not due to appropriation of funds for unrelated purposes as the airlines alleged in that case. In fact, Taxpayer acknowledges: "Amounts collected as E911 Taxes are not to be used to fund any other aspect of the Oregon government." (Ptf's Memo Supp Mot Summ J at 27.) Rather, Taxpayer insists that the E911 Tax is excessive because there is no evidence "that OOMA has received anything of value from the state." (*Id.* at 28.) The court rejects this argument. Taken to its logical end, Taxpayer's statement would imply a belief that the

existence of an emergency 911 communications system does not benefit Taxpayer, even though the system quite literally helps to keep Taxpayer's customers alive and safe. Rather than ascribe such a view to this or any reputable business, the court views the statement as hyperbole. It is particularly overblown in this case because all evidence is to the contrary. As discussed above, Taxpayer obviously is keenly interested in maintaining long-term relationships with its customers, not merely to preserve existing revenue streams but also because each customer is a potential source of additional, new business in the form of additional services from Taxpayer. To the extent the point requires any further reasoning, the court finds that Oregon's emergency communications system also benefits Taxpayer directly. If the system did not exist, Taxpayer could not comply with the requirement under federal law to provide access to a local system. *See* 47 CFR § 9.5 This is true even though, as Taxpayer argues, federal law also imposes an independent obligation on each *state* to provide an emergency communications system. (Ptf's Resp to Def's Cross-Mot Summ J and Rep to Def's Resp at 18 (citing 47 CFR 9.7.).) The existence of complementary obligations does not take away Taxpayer's own obligation. The court concludes that the E911 Tax is not excessive in comparison with the governmental benefit that Oregon confers on Taxpayer.

4. *Penalties*

The Department assessed failure-to-file penalties against Taxpayer pursuant to ORS 314.400(1), (3)(a), (b), and ORS 305.992. (Def's Rep Ptf's Resp Def's Cross-

Mot Summ J at 20.) Taxpayer argues that it has taken a reasonable position in asserting that its activities were not subject to the E911 Tax and urges the court to reject Taxpayer's imposition of penalties. (Ptf's Resp to Def's Cross-Mot Summ J and Rep to Def's Resp at 20.)

The court has jurisdiction to determine whether the Department has correctly applied statutes imposing penalties.[32] ORS 314.400(3)(a)-(b) provides:

> "(3) In the case of a report or return that is required to be filed more frequently than annually and the failure to file the report or return continues for a period in excess of one month after the due date:
>
> "(a) There shall be added to the amount of tax required to be shown on the report or return a failure to file penalty of 20 percent of the amount of the tax; and
>
> "(b) Thereafter the Department may send a notice and demand to the person to file a

32. Taxpayer has not alleged that it has requested a waiver of penalties from the Department, nor does Taxpayer ask the court to review any denial of such a request. *See Pelett v. Dept. of Rev.*, 11 OTR 364, 365-66 (1990) (holding that, under ORS 305.560(1), the court has the authority to review *de novo* whether a penalty applies, but not whether defendant should have waived the penalty); *Pinski v. Dept of Rev.*, 14 OTR 376, 379 (1998) (the question whether the Department should have waived the 100 percent penalty that was assessed pursuant to ORS 305.992 is "not a question within the jurisdiction of the court.").

> report or return within 30 days of the mailing of the notice. If after the notice and demand no report or return is filed within the 30 days, the Department may determine the tax according to the best of its information and belief, assess the tax with appropriate penalty and interest plus an additional penalty of 25 percent of the tax deficiency determined by the Department and give written notice of the determination and assessment to the person required to make the filing."

Taxpayer is responsible for collecting the E911 Tax and filing quarterly returns with the Department. ORS 403.215(1). Taxpayer stipulated that it did not file emergency communication tax returns with the Department during the periods at issue. (Stip Facts at 2, ¶ 4). ORS 314.400 does not permit the court to take into consideration the reasonableness of the legal argument offered by Taxpayer in order to reduce the amount of the penalties. *Cf.* ORS 314.402(4)(b)(A)-(B) (reducing "substantial underpayment" penalty if underpayment was based on "substantial authority," or had "reasonable basis" and was "adequately disclosed"). The court concludes Taxpayer is subject to the penalty under ORS 314.400(3)(a)-(b).

The Department also assessed penalties for each tax period at issue as provided in ORS 305.992(1), which states:

> "(1) If any returns required to be filed under * * * ORS chapter * * * 314 * * * are

> not filed for three consecutive years by the due date (including extensions) of the return required for the third consecutive year, there shall be a penalty for each year of 100 percent of the tax liability determined after credits and prepayments for each such year.
>
> "(2) The penalty imposed under this section is in addition to any other penalty imposed by law. However, the total amount of penalties imposed for any taxable year under this section * * * 314.400 * * * may not exceed 100 percent of the tax liability."

