No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC. ET AL.

Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF AMICUS CURIAE FOR THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should the Court abrogate the physical presence standard of "substantial nexus" for state sales and use taxes, reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)?

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the American Legislative Exchange Council (ALEC) respectfully submits this brief amicus curiae in support of Respondents Wayfair, Inc., et al.[1]

The American Legislative Exchange Council (ALEC) is a nonprofit, tax-exempt corporation and is the nation's largest non-partisan individual membership association of state legislators. ALEC has approximately 2,000 members in state legislatures across the United States. The American Legislative Exchange Council works to advance limited government, free markets and federalism at the state level through a nonpartisan public-private partnership of America's state legislators, members of the private sector and the general public.

Not all states, much less all state legislators, believe the physical presence standard discussed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) ("*Quill*") and *National Bellas Hess, Inc.* v. *Department of*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Revenue of the State of Illinois, 386 U.S. 753 (1967) ("*Bellas Hess*") should be abrogated. The physical presence standard has allowed the multi-trillion dollar online marketplace system to develop and thrive, providing regulatory certainty for all businesses. The standard is firmly rooted in the purpose and history of the Commerce Clause.

ALEC submits this brief both to help educate the Court on certain, salient topics and to emphasize that many state legislators wish this Court to sustain the current physical presence standard for the imposition of sales tax collection requirements set forth in the *Quill* and *National Bellas Hess* cases. This brief will look at the reasons why the founders included the Commerce Clause in the Constitution and the Clause's early jurisprudence, the development of the Physical presence standard leading up to *Quill* and *National Bellas Hess*, and examine the current online marketplace ecosystem and the consequences if the physical presence standard were abrogated.

SUMMARY OF ARGUMENT

The Framers of the Constitution included the Commerce Clause to prevent states from reaching across their borders to tax interstate transactions. *See*, *e.g.*, *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 329 (1944) ("[A] tax on an interstate sale like the one before us… involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in Congress, not in the States"). The Court developed the physical presence standard to provide a powerful check on the authority of state governments, ensuring that they violate neither the Commerce Clause nor an individual's or company's Due Process. *E.g. Allied-Signal Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992), *Bellas Hess*, 386 U.S. at 756-760. The ability to impose a sales or use tax is the ability to impose a tax upon a legislature's constituents, be they people or companies, or to tax goods within the state. This limitation prevents states from imposing "erroneous and oppressive" taxes upon people or companies not capable of holding the legislature accountable. *See M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) ("The only security against the abuse of [the power to tax], is found in the structure of the government itself. *In imposing a tax, the legislature acts upon its constituents*. This is, in general, a sufficient security against erroneous and oppressive taxation.") (Emphasis added.)

The *Quill* and *National Bellas Hess* physical presence standard led to an explosion of the online marketplace. Companies like Amazon, Overstock, eBay, and others developed because of the certainty regarding state sales tax the physical presence standard created. The standard has its roots both in the advent of mail order catalogs in 1940s-1990s and the original purposes for which the Founding Fathers included the Commerce Clause in the Constitution.

Though operating online, the trend to massive physical presence is clear. Over the past decade, many companies have gained a physical presence in a number of states through acquisitions, data centers, and warehouse construction. Amazon, for example, recently purchased the grocery chain Whole Foods. Through this purchase, Amazon virtually guaranteed a physical presence in each state. Similarly, existing box stores, such as Walmart, already have a physical presence in every state and have placed their inventories online.

If the Court were to abrogate the physical presence standard found in *Quill* and *Bellas Hess*, it would abrogate over 230 years of American trade philosophy, including both the purpose for which the Framers crafted the Commerce Clause and 20th Century jurisprudence. States with high sales taxes—such as California, New York, and Illinois—would be allowed to reach across their borders and impose heavy burdens on individuals and companies having no connection to the state, much like the states under the Articles of Confederation taxed goods imported from other states. Many of these entities reside in other states with low sales taxes or those without sales taxes altogether. Furthermore, these companies, small business, and individuals would not possess the ability to hold state legislators accountable through the electoral process. With little influence, their pleas would inevitably fall on deaf ears, as the state legislatures would correctly identify them as non-constituents.

ARGUMENT

I. The History of the Commerce Clause Supports Retention of *Quill*'s and *National Bellas Hess*'s Physical presence Standard

A. *Overview*

States may debate the propriety of the physical presence standard discussed in *Quill* and *Bellas Hess*. Even during the original debate on *Quill* in 1992, North Dakota faced off against states such as New Hampshire, Delaware, and Maine. *Quill*, 504 U.S. at 300. The American Legislative Exchange Council has been involved in these debates since the early 2000s. *See* 21st Century Commercial Nexus Act, (Adopted May 1, 2002, amended January 29, 2013), American Legislative Exchange Council, *available at* https://www.alec.org/model-policy/21st-century-commercial-nexus-act/. In 2002, ALEC adopted the 21st Century Commercial Nexus Act as model policy. The Act encouraged states to "create a bright line rule similar to that espoused by the Supreme Court of the United States in *Quill,* to determine when a business must collect and remit sales and use [taxes]." *Id. See also* Sales and Use Tax Collection Protection Act, (Re-approved January 29, 2013), American Legislative Exchange Council, *available at* https://www.alec.org/model-policy/sales-and-use-tax-collection-protection-act-2/ and Resolution Urging Congress to Reject Authorization of the Streamlined Sales Tax Project (SSTP), (Re-approved January 29, 2013), American Legislative Exchange Council, *available at* https://www.alec.org/model-policy/resolution-urging-congress-to-reject-authorization-of-the-streamlined-sales-tax-project-sstp/. Recently, ALEC published *Online Sales Tax Collection, Constitutional Precedent, and Interstate Commerce: What You Need to Know*. Jonathan Williams and Joel Griffith, ONLINE SALES TAX COLLECTION, CONSTITUTIONAL PRECEDENT, AND INTERSTATE COMMERCE: WHAT YOU NEED TO KNOW, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (2018), https://www.alec.org/app/uploads/2018/03/2018-03-20-ALEC-Online-Sales-Tax-Collection-WEB.pdf (last visited, April 2, 2018).

