No. 17-____

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1967, this Court held that the dormant commerce clause prohibits a State from requiring catalog retailers to collect sales taxes on sales into the State unless the retailer is "physically present" there. *Nat'l Bellas Hess v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967). That rule, questionable even then, became an isolated outlier when *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), held that only a "substantial nexus" was needed for other state taxes affecting interstate commerce. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court was asked to correct that aberration. But despite a vigorous dissent—and the lack of a similar, "physical presence" rule for *any* other type of tax, *id.* at 317—this Court tentatively retained the requirement on *stare decisis* grounds.

The legal and practical developments of the past 25 years strongly recommend revisiting that judgment. *Quill* has grown only more doctrinally aberrant, and has been roundly criticized by members of this Court, including Justices Kennedy, Thomas, and Gorsuch. But while its legal rationales have imploded with experience, its practical impacts have exploded with the rapid growth of online commerce. Today, States' inability to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike. "Given these changes …, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy J., concurring). The question presented is:

Should this Court abrogate *Quill*'s sales-tax-only, physical-presence requirement?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

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INTRODUCTION

Before Amazon was even selling books out of Jeff Bezos's garage, this Court held in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), that it would not apply its by-then-settled "dormant commerce clause" jurisprudence to state sales-tax obligations. Instead, while recognizing that "contemporary Commerce Clause jurisprudence might not dictate the same result," *id.* at 311, this Court resolved to retain—"'*at least for now*'"—a mechanistic exception of older vintage that universally prohibited States from imposing sales-tax requirements on vendors with no "physical presence" therein. *Id.* at 317-19 (adhering to *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967)) (emphasis added). The Question Presented is whether the time has now come to take this "physical-presence rule"—which is, in fact, an ever-more-anomalous *exception* to core doctrinal principles—and finally retire it.

As several members of this Court have said, the answer is "yes." Calling it "unwise to delay any longer," Justice Kennedy—who voted for the result in *Quill*—recently urged "[t]he legal system" to "find an appropriate case for this Court to reexamine" it. *See Direct Mktg. Ass'n v. Brohl* (*DMA*), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Justice Thomas, the only other remaining Justice from *Quill*, likewise now advocates abandoning it, along with other "unworkable" products of the dormant commerce clause. *E.g.*, *Comptroller v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting). Meanwhile, Justice Gorsuch recently suggested that *Quill* gave its own rule an "expiration date," setting it up to "wash away with the tides of time." *See Direct Mktg. Ass'n v. Brohl* (*DMA II*), 814 F.3d 1129, 1151 (10th Cir. 2016) (concurring opinion).

Because circuit conflicts are impossible in cases squarely governed by this Court's precedent, *see* Pet.App. 14a, such criticisms represent the clearest possible signal that this case merits certiorari.

Nor could there be a better or more timely vehicle than this Petition. Answering Justice Kennedy's invitation, South Dakota enacted a law to challenge *Quill*'s physical-presence requirement, while also minimizing the interim burdens on affected taxpayers and facilitating this Court's review. *See* Pet.App. 6a-7a. The result is a case in which the sole, dispositive issue is *Quill*'s continuing applicability, presented in a context that highlights its shaky legal foundations and harmful results. This Court should take this opportunity to reconsider a precedent that was "questionable even when decided, [and] now harms States to a degree far greater than could have been anticipated." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

In fact, since Justice Kennedy's call to address this "urgent" issue two years ago, the urgency has only intensified. Although this is the cleanest and most timely vehicle this Court will see for the Question Presented, South Dakota is not alone: Many States have recently enacted similar taxation provisions, and active litigation respecting those laws is likewise underway. Those cases are years behind this one, however, and this Court can thus spare the States and numerous affected businesses the substantial expense of unnecessary audits and litigation by providing a definitive answer now on *Quill*'s continuing force. This Petition should thus be granted to provide the clarity the legal system needs—even without regard to whether, on the merits, *Quill* should be overruled.

That said, *Quill* clearly needs to go. When this Court considers overruling its precedent, it looks to whether the existing rule: (1) is constitutional or statutory; (2) has engendered reliance interests; (3) has been undermined by changed circumstances; (4) has been consistently criticized as inconsistent with broader doctrine; and (5) has proven "unworkable" or "outdated" with experience. *See infra* pp.27-35. *Quill* fares poorly on every measure. It is a severely criticized, constitutional holding that *itself* warned when decided that it might later be reconsidered. *See infra* p.20. It is also, in Justice Gorsuch's words, a "precedential island[] … surrounded by a sea of contrary law." *DMA II*, 814 F.3d at 1151. And after 25 years of technological progress and economic changes, it has proven entirely out of date.

On the one hand, these changes have eliminated *Quill*'s sole animating concern—namely, the logistical burden national mail-order retailers might face in collecting sales tax in multiple jurisdictions. *See* 504 U.S. at 313 n.6; *see also Bellas Hess*, 386 U.S. at 759-60. Today, advances in computing have made it easy for retailers to collect different States' sales taxes. Implementing such technology poses a minimal obstacle for companies, like respondents here, that can instantly tailor their marketing and overnight delivery of hundreds of thousands of products to individual customers based on their IP addresses; these companies can surely calculate sales tax from a zip code. In fact, the record here shows that sales-tax collection is now uncomplicated for large-scale internet retailers, *see infra* pp.29-31, and that asking today's companies to undertake it when they do substantial business with a State's citizens imposes no undue burden on interstate commerce.

On the other hand, these same changes have rendered *Quill*'s outlier rule far more harmful and unfair. Under contemporary conditions, *Quill* does not alleviate special burdens on interstate, internet sellers—it gives them an unfair advantage over their brick-and-mortar rivals. *See DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). That is ironic, because equality of treatment between in-state and out-of-state businesses is now the overarching value of the dormant commerce clause. *Id.* Meanwhile, given the (ever growing) scale of e-commerce, the immediate effect is a "startling revenue shortfall" for State and local governments that cannot effectively collect tax on a growing proportion of retail purchases. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

In fact, *Quill* does double damage from a federalism perspective: It deprives States and local governments not only of critical revenue, but also of a power the Constitution and Tenth Amendment fully reserved to them. It is no answer to hope (as *Quill* did) that Congress might "fix" the problem created by this Court's own doctrine by devolving power back to the States. *See* 504 U.S. at 318-19. The damage to the Framers' design is done when the States must go begging to Congress for powers that belong to them by right, as 25 years of congressional inaction on this issue have vividly shown.

This Petition should be granted. The doctrinal tension created by *Quill*'s outlier, sales-tax-only exception requires resolution. And given all the harm it now causes, and the benefits it no longer delivers, the physical-presence requirement should be eliminated.

PETITION

Petitioner South Dakota respectfully seeks a writ of certiorari to review a judgment of the Supreme Court of South Dakota.

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (Pet.App. 1a-14a) is not yet published but is available at 2017 WL 4051554. The state trial court's decision (Pet.App. 15a-18a) is unreported.

JURISDICTION

The judgment below, affirming a final judgment on federal constitutional grounds, was entered September 13, 2017. Pet.App. 1a. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATEMENT

I. Background

In 2015, Justice Kennedy wrote separately to encourage this Court to reconsider *Quill*. *See DMA*, 135 S. Ct. at 1134-35. Though he had voted in favor of *Quill*'s result in 1992, he noted that it was "questionable even when decided," and that its legal and practical weaknesses had been exposed by the intervening decades and the birth of modern internet retail. *Id.* Calling it "unwise to delay any longer," he urged "[t]he legal system" to quickly find a vehicle for *Quill*'s reexamination. *Id.* at 1135.

South Dakota had good reason to answer the call. It "has no state income tax and relies on retail sales and use taxes for much of its revenue." Pet.App. 1a. And its low-density, rural population has a particularly strong

incentive to take advantage of tax-free sales from internet retailers, who now quickly deliver everything from major appliances to everyday necessities throughout the country. "As Internet sales by [these out-of-state] sellers have risen, state revenues have decreased," Pet.App. 2a, leading to serious shortfalls. Accordingly, the "South Dakota Legislature began its 2016 session concerned with its ability to maintain state revenue in the face of increasing Internet sales and their effect on sales tax collections," Pet.App. 6a-7a—particularly because, unlike Congress, it "must maintain a balanced budget." Pet.App. 7a; S.D. Const. art. XII, §7.

The result was "Senate Bill 106," which took up Justice Kennedy's invitation by requiring out-of-state sellers to collect and remit sales tax based not on their physical presence in South Dakota, but on their economic connection to the State. *See* Pet.App. 19a (§1) (imposing thresholds of $100,000 in sales or 200 separate transactions to trigger collection requirement). The Legislature took multiple steps to protect out-of-state sellers during the inevitable litigation process, including provisions insulating them from any interim tax obligations, *see* Pet.App. 20a-22a, 24a (§§3, 5-7, 8(10)), and promoting a clean and efficient vehicle for this Court's review, Pet.App. 20a-21a (§§2, 4). The law provided a cause of action the State could use to affirmatively sue out-of-state retailers who failed to comply, *id.*; an expeditious hearing and appeal process, *id.*; an automatic injunction staying the law's enforcement during this case's pendency, Pet.App. 20a (§3); and express protections against any retroactive tax collections, Pet.App. 21a, 24a (§§5-6, 8(10)). It also included detailed findings regarding the revenue shortfalls and

other changed circumstances supporting *Quill*'s reconsideration. *See* Pet.App. 22a-24a (§8). After multiple committee and public hearings, the bill passed with overwhelming support. Pet.App. 8a-9a.

The State sent direct notice about the new law to a large set of out-of-state retailers it believed would meet the statutory thresholds. It then sued four that failed to comply, seeking a declaratory judgment affirming the law's validity and applicability to them. Pet.App. 9a-10a. Three are respondents here; a fourth (Systemax) preferred not to assert its *Quill* defense. Instead, after the State agreed to dismiss its complaint in exchange, Systemax "voluntarily registered for a sales tax license and immediately began collecting taxes under the law" the next day. Pet.App. 10a.

