

Opinion of BREYER, J.

SUPREME COURT OF THE UNITED STATES

No. 98–10

JEFFERSON COUNTY, ALABAMA, PETITIONER v.
WILLIAM M. ACKER, JR., SENIOR JUDGE, UNITED
STATES DISTRICT COURT, NORTHERN DIS-
TRICT OF ALABAMA, AND U. W. CLEMON,
JUDGE, UNITED STATES DISTRICT
COURT, NORTHERN DISTRICT
OF ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[June 21, 1999]

JUSTICE BREYER, with whom JUSTICE O’CONNOR joins,
concurring in part and dissenting in part.

I agree that we have jurisdiction to hear the merits of
this case, and I join Parts I, II, and III of the Court’s
opinion. I do not agree with the majority, however, about
the constitutionality of the tax.

If Jefferson County’s license fee amounts to a tax im-
posed directly upon a federal official’s performance of his
official duties, it runs afoul of the intergovernmental tax
immunity doctrine. See *United States v. New Mexico*, 455
U. S. 720, 733 (1982) (“[A] State may not, consistent with
the Supremacy Clause, U. S. Const., Art. VI, cl. 2, lay a
tax ‘directly upon the United States’”) (citation omitted);
James v. Dravo Contracting Co., 302 U. S. 134, 157 (1937);
e.g., *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187, 190
(1956) (*per curiam*) (“[I]mmunity” of federal “instru-
ments” from state control in performance of duties ex-
tends to state requirement that “they desist from per-
formance” until they take an examination to satisfy the

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State “that they are competent” and “pay a fee for permission to go on”) (quoting *Johnson v. Maryland*, 254 U. S. 51, 57 (1920)). On the other hand, if Jefferson County’s license fee amounts to an income tax, there is no constitutional problem. See *Graves v. New York ex rel. O’Keefe*, 306 U. S. 466, 486 (1939); Public Salary Tax Act of 1939, 4 U. S. C. §111. The question here is whether Jefferson County’s license fee is a fee for the performance of official federal duties or, rather, whether it is an income tax on federal employees. In my view, it is the former.

I

I concede that Jefferson County measures the amount of its tax by taking a small percentage of the “gross receipts” or income derived from the licensed activity. Jefferson County Ordinance No. 1120, §1(F) (1987). The way in which a State measures a tax, however, is only one relevant feature. A state law, for example, that imposed fines upon all appellate judges who took too long in issuing decisions, cf. Cal. Govt. Code Ann. §68210 (West 1997) (salary withheld from tardy judges), would not suddenly become an “income tax” if the State began to measure the tax or fine, say, in terms of a small percentage of the judge’s federal income tax liability. Nor would a similar tax imposed upon a judge each time he administers an official oath automatically become an “income tax.” Neither would a driver’s license fee or a motor vehicle license fee become an “income tax” should imaginative state legislators make the fees “progressive” by devising some similar system of measurement. Consequently, one must look beyond that single feature of measurement in order to determine the nature of the tax as it operates in practice. Cf. *Lawrence v. State Tax Comm’n of Miss.*, 286 U. S. 276, 280 (1932). And four specific features of this rather unusual tax, taken together, convince me that it is not an “income tax.”

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First, the language, structure, and purpose of the ordinance indicate that it imposes a fee upon the performance of work, not a tax upon income. The ordinance is entitled “Occupational Tax.” It describes its purpose as establishing a “license . . . tax” or a “tax” on the “privilege” of engaging in a “vocation, occupation, calling or profession.” Ordinance No. 1120, preamble. And its operative language speaks in terms of a condition imposed upon work, not of a tax upon income. It says that it

“*shall be unlawful for any person to engage in or follow [with certain exceptions] any vocation, occupation, calling or profession . . . without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession*” §2 (emphasis added).