The current physical presence standard for the imposition of sales tax is consistent with the history of the Commerce Clause and its early jurisprudence. The need for the Commerce Clause arose from deficiencies within the Articles of Confederation and how states either raised revenue or engaged in protectionist practices during this phase of American History. "One of the most serious deficiencies of the first union under the Articles of Confederation was that states were able to erect barriers to trade with other states and foreign countries. The Commerce Clause was added to the Constitution so that Congress could create the original North American free trade zone." David B. Rivkin, *Healthcare reform vs. the Founders*, THE WALL STREET JOURNAL (September 29, 1993), *available at* https://bakerlaw.com/files/Uploads/Documents/News/Articles/INTELLECTUAL%20PROPERTY/2012/rivkin_93_wsj.pdf, (last visited March 29, 2018). *Quill*, 504 U.S. at 312 ("Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for those structural ills"), and *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 445-446 (1827).

The earliest cases addressing the Commerce Clause occurred in state courts and frequently involved questions of transportation and transportation monopolies. E. Prentice and J. Egan, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, 13 (1898) ("Prentice, THE COMMERCE CLAUSE"). The Supreme Court decided roughly five cases involving the Commerce Clause as of 1840. *Id.* at p. 14. Of these five early cases, one addressed interstate transportation and state issued transportation monopolies while another addressed whether a state could impose a license fee upon importers for the "privilege of selling imported goods." *Id.* at 18. *See also, Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

In these early cases, the Court discussed first conceptions of the physical presence standard. In *Brown v. Maryland*, and one of the cases it relied on, *M'Culloch*, the Court emphasized both a state's authority to tax persons and property within its borders and the property protections such limitations provided. "The only security against the abuse of [the power to tax], is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." *M'Culloch*, 17 U.S. (4 Wheat.) at 428 (brackets added).

The physical presence standard grew from cases addressing mail order catalogues and the application of state sales taxes to orders placed as a result of the catalogues and may trace its direct lineage to *Miller Brothers Co. v. State of Maryland*, 347 U.S. 340 (1954), *McLeod v. J.E. Dilworth Co*, 322 U.S. 327 (1944), and *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941). The standard serves as a bulwark, ensuring "a national economy free from [ ] unjustifiable local entanglements." *Bellas Hess*, 386 U.S. at 760; *see also, M'Culloch*, 17 U.S. (4 Wheat.) at 428.

B. The Articles of Confederation Did Not Provide for a Uniform Standard of Commerce and the Lack of a Standard Was a Driving Force Toward the Constitutional Convention

The federal government's inability to regulate foreign and domestic commerce under the Articles of Confederation led to both the 1787 Constitutional Convention in Philadelphia and the inclusion of the Commerce Clause in the final draft of the Constitution. The Framers intended to provide the new federal government—specifically Congress—broad authority over interstate commerce.

The commerce clause appearing in the Articles of Confederation did not have a binding effect on the states. With respect to domestic commerce, the Articles provided that

> the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant…

Articles of Confederation, Art. 4 § 1.

This clause was not a grant of authority to the federal government. Because it was not a grant of authority, problems with the Article's approach to foreign and domestic commerce developed. Connecticut, for example, placed heavier tariffs on goods imported from Great Britain than did Massachusetts. FROM JAMES MADISON TO THOMAS JEFFERSON (January 22, 1786), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0249, (last visited March 29, 2018). States raised revenues by imposing tariffs on goods imported from other states. *See e.g.*, The Federalist No. 42 at 333 (James Madison) (John C. Hamilton, ed., 1998) ("The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience… A very material object of this power was the relief of the state which import and export through other states, from the improper contributions levied on them by the later. Were these at liberty to regulate the trade between state and state, it must be foreseen… to load articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former.") and The Federalist No. 22 at 185 (Alexander Hamilton) (John C. Hamilton, ed., 1998), *id*. at 185 ("The interfering and unneighbourly [sic] regulations of some states, contrary to the free spirit of the union, have, in different instances, given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by national control, would be multiplied and extended till they become not less serious sources of animosity and discord, than injurious impediments to the intercourse between the [states].")

In 1785, members of Congress recognized the Article's deficiencies. A resolution was proposed, which would provide Congress "an adequate power over trade." FROM JAMES MADISON TO THOMAS JEFFERSON (Oct. 3, 1785), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0195 (last visited March 29, 2018). The resolution recognized

> [T]he relative situation of the United States… to require uniformity in their commercial regulations… a stipulation of privileges, reciprocal to those enjoyed by the subjects of such nations in the ports of the United States; for preventing animosities, which cannot fail to arise among the several States from the

> interference of partial and separate regulations… and whereas, such uniformity can be best concerted and carried into effect by the federal councils…

RESOLUTION CALLING FOR THE REGULATION OF COMMERCE BY CONGRESS (November 14, 1785), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0213, (last visited March 29, 2018).

The resolution was tabled after some debate as Congress tried to negotiate a compromise for "regulating trade with regard to other States." LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (January 22, 1786). The resolution's failure led to the Annapolis Convention. The delegates to the Annapolis Convention agreed to a resolution, which called for a constitutional convention to strengthening the Articles' commerce provisions. ADDRESS OF THE ANNAPOLIS CONVENTION (September 14, 1786), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-03-02-0556, (last visited March 29, 2018).

