SC14-2404

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE,
Appellant,

v.

AMERICAN BUSINESS USA CORPORATION,
Appellee.

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL
Case No. 4D13-1472

INITIAL BRIEF OF APPELLANT FLORIDA DEPARTMENT OF REVENUE

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STATEMENT OF THE CASE AND FACTS

Florida taxes the sale of goods. If a customer visits a store and buys a bouquet of flowers, that ordinary sale is taxed like nearly any other. But when a customer orders flowers for delivery to another person—an everyday occurrence—the transaction can be more involved. This is particularly so when the florist receiving the order uses another florist (near the delivery location) to produce and deliver the bouquet. With multiple florists involved, there could be questions about how to apply the tax. Which florist is the seller? Is it the one taking the order or the one delivering the flowers? To avoid these questions, the Florida Legislature enacted an unambiguous statute providing that Florida florists "are liable for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered." § 212.05(1)(*l*), Fla. Stat. Conversely, florists "are *not* liable for sales tax on payments received from other florists for items delivered to customers in this state." *Id.* (emphasis added). Florida law thus establishes that the sale of flowers takes place where the florist makes the sale—not where the flowers are delivered. A majority of states have taken the same approach.

The issue in this case is whether the approach Florida and most other states have chosen violates the United States Constitution. Specifically, the issue presented is whether the dormant Commerce Clause prohibits Florida from

collecting sales taxes from a Florida florist on sales made in Florida for the out-of-state delivery of flowers.

Procedural Background

The Department issued a proposed assessment to a Florida florist, Appellee American Business USA Corporation (the "Florist"), for unpaid sales tax and interest. R1:1-2.[1] The Florist filed a protest, and the Department referred the matter to the Division of Administrative Hearings. R1:8-10. The administrative law judge entered a recommended order upholding the Department's assessment, finding that "[t]he [Florist]'s sale of flowers, wreaths, bouquets, potted plants, and other such items of tangible personal property were subject to sales tax pursuant to section 212.05(1)(*l*) and rule 12A-1.047(1)." R1:141. The Department entered a final order accepting the recommendation, R1:124-47, and the Florist appealed to the Fourth District, R1:148-71.

On appeal, the Florist raised both Due Process and dormant Commerce Clause challenges to the assessment of taxes on its sales of flowers, gift baskets, and other items delivered outside Florida. *Am. Bus. USA Corp. v. Dep't of Revenue*, 151 So. 3d 67, 70 (Fla. 4th DCA 2014). The Fourth District affirmed in part and reversed in part. *Id.* It rejected the Florist's Fourteenth Amendment Due

[1] The record on appeal comprises two volumes. This brief will refer to the record as R#:*, with # as the volume number and * as the page number.

Process Clause arguments, finding that "traditional notions of fair play and substantial justice were not offended because the [Florist] was registered in Florida and had a mailing address in Florida." *Id.* at 73. The court also affirmed the Department's order to the extent it assessed taxes for sales on calling cards, holding that the Florist's failure to maintain adequate records was a sufficient basis to affirm. *Id.* at 70. (Taxes on the calling cards are not at issue in this appeal.) But the Fourth District reversed the portion of the tax assessment relating to sales for out-of-state flower deliveries. *Id*. at 70, 74. The Fourth District held that the dormant Commerce Clause precluded the tax, finding it "unconstitutional as applied to the [Florist]'s sales to out-of-state customers for out-of-state delivery." *Id.* at 70.

The Department timely appealed to this Court the Fourth District's decision declaring the tax statute unconstitutional as applied. *See* Fla. R. App. P. 9.030(a)(1)(A)(ii); *see also* Fla. Const. art. V, § 3(b)(1); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 327 (Fla. 2013) (appeal of district court decision finding statute unconstitutional as applied).