Below, the State conceded that it could only prevail by convincing *this* Court to abrogate *Quill*'s physical-presence requirement. It thus acquiesced in respondents' summary judgment motion. The state trial court held that *Quill* invalidates "as a matter of law" a state regime that, like South Dakota's, applies to sellers lacking any in-state physical presence. Pet.App. 16a. Because it was "duty bound to follow applicable precedent of the United States Supreme Court," the court was compelled to rule for respondents, "even when changing times and events clearly suggest a different outcome." Pet.App. 17a.

The South Dakota Supreme Court reached the same result. It recited the history above, Pet.App. 3a-11a, taking note of the State's various arguments why *this* Court should reconsider the physical-presence rule for sales-tax obligations, *see* Pet.App. 13a, along with the recent criticisms levelled at *Quill* by Justices Kennedy and Gorsuch. Pet.App. 13a-14a. But, "mindful of

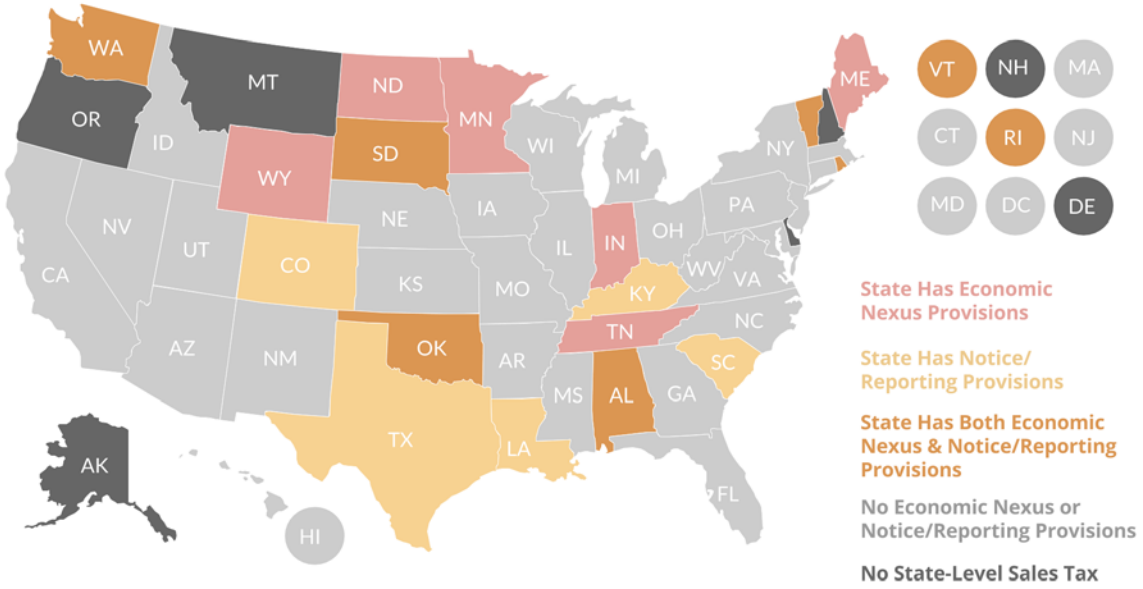
the Supreme Court's directive to follow its precedent when it 'has direct application in a case,' and to leave to that Court 'the prerogative of overruling its own decisions,'" the state court knew it had no choice: "However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled." Pet.App. 14a.

II. Developments In Other States

In the meantime, many other States have also responded to Justice Kennedy's invitation by enacting provisions materially identical to South Dakota's or otherwise challenging *Quill*'s physical-presence requirement. Many States (including South Dakota) also enacted various "expanded" definitions of "physical presence" after *Quill*. And yet more States are considering additional measures in their upcoming legislative sessions. The action throughout the Nation is extensive and complex, as seen in the following maps.

Current Law: Non-Physical Nexus and Notice/Reporting

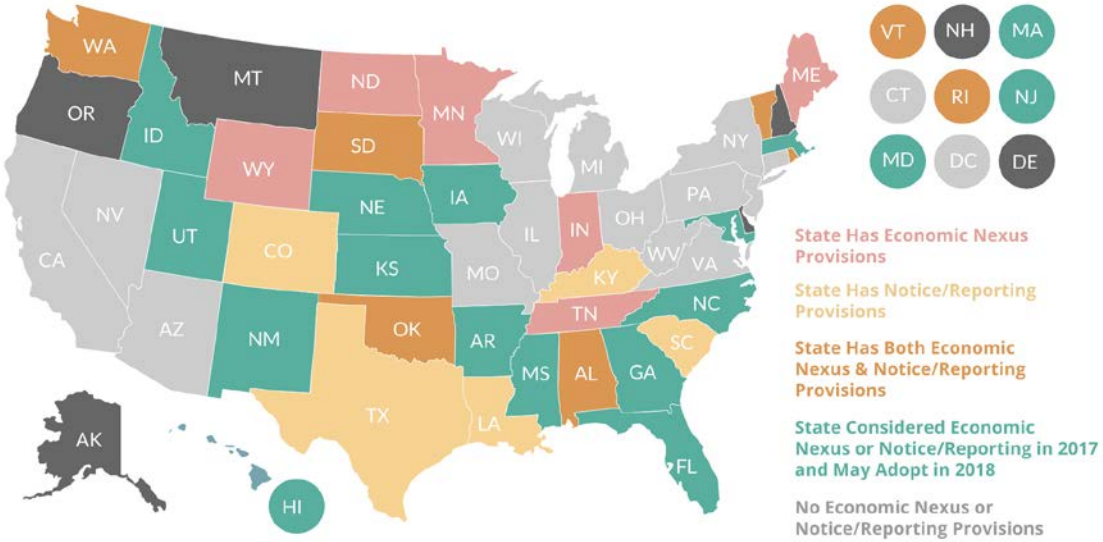
State Sales & Use Tax laws/regulations which: 1) assert nexus solely based on sales activity in a state, without regard to traditional physical presence (all of these laws/regulations, except for Oklahoma's, have been adopted since 2015); or, 2) which require remote sellers to provide notice of potential use tax liability at the point of purchase as well as reporting to the consumer and to the state annual data regarding total purchases (as of September 27, 2017).



Source: MultiState Associates (www.multistate.us).

Current & Proposed:
Non-Physical Nexus and Notice/Reporting

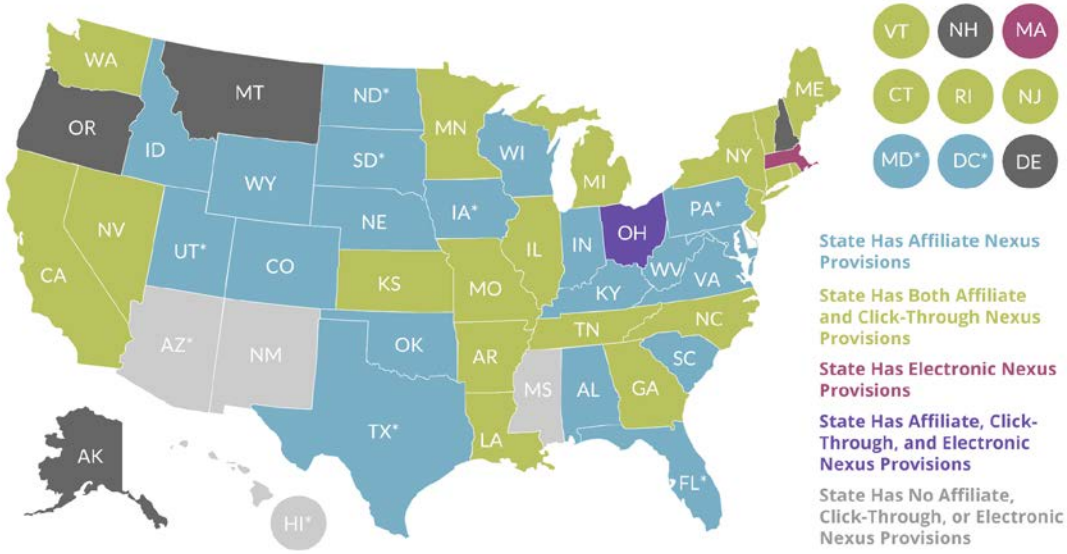
State Sales & Use Tax current and proposed laws/regulations which: 1) assert nexus solely based on sales activity in a state, without regard to traditional physical presence; or, 2) which require remote sellers to provide notice of potential use tax liability at the point of purchase as well as reporting to the consumer and to the state annual data regarding total purchases (as of September 27, 2017).



Source: MultiState Associates (www.multistate.us).

Current Law: Expanded Physical Nexus

State Sales & Use Tax laws/regulations which attribute nexus to a seller based on the physical presence of an affiliate in the state (i.e., a related corporate entity), the activities of another party in the state (e.g., a website in the state directing sales to the remote seller, known as "click-through" nexus), or the use of software or other electronic presence in the state (as of September 27, 2017).



Notes (denoted by asterisk): Arizona and Hawaii- No affiliate nexus or click-through nexus statute, but DOR (or equivalent agency) asserts underlying law provides authority to require collection based on an affiliate relationship. District of Columbia, Florida, Iowa, Maryland, North Dakota, Pennsylvania, South Dakota, Texas, and Utah- No click-through nexus statute, though the DOR (or equivalent agency) takes the position that click-through relationships create nexus.

Source: MultiState Associates (www.multistate.us)

Litigation is proceeding in several of these jurisdictions. But those cases lag well behind this one, and are unlikely to reach this Court on the merits before October Term 2019. Conversely, given Justice Kennedy's exhortation against delay, *supra* p.5, South Dakota filed this Petition within weeks of the opinion below, to facilitate a possible decision this Term.

