

No. 17-494

IN THE

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

BRIEF OF THE NATIONAL GOVERNORS
ASSOCIATION, NATIONAL CONFERENCE OF STATE
LEGISLATURES, COUNCIL OF STATE
GOVERNMENTS, NATIONAL ASSOCIATION OF
COUNTIES, NATIONAL LEAGUE OF CITIES, US
CONFERENCE OF MAYORS, INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION,
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION, GOVERNMENT FINANCE OFFICERS
ASSOCIATION, THE INTERNATIONAL PUBLIC
MANAGEMENT ASSOCIATION FOR HUMAN
RESOURCES, NATIONAL SCHOOL BOARDS
ASSOCIATION, NATIONAL AASA: THE SCHOOL
SUPERINTENDENTS ASSOCIATION, AND NATIONAL
ASSOCIATION OF ELEMENTARY SCHOOL
PRINCIPALS SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
BRIEF OF AMICI CURIAE.....	1
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I.	

B. <i>Quill</i> unreasonably hinders the States from collecting owed sales and use taxes.	14
C. The detrimental effect of <i>Quill</i> has been, and will continue to be, increasingly exacerbated by the consistent expansion of e-commerce.	18
CONCLUSION	21
APPENDIX: LIST OF AMICI	1a

TABLE OF AUTHORITIES

Cases

<i>Am. Target Advert., Inc. v. Giani</i> , 199 F.3d 1241 (10th Cir. 2000), cert. denied, 531 U.S. 811 (2000).....	4
<i>Capital One Bank v. Comm’r of Revenue</i> , 899 N.E.2d 76 (Mass. 2009), cert. denied, 557 U.S. 919 (2009).....	4
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977).....	4
<i>Couchot v. State Lottery Comm’n</i> , 659 N.E.2d 1225 (Ohio 1996), cert. denied, 519 U.S. 810 (1996).....	4
<i>Direct Mktg. Ass’n v. Brohl</i> , 135 S. Ct. 1124 (2015).....	<i>passim</i>
<i>Geoffrey, Inc. v. S.C. Tax Comm’n</i> , 437 S.E.2d 13 (S.C. 1993), cert. denied, 510 U.S. 992 (1993).....	5
<i>KFC Corp. v. Iowa Dep’t of Revenue</i> , 792 N.W.2d 308 (Iowa 2010), cert. denied, 565 U.S. 817 (2011).....	4
<i>National Bellas Hess, Inc. v. Department of Revenue of Illinois</i> , 386 U.S. 753 (1967).....	4
<i>Overstock.com, Inc. v. N.Y. State Dep’t of Taxation and Fin.</i> , 987 N.E.2d 621 (N.Y. 2013), cert. denied, 134 S. Ct. 682 (2013).....	5
<i>Quill Corp. v. North Dakota</i> , 504 U.S. 298 (1992).....	<i>passim</i>

<i>State v. Wayfair Inc.</i> , No. 28160, 2017 WL 4051554, at *1 (S.D. Sept. 13, 2017).....	11
<i>State v. Wayfair, Inc.</i> , 229 F. Supp. 3d 1026 (D.S.D. 2017).....	10
<i>Tax Comm'r of State v. MBNA Am. Bank, N.A.</i> , 640 S.E.2d 226 (W.Va. 2006), cert. denied sub nom <i>FIA Card Srvs., NA. v. Tax Comm'r of West Virginia</i> , 551 U.S. 1141 (2007).....	5

Statutes

S.D. Codified Laws § 10-64-1 (2016).....	2, 9
S.D. Codified Laws § 10-64-2 (2016).....	9

Other Authorities

Economic Analysis of Tax Revenue from E-Commerce in Ohio, Economics Center 1 (2011), http://www.efairness.org/pdf/economics centerstudy.pdf	15
Elliott D. Pollack & Company, Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona (2012), https://ex.democracydata.com/A160F09 F756BBBF1C6606EA72D6BD1EE092 B1AB5/35555b34-542c-46ca-b8d6- ce045a849330.pdf	15
Joe Crosby, Liz Malm, and Ryan Maness, <i>South Dakota v. Wayfair: Three Maps</i> , MultiState Insider (Oct. 4, 2017),	

- <https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps>.....5, 6
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http://www.efairness.org/files/Updated %20Sales%20Tax%20Loss%20Report.p df.....	20
National Conference of State Legislatures (NCSL), State Efforts to Collect Remote Sales Taxes (Feb. 2014), http://www.ncsl.org/documents/statefe d/MFA_intheStatesF	

BRIEF OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of Petitioner, the State of South Dakota, urging that the Court grant review in No. 17-494.

