# Taxing the Nontaxable: Are State and Local Governments Allowed to Tax Internet Streaming Service Providers?

**Michael Wallace ***

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* J.D. Candidate, The George Washington University Law School, May 2018. A native Arkansan, I attended Harding University for my undergraduate studies, where I graduated magna cum laude with a B.S. in Public Administration. I would like to thank Jodie Griffin for her feedback and guidance regarding this note. Last, but not least, I would like to thank my father, Robert Wallace, and mother, Cynthia Wallace, for all of their support and encouragement throughout my life and academic career.

# I. INTRODUCTION

For Netflix, Hulu, and other Internet streaming service providers ("ISSPs"), the years 2015 through 2017 have been filled with confusion and frustration. ISSPs are required to collect and remit varying tax amounts from customers based on state and local governments' sales and use tax codes.[1] Yet, imposing such taxes violates the Permanent Internet Tax Freedom Act, burdens interstate commerce in violation of the Commerce Clause by requiring the ISSP to sort through hundreds of tax codes, and possibly violates the Due Process Clause of the Fourteenth Amendment by enforcing statutes and regulations on companies that are not under the state or local government's jurisdiction.

The application of existing state and local governments' sales and use tax codes imposes a substantial burden on ISSPs. According to the Federal Communications Commission ("FCC"), "the current patchwork of state and local laws and regulations relating to taxation of digital goods and services . . . may hinder new investment and business models,"[2] thus hindering interstate commerce. For example, a double or triple taxation issue could arise if a resident of Washington, D.C. streams a video through an ISSP based in California during a layover at Dallas Fort Worth International Airport, and each jurisdiction claimed a right to tax the streamed video.[3] Adding to the complexity and confusion, "some [state and local governments] tax [online sales] as part of the sales tax imposed on tangible personal property; others tax them as a separate category of services."[4] Furthermore, each taxing jurisdiction differs on the content and products that are subject to be tax.[5]

Various sources of law, however, suggest that it is impermissible to require ISSPs to collect and remit sales and use taxes.[6] The United States Congress enacted the Internet Tax Freedom Act in 1998, which prohibited the

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1. *See generally* Jason Henry, *Pasadena Will Tax Netflix, Hulu and Your City Might be Next*, SAN GABRIEL VALLEY TRIBUNE (Sept. 27, 2016) http://www.mercurynews.com/2016/09/27/pasadena-will-tax-netflix-hulu-and-your-city-might-be-next/ [https://perma.cc/N8S8-WYRZ]; *see generally* Jennifer Jensen, *US – The Disparate State and Local Tax Treatment of Digital Streaming Services*, PWC (Sept. 9, 2015) http://ebiz.pwc.com/2015/09/us-the-disparate-state-and-local-tax-treatment-of-digital-streaming-services-2/ [https://perma.cc/7ERV-JYE6]; *see generally* Vidya Kauri, *'Netflix Tax' On Digital Downloads Takes Effect in Pa.*, LAW 360 (Aug. 3, 2016) https://www.law360.com/articles/824535/print?section=corporate [https://perma.cc/TG7F-2QL5].

2. FCC, *Connecting America: The National Broadband Plan* (2014), at 58, https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

3. *See* Jeremy Bui, The Permanent Internet Tax Freedom Act, H.R. 3086, 113th Congress (2014), 23 COMM. LAW CONSPECTUS 536, 537 (2014).

4. Delta, George B. and Matsuura, Jeffrey H., *Law of the Internet: State Taxation of Electronic Commerce*, Aspen Publishers, §15.06(B)(1) (2016).

5. *Id.*

6. *See e.g.*, Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, §922(b), 130 Stat. 122, 281 (2016); *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992).

introduction of new taxes on Internet access.[7] In 2016, Congress passed the Trade Facilitation and Trade Enforcement Act, which extended the Internet Tax Freedom Act's applicability to 2020.[8] Importantly, ISSPs fall within the category of "Internet access" as defined by the Internet Tax Freedom Act.[9] Further, a state or local government violates the Commerce Clause by requiring an ISSP to collect and remit sales and use taxes, unless the ISSP has a "substantial nexus" with the taxing jurisdiction.[10] Finally, the exercise of jurisdiction over ISSPs by state and local governments may also violate the Due Process Clause.[11]

### *A. Internet Streaming Service Providers Are Faced with A Confusing Web of Conflicting Consumer Taxation Laws*

ISSPs are in a state of confusion regarding its tax obligations for online streaming services. State and local governments have passed and implemented legislation and regulations that require ISSPs to collect and remit sales and use taxes.[12] However, Congress intended to prevent the taxation of Internet access when it permanently extended the Internet Tax Freedom Act in 2016.[13] In addition, the Commerce Clause and the Due Process Clause limit the actions of state and local governments.[14] In 1992, the United States Supreme Court held that a "substantial nexus" is required for states to force out-of-state sellers to collect and remit taxes from customers, formulating a test for imposing sales and use taxes on out-of-state companies.[15] In order for a state or local government to tax an ISSP, the Due Process Clause requires the company to be "physically present" in the jurisdiction or "purposefully direct[] its activities" at residents of the jurisdiction.[16] Yet, state and local jurisdictions continue to pass legislation

7. *See* Internet Tax Freedom Act, 47 U.S.C. § 151 (2012); Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 1101(a)(1), 112 Stat. 2681, 2681-719 (1998).

8. *See* Trade Facilitation and Trade Enforcement Act of 2015 § 922(b).

9. 47 U.S.C. 231

10. *See id.*; *Quill*, 504 U.S. at 313.

11. *See* U.S. CONST. amend. XIV, § 1.

12. *See* Kauri, *'Netflix Tax' On Digital Downloads Takes Effect in Pa.*, *supra* note 1; Sales, Use & Hotel Occupancy Tax Bulletin 16-001, PENNSYLVANIA DEPARTMENT OF REVENUE (July 21, 2016), http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPolicies BulletinsNotices/Documents/Tax%20Bulletins/SUT/st_bulletin_16-001.pdf; Jensen, *US – The Disparate State and Local Tax Treatment of Digital Streaming Services*, *supra* note 1; Henry, *Pasadena Will Tax Netflix, Hulu and Your City Might be Next*, *supra* note 1.

13. *See* Trade Facilitation and Trade Enforcement Act of 2015, at Sec. 922; Internet Tax Freedom Act, *supra* note 7.

14. *See* U.S. CONST. Art. 1, § 8, cl. 3 (2016); U.S. CONST. amend. XIV, at § 1.