As with the penalty under ORS 314.400, nothing in ORS 305.992 reduces the penalty based on the character of the taxpayer's position. Here there is no dispute that Taxpayer did not file quarterly returns for the periods at issue. (*See* Stip Facts at 2, ¶ 4.) The court concludes that Taxpayer is subject to the penalty under ORS 305.992 for each period at issue in this case. *See, e.g., Ashby v. Dep't of Revenue*, 21 OTR 47, 55 (2012) (holding that Taxpayer is subject to penalty of ORS 305.992 when there is no dispute that Taxpayer failed to file returns for the tax years at issue in that case).

V. CONCLUSION

The court concludes that Taxpayer is subject to the reporting and remitting requirements of the E911 Tax imposed by ORS 403.200(1). The imposition of the E911 Tax on Taxpayer does not violate the federal Due

Process Clause because Taxpayer has sufficient minimum connections with Oregon. The imposition of the E911 Tax is permissible under the Commerce Clause because there is substantial nexus between Oregon and Taxpayer, and because the measure of the E911 Tax is fairly related to Taxpayer's activities in Oregon and is not excessive. Taxpayer is subject to penalties pursuant to ORS 314.400 and 305.992. Now, therefore,

IT IS ORDERED that Plaintiff's motion for summary judgment is denied; and

IT IS FURTHER ORDERED that the Defendant's cross-motion for summary judgment is granted.

Dated this _____ day of March, 2020.

____

THIS DOCUMENT WAS SIGNED BY JUDGE ROBERT T. MANICKE ON MARCH 2, 2020, AND FILED THE SAME DAY. THIS IS A PUBLISHED DOCUMENT.

APPENDIX C — OPINION OF THE OREGON TAX COURT, MAGISTRATE DIVISION, FILED MARCH 27, 2018

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Emergency Communications Tax

TC-MD 160375G

OOMA, INC., A FOREIGN CORPORATION,

Plaintiff,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,

Defendant.

DECISION

On cross-motions for summary judgment, this case concerns whether an out-of-state telecommunications provider without a physical presence in Oregon must collect Oregon's emergency communications tax (9-1-1 tax) from its subscribers. Plaintiff (Ooma) appealed from Defendant's (the department's) Notices of Assessment for the quarters ending March 2013 to March 2016.

I. STATEMENT OF FACTS

Ooma is a foreign corporation (subchapter C) with its principal place of business in Palo Alto, California. (Stip Facts ¶¶ 1,5.) Ooma slid not file 9-1-1 tax returns with the department during the periods at issue. (*Id.* ¶ 4.)

Ooma provides voice-over-internet-protocol (VoIP) services to customers across the United States, including residents of Oregon. (Slip Facts ¶ 7.) VoIP technology enables customers to conduct voice communications via a high-speed (broadband) internet connection. (*Id.*) Ooma also provides additional telecommunications services to residents of Oregon that include voicemail, call waiting, call forwarding and caller identification. (*Id.* ¶ 8.) Oregon residents purchase the broadband connections necessary to receive Ooma's services from unaffiliated independent third parties. (*Id.* ¶ 9.)

To access the VoIP services provided by Ooma, an Oregon resident must first purchase one of two Ooma VOIP devices known as "Ooma Telo" or "Ooma Office." (Stip Facts ¶ 11.) The Telo and Office devices can be purchased from independent retail stores, directly from Ooma via Ooma's website, and from several independent online retailers. (*Id.*) Ooma sold the equipment needed to access its VoIP services to independent third-party retailers with locations in Oregon for resale to Oregon residents. (*Id.* ¶ 16.)

Once an Oregon resident has the equipment necessary to access Ooma's services, calls are transmitted along one

of two different paths. (Stip Facts ¶ 12.) Calls between Ooma customers are transmitted via broadband directly from one Ooma device to the other. (*Id.* 113.) If the call recipient is not an Ooma customer, the digital data sent from the call initiator is processed through one of several regional data centers. (*Id.* 114.) Those digital data centers convert the digital data into an analog audio signal, which is then directed to the Public Switched Telephone Network (PSTN). (*Id.*) 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.*)

For purposes of the parties' motions, the department did not dispute the following assertions of Ooma with respect to the periods at issue. (Stip Facts ¶ 19.)