Factual Background

The Florist is a for-profit business incorporated in Florida, operating in Florida, and having its sole physical location and "principal address" in Florida. R1:130, 2:22 (Ex. 9). It specialized in the sale of flowers, gift baskets, and other

items of tangible personal property, as well as prepaid calling arrangements. R1:58. Although it maintained its sole physical presence in Florida, all of its sales were initiated online. *Id.* at 57. The Florist "did not maintain any inventory of flowers, gift baskets and other items of tangible personal property," so it would use "local florists to fill the orders it received for flowers, gift baskets and other items." *Id.* at 58. It "charged its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered in Florida." *Id.* But it "did not charge its customers sales tax on sales of flowers, gift baskets and other items on tangible personal property delivered outside of Florida." *Id.*

SUMMARY OF THE ARGUMENT

To avoid uncertainty and confusion, and consistent with the practices of most states, Florida law imposes tax liability on Florida florists that sell to retail customers, regardless of where the flowers are delivered. The Fourth District held that this tax violated the dormant Commerce Clause when applied to transactions involving out-of-state deliveries. That decision misapprehended decades of Commerce Clause jurisprudence, and this Court should reverse.

A state tax is compatible with the dormant Commerce Clause if it applies to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and fairly relates to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Florida's sales tax satisfies each prong of the *Complete Auto* four-prong test.

First, Florida has a substantial nexus with the Florist's sales because the Florist's sole physical presence is in Florida and the Florist's sales activities took place in Florida. Indeed, everything the Florist did took place in Florida. This is enough to establish a substantial nexus.

Second, the tax is fairly apportioned, meaning that it reaches only the state's fair share and does not threaten double taxation by taxing amounts properly claimed by other jurisdictions. The law imposes tax liability on the florist taking

the initial order from the customer, but it exempts any florist accepting an assignment from another florist and making the delivery. If every state embraced a provision like this one (and most have), each flower delivery transaction would be taxed just once—when the florist initially took the order. The tax is, therefore, fairly apportioned.

Third, the tax does not discriminate against interstate commerce because it does not favor in-state interests. The in-state florist who receives the initial order is liable for the tax, regardless of whether the flowers are ultimately delivered in Florida or out-of-state.

Fourth, the tax fairly relates to the services provided by the State. The Florist, like every other Florida resident or business, benefits from the State's resources.

Because Florida's tax satisfies the *Complete Auto* test, it does not violate the dormant Commerce Clause. In addition, an order invalidating the challenged law—and therefore rejecting the majority approach for taxing flower sales throughout the country—could actually burden interstate commerce by injecting uncertainty and inconsistency into the taxation of retail floral sales.

This Court should reverse the Fourth District's erroneous decision.

STANDARD OF REVIEW

This Court reviews de novo decisions determining a statute's constitutionality. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). The challenged statute—like all statutes—is "clothed with a presumption of constitutionality," *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008), and this Court must indulge all reasonable presumptions in favor of its constitutionality, *see State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *Smithers v. N. St. Lucie River Drainage Dist.*, 73 So. 2d 235, 237 (Fla. 1954). This Court must uphold the statute unless the challenger can demonstrate its constitutional invalidity "beyond reasonable doubt." *Crist*, 978 So. 2d at 139 (quoting *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004)) (internal quotation marks omitted).

ARGUMENT

I. WITH FLOWER DELIVERY, THE SALE TAKES PLACE WHEN THE CUSTOMER PLACES THE ORDER.

A. The Unique Nature of Flower Delivery Transactions Merits Unique Sales Tax Treatment.

The typical retail sales transaction is simple. There is a buyer, there is a seller, and there is a tax. But with flower delivery, the transaction can be more involved. If a customer in Connecticut calls a florist in Florida to send a bouquet to a loved one in Louisiana, four parties might be involved: (i) the person placing the

order, (ii) the Florida florist initially receiving the order, (iii) the Louisiana florist ultimately preparing and delivering the bouquet, and (iv) the recipient. Fifty years ago, the Illinois Supreme Court described the familiar transaction this way:

> A customer orders flowers from an out-of-state florist for delivery to an Illinois addressee. The out-of-state florist telegraphs the order to an Illinois florist who delivers flowers from his stock to the Illinois addressee. The customer pays the out-of-state florist for the flowers, the cost of the telegram and frequently a service charge. Payment from the out-of-state florist to the Illinois florist is made through a trade association clearing house.