INTEREST OF AMICI

The present amici are organizations representing state and local elected and appointed officials from throughout the United States, up to and including state governors.¹

Justice Kennedy's invitation, an appropriate vehicle would be arriving to the Court soon. They write to inform the Court that South Dakota's legislation is the ideal vehicle to reach this important issue and, therefore,

S U M M A R Y

u r g e
O F A

States and local governments lost an estimated \$26 billion in 2015 from uncollected sales and use taxes from out-of-state sellers for one reason: the Supreme Court's decisions in *Quill* and *Bellas Hess* do not allow States to require out-of-state merchants to collect and remit these taxes on sales to consumers within the State unless the out-of-state merchant has a physical presence within the State. The effect of these decisions in today's digital economy, where online sales are a mere click away, is devastating for States and local governments, who depend on these revenues.

disadvantage for traditional brick-and-mortar retailers—businesses that create jobs within the states and localities—which must add five to ten percent to their prices to account for these taxes.

Confronted with obstacles erected by *Quill*, States have enacted various legislative fixes to attempt to collect the billions of dollars of sales and use taxes owed to them by out-of-state merchants. In 2016, the South Dakota Legislature enacted, and the Governor signed, Senate Bill 106, requiring out-of-state retailers to collect and remit sales and use tax if they annually conduct with South Dakota residents either (1) \$100,000 worth of business, or (2) 200 separate transactions. S.D. Codified Laws §§ 10-64-1 *et seq.* (2016).

The South Dakota legislation was designed as a direct response to Justice Kennedy’s invitation in *Direct Marketing Association v. Brohl* to present “an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.” 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Shortly after the law was enacted, South Dakota sought a declaratory judgment in state circuit court to permit enforcement against three out-of-state retailers. After an unsuccessful removal to federal court, the case quickly worked its way through the state courts, with both the state circuit court and the Supreme Court of South Dakota concluding that this Court’s precedents in *Quill* and *Bellas Hess* forbid South Dakota from enforcing the legislation against the out-of-state retailers.

South Dakota’s carefully tailored legislation arrives before this Court in a clean procedural posture, primed to assist the Court in addressing a single question—whether *Quill* retains constitutional force in the modern digital economy.

ARGUMENT

I. *QUILL* HAS RESULTED IN A TIDAL WAVE OF LITIGATION AND CREATED A SEA OF UNCERTAINTY AMONG STATES AS TO HOW TO COLLECT TAXES IN TODAY’S DIGITAL AGE.

Quill stands as the single greatest obstacle to meaningful sales tax reform in today’s digital economy. Decided before the massive expansion in online retail, *Quill* has caused States and local governments to lose billions in annual sales and tax revenue, “inflicting extreme harm and unfairness on the States.” *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

In *Quill Corp. v. North Dakota*, this Court reaffirmed the prohibition on States levying a sales and use tax on sales by businesses that lack a physical presence within the state. 504 U.S. 298 (1992). The Court openly reconsidered the prohibition and ultimately chose to retain its rule—but did so only to protect the reliance interests that had grown up around the rule. Echoing its prior decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), the Court held that physical presence was required to avoid a violation of the “negative” or

More specifically, States have resorted to a variety of “Amazon laws” and a hodgepodge of other legislation intended to recoup the massive losses incurred. As of today, over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their State. *See* Joe Crosby, Liz Malm & Ryan Maness, *South Dakota v.*

online retailers failed to prove the statute unconstitutional under the Commerce Clause. *Id.*

After New York, the flood gates opened. By 2011, the following states introduced some type of “Amazon” legislation: Arkansas, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, Rhode Island, South Dakota, Tennessee, Texas, Vermont and Virginia. See Sylvia Dion, *Amazon Laws: The New Normal? Internet Sales Tax Law Update*, SalesTaxSupport.com (July 17, 2011).⁴ As of today, over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their State. See Joe Crosby, Liz Malm & Ryan Maness, *South Dakota v. Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017).⁵

In spite of the initial popularity of “Amazon” legislation, studies indicated that these laws failed to generate the anticipated sales tax revenues or to level the playing field between online retailers and brick-and-mortar stores because major online retailers, like Amazon.com, severed their affiliate contracts in States with an “Amazon” law and failed to register as sales tax collectors. See Lance Whitney, *Amazon Cuts*

⁴ Available at <http://www.salestaxsupport.com/blogs/issues/internet-tax-ecommerce/are-amazon-laws-the-new-normal-an-update-on-internet-sales-tax-laws/>.

⁵ Available at <https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps>.