15. *See e.g., Quill v. North Dakota*, 504 U.S. 298. To note, *South Dakota v. Wayfair, Inc.*, a case challenging the "substantial nexus" test developed in *Quill*, is currently before the U.S. Supreme Court, with a decision to be issued by the end of the term, June 2018.

16. *See* Quill v. North Dakota, 504 U.S. at 306-08.

that subject ISSPs to various and differing sales and use taxes.[17] ISSPs are therefore uncertain as to whether they are required to collect and remit sales and use taxes. With all of this confusion, what should ISSPs do? The answer to this question rests on how the courts interpret the interplay of the Permanent Internet Tax Freedom Act, the "substantial nexus" requirement of the Commerce Clause, and the Due Process Clause.[18] This Note argues that state and local governments are not permitted to require ISSPs to collect and remit sales and use taxes because doing so would violate the Permanent Internet Tax Freedom Act, the Commerce Clause, and possibly the Due Process Clause.

This Note looks at past and present legislation, case law, congressional intent, and agency and commission recommendations to conclude that state and local governments are not permitted to require ISSPs to collect and remit sales and use taxes. In doing so, this Note explores how courts should address the issue of multiple and differing methods of taxation, and the overall burden on interstate commerce that arises by the taxation of ISSPs by state and local governments. Part II provides a brief background on the developments affecting the taxation of ISSPs. Part III outlines a three-part argument as to why courts should prohibit state and local governments from requiring ISSPs to collect and remit sales and use taxes. The contentions are (1) the Permanent Internet Tax Freedom Act prohibits ISSP taxation, (2) such taxation violates the Commerce Clause by placing an undue burden on interstate commerce, and (3) the imposition of such tax laws on ISSPs may violate the Due Process Clause.

## II. THE CONFUSION AND COMPLEXITY FACING INTERNET STREAMING SERVICE PROVIDERS

With the advent of Internet video streaming in the late 2000's, cities and states have tried to recuperate some of their lost tax revenue by taxing ISSPs.[19] For example, Netflix was founded in 1997, but it was not until 2007 that Netflix started providing online streaming service in the United States.[20] Hulu, another ISSP, launched its streaming services in 2008.[21] Because of

17. *See* Kauri, *'Netflix Tax' On Digital Downloads Takes Effect in Pa.*, *supra* note 11; *see* Sales, Use & Hotel Occupancy Tax Bulletin 16-001, *supra* note 11; *see* Jensen, *US – The Disparate State and Local Tax Treatment of Digital Streaming Services*; *see* Henry, *Pasadena Will Tax Netflix, Hulu and Your City Might be Next*, *supra* note 11.

18. *See* Trade Facilitation and Trade Enforcement Act of 2015 at Sec. 922; *see generally* Quill v. North Dakota, 504 U.S. 298; *see* U.S. Constitution Art. 1, § 8, cl. 3; *see* U.S. Constitution Amend. XIV, § 1.

19. *See* Mary Benton and Zach Gladney, *From the Litigators' Desks: The Future in State Taxation of the Cloud and an Enduring Guiding Principle*, 26 J. MULTISTATE TAX'N AND INCENTIVES, 14, 14 (2016).

20. *See Netflix's View: Internet TV is Replacing Linear TV*, NETFLIX, https://ir.netflix.com/long-term-view.cfm [https://perma.cc/J5HS-88MK] (last updated Jan. 18, 2017).

21. *See About Hulu*, HULU, https://www.hulu.com/press/about [https://perma.cc/6T6N-YV4M] (last visited Nov. 12, 2017).

these technologies, the traditional tax bases, including cable video services and in-store video rentals, are diminishing, thereby increasing the pressure on state and local governments to expand their tax reach.[22]

Therefore, cities and states are rapidly, and increasingly, passing new statutes and regulations levying various taxes on ISSPs.[23] Some cities and states tax ISSPs under their general sales tax. Searcy, Arkansas, for example, applies a sales tax rate of 9.5% on Internet video streaming.[24] In Pennsylvania, on the other hand, ISSPs are required to charge customers "a 6[%]sales tax on digital downloads."[25] The "digital tax" went into effect August 1, 2016, and required sellers to "collect [sales] tax on digitally or electronically delivered or streamed video," therefore adding an additional six percent to their monthly fee.[26]

Another method of taxing ISSPs is through use and excise taxes.[27]Washington State passed an act in 2009 amending its existing excise taxation policy to include the taxation of digital products.[28] This amendment permitted the taxation of digital goods to "protect the sales and use tax base [of the state]."[29] The city of Chicago implemented an amusement tax on ISSPs in September 2015.[30] The Chicago Department of Finance specified that "the [city's] amusement tax applies to charges for the privilege to witness, view,

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22. *See* Benton and Gladney, *supra* note 18, at 14; *see also Catherine* Chen, *Taxation of Digital Goods and Services*, 70 N.Y.U. ANN. SURV. AM. L. 421, 422-24 (2015).

23. *See* Kauri, *'Netflix Tax' On Digital Downloads Takes Effect in Pa.*; *see generally* Engrossed Substitute House Bill, 2075 § 101, 61st Washington State Legislature (2009); *see* Jensen, *US – The Disparate State and Local Tax Treatment of Digital Streaming Services*; *see* Henry, *Pasadena Will Tax Netflix, Hulu and Your City Might be Next*.

24. *See State Tax Rates*, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, http://www.dfa.arkansas.gov/offices/exciseTax/salesanduse/Pages/StateTaxRates.aspx [https://perma.cc/MM9F-6QT8] (last visited Mar. 3, 2018); see List of Cities and Counties with Local Sales and Use Tax, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, http://www.dfa.arkansas.gov/offices/exciseTax/salesanduse/ Documents/cityCountyTaxTable.pdf [https://perma.cc/G73P-HRS7] (last visited Mar. 3, 2018). *See also* https://www.arktimes.com/ArkansasBlog/archives/2017/02/10/amazon-set-to-begin-collecting-sales-tax-on-arkansas-purchases-in-march [https://perma.cc/X29P-6KJD] (last visited Mar. 3, 2018).

25. *See* Kauri, *'Netflix Tax' On Digital Downloads Takes Effect in Pa.*; *see also* Sales, Use & Hotel Occupancy Tax Bulletin 16-001.

26. *See* Sales, Use & Hotel Occupancy Tax Bulletin 16-001.