The state law that authorizes the county’s tax describes its own purpose as one of “equaliz[ing] the burden of taxation,” and it authorizes the county “to levy a license or privilege tax upon any person for engaging in any business” *other* than a business already subject to other state or county licensing fees, liability for which is triggered, not by income, but by engaging in the work. See 1967 Ala. Acts 406, §§3, 4; see generally Appendix, *infra*, at 11–17. Indeed, the Alabama Supreme Court has found as a matter of state law that a municipal tax very similar in substance to Jefferson County’s tax was an occupational license tax, rather than an income tax. See *McPheeter v. Auburn*, 288 Ala. 286, 292, 259 So. 2d 833, 837 (1972).

Second, the tax, as measured, works more like a licensing fee than an income tax. On the one hand, the tax calculation *does not include* many kinds of *income*, such as retirement income, dividends, interest, or other unearned income, or earned income if that income is earned outside the county—irrespective of how much income is involved. See Ordinance No. 1120, §1(F). On the other hand, by the

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terms of the ordinance, not only a county resident but also a nonresident who works some of the time in Jefferson County, §§1(B), 3, must pay the tax as long as he becomes “entitled to receive” pay for his work, even if he receives that pay only in a later year or *never receives any income* at all, see §1(F). And, of course, as I mentioned earlier, the event that triggers liability is not the receipt of income but the person’s “engag[ing]” in certain work. §2.

Third, Jefferson County’s tax is riddled with exceptions, which make sense only if one sees the tax as part of a state-wide occupational *licensing* scheme, not as an income tax. See 1967 Ala. Acts 406, §4 (authorizing counties to impose a license tax only in respect to occupations not subject to state, or other county, licensing taxes). The ordinance excludes from its definition of “vocation, occupation, calling and profession” domestic servants, those engaged in occupations licensed elsewhere by the county, and those engaged in the more than 150 occupations licensed by the State. Ordinance No. 1120, §1(B). This last-mentioned category is large. Its members range from architects to amusement park operators, from detectives to dentists, from laundry owners to lawyers, from sewing machine operators to scientists. See generally Ala. Code §40–12–41 *et seq.* (1993); Appendix, *infra*, at 11–17. And the licensing fees that the State exacts from this range of individuals are, with only a few exceptions, all unrelated to income. Each attorney, for example, pays “an annual license tax to the state” in the amount of \$250, §40–12–49; each civil, electrical, or mechanical engineer pays \$20, §40–12–99; and each ticket scalper pays \$100, §40–12–167. Some fees vary depending upon special industry-related features, such as population (*e.g.*, advertising, §40–12–45; amusement park operators, §40–12–47), number of employees (*e.g.*, automobile garages or shops, §40–12–54), or business size (*e.g.*, soft-drink bottlers, number of bottles per minute, §40–12–65; construction companies, value of

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orders accepted, §40–12–84; vending machine operators, total sales, §40–12–176). License fees for a handful of businesses are measured by the income or gross receipts of the company (not of a private person). See §40–16–4 (certain financial institutions); §§40–21–50, 40–21–53 (public utilities); §40–21–57 (railroad operators); §40–21–60 (“express” shipping companies).

These many exceptions to the ordinance mean that individuals with identical pay earned from work performed within Jefferson County will pay very different amounts in license fees. Such differences are not surprising where occupational licensing fees are at issue, as different license charges with different legislative pedigrees and applied to different industries often vary dramatically one to the next. Cf. *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159 (1930) (State “may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products” without violating the Fourteenth Amendment’s Equal Protection and Due Process Clauses). But I am not aware of any *income tax* that would produce such widespread differences in the tax owed by persons with identical incomes. Nor can Jefferson County separate its own tax from the rest of the State’s licensing system by claiming that its own tax is different in kind. It would not make sense for a county income tax to exempt an engineer entirely, simply because he had paid the State \$20 for a license; at most a county income tax might provide a \$20 deduction from, or credit against, the amount of income tax due to the county. But, of course, if the county’s tax is simply another *licensing fee*, then this structure makes sense. The engineer does not pay the county anything at all, because he has already paid a licensing fee to the State; the county charge would be redundant. The empirical significance of these factors depends upon the makeup of the work force in Jefferson County (e.g., to what extent is Jefferson County made up

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of bedroom communities whose residents work elsewhere), a matter about which the record tells us nothing.

