KILPATRICK TOWNSEND
ATTORNEYS AT LAW

KILPATRICK TOWNSEND & STOCKTON LLP
www.kilpatricktownsend.com

2001 Ross Avenue, Suite 4400
Dallas, TX 75201
t 214 922 7100 f 214 922 7101

MPA
AMERICA

direct dial 214 922 7112
direct fax 214 853 5731
JSteed@kilpatricktownsend.com

July 20, 2021

Blake Hawthorne, Clerk
SUPREME COURT OF TEXAS
P.O. Box 12248
Austin TX 78711

Re: Case No. 20-0462, *Sirius XM Radio Inc. v. Glenn Hegar, Comptroller of Public Accounts, and Ken Paxton, Attorney General*

To the Honorable Clerk of the Court:

Please forward this letter brief to the justices of the Court on behalf of the Motion Picture Association, writing as *amicus curiae* in support of Sirius XM's petition for review.

Interest of *Amicus Curiae*

The Motion Picture Association, Inc. (MPA) submits this letter-brief as *amicus curiae* in support of Sirius XM Radio Inc.'s petition for review because the MPA's members have serious concerns about the uncertainties created by the Comptroller's actions and by the Austin Court of Appeals' opinion.

The MPA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture and television industry. Since then, the MPA has served as the voice and advocate of the film and television industry around the world, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide.

The MPA's member companies are Walt Disney Studios Motion Pictures; Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; and Warner Bros.

Entertainment Inc.[1] The MPA's members provide subscription-based streaming video services that, in production and delivery, are very similar to the radio services provided by Sirius XM—meaning most of the services provided by most of the MPA's members are produced and performed outside Texas, and received by customers nationwide, including customers in Texas. Most of the MPA's members also engage in advertising, and pay taxes on advertising revenue based on the same apportionment rules that are at issue in this case.

The MPA is concerned that the Comptroller's recent actions—and the Austin Court of Appeals' opinion—have created substantial uncertainty about the tax burden that the MPA's members must carry, reversing decades of precedent and perhaps drastically increasing the size of that burden.

The MPA's members are bearing the costs associated with writing and submitting this letter-brief, and no party to this case (or counsel for a party to this case) has participated in the preparation or filing of this letter-brief.

1. The Comptroller's actions belie the Comptroller's claims.

In its response to Sirius XM's petition, the Comptroller claims that the court of appeals "broke no new ground, made no new law, and adopted no new test." Resp. to PFR viii, 1, 5. According to the Comptroller, when it audited Sirius XM and "determined that Sirius XM's subscription receipts should be apportioned based on the location [of Sirius XM's subscribers]," instead of on the location of its production facilities (where its services are produced or performed), the Comptroller was merely doing things the way they had always been done. *See id.* at 3, 8–10, 14 (claiming Comptroller "has consistently applied the applicable legal principle, which has not been changed by the Legislature in the past forty years"); *see also* Resp. Br. 1, 29 (claiming Comptroller has taken same approach "for decades").

The Comptroller's claims are belied by the Comptroller's actions. Echoing the assertions made by Sirius XM, the MPA and its members can attest that Texas's apportionment rules have always been applied in a way that apportioned receipts or taxable revenue based on the location where services were "performed"—typically meaning the location(s) of production facilities (and the costs of production)[2]—and **not** based on the location where those

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[1] For the purposes of this letter-brief, references to the MPA's "members" or "member companies" include reference to the corporate affiliates that own and operate streaming services.

[2] Here, "production" is used more broadly than it is used in the film and television industry, and might refer to activities related to the creation,

services were received by customers. *See*, *e.g.*, *Westcott Commc'ns, Inc. v. Strayhorn*, 104 S.W.3d 141 (Tex. App.—Austin 2003, pet. denied). Sirius XM appears to have followed these well-established apportionment rules when it originally filed its tax returns. *See* CR3150 (¶ 6). But instead of following its usual practice, the Comptroller used its audit of Sirius XM's returns as an opportunity to change the longstanding application of the apportionment rules, through its reapportionment of Sirius XM's receipts, and through its imposition of an additional $2.5 million in taxes. *See* CR3150 (¶¶ 7–8).