> a. None of Ooma's employees visited the State of Oregon;
>
> b. Ooma did not hire or compensate independent sales representatives, agents or anyone of similar role or function to act on its behalf in Oregon to promote, advertise, solicit, or sell its VoIP services to Oregon residents;
>
> c. 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;

d. Ooma did not participate in any court proceeding, mediation or arbitration in Oregon;

e. Ooma did not participate in any legal or collection action in the State of Oregon;

f. Ooma did not possess any license, permit, registration, or authorization issued by any entity, government, or organization in the State of Oregon;

g. Ooma did not communicate with any entity, government or organization in Oregon regarding whether any license, permit, registration, or authorization was required relating to the provision of Ooma's VoIP services to Oregon residents;

h. Ooma made no direct or indirect representation that it would pay or had paid Oregon taxes on VoIP services sold to Oregon residents; and

i. Ooma owned no real or tangible personal property in Oregon.

Ooma prepared marketing plans and employed business strategies that targeted customers nationwide, including Oregon residents. (Stip Facts ¶¶ 21, 22.) Ooma provided promotional and marketing materials to select national retailers for use in their retail locations, including retail locations in Oregon. (*Id.* ¶ 23.) In those instances, the retailer decided where and when to use Ooma's 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 or locations in the State of Oregon. (*Id.* ¶ 24.)

The parties' stipulated exhibits include a list Ooma's equipment sales in Oregon during the periods at issue; two versions of a standard form contract ("Terms and Conditions") used by Ooma with its VoIP customers nationwide, including in Oregon; and totals of Ooma's Oregon revenues from recurring billings and product sales during the periods at issue. (Stip Facts, Exs B, C, E.) The parties also stipulated to a chart showing the amount of tax Ooma would owe if it were subject to the 9-1-1 tax: $299,175.75 over the periods at issue, not including penalties and interest. (*Id.* ¶2 6, Ex D) Details from the stipulated exhibits are introduced where pertinent in the analysis below.

II. ANALYSIS

The issue is whether the United States Constitution prohibits Oregon from requiring Ooma to collect, report, and remit the 9-1-1 tax during the periods at issue. Oregon imposes a tax of 75 cents per month on telecommunications service subscribers with access to the emergency communications system—the 9-1-1 tax.[1] ORS 403.200.

1. ORS 403.200 was changed several times during the periods at issue, including the insertion of an express reference to "Voice over Internet Protocol service." *See* Or Laws 2014 ch 59, § 3a (2014). Neither party has argued that those changes are material to the outcome of this case.

Although the subscriber is liable, the service provider must collect the tax and file a return with the department each quarter. ORS 403.200(2),(3); 403.215. Ooma contends that requiring it to collect and remit the 9-1-1 tax violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

A. Due Process Clause

"The Due Process Clause requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State[.]" *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 US 298, 306, 112 S Ct 1904, 119 L Ed 2d 91 (1992) (citations and internal quotation marks omitted). The United States Supreme Court has often identified "notice" or "fair warning" that an individual might be subject to the power of the state as the "analytic touchstone of due process nexus analysis." *Id.* at 312. "[T]his 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum." *Burger King Corp. v. Rudzewicz*, 471 US 462, 472, 105 S Ct 2174, 85 L Ed 2d 528 (1985) (holding court's exercise of jurisdiction over lawsuit against out-of-state company did not violate the Due Process Clause).

A taxpayer need not be physically present in a state to have due process nexus with that state. *See Quill*, 504 US at 298 (overruling cases requiring physical presence for

the imposition of duty to collect use tax); *Am. Refrigerator Transit Co. v. State Tax Comm'n*, 238 Or 340, 347, 395 P2d 127, 131 (1964) ("Nexus may be found even where neither property nor personnel of the taxpayer is employed within the taxing state if it can be said that the state substantially contributes to the production of the taxpayer's income."). A taxpayer engaging in "continuous and widespread solicitation of business within a State" has the "fair warning" required by the Due Process clause. *Quill*, 504 US at 308. When a company makes "regular monthly sales" of tangible personal property to a state's residents, that company's engagement with the state "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous" *Keeton v. Hustler Magazine, Inc.*, 465 US 770, 774, 104 S Ct 1473, 79 L Ed 2d 790 (1984).

Here, Ooma's activities with respect to Oregon are evidence that it purposely solicited sales from Oregon residents. Ooma entered into thousands of contracts with Oregon residents to provide VoIP services. Ooma's lines in service grew from 6,663 to 13,467 during the periods at issue, and its monthly billings grew from approximately $34,000 in January 2013 to approximately $97,000 in March 2016. (Def's Mot at 3-4.) Further, Ooma sold more than 2,000 devices to Oregon retailers and directly to Oregon residents. (Stip Facts, Ex B.) By the department's calculations, those sales averaged approximately $16,000 per month. (Dees Mot at 7.)