O'Brien v. Isaacs, 203 N.E.2d 890, 891 (Ill. 1965). The transactions at issue here followed the same pattern, albeit with more modern technology: "When the [Florist] received an order over the Internet for items of tangible personal property, the [Florist] relayed the order to a florist in the vicinity of the customer (the local florist). The [Florist] utilized the Internet or telephone to relay an order." R1:107 at ¶ 14.

These transactions frequently provide joy to those receiving bouquets, but they can present thorny issues for sales tax purposes. Who is the seller? Is it the florist initially receiving the order? That florist promises the delivery in exchange for the customer's order. Or is it the florist preparing the flowers? That florist receives payment from the first florist in exchange for arranging and delivering the flowers. Where did the sale take place? Was it where the customer placed the order with the initial florist, was it where the initial florist made arrangements with the

second florist, or was it where the second florist delivered the flowers? And who had legal title to the flowers? And when?

If the Legislature provided no guidance, these abstract questions might yield interesting tax litigation. *Cf. O'Brien*, 203 N.E.2d at 891 (considering issues of agency, title, resale, and bailment in flower delivery case). But Florida and most other states have specified precisely how these transactions are taxed.

B. Like the Majority of States, Florida Law Specifies How Flower Delivery Transactions Are Taxed.

To avoid uncertainty and confusion, and consistent with the practices of most states, Florida law specifies how sales tax applies in a flower delivery transaction:

> Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered. Florists located in this state are not liable for sales tax on payments received from other florists for items delivered to customers in this state.

§ 212.05(1)(*l*), Fla. Stat. Florida's Administrative Code provides further specificity:

> (1) Florists are engaged in the business of selling tangible personal property at retail and their sales of flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable.
>
> (2) Where florists conduct transactions through a florists' telegraphic delivery association, the following rules will apply in the computation of the tax, which will be on the entire amount paid by the customer without any deductions whatsoever:

> (a) On all orders taken by a Florida florist and telegraphed to a second florist in Florida for delivery in the state, the sending florist is held liable for the tax.
>
> (b) In cases where a Florida florist receives an order pursuant to which he gives telegraphic instructions to a second florist located outside Florida for delivery of flowers to a point outside Florida, tax will likewise be owing with respect to the total receipts of the sending florist from the customer who places the order.
>
> (c) In cases where Florida florists receive telegraphic instructions from other florists located either within or outside of Florida for delivery of flowers, the receiving florist will not be held liable for tax with respect to any receipts which he may realize from the transaction. In this instance, if the order originated in Florida, the tax will be due from and payable by the Florida florist who first received the order and gave telegraphic instructions to the second florist.

Fla. Admin. Code R. 12A-1.047 (2014).

Florida law thus imposes tax liability on Florida florists for sales to retail customers, regardless of where the items are delivered. And it is the florist that is liable for the tax. § 212.05(1)(*l*), Fla. Stat. ("*Florists* located in this state are liable for sales tax on sales . . . .") (emphasis added). One need not worry, therefore, about how and when a subsequent florist held the flowers, whether the subsequent florist had constructive or legal title to the flowers, or whether the subsequent florist acted as an agent for the first. The law resolves those potential tax issues by specifying how these transactions are taxed.