27. A use tax is a "tax on purchases made outside one's state of residence on taxable items that will be used, stored or consumed in one's state of residence and on which no tax was collected in the state of purchase. https://www.investopedia.com/terms/u/use-tax.asp [https://perma.cc/Q6L3-ZKSU] (last visited Mar. 3, 2018); An excise tax is "an indirect tax charged on the sale of a particular good [that] is not directly paid by an individual consumer; instead, the Internal Revenue Service levies the tax on the producer or merchant, who passes the tax onto the consumer by including it in the product's price." https://www.investopedia.com/terms/e/excisetax.asp [https://perma.cc/X6QS-V5LD} (last visited Mar. 3, 2018).

28. *See generally* Engrossed Substitute House Bill.

29. *Id.* at § 101(3)(a).

30. *See* Jensen, *US – The Disparate State and Local Tax Treatment of Digital Streaming Services*.

or participate in an amusement either in person or *electronically delivered*."[31] Therefore, citizens of Chicago now pay a nine percent amusement tax on top of the membership fee Netflix, Hulu, and other ISSPs charge.[32] Chicago requires the ISSPs to collect and remit the tax if the customer's residential street address or primary business address is in Chicago"[33] Chicago consumers have challenged the city's amusement tax on ISSPs by claiming that the application of the amusement tax on Internet streaming services violates the Permanent Internet Tax Freedom Act and the Commerce Clause.[34]

Other cities and states tax ISSPs under service taxes. In California, ISSPs may be subject to the service tax rate applied to cable providers in up to 46 cities in the near future.[35] One of those cities, Pasadena, decided that an existing "9.[%] tax on 'video services' [will apply] to subscribers of streaming video providers."[36] On the other side of the country, the state of Florida currently taxes ISSPs under "Florida's communications services tax."[37]

In sharp contrast, some states do not tax ISSPs at all. The state of Idaho, for example, clarified that "streaming services are not subject to tax."[38] Similarly, Alabama briefly considered enacting a streaming tax, but abandoned the measure after pressure from its citizens.[39] As a result, ISSPs are faced with the burden of interpreting, applying, collecting, and remitting taxes according to multiple state and local governments' sales and use tax codes.

## III. STATE AND LOCAL GOVERNMENTS CANNOT REQUIRE INTERNET STREAMING SERVICE PROVIDERS TO COLLECT AND REMIT SALES AND USE TAXES

The Permanent Internet Tax Freedom Act, the Commerce Clause, and possibly the Due Process Clause prohibit state and local governments from requiring ISSPs to collect and remit sales and use taxes. The Permanent Internet Tax Freedom Act prohibits the taxation of Internet access.[40] The Commerce Clause allows the U.S. Congress to regulate commerce "among the several states;" thus regulation of commerce by states and localities that

31. *Id.* (emphasis added).
32. *See id.*
33. *Id.*
34. *See generally* Labell v. Chicago, Case No. 2015 CH 13399 (Cir. Ct. Cook Cty. Ill. July 21, 2016) (opinion and order on motion to dismiss).
35. *See* Henry, *Pasadena Will Tax Netflix, Hulu and Your City Might be Next*.
36. *Id.*; *see also* Pasadena, Cal. Code of Ordinances 4.56.070 (2017); https://www.municode.com/library/ca/pasadena/codes/code_of_ordinances?nodeId=TIT4REFI_CH4.56UTUSTA.
37. *See* Jensen, *US – The Disparate State and Local Tax Treatment of Digital Streaming Services*.
38. *Id.*
39. *See id.*
40. *See* Internet Tax Freedom Act, 47 U.S.C. § 151 Note at Sec. 1101(a).

affects interstate commerce would violate Congress's constitutional right to regulate interstate commerce.[41] The Due Process Clause prohibits the taxation of a company that is not physically present in the jurisdiction or does not "purposefully direct[] its activities" at residents of the jurisdiction.[42] Therefore, state and local governments are prohibited from requiring ISSPs to collect and remit ales and use taxes. Due to the already existing legislation and Constitutional requirements, there is no need for legislative reform if the courts apply these requirements correctly.

### *A. The Permanent Internet Tax Freedom Act*

In 1998, Congress prohibited state and local governments from taxing Internet access by passing the Internet Tax Freedom Act.[43] The Internet Tax Freedom Act specifically stated that:

> No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the enactment of this Act – (1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and [(2)] multiple or discriminatory taxes on electronic commerce.[44]

The Internet Tax Freedom Act was extended a total of five times before Congress decided to enact the permanent moratorium in 2016.[45]

The Permanent Internet Tax Freedom Act made the moratorium on the taxation of Internet access created by the Internet Tax Freedom Act permanent.[46] The permanent moratorium effectively prohibits all state and local governments from creating and applying sales and use taxes to ISSPs because of the applicability and purpose of the Permanent Internet Tax Freedom Act.[47]

The Permanent Internet Tax Freedom Act maintained the same language as the Internet Tax Freedom Act.[48] Accordingly, the Permanent Internet Tax Freedom Act also defined Internet access service as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary

41. *See* U.S. Constitution Art. 1, § 8, cl. 3.

42. *See* Quill v. North Dakota, 504 U.S. at 306-08 (citing Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-45 (1954)).

43. *See* Internet Tax Freedom Act, 47 U.S.C. § 151 Note.

44. *See id.* at Sec. 1101(a).

45. *See* "The Permanent Internet Tax Freedom Act," 23 COMM. LAW CONSPECTUS at 537; Trade Facilitation and Trade Enforcement Act of 2015 at Sec. 922.

46. *See* Trade Facilitation and Trade Enforcement Act of 2015 at Sec. 922.

47. 47.U.S.C. §151 Note at Sec. 1101(a).

48. *See* "The Permanent Internet Tax Freedom Act," 23 Comm. Law Conspectus at 537; Trade Facilitation and Trade Enforcement Act of 2015 at Sec. 922.

content, information, and other services as part of a package of services offered to consumers."[49]

Of note, during the 114th Congress, the Marketplace Fairness Act of 2015 and the Digital Goods and Services Tax Fairness Act of 2015 were introduced into the Senate.[50] The Marketplace Fairness Act would "require all sellers . . . to collect and remit sales and use taxes with respect to remote sales . . . "[51] The Digital Goods and Services Tax Fairness Act would require a seller to "be responsible for collecting and remitting the correct amount of tax for the State and local jurisdictions whose territorial limits encompass the customer tax address . . . ."[52] However, neither of these proposed pieces of legislation have moved out of committee, and therefore, are not applicable.[53]

#### 1. Applicability of the Permanent Internet Tax Freedom Act

The Permanent Internet Tax Freedom Act explicitly preempts state and local government laws that permit taxing ISSPs In cases where federal law conflicts with state law, courts have held that preemption under the Supremacy Clause applies when the federal law explicitly says so.[54] In *English v. General Electric Company*, the United States Supreme Court emphasized that state law is preempted by federal law "when Congress has made its intent known through explicit statutory language…."[55] Congress's explicit direction that "[n]o State or political subdivision thereof may impose any . . . [t]axes on Internet access . . . or discriminatory taxes on electronic commerce" demonstrates that the Permanent Internet Tax Freedom Act is meant to preempt any state or local law establishing such taxes.[56] Therefore, state and local tax laws that conflict with the Permanent Internet Tax Freedom Act are preempted and impermissible.