The trial court correctly recognized the longstanding application of apportionment rules and undid the Comptroller's effort to unilaterally change those rules. *See* CR3149–3155, CR3161–3162. But the Comptroller appealed and persuaded the court of appeals to break from its own precedent (*Westcott*) so that the Comptroller could apply the apportionment rules differently, in a way that apportioned taxable revenue based on the location where services were received by customers. *See* Op. 13.

Tellingly, after the court of appeals issued its opinion (in May 2020), the Comptroller immediately proposed and adopted changes to the apportionment rules. *See* 45 TexReg 8104 (Nov. 13, 2020) (proposing changes); 2021 TX REG TEXT 570096 (NS) (adopting proposed changes); *see also* Resp. Br. 4 n.1 (acknowledging amendments). As of January 24, 2021, Section 3.591(e)(26) of the Texas Administrative Code now states that "[g]ross receipts from a service are sourced to the location where the service is performed," and Section 3.591(e)(26)(A) defines "[l]ocation of performance" as "the location of the receipts-producing, end-product act or acts"—explicitly excluding consideration of "the location of other acts," such as the location of production facilities where the services were created or produced. 35 Tex. Admin. Code § 3.591(e)(26). The prior version of Section 3.591(e)(26)—the version that applies to this case—did not contain this definition of "[l]ocation of performance." *See* 32 TexReg 52. And this new language appears to have been taken straight from the court of appeals' opinion.

If, as the Comptroller claims, the court of appeals "broke no new ground, made no new law, and adopted no new test" (Resp. to PFR 5); if the Comptroller was just doing things the way things had always been done, applying the apportionment rules the same way they had been applied "for decades" (Resp. Br. 1); and if the court of appeals was just applying "a plain reading of the Tax Code" and a "straightforward" interpretation of Section

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development, composition, or distribution of services—and not only to the actual filming of a movie or television show.

3.591(e)(26) (*id.* at 1, 16, 29)—then why would the Comptroller need to immediately amend Section 3.591(e)(26) to include new language from the court of appeals' opinion?

An amendment indicates a substantive change in the law. *See Ross v. Blake*, --- U.S. ---, 136 S.Ct. 1850, 1858 (2016) (citing *Stone v. INS*, 514 U.S. 386, 397 (1995)); *Risner v. Harris Cnty. Republican Party*, 444 S.W.3d 327, 343 (Tex. App.—Houston [1st Dist.] 2014); *Tex. D.O.B. v. Mt. Olivet*, 27 S.W.3d 276, 285 (Tex. App.—Austin 2000); *Assoc. Gen. Contractors of Tex., Inc. v. City of El Paso*, 879 S.W.2d 318, 319–320 (Tex. App.—El Paso 1994). By all appearances, Sirius XM filed its 2009 and 2010 tax returns in accordance with the way the apportionment rules had always been understood and applied—and the Comptroller unilaterally changed that longstanding application when it audited Sirius XM's returns and imposed $2.5 million in new taxes. By amending Section 3.591 to incorporate the "receipts-producing, end-product act" language from the court of appeals' opinion, the Comptroller essentially confirmed that the court of appeals' adoption of this language—and of this new test—represented a substantive change in the law.

Perhaps the Comptroller's new way of doing things is now reflected in the new 2021 version of Section 3.591.[3] But this Court should grant review to clarify that the Comptroller's new way of doing things is, indeed, new—and that, regardless of whether the Comptroller's new approach applies going forward, it did **not** apply under the previous version of Section 3.591.[4]

2. The court of appeals' opinion creates substantial uncertainties.

The MPA shares the various concerns voiced by Sirius XM and the other *amici*, about the substantial uncertainties created by the court of appeals' opinion and by the Comptroller's actions.[5] But the MPA has an additional

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[3] Whether, going forward, the Comptroller can enforce its new way of doing things under this new version of Section 3.591 depends, of course, on whether the new version of Section 3.591 conflicts with the plain language of the Tax Code. *See* Sirius XM's Br. 30–32.