C. The Constitutional Convention and Early Supreme Court Cases Support Limiting a State's Taxing Authority to Those Individuals and Corporations Having a Physical Presence in the State

The first draft of the Constitution introduced May 29, 1787 included specific grants of authority, empowering Congress "to raise revenue, to coin money, to establish post-offices, post and military roads, and other grants upon related subjects" along with a general grant "to regulate commerce with all nations and among the several States." Prentice, THE COMMERCE CLAUSE at 7.

Many of the specific grants of commercial authority found their way into the final version. *Id.* at p. 9. The power to raise revenue or coin money, as cited in the previous paragraph, may be found in U.S. Const., Article 1 Sec. 8, along with the broader authority "[t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." *See also*, Prentice, THE COMMERCE CLAUSE at 10, The Federalist No. 22 at 332 (Alexander Hamilton) (John C. Hamilton, ed., 1998).

During the ratification debate, Alexander Hamilton and James Madison both sought to allay anti-Federalist fears. They did so with respect to interstate commerce by reminding people of the failures of the Articles of Confederation and explaining how the new Constitution would remedy those failures. In Federalist 11, for example, Alexander Hamilton wrote that

> An unrestrained intercourse between the states themselves will advance the trade of each, by an interchange of their respective productions… The veins of commerce in every part will be replenished, and will acquire additional motion and vigour [sic] from a free circulation of the commodities of every part.

The Federalist No. 11 at 118 (Alexander Hamilton) (John C. Hamilton, ed., 1998).

The first Commerce Clause case decided by the Court was *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). By 1840, the Court heard only five cases where it was asked to render decisions on the Clause. B. Putney. FEDERAL POWERS UNDER THE COMMERCE CLAUSE (1935), CQ PRESS, http://library.cqpress.com/cqresearcher/cqresrre1935100400 (last visited, March 29, 2018). By 1860, the number of Commerce Clause cases the Court decided increased to 20; by 1870, the number of cases grew to 30; by 1900, the number of cases grew to at least 185. *Id*., *see also,* Prentice, THE COMMERCE CLAUSE at 14.

Two of the Court's early decisions addressing the Commerce Clause and taxation recognized the inherent conflict between federal and state interests. On the one hand, states have a theoretically unlimited taxing authority. *E.g. M'Culloch*, 17 U.S. (4 Wheat.) at 428 ("The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse."). On the other hand, the Framers included the Commerce Clause "to create an area of free trade among the several states." *McLeod,* 322 U.S. at 330. The Marshall Court sought to balance the competing interests by limiting a state's authority to tax interstate commerce. *Brown v. Maryland*, 25 U.S. (12 Wheat.) at 448-449.

The first cases, including those decided by state courts, interpreting the Commerce Clause involved questions of transportation and transportation monopolies. Prentice, THE COMMERCE CLAUSE at 13. The Court's first Commerce Clause opinion addressed interstate transportation and a state-issued monopoly. In *Gibbons v. Ogden*, the Court struck down a New York State law providing Livingston and Fulton the exclusive right to navigate the rivers of New York by steamboat as "repugnant" to the Constitution and its Commerce Clause. 22 U.S. (9 Wheat.) at 240.

The second case decided by this Court under the Commerce Clause involved a form of interstate taxation. In *Brown v. Maryland*. the State of Maryland imposed a "license tax" upon those importing goods into the state for sale. Prior to Maryland's actions, Congress imposed a duty on the particular good sold in Maryland. The Court struck down the duty as a violation of the Commerce Clause. After noting that states have the authority to tax their "own citizens, or [the citizens'] property within [the state's] territory," Chief Justice Marshall stated that

> the taxing power of the States must have some limits. [A State's authority to tax] cannot reach and restrain the action of the national government within its proper sphere… It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from

> taxing goods in their transit through the State from one port to another, for the purpose of re-exportation?... Or what should restrain a State from taxing any article passing through it from one State to another for the purpose of traffic? or [sic] from taxing the transportation of articles passing from the State itself to another State, for commercial purpose?

25 U.S. (12 Wheat.) at 449.[2]

D. The Judicial Development and History of the Physical Presence Standard—The Physical Presence Standard Helps Prevent States from Abusing Their Authority to Tax

As discussed above, the Court has long recognized the inherent conflict between state authority and federal authority with regard to taxation. States are constrained only by the voting populous—if a voting populous feels it is overtaxed, it may elect state legislators who will reduce tax burdens. If a state taxes an out-of-state resident, that resident has little recourse against the legislators. She cannot vote for a reform-minded legislator nor would the legislature heed her cries for relief. *Bellas Hess*, 386 U.S. at 759-760.

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[2] After asking a series of rhetorical questions, the Court stated that all the questions posed were "within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce…" The Court continued, citing approvingly to *M'Culloch*.

While the idea of limiting states' ability to tax out-of-state individuals and entities can be found in the earliest of Court Commerce Clause decisions, the modern solution to preventing abuse of taxing authority is the physical presence standard. The standard is grounded on theories that a business should have an adequate "nexus" with the taxing jurisdiction and that a lack of a minimum contact would deprive the business of Due Process. *E.g. Quill*, 504 U.S. at 311.

As applied to taxation, the Due Process Clause "ensures fundamental fairness in the operation of the state government towards its citizens." Sidney S. Silhan, *If it Ain't Broke Don't Fix It: An Argument for the Codification of the Quill Standard for Taxing Internet Commerce*, 76 Chi.-Kent L. Rev. 671, 679 (2000). The two claims, according to the Court in *Bellas Hess* "are closely related." 386 U.S. at 756. In the context of commerce and taxation, the Court has stated that "in determining whether a state tax falls within the confines of the Due Process Clause… the 'simple but controlling question is whether the state has given anything for which it can ask a return." *Id.*

One of the holdings in *Quill*, though, was to overrule the Due Process holdings discussed, in part, in *Bellas Hess* and other related cases. *Quill*, 504 U.S. at 308 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical presence can defeat personal jurisdiction there." *Quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

Foundational to *Quill* and *Bellas Hess* are cases such as *Miller Bros.*, 347 U.S. 340 (1954), *Norton Co. v. Department of Revenue of the State of Illinois*, 340 U.S. 534 (1951), *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), and *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941).