Fourth, Jefferson County's ordinance directly imposes upon the Federal Government (the federal official's employer) burdens that to a limited extent exceed those imposed by an ordinary state or local income tax. The ordinance requires the employer, obliged to withhold the tax, to determine where the employee has spent each working day and apportion related wages accordingly. Ordinance No. 1120, §§3, 4. The task of apportioning an employee's workday is more complicated and more closely connected to official duties than simply determining where an employee resides—the conventional "income tax" recordkeeping requirement. Similarly, a tax liability that arises from having worked on a particular day in a particular place, together with related and complex recordkeeping requirements, creates a risk that the tax will have a practical influence upon official decisions in a way that an ordinary income tax will not. (Consider, for example, a federal criminal case in which the defendant seeks a change of venue to Jefferson County. *E.g.*, *United States v. Tokars*, 839 F. Supp. 1578 (ND Ga. 1993); see 92 F. 3d 1561, 1573, and n. 18. (CA11 1996).) Further, the ordinance's language says it is unlawful for a federal employee who has not paid the tax to perform his work—that is, it prohibits "engag[ing]" in that work. Ordinance No. 1120, §2. This language, which I assume could not actually authorize an injunction against the performance of federal work, could nonetheless have an unwelcome impact on a conscientious but tax-delinquent judge who has sworn to uphold the law.

I recognize that one might find income taxes that embody one or two of the features that I have just discussed. Income taxes come in many shapes and sizes. But I do not claim that any one or two of the considerations I have mentioned is sufficient to prove my point. Rather, it is all

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these features taken together that tip the balance.

The majority either ignores or attempts to distinguish each of these features on its own, as by itself potentially unconstitutional or found in other income taxes. *Ante*, at 14–17. But it is a consideration of the whole, not of each separate part, that leads to my conclusion. To properly characterize a tax, all of its distinguishing features must be properly taken into account. Each of the features discussed above seems an *odd* or *unusual* feature of an income tax but an *ordinary* feature of a licensing fee. *Taken together*, these features show that the tax before us is so different from an ordinary income tax, and so much like a licensing fee, that for federal constitutional purposes I must conclude that Jefferson County has imposed an occupational or license tax— that is, a fee for obtaining a license to engage in official work— just as the county in its ordinance purports to do.

II

Jefferson County argues that, in any event, the United States has consented to the imposition of the tax. It points first to the Public Salary Tax Act of 1939, which grants federal consent “to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority.” 4 U. S. C. §111.

This statute cannot help Jefferson County, however, because in *Graves*, this Court held only that the intergovernmental tax immunity doctrine does not prevent a State from imposing a nondiscriminatory tax upon “the salaries of officers or employees of the national . . . government.” 306 U. S., at 486. And the Public Salary Tax Act

“simply codified the result in *Graves* and foreclosed the possibility that subsequent judicial reconsideration of that case might reestablish the broader inter-

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pretation of the immunity doctrine.” *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 812 (1989).

See also *id.*, at 811–812 (“During most of the legislative process leading to adoption of the Act it was unclear whether state taxation of federal employees was still barred by intergovernmental tax immunity”); H. R. Rep. No. 26, 76th Cong., 1st Sess., 2 (1939). If Jefferson County’s tax is not an income tax and hence falls outside the scope of *Graves*, this statute cannot save it.

The second statute upon which the county relies, the Buck Act, presents a more difficult question. It says:

“No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein . . . by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such . . . taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area . . . to the same extent and with the same effect as though such area was not a Federal area.” 4 U. S. C. §106(a).

A special definitional provision, which applies through cross-reference to the Buck Act (but *not* to the Public Salary Tax Act) defines the term “income tax” broadly to include “any tax . . . measured by . . . income, or . . . gross receipts.” §110(c). And in *Howard v. Commissioners of Sinking Fund of Louisville*, 344 U. S. 624, 628–629 (1953), this Court held that a city’s “license fee” measured by income and levied on employees working at a federal plant fell within this definition.

