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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SOUTH DAKOTA *v.* WAYFAIR, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

No. 17–494. Argued April 17, 2018—Decided June 21, 2018

South Dakota, like many States, taxes the retail sales of goods and services in the State. Sellers are required to collect and remit the tax to the State, but if they do not then in-state consumers are responsible for paying a use tax at the same rate. Under *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, and *Quill Corp.* v. *North Dakota*, 504 U. S. 298, South Dakota may not require a business that has no physical presence in the State to collect its sales tax. Consumer compliance rates are notoriously low, however, and it is estimated that *Bellas Hess* and *Quill* cause South Dakota to lose between $48 and $58 million annually. Concerned about the erosion of its sales tax base and corresponding loss of critical funding for state and local services, the South Dakota Legislature enacted a law requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State." The Act covers only sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. Respondents, top online retailers with no employees or real estate in South Dakota, each meet the Act's minimum sales or transactions requirement, but do not collect the State's sales tax. South Dakota filed suit in state court, seeking a declaration that the Act's requirements are valid and applicable to respondents and an injunction requiring respondents to register for licenses to collect and remit the sales tax. Respondents sought summary judgment, arguing that the Act is unconstitutional. The trial court granted their motion. The State Supreme Court affirmed on the ground that *Quill* is controlling precedent.

Held: Because the physical presence rule of *Quill* is unsound and incorrect, *Quill Corp.* v. *North Dakota*, 504 U. S. 298, and *National Bellas*

Hess, Inc. v. *Department of Revenue of Ill.*, 386 U. S. 753, are overruled. Pp. 5–24.

(a) An understanding of this Court's Commerce Clause principles and their application to state taxes is instructive here. Pp. 5–9.

(1) Two primary principles mark the boundaries of a State's authority to regulate interstate commerce: State regulations may not discriminate against interstate commerce; and States may not impose undue burdens on interstate commerce. These principles guide the courts in adjudicating challenges to state laws under the Commerce Clause. Pp. 5–7.

(2) They also animate Commerce Clause precedents addressing the validity of state taxes, which will be sustained so long as they (1) apply to an activity with a substantial nexus with the taxing State, (2) are fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services the State provides. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279. Before *Complete Auto*, the Court held in *Bellas Hess* that a "seller whose only connection with customers in the State is by common carrier or . . . mail" lacked the requisite minimum contacts with the State required by the Due Process Clause and the Commerce Clause, and that unless the retailer maintained a physical presence in the State, the State lacked the power to require that retailer to collect a local tax. 386 U. S., at 758. In *Quill*, the Court overruled the due process holding, but not the Commerce Clause holding, grounding the physical presence rule in *Complete Auto*'s requirement that a tax have a "substantial nexus" with the activity being taxed. Pp. 7–9.

(b) The physical presence rule has long been criticized as giving out-of-state sellers an advantage. Each year, it becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause. Pp. 9–17.

(1) *Quill* is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of *Complete Auto*'s nexus requirement. That requirement is "closely related," *Bellas Hess*, 386 U. S. at 756, to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345. And, as *Quill* itself recognized, a business need not have a physical presence in a State to satisfy the demands of due process. When considering whether a State may levy a tax, Due Process and Commerce Clause standards, though not identical or coterminous, have significant parallels. The reasons given in *Quill* for rejecting the physical presence rule for due process purposes

apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Other aspects of the Court's doctrine can better and more accurately address potential burdens on interstate commerce, whether or not *Quill*'s physical presence rule is satisfied.

Second, *Quill* creates rather than resolves market distortions. In effect, it is a judicially created tax shelter for businesses that limit their physical presence in a State but sell their goods and services to the State's consumers, something that has become easier and more prevalent as technology has advanced. The rule also produces an incentive to avoid physical presence in multiple States, affecting development that might be efficient or desirable.

Third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow in favor of "a sensitive, case-by-case analysis of purposes and effects," *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 201. It treats economically identical actors differently for arbitrary reasons. For example, a business that maintains a few items of inventory in a small warehouse in a State is required to collect and remit a tax on all of its sales in the State, while a seller with a pervasive Internet presence cannot be subject to the same tax for the sales of the same items. Pp. 10–14.

(2) When the day-to-day functions of marketing and distribution in the modern economy are considered, it becomes evident that *Quill*'s physical presence rule is artificial, not just "at its edges," 504 U. S. at 315, but in its entirety. Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. And the Court should not maintain a rule that ignores substantial virtual connections to the State. Pp. 14–15.

(3) The physical presence rule of *Bellas Hess* and *Quill* is also an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia have asked the Court to reject *Quill*'s test. Helping respondents' customers evade a lawful tax unfairly shifts an increased share of the taxes to those consumers who buy from competitors with a physical presence in the State. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. And it is also essential to the confidence placed in the Court's Commerce Clause decisions. By giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes, *Quill*'s physical presence rule has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field. Pp. 16–17.

(c) *Stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power. If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers, the Court should be vigilant in correcting the error. It is inconsistent with this Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. The Internet revolution has made *Quill*'s original error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace, where the Internet's prevalence and power have changed the dynamics of the national economy. The expansion of e-commerce has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes, leading the South Dakota Legislature to declare an emergency. The argument, moreover, that the physical presence rule is clear and easy to apply is unsound, as attempts to apply the physical presence rule to online retail sales have proved unworkable.

Because the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, arguments for reliance based on its clarity are misplaced. *Stare decisis* may accommodate "legitimate reliance interest[s]," *United States* v. *Ross*, 456 U. S. 798, 824, but a business "is in no position to found a constitutional right . . . on the practical opportunities for tax avoidance," *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 366. Startups and small businesses may benefit from the physical presence rule, but here South Dakota affords small merchants a reasonable degree of protection. Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. The potential for such issues to arise in some later case cannot justify retaining an artificial, anachronistic rule that deprives States of vast revenues from major businesses. Pp. 17–22.

(d) In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State, 430 U. S., at 279. Here, the nexus is clearly sufficient. The Act applies only to sellers who engage in a significant quantity of business in the State, and respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Any remaining claims regarding the Commerce Clause's application in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand. Pp. 22–23.

2017 S.D. 56, 901 N. W. 2d 754, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which THOMAS,

GINSBURG, ALITO, and GORSUCH, JJ., joined. THOMAS, J., and GORSUCH, J., filed concurring opinions. ROBERTS, C. J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 17–494

SOUTH DAKOTA, PETITIONER *v.* WAYFAIR, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

[June 21, 2018]

JUSTICE KENNEDY delivered the opinion of the Court.

When a consumer purchases goods or services, the consumer's State often imposes a sales tax. This case requires the Court to determine when an out-of-state seller can be required to collect and remit that tax. All concede that taxing the sales in question here is lawful. The question is whether the out-of-state seller can be held responsible for its payment, and this turns on a proper interpretation of the Commerce Clause, U. S. Const., Art. I, §8, cl. 3.

In two earlier cases the Court held that an out-of-state seller's liability to collect and remit the tax to the consumer's State depended on whether the seller had a physical presence in that State, but that mere shipment of goods into the consumer's State, following an order from a catalog, did not satisfy the physical presence requirement. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967); *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992). The Court granted certiorari here to reconsider the scope and validity of the physical presence rule mandated by those cases.

I

Like most States, South Dakota has a sales tax. It taxes the retail sales of goods and services in the State. S. D. Codified Laws §§10–45–2, 10–45–4 (2010 and Supp. 2017). Sellers are generally required to collect and remit this tax to the Department of Revenue. §10–45–27.3. If for some reason the sales tax is not remitted by the seller, then in-state consumers are separately responsible for paying a use tax at the same rate. See §§10–46–2, 10–46–4, 10–46–6. Many States employ this kind of complementary sales and use tax regime.

Under this Court's decisions in *Bellas Hess* and *Quill*, South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State. Without that physical presence, South Dakota instead must rely on its residents to pay the use tax owed on their purchases from out-of-state sellers. "[T]he impracticability of [this] collection from the multitude of individual purchasers is obvious." *National Geographic Soc.* v. *California Bd. of Equalization*, 430 U. S. 551, 555 (1977). And consumer compliance rates are notoriously low. See, *e.g.,* GAO, Report to Congressional Requesters: Sales Taxes, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs 5 (GAO–18–114, Nov. 2017) (Sales Taxes Report); California State Bd. of Equalization, Revenue Estimate: Electronic Commerce and Mail Order Sales 7 (2013) (Table 3) (estimating a 4 percent collection rate). It is estimated that *Bellas Hess* and *Quill* cause the States to lose between $8 and $33 billion every year. See Sales Taxes Report, at 11–12 (estimating $8 to $13 billion); Brief for Petitioner 34–35 (citing estimates of $23 and $33.9 billion). In South Dakota alone, the Department of Revenue estimates revenue loss at $48 to $58 million annually. App. 24. Particularly because South Dakota has no state income tax, it must put substantial reliance on its sales

and use taxes for the revenue necessary to fund essential services. Those taxes account for over 60 percent of its general fund.

In 2016, South Dakota confronted the serious inequity *Quill* imposes by enacting S. 106—"An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." S. 106, 2016 Leg. Assembly, 91st Sess. (S. D. 2016) (S. B. 106). The legislature found that the inability to collect sales tax from remote sellers was "seriously eroding the sales tax base" and "causing revenue losses and imminent harm . . . through the loss of critical funding for state and local services." §8(1). The legislature also declared an emergency: "Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist." §9. Fearing further erosion of the tax base, the legislature expressed its intention to "apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines" and noted the urgent need for this Court to reconsider its precedents. §§8(11), (8).

To that end, the Act requires out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the state." §1. The Act applies only to sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. *Ibid.* The Act also forecloses the retroactive application of this requirement and provides means for the Act to be appropriately stayed until the constitutionality of the law has been clearly established. §§5, 3, 8(10).

Respondents Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., are merchants with no employees or real estate in South Dakota. Wayfair, Inc., is a leading online

retailer of home goods and furniture and had net revenues of over $4.7 billion last year. Overstock.com, Inc., is one of the top online retailers in the United States, selling a wide variety of products from home goods and furniture to clothing and jewelry; and it had net revenues of over $1.7 billion last year. Newegg, Inc., is a major online retailer of consumer electronics in the United States. Each of these three companies ships its goods directly to purchasers throughout the United States, including South Dakota. Each easily meets the minimum sales or transactions requirement of the Act, but none collects South Dakota sales tax. 2017 S. D. 56, ¶¶ 10–11, 901 N. W. 2d 754, 759–760.

Pursuant to the Act's provisions for expeditious judicial review, South Dakota filed a declaratory judgment action against respondents in state court, seeking a declaration that the requirements of the Act are valid and applicable to respondents and an injunction requiring respondents to register for licenses to collect and remit sales tax. App. 11, 30. Respondents moved for summary judgment, arguing that the Act is unconstitutional. 901 N. W. 2d, at 759–760. South Dakota conceded that the Act cannot survive under *Bellas Hess* and *Quill* but asserted the importance, indeed the necessity, of asking this Court to review those earlier decisions in light of current economic realities. 901 N. W. 2d, at 760; see also S. B. 106, §8. The trial court granted summary judgment to respondents. App. to Pet. for Cert. 17a.

The South Dakota Supreme Court affirmed. It stated: "However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes." 901 N. W. 2d, at 761. This Court granted certiorari. 583 U. S. ___ (2018).

II

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, §8, cl. 3. The Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the 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, 325–326 (1979). Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action. Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945). But this Court has observed that "in general Congress has left it to the courts to formulate the rules" to preserve "the free flow of interstate commerce." *Id.,* at 770.

To understand the issue presented in this case, it is instructive first to survey the general development of this Court's Commerce Clause principles and then to review the application of those principles to state taxes.

A

From early in its history, a central function of this Court has been to adjudicate disputes that require interpretation of the Commerce Clause in order to determine its meaning, its reach, and the extent to which it limits state regulations of commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), began setting the course by defining the meaning of commerce. Chief Justice Marshall explained that commerce included both "the interchange of commodities" and "commercial intercourse." *Id.,* at 189, 193. A concurring opin-

ion further stated that Congress had the exclusive power to regulate commerce. See *id.,* at 236 (opinion of Johnson, J.). Had that latter submission prevailed and States been denied the power of concurrent regulation, history might have seen sweeping federal regulations at an early date that foreclosed the States from experimentation with laws and policies of their own, or, on the other hand, proposals to reexamine *Gibbons*' broad definition of commerce to accommodate the necessity of allowing States the power to enact laws to implement the political will of their people.

Just five years after *Gibbons*, however, in another opinion by Chief Justice Marshall, the Court sustained what in substance was a state regulation of interstate commerce. In *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829), the Court allowed a State to dam and bank a stream that was part of an interstate water system, an action that likely would have been an impermissible intrusion on the national power over commerce had it been the rule that only Congress could regulate in that sphere. See *id.,* at 252. Thus, by implication at least, the Court indicated that the power to regulate commerce in some circumstances was held by the States and Congress concurrently. And so both a broad interpretation of interstate commerce and the concurrent regulatory power of the States can be traced to *Gibbons* and *Willson*.

Over the next few decades, the Court refined the doctrine to accommodate the necessary balance between state and federal power. In *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852), the Court addressed local laws regulating river pilots who operated in interstate waters and guided many ships on interstate or foreign voyages. The Court held that, while Congress surely could regulate on this subject had it chosen to act, the State, too, could regulate. The Court distinguished between those subjects that by their nature "imperatively deman[d] a single

uniform rule, operating equally on the commerce of the United States," and those that "deman[d] th[e] diversity, which alone can meet . . . local necessities." *Id.*, at 319. Though considerable uncertainties were yet to be overcome, these precedents still laid the groundwork for the analytical framework that now prevails for Commerce Clause cases.

This Court's doctrine has developed further with time. Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." *Granholm* v. *Heald*, 544 U. S. 460, 476 (2005) (internal quotation marks omitted). State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970); see also *Southern Pacific*, *supra*, at 779. Although subject to exceptions and variations, see, *e.g., Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986), these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.

B

These principles also animate the Court's Commerce Clause precedents addressing the validity of state taxes. The Court explained the now-accepted framework for state taxation in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). The Court held that a State "may tax exclusively interstate commerce so long as the tax does not

create any effect forbidden by the Commerce Clause." *Id.*, at 285. After all, "interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 31 (1988). The Court will sustain a tax so long as it (1) applies 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 the State provides. See *Complete Auto*, *supra*, at 279.

Before *Complete Auto*, the Court had addressed a challenge to an Illinois tax that required out-of-state retailers to collect and remit taxes on sales made to consumers who purchased goods for use within Illinois. *Bellas Hess*, 386 U. S., at 754–755. The Court held that a mail-order company "whose only connection with customers in the State is by common carrier or the United States mail" lacked the requisite minimum contacts with the State required by both the Due Process Clause and the Commerce Clause. *Id.,* at 758. Unless the retailer maintained a physical presence such as "retail outlets, solicitors, or property within a State," the State lacked the power to require that retailer to collect a local use tax. *Ibid.* The dissent disagreed: "There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax." *Id.,* at 761–762 (opinion of Fortas, J., joined by Black and Douglas, JJ.).

In 1992, the Court reexamined the physical presence rule in *Quill*. That case presented a challenge to North Dakota's "attempt to 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. Despite the fact that *Bellas Hess* linked due process and the Commerce Clause together, the Court in *Quill* overruled the

due process holding, but not the Commerce Clause holding; and it thus reaffirmed the physical presence rule. 504 U. S., at 307–308, 317–318.