Further, ISSPs fall under the protection of the Permanent Internet Tax Freedom Act according to the explicit statutory language. The Permanent Internet Tax Freedom Act defines Internet access service as "a service that enables users to access content, information . . . or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services…."[57] Netflix, for example,

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49. Internet Tax Freedom Act, 47 U.S.C. § 151 Note, at Sec. 1101(d)(3)(D).

50. *See* S. 698 – Marketplace Fairness Act of 2015, 114th Congress, https://www.congress.gov/bill/114th-congress/senate-bill/698; S. 851 – Digital Goods and Services Tax Fairness Act of 2015, 114th Congress, https://www.congress.gov/bill/114th-congress/senate-bill/851

51. *See* S. 698 - Marketplace Fairness Act of 2015.

52. S. 851 – Digital Goods and Services Tax Fairness Act of 2015.

53. *See* S. 698 - Marketplace Fairness Act of 2015; *see* S. 851 – Digital Goods and Services Tax Fairness Act of 2015.

54. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95-98 (1983).

55. English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

56. *See* Internet Tax Freedom Act, 47 U.S.C. § 151 Note at Sec. 1101(a).

57. *Id.* at Sec. 1101(e)(3)(D).

offers video streaming services over the Internet, allowing "[m]embers [to] watch as much [videos] as they want, anytime, anywhere, on nearly any Internet-connected screen."[58] Netflix thus provides a "service that enables users to access content . . . offered over the Internet," and should be classified under Internet access.[59] Therefore, Netflix and similar ISSPs are encompassed within the statutory definition of Internet access service and should be protected by the tax prohibition created by the Permanent Internet Tax Freedom Act.

Proponents of taxing ISSPs might argue that ISSPs are comparable to cable providers and should be classified and taxed as such.[60] However, such a comparison is flawed because ISSPs do not meet the definition of a cable system as defined by statute and interpreted by courts. Because the Permanent Internet Tax Freedom Act does not deal with cable systems, this Note looks to other statutes for the definition of a cable system. According to the Copyright Act

> A "cable system" is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.[61]

ISSPs do not clearly fit within the definition of a cable system established by Congress and thus, they cannot be classified as such. ISSPs do not "receive signals transmitted or programs broadcast by one or more television broadcast stations."[62] Netflix, for example, acquires its content through licensing deals with owners and suppliers, as well as by creating its own content.[63] Netflix does not receive its content from transmitted signals or broadcast programs and, accordingly, is not a cable system. Furthermore, Netflix transmits all of its content on its "Open Connect" system, which is comprised of a network of servers accessed through Internet service

58. *See generally* Netflix Media Center, *About Netflix: Netflix Has Been Leading the Way for Digital Content Since 1997*, https://media.netflix.com/en/about-netflix [https://perma.cc/LNC2-ZEM9] (accessed Dec. 28, 2016). According to the website, "Netflix is the world's leading *Internet* television network…."

59. *See* Internet Tax Freedom Act, 47 U.S.C. § 151 Note at Sec. 1101(e)(3)(D).

60. *See, e.g.*, *Netflix, Inc. v. Finance and Administration Cabinet Dep't of Revenue*, Order No. K-24900 at 2 (Kentucky Bd. Tax App. Sept. 23, 2015).

61. 17 U.S.C. § 111(f)(3) (2012).

62. *Id.*

63. *See Netflix's View: Internet TV is Replacing Linear TV*, NETFLIX, https://ir.netflix.com/long-term-view.cfm (updated April 18, 2016).

providers.[64] Netflix is not transmitting "such signals or programs by wires, cables, microwave, or other communications channels," but is simply allowing access to the content on the servers.[65] As a result, Netflix and other ISSPs cannot properly be classified as cable systems because they do not meet any applicable statutory definition.

Courts have also held that ISSPs fail to satisfy the definition of a cable system contained in the Copyright Act. In *Fox Television Stations, Inc. v. FIlmOn X, LLC*, a case regarding broadcast licensing, the District Court for the District of Columbia held that a company that uses the Internet to transmit content is not a cable system.[66] The Court's reasoning centered around the fact that, "cable companies . . . receive the signals and directly retransmit them by coaxial cable, wires, or microwave links to their subscribers[; and] the Internet is not a physical 'facility[] located in any State.'"[67] Unlike cable companies, ISSPs do not receive their content from signals or broadcasts, or retransmit their content over coaxial cable, wires, or microwave links.[68] For example, Netflix receives its content through licensing deals, and allows customers to access the content on its servers via the Internet.[69] Therefore, Netflix and similar ISSPs are not receiving signals or retransmitting them, but simply allowing access to content via the Internet.

Another reason that ISSPs should not be treated like cable systems is that they fail to meet the physical facility requirement. According to the court in *FIlmOn X*, a cable system must have a physical facility that retransmits the signal.[70] Arguably, in order to have a physical facility, an ISSP would have to have a physical presence. The Court of Appeals of New York held "physical presence is not typically associated with the Internet in that many websites are designed to reach a national or even a global audience from a single server whose location is of minimal import."[71] Hence, because it is Internet-based, an ISSP has neither a physical presence nor a physical facility that retransmits the signal. For the above reasons, an ISSP is not a cable system and should not be classified or taxed as such.

64. *See* Niccolai, James, *Behind the Curtain: How Netflix Streams Movies to Your TV*, TECHHIVE (May 22, 2014) http://www.techhive.com/article/2158040/how-netflix-streams-movies-to-your-tv.html.

65. 17 U.S.C. § 111(f)(3); *see id.*

66. *See* Fox Television Stations, Inc. v. FIlmOn X, LLC., 150 F. Supp. 3d. 1, 20 (D.D.C. 2015).

67. *Id*. at 19.

68. *See, e.g., Netflix's View: Internet TV is replacing linear TV*, *supra* note 58.

