IN THE

# Supreme Court of the United States

South Dakota, Petitioner,

Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. *Respondents.* 

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

BRIEF OF THE NATIONAL GOVERNORS AS\_TSER93506 2S2Wj12.9355 0 4.4242 73e

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#### **BRIEF OF AMICI CURIAE**

The National Association of Counties (NACo) is

The Government 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

professional development, and conferences, certification, assessment, and advocacy.

The National Association of State Treasurers seeks to provide advocacy and support that enables member states to pursue and administer sound financial policies and programs benefiting the citizens of the nation. Membership is comprised of all state treasurers or state finance officials with comparable responsibilities from the United States, its commonwealths, territories, and the District of Columbia. The private sector is represented through the Corporate Affiliate Program that was established to build professional relationships and foster cooperation between the public and private sectors.

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.

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, 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 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.

Founded in 1910, the Association of School Business Officials International (ASBO) is a nonprofit organization that, through its members and affiliates, represents approximately 30,000 school business professionals worldwide. ASBO International is committed to providing programs, services, and a global network that promote the highest standards in school business. Its members support student achievement through effective resource management in various areas ranging from finance and operations to food services and transportation.

#### SUMMARY OF ARGUMENT

State and local governments lost an estimated \$26 billion in sales and use tax revenue in 2015 because they were unable to effectively collect owed taxes. The direct cause of this problem is simple to

identify: the Court's decisions in *Bellas Hess, Inc.* v. *Department of Revenue* 

Here, the South Dakota legislature enacted a law that requires 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.

economic activity sufficient to create an economic nexus should be left to the State legislatures, as this determination is a highly individualized and context-specific inquiry. See W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994) (explaining that the Court's Commerce Clause jurisprudence invokes "a sensitive, case-by-case analysis of purposes and effects" when judging between the national interest and the interests of states to exercise their legitimate taxing powers).

Upholding the South Dakota legislation and overturning *Quill* ensures that out-of-state retailers who enjoy a significant business benefit from the taxing State also remit the same taxes as in-state retailers. Questionable when decided, it is time to give *Bellas Hess* and *Quill* the "complete burial" they justly deserve. *Quill Corp.* 

ten percent. See, e.g., Scott Drenkard & Nicole Kaeding, State and Local Sales Tax Rates in 2016 (Mar. 9, 2016).<sup>2</sup> "Sales tax" refers to a tax assessed on the sale of a product at the point of sale. It is typically collected and then remitted to the State by the merchant. However, Quill does not allow a State to require the collection and remittance of tax on a sale in which the seller sits in another State, and States have been forced to seek alternative methods for collecting this lost revenue, to little avail.

Under Quill, an out-of-state seller must have a physical nexus in a State before the State can require the seller to collect sales taxes. Quill Corp., 504 U.S. at 315-16. States thus try alternate methods to capture the tax revenue from sales made to its residents from out-of-state sellers, and lower courts have been forced, over and over, to cabin Quill to its facts. This Court has never 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 through numerous lower-court cases that effectively upheld state laws "imposing regulatory and tax duties of comparable severity to sales and use tax collection duties." Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (collecting cases). And lower courts continue to hold that seemingly indistinguishable taxes—like a

<sup>&</sup>lt;sup>2</sup> Available at https://taxfoundation.org/state-and-local-sales-tax-rates-2016/.

"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*, 88 N.E.3d 900, 909-12 (Ohio 2016).3

Additionally, most States have enacted a "use tax"—a tax on consumers of a product or service that is used, consumed, or stored in the taxing State. *See* Sales Tax Institute, *What States Impose Sales/Use Tax.*<sup>4</sup> Sales and use taxes are complementary: a use

<sup>&</sup>lt;sup>3</sup> 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), available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps. By 2011, for example, New York and over 20 other states had enacted some type of "Amazon legislation,"

States' inability to collect sales and use taxes also creates market distortions that further depress state sales and use tax revenues. The tax collection inequity creates a distinct disadvantage for the brick-and-mortar stores located within the State. Sellers have the advantage of not adding sales taxes to a customer's bill, and thus are able to sell their products at lower overall cost, even if the products themselves were sold for the same exact price. Instate merchants, on the other hand, are still required to collect and remit sales tax, and their prices necessarily reflect this. Because the remote retailer is not required to collect the tax, the total price that the consumer pays for an item purchased from the remote retailer will be up to 10% less than what the consumer would have to pay for the same item if he or she were to buy it from the in-state retailer, even if the advertised price is the same.