Ooma argues that its activities were not purposefully directed toward Oregon residents because Oregon residents were not specifically targeted, but were merely

swept up in its national marketing strategy. Ooma would hold that the Due Process clause requires that companies have state-specific business plans before becoming subject to state tax. Its argument appears to be based on the plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro (Nicastro)*, 564 US 873, 131 S Ct 2780, 2783, 180 L Ed 2d 765 (2011). In *Nicastro*, four justices endorsed a "forum-by-forum, or sovereign-by-sovereign, analysis" to show that a party has "targeted the forum" before an exercise of jurisdiction over that party is proper. *Id.* at 884; but see *Willemsen v. Invacare Corp.*, 352 Or 191, 200-02, 282 P3d 867, 875 (2012) (concluding that Justice Breyer's concurrence, not the plurality opinion, was controlling).

The facts of this case differ significantly from those in *Nicastro* and other products liability cases examining the so-called "stream-of-commerce doctrine." *See* 564 US at 877-78 (lawsuit in New Jersey court against foreign manufacturer of injurious machinery distributed by independent third party); *Willemsen*, 352 Or at 200-03 (lawsuit in Oregon court against foreign manufacturer of allegedly defective battery charger sold by third-party distributor). In those cases, the "stream of commerce" served as a metaphor for an independent national or international distribution system. The seller purposefully placed its goods into the "stream" by selling them to a distributor but, having done so, lost control over where the "stream" ultimately carried them—to the goods' final owners or users. The Willemsen court noted that "if [the battery manufacturer] had sold its battery chargers directly in Oregon, there would be no dispute that Oregon could exercise personal jurisdiction." *Willemsen*, 353 Or at 198.

Here, while Ooma's shipments to independent retailers might be characterized as having entered the "stream of commerce," those shipments do not represent the extent of Ooma's business with Oregon residents. Ooma sold its goods directly to Oregon residents and provided VoIP services to Oregon residents. And nothing in the record suggests that was unintentional. Ooma engaged in a national marketing strategy, and such a strategy necessarily targets the residents of the various states. Ooma's activity in Oregon was no less purposeful because it engaged in similar activity elsewhere.

Ooma's numerous direct contacts with Oregon customers distinguish this case from *Scioto Insurance Company v. Oklahoma Tax Commission*, 2012 OK 41, 279 P3d 782 (2012), and *Griffith v. ConAgra Brands, Inc.*, 229 W Va 190, 728 SE2d 74 (2012), both cited by Ooma. Those cases involved entities that licensed intellectual property to related and unrelated third parties. In each case, the taxpayer–licensor had no direct contacts with the taxing state but received royalties from the activities of licensees (or sublicensees) within the taxing state. *See Scioto*, 279 P3d at 783; *ConAgra*, 728 SE2d 76. That is not the case here. Ooma received revenue directly from Oregon customers for goods and services it sold in Oregon. Scioto and ConAgra are therefore inapposite.

Considering Ooma's regular sales of telecommunications devices and services to Oregon customers, the Due Process clause does not prevent Oregon from requiring Ooma to collect the 9-1-1 tax.

B. Commerce Clause

The U.S. Supreme Court has announced a four-part test to determine whether a tax runs afoul of the "negative sweep" of the Commerce Clause (*i.e.* the "dormant" Commerce Clause). *See Quill*, 504 US at 309; *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 279, 97 S Ct 1076, 51 L Ed 2d 326 (1977) (describing four-part test). Under *Complete Auto*'s four-part test, a tax will be upheld if it "[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 US at 279.

Ooma argues under the first prong of the *Complete Auto* test that it does not a have a substantial nexus with Oregon and under the fourth prong that the 9-1-1 tax is not fairly related to services provided by Oregon. The court will address each argument in turn.

1. Substantial Nexus

Ooma contends the court should apply the bright-line, physical-presence rule announced in *Quill* to the 9-1-1 tax here. The United States Supreme Court held in *Quill* that "physical presence" in a state is required to establish a substantial nexus under the Commerce Clause where a duty to collect a sales or use tax is at issue. *Quill*, 504 US at 317-19; see also *Capital One Auto Finance Inc. v. Dept. of Rev*, 22 OTR 326, 338 (2016) (describing *Quill*). The physical-presence rule was first announced in an

earlier case, *National Bellas Hess, Inc. v. Department of Revenue of State of Illinois*, 386 US 753, 87 S Ct 1389, 18 L Ed 2d 505 (1967). The *Quill* Court upheld the physical-presence rule (under the Commerce Clause) because of the "continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis*."[2] 504 US at 317.