REASONS FOR GRANTING THE WRIT

There are three broad sets of reasons this Court should grant this Petition and reconsider *Quill*. First, under contemporary conditions, *Quill*'s rule is unusually (and increasingly) harmful. Second, *Quill* is not only incorrect, but also now the kind of mistake that should not be reinforced for the sake of *stare decisis*. And third, this issue cannot wait: The extensive activity in the States and uncertainty in the regulated industry now make it doubly "unwise" for this Court to delay any further.

I. This Issue Is Exceptionally Important.

The physical-presence exception for sales-tax collection duties is causing serious harms this Court could not have foreseen when it decided *Quill* in 1992. Those harms fall in three places: on the States, which are deprived of critical revenue; on brick-and-mortar retailers, who are deprived of a level playing field; and, ironically, on the very interstate commerce *Quill* aimed to protect.

A. *Local governments are severely and increasingly harmed by Quill.*

Justice Kennedy's *DMA* concurrence recognized the large and increasing harms that *Quill* causes to state and local treasuries. Current scholarship confirms this point. Justice Kennedy relied on a study by Professor

William Fox of the University of Tennessee and others to conclude that Colorado alone lost around $170 million in 2012 because it could not require out-of-state retailers to collect sales tax on Colorado sales. *See* 135 S. Ct. at 1135 (citing Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* 11 tbl.5 (2009)). That year, state and local governments as a whole were owed an estimated $23 billion in sales-tax revenues that out-of-state retailers were not obligated to collect under *Quill*.[1] An updated study projects their likely losses at $33.9 billion in 2018 and *$211 billion* from 2018-2022.[2]

It is thus no surprise that States are feeling the squeeze. Thirty-three "faced revenue shortfalls in 2017," and six had no budgets in place at the start of the fiscal year this July.[3] As Justice Kennedy emphasized, the revenue that *Quill* withholds amounts to billions that state and local governments can ill-afford to lose when it comes to paying for "education systems, healthcare services, and infrastructure." *DMA*, 135 S. Ct. at 1135.

Though this issue is clearly widespread, conditions in South Dakota illustrate the harm. The State is particularly dependent on its sales tax, and can ill-afford the losses *Quill* engenders. *See supra* pp.5-6. Indeed, at the very moment it enacted the law at issue, the Legislature was forced to increase the sales-tax rate substantially to help pay teacher salaries. *See* H.B. 1182,

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[1] https://goo.gl/3Dj54Z.

[2] https://goo.gl/diFoLR.

[3] *See, e.g.*, https://goo.gl/o3D77c.

91st Legis. Assemb. Session (S.D. 2016). Governor Daugaard estimated the State's *Quill*-related losses at upwards of $50 million in his Budget Address for FY2018.[4] Even respondents, while making several self-serving assumptions, conceded below that South Dakota was losing at least $21 million/year, *see* Appellees' Br. 21[5]—a huge sum in a small State. Assuming the same per-capita loss, that very conservative estimate of *Quill*'s harm would amount to over $600 million in Texas, or $900 million in California.

This critical problem only grows worse as more and more sales move online. While overall retail grew only 1.9 percent from 2014 to 2015, internet retail grew by 14 percent.[6] *See DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (stressing that while "mail-order sales" at time of *Quill* totaled "$180 billion," "e-commerce sales alone totaled $3.16 trillion" in 2008). Absent this Court's intervention, state and local governments will only fall further and further behind.

That is doubly so because the already-brutal effects of the revenue shortfall can multiply in several ways. For example, to make up the shortfall, South Dakota must typically raise sales-tax rates. *See supra* pp.6-7. But higher rates only encourage more consumers to seek tax avoidance online—an effect economic research has shown to be particularly strong. *See, e.g.*, Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1, 24 (2014) ("[A] one percentage point increase in a state's sales tax leads to an increase of just under 2 percent in online purchasing from other states,

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[4] https://goo.gl/16tvue.

[5] https://goo.gl/8ytvhs.

[6] https://goo.gl/nohxHu.

and a 3-4 percent decrease in online purchasing from home-state sellers."). Because rising rates shrink the tax base by pushing sales online (in a way *Quill* itself exacerbates), rates need to rise *even more* to make up the shortfall—shrinking the base even further.

Similarly, lower revenues and diversion of sales online cause downstream economic effects that further harm local governments and communities. Online sales do not support local jobs or spending the way local stores do, and local government can thus find itself called upon to deliver more support services with less revenue to do so. Meanwhile, the revenue shortfall means that already-burdened state and local governments hire fewer teachers, police officers, game wardens, and maintenance crews. Just as there is a "multiplier effect" on economic growth from fiscal outlays, disappearing fiscal fuel drains activity from the local economy at a multiplying rate that feeds back on itself in the form of even more revenue losses. The pain from *Quill* thus goes beyond even the "extreme harm and unfairness" Justice Kennedy identified. *DMA*, 135 S. Ct. at 1134.

B. *Quill also unfairly harms local, brick-and-mortar businesses.*

On top of *Quill*'s detrimental effects on local economies, its unfairness to brick-and-mortar retailers is itself a reason to grant certiorari. *Quill* tilts the economic playing-field against these companies—including many small, local businesses—draining the local economy and upsetting the fair, competitive dynamic that makes the free market work.

As Justice Gorsuch has emphasized, out-of-state vendors "don't seek comparable treatment to their in-state brick-and-mortar rivals" when they invoke *Quill*;

rather, "they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *DMA II*, 814 F.3d at 1150. Multiple studies by noted economists confirm this intuition by demonstrating that *Quill* in fact functions as a kind of subsidy for out-of-state internet retailers, who benefit from the very high rates at which consumers divert their purchases online to avoid taxes. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000); Arthur B. Laffer & Donna Arduin, *Pro-Growth Tax Reform and E-Fairness* (2013), http://www.efairness.org/files/dr-art-laffer-sudy.pdf. To match the price effectively available online *from tax avoidance alone*, local retailers must discount their prices 5-10%—which can erase their entire profit margin.[7] This, in turn, predictably exacerbates the recognized struggles now facing both national retailers and local mom-and-pop businesses.

The functional subsidization of internet retailers over their brick-and-mortar competitors is not just a practical economic problem, however; it is a doctrinal embarrassment. "[T]o the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence," it is the "anti-discrimination principle" that in-state and out-of-state businesses should compete on level ground. *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). But the practical effect of *Quill* is the opposite: It favors out-of-state businesses over local ones. The unjustifiable harm to main-street businesses and brick-and-mortar retail institutions demonstrates

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[7] *See* https://goo.gl/wxEpJx (estimating average retail margin at 3%).

both the important, concrete issues at stake *and* how far *Quill* has strayed from core, dormant-commerce-clause principles.

Meanwhile, the struggles of main-street stores affect not only those businesses and the local and national economy, but the culture of their communities as well. Empty storefronts and abandoned retail institutions both contribute to creeping economic anxiety and signal the disappearance of shared spaces and experiences, in small towns and big cities alike. Modern market conditions are hard enough on brick-and-mortar retailers without preserving an isolated holding that severely tilts the economic playing field *against* them in the supposed name of *fairness*. No one could have foreseen in 1992 the ways that internet retail would remake the American economy in 2017. But today, at least, this Court must take account of how its own, outdated precedent has played a part in that development, pushing economic activity (and important entry-level jobs) from main street to distant tech companies, with a tangible effect on everyday American life.

C. *Quill harms interstate commerce itself.*

The purported point of the physical-presence rule that *Quill* preserved was to protect interstate commerce from a possible "undue burden" that would result if remote sellers had to collect sales tax in 50 States. But even *Quill* acknowledged that a "physical presence" rule is a fairly "artificial" and "formalistic" tool for achieving this result, 504 U.S. at 314-15; *see also DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring). For example, one consequence of *Quill* is that having a warehouse or sales agent in one tiny corner of California is enough to subject a business's *every* California sale to California's sales-tax requirements. *Nat'l Geographic Soc'y v. Cal.*

Bd. of Equalization, 430 U.S. 551 (1977) (so holding). And the upshot of this "artificial" approach is that *Quill* ends up burdening a lot of *interstate* commerce—achieving the opposite of its own design.

As an initial matter, note that establishing an in-state physical presence is itself often a form of interstate commerce. When a Missouri company builds a store in Montana, a Colorado firm hires a sales team in Connecticut, or an Alabama retailer makes deliveries to Arkansas with its own trucks, each is engaged in interstate commerce no less than a firm that ships goods interstate by common carrier. But because the *Quill* rule is "artificial," it discourages all this interstate commerce on its face: Firms maximize the effective subsidy from *Quill* if they minimize their *interstate* presence and instead stick to shipping from one State to all the others. It is hard to even imagine why the dormant commerce clause—a doctrine of interstate comity—should affirmatively encourage out-of-state business to avoid investing in jobs or infrastructure in other States. *Quill*'s rule is at war with its own ends; it undermines rather than advances the economic union the dormant commerce clause is meant to promote.

Worse, the *Quill* rule turns the "physical presence" requirement into a dangerous trap. If a sales representative from an internet retailer in Oklahoma goes to a conference in Texas and ends up making a sale there over lunch, his company is now arguably liable for millions in sales taxes it never collected from Texas purchasers—a result far worse than just collecting and remitting itself. Clearly, the far-more-relevant "nexus" in such instances is the extent of the company's Texas sales, rather than an *unrelated* interaction in Texas that happened to involve a "physical" presence there.

Yet *Quill* makes the former irrelevant and the latter dispositive, raising a risk of catastrophic error for firms engaged in interstate commerce. Again, this *burdens* interstate commerce rather than freeing it.