Affiliate Ties in More States Over Taxes, CNet (June

States proposed at least one of these types of legislation. *See, e.g.*, Liz Malm, Ryan Maness & Joe Crosby, *Sales Tax Compliance Legislation is Still a Hot Topic at the State (and Federal) Level*, MultiState Insider (May 3, 2017).¹⁰

While these laws have had varying levels of success, none apart from an economic nexus law of the kind that South Dakota enacted, could effectively capture the rightful share of current taxes due States by online retailers who generate large revenues through their business activity in a particular State. Contrary to the argument posited by many retailers, overturning *Quill* does not lead to the imposition of a new tax. Rather, *Quill* prevents States from effectively collecting a tax that they are already owed. As such, States have realized that the proper path forward in this new digital economy is not a challenge to *Quill* Quill

Notably, South Dakota's initial complaint that ultimately led to this petition for a writ of certiorari began with the following statement: "The State—through this declaratory judgment action—seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill* . . . and ultimately seeks a decision from the United States Supreme Court to that effect in this case." Compl. at 1-2, *State v. Wayfair, Inc.*, 229 F. Supp. 3d 1026, 1028 (D.S.D. 2017).

The South Dakota law frames the problems created by *Quill* with precision, and indicates that the time for review is now.

B. South Dakota's challenge is in a clean posture, free from any ancillary questions or jurisdictional concerns.

Unlike other cases that have sought certiorari on

property in South Dakota in excess of \$100,000 and/or sold tangible personal property in the state in 200 or more separate transactions. Lastly, the parties agreed that none of the sellers were registered to collect South Dakota sales tax. *See State v. Wayfair Inc.*, No. 28160, 2017 WL 4051554, at *14 (S.D. Sept. 13, 2017).

There are no ancillary issues. The parties have agreed that the only determinative issue is whether *Quill* retains its force in the modern digital economy. In the state actions below, the State even conceded that summary judgment was appropriate against it on that issue because only this Court has the power to decide the continuing force of *Quill*. The state circuit court and the state supreme court similarly agreed that the only issue on which this case turns is *Quill*'s viability in this brave new world of prolific e-commerce. Notably, South Dakota does not have income tax and, thus, relies on sales tax for its state revenue. This unique feature of the South Dakota case further allows the Court to clearly and fully address the primary *Quill* issue.

There are no jurisdictional issues. South Dakota's initial complaint was filed in state circuit court. The defendant retailers sought to remove the State's action to the United States District Court for South Dakota on the basis of federal question jurisdiction. However, the District Court rejected removal and remanded the case to the South Dakota circuit court in January 2017. The state circuit granted the defendants' motion for summary judgment based on this Court's precedent in *Quill*. The state supreme court followed suit, affirming the circuit court's application of *Quill* based on the facts of this case.

made to its residents from out-of-state sellers. Most States have approached this issue by enacting a “use tax”—a tax on consumers of a product or service that is used, consumed, or stored in the taxing State. The two taxes are mutually exclusive: a use tax is not assessed on transactions where a sales tax has already been collected and remitted by the seller to the State. But, to fully capture revenue from sales of products purchased or used in a state, the State must be permitted to impose and collect both sales and use taxes.

Quill mandates that a remote, out-of-state seller must have a physical nexus in a State before the State can require the seller to collect sales or use taxes. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315-16 (1992). The concrete result of this is that because States cannot rely on collection and remittance from the out-of-state sellers, the burden falls to consumers to report their own out-of-state purchases and to remit the corresponding taxes. This results in a de facto “honor system”, where the State’s ability to collect owed taxes depends entirely on individuals who are often unaware of this responsibility. As a result, although it sounds reasonable in theory, the use tax is an ineffective alternative in practice because most States are unable to collect the use taxes they are owed.

For most States, sales taxes account for approximately a third of all revenues. *See* National Conference of State Legislatures (NCSL), *State Efforts to Collect Remote Sales Taxes* (Feb. 2014)

(hereinafter NCSL, *State Efforts to Collect*).¹¹ In some States, the reliance is even more profound. South Dakota, for example, depends on the sales tax for over 40 percent of total tax collections. *See* Morgan Scarboro,

would efficiently capture revenue from sales on tangible personal property purchased in a given jurisdiction from both in-state retailers (through the sales tax) and remote retailers (through the use tax).

The practical effect of *Quill* is that States are typically unable to require remote sellers to collect and remit use taxes. This taxation collection inequity leads to a distinct disadvantage for the “brick-and-mortar” stores located within the State. Remote sellers can afford to set their prices lower to account for the fact that the State cannot force them to collect and remit a use tax. Local economies and jobs suffer as a result. In-state merchants, on the other hand, are still required to collect and remit sales tax.

In addition to the unfair marketplace advantage afforded out-of-state retailers under *Quill*, States and local governments also suffer from depressed economic growth. In **Arizona**, for example, a study estimated that the lost impact of e-commerce on the Arizona economy “could grow to as much as 8,679 jobs, \$302.5 million in wages, and \$841.1 million in economic activity” by 2015. *See* Elliott D. Pollack & Company, *Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona* i (2012).¹⁴ Another study found that **Ohio** suffered a revenue shortfall of more than \$200 million as a result of sales and use tax non-payment. *See* *Economic Analysis of Tax Revenue from E-Commerce in Ohio*, Economics Center 1

¹⁴ Available at <https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b34-542c-46ca-b8d6-ce045a849330.pdf>.