Cases such as *Norton Co.* and *Nelson* stand for the proposition that any presence in a taxing state, even small, is sufficient to trigger sales and use tax-collecting requirements. *Miller Brothers* and *McLeod*, on the other hand, stand for the proposition that a state may not impose sales and use tax-collecting requirements where the only contacts with the taxing jurisdiction are through common carriers.

In *Nelson*, the Court sustained Iowa's use tax assessments against the Sears, Roebuck & Company. The company maintained a mail-order business, which included customers from Iowa. It also maintained stores in the state. Iowa wanted to tax sales from both the physical stores and the mail orders from Iowa residents. Iowa successfully argued that the mail order portion of Sears' business should be subject to the state's sales tax. According to the Court, Sears' stores provided sufficient grounds to sustain the tax. *Nelson*, 312 U.S. at 365-366.

This Court reached a similar conclusion in *Norton Co*. The Court allowed Illinois to collect sales tax from the Norton Company for all sales to Illinois residents. Similar to the *Nelson* case, the Norton Company maintained an office and warehouse in Chicago where customers could place orders. The company also maintained a mail-order business, which included customers from Illinois. The Court believed the company submitted to the jurisdiction of Illinois and thus, Illinois could collect sales tax from the orders assignable to the state's residents. In the decision, though, the Court defined when a state may impose such a tax and when it may not.

> Where a corporation elects to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filing, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.

Norton Co., 340 U.S. at 537.

A decade after the Court decided *Bellas Hess*, it affirmed the holding in *Nelson* and *Norton Co.* in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977).[3] California

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[3] The Court decided *National Geographic* less than one month after *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Court cited both *Complete Auto* and *Bellas Hess* in the decision. It cited *Complete Auto* for the proposition that "[o]ther fairly apportioned, nondiscriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State." 430 U.S. at 558. The Court analyzed *Bellas Hess*, using the case to support the distinction between an out-of-state seller "whose only connection with customers in the taxing

required retailers to collect a statewide use tax. The National Geographic Society, which conducted sales through its magazines and mail-order catalogues, objected claiming an insufficient nexus between the state and the Society. The Society, though, maintained two offices in the state for various reasons, including soliciting contributions. Because of the two offices located in the state, the Court sustained the tax collection obligation. 430 U.S. at 556-557.

The *McLeod* and *Miller Brothers* cases are cut from the same cloth. In both cases, businesses conducted interstate transactions and maintained no physical presence in the taxing states. In *McLeod*, the J.E. Dilworth Company sold products to Arkansas companies through traveling salesmen domiciled in Tennessee or over the phone. In *Miller Brothers*, the company sold to Maryland residents who crossed into Delaware to purchase from the store. The company would send catalogs to former customers and occasionally deliver products to Maryland residents who placed orders at the store's Delaware location. The companies' contacts with the taxing jurisdiction were advertisements sent through the mail and customers located within the jurisdiction. According to the Court, neither a customer nor advertisements targeted to residents of a particular state may form the basis for physical presence. As the Court noted in *Bellas Hess*, it "has never held that a State may

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State was by common carrier or mail" and sellers with retail outlets, solicitors, or property within the state. 430 U.S. at 559. A state would not be able to collect tax from the former while the latter had a sufficient nexus to require tax collection. *Id*.

impose the duty of use tax collection and payment upon a seller whose only connection is by common carrier or the United States mail." 386 U.S. at 758 (citing both *Nelson v. Sears, Roebuck & Co.* and *Miller Bros.*).

A case often cited within the Court's Commerce Clause and taxation jurisprudence is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). While *Complete Auto* falls within the Commerce Clause and taxation jurisprudence, it mostly falls outside of the Court's physical presence analysis. *Quill*, 504 U.S. at 303-304 ("With respect to the Commerce Clause, the court emphasized that [*Complete Auto*] rejected the line of cases holding that the direct taxation of interstate commerce was impermissible…").[4] The case briefly mentioned the four-pronged test for analyzing a state's challenged tax regime. Under the four-prong test, courts will sustain "a tax against Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

The appellant, the company challenging the tax, in *Complete Auto* "did not allege that its activity which Mississippi taxes *does not* have a sufficient nexus with the state…" *Id.* at 277-278 (emphasis added). Since the company challenging the tax did not allege

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[4] The Court's opinion as to this part discussing *Complete Auto* was unanimous. 504 U.S. at 299.

it did not have a sufficient nexus, the Court noted "that no claim is made that the activity is not sufficiently connected to the State to justify a tax." *Id.* at 287. In other words, the Court assumed the company challenging Mississippi's taxes satisfied the physical presence standard.

E. Overturning Precedent is Contrary to the Principles of Federalism as it Erodes Protection of State Borders

1. Abandoning the physical presence standard unleashes possibly thousands of aggressive state and local auditors against businesses far outside their jurisdiction

Supporters of overturning the *Quill* decision have wrapped themselves in the language of federalism. However, a proper understanding of federalism involves a balance between federal and state governments. In the case of protecting interstate commerce, Article 1 of the United States Constitution clearly allocates to the federal government the role of protecting the American people.

As discussed above, the U.S. Constitution was written to replace the Articles of Confederation in no small part due to the latter's failure to prevent a spiraling interior "war" of states who could assert tax and regulatory authority outside their borders and thereby create "fiefdoms" for themselves. The U.S. Constitution's Commerce Clause and subsequent jurisprudence make clear that taxing power must be limited by state borders.