Of the states that impose sales taxes, no fewer than thirty-six (along with the District of Columbia) have taken this same logical approach by adopting special sourcing rules concerning florists. *See* Ala. Admin. Code r. 810-6-1-.67 (a) (2014); Ariz. Admin. Code. R. 15-5-172 (applying rule similar to Florida's "[w]hen the florist conducts transactions through a delivery association"); Ark. Code Ann. § 26-52-52-507 (2014); Cal. Code Regs. tit. xviii, § 1571(b)(1)-(2) (2007) (similar rule but excluding from definition of "florist" those "who do[] not fulfill other florists' orders for the delivery of flowers"); Conn. Agencies Regs. § 12-426-4 (2014); D.C. Mun. Regs. tit. ix, § 441 (2014); Ga. Comp. R. & Regs. 560-12-2-.42(3) (2014); Idaho Admin. Code r. 35.01.02.059 (2014); 35 Ill. Comp. Stat. 120/1 (2014); Ill. Admin. Code tit. 86, § 130.1965 (2014); Ind. Code Ann. § 6-2.5-13-1(h) (2014); Kan. Admin. Regs. § 92-19-13a (2014); 103 Ky. Admin. Regs. 27:050 (2014); Me. Bureau of Taxation, *Sales & Use Tax Instruction Bulletin No. 21*, 1989 WL 592717, at *1-2 (1989); Md. Code Regs. 03.06.01.18 (2014); Mich. Admin. Code r. 205.80 (2014); Minn. Stat. Ann. § 297A.668, Subd. 9 (2014); Minn. R. 8130.8900 (2014); 35-IV Miss. Code R. § 8.01 (2014); Mo. Code Regs. Ann. tit. 12, § 10-103.620 (2014); 316 Neb. Admin. Code § 1-052 (2014); Nev. Admin. Code § 372.230 (2014); N.J. Div. of Taxation, *Out-of-State Sales & New Jersey Sales Tax, Publication ANJ-10* (rev. Mar. 2009); N.M. Stat. Ann. § 7-9-3.5A(2)(e) (West 2014); N.M. Code R. 3.2.1.15(H) (2014) ; N.Y. Comp. Codes R.

& Regs. tit. 20, 526.7(e)(3) (2014); N.C. Gen. Stat. Ann. § 105-164.4B(d)(3) (West 2014); N.D. Admin. Code 81-04.1-04-21 (2014); Ohio Admin. Code 5703-9-31 (2014); Okla. Stat. Ann. tit. 68, § 1354(A)19. (West 2014); Okla. Admin. Code § 710:65-19-108 (2014); 61 Pa. Code § 31.24 (2014); 60-1. R.I. Code R. § 206:1 SU 07-49 (West 2014); S.C. Code Ann. Regs. 117-309.1 (2014); S.D. Admin. R. 64:06:02:32 (2014); Tenn. Code Ann. § 67-6-907 (West 2014) (determining tax based on location of delivery but providing that "[t]he retail florist that took the order shall collect from the purchaser the applicable state sales tax"); 34 Tex. Admin. Code § 3.307(c) (2014); Utah Admin. Code r. 865-19S-50 (2014); 23 Va. Admin. Code § 10-210-610 (2014); Wash. Admin. Code § 458-20-158 (2014) (applying rule similar to Florida's "[w]here, through the Florist's Telegraphic Delivery Association, one florist takes an order pursuant to which he gives telegraphic instructions to a second florist for delivery of flowers"); Wis. Stat. Ann. § 77.522 (2014); Wis. Admin. Code Dep't of Revenue § 11.945 (2014) (similar rule but excluding from definition of "retail florist" those "who do[] not prepare and sell cut flowers"); *see also* Hellerstein, *State Taxation* ¶ 18.02, n.51 (3d ed.) (citing Letter of Findings 04-20110615, Ind. Dep't of State Revenue, July 1, 2012).

Many of these statutes and administrative rules have existed for decades. Others were adopted or amended more recently, as the national consensus grows.

Minnesota, for example, added its sale sourcing provision in 2011 specifically to bring the state's practice in line with the majority approach. A legislative report explained the change:

> Florist sales. Changes the sales tax sourcing rules for florist sales to source the sale to the location of the retailer taking the order from the customer, rather than to the location of the flower delivery. This is the current practice in most states and is preferred by the industry. . . .

Minn. H. Rep., House Research Bill Summary, H.F. 20, at 10 (July 19, 2011) (summarizing provisions of omnibus tax bill H.F. 20 (2011)), *available at* http://www.house.leg.state.mn.us/hrd/bs/87/2011-1/hf0020.pdf.

Despite this longstanding and widespread practice, neither the district court nor the Florist has identified any decision striking down any of these provisions—other than the decision at issue here.