69. *See Id.*

70. *See* Fox Television Stations, Inc. v. FIlmOn X, LLC., 150 F. Supp. 3d. at 19.

71. Overstock.com, Inc. v. New York Department of Taxation and Finance, 987 N.E.2d 621, 626 (N.Y. 2013).

### 2. The Purpose of the Permanent Internet Tax Freedom Act

The taxation of ISSPs by state and local governments runs contrary to the purpose of the Permanent Internet Tax Freedom Act, which is to prevent the taxation of Internet access and promote the growth of the Internet.[72] In determining the purpose of the Permanent Internet Tax Freedom Act, one should look at the plain language of the statute and Congressional intent.[73]

The Permanent Internet Tax Freedom Act explicitly states that Internet access remain tax-free: "It is the sense of Congress that no new Federal taxes similar to [taxes on Internet access and multiple or discriminatory taxes on electronic commerce] should be enacted with respect to the Internet and Internet access…."[74] Therefore, Congress intended Internet access, and thus ISSPs, to remain tax-free from state and local governments.

The purpose of the Permanent Internet Tax Freedom Act can also be determined by reviewing the Congressional intent. The Congressional Record evidences that Congress's purpose in passing the Act was to protect Internet access from taxation and to promote the growth of the Internet. Congressman Robert Goodlatte (R-VA) asserted that the Permanent Internet Tax Freedom Act protects Americans from a substantial tax burden, but also "maintains unfettered access to [the Internet]," and promotes the growth of the Internet by creating a permanent tax ban to enhance predictability for investors.[75] Similarly, Congressman Steven Chabot (R-OH) believed Internet access needed to be protected from taxation because Americans use it every day "to run small businesses, to do research, to apply for jobs, to listen to music, to communicate with friends and family . . . and for so many other things."[76] Therefore, the Congressional Record demonstrates that in passing the Permanent Internet Tax Freedom Act, Congress intended to protect Internet access, including ISSPs, from taxation, as well as to promote the growth of the Internet.

Congress could not have intended that ISSPs be subject to taxation because such a requirement would hinder the statute's purpose.[77] According to opponents of taxing Internet access, "allowing states to impose tax[es] on internet access would hurt the growth of the wireless industry and price out

72. *See* Internet Tax Freedom Act, 47 U.S.C. § 151 Note at Sec. 1101(a); *see also* House Congressional Record, H3952 (June 9, 2015) (stating "Congress has worked assiduously for 16 years to keep Internet access tax-free.").

73. *See* Miller v. French, 530 U.S. 327, 336 (2000) (stating "[w]here Congress has made its intent clear, '[the court] must give effect to that intent.'" (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962)).

74. Internet Tax Freedom Act, 47 U.S.C. § 281 Note at Sec. 1201.

75. *See* House Congressional Record at H3952.

76. *See id.* at H3952 (emphasis added).

77. *See id.* at H3952.

lower-income customers," which would thereby "impose an unnecessary burden on consumers and providers."[78]

Based on the above arguments that the Permanent Internet Tax Freedom Act preempts state and local taxing authority, that ISSPs fall under the statutory definition of Internet access, and the congressional intent in passing the Permanent Internet Tax Freedom Act, is a clear indicator that ISSPs should not be subject to state and local sales and use taxes.

### *B. The Commerce Clause*

The Commerce Clause gives Congress the power to regulate interstate commerce and prohibits state and local governments from enacting regulations that place an unconstitutional burden on interstate commerce.[79] In 1992, the United States Supreme Court addressed the issue of requiring an out-of-state vendor to collect and remit sales and use taxes in *Quill Corp. v. North Dakota*.[80] The Court held that physical presence in the taxing jurisdiction was required for an entity to have a substantial nexus with the taxing jurisdiction as required by the Commerce Clause.[81] Accordingly,, the Court reasoned that a business that "deliver[ed] all of its merchandise to its North Dakota customers by mail or a common carrier from out of state locations" did not meet the required substantial nexus with the taxing state of North Dakota.[82] Therefore, "[u]nless the remote seller has a 'nexus,' that is, some type of contact or connection, with the state in which the customer is located, the seller has no obligation to collect and remit the state's sales or use tax."[83] As a result, the issue of whether a business has the required nexus "has become one of the most contentious issues between states and out-of-state vendors."[84]

78. *See* Sarah McGahan, and Troy Young, *Extended Yet Again: The Debate Over State Taxation of Internet Access Will be One for the 114th Congress*, THE TAX ADVISER (Mar. 1, 2015), http://www.thetaxadviser.com/issues/2015/mar/salt-mar2015.html [https://perma.cc/5NKU-PJ4P]; *see also* House Congressional Record at H3952 (Congressman Goodlatte states "[Taxing Internet access] is regressive. Low-income households pay 10 times as much in communication taxes as high-income households as a share of income.").

79. *See* Granholm v. Heald, 544 U.S. 460, 493 (2005) (Stevens, J., dissent) (stating that "a state law may violate the unwritten rules described as the "dormant Commerce Clause" [] by imposing an undue burden on both out-of-state and local producers engaged in interstate activities…"); *see also* U.S. Constitution Art. 1, § 8, cl. 3 (2016).

80. *See generally* Quill v. North Dakota, 504 U.S. 298.

81. *See id.* at 313-14.

82. *See id.* at 302; *see also National Bella Hess v. Department of Revenue*, 386 U.S. 753, 755 (holding that a company, with only a contact through "the United States mail or common carrier" with the state, was not required to "collect and pay…the tax imposed by [the state] upon consumers who purchase the company's goods for use within the State.").

83. *See* Delta and Matsuura, *Law of the Internet: State Taxation of Electronic Commerce*.

84. *Id.*

### 1. The Taxation of ISSPs by State and Local Governments' Fails to Satisfy the Substantial Nexus Test Required by the Commerce Clause

State and local governments' requirements that ISSPs collect and remit sales and use taxes violate the Commerce Clause because the taxation places an undue burden on interstate commerce. To determine whether a state or local government's imposition of sales and use taxes on ISSPs are an undue burden on interstate commerce, courts should look at the "substantial nexus" requirement.[85] The test to determine "substantial nexus" with the taxing jurisdiction is whether a company has a physical presence in the jurisdiction.[86] Without this connection, the requirement that ISSPs collect and remit sales and use taxes creates an undue burden on interstate commerce.