Not only is *Quill* self-defeating from the standpoint of its own constitutional values, it is also bad for the national economy writ large. Irrationally preferring one form of business organization over another makes the market inefficient: As several economists have explained, it means that there will be too much online commerce and too few brick-and-mortar stores. *See, e.g.*, *supra* pp.15-17. Subsidizing online retail pushes resources away from services only local stores provide: things like hands-on customer service, repairs and installations, or the chance to handle merchandise before paying for it. Because those services are "vital to channel profits," the effect "may be disastrous" for the entire market. Steven Strauss, *The Impact of Free Riding on Price and Service Competition in the Presence of E-Commerce Retailers* 50 (Yale Sch. of Mgmt. Working Paper Series PHD, No. 2, 2002).

It also leads to lots of economic waste. *Quill* encourages Californians to buy and ship from Wayfair in Massachusetts the same items that Bay-Staters are encouraged to buy and ship from Newegg in California. Both buyers get "free shipping" and "no tax" on the same items as they cross paths on pointless cross-country excursions.[8] A fair, free market naturally eliminates this kind of waste; only a distortion of interstate commerce creates it.

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[8] *See, e.g.*, https://goo.gl/StcPYt (Wayfair); https://goo.gl/N3YUqz (Newegg).

In sum, *Quill* is an unusually harmful precedent from the perspective of not only local governments and affected industries, but the very national economy it ostensibly protects. The harms are serious and increasing. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). This Court should not hesitate to reconsider a *per se* rule that, in its artificial rigidity, does so much damage while undermining its own ends. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007).

II. *Quill* Should Be Overruled.

Quill is doubly costly from a federalism perspective: It not only harms state and local governments and economies, it also strips from States a power preserved by the Constitution and Tenth Amendment. Remarkably, however, *Quill* admits that this seizure is not compelled by "contemporary Commerce Clause doctrine," 504 U.S. at 311. Instead, *Quill* was willing to justify transforming the outdated physical-presence rule of *Bellas Hess* into an isolated exception from then-prevailing doctrine based solely on *stare decisis* and the supposed value of leaving a "bright-line" rule undisturbed. Even then, preserving such an unjustified incursion into the States' revenue powers was likely the wrong choice—*Quill* was "questionable even when decided," *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). But now, at least, it is also clear that "special justifications" exist to support jettisoning a sales-tax-only, physical-presence rule the Constitution does not support. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

That said, the Question Presented necessarily encompasses the antecedent question whether *Quill* must be formally overruled, or instead whether the Court can

limit that decision to its precise facts involving traditional catalog mailers rather than contemporary e-commerce. It is possible that traditional catalog businesses that do not maintain interactive, online storefronts specially rely on the *Quill* rule, or that e-commerce is "present in a meaningful way" that traditional catalog mailers are not. *See DMA*, 135 S. Ct. 1135 (Kennedy, J., concurring). The lower courts cannot make this distinction, however, because it requires rejecting the uniform physical-presence rule that *Quill* articulates for sales taxes. But whatever else it might permit—whether it is prepared to squarely overrule its precedent or not—this Court should not continue allowing internet retailers to seize an unfair advantage in the name of *stare decisis* protections *Quill* intended for a very different industry.

A. *The physical-presence rule is incorrect.*

The current, recognized touchstone for assessing state taxes challenged under the dormant commerce clause comes from this Court's 1977 decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Its four-part test imposes no physical-presence requirement; in fact, its purpose is to determine when *non-resident* businesses conducting interstate commerce in a State may be asked to contribute their "'just share'" to collecting that State's taxes. *Id*. *Complete Auto* permits state taxes that are (1) "applied to an activity with a substantial nexus with the taxing State," (2) "fairly apportioned," (3) "not discriminat[ory]," and (4) "fairly related to the services provided by the State." *Id.* The operative issue in cases like this one—and the sole issue respondents raised below—concerns the first element: the "nexus" between the taxing State and the person or activity taxed.

Were this test actually applied to a law like South Dakota's, it would pass with flying colors. A tax-collection obligation exactly equal to that imposed on local businesses and pegged solely to in-state sales is apportioned as fairly and evenhandedly as possible based on the precise extent to which the seller benefits from the State's market. Meanwhile, the "nexus" question—in *Complete Auto*'s words—concerns not just the nexus between the complaining *firm* and the taxing State, but rather the nexus between the taxed "*activity* … [and] the taxing State." *Id.* (emphasis added). That test is clearly met where the taxed activities are sales made to people and businesses *inside the State*. *See, e.g.*, *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) (applying *Complete Auto* and explaining that "[i]t has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State"). When one adds South Dakota's safe-harbor limiting the tax-collection duty to companies that consummate 200 sales or $100,000 worth of business in its (very small) market, the existence of a "substantial nexus" is beyond dispute.

The problem, however, is that this Court has never straightforwardly applied *Complete Auto*'s governing test to laws like South Dakota's. That's because, ten years before *Complete Auto*, it held in *Bellas Hess* that the dormant commerce clause prohibits imposing a tax-collection obligation on a company whose only connection to a State is through a common carrier like the U.S. Mail. *See* 386 U.S. at 759-60. That holding was rooted in then-prevailing doctrines under both the Commerce and Due Process Clauses, which this Court described as "similar." *Id.* at 756. Accordingly, 25 years later—after

this Court's Due Process jurisprudence evolved beyond any physical-presence requirement, and *Complete Auto* signaled the same for the dormant commerce clause—the North Dakota Supreme Court upheld a sales-tax obligation placed on catalog retailers, reasoning in its *Quill* decision that this Court had functionally discarded *Bellas Hess*. *See Quill*, 504 U.S. at 301. The question confronting *this* Court in *Quill* was thus not whether *Complete Auto* would uphold such a law after this Court had settled on that test, but rather whether *Bellas Hess*'s physical-presence rule had already been overruled by *Complete Auto* and other intervening changes.

Going out of its way to signal the closeness of the question, this Court ultimately said no. It admitted that it had not applied a physical-presence requirement to *any* other tax; "agree[d] with much of the … reasoning" in the state court's criticism of *Bellas Hess*; conceded that contemporary doctrine did not require such a rule; and even acknowledged that the results of keeping it would be "artificial." *Id.* at 302, 311, 315. Indeed, in an illuminating double-negative, the best *Quill* could muster was that a bright-line, physical-presence requirement for sales-tax obligations was "not inconsistent with *Complete Auto*." *Id.* at 311. Even that much was doubtful then, but it is obviously incorrect today: *Quill*'s sales-tax-only, physical-presence exception to *Complete Auto* lacks any constitutional basis and now sticks out from its surrounding precedent like a sore thumb.

The problems with the *Quill* rule on the merits begin with the constitutional text. As many members of this Court have noted—*see McBurney v. Young*, 569 U.S. 221, 234-35 (2013) (collecting citations)—the

dormant commerce clause is atextual, which may explain the problems that arise regarding many of its "ad hoc" rules and exceptions like *Quill*. *See DMA II*, 814 F.3d at 1148 (Gorsuch, J., concurring); *Wynne*, 135 S. Ct. at 1809, 1811 (Scalia, J., dissenting) (criticizing the "Imaginary Commerce Clause" for its "bestiary of ad hoc … exceptions"). Put otherwise, *Quill* may be "unworkable" because Justice Thomas is correct that the entire "negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J. dissenting).

That proposition is unnecessary to decide this case, however, because *Quill*'s physical-presence requirement is particularly unmoored from the Constitution's text. As Justice Thomas has noted, many core principles attributed to the dormant commerce clause *are* reflected in the Constitution: The proscription against interstate tariffs is seen in the Import/Export Clause, *id.* at 621 (citing U.S. Const. art. I, §10, cl. 2); and the rule against taxes unevenly targeting other States' citizens or their commerce appears in the Privileges and Immunities Clause, U.S. Const. art. IV, §2, cl. 1. The dormant commerce clause rules prohibiting "discrimination against" or "undue burdens on" interstate commerce can thus claim at least some textual heritage. But nothing in the text remotely supports a rule that "physical presence" is required within a State before that State can ask a party to collect and remit a tax on sales made *into that State's jurisdiction* on *exactly the same terms* that apply to in-state businesses.

To the contrary, terms of "'substantial equality'" between residents and non-residents are the precise object

of the comity clauses that appear in the Constitution. *Supreme Court v. Piper*, 470 U.S. 274, 280 (1986). And that explains why this Court has, at least since *Complete Auto*, firmly rejected the view that interstate commerce enjoys any "free trade" immunity from non-discriminatory state taxes, recognizing instead that interstate commerce "may be made to pay its way." 430 U.S. at 278, 284. *Quill* itself acknowledged that the physical-presence rule was a product of an earlier era in which that now-foundational premise was undercut by a more formal and restrictive view of the dormant commerce clause that prevented States from imposing "direct" taxes or obligations on interstate commerce as such. *See* 504 U.S. at 310-11. In that context, in-state presence was necessary to provide some hook for the State's taxing power *other* than the interstate commerce itself. But the whole point of *Complete Auto* was to dispense with such formalisms, 430 U.S. at 279, 281, and it expressly overruled at least one such formalistic precedent in doing so. *Id.* at 288-89. Accordingly, the conclusion that keeping *Bellas Hess*'s formalistic rule was "not inconsistent," 504 U.S. at 311, with *Complete Auto* was dubious even when *Quill* was decided in 1992—explaining, perhaps, why Justices Thomas and Kennedy did not join it. *See id.* at 319-21 (joining Scalia, J., concurring in the judgment).

That said, *Quill*'s infirmities have become far more obvious in the 25 years since, as critical legal and technological changes have disproven its premises. For example, *Quill* presumed that a bright-line, physical-presence rule would at least promote the dormant commerce clause's purposes by providing a clear safe-harbor and minimizing compliance burdens on interstate busi-

nesses. *Id.* at 313-17. But, as explained in greater detail below, changes in state law and the nature of retail itself have made *Quill*'s safe-harbor far from clear, while also eliminating any reasonable concern about inordinate compliance burdens. *See infra* pp.34-35.