If the Supreme Court overturns *Quill*, state tax collectors would be empowered to reach across their boundaries to collect taxes from non-resident online retailers located outside of their jurisdictions. These retailers could face fines or legal challenges from taxing jurisdictions based on rules in which the online retailers have no voice.

Prior to the ratification of the 14th Amendment, the Court recognized the basic need to limit states' taxing authority. *E.g. M'Culloch*, 17 U.S. (4 Wheat.) at 429-430. As the Court nearly two centuries ago explained,

> All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared

> to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

Cases decided after the 14th Amendment's ratification simply built upon this limitation, recognizing the Pandora's box should a state be permitted to impose tax burdens on entities engaged in commerce outside its jurisdiction. *Bellas Hess*, 386 U.S. at 759 ("[I]f the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision through the Nation with the power to impost sales and use taxes.").

Hardworking individual and business taxpayers deserve protection from out-of-state tax collectors and regulators. The United States Constitution, as well as subsequent rulings from the United States Supreme Court, such as the landmark *Quill* decision, outlines the proper balance between the federal government, the states and the American taxpayer.

Overturning the *Quill* precedent will erode the protection of state borders as effective limits on state tax power. This will encourage tax-heavy states like California, New York, and Illinois to unleash their aggressive tax collectors on businesses located in better-managed locations. This would be especially damaging to the five states that choose to avoid statewide sales taxes (New Hampshire, Delaware, Montana, Oregon and Alaska), as well as the businesses within their states. These businesses could be subject to audit and enforcement actions in states across the country in which they have no physical presence and, thus, no political influence.

2. A Bright Line Test is Needed to Firmly Establish Limits of State Taxing Power

A bright line test limits the risk of lawsuits that bog down interstate commerce.

> Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.... a bright line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail order industry's dramatic growth over the last quarter century is due in part to the bright line exemption from state taxation created in *Bellas Hess*.

Quill, 504 U.S. at 315-316.

3. The Public Overwhelmingly Opposes Enabling Out-of-State Efforts to Force Remittance by Retailers

Unsurprisingly, most Americans oppose the idea of burdensome online tax collection requirements. A March 2018 poll of likely voters by National Taxpayers Union found Republicans oppose such laws by a 42-point margin, Democrats by a 38-point margin, and independents by a 46-point margin. Poll: Strong Opposition to Internet Tax Schemes Across Partisan, Ideological Lines, NATIONAL TAXPAYERS UNION (2018), https://www.ntu.org/library/doclib/Poll-Strong-Opposition-to-Internet-Sales-Tax-Schemes-Across-Partisan-Ideological-Lines.pdf (last visited March 29, 2018).

II. In Order to Protect Unfettered Interstate Commerce, National Economic Dynamics Require and Justify a Continued Physical Presence Standard

*A. **Onerous Compliance Costs Related to Sales Tax Remittance Unduly Burden Interstate Commerce, Stunting Economic Dynamism***

1. Compliance Requirements are Unfair Discrimination Against Small Remote Retailers Engaged in Interstate Commerce

The Court in *Quill* expressed concern that collection duties could possibly "be imposed by the Nation's 6,000 plus taxing jurisdictions." *Quill*, 504 U.S. at 313, n.6. Now there are more than 12,000 tax jurisdictions across the states – roughly twice as many as when the U.S. Supreme Court decided the landmark *Quill* case in 1992. *See*, Steve DelBianco. *Act now on No Regulation Without Representation*, THE HILL, June 19, 2017, http://thehill.com/blogs/congress-blog/economy-budget/338456-act-now-on-no-regulation-without-representation, (last visited March 29, 2018); and

Chris Atkins, *Important Tax Cases:* Quill Corp. v. North Dakota *and the Physical presence Rule for Sales Tax Collection*, Tax Foundation, July 19, 2005, https://taxfoundation.org/important-tax-cases-quill-corp-v-north-dakota-and-physical-presence-rule-sales-tax-collection/ (last visited March 29, 2018) Each of these jurisdictions might have different rates, exemptions, rules, tax holidays, or other differences that online retailers would either be forced to track or face the risk of costly audits and fines. A remote retailer must determine the place of residence or place of use for each item sold in order to collect and remit sales taxes to each of those jurisdictions.

By contrast, brick-and-mortar businesses are only required to collect and remit taxes for the jurisdictions in which they are physically located. A remote retailer engaged in business with twenty jurisdictions could face exponentially higher compliance costs relative to gross sales compared to a retailer with physical presence in one jurisdiction.

When Patrick Byrne, the founder of online retailer Overstock.com, testified before Congress to oppose the threat of new online tax collection burdens, he stated:

> In 1999, we had 18 employees, carried 100 products and had $1.8 million in revenue. If we had been required to administer and collect sales tax on behalf of remote state governments without meaningful simplification, indemnity, and compensation, our chances of becoming an

> employer of 1,500 American workers that we are today would have been small.

Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce, House Comm on the Judiciary, 112th Cong. 1 (2011) (Testimony of Patrick Byrne).

The innovative e-commerce sector created more than 355,000 new jobs between 2007 and 2016. Dr. Michael Mandel. THE CREATION OF A NEW MIDDLE CLASS?: A HISTORICAL AND ANALYTIC PERSPECTIVE ON JOB AND WAGE GROWTH IN THE DIGITAL SECTOR, PART I,, PROGRESSIVE POLICY INSTITUTE (2017), http://www.progressivepolicy.org/wp-content/uploads/2017/03/Tech-middle-class-3-9-17b.pdf (last visited March 29, 2018). Dealing with federal, state, and local taxes and regulations is already an incredibly burdensome task for start-ups and small businesses. Online retailers should not be forced to decide between complying with onerous requirements or forgoing new opportunities in other states.

Compliance burdens would fall particularly hard on specialty businesses and small sellers, serving as barriers to entering the national marketplace.