ISSPs do not satisfy the "substantial nexus" test with the taxing jurisdictions because the content is accessed via the Internet, a common carrier. In *Quill*, the Supreme Court held that an out-of-state vendor whose only connection to customers in the taxing state was through "mail or common carrier as part of a general interstate business" could not be required to collect and remit taxes due to a lack of "substantial nexus" because it would be an undue burden on interstate commerce.[87] ISSPs, as in *Quill*, deliver their merchandise and products through a common carrier, the Internet.[88] Therefore, like in *Quill* and *National Bella Hess, Inc. v. Department of Revenue*, where the company was not subject to collecting and remitting sales and use taxes by the state because its only contact was through a common carrier, ISSPs should not be subject to taxation by governments in which their only connection is Internet access service, a common carriage service.[89]

To note, there is the possibility that the Internet's classification as a common carrier will change.[90] However, the potential reclassification will not change the conclusion that ISSPs do not satisfy the "substantial nexus" requirement established by *Quill*. The Supreme Court's use of the phrase

85. The exceptions being cases where the ISSP has physical offices or headquarters in the jurisdiction.

86. *See* Quill v. North Dakota, 504 U.S. at 298; *see* National Bella Hess, Inc. v. Department of Revenue, 386 U.S. 754, 759-60 (1967).

87. *See* Quill v. North Dakota, 504 U.S. at 302, 307.

88. *See* United States Telecom Association, et al., v. Federal Communications Commission, 825 F.3d 674, 711 (D.C. Cir. 2016) (upholding the FCC's classification of the Internet as a common carrier).

89. This would not be the case for ISSPs headquartered or with physical offices in jurisdictions. In those cases, ISSPs could be taxed by the jurisdiction.

90. *See generally* Restoring Internet Freedom, *Notice of Proposed Rulemaking*, FCC 17-60 (2017), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1.pdf [https://perma.cc/PXE5-ADE6]; *see generally* Marc S. Martin and Michael A. Sherling, *Net Neutrality and Broadband Privacy Under The New FCC*, LAW 360 (Feb. 13, 2017); *see generally* Jenna Ebersole, *4 Clues From The FCC Chairman On Net Neutrality's Fate*, LAW 360 (March 10, 2017).

"mail or common carrier as part of a general interstate business"[91] suggests that the Court was applying the lay definition of "common carrier" because it used the phrase to include other methods of transportation, in addition to standard mail. It would be a stretch to conclude that the Court used the phrase "common carrier," as defined by the Communications Act of 1934,[92] when it was discussing sending packages via the United States Postal Service.[93] Therefore, the Court was likely using the lay definition of a "common carrier," which is "a business or agency that is available to the public for transportation of persons, goods, or messages."[94] The Internet is an entity "available to the public for the transportation of . . . goods or messages."[95] Therefore, the Internet meets the criteria of a common carrier for the "substantial nexus" test, regardless of its classification for regulatory purposes.

Furthermore, ISSPs do not have the required "substantial nexus" with the taxing jurisdictions because the content is accessed via the Internet, without the ISSP maintaining an actual physical presence in the taxing jurisdiction. ISSPs provide services to customers via the Internet, which, as the District Court for the District of Columbia concluded, is not a physical facility.[96] Therefore, ISSPs do not have a physical presence in the taxing states and localities because the Internet does not count as a physical facility; thus, there is not substantial nexus.

ISSPs also do not have the required substantial nexus with the taxing jurisdiction because "physical presence is not typically associated with the Internet in that many websites are designed to reach a national or even a global audience from a single server whose location is of minimal import."[97] Netflix and other similar ISSPs use content delivery networks, which are comprised of a system of servers.[98] According to the court in *Overstock.com v. New York*, the locations of servers are "of minimal import," and therefore, the mere presence of a server does not satisfy the "substantial nexus" requirement.[99] This argument is further supported by the fact that the State of Washington explicitly excluded the use of servers from the "substantial nexus" requirement for taxation.[100] As a result, the only jurisdictions that should be

91. *See* Quill v. North Dakota, 504 U.S. at 307 (citing to National Bella Hess, Inc., 386 U.S. 758).

92. *See* Communications Act of 1934, 47 U.S.C. § 153(11) (2016) (defining a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier").

93. *See generally* Quill v. North Dakota, 504 U.S. 298.

94. "Common Carrier." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 6 Apr. 2017.

95. *Id.*

96. *See* Fox Television Stations v. FilmOn X, 150 F. Supp. 3d. at 19.

97. *See* Overstock.com v. New York, 987 N.E.2d at 626.

98. *See* Niccolai, *Behind the Curtain: How Netflix Streams Movies to Your TV*.

99. *See* Overstock.com v. New York, 987 N.E.2d at 626.

100. *See* Engrossed Substitute House Bill, at § 101(4)(b).

allowed to tax ISSPs are the jurisdictions in which the ISSPs are headquartered or have offices because this would meet the "substantial nexus" requirement. Nevertheless, the majority of state and local governments do not satisfy the "substantial nexus" required to force ISSPs to collect and remit sales and use taxes.

The United States Supreme Court in *Quill* emphasized that the "Commerce Clause and its nexus requirement are informed . . . by structural concerns about the effects of state regulation on the national economy."[101] The Court first laid out these structural concerns in *Bella Hess, Inc.*, holding that if a state or local jurisdiction was allowed to tax out of state businesses without a substantial nexus, then every other jurisdiction throughout the United States with the "power to impose sales and use taxes" would be allowed to tax the business too.[102] This would place an extreme burden on businesses and interstate commerce by subjecting businesses, such as ISSPs, to a multitude of differing tax rates, exemptions, and "record-keeping requirements" imposed by a jurisdiction with "no legitimate claim to impose 'a fair share of the cost of the local government.'"[103] Therefore, the taxation of ISSPs by states, localities, and other political subdivisions is not only impermissible because of the burden it places on interstate commerce; it is also unfair to ISSPs with no substantial nexus to the taxing jurisdiction because these companies should not be expected to share the cost of governments from which they receive no benefits or protections.

One could argue that the pleasure of doing business in the taxing jurisdiction is a benefit that justifies taxation; however, the Supreme Court of Florida has implied otherwise.[104] The Court identified some of these benefits, such as fire and police protection and the jurisdiction's "maintenance of a civilized society."[105] Based on the court's list of "benefits" or "protections," the pleasure of doing business in the taxing jurisdiction does not seem to fall into the "benefits" or "protections" the courts consider in these instances.[106] Proponents may also argue that ISSPs benefit from the provision of the Internet infrastructure provided by state and local governments. However, this is a stretch. The Internet infrastructure that ISSPs rely on is not provided by state and local governments, but instead is installed and maintained by private companies. Therefore, ISSPs do not enjoy the benefits or protections identified by the courts from the majority of taxing jurisdictions and should not be subject to collecting and remitting their sales and use taxes.