C. The Florist Is Subject to the Florida Law.

There is no dispute that the Florist, which stipulated below that it specialized in the sale of flowers, R1:58 at ¶ 6, is a "florist" for purposes of Florida law. Nor is there any real dispute that the taxable sale takes place when the Florist accepts a customer's order. Indeed, the Florist acknowledges that it is liable for sales tax on orders for *in-state* flower deliveries, and it has paid the tax on those transactions. *Id.* at ¶ 14. Having never actually delivered flowers—instead "us[ing] local florists to fill the orders it received," *id.* at ¶ 12—the Florist would not have paid taxes on *any* flower sales if the transactions it handled were not sales. Yet the Florist

willingly paid taxes on transactions for in-state delivery. And even for those in-state deliveries, it had to determine the tax based on where it received the order—not where the flowers were delivered. *See* § 212.054(3)(m), Fla. Stat. ("For the purpose of this section, a transaction shall be deemed to have occurred in a county imposing the surtax when . . . [t]he florist taking the original order to sell tangible personal property is located in the county, notwithstanding any other provision of this section.").

Because the Florist is "located in this state" and makes sales in Florida, it is "liable for sales tax . . . regardless of where or by whom the items sold are to be delivered." § 212.05(1)(*l*), Fla. Stat. Nonetheless, the Fourth District concluded that it was the location of the delivery—not the location of the sale or the seller—that controlled. Therefore, the court concluded, the Florida tax was "for out-of-state deliveries," and violated the Commerce Clause. *Am. Bus.*, 151 So. 3d at 68. In reaching this conclusion, the district court misapprehended not only Florida law but also decades of Commerce Clause jurisprudence.

II. FLORIDA'S SALES TAX ON IN-STATE FLORIST SALES DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. Florida's Sales Tax On In-State Florists Does Not Undermine the Purpose of the Commerce Clause.

The Commerce Clause expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I,

§ 8, cl. 3. Despite the text's affirmative grant of authority, the Supreme Court has long found this language to "contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Okla. Tax Comm'n v. Jefferson Lines, Inc*., 514 U.S. 175, 179 (1995). This negative aspect advances the Commerce Clause's purpose of "preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do it if were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Id.* at 179-80; *accord Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986).

The Supreme Court has interpreted the Commerce Clause in the context of the Framers' "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). Accordingly, dormant Commerce Clause jurisprudence is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S. 298, 312 (1992).

Because not all state taxes threaten national economic interests, not all state taxes raise dormant Commerce Clause concerns. Indeed, the Court has emphasized that the Commerce Clause was never intended to prohibit all state taxes on interstate transactions. *See, e.g.*, *id.* at 310 n.5 (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981)); *see also Jefferson Lines*, 514 U.S. at 181 (noting Court "had no trouble rejecting the claim that the 'mere formation of the contract between persons in different states' insulated the receipts from taxation") (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 253 (1938)); *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959). Those engaged in interstate commerce therefore cannot rely on the Commerce Clause "to relieve [them] from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock*, 303 U.S. at 254.

The limits the Commerce Clause *does* place on state regulation have not always been clear, "and the Court's understanding of the dormant Commerce Clause has taken some turns." *Jefferson Lines*, 514 U.S. at 180; *accord Quill Corp.*, 504 U.S. at 309 ("Our interpretation of the 'negative' or 'dormant' Commerce Clause has evolved substantially over the years, particularly as that Clause concerns limitations on state taxation powers."); *see also id*. (noting rejection of earlier pronouncement that "no State has the right to lay a tax on

interstate commerce in any form"). This evolution notwithstanding, "[i]t has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Jefferson Lines*, 514 U.S. at 184 (citing *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940)). Similarly, the Court has upheld a state tax on interstate telephone calls when a resident of that state pays for the call, *Goldberg v. Sweet*, 488 U.S. 252 (1989), a state tax on tickets for interstate bus travel purchased within the taxing state, *Jefferson Lines*, 514 U.S. at 184, and a tax on aviation fuel sold within the state, even when consumed primarily out of state, *Wardair Canada, Inc.*, 477 U.S. at 4. In each of these instances, the Court upheld taxes on local sales, notwithstanding the substantial interstate aspects of the transaction.

B. Florida's Statute Satisfies the *Complete Auto* Test.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Supreme Court established the test for evaluating a state tax's compatibility with the dormant Commerce Clause. A Court will sustain a state tax 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." *Quill Corp.*, 504 U.S. at 311 (quoting *Complete Auto*, 430 U.S. at 279). Florida's sales tax satisfies each prong.