2. Compliance Risks Shift from Consumers and the State to Small Remote Retailers

Imposing these compliance requirements will shift risks from consumers and the State onto small remote retailers. Audit risks for sales tax collection and remittance will be a constant threat along with possibility of lawsuits from consumers related to retailers inadvertently collecting more tax than lawfully due.

As responsibility shifts from consumer to retailer for remittance of taxes due, auditing costs for compliance will be borne by the retailer. A simple audit by one taxing jurisdiction can require tens of thousands of dollars in legal fees. In some instances, legal counsel will be required to be on site in the state investigating or litigating compliance. Demonstration of compliance will not absolve a retailer of the expenses incurred. And in the event of an inadvertent underpayment, fines may cripple the financial health of a retailer. Furthermore, retailers may incur liabilities to consumers for inadvertently collecting and remitting more than the requisite tax.

3. Compliance Costs Threaten Viability of Businesses

Compliance costs for multistate tax collection and remittance include capital expenditure on software used to determine tax categories, determine the tax owed on particular products, filing tax remittance forms, and remitting taxes collected. Additionally, the company must respond to assessment inquiries from taxing jurisdictions. This may require securing legal representation in multiple jurisdictions. *See*

U.S. Gov. Accountability Office, GAO-18-114, Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses are Likely to Experience Compliance Costs, November 2017. ("GAO, *Sales Taxes*".)

Setup itself is not a simple process. Products must be coded by type as differing sales tax rates often apply even within a state for varying types of products. Additionally, a product classification in one state or jurisdiction may not hold true in another. The tax software system must be integrated into the business's order entry system and website. Costs related to this setup can exceed $150,000 even for a medium sized online retailer. Larry Kavanagh, Expert Report Concerning the Costs and Burdens for Remote Retailers to Comply with Sales and Use Tax Collection Obligations Imposed by Jurisdictions Throughout the United States, Including Alabama, True Simplification (2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf, (last visited March 29, 2018)

Determination of sales tax amounts for each potential sale requires interaction with the database for the software system. The costs for inquiries typically increase with the number of inquiries. The GAO found licensing fees ranging from "$12 per month for up to 30 information requests each month and as high as $200,000 per year for unlimited information requests." GAO, *Sales Taxes* at 19. According to a top consultant and industry expert Larry Kavanagh, costs for one major software provider run "$35,000 a year plus $0.13 per transaction over 500,000 transactions." Larry Kavanagh, EXPERT REPORT CONCERNING THE COSTS AND BURDENS FOR REMOTE RETAILERS TO COMPLY WITH SALES AND USE TAX COLLECTION OBLIGATIONS IMPOSED BY JURISDICTIONS THROUGHOUT THE UNITED STATES, INCLUDING ALABAMA, TRUE SIMPLIFICATION (2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf, (last visited March 29, 2018).

Costs extend beyond setup and transaction fees. Sales tax holidays vary across states and localities. The time periods of such holidays also vary from year to year, often with minimal notice. Even engagement with a fraction of the nation's taxing jurisdictions may require filing of hundreds of tax returns and ongoing administration, consuming hundreds of hours of valuable time and thousands of dollars in labor costs.

4. This "Welter of Complicated Obligations" Unduly Burdens Interstate Commerce

As explained by the Court in *Quill*, the "substantial nexus" requirement within *Complete Auto* test upheld by *Quill* exists to "limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce.... Thus, the 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Quill,* 504 U.S. at 313. The Court also stated, "North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce" and expressed concern that "similar obligations might be imposed by the Nation's 6,000 plus taxing jurisdictions." *Id.,* 504 U.S. at 313, n.6. The Court in *Quill* favorably quoted an analogous concern in *Bellas Hess* of the "many variations in rates of tax, in allowable exemptions, and in administrative and record keeping requirements could entangle [a mail order house] in a virtual welter of complicated obligations." *Id.* (*quoting Bellas Hess*, 386 U. S., at 759-760).

Close examination of compliance costs and a growing number of tax jurisdictions clearly illustrates that despite technological advancement, these compliance costs continue to be an undue burden on interstate commerce.

Forcing remote sellers to comply with a complex network of taxes and reporting regulations stretching beyond the purview of residents stunts economic dynamism, unduly burdening interstate commerce. The myriad compliance costs may drive some retailers out of entire markets and deter entry by others.

B. Tax Compliance Burden on Remote Retailers not Fairly Related to the Services Provided by the State

Absent constitutionally required nexus, the Court has said "inquiry into whether the out-of-state seller enjoys services related to the taxing State" is of "significance." *National Geographic*, 430 U.S. at 558. Continuing, the Court noted that "fairly apportioned, nondiscriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State." *Id*. The Court in *Bellas Hess* focused on the concern of retailers being subject to the "welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" *Bellas Hess*, 386 U.S. at 759-760. Likewise, one of the four prongs to sustaining a tax against a Commerce Clause challenge under the *Complete Auto is that the tax must be "fairly related to the services provided by the State." National Geographic*, 430 U.S. at 279 (emphasis added).

Remote sellers forced to collect and remit sales taxes do not benefit from police protection, fire protection, highways, roads, trash collection, water services, educated workforce, or assorted public utilities funded by sales tax revenue. Retailers with physical presences in these jurisdictions, on the other hand, do utilize these services. Remote sellers should not be forced to comply with collection and remittance requirements because such tax revenue collected by the remote sellers on behalf of the state are not "fairly related to the services provided" the remote sellers.

C. The Condition of the U.S. Retail Market After Decades of Online Sales Expansion

As technology has advanced over the past twenty years, the retail marketplace has not segmented into brick-and-mortar v. online retailers. Instead, for many retailers with a traditional physical retail locations, online sales transactions are merely just another—albeit very profitable—distribution channel. This "omnichannel" strategy is evidenced by the many brick-and-mortar retailers with a strong online presence, such as Walmart and Target.