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101. *See* Quill v. North Dakota, 504 U.S. at 312.

102. *See* National Bella Hess v. Department of Revenue, 386 U.S. at 759-60 (stating "the very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements").

103. *Id.*

104. *See generally,* Florida Dep't of Revenue v. American Business USA Corp., 191 So.3d 906 (Fla. S. Ct. 2016)

105. *See id.* at 916 (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995).

106. *Id.* at 916-17 (quoting *Delta Air Lines, Inc. v. Dep't of Revenue*, 455 So.2d 317, 323 (Fla. 1984)).

Not only do United States Supreme Court decisions discussed above indicate that the taxing of ISSPs by state and local governments places a burden on interstate commerce, the Federal Communications Commission ("FCC") and proponents of taxing ISSPs have also asserted that the imposition of various taxation systems is overly burdensome to ISSPs.[107] In its National Broadband Plan, the FCC stated, "a national framework for digital goods and services taxation would reduce uncertainty and remove one barrier to online entrepreneurship and investment."[108] Furthermore, the Advisory Committee on Electronic Commerce proposed that "[s]tate[] and local governments [ ] work . . . to draft a uniform sales and use tax act that would simplify State and local sales and uses systems…"[109] The Advisory Committee's recommendation to simplify the taxing systems of state and local governments' sales and use tax systems implies that subjecting any company that does interstate business over the Internet to taxation by various state and local governments would be a burden to interstate commerce. In fact, even proponents of taxing ISSPs admit that the subjection of a company to the multitude of state and local sales tax systems would be an undue burden on commerce.[110] Therefore, requiring ISSPs to collect and remit sales and use taxes based on a multitude of differing tax codes is a violation of the Commerce Clause because the regulations "unduly burden interstate commerce."[111]

The taxation of ISSPs by state and local governments violates the Commerce Clause because the requirements would place an undue burden on interstate commerce. The taxation of ISSPs by multiple state and local governments causes an undue burden on interstate commerce because ISSPs do not satisfy the "substantial nexus" requirement established by the Supreme Court in *Quill*.[112] Furthermore, major proponents of taxing ISSPs agree that subjecting ISSPs to the multitude of state and local tax codes would be an

107. FCC, *Connecting America: The National Broadband Plan* 58 (2010); STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., *Overview of Issues Related to the Internet Tax Freedom Act and of Proposals to Extend or Modify the Act Scheduled for a Hearing Before the Senate Committee on Finance on August 1, 2001* 6 (Comm. Print 2001) WL 36044176.

108. See *Connecting America: The National Broadband Plan* at 58.

109. See Overview of Issues Related to the Internet Tax Freedom Act and of Proposals to Extend or Modify the Act Scheduled for a Hearing Before the Senate Committee on Finance on August 1, 2001, JOINT COMMITTEE ON TAXATION (July 30, 2001) 2001 WL 36044176 at *6.

110. *See What is The Marketplace Fairness Act*, MARKETPLACEFAIRNESS.ORG (last visited Mar. 4, 2018) http://marketplacefairness.org/what-is-the-marketplace-fairness-act/ [https://perma.cc/XP8W-5DRV].

111. Quill v. North Dakota, 504 U.S. at 312.

112. *See* Quill Corp. v. North Dakota, 504 U.S. at 298; *see* National Bellas Hess v. Department of Revenue, 386 U.S. at 759-60

undue burden on interstate commerce.[113] Therefore, requiring ISSPs to collect and remit sales and use taxes violates the Commerce Clause.

### 2. Counter Arguments Raised by Proponents of Taxing ISSPs Violate the Commerce Clause

This section addresses counter arguments that proponents of taxing ISSPs could raise, and how those arguments fail to meet the substantial nexus requirement of the Commerce Clause, thus placing an undue burden on interstate commerce.

Proponents of taxing ISSPs will argue that *Overstock.com, Inc.* should guide the courts, which held that in-state independent contractors satisfied the substantial nexus requirement.[114] The Court of Appeals of New York reasoned that having in-state independent contractors who provide links to an Internet company's website for the purpose of purchasing items qualifies as 'active, in-state solicitation;' and therefore, the company has a physical presence in the state.[115] This, however, was a clear example of judicial activism in which the court came to a conclusion without a rational basis, according to the dissenting opinion of Justice Smith.[116] Smith criticized the majority's opinion, claiming that such logic was "so strained as not to have a reasonable relation to the circumstances of life as we know them."[117]

Furthermore, the majority opinion in *Overstock.com* partly supports the assertion of this Note, that is, ISSPs should not be subject to state and local governments' sales and use taxes. The Court stated the physical presence requirement "need not be substantial," but "must be demonstrably more than a 'slight[] presence.'"[118] Based on the District Court for the District of Columbia's statement that the Internet is not a physical facility, a company that is solely based on the Internet would not have even a slight presence in the taxing jurisdiction.[119] Therefore, an ISSP, which is a company that provides services via the Internet, does not even have a slight presence in the majority of states and municipalities, because the Internet is not a physical facility.[120] As a result, ISSPs should not be subject to state and local governments' sales and use taxes because they do not have even a slight physical presence, and therefore, do not satisfy the "substantial nexus" test.

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113. *See What is The Marketplace Fairness Act*; *see generally see generally* The Streamlined Sales and Use Tax Agreement, STREAMLINEDSALESTAX.ORG, http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2012-16-16.pdf [https://perma.cc/RM49-LPM2].

114. *See* Overstock.com v. New York, 987 N.E.2d at 623, 626.

115. *Id.*

116. Overstock.com v. New York, 987 N.E.2d at 629 (Smith, J. dissenting).

117. *Id.*

118. *See* Overstock.com v. New York, 987 N.E.2d at 625 (*quoting*, *Orvis Co. v. Tax Appeals Tribunal of State of N.Y.*, 86 N.Y.2d 165, 178 (1995)).

119. *See Fox Television Stations v. FIlmOn X*, 150 F. Supp. 3d. at 19

120. *See id.* at 19; Overstock.com v. New York, 987 N.E.2d at 626.