The Court in *Quill* recognized that intervening precedents, specifically *Complete Auto*, "might not dictate the same result were the issue to arise for the first time today." 504 U. S., at 311. But, nevertheless, the *Quill* majority concluded that the physical presence rule was necessary to prevent undue burdens on interstate commerce. *Id.,* at 313, and n. 6. It grounded the physical presence rule in *Complete Auto*'s requirement that a tax have a "'substantial nexus'" with the activity being taxed. 504 U. S., at 311.

Three Justices based their decision to uphold the physical presence rule on *stare decisis* alone. *Id.*, at 320 (Scalia, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment). Dissenting in relevant part, Justice White argued that "there is no relationship between the physical-presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it." *Id.*, at 327 (opinion concurring in part and dissenting in part).

III

The physical presence rule has "been the target of criticism over many years from many quarters." *Direct Marketing Assn.* v. *Brohl*, 814 F. 3d 1129, 1148, 1150–1151 (CA10 2016) (Gorsuch, J., concurring). *Quill*, it has been said, was "premised on assumptions that are unfounded" and "riddled with internal inconsistencies." Rothfeld, *Quill*: Confusing the Commerce Clause, 56 Tax Notes 487, 488 (1992*).* *Quill* created an inefficient "online sales tax loophole" that gives out-of-state businesses an advantage. A. Laffer & D. Arduin, Pro-Growth Tax Reform and E-Fairness 1, 4 (July 2013). And "while nexus rules are clearly necessary," the Court "should focus on rules that

are appropriate to the twenty-first century, not the nineteenth." Hellerstein, Deconstructing the Debate Over State Taxation of Electronic Commerce, 13 Harv. J. L. & Tech. 549, 553 (2000). Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.

A

Quill is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto*, 430 U. S., at 279. Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow.

1

All agree that South Dakota has the authority to tax these transactions. S. B. 106 applies to sales of "tangible personal property, products transferred electronically, or services *for delivery into South Dakota*." §1 (emphasis added). "It has long been settled" that the sale of goods or services "has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 184 (1995); see also 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d §11:1, p. 471 (2003) ("Generally speaking, a sale is attributable to its destination").

The central dispute is whether South Dakota may require remote sellers to collect and remit the tax without some additional connection to the State. The Court has

previously stated that "[t]he imposition on the seller of the duty to insure collection of the tax from the purchaser does not violate the [C]ommerce [C]lause." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 50, n. 9 (1940). It is a "'familiar and sanctioned device.'" *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 212 (1960). There just must be "a substantial nexus with the taxing State." *Complete Auto*, *supra*, at 279.

This nexus requirement is "closely related," *Bellas Hess*, 386 U. S., at 756, to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954). It is settled law that a business need not have a physical presence in a State to satisfy the demands of due process. *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 476 (1985). Although physical presence "'frequently will enhance'" a business' connection with a State, "'it is an inescapable fact of modern commercial life that a substantial amount of business is transacted . . . [with no] need for physical presence within a State in which business is conducted.'" *Quill*, 504 U. S., at 308. *Quill* itself recognized that "[t]he requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Ibid.*

When considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels. The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus.

The *Quill* majority expressed concern that without the physical presence rule "a state tax might unduly burden interstate commerce" by subjecting retailers to tax-

collection obligations in thousands of different taxing jurisdictions. *Id.*, at 313, n. 6. But the administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State. For example, a business with one salesperson in each State must collect sales taxes in every jurisdiction in which goods are delivered; but a business with 500 salespersons in one central location and a website accessible in every State need not collect sales taxes on otherwise identical nationwide sales. In other words, under *Quill*, a small company with diverse physical presence might be equally or more burdened by compliance costs than a large remote seller. The physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States. Other aspects of the Court's doctrine can better and more accurately address any potential burdens on interstate commerce, whether or not *Quill*'s physical presence rule is satisfied.

2

The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 623 (1978). But it is "not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of state tax burden." *Complete Auto*, *supra*, at 288 (internal quotation marks omitted). And it is certainly not the purpose of the Commerce Clause to permit the Judiciary to create market distortions. "If the Commerce Clause was intended to put businesses on an even playing field, the [physical presence] rule is hardly a way to achieve that goal." *Quill*, *supra*, at 329 (opinion of White, J.).

Quill puts both local businesses and many interstate

businesses with physical presence at a competitive disadvantage relative to remote sellers. Remote sellers can avoid the regulatory burdens of tax collection and can offer *de facto* lower prices caused by the widespread failure of consumers to pay the tax on their own. This "guarantees a competitive benefit to certain firms simply because of the organizational form they choose" while the rest of the Court's jurisprudence "is all about preventing discrimination between firms." *Direct Marketing*, 814 F. 3d, at 1150–1151 (Gorsuch, J., concurring). In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced.

Worse still, the rule produces an incentive to avoid physical presence in multiple States. Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable. The Commerce Clause must not prefer interstate commerce only to the point where a merchant physically crosses state borders. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents. This Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State.

3

The Court's Commerce Clause jurisprudence has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 201 (1994). *Quill*, in contrast, treats economically identical actors differently, and for arbitrary

reasons.

Consider, for example, two businesses that sell furniture online. The first stocks a few items of inventory in a small warehouse in North Sioux City, South Dakota. The second uses a major warehouse just across the border in South Sioux City, Nebraska, and maintains a sophisticated website with a virtual showroom accessible in every State, including South Dakota. By reason of its physical presence, the first business must collect and remit a tax on all of its sales to customers from South Dakota, even those sales that have nothing to do with the warehouse. See *National Geographic*, 430 U. S., at 561; *Scripto, Inc.*, 362 U. S., at 211–212. But, under *Quill*, the second, hypothetical seller cannot be subject to the same tax for the sales of the same items made through a pervasive Internet presence. This distinction simply makes no sense. So long as a state law avoids "any effect forbidden by the Commerce Clause," *Complete Auto*, 430 U. S., at 285, courts should not rely on anachronistic formalisms to invalidate it. The basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws.

B

The *Quill* Court itself acknowledged that the physical presence rule is "artificial at its edges." 504 U. S., at 315. That was an understatement when *Quill* was decided; and when the day-to-day functions of marketing and distribution in the modern economy are considered, it is all the more evident that the physical presence rule is artificial in its entirety.

Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. In a footnote, *Quill* rejected the argument that "title to 'a few floppy diskettes' present in a State" was

sufficient to constitute a "substantial nexus," *id.*, at 315, n. 8. But it is not clear why a single employee or a single warehouse should create a substantial nexus while "physical" aspects of pervasive modern technology should not. For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones. Or a company may lease data storage that is permanently, or even occasionally, located in South Dakota. Cf. *United States* v. *Microsoft Corp.*, 584 U. S. ___ (2018) (*per curiam*). What may have seemed like a "clear," "bright-line tes[t]" when *Quill* was written now threatens to compound the arbitrary consequences that should have been apparent from the outset. 504 U. S., at 315.

The "dramatic technological and social changes" of our "increasingly interconnected economy" mean that buyers are "closer to most major retailers" than ever before—"regardless of how close or far the nearest storefront." *Direct Marketing Assn.* v. *Brohl*, 575 U. S. ___, ___, ___ (2015) (KENNEDY, J., concurring) (slip op., at 2, 3). Between targeted advertising and instant access to most consumers via any internet-enabled device, "a business may be present in a State in a meaningful way without" that presence "being physical in the traditional sense of the term." *Id.*, at ___ (slip op., at 3). A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.

C

The physical presence rule as defined and enforced in *Bellas Hess* and *Quill* is not just a technical legal problem—it is an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia now ask this Court to reject the test formulated in *Quill*. See Brief for Colorado et al. as *Amici Curiae*. *Quill*'s physical presence rule intrudes on States' reasonable choices in enacting their tax systems. And that it allows remote sellers to escape an obligation to remit a lawful state tax is unfair and unjust. It is unfair and unjust to those competitors, both local and out of State, who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax, a tax many States for many years have considered an indispensable source for raising revenue.

In essence, respondents ask this Court to retain a rule that allows their customers to escape payment of sales taxes—taxes that are essential to create and secure the active market they supply with goods and services. An example may suffice. Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that "'[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.'" Brief for Petitioner 55. What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price," *Quill*, 504 U. S., at 328 (opin-

ion of White, J.); and help create the "climate of consumer confidence" that facilitates sales, see *ibid.* According to respondents, it is unfair to stymie their tax-free solicitation of customers. But there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result. Helping respondents' customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies *Quill*—even one warehouse or one salesperson—an increased share of the taxes. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. This is also essential to the confidence placed in this Court's Commerce Clause decisions. Yet the physical presence rule undermines that necessary confidence by giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes.

In the name of federalism and free markets, *Quill* does harm to both. The physical presence rule it defines has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.

IV

"Although we approach the reconsideration of our decisions with the utmost caution, *stare decisis* is not an inexorable command." *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (quoting *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997); alterations and internal quotation marks omitted). Here, *stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power.

If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error. While it can be

conceded that Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule. It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. Courts have acted as the front line of review in this limited sphere; and hence it is important that their principles be accurate and logical, whether or not Congress can or will act in response. It is currently the Court, and not Congress, that is limiting the lawful prerogatives of the States.

Further, the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by *Quill* must give way to the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age. *Direct Marketing*, 575 U. S., at ___ (KENNEDY, J., concurring) (slip op., at 3). Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.

The *Quill* Court did not have before it the present realities of the interstate marketplace. In 1992, less than 2 percent of Americans had Internet access. See Brief for Retail Litigation Center, Inc., et al. as *Amici Curiae* 11, and n. 10. Today that number is about 89 percent. *Ibid.,* and n. 11. When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller, S. Li, Amazon Overtakes Wal-Mart as Biggest Retailer, L. A. Times, July 24, 2015, http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html (all Internet materials as last visited June 18, 2018).

The Internet's prevalence and power have changed the dynamics of the national economy. In 1992, mail-order sales in the United States totaled $180 billion. 504 U. S., at 329 (opinion of White, J.). Last year, e-commerce retail

sales alone were estimated at $453.5 billion. Dept. of Commerce, U. S. Census Bureau News, Quarterly Retail E-Commerce Sales: 4th Quarter 2017 (CB18–21, Feb. 16, 2018). Combined with traditional remote sellers, the total exceeds half a trillion dollars. Sales Taxes Report, at 9. Since the Department of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8 percent to 8.9 percent of total retail sales in the United States. Compare Dept. of Commerce, U. S. Census Bureau, Retail E-Commerce Sales in Fourth Quarter 2000 (CB01–28, Feb. 16, 2001), https://www.census.gov/mrts/www/data/pdf/00Q4.pdf, with U. S. Census Bureau News, Quarterly Retail E-Commerce Sales: 4th Quarter 2017. And it is likely that this percentage will increase. Last year, e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace. See *ibid.*

This expansion has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes. In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. Brief for Law Professors et al. as *Amici Curiae* 11, n. 7. Now estimates range from $8 to $33 billion. Sales Taxes Report, at 11–12; Brief for Petitioner 34–35. The South Dakota Legislature has declared an emergency, S. B. 106, §9, which again demonstrates urgency of overturning the physical presence rule.

The argument, moreover, that the physical presence rule is clear and easy to apply is unsound. Attempts to apply the physical presence rule to online retail sales are proving unworkable. States are already confronting the complexities of defining physical presence in the Cyber Age. For example, Massachusetts proposed a regulation that would have defined physical presence to include making apps available to be downloaded by in-state residents and placing cookies on in-state residents' web

browsers. See 830 Code Mass. Regs. 64H.1.7 (2017). Ohio recently adopted a similar standard. See Ohio Rev. Code Ann. §5741.01(I)(2)(i) (Lexis Supp. 2018). Some States have enacted so-called "click through" nexus statutes, which define nexus to include out-of-state sellers that contract with in-state residents who refer customers for compensation. See *e.g.,* N. Y. Tax Law Ann. §1101(b)(8)(vi) (West 2017); Brief for Tax Foundation as *Amicus Curiae* 20–22 (listing 21 States with similar statutes). Others still, like Colorado, have imposed notice and reporting requirements on out-of-state retailers that fall just short of actually collecting and remitting the tax. See *Direct Marketing*, 814 F. 3d, at 1133 (discussing Colo. Rev. Stat. §39–21–112(3.5)); Brief for Tax Foundation 24–26 (listing nine States with similar statutes). Statutes of this sort are likely to embroil courts in technical and arbitrary disputes about what counts as physical presence.

Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent. See *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___–___ (2015) (slip op., at 9–10). But even on its own terms, the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced. And, importantly, *stare decisis* accommodates only "legitimate reliance interest[s]." *United States* v. *Ross*, 456 U. S. 798, 824 (1982). Here, the tax distortion created by *Quill* exists in large part because consumers regularly fail to comply with lawful use taxes. Some remote retailers go so far as to advertise sales as tax free. See S. B. 106, §8(3); see also Brief for Petitioner 55. A business "is in no position to found a constitutional right on the practical opportunities for tax avoidance." *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 366 (1941).

Respondents argue that "the physical presence rule has permitted start-ups and small businesses to use the Inter-

net as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nationwide sales tax collection." Brief for Respondents 29. These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States. State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase. Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems. Indeed, as the physical presence rule no longer controls, those systems may well become available in a short period of time, either from private providers or from state taxing agencies themselves. And in all events, Congress may legislate to address these problems if it deems it necessary and fit to do so.

In this case, however, South Dakota affords small merchants a reasonable degree of protection. The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State; the law is not retroactive; and South Dakota is a party to the Streamlined Sales and Use Tax Agreement, see *infra* at 23.

Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. For example, the United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137. Others have argued that retroactive liability risks a double tax burden in violation of the Court's apportionment jurisprudence because it would make both the buyer and the seller legally liable for collecting and remit-

ting the tax on a transaction intended to be taxed only once. See Brief for Law Professors et al. as *Amici Curiae* 7, n. 5. Complex state tax systems could have the effect of discriminating against interstate commerce. Concerns that complex state tax systems could be a burden on small business are answered in part by noting that, as discussed below, there are various plans already in place to simplify collection; and since in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided. And, if some small businesses with only *de minimis* contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories. These issues are not before the Court in the instant case; but their potential to arise in some later case cannot justify retaining this artificial, anachronistic rule that deprives States of vast revenues from major businesses.

For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), should be, and now are, overruled.

V

In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State. 430 U. S., at 279. "[S]uch a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Polar Tankers, Inc.* v. *City of Valdez*, 557 U. S. 1, 11 (2009).

Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more

than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. S. B. 106, §1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.

The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act. Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here. That said, South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. S. B. 106, §5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability. See App. 26–27. Any remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.

The judgment of the Supreme Court of South Dakota is

vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–494

SOUTH DAKOTA, PETITIONER *v.* WAYFAIR, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

[June 21, 2018]

JUSTICE THOMAS, concurring.

Justice Byron White joined the majority opinion in *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967). Twenty-five years later, we had the opportunity to overrule *Bellas Hess* in *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992). Only Justice White voted to do so. See *id.*, at 322 (opinion concurring in part and dissenting in part). I should have joined his opinion. Today, I am slightly further removed from *Quill* than Justice White was from *Bellas Hess*. And like Justice White, a quarter century of experience has convinced me that *Bellas Hess* and *Quill* "can no longer be rationally justified." 504 U. S., at 333. The same is true for this Court's entire negative Commerce Clause jurisprudence. See *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. ___, ___ (2015) (THOMAS, J., dissenting) (slip op., at 1). Although I adhered to that jurisprudence in *Quill*, it is never too late to "surrende[r] former views to a better considered position." *McGrath* v. *Kristensen*, 340 U. S. 162, 178 (1950) (Jackson, J., concurring). I therefore join the Court's opinion.