As a result, local economies and jobs suffer as consumers choose tax-free online shopping over the local mall. In 2017, retailers closed over 6,700 brick-and-mortar stores across the country; this total exceeds even the number of stores that closed during the 2008 financial crisis. *See* Keshia Hannam, *A Record Amount of Brick and Mortar Stores Will Close in 2017* (Oct. 26, 2017). Each store closing reflects lost jobs and lost tax revenue opportunity on several levels.

This transition, of course, leads to depressed economic growth. In Arizona, for example, a study estimated that the economic loss impact of e-

<sup>12</sup> Available at http://fortune.com/2017/10/26/a-record-amount-of-brick-and-mortar-stores-will-close-in-2017/.

commerce on Arizona would "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 (2012). 13 A different study estimated that Massachusetts lost approximately \$387 million in state tax revenue in 2011; the study further estimated that in that same year, tax inequity cost Massachusetts almost 2,000 new jobs. See The Impact of the Internet Sales Tax Disparity on Massachusetts Tax Revenues, Sales and Jobs, Efairness.org (Nov. 13, 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 The Economics Center, Economic Analysis of Tax Revenue from E-Commerce in Ohio 1 (Oct. 2011). 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

<sup>13</sup> Available at https://ex.democracydata.com/ A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b3 4-542c-46ca-b8d6-ce045a849330.pdf.

property value. *Id.* States with financial models built upon sales tax feel this depressed economic growth particularly acutely. For example, a study estimated that Tennessee would lose \$456.1 million in sales tax revenue in 2011, resulting in 6,899 lost jobs, \$297.4 million wages lost by households, and a \$232 million decrease in consumer spending. *See* Younger Associates, *The Impact of Sales Tax Loss to E-Commerce in the State of Tennessee* (Sept. 2011).16

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

Remote sales—largely consisting of orders made online, over the phone, and through the mail—have increased considerably over the past several decades. When the Court decided *Quill*, e-commerce did not even exist. The first legitimate online sales transaction was not completed until 1994. *See* Marissa Fessenden, *What Was the First Thing Sold on the Internet?* (Nov. 30, 2015). 17 Today, online shopping is rampant; about 190 million U.S. consumers were expected to shop online in 2016. *See* Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online* (June 8, 2016). 18

<sup>16</sup> Available at https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/8ff4a98d-a85f-4d1e-8f56-24dd8e27891d.pdf.

<sup>17</sup> Available at https://www.smithsonianmag.com/smart-news/what-was-first-thing-sold-internet-180957414/.

<sup>18</sup> Available at http://fortune.com/2016/06/08/online-shopping-increases/.

The expansion of e-commerce showed no signs of

property tax revenues, distressed and blighted communities that further depress property values, and vacant lots that are more dependent on municipal resources of police and firefighting as they become nuisances. Communities also lose valuable partners in community civic life when these businesses fail because of the price disadvantage they face. They no longer can sponsor local youth sports, be a source of community leaders, or employ local residents.

Ultimately, the loss of revenue is crushing. In 2015, for example, uncollected U.S. sales and use taxes from remote sales were estimated to be almost \$26 billion. Of this \$26 billion, over \$17 billion uncollected taxes were projected to be from electronic sales. See National Conference of State Legislatures (NCSL) & International Council of Shopping Centers (ICSC), Uncollected Sales & Use Tax from Remote Sales: Revised Figures (Mar. 2017). <sup>21</sup> The fundamental problem that Quill and Bellas Hess imposes on the States remains: States are unable to collect owed taxes, and their revenue streams significantly suffer as a result.