Ashwini Murphy, an e-commerce expert estimates that "pure-play e-commerce companies around the world are less than 100,000. Which means, e-commerce by default means omni-channel." Ashwini Murphy, HOW MANY E-COMMERCE COMPANIES ARE THERE? WHAT'S THE GLOBAL E-COMMERCE MARKET SIZE? PIPE CANDY (2017), http://blog.pipecandy.com/e-commerce-companies-market-size/ (last visited March 29, 2018). Consider the recent acquisition of Whole Foods by Amazon or the new brick-and-mortar Amazon bookstores operating. Jordan Valinsky, WAYS AMAZON HAS ALREADY CHANGED WHOLE FOODS, CNN MONEY, (2018), http://money.cnn.com/2018/02/09/news/companies/amazon-whole-foods-changes/index.html (last visited March 30, 2018), and Jake Swearingen, WHY IS AMAZON BUILDING BRICK-AND-MORTAR BOOKSTORES?, NEW YORK MAGAZINE (2017), http://nymag.com/selectall/2017/06/why-is-amazon-building-bookstores.html (last visited March 30, 2018).

Another common example is the wide array of tech products available online through Apple in conjunction with the Apple stores. According to Krista Garcia, "60 percent of the biggest ecommerce players are multichannel, with a majority of sales occurring in-store." Krista Garcia, US ECOMMERCE SALES 2017: THE TOP 10 COMPANIES, EMARKETER

(2017), https://www.emarketer.com/Report/US-Ecommerce-Sales-2017-Top-10-Companies/2002164 (last visited March 29, 2018). In fact, 9 of the top 10 U.S. online retailers also have physical store locations (eBay being the exception). These retailers—including Walmart, Best Buy, Macy's, and Costco—account for 64 percent of total U.S. retail ecommerce.

As retail businesses expand, nexuses sufficient to meet the physical presence standard often expand regions far larger than a single state. These businesses are enabled to artificially suppress competition from smaller, more geographically constricted entities by forcing on them sales tax compliance burdens. For example, Amazon once opposed efforts to force remote sellers without the requisite physical presence into collecting and remitting sales tax revenue. However, as Amazon developed a physical presence across the nation sufficient to meet the nexus requirements in nearly every state, the company changed its stance. Chris Isadore, AMAZON TO START COLLECTING SALES TAXES EVERYWHERE, CNN, (2017). http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html (last visited March 30, 2018).

Far from dominating the retail sector, remote sales equaled just 8.9 percent of the $5 trillion annual U.S. retail market in 2017. U.S. CENSUS BUREAU, QUARTERLY RETAIL E-COMMERCE SALES, 4TH QUARTER 2017, (2018), https://www2.census.gov/retail/releases/historical/ecomm/17q4.pdf (last visited March 29, 2018). As discussed above, 64 percent of these sales are attributed to companies with physical retail locations. Annual retail trade employment levels reached a third consecutive record high in 2017, at 15.86 million. U.S. BUREAU OF LABOR STATISTICS, ALL EMPLOYEES: RETAIL TRADE [USTRADE], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/USTRADE, (last visited March 29, 2018). This represents more than a 9 percent increase since Great Recession lows.

Many consumers prefer a shopping experience of physically viewing, touching, and experiencing the products along with interacting with sales associates. Recent moves by leading real-estate investment firms suggest experts expect a strong future for physical commerce venues as well. For instance, this March, Klépierre bid $6.8 billion in cash and stock for Hammerson, a real-estate investment trust (REIT). This was a 41 percent premium to Hammerson's share price. Stephen Wilmot. *Death of the Mall? Greatly Exaggerated, Says Big Money*, THE WALL STREET JOURNAL, March 19, 2018.

The economy has benefited from this retail evolution with broadened consumer choice, increased jobs opportunities, more competitive consumer prices.

C. States are not Facing Sales Tax Revenue Shortfall Related to Remote Retailers

1. Sales Tax Revenue Continues to Soar, Despite the "Lost Revenue" from Remote Sales

State and local sales tax collection hit a record $574 billion in 2017, a seventh consecutive record. From

2011 through 2017, state and local sales tax revenue increased by 23 percent,[5] eclipsing the 13.9 percent combined growth in national population and inflation. Population increased just 4.9 percent increase by the end of 2017;[6] inflation rose 9 percent through this period.[7] States continue to derive approximately 30 percent of all revenue from sales taxes. Norton Francis and Frank Sammartino, *Governing with Tight Budgets* (September 2015), p 3, https://www.urban.org/sites/default/files/publication/66046/2000376-Long-Term-Trends-in-State-Finances.pdf.

Total lost revenue from remote sales, nationwide, based on estimated seller collection rates is estimated at $8.5 billion to $13.4 billion annually. GAO, *Sales Taxes*, at 45 Another study estimates an even smaller loss of $5 billion in sales tax revenue. Jeffrey A. Eisenach, and Robert E. Litan,

[5] U.S. BUREAU OF ECONOMIC ANALYSIS, STATE AND LOCAL GOVERNMENT CURRENT TAX RECEIPTS: TAXES ON PRODUCTION AND IMPORTS: SALES TAXES [B248RC1Q027SBEA], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/B248RC1Q027SBEA (last visited March 29, 2018).

[6] WORLD BANK, POPULATION, TOTAL FOR UNITED STATES [POPTOTUSA647NWDB], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/POPTOTUSA647NWDB, (last visited March 28, 2018).

[7] U.S. BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS: ALL ITEMS [CPIAUCSL], FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://fred.stlouisfed.org/series/CPIAUCSL (last visited March 26, 2018).

UNCOLLECTED SALES TAX ON ELECTRONIC COMMERCE: A REALITY CHECK, Empiris, LLC (2010), https://netchoice.org/wp-content/uploads/eisenach-litan-e-commerce-taxes.pdf (last visited, March 29, 2018). Estimates are merely 1-2 percent of the $5 trillion U.S. retail market. GAO, *Sales Taxes*, p. 45.