Meanwhile, lower courts have been forced, over and over, to cabin *Quill* to its facts. This Court has never even attempted to explain why sales-tax collection needs a *different* "nexus" rule from other kinds of taxes imposed on non-resident businesses, nor has it condemned laws that impose equal or potentially heavier burdens on interstate commerce without a physical presence. Instead, this Court has acquiesced in countless lower-court cases holding that "*Quill* does nothing to forbid states from imposing regulatory and tax duties of comparable severity to sales and use tax collection duties." *DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring) (collecting cases). And lower courts continue to hold that seemingly indistinguishable taxes—like a "Corporate Activities Tax" on out-of-state retailers calculated based on gross receipts from in-state sales—are not governed by *Quill* because they are not formally "sales taxes." *See, e.g.*, *Crutchfield Corp. v. Testa*, __ N.E.3d __, 2016 WL 6775765, at *1-2, *9-11 (Ohio 2016).

In short, experience since 1992 has shown that the supposed benefits of the physical-presence rule are illusory, and in no way justify the illogical distinctions foisted upon the lower courts. In today's environment, laws like South Dakota's impose not "undue burdens" on interstate commerce but quotidian costs of doing business that any company would expect to bear. Applying *Complete Auto*'s test to such laws should be a trivial exercise: As it makes clear, "it was not the purpose of the commerce clause to relieve those engaged in

interstate commerce from their just share of the state tax burden even though it increases the cost of doing business." 430 U.S. at 279. On that principle alone, *Quill* is plainly incorrect.

B. *Stare decisis no longer justifies keeping the physical-presence rule.*

Given the lack of merit for the underlying physical-presence rule—a point, again, that *Quill* virtually conceded—*Quill* largely rested its decision on the force of *stare decisis*. But looking to the *stare decisis* factors this Court identified in *Quill* and elsewhere now shows that the necessary "special justifications" exist for doing away with the physical-presence rule. These factors include whether the rule: (1) is constitutional or statutory; (2) has engendered legitimate reliance interests; (3) has been undermined by changed circumstances; (4) has been consistently criticized, and is now seen as sufficiently inconsistent with other doctrine that it is "a positive detriment to coherence ... in the law"; and (5) has proven "unworkable" and/or "outdated … after being 'tested by experience.'" *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233 (2009); *Patterson*, 491 U.S. at 173-74; *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (collecting cases). Whatever was true in 1992, the physical-presence rule now fares poorly on each of these factors.

1. *Constitutional Rule*. To begin, it is "this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality); *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]dherence to precedent is not rigidly required in constitutional cases[.]"). And as this Court recently clarified, that includes "judge-made rule[s]," even when they are

technically subject to congressional reconsideration. *Pearson*, 555 U.S. at 233.

Quill's rule fundamentally alters the Framers' separation of powers; it seizes a power from the States and forces them to beg Congress to give it back. As demonstrated by twenty-five years of congressional inaction in response to this Court's explicit call in *Quill*, 504 U.S. at 318, Congress has little incentive to "correct" that error by devolving power back to the States. The dormant commerce clause is a court-fashioned doctrine, and the Court is responsible for correcting its distortionary effects—as demonstrated by the correction this Court made in *Complete Auto* itself. *See* 430 U.S. at 288-89. Experience now doubly confirms that the Court cannot rely on anyone else.

2. *Reliance*. As to the key question of reliance interests, there is also a marked difference between today and 1992. In *Quill*, this Court expressed concern that the physical-presence requirement had "become part of the basic framework of a sizable industry," attributing the growth of mail-order in part to *Bellas Hess*'s "bright-line exemption from state taxation." 504 U.S. at 316-17. Today, however, there are three reasons to discount such claims of reliance.

First, while *Quill* postulated that a "bright-line exemption from state *taxation*" had "become part of the basic framework" of the mail-order industry, *id.* (emphasis added), there *is no exemption* from state *taxation* for mail-order sales. Instead, the tax is still owed (as a use tax), and *Quill* only prevents the State from making the remote retailer *collect it*. *See DMA*, 135 S. Ct. at 1127. Missing this distinction is understandable because consumers almost never pay use taxes. And this also explains why remote sellers so jealously guard this

rule, to the point of frequently (and deceptively) advertising their sales as "no tax." *See* Pet.App. 22a (§8(3)) (so finding). But this is not a *legitimate* reliance interest: No one is entitled to rely on how their business model benefits from (and even encourages) widespread tax avoidance by their customers. A proper accounting of the physical-presence rule's legitimate reliance interests is limited solely to concerns about costs of *collection*—the functional tax advantage is a windfall no business can legitimately hope to retain.

Second, when it comes to those costs of collection, the practical realities have radically changed since 1967 and 1992. A mail-order transaction in those eras almost always involved consumers using paper checks to buy products by mail. In that context, accurately collecting sales tax would require nationwide mail-order companies to provide instructions for consumers to calculate their own sales-tax liability before handwriting a check. And even putting aside that special logistical challenge, it was surely much more difficult for companies to account for different tax rates and bases in the different taxing jurisdictions before the age of computers (in 1967) or internet-enabled network computing (in 1992).

Yet modern internet retail makes this all much easier than this Court could have imagined in 1992. Today, consumers purchasing online must input their address before they "check out" with a credit card, giving online retailers a perfect opportunity to calculate and collect the applicable sales tax. Readily available accounting software can now even track collections and prepare State-by-State remittances automatically, while "cloud-based" designs allow the underlying databases to be updated remotely whenever state laws change—automating everything on the seller's end. *See* Diane L. Yetter

& Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 575-76 (Aug. 7, 2017).[9] Today, this kind of algorithmic, data-driven task is rightly treated as marginal, particularly in the context of internet retailers like respondents, who specialize in using data and computing tools to identify and market products to individual consumers and then deliver those products rapidly throughout the country.

The record below vividly demonstrates just how easy the task has become. When Systemax chose to voluntarily comply, it began collecting South Dakota sales tax through its online portal *the very next day*. *Supra* p.7. That is no surprise: Because companies like respondents typically have physical presence in at least one State—and often several—they must already build sales-tax compliance functionality into their checkout processes. Adding collection in additional jurisdictions is more akin to flipping a switch than starting from scratch.

Many States—including South Dakota—have also worked together since *Quill* to simplify their tax laws and lower compliance costs through the Streamlined Sales Tax (SST) project. These States established common definitions and administrative procedures, and certified certain tax-compliance software providers that sellers could use *at no cost* in collecting and remitting sales taxes to the relevant States. Seven certified companies now offer software for compliance in the 24

[9] All of this post-dates *Quill*. Taxware released the first such program in 1996, with sophistication incomparable to modern options. *See id.*

States that have adopted the SST agreement, and using that software is both entirely free to merchants and a complete defense to any errors in collection and remittance. Yetter & Crosby, *supra*, at 576-77.[10]

This highlights how anomalous *Quill* has become. There could be *no* burden on interstate commerce—the marginal cost of compliance could be zero because SST covers all of it—and *Quill* would still prohibit a State from requiring an out-of-state retailer to collect sales tax. This indicates, in turn, that internet retailers' "reliance" on *Quill* is rooted not in the (perhaps) legitimate desire to avoid the (vanishing) costs of compliance, but in the largely illegitimate desire to preserve their apparent tax advantage at checkout. 814 F.3d at 1150 (Gorsuch, J., concurring).

This leads to the third difference between the present day and 1992—one that stems from *Quill* itself. As Justice Gorsuch has explained, by limiting its rule to state laws that directly require out-of-state retailers to collect sales tax, *Quill* invited States to respond by imposing other, no-less-burdensome requirements on out-of-state retailers. *Id.* at 1151. That might include a reporting regime like Colorado's, *see id.* at 1133, a "Corporate Activities Tax" pegged to gross receipts from in-state sales like Ohio's, *supra* p.26, expansive definitions of physical presence like New York's, *see Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y.), *cert. denied*, 134 S. Ct. 682 (2013), or any number of other possible measures. When an exception is so isolated, it often disappears as "reliance interests never form … or erode over time." *DMA II*, 814 F.3d at

[10] *See generally* https://goo.gl/n2JWhd.

1151. Accordingly, "*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Id.*

Meanwhile, *Quill* itself warns any reasonably attentive seller against blind reliance on its lasting vitality. Beyond recognizing its tension with contemporary doctrine, *supra* pp.23-24, *Quill* repeatedly employs temporary formulations, indicating that the time to abandon *Bellas Hess* may yet come. *See, e.g.*, 504 U.S. at 318 (noting *stare decisis* factor recommends "'withholding our hand, *at least for now*'"); *id.* ("[W]e disagree … that *the time has come* to renounce the bright-line test of *Bellas Hess*.") (emphases added). In fact, in jettisoning *Bellas Hess*'s Due Process holding, *Quill* expressly invited Congress to enact "legislation that would 'overrule' the *Bellas Hess* rule." *Id.* It would be foolish to rely heavily on a rule Congress might dissolve with this Court's blessing, or this Court might soon dissolve itself.

3. *Changed Circumstances.* For similar reasons, the other factors this Court frequently cites as "special justifications" for overturning precedent also support a grant here. *See DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring). For example, this Court is far more likely to entertain revision of its precedent when part of the justification is that "there has been an important change in circumstances in the outside world." *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (citing, *inter alia*, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality)). That factor is obviously present here. *See supra* pp.12-15.