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[June 21, 2018]

JUSTICE GORSUCH, concurring.

Our dormant commerce cases usually prevent States from discriminating between in-state and out-of-state firms. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), and *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992), do just the opposite. For years they have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals. See *ante,* at 12–13; *Direct Marketing Assn.* v. *Brohl*, 814 F. 3d, 1129, 1150 (CA10 2016) (Gorsuch, J. concurring). As Justice White recognized 26 years ago, judges have no authority to construct a discriminatory "tax shelter" like this. *Quill, supra,* at 329 (opinion concurring in part and dissenting in part). The Court is right to correct the mistake and I am pleased to join its opinion.

My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by

stare decisis, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day. See *Energy & Environment Legal Inst.* v. *Epel*, 793 F. 3d 1169, 1171 (CA10 2015); *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. ___, ___–___ (2015) (Scalia, J., dissenting) (slip op., at 1–3); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 610–620 (1997) (THOMAS, J., dissenting). Today we put *Bellas Hess* and *Quill* to rest and rightly end the paradox of condemning interstate discrimination in the national economy while promoting it ourselves.

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[June 21, 2018]

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), this Court held that, under the dormant Commerce Clause, a State could not require retailers without a physical presence in that State to collect taxes on the sale of goods to its residents. A quarter century later, in *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992), this Court was invited to overrule *Bellas Hess* but declined to do so. Another quarter century has passed, and another State now asks us to abandon the physical-presence rule. I would decline that invitation as well.

I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the "Internet's prevalence and power have changed the dynamics of the national economy." *Ante,* at 18. But that is the very reason I oppose discarding the physical-presence rule. E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to

expiate a mistake it made over 50 years ago.

I

This Court "does not overturn its precedents lightly." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 15). Departing from the doctrine of *stare decisis* is an "exceptional action" demanding "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). The bar is even higher in fields in which Congress "exercises primary authority" and can, if it wishes, override this Court's decisions with contrary legislation. *Bay Mills*, 572 U. S., at ___ (slip op., at 16) (tribal sovereign immunity); see, *e.g., Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 8) (statutory interpretation); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. ___, ___ (2014) (slip op., at 12) (judicially created doctrine implementing a judicially created cause of action). In such cases, we have said that "the burden borne by the party advocating the abandonment of an established precedent" is "greater" than usual. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989). That is so "even where the error is a matter of serious concern, provided correction can be had by legislation." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)).

We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context. Under our dormant Commerce Clause precedents, when Congress has not yet legislated on a matter of interstate commerce, it is the province of "the courts to formulate the rules." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 770 (1945). But because Congress "has plenary power to regulate commerce among the States," *Quill*, 504 U. S., at 305, it may at any time replace such judicial rules with legislation of its own, see *Prudential Ins. Co.* v. *Ben-*

jamin, 328 U. S. 408, 424–425 (1946).

In *Quill*, this Court emphasized that the decision to hew to the physical-presence rule on *stare decisis* grounds was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." 504 U. S., at 318 (footnote omitted). Even assuming we had gone astray in *Bellas Hess*, the "very fact" of Congress's superior authority in this realm "g[a]ve us pause and counsel[ed] withholding our hand." *Quill*, 504 U. S., at 318 (alterations omitted). We postulated that "the better part of both wisdom and valor [may be] to respect the judgment of the other branches of the Government." *Id.,* at 319; see *id.,* at 320 (Scalia, J., concurring in part and concurring in judgment) (recognizing that *stare decisis* has "special force" in the dormant Commerce Clause context due to Congress's "final say over regulation of interstate commerce"). The Court thus left it to Congress "to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.,* at 318 (majority opinion).

II

This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage "third time's a charm" has in daily life, it is a poor guide to Supreme Court decisionmaking. If *stare decisis* applied with special force in *Quill*, it should be an even greater impediment to overruling precedent now, particularly since this Court in *Quill* "tossed [the ball] into Congress's court, for acceptance or not as that branch elects." *Kimble*, 576 U. S., at ___ (slip op., at 8); see *Quill*, 504 U. S., at 318 ("Congress is now free to decide" the circumstances in which "the States may burden interstate

. . . concerns with a duty to collect use taxes").

Congress has in fact been considering whether to alter the rule established in *Bellas Hess* for some time. See Addendum to Brief for Four United States Senators as *Amici Curiae* 1–4 (compiling efforts by Congress between 2001 and 2017 to pass legislation respecting interstate sales tax collection); Brief for Rep. Bob Goodlatte et al. as *Amici Curiae* 20–23 (Goodlatte Brief) (same). Three bills addressing the issue are currently pending. See Marketplace Fairness Act of 2017, S. 976, 115th Cong., 1st Sess. (2017); Remote Transactions Parity Act of 2017, H. R. 2193, 115th Cong., 1st Sess. (2017); No Regulation Without Representation Act, H. R. 2887, 115th Cong., 1st Sess. (2017). Nothing in today's decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue. Armed with today's decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers. See, *e.g.,* Brief for Sen. Ted Cruz et al. as *Amici Curiae* 10–11 ("Overturning *Quill* would undo much of Congress' work to find a workable national compromise under the Commerce Clause.").

The Court proceeds with an inexplicable sense of urgency. It asserts that the passage of time is only increasing the need to take the extraordinary step of overruling *Bellas Hess* and *Quill*: "Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States." *Ante*, at 10. The factual predicates for that assertion include a Government Accountability Office (GAO) estimate that, under the physical-presence rule, States lose billions of dollars annually in sales tax revenue. See *ante*, at 2, 19 (citing GAO, Report to Congressional Requesters: Sales Taxes, States Could Gain Revenue from Expanded Au-

thority, but Businesses Are Likely to Experience Compliance Costs 5 (GAO–18–114, Nov. 2017) (Sales Taxes Report)). But evidence in the same GAO report indicates that the pendulum is swinging in the opposite direction, and has been for some time. States and local governments are already able to collect approximately 80 percent of the tax revenue that would be available if there were no physical-presence rule. See Sales Taxes Report 8. Among the top 100 Internet retailers that rate is between 87 and 96 percent. See *id.,* at 41. Some companies, including the online behemoth Amazon,* now voluntarily collect and remit sales tax in every State that assesses one—even those in which they have no physical presence. See *id.,* at 10. To the extent the physical-presence rule is harming States, the harm is apparently receding with time.

The Court rests its decision to overrule *Bellas Hess* on the "present realities of the interstate marketplace." *Ante,* at 18. As the Court puts it, allowing remote sellers to escape remitting a lawful tax is "unfair and unjust." *Ante,* at 16. "[U]nfair and unjust to . . . competitors . . . who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax." *Ante,* at 16. But "the present realities of the interstate marketplace" include the possibility that the marketplace itself could be affected by abandoning the physical-presence rule. The Court's focus on unfairness and injustice does not appear to embrace consideration of that current public policy concern.

The Court, for example, breezily disregards the costs that its decision will impose on retailers. Correctly calculating and remitting sales taxes on all e-commerce sales

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*C. Isidore, Amazon To Start Collecting State Sales Taxes Everywhere (Mar. 29, 2017), CNN Tech, http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html (all Internet materials as last visited June 19, 2018).

will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence" in the jurisdiction. Sales Taxes Report 3. A few examples: New Jersey knitters pay sales tax on yarn purchased for art projects, but not on yarn earmarked for sweaters. See Brief for eBay, Inc., et al. as *Amici Curiae* 8, n. 3 (eBay Brief). Texas taxes sales of plain deodorant at 6.25 percent but imposes no tax on deodorant with antiperspirant. See *id.*, at 7. Illinois categorizes Twix and Snickers bars—chocolate-and-caramel confections usually displayed side-by-side in the candy aisle—as food and candy, respectively (Twix have flour; Snickers don't), and taxes them differently. See *id.,* at 8; Brief for Etsy, Inc., as *Amicus Curiae* 14–17 (Etsy Brief) (providing additional illustrations).

The burden will fall disproportionately on small businesses. One vitalizing effect of the Internet has been connecting small, even "micro" businesses to potential buyers across the Nation. People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale. See Sales Taxes Report 22 (indicating that "costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions"). And the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate. See Etsy Brief 17–19 (describing the inadequacies of such software); eBay Brief 8–12 (same); Sales Taxes Report 16–20 (concluding that businesses will incur "high" compliance costs). The Court's decision today will surely have the effect of dampening opportunities for commerce

in a broad range of new markets.

A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways. As we have said in other dormant Commerce Clause cases, Congress "has the capacity to investigate and analyze facts beyond anything the Judiciary could match." *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 309 (1997); see *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 356 (2008).

Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. See Goodlatte Brief 12–14 (providing varied examples of how Congress could address sales tax collection). In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect.

An erroneous decision from this Court may well have been an unintended factor contributing to the growth of e-commerce. See, *e.g.,* W. Taylor, Who's Writing the Book on Web Business? Fast Company (Oct. 31, 1996), https://www.fastcompany.com/27309/whos-writing-book-web-business. The Court is of course correct that the Nation's economy has changed dramatically since the time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix

it in a totally different era. The Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, §8. I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century.

I respectfully dissent.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13170

D.C. Docket No. 0:17-cv-60663-RNS

DENNIS HAYNES,
individually,

Plaintiff - Appellant,

versus

HOOTERS OF AMERICA, LLC,
a foreign limited liability company,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 19, 2018)

Before ED CARNES, Chief Judge, MARCUS, Circuit Judge, and ROSS,* District Judge.

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* The Honorable Eleanor L. Ross, United States District Judge for the Northern District of Georgia, sitting by designation.

ROSS, District Judge:

At issue in this appeal is whether the plaintiff's claims for declaratory and injunctive relief pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.*, are moot due to the fact that the defendant entered into a remediation plan as a result of a settlement between the defendant and a different plaintiff in an almost identical earlier-filed suit. After thorough review, we conclude that the plaintiff's claims are not moot. Accordingly, we vacate and remand for further proceedings consistent with this opinion.

I. *Background*

The essential facts, as set forth in the motion to dismiss record before the district court, are undisputed. Dennis Haynes is blind and is a disabled person within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. ("ADA"). In order to read and navigate internet websites, Haynes utilizes Screen Reader Software, specifically, JAWS Screen Reader Software. Hooters of America, LLC ("Hooters") owns and operates a national chain of restaurants. Hooters also operates a website, located at www.hooters.com. Prior to the inception of this lawsuit, Haynes attempted to read and navigate Hooters' website but was unable to do so because the website was not compatible with Screen Reader Software.

On April 4, 2017, Haynes sued Hooters in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief, as well as costs and attorneys' fees, pursuant to Title III of the ADA, 42 U.S.C. § 12181, *et seq*. In pertinent part, Haynes requested that (1) the district court enter an order directing Hooters to alter its website to make it accessible to, and usable by, individuals with disabilities to the full extent required by Title III of the ADA and (2) the district court enter an order directing Hooters to continually update and maintain its website to ensure that it remains fully accessible to, and usable by, visually impaired individuals.

Prior to the initiation of Haynes' suit, on August 22, 2016, a different plaintiff filed a separate and nearly identical website-inaccessibility lawsuit against Hooters. Less than three weeks after the filing of that suit, the parties reached an agreement and settled their dispute ("Gomez Settlement Agreement"). The Gomez Settlement Agreement was executed on September 29, 2016. As part of the Gomez Settlement Agreement, Hooters agreed to place an accessibility notice on its website within six months and agreed to improve access on its website within twelve months to conform with the WCAG 2.0 web access standard, the recognized industry standard for website accessibility.[1]

[1] The Gomez Settlement Agreement does not define the term "accessibility notice," but merely states that Hooters shall use WCAG 2.0 as a guideline in making this improvement.

While the Gomez Settlement Agreement is in effect, the only person who can enforce any rights under it is the plaintiff in that case. After the agreement expires in September 2018, no one will have any rights under it. In any event, nothing in the agreement requires Hooters, either before or after it expires, to continuously update and maintain its website to ensure it remains accessible to the blind. Not only that but because the parties in Gomez voluntarily dismissed the case on October 5, 2016, and the district court did not retain jurisdiction to enforce the settlement agreement, the court could not order Hooters to abide by it.

Hooters moved to dismiss Haynes' suit, arguing that, because Hooters was in the process of actively implementing a remediation plan for its website, pursuant to the Gomez Settlement Agreement, there was no live case or controversy and Haynes' claim must be dismissed on mootness grounds. At the time Hooters filed its motion to dismiss in April 2017, Hooters stated that it was in the process of remediating its website, that its website had been substantially updated, and that it complied with the first aspect of its remediation plan by placing an accessibility notice on its website. The district court granted Hooters' motion and dismissed Haynes' complaint. The district court held that Haynes' claims for declaratory and injunctive relief pursuant to the ADA were moot, given that Hooters agreed to remedy, in accordance with the Gomez Settlement Agreement, all of the website inaccessibility issues Haynes complained of in his suit. Additionally, the district

court determined that there were no allegations that the relief requested by Haynes differed from the relief addressed by the Gomez Settlement Agreement, and, thus, the district court found no live controversy warranting the court's intervention.

This appeal followed.

II. *Mootness*

Whether a case is moot is a question of law that we review de novo. Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1182 (11th Cir. 2007) (citing Troiano v. Supervisor of Elections in Palm Beach Cty., Fla., 382 F.3d 1276, 1282 (11th Cir. 2004)).

In this appeal, we must consider whether, when a plaintiff sues a defendant for certain relief, the defendant's agreement with a third party to take actions which grant the plaintiff some of the relief he seeks moots the plaintiff's suit. As we have explained,

> Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of "Cases" and "Controversies." . . . [A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. As this Court has explained, put another way, a case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.

Troiano, 382 F.3d at 1281-82 (citation omitted).

Hooters contends that by entering into the remediation plan pursuant to the Gomez Settlement Agreement, Haynes' case was moot because the remediation

plan afforded Haynes all the relief he sought and could obtain; therefore, the district court was unable to order any further meaningful relief. The Court disagrees and finds that this case is not moot. Hooters' assurance to an unrelated third party to remediate its website does not alone moot Haynes' claims for relief.

First, the Court notes that while Hooters may be in the process of updating the accessibility of its website, there is nothing in the record demonstrating that Hooters has successfully done so. Accordingly, it cannot be said that the issues are no longer "live" or that the parties lack a legally cognizable interest in the outcome.

Second, some of the relief requested by Haynes remains outstanding and could be granted by a court. Specifically, Haynes requested an injunction, one that he may enforce against Hooters if Hooters does not bring its website into compliance with the ADA. Relatedly, Haynes requested in his complaint that the district court direct Hooters to <u>continually update and maintain</u> its website to ensure that it remains fully accessible. Accordingly, even if Hooters' website becomes ADA compliant, Haynes seeks injunctive relief requiring Hooters to maintain the website in a compliant condition. Thus, notwithstanding the fact, as argued by Hooters and as found by the district court, that the Gomez Settlement Agreement supplies Haynes with much of the relief he requested, there is still a live controversy about whether Haynes can receive an injunction to force Hooters

to make its website ADA compliant or to maintain it as such. Therefore, this case is not moot. See Wright v. Giuliani, 230 F.3d 543, 547 (2d Cir. 2000) (finding that although relief mandated in another case may remedy the conditions complained of in the instant case, the instant case will not be moot provided the first decision did not "grant the precise relief sought by the plaintiffs in this case").