(2011).¹⁵ The Ohio study further noted that, based on 2011 data, 11,000 direct retail jobs could be recaptured if tax parity were achieved between store retail and online retail. *Id.* In discussing the impact this has on local economies, the study also identified a decrease in commercial rent revenues as a secondary impact of the local stores' loss of revenue; this decrease in commercial rent revenue represented a \$120 million decrease in property value. *Id.* The inability to collect owed use taxes thus not only results in a direct revenue loss; it also further impedes States abilities to rely on other sources of revenue because property tax revenue drops when brick-and-mortar stores close due to depressed sales.

Importantly, *Quill* prevents States from effectively collecting a tax that they are already owed. *See No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders Before the H. Comm. On the Judiciary*, 115th Cong. (2017) (statement of Sen. Deb Peters (SD) on behalf of NCSL) ("Remember, this is not a new tax, it is a due tax."). If the out-of-state retailers do not collect and remit use taxes, States are then forced to rely on its residents to voluntarily self-report and pay use taxes on their out-of-state purchases. Unsurprisingly, this scheme does not result in high levels of compliance. Use tax compliance by individual purchasers has been estimated to be somewhere between zero and five percent. *See* U.S. Government Accountability Office, *Sales Taxes: Electronic Commerce Growth Presents Challenges*;

¹⁵ Available at <http://www.efairness.org/pdf/economicscenter-study.pdf>.

difference as long as *Quill* remains on the books and out-of-state sellers don't have to collect use tax no matter how easy states have made doing so.

- C. The detrimental effect of *Quill* has been, and will continue to be, increasingly exacerbated by the consistent expansion of e-commerce.**

extensive business within a State has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.” *Id.* As Justice Kennedy predicted, the strength of this argument has increased with time, as the prevalence of remote sales has continued to increase. Similarly, then-Judge Gorsuch noted in his concurrence on remand to the Tenth Circuit that “*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.” *Direct Mktg. Ass’n v. Brohl*, 814 at 1151 (Gorsuch, J., concurring). The drastic expansion of e-commerce over the past two decades has indicated that *Bellas Hess* and *Quill* will not wash away on their own; their damaging effects will continue to harm States until they are overturned.

The expansion of e-commerce has shown no signs of slowing down over the course of 2017. The Census Bureau of the Department of Commerce reported that an estimated \$111.5 billion in U.S. retail e-commerce sales were conducted in the second quarter of 2017. *Quarterly Retail E-Commerce Sales: 2nd Quarter 2017*, U.S. Census Bureau News (U.S. Dep’t of Commerce, Washington, D.C.), Aug. 17, 2017, at 1.¹⁹ This accounted for 8.2 percent of total sales, and it represented a 4.8 percent increase in e-commerce sales from the first quarter of 2017. During this time period, total retail sales increased by only 0.5 percent. Further, the \$111.5 billion in second quarter e-

¹⁹ Available at https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

commerce sales represented a substantial 16.2 percent increase from the second quarter of 2016, compared to a 4.1 percent increase in total retail sales over the same period.²⁰ E-commerce sales are not only rapidly expanding; they are expanding at almost four-times the rate of total retail sales. It is estimated that

highlighted, the cause grows “more urgent” with time. *Brohl*, 135 S. Ct. at 1135 (Kennedy, J., concurring). The detrimental effects will continue to grow alongside the growth of e-commerce.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of 416 Toin00 peappoin-1.538 executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local g416 nance through advocacy and by developing the professional management of local g416 nments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local g416 nment attorneys since 1935. Ownn-1solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The G416 nment Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to g416 nment finance professsionals through research, education, and the identification and promotion of best practices. Its 18in00 members are dedicated to the 1sound management of g416 nment financial resources.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

AASA, the School Superintendents Association, advocates for the highest quality public education for all students, and develops and supports school system leaders. Founded in 1865, AASA is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders.

The National Association of Elementary School Principals (NAESP), founded in 1921, is a professional organization serving elementary and middle school principals and other education leaders throughout the

United States, Canada, and overseas. NAESP advocates for the support principals need to be successful 21st century leaders—to achieve the highest results for children, families, and communities. And, we support the continual development of our members—principals in many different stages of their careers—through benefits, and awards. All of our activities are designed to help principals and learning communities achieve desired results for every child. The mission of the National Association of Elementary School Principals (NAESP) is to lead in the advocacy and support for elementary and middle level principals and other education leaders in their commitment for all children.