<sup>21</sup> Available at http://www.efairness.org/files/Updated%20 Sales%20Tax%20Loss%20Report.pdf.

- II. ECONOMIC PRESENCE IS A NEXUS
  ALTERNATIVE TO PHYSICAL PRESENCE
  UNDER THE COMPLETE AUTOTEST THAT
  SATISFIES THE DEMANDS OF THE
  COMMERCE CLAUSE.
  - A. Quill incorrectly articulated a difference between the nexus requirements of the Due Process Clause and the Commerce Clause.

Two fundamental issues have led to the current *Quill* quagmire. First, *Quill* incorrectly determined that the nexus for Commerce Clause purposes was different from the nexus for Due Process purposes. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 311-13

U.S. at 325 (White, J., dissenting). The dubious distinction between the "nexus" requirements under the Due Process and Commerce Clauses resulted in a "bright-line" rule that has become opaque in the wake of technological advancement and the

authority for this assertion. *Id.* at 325 (White, J., dissenting). Furthermore, the Court disregarded the fact that when the Court announced the *Complete Auto* four-part framework, its nexus requirement had its doctrinal antecedents in due process concerns. *See Complete Auto*, at 430 U.S. at 281-82, 285. Under *Complete Auto*, the nexus requirement is met if a tax "is applied to an *activity* with a substantial nexus with the taxing State." 430 U.S. at 279 (emphasis added). Of course, the applicable "activity" is selling a product or service to someone in the State.

The Court removed the word "activity" from the Commerce Clause nexus formulation in Quill in favor of a heightened standard based on the seller itself. The sole constitutional inquiry, the Court now concluded, was whether the corporation was physically present in the state, even if the agent's physical presence had nothing to do with the taxed activity. See Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551 (1977) (holding that the National Geographic Society was liable for use tax collection responsibilities in California even though its physical presence in the state was unrelated to its mail-order sales). Before Quill, the Court had never found sufficient a nexus for due process purposes, but an insufficient nexus under the Commerce Clause. Quill, 504 U.S. at 319 (Scalia, J., concurring) ("It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax."). Quill remains the anomaly, and the most appropriate resolution here is to simply apply the Complete Auto test as it was originally articulated.

B. Economic Nexus Satisfies the Demands of the Commerce Clause and Resolves All Concerns of Wayfair and Amici.

Even if a heightened nexus requirement was c

can (4) voluntarily self-report and pay a use tax is an ineffective and unrealistic collection plan. See, e.g., Lila Disque & Helen Hecht, Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach, 65 Am. U. L. REV. 1163, 1179-80 (2016) (observing that many instate consumers are "unaware of the reporting requirement and have failed to keep records of their purchases" and noting efforts made by States to simplify use tax reporting).

The majority of states that impose a sales tax have joined the Streamline Sales and Use Tax Agreement ("SST"), which has made the calculation, collection, and remittance of taxes owed simple for The SST 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 SST States, and using that software is both entirely free to merchants and a complete defense to any errors in collection and remittance. See Diane L. Yetter & Joe Crosby, No. Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone, 85 State Tax Notes 571, 576-77 (Aug. 7, 2017). This agreement provides sellers with a database of tax rates for jurisdictions levying taxes, and it relieves sellers from liability if there are errors in the database. As a practical matter, the SST Agreement has abated the undue burden concerns facing out-of-state sellers in all states where it has been adopted. Despite states' continued efforts to simplify their tax systems and facilitate easy tax collection, these efforts will

remain futile if *Quill* retains force and excuses outof-state sellers from collecting and remitting their share of sales and use taxes.

Overturning Quill and ruling the South Dakota statute constitutionally appropriate does not fully

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## CONCLUSION

For the foregoing reasons, the judgment below