Finally, Haynes was not a party to the Gomez Settlement Agreement. Consequently, if, for whatever reason, Hooters does not remediate its website in accordance with the Gomez Settlement Agreement, Haynes will have no way of enforcing the remediation plan. See Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 745 (8th Cir. 2004) ("If the suit were to be dismissed upon an agreement between third parties to perform at some time in the future, if 'some impediment arises or some prolonged delay ensues' in the planned performance, the plaintiff would be 'at square one.'") (quoting Kostok v. Thomas, 105 F.3d 65, 66 (2d Cir. 1997)).

In sum, for all of the reasons stated herein, the Court finds that Haynes' claims are not moot.

III. *Conclusion*

Because the Court finds that Haynes' complaint presents a live case or controversy, Haynes' case is not moot. We therefore vacate and remand the judgment of the district court.[2]

VACATED AND REMANDED.

[2] Hooters filed a motion for sanctions against Haynes under Federal Rule of Appellate Procedure 38 for filing a frivolous appeal. That motion is DENIED.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-2242

BECK AUTO SALES, INC.,

Appellant,

v.

ASBURY JAX FORD, LLC, and
LISA MARASCO,

Appellees.

On appeal from the Circuit Court for Leon County.
Karen Gievers, Judge.

June 20, 2018

WINSOR, J.

A car dealership sued its former employee and a competing dealership, alleging that the two conspired to steal business worth millions of dollars. Based on an arbitration agreement between the plaintiff dealership and the former employee (Lisa Marasco), the trial court sent claims against the employee to arbitration. The issue in this case is whether the trial court should have also sent the claims against the competing dealership—a nonparty to the arbitration agreement. The defendant dealership argued that under principles of equitable estoppel, all claims against both defendants should be arbitrated. The trial court disagreed, and we do too.

I.

In 2015, Asbury Jax Ford, LLC, doing business as Coggin Ford, acquired a car dealership in Jacksonville, Florida. The acquired dealership had a contract and longstanding relationship with the City of Tallahassee, to which it sold many vehicles. When Coggin acquired the other dealership, it acquired the Tallahassee contract as well, and it hoped to continue the related sales. But in 2016, the City decided not to renew the contract, instead opening the procurement process and publicly requesting proposals. The Coggin dealership submitted its proposal, but the contract ultimately went to a competing dealership, Beck Auto Sales, Inc., a dealership in Palatka, Florida, and the appellant here.

Two months after the Beck dealership won the new contract, the Coggin dealership sued the Beck dealership and Lisa Marasco. According to the complaint, Marasco, while still working for the Coggin dealership, had actively worked to sabotage Coggin's relationship with the City, hoping to prevent the contract's renewal. The complaint further alleged that Marasco and the Beck dealership acted in a "joint effort" to help the Beck dealership win the contract, which it ultimately did. After Beck took over the contract, it hired Marasco to come on board and manage the new relationship.

The Coggin dealership's complaint included the following seven claims: (1) breach of fiduciary duty (against Marasco); (2) aiding and abetting a breach of fiduciary duty (against Beck); (3) conversion (against Marasco); (4) civil conspiracy (against Marasco and Beck); (5) tortious interference (against Marasco and Beck); (6) unfair competition (against Marasco and Beck); and (7) a violation of the Florida Deceptive and Unfair Trade Practices Act (against Marasco and Beck).

In response to the complaint, Marasco moved to compel arbitration of all claims against her and the Beck dealership. She attached a written arbitration agreement she and the Coggin dealership had entered, in which the two agreed to arbitrate certain disputes relating to Marasco's employment. More specifically, the agreement provided that the "[d]isputes subject to arbitration" would be "all [d]isputes between the parties" as well as "disputes involving any person or entity whose liability or right

of recovery derives from a [d]ispute" covered by the agreement. Although the Beck dealership was not a party to the agreement, Marasco argued that the Coggin dealership's claims alleged "substantially interdependent and concerted misconduct" against both defendants. And under the doctrine of equitable estoppel, Marasco argued, *all* claims should be arbitrated. The Beck dealership separately moved to compel arbitration, expressly adopting Marasco's arguments.

The Coggin dealership agreed to arbitrate its claims against Marasco, but it refused to arbitrate those against the Beck dealership. It argued, among other things, that equitable estoppel did not apply because the claims against the two defendants were not truly inextricably intertwined. After a hearing, the lower court denied the Beck dealership's motion to compel arbitration. The court found that Beck was not a party to the arbitration agreement and that the equitable-estoppel argument was insufficient to deprive the Coggin dealership of its right to a jury. Beck now appeals that nonfinal order. We have jurisdiction, *see* Fla. R. App. P. 9.130(a)(3)(C)(iv)[1], and our review is de novo, *see Perdido Key Island Resort Dev., LLP v. Regions Bank*, 102 So. 3d 1, 3 (Fla. 1st DCA 2012).

II.

Ordinarily, a party cannot compel arbitration under an arbitration agreement to which it was not a party. *Koechli v. BIP Int'l, Inc.*, 870 So. 2d 940, 943 (Fla. 1st DCA 2004). But Florida and federal courts have recognized that principles of equitable estoppel sometimes allow a non-signatory to compel arbitration against someone who *had* signed an arbitration agreement. *Perdido Key*, 102 So. 3d at 5; *see also Bailey v. ERG Enters., LP*, 705 F.3d 1311, 1320 (11th Cir. 2013). Courts have recognized that this can be appropriate (1) when the signatory's claims allege "substantially interdependent and concerted misconduct" by the signatory and the non-signatory or (2) when the claims relate directly to the

[1] Because she was a party below, Lisa Marasco is an appellee here. *See* Fla. R. App. P. 9.020(g)(2). But the parties all agree that claims against her are subject to arbitration, and she has not participated in this appeal.

contract and the signatory is relying on the contract to assert its claims against the non-signatory. *Koechli*, 870 So. 2d at 944 (citations omitted); *see also Bailey*, 705 F.3d at 1320. Here, the Beck dealership relies exclusively on the first circumstance; it alleges that claims against it and Marasco allege "substantially interdependent and concerted misconduct." And indeed, the thrust of the complaint is that Marasco and the Beck dealership acted in concert to harm the Coggin dealership.

Assuming we agreed with the Beck dealership and concluded the claims were interdependent, our inquiry would not be over. Application of equitable estoppel could address the Beck dealership's non-signatory status—effectively counting it as a signatory—but it would not expand the scope of disputes subject to arbitration. Although Florida law, like federal law, favors arbitration, *Perdido Key*, 102 So. 3d at 3; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), it is still true that "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate," *Perdido Key*, 102 So. 3d at 3 (quoting *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)). Therefore, even when a non-signatory can rely on equitable estoppel "to access [the arbitration] clause," the non-signatory can compel arbitration only if the dispute at issue "falls within the scope of the arbitration clause." *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1355 (11th Cir. 2017) (applying Florida law). And the "scope of the arbitration clause" is a pure matter of contractual interpretation.

The arbitration provision here covered a wide range of disputes, including those "arising before, during or after any employment relationship," and applying "whether or not arising out of or related to [Marasco's] . . . employment." But as noted above, the arbitration provision generally limited its applicability to disputes "between the parties" to the arbitration agreement, meaning it would not reach disputes involving the Beck dealership (a nonparty). Unlike in *Koechli*, when we similarly recognized that the agreement's reach was limited to "any dispute between the [contracting] parties" but nonetheless concluded the non-signatory was effectively a "party," we can conceive of no basis to conclude the Beck dealership was a party to the agreement between

Marasco and the Coggin dealership. *See* 870 So. 2d at 945 (holding that based on unique facts of the case, "the word 'party' include[d] appellants, who received rights and were bound to obligations under the [applicable] agreement").[2] At bottom, the Beck dealership was not a party to the arbitration agreement, so disputes with it fall outside of the agreement's general scope.

Acknowledging this problem, the Beck dealership turns to another provision of the arbitration agreement, a provision that broadens the agreement's general scope: "Also subject to arbitration are disputes involving any person or entity whose liability or right of recovery derives from a Dispute that is covered by this Agreement (e.g., partner, agent, subsidiary of parent corporation, affiliate, shareholder, successor or assign of a party)." This provision expands the scope to include disputes involving others, but only to the extent the other parties' liability "derives from" a covered dispute. The Beck dealership therefore argues that its liability "derives from" the dispute between the Coggin dealership and Marasco.

"Derivative liability is similar to vicarious liability in that (1) there is no cause of action unless the directly liable tortfeasor commits a tort and (2) the derivatively liable party is liable for *all* of the harm that such a tortfeasor has caused." *Peltz v. Tr. Hosp. Int'l, LLC*, No. 3D17-428 *2 n.6 (Fla. 3d DCA Apr. 11, 2018) (quoting *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003)); *cf. also* Derivative Liability, *Black's Law Dictionary* (10th ed. 2014) (defining term as "[l]iability for a wrong that a person other than the one wronged has a right to redress"); *Grobman*, 863 So. 2d at 1235-36 (noting that cases of derivative liability "involve

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[2] The *Koechli* decision is further distinguishable because it relied on the fact that the substantive claims at issue were based on the same agreement that included the arbitration provision. "Because the basis of BIP's claims arise out of or are intimately related to the refurbishment agreement, it would be inequitable to allow BIP both to rely upon the agreement in its action against non-signatories and selectively repudiate it when seeking to resist arbitration." *Id.* at 945. Here, the underlying substantive claims are not based on the arbitration agreement.

wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another" (citation omitted)).

We conclude that the Beck dealership's liability (if any) does not "derive from" the remaining disputes as that phrase is used in the agreement. The claims are unquestionably related, and they may well ultimately rise or fall together. But we cannot ignore the fact that the arbitration provision used the specific phrase "derives from," rather than a more general term, like, say, "relates to." *Cf. Kroma*, 845 F.3d at 1356 ("If the parties had consented in the arbitration clause to arbitrate any disputes concerning the validity, interpretation, etc., of the contract, instead of consenting to arbitrate only 'disputes arising *between them*' . . ., the Kardashians may have been able to use equitable estoppel . . . . But, as the 'between them' language shows, that is not what the parties to the agreement consented to do in the arbitration provision."). Nor can we ignore the fact that the agreement includes specific examples of liability that *could* derive from other disputes: "(e.g., partner, agent, subsidiary of parent corporation, affiliate, shareholder, successor or assign of a party)." Had the parties sought a broader view of what it means for liability to "derive from" other disputes, they surely would have selected different examples. We cannot ignore the words the drafters chose.

III.

The Coggin dealership's claims against the Beck dealership are not claims based upon derivative liability; they are based on Beck's own alleged misconduct. That means the claims are not within the scope of the arbitration agreement. And that means the trial court correctly denied the motion to compel.[3]

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[3] As in *Perdido Key*, we note that this decision "will result in arbitrable causes of action as well as non-arbitrable causes of action." 102 So. 3d at 6. This may yield "'the possibly inefficient maintenance of separate proceedings in different forums,'" *id.* at 6-7 (quoting *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011)), but it is the result precedent compels.

AFFIRMED.

ROWE, J., concurs; WOLF, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WOLF, J., dissenting.

Coggin Ford (Coggin) entered into a broad arbitration agreement with its employee, Lisa Marasco, which encompassed all disputes concerning the relationship between Ms. Marasco and Coggin as well as "disputes involving any person or entity whose liability or right of recovery derives from a Dispute that is covered by [the arbitration] Agreement." Coggin's complaint against Marasco and Beck Auto Sales, Inc. (Beck) is drafted so that the causes of action against both are inextricably intertwined. There is no allegation that Beck acted independently of Marasco. All of the allegations against Beck are derived from Coggin's dispute with Marasco, which is covered by the arbitration agreement. Under these circumstances, Coggin is estopped from asserting that the dispute with Beck in this case is not subject to the arbitration provisions of the agreement.

The majority correctly states the general law concerning application of estoppel to compel arbitration by a non-signatory to the agreement, which I will partially repeat here with emphasis added.

Florida and federal courts have recognized that principles of equitable estoppel sometimes allow a non-signatory to compel arbitration against an opposing party who *was* a signatory to an arbitration agreement. *Perdido Key Island Resort Dev., L.L.P., v. Regions Bank*, 102 So. 3d 1, 5 (Fla. 1st DCA 2012). Courts have recognized that allowing a non-signatory to compel arbitration can be appropriate (1) "when the *signatory's claims allege substantially interdependent and concerted misconduct* by the signatory and the

non-signatory"; or (2) "when the claims relate directly to the contract and the signatory is relying on the contract to assert its claims against the non-signatory." *Koechli v. BIP Int'l, Inc.*, 870 So. 2d 940, 944 (Fla. 1st DCA 2004) (citations omitted) (emphasis added).

Florida law, like federal law, favors arbitration. *Perdido Key*, 102 So. 3d at 3; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983). However, it is still true that "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." *Perdido Key,* 102 So. 3d at 3 (quoting *Seifert v. U.S. Home Corp.,* 750 So. 2d 633, 636 (Fla. 1999)). Therefore, even when a non-signatory can rely on equitable estoppel "to access [the arbitration] clause," the non-signatory can compel arbitration only *if the dispute at issue "falls within the scope of the arbitration clause*." *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1355 (11th Cir. 2017) (emphasis added) (applying Florida law). The "scope of the arbitration clause" is a pure matter of contractual interpretation.

Thus, we must look at the specific words of the arbitration agreement *in context* and the *specific allegations* of the instant complaint to determine whether the dispute falls within the scope of the arbitration agreement. *Hand v. Grow Constr., Inc.,* 983 So. 2d 684 (Fla. 1st DCA 2008) (finding in order to give proper meaning to a specific contractual provision, courts must consider context of the entire contract).

The subject matter of the arbitration agreement is very broad, effectively covering any dispute between Coggin and Ms. Marasco. The specific language indicates the arbitration provision includes disputes "arising before, during or after any employment relationship," and applying "whether or not arising out of or related to [Marasco's] . . . employment."

A review of the specific allegations of the complaint reveal each count arose out of and was substantially interdependent with Ms. Marasco's relationship with Coggin. It also reveals concerted misconduct between Marasco and Beck, thereby justifying enforcement of the arbitration agreement by the non-signator, Beck. *See Koechli,* 870 So. 2d at 944.

The counts against Beck include: Count 2, aiding and abetting a breach of fiduciary duty (the person who was alleged to have been aided and abetted was Marasco); Count 4, civil conspiracy (against both Marasco and Beck); Count 5, tortious interference (against both Marasco and Beck); Count 6, unfair competition (against both Marasco and Beck); and Count 7, a violation of the Florida Deceptive and Unfair Trade Practices Act (against both Marasco and Beck). While arguably Beck could have committed the alleged torts individually, that is not how Coggin chose to allege the tortious conduct in its complaint.

The introductory sentence of the complaint reads: "This *action* arises out of Defendants Marasco and Beck's *joint effort* to obtain a contract . . . though a breach of fiduciary duty, conspiracy, unfair competition, and tortious interference." (Emphasis added). By its very language, the complaint alleges all the counts against Beck were based on interrelated efforts of Beck and Marasco. The complaint does not allege a single action on the part of Beck that was not done in concert with Marasco.