[4] By making this clarification, the Court can also resolve the conflict between the court of appeals' new opinion and its prior opinion in *Westcott*. *See* Sirius XM's Br. 2, 18–20, 29–30; Tax Exec. Inst., Inc.'s Amicus Br. 4–10; Br. of Council on State Taxation & Tex. Taxpayers and Research Assoc. as *Amici Curiae* 4–9.

[5] *See* Sirius XM's Br. 32–34; Amicus Curiae Br. by Broadband Tax Inst. 8–12; Tax Exec. Inst., Inc.'s Amicus Br. 11–14; Br. of Council on State Taxation & Tex. Taxpayers and Research Assoc. as *Amici Curiae* 9–11.

concern about uncertainty that has not been addressed by the other parties—and the MPA respectfully asks the Court to grant review to dispel or resolve these uncertainties.

As noted, an amendment to a statute or regulation typically indicates a substantive change in the law. (See cases cited in Part 1, above.) In limited circumstances, however, an amendment may simply clarify what the law has always been. *See Hegar v. Am. Multi-Cinema, Inc.*, 605 S.W.3d 35, 44–45 (Tex. 2020) (distinguishing between substantive amendments and clarifying amendments); *see also Braxton v. United States*, 500 U.S. 344, 347–348 (1991) ("Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations."); *Greenbrier Hosp., LLC v. Azar*, 974 F.3d 546, 549 (5th Cir. 2020) (noting particular amendment to regulation "does not reflect a change in policy, rather, it conforms the regulation text to the actual policy").

Here—given the Comptroller's claims before the court of appeals and now before this Court—the Comptroller may try to claim that its 2021 amendments to Section 3.591 made no substantive changes, but only clarified what the law has always been. And the case law suggests that, when an amendment merely clarifies what the law has always been, the amendment applies retroactively without violating the usual prohibitions against retroactivity. *See Hegar*, 605 S.W.3d at 44–45 (indicating clarifying amendment applies to past claims but substantive amendment does not); *see also Am. Bankers Ins. Co. v. State*, 768 S.W.2d 377, 379 (Tex. App.—Dallas 1989) (holding amendment that "is a substantive change in the law…should not be applied retroactively"—implying nonsubstantive amendment might be retroactive). The MPA is therefore seriously concerned about the potential retroactive tax liabilities that the court of appeals' opinion may have created.

For years, the MPA's member companies have filed Texas tax returns (and reported to the SEC) based on their understanding of Texas's apportionment rules, which aligns with Sirius XM's position in this case. If, as the Comptroller now claims, the "receipts-producing, end-product act" approach to apportionment—*i.e.*, the customer-location approach to apportionment—is what the law has always been, then the MPA is concerned that the Comptroller may seek to impose additional taxes on the MPA's member companies, just as it imposed additional taxes on Sirius XM. *See* CR3150 (¶¶ 7–8).

Whether the Comptroller can impose additional taxes going forward, under the newly amended version of Section 3.591, is a question that is not

presented in this case. But the court of appeals' opinion—which predates the amendments to Section 3.591—essentially ratifies and substantiates the Comptroller's claim that the customer-location approach to apportionment was always the law, even before the Comptroller amended Section 3.591. *See* Op. 10–13. This is contrary to how Sirius XM and the MPA's member companies previously understood the law. The court of appeals' opinion therefore creates substantial uncertainties about whether the Comptroller can seek to impose additional past-due taxes on all companies that have been doing business in Texas for years—including the MPA's member companies.

Such tax uncertainties are intolerable.

For these reasons, the MPA respectfully asks the Court to grant review and to resolve these uncertainties by reversing the court of appeals' opinion and by holding that the Comptroller's "receipts-producing, end-product act" approach to apportionment is a new, substantive change that—though it may apply going forward, under the 2021 version of Section 3.591—did **not** apply under the previous version of Section 3.591(e)(26).

Respectfully,

/s/ *Jason P. Steed*
Jason P. Steed
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas TX 75201
(214) 922-7112
jsteed@kilpatricktownsend.com

Counsel for the Motion Picture Association, Inc. as *Amicus Curiae*