Nonetheless, the Buck Act does not apply here. Congress passed the Buck Act in 1940 because it was uncertain whether the consent to taxation provided in the 1939 Public Salary Tax Act would extend to income taxes on those who lived or worked in federal areas; Congress

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feared that these taxes would be barred for a special reason—namely, that States might lack jurisdiction to apply their laws to those who lived or worked in such areas. See S. Rep. No. 1625, 76th Cong., 3d Sess., 3 (1940). Consequently, the Buck Act’s language consents to nothing. Rather, it says “[n]o person shall be *relieved*” of liability for “any income tax” by virtue of a particular circumstance, specifically, “by reason of” that person’s “residing within a federal area” or his “receiving income from transactions occurring or services performed” in that “area.” 4 U. S. C. §106(a) (emphasis added). The Buck Act seeks to prevent a person who lives or works in a federal area from making a certain kind of legal defense to taxation, namely, the defense that the State lacks jurisdiction to impose an income tax upon a person who lives or works in such an area.

The Buck Act’s very next phrase makes clear that the Act is limited so as to accomplish only the purpose I have just described. It says that the state or local

“taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area . . . *to the same extent and with the same effect* as though such area was not a Federal area.” *Ibid.* (emphasis added).

And the Buck Act adds that in any event, it “shall not be deemed to authorize the levy or collection of any tax on . . . the United States.” §107(a). Thus, the Buck Act’s own language indicates that the Act is not intended to alter the contours of the intergovernmental tax immunity doctrine itself.

The case before us falls outside the Buck Act because no one here has asked to “be relieved” of tax liability “*by reason of* his residing within a Federal area or receiving income from . . . services performed in such area.” §106(a). Rather, the respondents claim that Jefferson County’s

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ordinance is unconstitutional, not by reason of the federal nature of *where they work*, but by reason of the federal nature of *what they do*. And for the reasons discussed above, the county's ordinance would violate the intergovernmental tax immunity doctrine *whether or not* the respondents lived or worked in a federal area. The Buck Act cannot help the county's claim because it gives the State power to tax income earned in a federal area only "to the same extent" and "with the same effect as," not to a greater extent than, if that income were earned elsewhere. *Ibid.* Indeed, for the reasons I discussed earlier, Jefferson County's tax falls outside the Act because it is a "tax on . . . the United States." §107(a).

Nor does the Court's decision in *Howard* govern the outcome here. As an initial matter, *Howard* considered only the jurisdictional issue I have referred to above and did not expressly discuss whether Louisville's tax nonetheless violated the intergovernmental tax immunity doctrine for reasons independent of *where* the federal employees lived or worked. 344 U. S., at 627–629; see also *id.*, at 626 (taxpayers argued that the tax was "invalid" as applied to them because the plant, being a federal enclave, was "not within the City"); *id.*, at 629 (taxpayers "conceded" that the city could "levy such a tax within its boundaries outside the federal area").

More importantly, the tax at issue in *Howard*, though styled a "license fee for the privilege of engaging in [certain] activities," Louisville Ordinance No. 83, §1 (1950) (attached to Lodging of Respondents, Mar. 25, 1999), differed from the tax at issue here in two critical ways. First, the Louisville ordinance at issue in *Howard* did not make it "unlawful" to *engage in work* without paying the tax. Compare *id.*, §1, with Jefferson County Ordinance No. 1120, §2. And second, the Louisville ordinance did not exempt everyone who paid license fees under state law. Indeed, the ordinance specified that its license fee was to

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be paid *in addition to* certain other license fees imposed by the city or the State. Compare Louisville Ordinance No. 83, §12, with Jefferson County Ordinance No. 1120, preamble, §1(B). Thus, the provisions of the Louisville ordinance made clear that the tax it imposed was a separate and additional tax— not an alternative— to the licensing scheme already in place.