For instance, as to Count 2, aiding and abetting, the complaint alleges "Beck was fully aware of Marasco's breach and, in fact, provided substantial assistance and encouragement to Marasco . . . ." Count 4, civil conspiracy, specifically alleges Beck and Marasco "conspired to interfere with Coggin's relationship with its customers and to violate Marasco's fiduciary duties to Coggin." The gist of Count 5, tortious interference, is that Marasco was "secretly working for Beck" and "ensured Beck's [proposal] would prevail against Coggin." The gravamen of Count 6 is that Marasco provided Beck with Coggin's confidential information in order to help Beck unfairly compete against Coggin. Count 7 is repetitive of the other six counts. None of these counts alleged that Beck committed any act independent of Marasco. Thus, the test of "substantially interdependent and concerted misconduct" by the signatory and non-signatory has been met based on Coggin's own allegations. *Koechli*, 870 So. 2d at 944. As such, the subject of the dispute falls within the scope of the arbitration clause.

The next issue is whether the agreement itself precludes application of the doctrine of estoppel because it reflects the intent of the parties to exclude non-signatories from invoking the

arbitration agreement. We cannot consider a single term or sentence in isolation; instead, each provision "should be construed in connection with other provisions . . . to arrive at a reasonable construction to accomplish the intent and purpose of the parties." *Hand,* 983 So. 2d at 697 (quoting *James v. Gulf Life Ins. Co.*, 66 So. 2d 62 (Fla. 1953)).

The arbitration agreement contains the following provision: "Also subject to arbitration are disputes involving any person or entity whose liability or right of recovery *derives from a Dispute that is covered by this Agreement* (e.g., partner, agent, subsidiary or parent corporation, affiliate, shareholder, successor or assign of a party)." (Emphasis added).

Thus, the focus of our analysis should be whether the liability arose from a dispute covered by the agreement and not whether derivative liability exists or whether the right of recovery stems from a breach of the arbitration agreement.

The majority utilizes general law concerning the definition of the term "derivative liability" to determine that Beck could not be an intended subject of this contract because its liability is direct and is not derived from the conduct of another tortfeaser. That analysis ignores that, in context, the language requiring arbitration does not focus on liability derived from another person, but liability that is "derive[d] from a *Dispute* that is covered by this agreement." (Emphasis added). As previously discussed, the subject matter of the claim arises out of a dispute concerning the relationship between Coggin and Ms. Marasco, the central matter covered by the arbitration agreement. As the dispute is framed by Coggin's own complaint, the liability of Beck derives from this dispute.

Further, since the liability, if any, in this case arises from the joint actions of Marasco and Beck, any liability should be determined through the arbitration process rather than through two different types of forums.

Because of the broad language of the arbitration agreement and nature of the allegations in Coggin's complaint, Coggin should be estopped from arguing that Beck cannot assert rights under the arbitration agreement.

Katherine E. Giddings and Kristen M. Fiore, Akerman LLP, Tallahassee, and Donald E. Holmes, Russell D. Castleberry, and George A. Young, Holmes & Young, P.A., Palatka, for Appellant.

Christopher B. Lunny, M. Drew Parker, and Angela D. Miles, Radey Law Firm, Tallahassee, for Appellee Asbury Jax Ford, LLC. No appearance for Appellee Marasco.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-2094

MAGNOLIA FLORIDA TAX
CERTIFICATES, LLC, a Florida
limited liability company, et al.,

Appellants/Cross-Appellees,

v.

FLORIDA DEPARTMENT OF
REVENUE, et al.,

Appellees/Cross-Appellants.

On appeal from the Circuit Court for Leon County.
Terry P. Lewis, Judge.

June 22, 2018

PER CURIAM.

In this appeal and cross-appeal from a summary final judgment, three issues have been raised for our consideration: (1) whether the trial court erred in entering summary judgment against Appellants on count II of their complaint challenging the deposit requirement imposed upon bidders for tax certificates in Broward, Miami-Dade, and Orange Counties; (2) whether the trial court erred in entering summary judgment against Appellants on count III of their complaint challenging the affidavit requirement imposed upon bidders for tax certificates in Broward County; and (3) whether the trial court erred in denying a motion to abate the

proceedings until Appellants/Cross-Appellees complied with the registration requirements of the Fictitious Name Act. We affirm as to the third issue without further discussion. We also affirm as to the first and second issues for the reasons that follow.

In challenging the imposition of a separate deposit upon each of their general partnerships bidding for tax certificates, Appellants' initial brief advances the following arguments: (1) the deposit is unreasonable because it exceeds the amount necessary to recoup readvertising costs; (2) the deposit is inefficient because it requires the tax collector's office to reissue refunds of large sums; (3) the deposit is contrary to legislative intent because it discourages open competition and participation in auctions; and (4) the trial court misinterpreted section 197.432(7), Florida Statutes, by failing to consider that a third-party surety is permitted to post a deposit on behalf of bidders that is calculated based upon a percentage of the bidding group's expected purchases. Appellants failed to preserve any of these arguments, which were not raised below. *See Aills v. Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010) (holding that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal); *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (holding that an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved); *Adkison v. Morey,* 43 Fla. L. Weekly D550 (Fla. 1st DCA Mar. 8, 2018) (holding that the argument made on appeal was waived because it was never presented to the trial court). Because we cannot address these arguments for the first time on appeal, we affirm the summary judgment against Appellants on count II of their complaint.

In challenging the pre-bidding documentation required by Broward County insofar as it requires all business entities—as opposed to natural persons—to provide an affidavit concerning certain information about the entity, including its name, the type of entity, its state of origin, and information concerning its employer identification number (EIN), Appellants assert that such a requirement is not authorized by section 197.432, Florida Statutes. However, Broward County is a charter county that has the power to "enact county ordinances not inconsistent with

general law." Art. VIII, § 1(g), Fla. Const. A local government enactment is inconsistent with state law if it directly conflicts with a state statute or if the legislature has preempted a particular subject area. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). Although section 197.432 provides general procedures for tax certificate sales, it does not specify how tax collectors are to ascertain the identities of bidders or set out what information may be requested of bidders. Accordingly, it cannot be said that the affidavit requirement imposed in Broward County is inconsistent with any provision of section 197.432. Moreover, there is nothing in the language of section 197.432 that expressly or impliedly preempts Broward County from imposing an affidavit requirement to ascertain or verify the identity of bidders at tax certificate sales. Accordingly, the trial court correctly concluded as a matter of law that Broward County had discretion to impose an affidavit requirement on bidders in order to carry out its statutory duty to conduct tax certificate sales.

To the extent Appellants claim that the affidavit requirement is contrary to legislative intent and discriminates against non-natural persons, these claims are without merit. There is nothing in section 197.432 expressing an intent to allow business entities to use hundreds of thousands of "shell" bidders to gain an unfair advantage at tax certificate sales. Moreover, Appellants have failed to demonstrate that the disparate treatment between natural and non-natural persons is improper. A constitutional challenge that does not involve a fundamental right or suspect classification is evaluated under the rational basis test, which merely requires the existence of a conceivably rational basis for the enacting governmental body to believe that the challenged legislation would further a legitimate governmental purpose. *WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004). Here, Broward County's affidavit requirement helps ensure that all bidders are bona fide business organizations created under the laws of some state and not sham entities using names made up for the sole purpose of manipulating the lottery selection process to resolve tie bids. Requiring each bidder to identify itself and attest that it did not obtain its EIN for the purpose of gaining advantage in a tax certificate sale in contravention of Internal Revenue Service directives is rationally

related to the county's legitimate interest in ensuring the fairness of tax certificate sales. Accordingly, we affirm the summary judgment entered against Appellants on count III of their complaint.

AFFIRMED.

LEWIS, ROBERTS, and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Douglas Manson and William S. Bilenky of Manson Bolves Donaldson Varn, P.A., Tampa, for Appellants/Cross-Appellees.

John A. Tucker, IV, of Foley & Lardner LLP, Jacksonville; Robert H. Hosay, James A. McKee, and Benjamin J. Grossman of Foley & Lardner LLP, Tallahassee, for Appellee Anne M. Gannon, Palm Beach County Tax Collector.

Vanessa Thomas of Forman, Hanratty, Thomas & Montgomery, Ocala, for Appellee George Albright, Marion County Tax Collector.

Andrew J. Meyers, Broward County Attorney; Mark A. Journey, Scott Andron, and Joseph K. Jarone, Assistant County Attorneys, Fort Lauderdale, for Appellee Broward County.

Douglas C. Spears and Benjamin C. Iseman of Swann Hadley Stump Dietrich & Spears, P.A., Winter Park, for Appellee Scott Randolph as Orange County Tax Collector.

Abigail Price-Williams, Miami-Dade County Attorney, and Ileana Cruz, Assistant County Attorney, Miami, for Appellee/Cross-Appellant Marcus Saiz De La Mora, Miami-Dade County Tax Collector.

Timothy R. Qualls of Young Qualls, P.A., Tallahassee, for remaining Appellee Tax Collectors.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ZDZISLAW JESSE ROZANSKI, Appellant, v. WELLS FARGO BANK, N.A., and HALINA KWIATKOWSKI, Appellees.	)	Case No. 2D16-3800

Opinion filed June 22, 2018.

Appeal from the Circuit Court for Pinellas County; Marion L. Fleming, Judge.

Alexander Allred of Castle Law Group, P.A., Largo, for Appellant.

Martin S. Awerbach and Michael A. Cohn of Awerbach | Cohn, Clearwater, for Appellee Wells Fargo Bank, N.A.

No appearance for remaining Appellee.

MORRIS, Judge.

Zdzislaw Rozanski appeals a partial summary judgment entered in favor of Wells Fargo Bank, N.A., imposing and foreclosing an equitable lien against Rozanski's real property. Rozanski argues that the trial court erred in allowing Wells

Fargo to foreclose on the equitable lien because Wells Fargo did not show that Rozanski was in default on the loan from which the lien arose. We agree and reverse the decision of the trial court on the issue of foreclosure.

I. Facts

In 2002 Rozanski purchased the property that is the subject of this case. That same year, he married Halina Kwiatkowski. In 2003 he executed a note with Wells Fargo in the amount of $273,000, which was secured by a mortgage on the property. Both the mortgage and the note were in his name alone.

In 2007 Kwiatkowski filed for divorce from Rozanski. A final judgment of dissolution was entered in 2008, pursuant to a marital settlement agreement, granting Kwiatkowski sole possession of the property, and a quit claim deed was executed in her favor. Also in 2008, Kwiatkowksi refinanced the property through a loan with Wells Fargo in the amount of $370,000, which was secured by a mortgage. A portion of this money was used to pay off the balance of Rozanski's mortgage, $321,042, and Wells Fargo issued a release of Rozanski's mortgage.

In 2012 Wells Fargo filed a complaint for mortgage foreclosure against Kwiatkowski. In 2014 Wells Fargo added Rozanski as a defendant. He answered, alleging that the quit claim deed conveying ownership to Kwiatkowksi was a forgery. In the dissolution case, Rozanski obtained a judgment setting aside the final judgment of dissolution based on fraud upon the court. In the meantime, Wells Fargo amended its complaint to allege a count to impose and foreclose an equitable lien against Rozanski's property, "under principles of subrogation," in the amount of the payoff of Rozanski's mortgage. In response to the final judgment setting aside the dissolution of marriage,

Wells Fargo filed a motion for summary judgment, proceeding solely on its count to impose and foreclose an equitable lien.

After a hearing, the trial court granted Wells Fargo's motion and entered a final judgment imposing and foreclosing an equitable lien. The trial court ruled that Wells Fargo "is entitled to impose and foreclose the Equitable Lien against the Property in the Prior Mortgage Payoff amount of $321,042.02, based upon subrogation," citing Tribeca Lending Corp. v. Real Estate Depot, Inc., 42 So. 3d 258 (Fla. 4th DCA 2010).

II. Analysis

On appeal, Rozanski contends that Wells Fargo had no legal or equitable basis to foreclose on the equitable lien, although he does not "take issue with the existence of the equitable lien." He argues that Wells Fargo was not entitled to foreclose on the equitable lien because he was never in default on his mortgage.

Equitable liens may be imposed to prevent unjust enrichment. See Palm Bch. Sav. & Loan Ass'n v. Fishbein, 619 So. 2d 267, 270 (Fla. 1993); Tribeca Lending Corp., 42 So. 3d at 262. "[T]he doctrine of equitable subrogation, a twin remedy to the equitable lien, is designed to apply where the claimant satisfied an obligation of another and then stands in the shoes of the satisfied creditor." Tribeca Lending Corp., 42 So. 3d at 262. "As a result of equitable subrogation, the party discharging the debt . . . succeeds to the right and priorities of the original creditor." Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 646 (Fla. 1999).

Because Wells Fargo discharged Rozanski's debt when Kwiatkowski obtained her loan in 2008, Wells Fargo succeeded to the rights and priorities it had as Rozanski's original lender and mortgagee. Therefore, Wells Fargo was entitled to the

equitable lien, which Rozanski does not dispute. However, Wells Fargo was entitled to only the rights and priorities that it had at the time it satisfied Rozanski's mortgage in 2008, and Wells Fargo did not plead or demonstrate below that it had the right to foreclose on Rozanski's mortgage in 2008.

Wells Fargo argues that foreclosure of the equitable lien was proper pursuant to the decision in Fishbein, 619 So. 2d 267. In Fishbein, the husband borrowed $1,200,000, secured by a mortgage on the homestead property, but he forged his wife's signature on the mortgage. Id. at 268. The loan proceeds were used to pay off three prior mortgages on the property in the amount of $930,000. Then the mortgage went into default, and the bank commenced foreclosure proceedings. Id. at 269. The parties divorced, and the wife was awarded the house. The trial court ruled that the mortgage could not be enforced against the house but that the bank was entitled to an equitable lien. The supreme court agreed that the bank was entitled to an equitable lien in the amount of $930,000. Id. at 270-71.

The court reasoned that an equitable lien was appropriate because the wife stood "in no worse position than she stood before the execution of the mortgage," noting that "[w]hen the bank made its loan, one of the prior mortgages was already overdue" and that the parties could not pay the prior mortgages. Id. Wells Fargo relies on the fact that only one of the three prior mortgages was in default in Fishbein as support for its argument "that being in default is not a required element for the . . . foreclosure of the equitable lien." On the other hand, Rozanski argues that the bank could only foreclose on the equitable lien in Fishbein because at least one mortgage was overdue in that case, whereas in this case there was no evidence that Rozanski

was overdue on his mortgage. However, as we read Fishbein, the court did not decide the issue of whether the bank was entitled to *foreclose* on the equitable lien.[1] Rather, the court focused solely on whether the bank was entitled to *imposition* of an equitable lien where the wife claimed a homestead interest and had not engaged in any misconduct herself.

We also note that the facts of this case are distinguishable from Tribeca Lending Corp., 42 So. 3d 258, which the trial court cited in its judgment. The party seeking the imposition and foreclosure of the equitable lien in that case, Tribeca Lending Corp., had paid off a prior mortgage, but that prior mortgage was in default and a foreclosure judgment had been entered. 42 So. 3d at 260-61. Thus, Tribeca Lending Corp. was entitled to foreclose on the equitable lien in the same way the original lender was entitled to foreclose on the mortgage. Here, there was no showing that Rozanski was in default on his mortgage or that Wells Fargo was entitled to foreclose on the mortgage at the time it satisfied Rozanski's debt with the refinancing in 2008. See Brotheridge v. Option One Mortg. Corp., 67 So. 3d 254, 256 (Fla. 2d DCA 2010) (noting that foreclosure of equitable lien would not be proper where debtors were not given an opportunity to make payment on the lien amount and there was no proof of any default by the debtors on their earlier obligations).

Because there was no showing that Rozanski was in default on his mortgage in 2008, the trial court erred in ordering the foreclosure of the equitable lien.