1. The Florist's activities have a substantial nexus with Florida.

The Florist's sole physical presence is in Florida. All of its sales took place in Florida. Indeed, everything the Florist did took place in Florida. This is enough to show "there is 'nexus' aplenty here." *Jefferson Lines*, 514 U.S. at 184 (quoting *D.H. Holmes*, 486 U.S. at 33 (internal quotation marks omitted)); *see also Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) ("The nexus requirement is met by the business all three taxpayers [] did in California during the years in question."). Even if the Fourth District were correct that "[m]erely registering in a state does not give the taxing state the right to assess sales taxes on transactions without any other facts to constitute 'substantial nexus,'" *Am. Bus.*, 151 So. 3d at 73, the Florist did not "merely" register here. Everything it did, it did here. *Cf. Goldberg v. Sweet*, 488 U.S. at 266 ("It is not a purpose of the Commerce Clause to protect state residents from their own state taxes.").

Misapprehending the nexus inquiry, the district court relied primarily on *Quill Corp.*, which presented the separate issue of whether a state could collect taxes from sellers who did *not* reside within the state. *Am. Bus.*, 151 So. 3d at 73 (citing *Quill Corp.*, 504 U.S. at 315). In *Quill Corp.*, the Court held that a state could not "require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." 504 U.S. at 301. In doing so, the Court reaffirmed its

decision in *National Bellas Hess*, which held twenty-five years earlier "that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Id.* at 311 (citing *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967)).

Quite unlike the Florist here, the entity subject to taxation in *National Bellas Hess* maintained no physical presence in the taxing state—no office or property, no agents or sales solicitors, and no telephone listing. 386 U.S. at 753-55. There is, of course, a "'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within (the taxing) State, and those (like Bellas Hess) who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.'" *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 559 (1977). Therefore, in *National Geographic Society*, the Court had no trouble concluding that a taxpayer's "continuous presence in California in offices that solicit advertising for its magazine provides a sufficient nexus to justify that State's imposition" of the tax. *Id.* at 562. Here, the Florist's entire operation was within Florida. *See supra; cf. also Roger Dean Enters., Inc. v. State, Dep't of Revenue*, 387 So. 2d 358, 362 (Fla. 1980) ("'The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State'") (quoting *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 437 (1980))); *TA Operating Corp. v. State,*

Dep't of Revenue, 767 So. 2d 1270, 1274 (Fla. 1st DCA 2000) (noting that in *Quill Corp*. and *National Bellas Hess*, "[t]he nexus necessary to tax the state's own residents' use was never in doubt").

Thus, whatever limit *Quill Corp*. and *National Bellas Hess* may place on Florida's ability to tax an out-of-state entity with no Florida presence that directs mail-order sales to Florida, they are no obstacle to Florida's taxing a Florida resident. *See D.H. Holmes Co*., 486 U.S. at 33 ("[The taxpayer's] argument ignores . . . [its] significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business. We thus see little similarity between the mail-order shipments in *National Bellas Hess* and [the taxpayer's] activities in this case.").

Even putting aside the Florist's residence in Florida, the fact that it consummates flower sales in Florida independently provides the necessary nexus. "[E]very person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state." § 212.05, Fla. Stat. "For the exercise of such privilege, a tax is levied on each taxable transaction or incident, ..." *Id.* § 212.05(1). The Florist's sales are Florida sales. Under Florida law, the retail sale is the initial receipt of an order from a customer by a florist. *See supra*. That the sale leads to a chain of events leading to delivery elsewhere does not change this.

In *Jefferson Lines*, the Supreme Court held that Oklahoma could tax the sale of a bus ticket sold within the state, even when the trip terminated out of state, and even when the majority of the trip was out of state. 514 U.S. at 184-200. Regardless of where the purchased "travel" was delivered, the "sale" took place in Oklahoma, because that is where the company sold the ticket. Even when it leads to future interstate activity, "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale." *Id.* at 186. In this case, the discrete event occurs when the Florist accepts the order, and that happens in Florida.