Ooma offers two alternative theories in favor of applying *Quill*'s physical-presence rule. The first is that *Quill* is controlling because the 9-1-1 tax is a sales tax. The second is that the 9-1-1 tax mimics a sales tax, even if it is not actually a sales tax, and thus the reasoning of *Quill* requires extending its holding here.

The issue first at hand is whether the 9-1-1 tax is the type of tax controlled by *Quill*. The tax at issue in *Quill* was a "use tax upon property purchased for storage, use, or consumption" within North Dakota, set at a percentage of retailers' gross receipts. 504 US at 302; *Heitkamp v. Quill*, 470 NW2d 203, 205 (1991) (citing statute); see 1991 ND Laws Ch 676 (HB 1325) (reenacting five percent tax on retailers' gross receipts while amending another subsection of statute).[3] The tax's base included receipts from the provision of "communication services." *See* 1991 ND Laws Ch 676 (HB 1325). Thus, the general scope of the *Quill* tax applied to services as well as tangible goods, and

2. The Court overruled the *Bellas Hess* holding that the Due Process Clause also required physical presence before a duty to collect a sales and use tax could be imposed. *Quill*, 504 US at 308.

3. The statute, NDCC section 57-39.2-02.1, was cited as current in the North Dakota Supreme Court's 1991 decision.

was measured by the sales price of the goods or services. In that respect, it corresponded to the definition of a general retail sales tax proffered by a leading treatise on state taxation--it was a tax "imposed upon the retail 'sale' of tangible personal property or services, and * * * measured by the sales price of the goods or services." Jerome R. Hellerstein & Walter Hellerstein, 2 *State Taxation* ¶ 12.01[2][f][ii], 12-5 (3d ed 2000 & 2015 Supp).[4]

Although the 9-1-1 tax is collected by telecommunications providers from their customers in a manner similar to a sales tax, it differs from the *Quill* tax in at least two ways. First, the 9-1-1 tax is not measured by sales price. Instead, it is a fixed charge regardless of the price of the telecommunication service. Second, the 9-1-1 tax is not a sales or use tax in form. It is not imposed on the purchase or sale of telecommunication services, but rather on those

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4. Hellerstein illustrates the breadth of the term sales tax by quoting definitions from other authorities in an introductory paragraph. *See* Jerome R. Hellerstein & Walter Hellerstein, 2 *State Taxation* ¶ 12.01 [2][f][ii], 12-2-12-3 (3d ed 2000 & 2015 Supp). Ooma quotes one such definition: "a tax for which the amount of tax payable is produced by a constant rate applied to the volume or value of commodities or services transferred or exchanged." *Id.* (quoting N. Jacoby, Retail Sales Taxation 8 (1938).) The department's reply notes that among the broad array of sales tax definitions provided by Hellerstein are some that clearly would not include the 9-1-1 tax—such as tax on "all business sales of tangible personal property at either the retailing, wholesaling, or manufacturing stage[.]" *Id.* (quoting R. Haig & C. Shoup, The Sales Tax in the American States 3 (1934).) For their part, the authors of the treatise identify the "most significant form of sales taxation in the United States" as the "general retail sales tax."

who have access to the emergency communications system through such services. Those differences distinguish the 9-1-1 tax from a general retail sales tax and from the tax before the Court in *Quill*.

The next question is whether the 9-1-1 tax mimics a sales tax in such a way that the physical-presence rule in *Quill* applies. The Regular Division analyzed such a claim in *Capital One*, 22 OTR at 326. In *Capital One*, the taxpayer argued that two of its subsidiary banks were not subject to Oregon income or excise tax. The banks had no employees or real or personal property in Oregon, although they had a substantial number of customers in Oregon and significant revenues from Oregon. Relying on *Quill*, the taxpayer argued that the banks did not have substantial nexus with Oregon because they lacked a physical presence in Oregon. Addressing that argument, the court observed that "nothing in *Quill* imposes a physical presence standard for Commerce Clause nexus outside the realm of collection obligations for sales or use taxes." *Capital One*, 22 OTR at 338. The court in *Capital One* identified "two bases" for the holding in *Quill*: (1) "imposing sales or use taxes on out-of-state taxpayers with no physical presence in the state creates an undue burden" on interstate commerce; and (2) the "settled expectations with respect to a physical presence standard in the realm of sales or use taxes" *Id.* Because neither of those concerns were present in *Capital One*, the court concluded that "neither of these bases require or even suggest that courts should adopt a physical presence requirement for taxes imposed upon or measured by net income." *Id.* at 344.