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[1]The court noted that the trial court had "stayed any foreclosure sale on the equitable lien for six months to permit [the wife] to try to make a private sale of the house." Fishbein, 619 So. 2d at 269. There was no other discussion regarding foreclosure of the equitable lien.

We affirm the imposition of the equitable lien against Rozanski's property, but we reverse the final summary judgment to the extent that it orders foreclosure of that lien.

Affirmed in part, reversed in part, and remanded.

BADALAMENTI and ROTHSTEIN-YOUAKIM, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CITY OF CLEARWATER, Appellant, v. BAYESPLANADE.COM, LLC, a Florida Limited Liability Company, Appellee.	)	Case No. 2D17-2006

Opinion filed June 22, 2018.

Appeal from the Circuit Court for Pinellas County; Jack R. St. Arnold, Judge.

Paul Richard Hull, Assistant City Attorney, Clearwater, for Appellant.

Robert V. Potter and Sharon E. Krick of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, for Appellee.

BLACK, Judge.

BayEsplanade.com, LLC, filed a complaint against the City of Clearwater to quiet title to 5.88 acres of submerged land below what is now known as Mandalay Channel, between Clearwater Beach and the islands that comprise Island Estates. BayEsplanade claimed title through a 1957 quitclaim deed. The City of Clearwater filed

a counterclaim to quiet title, claiming title through a 1934 quitclaim deed. Following cross motions for summary judgment, final summary judgment quieting title was entered in favor of BayEsplanade. We reverse the judgment in favor of BayEsplanade and remand with instructions that judgment be entered quieting title in favor of the City of Clearwater. The language of the 1934 deed to the City of Clearwater is unambiguous, and the trial court erred in admitting extrinsic evidence to construe it.

The issue presented in the motions for summary judgment concerns whether the 1934 quitclaim deed from the Clearwater Island Bridge Company (the Bridge Company) to the City of Clearwater unambiguously conveyed all lands—including submerged land—within the boundaries described in the deed. A brief deraignment of title to the submerged land in dispute is necessary.

Prior to 1926, title to the submerged land was held by the Trustees of the Internal Improvement Fund of the State of Florida. In 1926, the Trustees conveyed approximately thirty-five acres of submerged land to the Bridge Company, which included the submerged land at issue in this case (the TIIF deed). The TIIF deed described the eastern boundary of the conveyed submerged land as "the West side of [the] channel between Sand Key and Ragged Key."

In 1934, the Bridge Company executed a quitclaim deed and release to the City of Clearwater, conveying the lands described as follows:

> [1] Beginning on the shore of the Gulf of Mexico at a point where the North line of the tract of land designated as "Clearwater City Park" on a plat of Clearwater Beach as the same is recorded in Plat Book 5, Page 2 of the Public Records of Pinellas County, Florida, if prolonged West would intersect said Gulf shore, thence run Southerly along said shore line Four Hundred (400) feet; thence East parallel to the North line of said "Clearwater City Park" to the waters of Clearwater Bay as of the 17th day of May, 1917; thence

> Northeasterly along Clearwater Bay to a point where said line would intersect the North line of said "Clearwater City Park" if prolonged East; thence West to the point of beginning; [2] together with all lands lying between the North and South lines of said tract extended Eastwardly to the Channel of Clearwater Harbor; [3] together with all riparian rights.

The 1934 deed clearly conveys three interests: (1) the upland parcel described as beginning on the shore of the Gulf of Mexico and extending to the waters of Clearwater Bay (Parcel 1); *together with* (2) the parcel described as "all lands lying between the North and South lines of [Parcel 1] extended Eastwardly to the Channel of Clearwater Harbor"; *together with* (3) all associated riparian rights. See, e.g., Thrasher v. Arida, 858 So. 2d 1173, 1174 (Fla. 2d DCA 2003) (describing a deed as conveying two parcels where the deed conveyed one described area *together with* a second area). There are no reservations or exceptions in the deed.

The Bridge Company had previously conveyed Parcel 1 and the appurtenant riparian rights to the City of Clearwater in a May 17, 1917, deed. At the time of the 1917 deed, a bridge spanned the Channel of Clearwater Harbor,[1] connecting Clearwater Beach to the mainland. The description of Parcel 1 in the 1917 deed referenced the bridge:

> Beginning on the shore of the Gulf of Mexico at a point where the North line of the tract of land designated as "Clearwater City Park" on a plat of Clearwater Beach as the same is recorded in the Land Records of Pinellas County Florida, if prolonged West would intersect said Gulf shore; thence run southerly along said shore line Four Hundred (400) feet; thence East parallel to the North line of said

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[1]The parties agree that the channel between Sand Key and Ragged Key is now known as Mandalay Channel and has previously been known as the Channel of Clearwater Harbor.

> "Clearwater City Park" to the waters of Clearwater Bay; thence Northeasterly along Clearwater Bay to a point Twenty five (25) feet distant measured at right angle from the center of a bridge now located and constructed by the Clearwater Island Bridge Company; thence northwesterly along a curved line Twenty five (25) feet from the center of said bridge to a point on the North line of said "Clearwater City Park" extended eastwardly; thence West to the point of beginning. Together with all riparian rights.

The 1917 deed also contained restrictions on the use of Parcel 1, which were released in the 1934 deed. The bridge connecting Clearwater Beach to the mainland was destroyed in 1921 by a hurricane. Thus, the bridge is not referenced in the 1934 deed. Importantly, the 1917 deed does not convey any property east of the bridge and to the Channel of Clearwater Harbor.

In 1957, the Bridge Company conveyed by quitclaim deed to BayEsplanade's predecessor in interest, North Bay Company, a parcel bounded on the east by the "West side of [the] channel between Sand Key and Ragged Key" and on the west by the "average high water line on Sand Key," containing approximately thirty-five acres. North Bay Company quitclaimed the parcel to BayEsplanade in 2005.

In its motion for summary judgment, BayEsplanade sought a determination of whether the words used in the 1934 deed to the City of Clearwater "describe the Submerged Lands in Controversy or whether they describe other lands." BayEsplanade contended that the language of the deed conveying "all lands lying between the North and South lines of [Parcel 1] extended Eastwardly to the Channel of Clearwater Harbor" did not convey title to the submerged land lying within the described boundary. In its motion, BayEsplanade did not suggest what "other lands" the 1934 deed could be describing.

The City of Clearwater also filed a motion for summary judgment. The City contended that the 1934 deed was not ambiguous and not subject to attack by extrinsic or parol evidence. It argued that the deed conveyed all lands—whatever they might be—within the boundaries identified in the deed. The City further argued that its title was first in time and superior to any claim of title BayEsplanade may have.

In its order granting summary judgment and quieting title in favor of BayEsplanade, the trial court found that the language "together with all lands lying between the North and South lines of said tract extended Eastwardly to the Channel of Clearwater Harbor; together with all riparian rights" was either patently or latently ambiguous, such that consideration and examination of extrinsic evidence was warranted.[2] Upon its consideration of the extrinsic evidence, the court determined that submerged land was not conveyed to the City of Clearwater in the 1934 deed. Rather, the court found that the Bridge Company retained ownership of the submerged land until it was conveyed to BayEsplanade's predecessor in title in 1957. The court determined that all lands except submerged lands were conveyed in the 1934 deed.

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[2]Although the trial court stated that the language in the deed was either patently or latently ambiguous, given that the court admitted parol evidence to construe the deed's language, the court could not have found the language patently ambiguous. See Mendelson v. Great W. Bank, F.S.B., 712 So. 2d 1194, 1196 (Fla. 2d DCA 1998) ("[I]f the instrument's description of the property is patently ambiguous, and the instrument furnishes no other information from which the parties' intention can be gleaned, the attempted conveyance is void, and parol evidence may not be employed to cure the deficiency."). We also note that nothing about the clause "together with all riparian rights" is ambiguous. Because it is a separate clause granting rights in addition to those conveyed in the first and second clauses of the deed, it is not, as the trial court found, "inconsistent" with the conveyance of submerged land. Even if the deed had not expressly conveyed riparian rights, they are appurtenant to the uplands conveyed in the deed. See, e.g., Haynes v. Carbonell, 532 So. 2d 746, 748 (Fla. 3d DCA 1988).

Our review of an order granting final summary judgment is de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). In a quiet title action, "the complainant must show with clearness, accuracy, and certainty the validity of [its] own title"; it "must rest upon the strength of [its] own title, and not upon the lack of right in the opposing party." Brickell v. Trammell, 82 So. 221, 229 (Fla. 1919) (citing cases). As such, we review de novo whether a deed is ambiguous or unambiguous. Hastie v. Ekholm, 199 So. 3d 461, 464 (Fla. 4th DCA 2016) (citing Am. Quick Sign, Inc. v. Reinhardt, 899 So. 2d 461, 467 (Fla. 5th DCA 2005)).

In our review of the language conveying "all lands" in the 1934 deed, we must "consider the language of the entire instrument in order to determine the intent of the grantor, both as to the character of estate and the property conveyed and to so construe the instrument as if legally possible to effectuate such intent." Thrasher, 858 So. 2d at 1175 (quoting Reid v. Barry, 112 So. 846, 851 (Fla. 1927)). "If there is no ambiguity in the language employed [in a deed] then the intention of the grantor must be ascertained from that language." Saltzman v. Ahern, 306 So. 2d 537, 539 (Fla. 1st DCA 1975). That is, "[w]hen the language of a deed is clear and certain in meaning and the grantor's intention is reflected by the language employed, there is no room for judicial construction of the language nor interpretation of the words used." Rogers v. United States, 184 So. 3d 1087, 1095 (Fla. 2015) (quoting Saltzman, 306 So. 2d at 539).

The 1934 deed conveyed three interests: Parcel 1; "all lands lying between the North and South lines of [Parcel 1] extended Eastwardly to the Channel"; and all associated riparian rights. Parcel 1 and the associated riparian rights are not at issue. Nor is there a dispute as to the boundaries described in the deed, including the

boundaries of the conveyance of "all lands"; the east boundary of the conveyed "all lands" is clearly the Channel of Clearwater Harbor. See Bd. of Trs. of the Internal Improvement Tr. Fund v. Walker Ranch Gen P'ship, 496 So. 2d 153, 156 (Fla. 5th DCA 1986) ("A deed conveys all within the boundaries, but does not convey the boundary itself. . . . Bounded by the navigable water, the lake, or the stream, the law extends the boundary to the edge of the channel." (quoting Axline v. Shaw, 17 So. 411, 413 (Fla. 1895))); cf. Bd. of Trs. of the Internal Improvement Tr. Fund v. Lost Tree Vill. Corp., 805 So. 2d 22, 25 (Fla. 4th DCA 2001) (discussing claim that deed was ambiguous as to the location of property). Rather, the dispute here is over the breadth or scope of "all lands."

"[A] riparian owner may separate his uplands from his submerged lands," conveying each to different grantees or selling one while withholding the other. Caples v. Taliaferro, 197 So. 861, 862 (Fla. 1940). At the time the 1934 deed was executed, the Bridge Company held title to the submerged land at issue through the TIIF deed. "All lands" as used in the 1934 deed to describe the property conveyed eastward to the Channel of Clearwater Harbor "has a clear, unequivocal common meaning"; there is no uncertainty as to what lands are conveyed. See Dade City v. Simpson, 290 So. 2d 530, 531 (Fla. 2d DCA 1974); cf. Syverson v. Jones, 10 So. 3d 1123, 1125 (Fla. 1st DCA 2009) (concluding no latent ambiguity existed in prenuptial agreement based on the omission of a qualifier on the term "marriage"). The phrase "all lands" is not ambiguous, and when read with the remainder of the deed, there is no indication that all lands is lesser in scope than "all" or that lands means anything other than lands. Further, there is no argument presented that "all lands" is a term of art, and we have found no basis to conclude that it is. See Dade City, 290 So. 2d at 531; Japanese Gardens Mobile

Estates, Inc. v. Hunt, 261 So. 2d 193, 196 (Fla. 2d DCA 1972) (" 'Owner' is not a term of art in a written real estate transaction; it can mean only one thing unless qualified in the writing itself. Clearly and unequivocally it means what it says, i.e., 'owner'; and to admit [e]xtrinsic evidence as to some other meaning . . . would be both to [c]reate an ambiguity and to rewrite the contract of the parties. Neither is permissible."). There is no reservation or exception in the 1934 deed; the conveyance is not subject to any prior deed, easement, reservation, exception, or right. Cf. Rogers, 184 So. 3d at 1100 ("The time for appellants to have declined voluntary relinquishment of subsurface mineral rights was when the fee simple sale was bargained and consummated . . . ." (quoting Holland v. State, 388 So. 2d 1080, 1082 (Fla. 1st DCA 1980))).

"When a deed is unambiguous and sufficient on its face to show the grantor's intent as to the property described and the estate conveyed, extrinsic evidence is not admissible to vary the terms." Rogers, 184 So. 3d at 1100. Nonetheless, and notwithstanding our conclusion that the language of the deed is unambiguous, "[w]henever a party presents an arguable claim that a document contains a latent ambiguity, the court is obliged to consider the extrinsic evidence, at least to the extent necessary to determine whether the claimed latent ambiguity exists." Thrasher, 858 So. 2d at 1175 (quoting Lost Tree Vill. Corp., 805 So. 2d at 26). "This is so because a latent ambiguity is shown where the writing is otherwise clear and unambiguous on its face, but some collateral fact creates a necessity for interpretation." Lost Tree Vill. Corp., 805 So. 2d at 26. However, in order for the trial court to have properly admitted parol evidence to construe the language of the 1934 deed, a latent ambiguity must first exist.[3]

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[3]We note that "[w]hen an agreement contains a latent ambiguity[,] . . . the issue of the correct interpretation of the agreement is an issue of fact which precludes

"A latent ambiguity in a deed description is said to exist when the deed, clear on its face, is shown by some extraneous fact to present an equivocation by being susceptible to two or more possible meanings." Lost Tree Vill. Corp., 805 So. 2d at 25; accord Thrasher, 858 So. 2d at 1175. A latent ambiguity arises when the words of a conveyance "apply to and fit without ambiguity" to more than one subject. Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998) (quoting Perkins v. O'Donald, 82 So. 401, 404 (Fla. 1919)). "In such cases [parol] evidence will be received to prove *which* of the subjects" was intended to be conveyed. Id. (emphasis added) (quoting Perkins, 82 So. at 404).

Although BayEsplanade contends that "all lands" is a phrase "normally used to convey 'all uplands,' " it provided no extrinsic evidence supporting that assertion.[4] There is no ambiguity as to the quality of title conveyed. Cf. Thrasher, 858 So. 2d at 1176 (discussing ambiguity as to legal description "with language limiting the quality of title or use of the property"). A subsequent conveyance of the identical property to BayEsplanade's predecessor in title is insufficient to establish a latent ambiguity. See Saltzman, 306 So. 2d at 538. And BayEsplanade presented no evidence of "alternative factual scenarios" to which "all lands" could apply. See Deni

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summary judgment." Barrington v. Gryphon Invs., Inc., 32 So. 3d 668, 671 (Fla. 2d DCA 2010) (alterations in original) (quoting Mac-Gray Servs., Inc. v. Savannah Assocs. of Sarasota, LLC, 915 So. 2d 657, 659-60 (Fla. 2d DCA 2005)). However, in this case, the parties agreed that no material facts beyond those presented at the summary judgment hearing existed, given that the conveyance at issue occurred in 1934.