Despite all of this, the Fourth District concluded that Florida lacks a substantial nexus with a business incorporated in Florida, residing in Florida, headquartered in Florida, and conducting sales in Florida. That conclusion cannot square with Supreme Court precedent. There is nexus aplenty.

2. The tax is fairly apportioned.

The purpose of the apportionment requirement is to "ensure that each State taxes only its fair share of an interstate transaction." *Jefferson Lines*, 514 U.S. at 184 (quoting *Goldberg*, 488 U.S. at 252) (internal quotation marks omitted). This is consistent with prohibiting multiple taxation, "which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State

exceeded its fair share would be taxed again by a State properly laying claim to it." *Id.* at 184-85. To evaluate apportionment, courts apply both "internal consistency" and "external consistency" tests. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). Florida's tax passes both tests.

An internally consistent tax is one that, if applied in every state, would yield "no impermissible interference with free trade." *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). "This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines*, 514 U.S. at 185.

Florida's tax is internally consistent because it imposes tax liability on the florist taking the order, but it exempts any florist accepting an assignment from another florist and making the delivery. If every state enacted a provision like this one (and most have, *see supra*), each flower delivery transaction would be taxed just once—when the florist initially took the order. *Cf. id.* ("If every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax.").

Moreover, even if other states taxed flowers differently, the Florist has made no showing of any actual threat of double taxation. The Florist complained of the theoretical possibility below, but it provided no evidence of any concrete threat. *Cf. Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 444 (1980) ("Inasmuch as New York does not presently tax the dividends in question, actual multiple taxation is not demonstrated on this record. . . . Instead of seeking relief from a present tax burden, appellant seeks to establish a theoretical constitutional preference for one method of taxation over another."); *see also Jefferson Lines*, 514 U.S. at 193 ("Nor has the taxpayer made out a case that Oklahoma's sales tax exposes any buyer of a ticket in Oklahoma for travel into another State to multiple taxation from taxes imposed upon passengers by other States of passage."); *Nw. States Portland Cement Co.*, 358 U.S. at 462-63 ("[O]ne of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. . . . We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.").

Florida's tax is also externally consistent. The external consistency test "looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed." *Jefferson Lines*, 514 U.S. at 185. Although the term "apportionment" "tends to conjure up allocation by

percentages," and although income tax apportionment disputes often turn on "formulas for slicing a taxable pie among several States in which the taxpayer's activities contributed to taxable value," in reviewing *sales* taxes, the Court has "had to set a different course." *Id.* at 186. The different course is needed because the sale of goods does not readily lend itself to an apportionment among states; a sale of goods is instead "most readily viewed as a discrete event." *Id.* Therefore, the Court has consistently upheld sales taxes without any apportionment among states. Those sales taxes are "properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Id.*; *cf.* § 212.05(1)(*l*), Fla. Stat. ("Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered.").

For these reasons, the external consistency test is uncomplicated when applied to sales taxes: "an internally consistent, conventional sales tax has long been held to be externally consistent as well." *Jefferson Lines*, 514 U.S. at 188; *see also id*. at 192 ("The taxpayer has failed to raise any specter of successive taxes that might require us to reconsider whether an internally consistent tax on sales of services could fail the external consistency test for lack of further apportionment (a result that no sales tax has ever suffered under our cases)."). Florida's sales tax is internally consistent, so it is likewise externally consistent.

Because the challenged sales tax is both internally and externally consistent, it satisfies the *Complete Auto* "fairly apportioned" prong.

3. The tax does not discriminate against interstate commerce.

The non-discrimination requirement considers whether a state tax provides a direct advantage to local businesses at the expense of out-of-state interests. *Jefferson Lines*, 514 U.S. at 197. Neither the Florist nor the district court has ever contended that the tax at issue favors in-state interests. The in-state florist is liable for the tax, regardless of where the flowers are ultimately delivered. § 212.05(1)(*l*), Fla. Stat. The state "imposes the same duty on equally valued purchases regardless of whether the purchase prompts interstate or only intrastate movement." *Jefferson Lines*, 514 U.S. at 199. There is no discrimination.