The Jefferson County ordinance is different from the Louisville ordinance in these significant respects. And as I have explained, it is the cumulative nature of the unusual aspects of the Jefferson County tax that make it an occupational or licensing tax.

* * *

For these reasons, I would affirm the decision of the Court of Appeals.

APPENDIX TO OPINION OF BREYER, J.
Persons and Businesses Subject to Alabama License or
Privilege Taxes¹

Persons engaged in furnishing abstracts of title
Persons manufacturing acetylene gas and carbide
Actuaries, auditors, and public accountants
Persons engaged in selling adding machines, calculating machines, typewriters, etc.
Persons engaged in advertising

¹See Ala. Code §40-12-40 *et seq.* (1993); §§40-21-50, 52, 53, 54, and 55; §§40-21-57, 58, 59, and 60; §40-16-4; Ala. Code §27-4-9 (1986). Each of these provisions is specifically mentioned among the exclusions in Jefferson County Ordinance No. 1120, §1(B) (1987).

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Persons who sell or install air-conditioning with water connections
Persons who sell or install air-conditioning without water connections
Owners/operators of amusement parks
Architects
Attorneys
Auctioneers
Dealers in automobiles, trucks, or other self-propelled vehicles
Automobile accessory dealers
Automobile garages or shops
Automobile storage garages
Automobile storage other than in garages
Automobile tire retreading shops
Barbers
Owners/lessees of baseball parks
Battery shops
Battery manufacturers
Beauty parlor operators
Persons who deal in, rent, or hire bicycles or motorcycles
Persons engaged in the business of making blueprints
Bond makers
Persons engaged in manufacturing, producing, or bottling soda water, soft drinks, or fruit juices
Bowling alleys and tenpin alleys
Agents and brokers of iron or railway, furnace, or mining supplies
Persons operating plants that manufacture brooms, brushes, mops, etc.
Persons engaged in selling cereal or soft drinks in sealed containers at retail
Persons engaged in selling soft drinks via dispensing devices or taps
Persons engaged in selling soft drinks at wholesale

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Certified public accountants
Retail dealers in cigars, cigarettes, snuff, tobacco, etc.
Wholesalers of cigars, cigarettes, snuff, tobacco, etc.
Persons operating circuses
Persons operating cleaning or pressing establishments
(*e.g.*, dry cleaners)
Persons dealing in coal or coke and maintaining one or
more “yards”
Persons who sell, distribute, haul, or deliver coal or
coke by truck
Manufacturers of coffins or caskets
People who sell or solicit orders for coffins or caskets
Collection agencies
Commission merchants and merchandise brokers
Operators of for-profit concerts, public lectures, and
musical entertainment
Persons engaged in discounting or buying conditional
sales contracts, drafts, notes, or mortgages
Persons who engage in lending money on salaries or
making industrial or personal loans
Contractors and construction companies
Persons whose principal business is buying cotton
Persons operating a compress for the purpose of com-
pressing cotton
Persons operating various types of mills and factories
Persons who operate cotton warehouses
Credit agencies
Persons operating creosoting or other preservative
wood treatment plants
Delicatessens
Dentists
Persons operating detective agencies or companies
doing business as such
Persons engaged in developing and printing films or
photographic plates
Devices for testing skill and strength used for profit

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Persons compiling, selling, or offering for sale directories
Dealers in refrigerators, heaters, and stoves, and repair shops for such devices
Embalmers
Engineers
Owners/operators of fertilizer factories
Fertilizer mixing plants
Persons selling goods in insurance, bankruptcy, or close-out sales, or persons selling goods damaged by fire, etc.
Fireworks dealers
Flying jennies, merry-go-rounds, roller coasters, etc.
Fortunetellers, palmists, clairvoyants, astrologers, phrenologists, and crystal gazers
Fruit dealers (selling from fruit stands or stores)
Persons operating gas stations or pumps
Persons who sell glass
Persons operating golf or miniature golf courses
Persons operating hat-cleaning establishments
Dealers in hides or furs, other than cattle, sheep, goat, or horse hides
Horse shows, rodeos, or dog and pony shows
Persons engaged in buying, selling, or exchanging horses, mules, or donkeys
Wholesale ice cream manufacturers
Ice factories
Innkeepers and hotels
Junk dealers
Persons renting or supplying laundered towels, aprons, coats, or linens (not including diapers)
Persons furnishing diaper service
Persons or other entities operating power or steam laundries
Self-service laundries
Hand-power laundries