4. *Constant Criticism & Inconsistency*. It also "weigh[s] in favor of reconsideration" when a precedent

"'has been questioned by Members of the Court in later decisions and has defied consistent application by the lower courts.'" *Pearson*, 555 U.S. at 235 (alteration omitted). Criticism of *Quill* has been severe and sustained—particularly recently—in this Court and in the lower courts. *See supra* pp.26-27. And to the extent *Quill* has been applied consistently in the lower courts, it is only by radically constraining that decision to its precise facts. *Id.*

This makes *Quill* "a positive detriment to coherence and consistency in the law," *Patterson*, 491 U.S. at 173: While its application has been consistently narrow, that comes at the cost of making dormant-commerce-clause doctrine consistently inconsistent. Indeed, ad hoc exceptions like *Quill* are an essential reason why Justices of this Court have concluded that the dormant commerce clause as a whole is incoherent and "unworkable." *See, e.g.*, *Wynne*, 135 S. Ct. at 1811 (Thomas, J., dissenting). *Quill* is an "island," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring)—"the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015); *see also Alleyne v. United States*, 133 S. Ct. 2151, 2165 (2013) (Sotomayor, J., concurring) (appropriate to overrule case, even after it has been reaffirmed once on *stare decisis* grounds, where it "has become even more of an outlier," and the Court finds it necessary to "'erase th[e] anomaly'").

5. *Experience & Workability*. Finally, *Quill* is a case where "experience has pointed up the precedent's shortcomings," *Pearson*, 555 U.S. at 233, and demonstrated that *Quill*'s supposedly bright-line rule is now increasingly "unworkable," *see, e.g.*, *Montejo v. Louisiana*, 556

U.S. 778, 792 (2009). *Quill*'s fundamental premise was that, at the very least, its bright-line, physical-presence rule would be an easily administered safe-harbor. But, as Justice White predicted, *see Quill*, 504 U.S. at 330-31 (White, J. concurring in part and dissenting in part), that has turned out to be incorrect—particularly because ubiquitous, interactive online commerce does not map easily onto traditional notions of "physical" presence. Does the "physical" presence of the Overstock.com "app" on consumers' smartphones make it "present"? How about offices of affiliated (but different) corporate entities, or of websites that route buyers to the out-of-state retailer's site? *See supra* pp.17-20. Questions like these have led to expensive, confusing, and high-stakes litigation as States increasingly expand their definitions of physical presence—a development that entirely post-dates *Quill*. *See* 504 U.S. at 320 (Scalia, J., concurring in the judgment) (relying on absence of litigation on this issue between *Bellas Hess* and *Quill*). And, worse, *Quill* makes it almost impossible to answer these questions because it acknowledges that its measure of "physical presence" can be logically arbitrary—there need be no connection between the actions that make a company "present" and the transactions on which it must collect tax. *Supra* pp.17-18. In this way, *Quill*'s purportedly simple approach has needlessly and harmfully complicated the tax code, the law books, and the retail business.

Unlike "physical presence," which maps so poorly onto modern online retail, a standard like South Dakota's fares far better in achieving *Quill*'s *own* goals. The "economic nexus" rule it employs—requiring $100,000 of sales in that State's relatively small market—guarantees that the retailer's relationship to the

State is "substantial," as *Complete Auto* requires, based on a legally and economically meaningful measure. This Court has been particularly willing to reconsider a rule it has adopted when, in contemporary context, it becomes "an increasingly unjustifiable anomaly" that "produce[s] litigation-spawning confusion in an area that should be easily susceptible of more workable solutions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404-05 (1970). South Dakota's law offers a far "more workable solution" to the problems *Quill* wanted to solve: Its line is bright and easily administered, its safe-harbor ensures that any burdens on out-of-state retailers are not undue, and it does not discourage businesses from participating in interstate commerce through physical investment or local job creation. This is vivid proof that *Quill* merits reconsideration.

III. The Question Presented Requires Immediate Review.

In addition to the foregoing, there are three reasons this Court should grant the Question Presented in this Petition, and without further delay.

First, and most important, is that States and local governments cannot afford delay. The harms Justice Kennedy identified in 2015 have continued mounting every day, as have their deleterious effects on local services and communities, as well as local, brick-and-mortar retailers. And because States must balance their books each year, they badly need to know whether to count on increased sales-tax collections, or not, for the coming year. Most state budgets start in July, and with the broad support of the other States, South Dakota has filed this Petition within weeks of the decision below, hoping to obtain an answer on the merits before the end of this Term.

Second, there is the widespread activity in the States in response to Justice Kennedy's concurrence, and the resulting burdens it creates for both regulated entities and the States embroiled in litigation. Many States have enacted nexus laws that challenge *Quill* by rejecting any need for physical presence. *Supra* pp.8-11. Because nearly all use "economic nexus" thresholds similar to or expressly modeled on South Dakota's, this case is an excellent vehicle for settling this issue generally.

But more importantly, most of the cases these statutes have generated are lagging well behind this one, and multiple States and businesses could find themselves engaged in years of costly and unnecessary litigation if this Court were to defer this issue for another day. Moreover, many of those cases include additional, ancillary issues that could confound this Court's inquiry, whereas South Dakota's candid acknowledgement of *Quill*'s binding force has isolated here the precise question whether *Quill*'s unyielding physical-presence requirement should be overruled. This is, accordingly, a uniquely clean and timely vehicle for an issue that demands broad and immediate resolution.

Relatedly, in this circumstance, allowing this issue to percolate is pointless, because other courts will no doubt acknowledge that they are bound by *Quill* and that this Court has the unilateral prerogative to abrogate that precedent. No split can develop here; the closest analog is the set of reasoned decisions recently rendered cabining *Quill* to its precise facts. *See supra* pp.25-26. Yet the widespread litigation on this issue sends much the same signal, suggesting that this Court should grant this Petition without regard at this stage

for which side may be right on the merits, so as to relieve the uncertainty now burdening the legal system.

Finally, there are strong institutional reasons to grant this Petition. Any decision striking down a State law on federal grounds is jurisprudentially significant, and federalism concerns frequently lead this Court to grant certiorari when a State seeks review in such a case. And yet this case goes well beyond even that situation: Here, in reliance on an express invitation from one of this Court's members, the entire machinery of South Dakota's government came together to bring this issue before this Court. The Legislature passed a statute, the State has prosecuted a suit, and the state courts adjudicated it expeditiously, all to answer Justice Kennedy's request that the system produce a vehicle without further delay. When a State commits itself to such measures in reliance on this Court's statements, this Court should give that State a chance to make its case.

That is particularly so because of the care the State took here to both respect this Court's precedent and protect the affected taxpayers. Recognizing the difficulty uncertain litigation regarding settled precedent could create, the State took extraordinary measures to insulate respondents and their peers against any threat of retroactive taxation. *Supra* p.6. And recognizing this Court's instruction not to anticipate the rejection of its binding precedents—even when intervening doctrine suggests they are outdated—neither the State nor its courts entertained the possibility of upholding this law, though that would have been a surefire path to certiorari. *See* Pet.App. 14a; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). If this Court is going to insist that the lower courts wait patiently for its intervention, 490 U.S. at 484, it should

be likely to actually intervene when courts and litigants respect that doctrine in questioning precedents this Court itself has marked as vulnerable.

In short, this Petition represents the most diligent efforts of "[t]he legal system" to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). It is "unwise to delay any longer." *Id.*

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 2, 2017

APPENDIX

APPENDIX A

#28160-a-GAS

2017 S.D. 56

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,

v.

WAYFAIR INC., OVERSTOCK.COM, INC.,
and NEWEGG INC., Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARK W. BARNETT
Judge

* * *

ARGUED AUGUST 29, 2017

OPINION FILED 09/13/17

* * *

SEVERSON, Justice

[¶1.] South Dakota has no state income tax and relies on retail sales and use taxes for much of its revenue. Pursuant to state statute, sales tax is generally collected by sellers selling merchandise in this state at the point of sale and is remitted to the state by those sellers. SDCL 10-45-27.3.[1] Decisions from the United

[1] SDCL 10-45-27.3 provides in relevant part:

States Supreme Court interpreting the Commerce Clause of the United States Constitution prohibit the State of South Dakota from imposing this collection obligation on sellers with no physical presence in the state. As Internet sales by these sellers have risen, state revenues have decreased. Faced with declining revenues, the 2016 South Dakota Legislature passed legislation extending the obligation to collect and remit sales tax to sellers with no physical presence in the state. S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1 (S.D. 2016).[2] The Legislature specifically passed the legislation to challenge the Supreme Court's Commerce Clause decisions. *Id.* § 8. Pursuant to the legislation, the State of South Dakota commenced a declaratory judgment action in circuit court seeking a declaration that certain Internet sellers (Sellers)[3] with no physical presence in the state must comply with the requirements of the 2016 legislation. *Id.* § 2. Sellers moved for summary judgment. Adhering to Supreme Court precedent, the circuit court granted the motion, entered judgment for Sellers, and enjoined the State from enforcing the 2016 legislation. The State appeals. We affirm.

> Any person who holds a license issued pursuant to this chapter or who is a person whose receipts are subject to the tax imposed by this chapter shall, except as otherwise provided in this section, file a return, and pay any tax due, to the Department of Revenue on or before the twentieth day of the month following each monthly period. The return shall be filed on forms prescribed and furnished by the department.

[2] A complete copy of the certified bill, S.B. 106, is attached to this decision as Appendix 1.

[3] Wayfair Inc., Overstock.com, Inc., and Newegg Inc.

Facts and Procedural History

[¶2.] Generally, sellers selling merchandise in South Dakota have an obligation to collect and remit sales tax on each transaction to the Department of Revenue. SDCL 10-45-27.3. However, the applicability of this requirement to sellers with no physical presence in a state has been limited by the Supreme Court's interpretations of the Commerce Clause since at least 1967. The Commerce Clause generally grants "exclusive authority [to] Congress to regulate trade between the States[.]" *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of the St. of Ill.*, 386 U. S. 753, 756, 87 S. Ct. 1389, 1391, 18 L. Ed. 2d 505 (1967).[4] In 1967, the Supreme Court held that the Commerce Clause prohibited Illinois from requiring a mail order seller in Missouri to collect and remit use tax[5] to Illinois for merchandise

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[4] The Commerce Clause provides in full:

> The Congress shall have Power
>
> * * *
>
> 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. Const. art. I, § 8, cl. 3.