[4]The validity of the TIIF deed conveying submerged land to the Bridge Company is not in question. Cf. Whetstone v. City of St. Augustine, 186 So. 3d 34, 36 (Fla. 5th DCA 2016) ("Because the Whetstones' property never included submerged lands, their predecessor in title could not have reserved submerged lands he did not have . . . .").

Assocs., 711 So. 2d at 1139 (quoting Perkins, 82 So. at 404); cf. Ware Constr. Co. v. Thomas, 357 So. 2d 452, 454 (Fla. 2d DCA 1978) ("While the language 'commercial, industrial or business places' is not defective, obscure, or insensible, it does consistently admit of two different interpretations; one encompassing the planned development and one not encompassing the planned development."); Lost Tree Vill. Corp., 805 So. 2d at 26 (discussing latent ambiguity with regard to survey and placement of the property in a location different than that intended by the parties).

The language of the deed at issue here applies to only one subject: all lands, regardless of whether they are upland or submerged. None of the extrinsic evidence presented by BayEsplanade renders the phrase "all lands" equivocal. BayEsplanade presented no evidence that the phrase "all lands" means something less or more limited than what it says, such that it means only some of all lands. See Japanese Gardens Mobile Estates, 261 So. 2d at 196 (stating that it is impermissible to create an ambiguity through extrinsic evidence where one otherwise does not exist). As a result, while the trial court may have properly considered parol evidence to determine whether the claimed latent ambiguity exists, the court incorrectly determined that the phrase "all lands" is ambiguous and therefore erred in admitting the parol evidence to construe it.

Had the deed conveyed Parcel 1 together with "lands eastward to the Channel," we might have concluded that the deed contains a latent ambiguity. Cf. Dade City, 290 So. 2d at 531 (concluding that "all roads" is unambiguous but stating that "if the question to be answered by parol is whether a given piece of land described as a road in a written instrument is, in fact, being used as a 'road,' such evidence would of course be admissible to establish such fact"). But the singular qualification on the

conveyance of the lands eastward to the Channel of Clearwater Harbor in 1934 deed was that it conveys *all* such lands. Parol evidence was inadmissible to establish that the phrase "all lands" really means "all lands except the submerged lands." See id.; see also State v. Good Times, Ltd., No. E2007-1172-COA-R3-CV, 2008 WL 4334894, at *4 (Tenn. Ct. App. Sept. 23, 2008) (stating, in the context of deed interpretation, that "[a]ll means all and not some, or a part, or a portion, or a few"). Moreover, giving "all lands Eastward to the Channel" the meaning that BayEsplanade suggests would render the word "all" meaningless. And "[w]here only one construction will give full effect to all of the words of the instrument, it should be followed." Thrasher, 858 So. 2d at 1176 (citing Loveland v. CSX Transp., Inc., 622 So. 2d 1120, 1121 (Fla. 3d DCA 1993)).

We hold that the 1934 deed conveying "all lands . . . to the Channel of Clearwater Harbor" to the City of Clearwater unambiguously conveyed all lands, including the submerged land within the boundaries described in the deed. Accordingly, we reverse the order granting final summary judgment quieting title in favor of BayEsplanade and reverse and remand with instructions to enter final summary judgment quieting title in favor of the City of Clearwater.

Reversed and remanded with instructions.

NORTHCUTT and MORRIS, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BAYVIEW LOAN SERVICING, LLC, Appellant, v. HUSO DZIDZOVIC; EAST LAKE WOODLANDS MASTER ASSOCIATION, INC., a dissolved corporation; GREENHAVEN UNIT ONE ASSOCIATION, INC.; EDINA DZIDZOVIC; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, successor in interest by purchase from the Federal Deposit Insurance Corporation, as received for Washington Mutual Bank f/k/a Washington Mutual Bank, FA, Appellees.	)	Case No. 2D17-3608

Opinion filed June 22, 2018.

Appeal from the Circuit Court for Pinellas County; Jack R. St. Arnold, Judge.

Jonathan L. Black of Phelan Hallinan Diamond & Jones, PLLC, Fort Lauderdale, for Appellant.

No appearance for Appellees.

LaROSE, Chief Judge.

Bayview Loan Servicing, LLC, appeals the trial court's order granting Huso Dzidzovic's motion to vacate the final judgment of foreclosure and dismissing its

foreclosure action.[1] We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). The trial court entered the order ex parte without a hearing. Further, no competent substantial evidence supports the order. Consequently, we reverse and remand.

Background

The trial court entered a final judgment of foreclosure against Mr. Dzidzovic. He appealed. By stipulation, the parties voluntarily dismissed the appeal. See Dzidzovic v. Bayview Loan Servicing, LLC, 233 So. 3d 1091 (Fla. 2d DCA 2017). Thereafter, the trial court scheduled a foreclosure sale.

Several weeks before the sale and pursuant to Florida Rule of Civil Procedure 1.540(b), Mr. Dzidzovic filed a "motion to vacate final judgment and dismiss action and motion to enforce settlement or in the alternative to reschedule sale date." He alleged that he had entered into a loan modification agreement with Bayview, following the final judgment, that he was in compliance with the terms of that agreement, and that Bayview was imprudently proceeding with the foreclosure sale.

On the same day that the motion was filed, the trial court, without hearing, entered an order granting the motion, vacated the final judgment, and dismissed the foreclosure action. Bayview filed an unsuccessful motion for rehearing.

Analysis

We "review an order granting a [rule 1.540(b)] motion . . . for abuse of discretion." State Farm Mut. Auto. Ins. Co. v. Statsick, 231 So. 3d 528, 531 (Fla. 2d DCA 2017). Thus, we afford the trial court's ruling a degree of deference, such that it will be affirmed unless the "judicial action is arbitrary, fanciful, or unreasonable . . . .

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[1]Defaults were entered against the codefendants below, including Edina Dzidzovic. None of the codefendants appeared in this appeal.

[D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (second alteration in original) (quoting Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). The trial court's order is problematic for three reasons.

First, by entering the order the same day the motion was filed, and without giving Bayview an opportunity to be heard, the trial court acted ex parte. This was error. "Due process mandates that in any judicial proceeding, the litigants must be afforded the basic elements of notice and opportunity to be heard." E.I. DuPont De Nemours & Co. v. Lambert, 654 So. 2d 226, 228 (Fla. 2d DCA 1995); see also Arcila v. BAC Home Loans Servicing, L.P., 145 So. 3d 897, 898-99 (Fla. 2d DCA 2014) (reversing trial court's ex parte order vacating an order of dismissal); Shlishey the Best, Inc. v. CitiFinancial Equity Servs., Inc., 14 So. 3d 1271, 1274-75 (Fla. 2d DCA 2009) (reversing the trial court's ex parte order granting a motion to vacate a foreclosure sale where the third-party purchaser was provided neither notice nor an opportunity to be heard).

Second, the trial court failed to conduct an evidentiary hearing on the motion. "Where a motion under rule 1.540(b) sets forth 'a colorable entitlement to relief,' the trial court should conduct an evidentiary hearing to determine whether such relief should be granted." Cottrell v. Taylor, Bean & Whitaker Mortg. Corp., 198 So. 3d 688, 691 (Fla. 2d DCA 2016) (quoting Chancey v. Chancey, 880 So. 2d 1281, 1282 (Fla. 2d DCA 2004)). Mr. Dzidzovic's allegation that the parties entered a loan modification agreement was a colorable claim for rule 1.540(b) relief. Cf. Nowlin v. Nationstar Mortg., LLC, 193 So. 3d 1043, 1045 (Fla. 2d DCA 2016) ("We conclude that there was a valid modification agreement between BAC and the Nowlins and, therefore, the trial court erred in entering the judgment of foreclosure.").

Further, "[a] trial court errs in granting a motion for relief from judgment without affording the opposing party an opportunity to be heard at an evidentiary hearing." Arcila, 145 So. 3d at 898; see also Novastar Mortg., Inc. v. Bucknor, 69 So. 3d 959, 960 (Fla. 2d DCA 2011) (holding that the trial court erred in granting rule 1.540(b)(3) motion to vacate without holding evidentiary hearing where allegations supported granting motion, but opposing party presented conflicting affidavit); Avi-Isaac v. Wells Fargo Bank, N.A., 59 So. 3d 174, 177 (Fla. 2d DCA 2011) (reversing and remanding order granting the bank's motion to vacate sale because the purchaser "did not have a meaningful opportunity to be heard when he was denied an evidentiary hearing where he could contest the facts alleged in the affidavit"); McCrea v. Deutsche Bank Nat'l Trust Co., 993 So. 2d 1057, 1058-59 (Fla. 2d DCA 2008) (holding that the trial court's failure to conduct a hearing before vacating a prior order of dismissal based upon ex parte communications with only one of the parties improperly excluded the other party from addressing whether the order should be vacated as the product of mistake under rule 1.540(b)); Monsour v. Balk, 705 So. 2d 968, 969 (Fla. 2d DCA 1998) (holding that trial court erred in denying motion for relief from judgment without "conducting an evidentiary hearing to determine whether or not the facts in the affidavits could be proven"); Schuman v. Int'l Consumer Corp., 50 So. 3d 75, 77 (Fla. 4th DCA 2010) ("[T]he motion for relief from judgment stated a claim of 'colorable entitlement to relief' that would require the trial court to conduct an evidentiary hearing before dismissing the motion.").

Third, the order is not supported by competent substantial evidence. " 'The making of a contract depends not on the agreement of two minds in one intention but on the agreement of two sets of external signs.' A trial court's finding of a meeting

of the minds must be supported by competent substantial evidence." Cheverie v. Geisser, 783 So. 2d 1115, 1119 (Fla. 4th DCA 2001) (first quoting Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985); then citing Roggio-Wilgus v. Marlin, 699 So. 2d 1050 (Fla. 4th DCA 1997)). Because there was no evidence demonstrating the existence of a loan modification agreement, the trial court abused its discretion in granting Mr. Dzidzovic's motion. See Sourcetrack, LLC. v. Ariba, Inc., 34 So. 3d 766, 768 (Fla. 2d DCA 2010) ("[D]iscretion can only be exercised by a court after it has received competent, substantial evidence permitting a discretionary decision."); see also Rude v. Golden Crown Land Dev. Corp., 521 So. 2d 351, 353 (Fla. 2d DCA 1988) ("Absent such evidence, a court's vacation of final judgment constitutes an abuse of discretion.").

Bayview argues that the parties never entered a loan modification agreement. Be that as it may, we are without authority to make such a finding. See Farneth v. State, 945 So. 2d 614, 617 (Fla. 2d DCA 2006) ("A fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact."); Douglass v. Buford, 9 So. 3d 636, 637 (Fla. 1st DCA 2009) ("Sitting as an appellate court, we are precluded from making factual findings ourselves in the first instance."). The trial court, as fact-finder, must make that determination.

In light of the foregoing, we must reverse the order on appeal and remand for the trial court to conduct a hearing. In doing so, we do not opine on Bayview's contention that Mr. Dzidzovic's motion was time-barred. We note that Mr. Dzidzovic filed his motion over one year after entry of the final judgment of foreclosure. This fact is not necessarily dispositive under rule 1.540(b).

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.

Fla. R. Civ. P. 1.540(b). Although "[t]he motion shall be filed . . . for reasons (1), (2), and (3) not more than 1 year after the judgment . . . was entered," the only time constraint for a motion under rule 1.540(b)(5) is that it be filed "within a reasonable time" following entry of judgment. Id. We leave it to the trial court, on remand, to determine the timeliness of the motion in light of an alleged loan modification agreement that may have superseded the foreclosure judgment. See In re Guardianship of Schiavo, 792 So. 2d 551, 560 (Fla. 2d DCA 2001) ("[R]ule [1.540(b)(5)] requires the movant to establish that significant new evidence or substantial changes in circumstances arising after the entry of the judgment make it 'no longer equitable' for the trial court to enforce its earlier order.").

Conclusion

We reverse the order on appeal and remand for further proceedings consistent with this opinion.

Reversed and remanded.

CRENSHAW and LUCAS, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed June 20, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1381
Lower Tribunal No. 15-22197

ASA College, Inc., etc.,
Appellant,

vs.

Dezer Intracoastal Mall, LLC, etc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, John Schlesinger, Judge.

Cole, Scott & Kissane, P.A., and Alexandra Valdes and Scott A. Cole, for appellant.

Coffey Burlington, P.L., and Susan E. Raffanello, for appellee.

Before EMAS, SCALES and LUCK, JJ.

EMAS, J.

ASA College, Inc. ("ASA") appeals the trial court's order denying ASA's motion for temporary injunctive relief and granting temporary injunctive relief to Dezer Intracoastal Mall, LLC ("Dezer"). For the reasons that follow, we reverse the denial of ASA's motion, but affirm the order, insofar as it grants Dezer's motion.

BACKGROUND

The dispute between ASA and Dezer arose out of their respective ownership of two parcels located within the Intercoastal Mall in North Miami Beach (the "Mall Property"). In 2013, Dezer purchased what is hereinafter referred to as the "Center Parcel" and, thereafter, ASA purchased what is hereinafter referred to as the "Office Parcel." When ASA and Dezer purchased their respective parcels, each was subject to an easement—the Amended and Restated Shopping Center Operation and Reciprocal Easement Agreement ("REA")—executed in 1997 by the prior owners of the Center Parcel and the Office Parcel.

In 2014, ASA began operating a college on the Office Parcel, and, according to ASA, Dezer thereafter attempted to limit ASA's ability to utilize certain common-area parking areas of the Center Parcel, which it was entitled to use under the terms of the REA. Specifically, according to ASA, Dezer erected fences on the Center Parcel and advised ASA that it would place signage and implement a window sticker system which would limit ASA and its guests to parking only in a specified portion of the Center Parcel.

ASA sued, seeking, inter alia, temporary and permanent injunctive relief asserting that Dezer violated the REA by interfering with ASA's ability to use the Center Parcel common-area parking. Dezer counterclaimed for, inter alia, temporary and injunctive relief, asserting that, pursuant to the REA, ASA was prohibited from operating a college on the Office Parcel.

ASA's motion for temporary injunction requested the court to enjoin Dezer from "erecting large green fences on common parking areas which ASA has the right to use," and from "threatening to remove [ASA's] easement for common parking rights." Dezer's motion for temporary injunction asked the court to enjoin ASA from operating a "post-secondary educational facility, college, or any use other than office use."

Following an evidentiary hearing, the trial court denied ASA's motion for temporary injunction on the parking dispute and granted Dezer's motion, temporarily enjoining ASA from operating its college on the Office Parcel. ASA appeals, asserting that, as to the parking dispute, the trial court incorrectly construed the terms of the REA, resulting in an erroneous conclusion that ASA could not demonstrate a substantial likelihood of success on the merits. ASA also contends that the trial court abused its discretion in granting Dezer's motion for temporary injunction on the office use dispute. We address each issue in turn.

THE PARKING DISPUTE

Generally, a party seeking a temporary injunction "must establish that: (1) irreparable injury will result if the injunction is not granted, (2) there is no adequate remedy at law, (3) the party has a clear legal right to the requested relief,[1] and (4) the public interest will be served by the temporary injunction." Bay N Gulf, Inc. v. Anchor Seafood, Inc., 971 So. 2d 842, 843 (Fla. 3d DCA 2007). "A preliminary injunction is an extraordinary remedy which should be granted sparingly." Garcia v. Dumenigo, 46 So. 3d 1085, 1087 (Fla. 3d DCA 2010) (quoting City of Jacksonville v. Naegele Outdoor Adver. Co., 634 So. 2d 750, 752 (Fla. 1st DCA 1994)) (additional citation omitted).