Ooma relies on the court's analysis in *Capital One* but distinguishes the facts of this case to argue that *Quill*'s physical-presence test should be extended to the 9-1-1 tax. Ooma argues that the 9-1-1 tax imposes an "undue burden" on interstate commerce and that "settled expectations" support the adoption of a physical-presence rule for the 9-1-1 tax. The court addresses those arguments in turn.

a. Undue burden

In *Quill*, the Court explained that substantial nexus and "fairly related" prongs of the *Complete Auto* test "ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 US at 313. In both *Bellas Hess* and *Quill*, the court took note that "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements" across thousands of jurisdictions "could entangle a mail-order house in a virtual welter of complicated obligations." *Id.* at 313 n 6 (quoting *Bellas Hess*, 368 US at 759-60) (brackets and internal quotation marks omitted). A bright-line, physical-presence rule limits burdens on interstate commerce "by the demarcation of a discrete realm of commercial activity that is free from interstate taxation." *Quill*, 504 US at 315.

Ooma argues that "innumerable" taxes in jurisdictions across the United States create a similar "welter of complicated obligations" that unduly burdens the telecommunications industry. Ooma cites one study finding that "[t]elecommunications providers must file 47,921 returns compared to 7,501 returns for general businesses."

2004 Telecommunications Tax Study, Council on State Taxation 4 (2005). However, that study lumps all taxes together—including emergency communications taxes, sales and use taxes, and myriad others. The question is whether emergency communications taxes such as Oregon's 9-1-1 tax create an undue burden on interstate commerce. That question cannot be answered by reference to all of the various taxes levied upon Ooma's industry.

The 9-1-1 tax is a statewide, fixed charge on each VoIP line with access to Oregon's emergency communications system, collected monthly and paid to Oregon on a quarterly basis. For the sake of argument, if each state and territory adopted an emergency communications tax like Oregon's, then telecommunications providers would be subject to a few dozen such taxes nationally.[5] Certainly, collecting 9-1-1 taxes imposes costs on telecommunications companies, and the fact that some such taxes are collected locally adds to that burden. However, Ooma has not shown that Oregon's 9-1-1 tax, or emergency communications taxes generally, create a "welter of complicated obligations" similar to sales and use taxes at the time *Bellas Hess* and *Quill* were decided.

Ooma correctly notes that the 9-1-1 tax shares some characteristics with sales and use taxes and is thus distinguishable from the income and excise taxes at issue in *Capital One*. In particular, service providers are required to collect the tax from their customers

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5. According to a recent FCC study cited by the department, 27 states collected 9-1-1 fees at the state level, six states did so locally, and 13 states collected fees at both the state and local level.

and therefore must determine beforehand what their tax obligations are. The court in *Capital One* observed that the obligation of a taxpayer to collect taxes from its customers is a "burden" that "looms large" in the sales and use tax context. *Capital One*, 22 OTR at 339. That is because the "taxpayer must ensure that the appropriate amount (and not more or less) is collected from the customer and directed to the appropriate taxing authority within the appropriate time"—determinations the taxpayer must make before it makes any sales in a jurisdiction. *Id.* Accordingly, a requirement to collect and remit a sales and use tax can become an undue burden "if the seller does not reasonably know whether it will have substantial nexus with the taxing state, or has minimal sales in a number of taxing jurisdictions." *Id.*

An evaluation of the burden placed on telecommunications providers by Oregon's 9-1-1 tax must consider the obligations already undertaken by telecommunications providers compliant with federal regulations. The FCC requires that interconnected VoIP service providers such as Ooma be capable of providing their customers with access to local emergency communications systems. *See* 47 CFR § 9.5.[6]

6. Specifically, a VoIP provider must be able to transmit "all 9-1-1 calls * * * and the caller's Registered Location for each call to the PSAP [Public Safety Answering Point], designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location." 47 CFR § 9.5(b)(2). It follows that once a provider determines its customer's Registered Location, it must also be capable of determining the correct PSAP "designated statewide default answering point, or appropriate local emergency authority" that serves that location. *See id.*

To comply with those regulations and identify the "local emergency authority," a VoIP provider must obtain the physical address of each of its customers — the customer's "Registered Location" — before providing VoIP service. 47 CFR § 9.7(d)(1). Ooma's "Terms and Conditions" show that it does in fact take steps to "validate" its customers' addresses and that it requires its customers to keep their addresses up to date. (*See* Stip Facts, Ex C at 7, 16.)