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Exhibitions of feats of sleight-of hand
Persons who sell or install lightning rods
Persons who sell or install lightning rods, though not
as a primary business
Wholesale dealers of lumber and timber
Persons operating lumberyards
Persons operating machinery repair shops
Manicurists, hairdressers, etc.
Persons engaged in manufacturing, cleaning, or uphol-
stering cushions, mattresses, pillows, or rugs
Persons engaged in the practice of medicine, chemistry,
bacteriology, etc., except chemists employed full time
by doctors or nonprofits and doctors who work full
time at medical schools
Persons engaged in selling mimeographs, duplicating
machines, dictaphones, teletypes, etc.
Persons engaged in iron ore mining
Persons who sell or erect monuments or tombstones
(other than fraternal associations)
Persons operating transient moving picture shows (in
tents or otherwise)
Persons operating moving picture shows
Persons operating newsstands
Oculists, optometrists, and opticians
Osteopaths and chiropractors
Cold storage plants, packinghouses, and refrigerated
warehouses
Pawnbrokers
Itinerant vendors and peddlers who sell drugs, oint-
ments, or medicines claimed to treat or cure diseases
Itinerant vendors and peddlers who sell spices, toilet
articles, and household remedies, etc.
Photographers and photograph galleries
Transient or traveling photographers with no fixed
place of business

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Persons who sell, rent, or deliver pianos, organs, and small musical instruments
General merchants who sell small musical instruments
Pig iron storage operators
Persons dealing in handguns, knives, and other similar weapons
Persons and other entities that sell, store, use, or otherwise consume packages of playing cards
Plumbers, steam fitters, tin shop operators, etc.
Pool tables in commercial establishments
Owners of racetracks, athletic fields, etc., charging more than \$0.50 admission
Persons who sell radios, etc.
Real estate brokers and agents dealing in realty within the State
Real estate brokers and agents dealing in realty outside the State
Restaurants, cafes, cafeterias, etc.
Roadhouses, nightclubs, and dance halls
Sandwich shops, barbecue stands, and hamburger or hot dog stands
Persons and corporations who operate sawmills, heading mills, or stave mills
Scientists, naturopaths, and chiropractors
Persons selling or delivering sewing machines
Operators of shooting galleries
Persons dealing in shotguns, rifles, and ammunition for such weapons
Skating rink operators
Soliciting brokers
Persons selling eyeglasses, other than nonprescription sunglasses
Stock and bond brokers
Operators of street fairs or carnivals
Owners, conductors, and people in charge of railroad supply cars from which goods are sold

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Operators of syrup or sugar factories, plants, or refineries
Persons engaged in conducting a theater, vaudeville, or variety show or other performance
Ticket scalpers
Persons operating public tourist camps
Dealers in tractors, road machinery, or trailers
Persons who issue or sell trading stamps or similar certificates
Persons transferring freight
Transient dealers
Persons operating transient theatrical and vaudeville shows
Transient vendors and peddlers, traveling by animal or using a vehicle other than a motor vehicle
Persons operating turpentine stills
Persons and other entities operating vending machines
Persons and other entities engaged in the operation of veneer mills or any other factories where lumber or timber is made into a finished product
Veterinary surgeons
Persons operating warehouses or storage yards
Persons who purchase and receive or collect grease and animal byproducts for rendering or recycling
Persons operating public utilities
Persons and other entities operating freight lines or equipment companies (*i.e.*, by rail)
Railroad operators
Persons operating “express” shipping companies
Financial institutions