Proponents of requiring ISSPs to collect and remit state and local governments' sales and use taxes also argue that the Marketplace Fairness Act will avoid this undue burden on interstate commerce because it would simplify state and local sales and use tax codes.[121] The Marketplace Fairness Act provides states with two options to simplify their relevant tax codes:

> (1) [adopt the Streamlined Sales and Use Tax Agreement, or (2)] agree to notify retailers in advance of any rate changes within the state; designate a single state organization to handle sales tax registrations, filings, and audits; establish a uniform sales tax base for use throughout the state; use destination sourcing to determine sales tax rates for out-of-state purchases . . . ; [and] provide software and/or services for managing sales tax compliance, and hold retailers harmless for any errors that result from relying on state-provided systems and data.[122]

As of April 2017, twenty-four states have adopted the Streamlined Sales and Use Tax Agreement.[123] Therefore, even though the Marketplace Fairness Act claims to solve the undue burden problem, it fails to do so because it could still subject companies to the burden of complying with twenty-seven different state tax codes, not to mention the multitude of local tax codes.

### *C. The Due Process Clause*

The taxation of ISSPs may violate the Due Process Clause by failing to satisfy its "physical presence" or "purposefully directing" requirements.[124] However, this argument is not likely to be successful. The United States Supreme Court has held that for a jurisdiction to be able to tax a company, the company must be "physically present" in the jurisdiction or "purposefully direct[] its activities" at residents of the jurisdiction, analogizing to personal jurisdiction.[125] The *Quill* Court looked to *International Shoe*, which held that the Due Process Clause requires a defendant to have "certain minimum contacts with [the jurisdiction] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[126] In doing so, the Court concluded a company satisfied this minimum contacts test by "purposefully direct[ing] its activities" at residents of the taxing jurisdiction.[127] Therefore, for a state or local government to require an ISSP to collect and remit sales and use taxes without violating due process, the ISSP

121. *See What is The Marketplace Fairness Act*.
122. *See id.*; *see generally* The Streamlined Sales and Use Tax Agreement.
123. *See What is The Marketplace Fairness Act*.
124. *See* Quill Corp. v. North Dakota, 504 U.S. at 306-08.
125. *See id.*
126. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (citing Milliken v. Meyer, 311 U.S. 457, 63 (1940)); *see also* U.S. Constitution Amend. XIV, § 1.
127. *See* Quill v. North Dakota, 504 U.S. at 306-08.

has to be physically present in the state or municipality, or have "purposefully directed its activities" at residents.

However, ISSPs are not physically present in jurisdictions where they do not have a physical facility. As previously discussed, the Internet is not a "physical facility," therefore, unless the ISSP has an actual facility in the taxing jurisdiction, the ISSP is not physically present in the state or municipality.[128] Rather, the real question is what counts as a physical facility.

Proponents of taxing ISSPs could argue that a server counts as a facility; however, judicial precedence implies the contrary. According to *Overstock.com, Inc.*, "physical presence is not typically associated with the Internet in that many websites are designed to reach a national or even a global audience from a single server whose location is of minimal import."[129] Netflix and other ISSPs use content delivery networks, which are comprised of a system of servers.[130] According to the Court of Appeals of New York, the location of the servers is "of minimal import," and therefore, the presence of a server does not count as a facility sufficient to satisfy the physical presence requirement of the Due Process Clause.[131] As a result, state and local governments cannot require ISSPs to collect and remit sales and use taxes relying on the physical presence of a server.

All ISSPs, however, most likely satisfy the "purposefully directing" prong of the test, possibly allowing state and local governments to require them to collect and remit sales and use taxes under the Due Process Clause. According to *Quill*, a company satisfies the minimum contacts requirement by "purposefully direct[ing] its activities" at residents of the jurisdiction.[132] For example, the Supreme Court has held that a state can exercise jurisdiction over a national magazine company because the magazine is bought and distributed on a national scale with a "substantial number of copies [ ] regularly sold and distributed" in the state.[133] ISSPs likely satisfy this test because access to their content is sold and distributed to customers throughout the United States. Therefore, their services are "purposefully directed" at residents of every taxing jurisdiction. As a result, state and local governments do not violate due process by requiring ISSPs to collect and remit sales and use taxes so long as the ISSPs "purposefully directed" their activities at residents of the taxing jurisdiction.

ISSPs could argue that state and local jurisdictions should not be allowed to require them to collect and remit sales and use taxes because the only connection they have with the taxing jurisdiction is the customer. In *Walden v. Fiore*, the Supreme Court held that Nevada could not exercise jurisdiction over a police officer in Georgia for seizing personal property from

128. *See* Fox Television Stations, Inc. v. FilmOn X LLC, 150 F. Supp. 3d. 1, 19 (D.D.C. 2015).

129. See Overstock.com v. New York, 987 N.E.2d at 626.

130. *See* Niccolai, *Behind the Curtain: How Netflix Streams Movies to Your TV*.

131. *See* Overstock.com, *supra* note 123, at 626.

132. *See Quill v. North Dakota*, 504 U.S. at 306-08 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)).

133. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984).

two people during their layover from San Juan to Las Vegas, finding "the plaintiff cannot be the only link between the defendant and the forum."[134] Yet, the city of Chicago is attempting to force ISSPs to collect and remit an amusement tax from Illinois residents who purchase their streaming services.[135] This would appear to violate the due process principle from *Walden* because the only connection between the taxing state and the ISSP is the customer. Therefore, ISSPs could argue state and local governments violate due process when they require ISSPs to collect and remit sales and use taxes; however, this is not likely to succeed because of the "purposefully directing" test.[136] Therefore, state and local governments most likely do not violate the Due Process Clause by requiring ISSPs to collect and remit sales and use taxes, because ISSPs "purposefully direct [their] activities" at residents of the taxing jurisdiction.[137]

## IV. CONCLUSION

With the permanent extension of the Internet Tax Freedom Act by the Permanent Internet Tax Freedom Act of 2016, coupled with the Commerce Clause and the Due Process Clause, ISSPs have a defense against state and local regulations requiring the collection and remittance of sales and use taxes. And when the courts decide whether to uphold such tax schemes, it should draw upon Congress's clear intent that Internet access remain unburdened by state and local taxes and the Commerce Clause prohibiting undue burdens on interstate commerce. Therefore, ISSPs should challenge the legality of these taxes in the courts on the basis of the above reasons, with courts ideally striking down state and local tax regulations that violate any of the above requirement.

134. *See* Walden v. Fiore, 134 S.Ct. 1115, 1122 (2014).

135. *See* Jensen, *US – The Disparate State and Local Tax Treatment of Digital Streaming Services*.

136. *See* Quill v. North Dakota, 504 U.S. at 308.

137. *Id.*