[5] Sales and use tax are often complementary. In the recent case *Direct Marketing Association v. Brohl*, __ U.S. __, 135 S. Ct. 1124, 1127, 191 L. Ed. 2d 97 (2015), Justice Thomas explained:

> Like many States, Colorado has a complementary sales-and-use tax regime. Colorado imposes both a 2.9 percent tax on the sale of tangible personal property within the State and an equivalent use tax for any property stored, used, or consumed in Colorado on which a sales tax was not paid to a retailer.

(Internal citations omitted.)

sold and shipped into that state. The seller had no physical presence in Illinois, and its only contacts with that state were by mail or common carrier.[6] The Court reasoned that exposing the seller's interstate business to local "variations in rates of tax . . . and recordkeeping requirements" would violate the purpose of the Commerce Clause "to ensure a national economy free from . . . unjustifiable local entanglements." *Id.* at 759-

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South Dakota uses a similar system. SDCL 10-46-2 (imposing an excise tax equal to the sales tax on the use of tangible personal property in the State).

[6] The seller's lack of a "physical presence" in Illinois was explained with reference to the following factors:

> [Seller] does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.
>
> All of the contacts which [Seller] does have with the State are via the United States mail or common carrier. Twice a year catalogues are mailed to the company's active or recent customers throughout the Nation, including Illinois. This mailing is supplemented by advertising 'flyers' which are occasionally mailed to past and potential customers. Orders for merchandise are mailed by the customers to [Seller] and are accepted at its Missouri plant. The ordered goods are then sent to the customers either by mail or by common carrier.

Bellas Hess, 386 U.S. at 754, 87 S. Ct. at 1390 (quoting *Dep't of Rev. v. Nat'l Bellas Hess, Inc.*, 214 N.E.2d 755, 757 (Ill. 1966)).

60, 87 S. Ct. at 1393. The Court concluded that "[u]nder the Constitution, this [was] a domain where Congress alone [had] the power of regulation and control." *Id.*[7]

[¶3.] In 1992, the Supreme Court, while limiting application of its due process analysis, reaffirmed *Bellas Hess*'s Commerce Clause limitations in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). In that case, the Court held that a mail-order house with no physical presence in North Dakota could not be required to collect and remit use tax to that state for "property purchased for storage, use, or consumption within the State." *Id.* at 302, 112 S. Ct. at 1908. Despite later developments in its Commerce Clause jurisprudence, the Court adhered to the "bright-line rule" of *Bellas Hess* on the basis that it

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[7] *Bellas Hess* was a product of what the Supreme Court refers to as "the 'negative' or 'dormant' Commerce Clause[.]" *Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 112 S. Ct. 1904, 1911, 119 L. Ed. 2d 91 (1992) (quoting P. Hartman, Federal Limitations on State and Local Taxation §§ 2:9-2:17 (1981)). Although the Commerce Clause provides a "positive grant of power to Congress," it carries a negative component "prohibiting States from . . . imposing excessive burdens on interstate commerce without congressional approval[.]" *Comptroller of the Treas. of Md. v. Wynne*, __ U.S. __, __, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015). This prohibition exists because "one of the chief evils that led to the adoption of the Constitution [was] . . . state tariffs and other laws that burdened interstate commerce." *Id.* Thus, the Supreme Court interprets the negative or dormant Commerce Clause as precluding states from imposing taxes "which discriminate[ ] against interstate commerce . . . by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Id.* (quoting *Nw. States Portland Cement Co. v. Minn.*, 358 U.S. 450, 458, 79 S. Ct. 357, 362, 3 L. Ed. 2d 421 (1959)).

"encourage[d] settled expectations and . . . foster[ed] investment by businesses and individuals." *Id.* at 316, 112 S. Ct. at 1915.

[¶4.] In 2015, the Supreme Court reviewed a Colorado law that instead of imposing the obligation to collect and remit use tax on sellers with no physical presence in that state, imposed the obligation "to notify . . . customers of their use-tax liability and to report" sales information back to the state. *Direct Marketing*, __ U.S. at __, 135 S. Ct. at 1127. The issue before the Supreme Court was whether the United States District Court had jurisdiction under the Tax Injunction Act (28 U.S.C. § 1341) over a suit challenging the new law on Commerce Clause grounds. Justice Kennedy, however, took the opportunity to write a concurrence questioning the advisability of continuing to follow *Bellas Hess* and *Quill* in light of later Commerce Clause jurisprudence and "in view of the dramatic technological and social changes that [have] taken place in our increasingly interconnected economy." *Id.* at __, 135 S. Ct. at 1135 (Kennedy, J., concurring). Despite noting the "startling revenue shortfall in many States" due to *Bellas Hess* and *Quill*, Justice Kennedy observed that Direct Marketing did not raise reconsideration of those decisions "in a manner appropriate for the Court to address it." *Id.* Nevertheless, he concluded that Direct Marketing provided "the means to note the importance of reconsidering doubtful authority." *Id.* He invited "[t]he legal system [to] find an appropriate case for [the Supreme] Court to reexamine *Quill* and *Bellas Hess*." *Id.*

[¶5.] With this legal backdrop, the South Dakota Legislature began its 2016 session concerned with its

ability to maintain state revenue in the face of increasing Internet sales and their effect on sales tax collections.[8] Senate Bill 106 was introduced during the session as: "An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016). The Act provided that any sellers of "tangible personal property" in South Dakota without a "physical presence in the state . . . shall remit" sales tax according to the same procedures as sellers with "a physical presence[.]" *Id.* § 1. However, the Act limited this obligation to sellers with "gross revenue" from sales in South Dakota of over $100,000 per calendar year or with 200 or more "separate transactions" in the state within the same time frame. *Id.* §§ 1-2. The Act authorized the State to bring a declaratory judgment action in circuit court against any person believed to meet the Act's criteria "to establish that the obligation to remit sales tax is applicable and valid under state and federal law." *Id.* § 2. The Act further authorized a motion to dismiss or a motion for summary judgment in the action. *Id.* It also provided that the filing of the action "operates as an injunction during the pendency of the" suit prohibiting the State from enforcing the Act's obligations. *Id.* § 3. Other sections of the Act prohibited retroactive application of the obligation to remit sales tax and made the obligation prospective only from the date of dissolution or lifting of an injunction provided for by the Act. *Id.* §§ 5-6.

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[8] South Dakota must maintain a balanced budget. *See* S.D. Const. art. XII, § 7.

[¶6.] In addition to these provisions, the Act contained an emergency clause declaring it "necessary for the support of the state government" and making it effective "on the first day of the first month" falling at least fifteen days after signing by the Governor. *Id.* § 9.[9] The Act's emergency clause made a two-thirds majority vote in both houses of the Legislature necessary for it to pass. S.D. Const. art. III, § 22.

[¶7.] Senate Bill 106 was introduced in the South Dakota Senate and referred for a hearing by the Senate State Affairs Committee. S. Journal, 91st Sess., 150 (S.D. 2016). The hearing was held on February 17, 2016. Id. at 316. Several witnesses testified in open committee in support of the bill, including a representative of the Governor's Office.[10] There was no opposition. *Hearing I*, *supra* note 9. The bill passed out of committee with a do pass recommendation and was debated and considered on the floor of the Senate on February 19, 2016. S. Journal at 319, 370. The bill passed the Senate on a vote of thirty-three yeas and zero nays. S. Journal at 370.

[¶8.] The bill had its first reading in the South Dakota House of Representatives on February 22, 2016,

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[9] Most legislation is effective "on the first day of July after its passage[.]" SDCL 2-14-16.

[10] *An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency: Hearing on S.B. 106 Before the S. Comm. on State Affairs*, 2016 Legis. Assemb., 91st Sess. 2:27 (S.D. 2016), http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016 [*Hearing I*].

and was referred for a hearing by the House State Affairs Committee. H. Journal, 91st Sess., 621 (S.D. 2016). The hearing was held on February 29, 2016. *Id.* at 710. Once again, several witnesses testified in open committee in support of the bill.[11] Again, there was no opposition. *Hearing II*, *supra* note 10. The bill passed out of the House committee with a do pass recommendation. H. Journal at 710. It was debated and considered on the House floor on March 1, 2016. *Id.* at 740. The bill passed by a vote of sixty-four yeas and two nays. *Id.* The Governor signed the bill on March 22, 2016. S. Journal at 619. It fulfilled the two-thirds vote requirement for the emergency clause and took effect on May 1, 2016. *Id.*; S.B. 106, § 9.

[¶9.] Shortly after the Governor signed Senate Bill 106 into law, the South Dakota Department of Revenue began issuing written notices to sellers it believed met the requirements of Senate Bill 106. The notices: informed the sellers of the passage of the law; explained its requirements; advised the sellers to register for South Dakota sales tax licenses by a date certain; and warned that the failure to register could result in a declaratory judgment action as authorized by the law. Although the three sellers in this appeal, as well as a fourth seller, Systemax Inc., received notices, they did not register for sales tax licenses. The State

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[11] *An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency: Hearing on S.B. 106 Before the H. Comm. on State Affairs*, 2016 Legis. Assemb., 91st Sess. 1:00 (S.D. 2016), http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016 [*Hearing II*].

filed a declaratory judgment action against Sellers in circuit court on April 28, 2016. The State sought a judicial declaration that the requirements of Senate Bill 106 were valid and applicable to Sellers, an order enjoining enforcement of the law during the pendency of the action, and an injunction requiring Sellers to register for licenses to collect and remit sales tax.[12]

[¶10.] Following service of the State's complaint, Systemax Inc. voluntarily registered for a sales tax license and immediately began collecting taxes under the law. Therefore, the State dismissed Systemax from its lawsuit on May 19, 2016. The remaining sellers then sought to remove the State's action to the United States District Court for South Dakota on the basis of federal question jurisdiction. The District Court rejected removal and remanded the case to the South Dakota circuit court in January 2017.