Those federal regulations highlight the difference between Ooma and a "mail-order house" Whereas an interstate retailer may learn the tax laws of distant jurisdictions only after customers place their orders from there, Ooma must become familiar with local laws regarding emergency communications before providing any service in a location. While some additional cost is imposed on Ooma to also determine its tax burden in a given jurisdiction before finalizing a sale there, the element of surprise found in the case of the mail-order house receiving an order from an unknown jurisdiction is lacking. Furthermore, as a fixed charge the 9-1-1 tax is administratively simple to calculate: 75 cents per line per month. A computer could do it, and indeed, Ooma's "Terms and Conditions" invites prospective customers to determine the specific state and local taxes for their areas in advance by visiting Ooma's web site. (*See* Stip Facts, Ex C at 13.) The 9-1-1 tax does not unduly burden interstate commerce.

b. Settled Expectations

Ooma argues that here, as in *Quill*, "settled expectations" militate in favor of establishing a bright-

line, physical-presence rule for 9-1-1 taxes. This court noted in *Capital One* that the *Quill* Court had separated its settled-expectations rationale into two strands. "First, the Court considered the benefit of the 'settled expectations' of taxpayers that result from a bright-line rule." *Capital One*, 22 OTR at 340. "Second, the Court considered the 'settled expectations' resulting from the doctrine of *stare decisis*, noting that the physical presence rule in *Bellas Hess* had 'engendered substantial reliance and has become part of the basic framework of a sizable industry.'" *Id.* (quoting *Quill* 504 US at 317.)

Regarding the first strand, Ooma argues that a bright-line, physical-presence rule would benefit its "fledgling" industry by providing certainty. However, as the department rightly points out, the decision whether to fashion tax rules supporting the " 'fledgling industry' *du jour*" is for the legislature to make, not this court. Indeed, although a bright-line, physical-presence rule may offer beneficial clarity, the Court has not extended it to other areas of taxation beyond sales and use taxes. *See Quill*, 504 US at 314, 317. The court declines to adopt a new rule on that basis.

Neither does the doctrine of *stare decisis* support Ooma's claim. The 9-1-1 tax is not a sales or use tax, and Ooma has not identified any case that extends the holding in *Quill* to similar taxes. To the contrary, other courts have declined to endorse a physical-presence requirement in this area. *See Vonage Am., Inc. v. City of Seattle*, 152 Wash App 12, 27, 216 P3d 1029 (2009); *Mayor & City Council of Baltimore v. Vonage Am. Inc.*, 569 F Supp

2d 535, 539 (D Md 2008). This court has explained that "nothing in *Quill* imposes a physical presence standard for Commerce Clause nexus outside the realm of collection obligations for sales or use taxes." *Capital One*, 22 OTR at 338. Because the 9-1-1 tax is not a sales or use tax, the application of *stare decisis* does not call for a physical presence rule here.

2. Fairly Related

Under the fourth prong of the *Complete Auto* test, nexus with out-of-state taxpayers requires that a tax be "fairly related to the services provided by the State." 430 US at 279. Under that test, "the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of state tax burden." *Commonwealth Edison Co. v. Montana*, 453 US 609, 626, 101 S Ct 2946, 69 L Ed 2d 884 (1981) (emphasis in original; internal quotation marks omitted). "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." *Goldberg v. Sweet*, 488 US 252, 266-67, 109 S Ct 582, 102 L Ed 2d 607 (1989).

There is some question as to whether the fourth prong of *Complete Auto* is the appropriate standard here. The U.S. Supreme Court distinguishes general revenue taxes from "user fees," the latter being fees designed as reimbursement for state-provided benefits like the use of airports and roads. *Commonwealth Edison*, 453 US at 621 (internal quotation marks omitted). A footnote

in *Commonwealth Edison* states that user fees are not reviewed under the same standard as taxes and require a showing that "the fees charged do not appear to be manifestly disproportionate to the services rendered[.]" *Id.* at 622 n 12 (quoting *Clark v. Paul Gray, Inc.*, 306 US 583, 599, 59 S Ct 744, 83 L Ed 1001 (1939)); see also *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 US 707, 716, 92 S Ct 1349, 31 L Ed 2d 620 (1972) (stating test is whether tax amount is "in excess of fair compensation for the privilege" of using state resources); *but see Am. Trucking Associations, Inc. v. Michigan Pub. Serv. Comm'n*, 545 US 429, 438, 125 S Ct 2419, 162 L Ed 2d 407 (2005) (favorably citing *Complete Auto* to uphold flat fee highway tax). Ooma contends that the 9-1-1 tax is a user fee and must withstand the "more difficult test" stated in the footnote of *Commonwealth Edison* and applied in *Evansville-Vanderburgh*.