4. The tax is fairly related to the services provided by Florida.

The final inquiry asks whether there is a fair relation between the tax and the benefits the state confers on the taxpayer. This inquiry, which is closely connected to the nexus prong, *Commonwealth Edison Co*., 453 U.S. at 626, serves "to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State," *Goldberg*, 488 U.S. at 266-67. But the tax need not meet the benefits, and there is no need for a "detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." *Jefferson*

Lines, 514 U.S. at 199. On the contrary, the analysis "focuses on the wide range of benefits provided to the taxpayer," *Goldberg*, 488 U.S. at 267, because "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,'" *Commonwealth Edison Co.*, 453 U.S. at 627 n.16 (1981). As the Court explained in *Jefferson Lines*:

> The bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax. *Complete Auto*'s fourth criterion asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State. What we have already said shows that demand to be satisfied here. The tax falls on the sale that takes place wholly inside Oklahoma and is measured by the value of the service purchased.

514 U.S. at 200 (citations omitted).

The Florist, like every other Florida resident or business, benefits from the state's resources. Accordingly, Florida's taxation of retail florist sales satisfies this fourth requirement.

C. Other Considerations Support a Finding of Constitutionality.

Because Florida's tax satisfies the *Complete Auto* test, it does not violate the dormant Commerce Clause. But there are also other considerations supporting a finding of constitutionality.

First, the states' preferred method for taxing sales of flowers is a practical one. It makes sense to tax the sale where it occurs, and it makes sense to recognize that the sale takes place when the purchaser places the order with the initial florist, even when delivery takes place at another time and place. The state laws "reasonably reflect[] the way that consumers purchase" flowers for delivery. *Goldberg*, 488 U.S. at 262; *accord Commonwealth Edison*, 453 U.S. at 615 (noting that Commerce Clause challenges to state taxes should focus on "'the practical effect of a challenged tax'" (quoting *Mobil Oil Corp.*, 445 U.S. at 443)). Furthermore, "a bright-line rule in the area of sales and use taxes [] encourages settled expectations and, in doing so, fosters investment by businesses and individuals." *Quill Corp*., 504 U.S. at 316. Indeed, the Supreme Court considered the likelihood that the tremendous growth in the mail-order industry was due in part to the bright-line exemption from sales taxes the Court recognized in *National Bellas Hess*. *Id.* Because courts should not "undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation,'" *Goldberg*, 488 U.S. at 261 (quoting *Container Corp. of Am.*, 463 U.S. at 169), this Court should defer to the states' "realistic legislative solution," *id.* at 265, to the unique nature of flower delivery transactions.

Moreover, an order rejecting the majority of states' preferred approach for taxing flower sales could actually burden interstate commerce. It would remove

Florida from the multi-state consensus on how to tax these transactions, potentially leading to multiple taxation if Florida responded by taxing all in-state flower deliveries, including those from sales originating (and taxed) out of state. The Florist does not appear to contend Florida could not constitutionally impose such a tax—or that Florida could not constitutionally impose a tax on the Florist's service (akin to a brokerage service) of arranging out-of-state deliveries. Florida's law currently avoids these complications and inconsistencies.

Finally, this Court should not ignore Congress's role in protecting the national economy from burdensome state legislation. The law challenged here has been in place for years, as have similar laws throughout the country. The issue of whether these laws harm the national economy "is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." *Quill Corp*., 504 U.S. at 318. Congress, of course, can authorize state actions that the dormant Commerce Clause would otherwise prohibit, just as it could prohibit state actions that the dormant Commerce Clause would otherwise allow. *See Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys*., 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."). The fact that Congress has chosen to allow these state laws to exist should, if nothing else, give the Court pause before concluding that the Florida Legislature

intruded on Congress's authority. *Cf. Quill Corp*., 504 U.S. at 318 ("No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.").

CONCLUSION

The statute at issue taxes a business located within Florida for sales made within Florida. It sources flower sales where those sales are made, like the majority of all states. Because the statute is consistent with the United States Constitution, this Court should reverse the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on March 3, 2015 to the following counsel of record:

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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