[¶11.] After the District Court's remand, Sellers filed a joint answer, motion for summary judgment, and statement of material facts admitting: each lacked a physical presence in South Dakota; each met the sales and transaction requirements for application of Senate Bill 106;[13] and none were registered to collect South Dakota sales tax. As an affirmative defense, Sellers raised the unconstitutionality of Senate Bill

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[12] Along with its complaint, the State filed a separate application for a preliminary injunction noting that the law provided for an injunction against its enforcement during the pendency of a suit under the law. *See* S.B. 106, § 3.

[13] Sales of personal property for delivery into South Dakota exceeding $100,000 and 200 or more separate transaction in the previous calendar year. *See* S.B. 106, § 1.

106 under the Commerce Clause. The State filed a response to the motion for summary judgement agreeing with Sellers' statement of material facts. The State further agreed that the court would have to grant Sellers' motion for summary judgment based upon *Bellas Hess* and *Quill* and indicated its intention to pursue review of the issue by the United States Supreme Court.

[¶12.] The circuit court did not hold a hearing. It entered its decision based on undisputed statements of material fact and the parties' briefs. As part of its decision, the court noted that the parties agreed that no hearing was necessary. The court found no material issue of fact in dispute over Sellers' lack of a physical presence in South Dakota. Observing its obligation to adhere to Supreme Court precedent prohibiting the imposition of an obligation to collect and remit sales tax on sellers with no physical presence in the State, the court granted Sellers' motion for summary judgment. It enjoined the State from enforcing the obligation to collect and remit sales tax against Sellers. The State filed a timely notice of appeal of the court's order granting summary judgment.

Issue

Whether the circuit court erred in granting summary judgment to Sellers.

Standard of Review

[¶13.] We review a summary judgment de novo. *Heitmann v. Am. Fam. Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 508 (citing *Ass Kickin Ranch, LLC v. N. Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 7, 822 N.W.2d 724, 726). We determine whether there are any "genuine issues of material fact" in the case and "whether

the law was correctly applied." *Id.* (quoting *Ass Kickin Ranch*, 2012 S.D. 73, ¶ 6, 822 N.W.2d at 726). If there are no genuine issues of material fact, "our 'review is limited to determining whether the [circuit] court correctly applied the law.'" *Id.*

Analysis and Decision

[¶14.] Sellers argue that there is an inadequate record for this Court's review in this matter. But Sellers moved for summary judgment and by doing so, limited the record available for review. *See* SDCL 15-6-56(c) (limiting the record on a motion for summary judgment to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any[.]"). In any event, the material facts are not in dispute. The parties agreed that each seller had a principal place of business outside of South Dakota and each lacked a physical presence in this state. The parties agreed that in the previous calendar year, each seller had gross revenue from the sale of tangible personal property in South Dakota in excess of $100,000 and/or sold tangible personal property in the state in 200 or more separate transactions. The parties agreed that none of the sellers were registered to collect South Dakota sales tax.

[¶15.] In view of these undisputed facts and the Supreme Court's holdings in *Bellas Hess* and *Quill*, Senate Bill 106 could not impose a valid obligation on Sellers to collect and remit sales tax to this State because none of them had a physical presence in the state. *See Bellas Hess*, 386 U.S. at 758-60, 87 S. Ct. at 1392-93 (rejecting imposition of "the duty of use tax collection and payment upon a seller" with no physical presence in the taxing state); *Quill*, 504 U.S. at 317-18,

112 S. Ct. at 1916 (reaffirming *Bellas Hess*'s Commerce Clause limitations in rejecting a state's attempt to require a seller with no physical presence in the state to collect and pay use tax for goods sold in the state). We see no distinction between the collection obligations invalidated in *Quill* and those imposed by Senate Bill 106, and hold that the circuit court correctly applied the law when it granted Sellers' motion for summary judgment.

[¶16.] Nonetheless, the State argues that the Supreme Court should reconsider *Bellas Hess* and *Quill*. It claims that in bringing this suit, the State has accepted Justice Kennedy's invitation in *Direct Marketing* for "[t]he legal system [to] find an appropriate case for [the Supreme] Court to reexamine" those decisions. __ U.S. at __, 135 S. Ct. at 1135 (Kennedy, J., concurring). According to the State, circumstances have changed since *Bellas Hess* and *Quill*, making *Bellas Hess* and *Quill* outdated. The State emphasizes that computer technology and software have advanced, South Dakota has streamlined its revenue laws, and the retail industry has evolved. The State also claims that the Supreme Court's application of the physical presence requirement to the collection of sales tax differs from its application of other Commerce Clause requirements to similar collection obligations. This has led to inconsistent results.

[¶17.] In his concurrence in *Direct Marketing*, Justice Kennedy recognized many of the State's arguments supporting reconsideration of *Bellas Hess* and *Quill*. *See* __ U.S. at __, 135 S. Ct. at 1134 (Kennedy, J., concurring). Some of them go as far back as Justice Fortas's original dissent in *Bellas Hess* and Justice White's concurrence and dissent in *Quill*. *See* 386 U.S.

at 760, 87 S. Ct. at 1393 (Fortas, J., dissenting); 504 U.S. at 321, 112 S. Ct. at 1916 (White, J., concurring in part and dissenting in part). Before joining the Supreme Court, Justice Gorsuch, while acknowledging Supreme Court precedent binding on lower courts, also raised similar concerns with *Bellas Hess* and *Quill*. *See Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147 (10th Cir. 2016) (Gorsuch, Circuit Judge, concurring).

[¶18.] However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled. *Quill* remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes. We are mindful of the Supreme Court's directive to follow its precedent when it "has direct application in a case" and to leave to that Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989). Therefore, we affirm.

[¶19.] GILBERTSON, Chief Justice, and ZINTER and KERN, Justices, and WILBUR, Retired Justice, concur.

APPENDIX B

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC.,
Defendants.

32CIV16-000092

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before me on the Defendants' Motion for Summary Judgment regarding the Complaint for declaratory relief filed by the Plaintiff pursuant to Senate Bill 106, "An Act to provide for the collection of sales taxes from certain remote sellers," 91st Sess., S.D. Legis. (2016) ("S.B. 106"), which has been codified as SDCL Chapter 10-64 "Collection of Sales Taxes From Out-of-State Sellers."

Upon a review of the record and the filings made by the parties, the Court rules in favor of the Defendants in granting them summary judgment. In reaching this decision, the Court finds as follows:

1. The Parties agree that no material issue of fact exists and this action may be decided as a matter of

law. Defendants' Brief in Support of Summary Judgment at 7-8 (noting that the parties agree that this case "presents no genuine dispute of fact" and "turns on pure questions of law"); Plaintiffs Response to Defendants' Motion for Summary Judgment at 2 ("the State agrees that there are no disputes of material fact"); *see also* Defendants' Statement of Material Facts, ¶¶ 1-9; Plaintiff's Response to Defendants' Statement of Material Facts ¶¶ 1-9.

2. The parties further agree that no hearing on the Defendants' Motion is necessary. In accordance with SDCL 10-64-3, this Court is directed to act on this matter "as expeditiously as possible" with the presumption that "the matter may be fully resolved through a motion to dismiss or a motion for summary judgment."

3. Because each of the Defendants lacks a physical presence in South Dakota, *see* Plaintiffs Response to Defendants' Statement of Material Facts, ¶¶ 1-3, the State acknowledges that under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the State of South Dakota is prohibited from imposing sales tax collection and remittance obligations on the Defendants. The State further admits that this Court is required to grant summary judgment in Defendants' favor, because of the *Quill* ruling. Parties' Joint Statement of Proceedings Following Remand at 4.

4. SDCL 10-64-2, by requiring remittance of sales tax by sellers who "do[] not have a physical presence in the state," fails as a matter of law to satisfy the physical presence requirement that remains applicable to state sales and use taxes under *Quill* and its application of the Commerce Clause (U.S. Const., Art. I, s. 8, cl. 3).

5. This Court is duty bound to follow applicable precedent of the United States Supreme Court. *James v. Boise*, -- U.S. --, 136 S. Ct. 685, 686 (2016) (state court is required to follow U.S. Supreme Court precedent interpreting federal law); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (where precedent of the Supreme Court has direct application in a case, lower courts must follow the decision which directly controls). This is true even when changing times and events clearly suggest a different outcome; it is simply not the role of a state circuit court to disregard a ruling from the United States Supreme Court.

6. The initiation of this action by the Plaintiff on April 27, 2016, resulted in the injunction of its enforcement as a matter of law under SDCL 10-64-4.

NOW, THEREFORE, after due consideration of the parties' submissions, the terms of SDCL Chapter 10-64, and controlling precedent, the Court hereby ORDERS that:

Defendants' Motion for Summary Judgment is GRANTED;

Judgment on the Plaintiff's Complaint shall enter for the Defendants;

The Plaintiff is enjoined from enforcing SDCL 10-64-2, in accordance with SDCL 10-64-4; and

Each party shall bear its own costs, disbursements, and fees.

Dated this 6th day of March, 2017.

BY THE COURT:

/s

Mark W. Barnett
Circuit Court Judge
Sixth Judicial Circuit

APPENDIX C

S.B. 106 provides:

AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis.

The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes, penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

(1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;

(2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;

(3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers actively market sales as tax free or no sales tax transactions;

(4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;

(5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

(8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.