In denying ASA's motion for temporary injunction on the parking dispute, the trial court determined that ASA had proven all of the requisite prongs for obtaining the injunction, with the exception of demonstrating a substantial likelihood of success on the merits. Specifically, the court determined that, although the REA contains general language providing ASA an easement to park in certain common-area parking areas in the Center Parcel, a more specific provision of the REA limits ASA to 100 parking spaces in the Office Parcel, and therefore, ASA could not demonstrate a substantial likelihood of success on the merits of its action.

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[1] This prong is alternatively described as a substantial likelihood of prevailing on the merits. See Miami-Dade Cty. v. Concrete Structures, Inc., 114 So. 3d 333 (Fla. 3d DCA 2013).

Although we generally review such orders for an abuse of discretion, Anchor Seafood, 971 So. 2d at 843, to the extent the order is based on the trial court's interpretation of a contract, we apply a de novo standard of review. Telemundo Media, LLC v. Mintz, 194 So. 3d 434, 435 (Fla. 3d DCA 2016). See also Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1258 (Fla. 2017) (holding: "The standard of review of trial court orders on requests for temporary injunctions is a hybrid. To the extent the trial court's order is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review") (internal citation omitted).

Because the trial court's denial of ASA's motion was premised upon its construction of the terms of the REA, we apply the de novo standard of review. Applying this standard, we conclude that the trial court erred in its construction of the REA, and that, under a correct construction of the terms of the REA, ASA satisfied the "substantial likelihood of success on the merits" prong.

The relevant sections of the REA provide:

> ARTICLE I
> DEFINITIONS
>
> As used in this REA, the following terms have the following meanings:
>
> . . .
>
> 1.3. *Common Area*.

"Common Area" means **all areas within the boundary of the Center Parcel or Office Parcel that are, or are designated or intended to be, available for the non-exclusive use, convenience and benefit of all Occupants (as hereinafter defined) of the Office Parcel and Center Parcel and their respective Permittees** (as hereinafter defined).

Among other things, **Common Area includes** by way of illustration and not of limitation: (a) Access Roads; (b) **the Parking Area (as hereinafter defined)**; (c) sidewalks and walkways . . .

. . .

1.9. *Occupant*

"Occupant" or "Occupants" means any Person entitled by Lease to use and occupy any area within the Center or the Office Parcel.

. . .

1.11. *Parking Area*. .

"Parking Area" means all areas in the Center or Office Parcel which are set apart or used from time to time for automobile and other vehicle traffic and parking, including, without limitation, traffic lanes, aisles and roadways (including Access Roads) and curbs adjacent thereto; vehicle parking stalls at grade or in multi-level parking decks; pedestrian walkways, grade separations, including retaining walls; lighting standards; and traffic and directional signals and all amenities relating thereto.

1.12. *Party*.

A "Party" means Center Owner or Office Owner and "Parties" mean all of the foregoing, or any successor Person(s) acquiring the leasehold and/or fee interest, as the case may be, of a Party in or to any portion of such Party's Parcel.

1.13. *Permittees*

"Permittees" means all Occupants and their respective officers, directors, employees, agents, partners, contractors, customers, visitors, invitees, licensees and concessionaires.

. . .

ARTICLE II
EASEMENTS

2.1. *Definitions and Documentation*.

For purposes of this Article, the following will apply:

(a) All rights, privileges and easements granted herein for the benefit of a Party (the "Grantee") are nonexclusive and in common with the party granting such rights, privileges and/or easements (the "Grantor") and, unless provided otherwise, are irrevocable and for the benefit of each of the Parties hereto and their respective successors and assigns as owners of their respective Parcels.

. . .

2.2 *Easements for Use of Common Areas (Other than Common Utility Facilities and Access Roads)*.

(a) **Center Owner hereby grants to Office Owner an easement in the Common Areas on the Center Parcel** (other than the Access Road portions thereof referred to in Section 2.3 and the Common Utility Facilities referred to in Section 2.4) for the benefit of the Office Parcel for:

(1) ingress to and egress from the Office Parcel; and
(2) circulation, passage **and parking of vehicles, subject to Section 6.2**; and
(3) circulation, passage and accommodation of pedestrians;

provided, however, that such easements are limited to such portions of the Common Area of the Center Parcel as are set aside, required and authorized for such use.

(b) Office Owner, to the extent any portion of the Office Parcel constitutes roadway, pedestrianways or parking spaces, hereby grants to Center Owner an easement in the Common Areas on the Office Parcel for the benefit of the Center Parcel for:

(1) ingress to and egress from the Center Parcel; and
(2) circulation, passage and parking of vehicles; and
(3) circulation, passage and accommodation of pedestrians; provided, however, that such easements are limited to such portions of the Common Area of the Office Parcel as are set aside, required and authorized for such use.

. . .

ARTICLE VI
PARKING REQUIREMENTS

6.1. *Parking Spaces.*

Occupants of the Office Parcel and their Permittees shall have the right to use up to one hundred (100) non-designated parking spaces on the Office Parcel for parking automobiles, subject to those rules and regulations applicable to other users of parking spaces thereon.

6.2. *Charges for Parking; Employee Parking Areas*.

No specific charge shall be made to or collected from any Occupants or Permittees on the Office Parcel for the right to park vehicles in the Parking Areas other than the payment by Office Owner of its share of the Common Area expenses.

Although section 6.1 establishes a limit of 100 parking spaces on the Office Parcel that may be used by Occupants of the Office Parcel (e.g., ASA) and their Permittees, there is no similar limitation on the easement granted in section 2.2(a) for parking by the Office Owner (i.e.,

ASA) in the common areas located within the Center Parcel. The only limitation on the easement established in section 2.2(a) is that it is "subject to section 6.2," which simply provides that the Occupants or Permittees on the Office Parcel shall not be charged for parking, other than what Office Owner (ASA) must pay as its share of common area expenses.

Thus, contrary to the trial court's interpretation that the "specific provision" of section 6.1 controls over the REA's "general contents," there is no conflict between sections 2.2(a) and 6.1, and thus no need to determine which provision "controls." Instead, the plain language contained within these two provisions can be read in harmony: under section 6.1, the Office Parcel's occupants and permittees (including ASA) have the right to use up to 100 spaces for parking on the Office Parcel, and, additionally under section 2.2(a), the Office Owner (ASA) has an easement to use the common-area parking areas of the Center Parcel, which is not limited in any manner by section 6.2. See City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000) (acknowledging "the rule of construction requiring courts to read provisions of a contract harmoniously in order to give effect to all portions thereof").

Accordingly, because we conclude that the trial court erred in its interpretation of the plain language of the REA, resulting in an erroneous determination that ASA failed to establish a substantial likelihood on the merits (while finding ASA satisfied the

remaining prongs needed for a temporary injunction), we reverse the court's denial of ASA's motion for a temporary injunction and remand for entry of a temporary injunction in favor of ASA. See St. Johns Inv. Mgmt. Co. v. Albaneze, 22 So. 3d 728 (Fla. 1st DCA 2009) (reversing denial of motion for temporary injunction where trial court's construction of contract conflicted with its plain meaning and thus, holding it was error for the trial court to find that appellant failed to demonstrate a substantial likelihood of success on the merits).

THE OFFICE USE DISPUTE

In temporarily enjoining ASA's operation of a college on the Office Parcel, the trial court determined that Dezer had established the requisite elements for obtaining such relief, to wit: irreparable injury, no adequate remedy at law, a substantial likelihood of success on the merits and that the injunction will serve the public interest.

Article VII of the REA provides in pertinent part:

> ARTICLE VII
> GENERAL COVENANTS
>
> . . .
>
> 7.2. *Limitation on Detrimental Characteristics*
> No use, operation or occupancy will be made, conducted or permitted on any part of the Office Parcel which use or operation is obviously detrimental to the operation of the Center in the reasonable judgment of Center Owner. **Included among the uses or operations which are prohibited** because of their obvious detriment to retail stores, merchandise or services usually found in a retail center, as well as their obvious detrimental effect upon the general appearance of the

> Center are uses or operations which produce or are accompanied by characteristics such as, but not limited to, the following:
>
> (a) Any noise, litter, odor or other activity which may constitute a public or private nuisance;
> (b) Any physically damaging or dangerous hazards;
> (c) Any dumping, disposal, incineration or reduction of garbage or refuse; or
> **(d) Any use of the Office Parcel for other than office use.**

We find no abuse of discretion in the trial court's decision to temporarily enjoin ASA from operating a college on the Office Parcel, pending a final decision on the merits. Although ASA is correct that the purpose of a temporary injunction, generally, is to preserve the status quo, Garcia v. Dumenigo, 46 So. 3d 1085, 1087 (Fla. 3d DCA 2010), this is only so where a failure to maintain the status quo will result in irreparable injury. Wexler v. Lepore, 878 So. 2d 1276 (Fla. 4th DCA 2004). And this court has previously held that where a restrictive covenant is involved, the party seeking to enforce the covenant need not establish irreparable injury. Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., Ltd., 563 So. 2d 103, 105 (Fla. 3d DCA 1990). In addition, "a mandatory injunction is the proper means of enforcing a restrictive agreement affecting real estate." Fox v. Madsen, 12 So. 3d 1261, 1263-64 (Fla. 4th DCA 2009). Accordingly, we affirm the trial court's order granting Dezer's motion for temporary injunctive relief.[2]

Affirmed in part, reversed in part, and remanded with directions and for further proceedings consistent with this opinion.

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[2] We find no merit in ASA's additional arguments on appeal.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

RONALD G. LENZI,
Appellant,

v.

THE REGENCY TOWER ASSOCIATION, INC.,
Appellee.

No. 4D17-2507

[June 20, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; David A. Haimes, Judge; L.T. Case No. CACE 17-006833.

Louis Arslanian, Hollywood, for appellant.

Josef M. Fiala of Vernis & Bowling of Palm Beach, P.A., North Palm Beach, and Jeffrey Green of Kaye Bender Rembaum, P.L., Pompano Beach, for appellee.

FORST, J.

Appellant Ronald Lenzi appeals the trial court's final judgment in favor of appellee The Regency Tower Association, Inc. ("the Association"). Appellant argues that the trial court misinterpreted the declaration of condominium ("the Declaration") by holding that the Declaration enabled the Board of Directors of the Association ("the Board") to unilaterally make any alterations to the common areas of the property. We reject Appellant's arguments and affirm.

Background

Appellant owned a condominium at Regency Tower. In late 2016, the Board voted to alter the flooring in the lobby of the condominium building from Carrara marble to ceramic tile. In response, Appellant filed a petition for arbitration attempting to overturn the Board's decision. Appellant argued that because the Declaration did not include a separate provision detailing the procedure for approving "material" alterations, section 718.113(2)(a), Florida Statutes (2016) precluded the Association from unilaterally making this material alteration. Section 718.113(2)(a)

provides that if a declaration "does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions." *Id.*

The Association disagreed and filed a motion to dismiss for failure to state a cause of action. It explained that the Declaration was not silent since Article XIX, titled "Right of Association to Alter and Improve Property and Assessment Therefor," stated that the Association had the power to make "such alterations or improvements to the COMMON PROPERTY" with merely the approval of the Board. The arbitrator agreed with the Association, and held that the phrase "such alterations or improvements" was broad and encompassed material alterations.

Seeking alternative redress, Appellant filed suit in the trial court, making the same argument that he made in the arbitration. In response, the Association filed a motion for judgment on the pleadings, again arguing that the complaint failed to state a cause of action. The trial court granted this motion, and entered final judgment in favor of the Association.

Analysis

"A trial court's interpretation of a condominium's declaration is . . . reviewed de novo." *Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n, Inc.*, 105 So. 3d 579, 580 (Fla. 3d DCA 2012).

"In construing the language of a contract, courts are to be mindful that 'the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.'" *Murley v. Wiedamann*, 25 So. 3d 27, 29 (Fla. 2d DCA 2009) (quoting *Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009)).

Section 718.113(2)(a) states that "there shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein." *Id.* It is undisputed that the lobby is a common element of the condominium, and that replacing the flooring as proposed was a material alteration. The issue before us is whether Article XIX of the Declaration "specif[ies] [a] procedure" the Association must follow to make "material" alterations to the common property. § 718.113(2)(a), Fla. Stat. The Association argues, and the trial court held, that the term "such alterations or improvements" in the Declaration should be construed as

covering both ordinary and material alterations or improvements. Under this construction, only Board approval is required.

We have previously explained that, unless they are defined, "terms 'should be given their plain and unambiguous meaning as understood by the "man-on-the-street."'" *Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, 1001 (Fla. 4th DCA 2010) (quoting *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. 3d DCA 2002)). "Whether they appear in a statute or in a declaration of condominium, words of common usage should be construed in their plain and ordinary sense." *Schmidt v. Sherrill*, 442 So. 2d 963, 965 (Fla. 4th DCA 1983).

A similar issue was addressed in *Martin v. Ocean Reef Villas Association, Inc.*, 547 So. 2d 1237 (Fla. 5th DCA 1989). There, the homeowner plaintiffs requested the appellate court "to construe the word 'mortgage' to mean *only* a purchase money mortgage." *Id.* at 1238. The court refused to do so, stating "[i]n construing a statute or a declaration of condominium, words of common usage should be construed in their plain and ordinary sense." *Id.* (citing *Koplowitz v. Imperial Towers Condo., Inc.*, 478 So. 2d 504, 505 (Fla. 4th DCA 1985)). *See also Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 191 (Fla. 2013) (concluding "[a]s the Legislature did not add the word 'judicial' before the word 'proceeding,' limiting the term 'proceeding' to apply to only judicial proceedings construes this term in a manner contrary to the language of the statute and the Legislature's intent.").

In *Benson v. City of Madison*, 897 N.W.2d 16 (Wis. 2017), the court applied the "general-terms canon" to conclude, based on the plain meaning of the word "corporation," that "the general term 'corporation' . . . presumptively should be read to include more specific types of corporations." *Id.* at 24. The "general-terms canon" posits that "[w]ithout some indication to the contrary, general words (like all words, general or not) are to be accorded their full and fair scope [and] are not to be arbitrarily limited." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012). "[T]he presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions . . . in the end, general words are general words, and they must be given general effect." *Id.*

In the instant case, Appellant essentially asks us to "arbitrarily limit[]" the scope of the word "alterations," converting it to mean only "non-material alterations." We decline, as it is clear that "alterations" refers to all alterations, not only non-material alterations. In fact, Black's Law Dictionary, although acknowledging that "real-estate lawyers habitually

use *alteration* in reference to a lesser change," nonetheless also recognizes that the word encompasses all manner of alterations: "*any* addition or improvement of real estate is by its very nature an alteration." *Alteration*, BLACK'S LAW DICTIONARY (10th ed. 2014) (second emphasis added). If our choice in dealing with a word used in a condominium declaration is to choose between the legal parlance amongst real estate lawyers versus the generally understood definition of the term, we stand with the latter. *See Scudder v. Greenbrier C. Condo. Ass'n, Inc.*, 663 So. 2d 1362, 1367 (Fla. 4th DCA 1995) ("In construing a statute or a declaration of condominium, words of common usage should be construed in their plain and ordinary sense.").

Conclusion

The language of Article XIX of the Declaration provides a manner for the approval of *all* alterations, material and otherwise, by Board vote. Thus, the Board could, as a matter of law, vote to alter the flooring in the lobby from marble to tile without the approval of seventy-five percent of the unit owners. We therefore affirm the trial court.

Affirmed.

DAMOORGIAN and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.