In *American Trucking Associations, Inc. v. State of Oregon*, 339 Or 554, 563-67, 124 P3d 1210 (2005), the Oregon Supreme Court concluded that the *Complete Auto* test—and not the *Evansville-Vanderburgh* test—was appropriate for analyzing a "flat-fee" highway tax. The tax at it issue in *American Trucking* was a fixed charge for use of Oregon's highways that certain carriers might choose to pay in lieu of a weight-mile tax. 339 Or at 559. The Oregon Supreme Court based its conclusion in part on the U.S. Supreme Court's favorable citation of *Complete Auto* in the same plaintiff's suit against Michigan. *Id.* at 567; *Am. Trucking Associations*, 545 US at 438.

The 9-1-1 tax at issue here resembles the flat-fee highway tax in *American Trucking*. Telecommunications

subscribers pay a fixed charge for access to emergency communications services, just as carriers may pay a fixed charge for access to highways. In one way the 9-1-1 tax is even less like a user fee than the highway tax: carriers only pay the highway tax if they will actually use the highways in a given year, whereas telecommunications subscribers must pay the 9-1-1 tax even though most of them will not dial 9-1-1 in a given month. Therefore, *Complete Auto*, as interpreted by the Court in *Commonwealth Edison*, supplies the appropriate standard.

The 9-1-1 tax is fairly related to the emergency communications services provided, and the measure of the tax corresponds to Ooma's activities in Oregon, because Ooma benefits from "the privileges of * * * an organized society" in Oregon, with a marketplace that provides Ooma with thousands of customers. *See Commonwealth Edison*, 453 US at 629. However, Ooma receives services from Oregon that go beyond staving off anarchy. The 9-1-1 tax funds access to a local emergency communications system that Ooma is required by the federal government to provide to its customers. *See* 47 CFR § 9.5. Access to such a system is part of the service Ooma provides its customers, and is therefore a reason for Ooma's customers to purchase its services. It is a benefit Ooma receives from the state of Oregon. *See Goldberg*, 488 US at 266-67. Finally, the measure of the 9-1-1 tax corresponds exactly with Ooma's Oregon activities: Ooma's collection obligation rises or falls with the number of VoIP lines it provides to its Oregon customers. The 9-1-1 tax satisfies the fourth prong of the *Complete Auto* test.

C. ORS 305.575

This court has jurisdiction to determine the correct amount of tax deficiency even when that amount differs from the amount of the assessment. ORS 305.575. Here, the parties have agreed that Exhibit D to their Joint Stipulation of Facts reflects the correct amount of tax Ooma will owe if the court determines they are subject to taxation in Oregon. Accordingly, the court finds that Ooma's total tax for the periods at issue (not including penalties and interest) was $299,175.75.

III. CONCLUSION

Assessment of the 9-1-1 tax to Ooma is not prohibited by either the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the United States Constitution. Now, therefore,

IT IS THE DECISION OF THIS COURT that Ooma's motion for summary judgment is denied.

IT IS FURTHER DECIDED that the department's motion for summary judgment is granted.

IT IS FURTHER DECIDED that Ooma's total tax for the quarters ending March 2013 to March 2016 is $299,175.75, as agreed by the parties in Exhibit D of their Joint Stipulation of Facts.

Dated this 27th day of March, 2018.

/s/ Poul F. Lundgren
POUL F. LUNDGREN
MAGISTRATE

This decision is the court's determination on the merits. A prevailing party may file a statement of costs and disbursements no later than 14 days after the entry date of this decision, as provided in Tax Court Rule — Magistrate Division (TCR MD) 16. Thereafter, the court will issue a final decision. Any claim of error regarding this decision may be raised in an appeal of the court's final decision.

Appendix C

MAGISTRATE DIVISION
OREGON TAX COURT

Magistrates: Allison R. Boomer ◆ Richard D. Davis ◆
Poul F. Lundgren

March 27, 2018

James C. Strong
DOJ GC Tax & Finance
1162 Court St NE
Salem OR 97301

RE: *OOMA, Inc. v. Department of Revenue, State of Oregon*
TC-MD 160375G

Enclosed is a copy of the Decision in the above-captioned matter, dated March 27, 2018.

If you have any questions, please call the court at (503) 986-5650. Thank you for your attention to this matter.

Enclosure