This boom in sales tax revenue occurred even as e-commerce retail sales more than doubled from approximately $200 billion in 2011 to more than $450 billion in 2017.[8] State and local governments as a whole are enjoying booming sales tax revenues even as e-commerce expands exponentially.

2. Remote Sellers Already Collecting the Vast Amount of Taxes Payable on Sales

Under current law, the United State Government Accountability Office (GAO) estimates that "state and local governments can…require remote sellers to collect about 75 to 80 percent of the taxes that would be owed if all remote sellers were required to collect tax on all remote sales at current rates." GAO, *Sales Taxes* p. 8. Remote sellers include both internet retailers (comprising more than 70 percent of the business-to-consumer remote sales) and e-marketplace sellers (comprising 18 percent of business-to-consumer remote sales) such as Etsy and eBay.

[8] U.S. BUREAU OF THE CENSUS, E-COMMERCE RETAIL SALES [ECOMSA], Federal Reserve Bank of St. Louis (2018), https://fred.stlouisfed.org/series/ECOMSA (last visited March 26, 2018).

In particular, the GAO "found that the percentage of taxes already being collected by sellers…was generally higher for Internet retailers than for other types of remote sellers like catalog retailers or e-marketplaces." GAO, *Sales Taxes*, at p. 8. A GAO analysis of just the 1,000 top internet retailers (not including e-marketplace sellers) found that "about 80 percent of the potential revenue from requiring all Internet retailers to collect is already collectible." Of the top 100 internet retailers, 85 either had a physical presence in or claimed to collect sales taxes for New York and California while 55 percent had a physical presence in or collected sales tax for smaller states. *Id*. at p. 13.

E-marketplaces are critical for the success of success of smaller entrepreneurs and new businesses. E-marketplace commerce accounts for just 18 percent of the business-to-consumer remote sales and an even smaller percentage of remote sales if business-to business sales are included. *Id*. at p. 35. Entities such as eBay provide a platform for individual sellers to reach online buyers. Because relatively few of these sellers have widespread nexuses, the amount of sales tax collectible from remote e-marketplace sellers under current law is just 14 percent to 33 percent of the total due from these sales. *Id*. at p. 40. Even though lost revenue from e-marketplace sellers is small, these e-marketplace platforms will likely be targeted if the physical presence standard is overturned. *Id*. at p. 45. Sales tax collection compliance costs would crush many of these entrepreneurs.

3. States Already Possess the Power to Enforce State Tax Laws on Purchases from Remote Sellers with no Physical presence

In *Direct Marketing Association v. Brohl*, __ U.S. __, 135 S. Ct. 1124 (2015), the state of Colorado required online retailers choosing not to collect state sales taxes to notify customers regarding Colorado's sales and use tax requirements and to report tax information related to particular sales to both the customer and the Department of Revenue. *Id.* at 1125. The Court indicated that Commerce Clause limitations on jurisdictional boundaries for sales tax collection requirements do not preclude states from requiring online retailers with no physical presence to inform customers of their state's sales and use tax requirements or to report tax information to the state.

These statistics illustrate that as commerce develops, it evolves. Many online retailers now have presence—showrooms, warehouses, etc. And some that began as brick and mortar become online retailers. Despite the claims of the "efairness" advocates that "online-only retailers are not collecting sales tax during a purchase," Internet commerce is not, nor should it be, free of taxation.

D. Remote Sales Taxes Unfettered from any Substantial Presence Undermines Tax and Economic Policy Competition

1. Capability to Force Remote Sellers to Collect Sales Tax Undermines the Drive for Fiscal Policy Reform

Overall, economic evidence strongly suggests states with lower tax burdens and more economic freedom regularly outperform their higher taxed and more restrictive counterparts. The annual *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index* presents the case of tax competition in full detail and shows how Americans "vote with their feet" across state lines to pursue economic opportunity. ARTHUR B. LAFFER, JONATHAN WILLIAMS, AND STEPHEN MOORE, RICH STATES, POOR STATES (10th ed,) (2017) https://www.alec.org/publication/rich-states-poor-states/ (last visited March 29, 2018). This healthy economic competition in a free market, between the 50 "laboratories of democracy," is at the heart of the American experiment with federalism.

State lawmakers possess the power to create a tax and fiscal policy environment conducive to economic growth. Individuals, businesses, and even government revenues benefit from the increased savings and investment spurred by a growth in total economic output. Poorly designed tax policy creates a fundamental disconnect between work and reward, driving out the key ingredients to earned success.

Unfortunately, the repeated failures of state tax increases have caused some state policymakers to look aggressively beyond their own state lines for tax revenue. This ill-advised strategy chases the promise of short-term revenue and fails to consider the harm to the national economy that is caused as businesses elsewhere are inadvertently stifled by compliance costs.

Remote sellers, like any other business, often choose their home state based on costs of compliance with state and local regulations. The desire to enhance the state economy by attracting these businesses fosters a healthy competition between the states to enact prudent tax and regulatory policies. Forcing remote sellers to comply with the sales tax collection and remittance requirements of locales in which they have no physical presence erodes this tendency.

2. Forcing remote sellers to act as tax collection agents for the state mutes political pressure for reform by constituents

Absent forcing remote sellers to collect and remit taxes, taxpayers would instead pay the use tax on their individual purchases quarterly or annually. Forcing remote sellers to collect the sales tax on each purchase as it occurs allows politicians to mask the full burden of the tax by spreading payment by the consumer over a period of time. As such, political pressure by consumers for fiscal reform is muted by forcing remote sellers to act as tax collection agents for the state. *See*, *e.g. M'Culloch*, 17 U.S. (4 Wheat.) at 428.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted,

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