No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

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

Respondent.

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

BRIEF OF RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in the RLC.

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INTEREST OF AMICUS CURIAE[1]

Amicus, the Retail Litigation Center, Inc., represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of industries.[2] The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases.

This is just such a case. By distorting the retail market in favor of absentee e-commerce, *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), have caused palpable harm to the RLC's members and the communities and customers they serve. Doctrinally, *Bellas Hess* and *Quill* are eccentric outliers in this Court's Commerce Clause jurisprudence. *See Direct Mktg. Ass'n v. Brohl (DMA II)*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). But *practi-*

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than the RLC or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. On October 16, 2017, and October 19, 2017, respectively, Petitioner and Respondents gave blanket consent to amicus briefs. On October 31, 2017, the RLC notified the parties of its intention to file this brief, and they again indicated their consent.

[2] The RLC's membership is listed on its website, www.RetailLitCenter.org.

cally, those decisions continue to have tremendous, harmful effect on America's retail industry. Indeed, there has been a strikingly inverse relationship between the legal support for, and practical significance of, the physical-presence requirement.

Over the past quarter century, technology has transformed retail commerce in a way utterly unforeseen when *Quill* revisited *Bellas Hess* in 1992. The word "internet" does not appear in *Quill*, which instead focused upon the "goliath" mail-order industry, with sales amounting to about $180 billion. 504 U.S. at 303. Since then, the internet has changed everything. "By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States." *Direct Mktg. Ass'n v. Brohl (DMA)*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring). By 2015, such sales totaled $5.71 trillion.[3] The mail-order "goliath" has given way to an e-commerce leviathan.

The RLC's members have met these market forces by incorporating technology into their businesses to provide their customers with superior service at reduced costs. But no amount of ingenuity can get around the unfair advantage that *Bellas Hess* and *Quill* give to absentee retailers by making their online sales appear duty-free. Thus, the RLC has a vital interest in whether this Court grants South Dakota's petition.

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[3] William F. Fox, *Inability to Collect Sales Tax on Remote Sales Still Harms the Economy*, State Tax Notes (Nov. 6, 2017, forthcoming).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents an issue of pressing importance to businesses seeking to compete fairly in interstate commerce and States seeking to collect sales taxes sustainably in the digital age. By giving absentee retailers—*i.e.*, businesses with no physical presence in the communities in which they sell their products—constitutional immunity from the obligation to collect sales taxes, *Bellas Hess* and *Quill* have tremendously distorted interstate commerce and State tax policy. Because the lack of point-of-sale sales tax collection makes absentee e-commerce sales appear duty-free, customers are drawn to such transactions. And because the precondition to that duty-free status is being physically absent, such transactions *necessarily* drain money away from both the private and public sectors of the local community. Every day that distortion grows greater as the internet and e-commerce become more entwined in our lives. If the Court does not act now, *Quill* threatens to inflict irremediable practical harms even as its legal and economic rationales have vanished.

The 50 years since *Bellas Hess*, and the 25 years since *Quill*, have seen a transformation in retail. When *Bellas Hess* was decided in 1967, it would have been beyond imagination that Americans would use credit cards to instantaneously buy books, clothes, food, tools, movies, appliances, furniture, and any other movable good via computers. Shopping malls, bookstores, and hardware stores seemed like irremovable fixtures of the American landscape. Neither the

internet nor even its military predecessor, ARPANET, yet existed. There was simply no way for e-commerce to displace traditional retail.

When *Quill* was decided in 1992, that possibility was still farfetched. As noted, the internet went unmentioned in *Quill*. Justice White's partial dissent notes sales made via "computer linkup," but only after sales by "wire transfers," "fax," and "phone," before concluding that "the days of the door-to-door salesperson are not gone." 504 U.S. at 328. Three years after *Quill*, *Newsweek*—still then a print publication—scoffed at the notion that "[c]ommerce and business will shift from offices and malls to networks and modems" and declared that a "local mall does more business in an afternoon than the entire Internet handles in a month."[4] But what seemed fantastical then is now retail reality—the ability to "just point and click for great deals" in "instant catalog shopping" via "a trustworthy way to send money over the Internet."[5]

Technological innovation and creative disruption have been at the heart of American business from the very founding, when Alexander Hamilton strove to bring British water mill technology to Paterson, New Jersey. Traditional retailers, such as those that compose the RLC, have adapted to, or outright adopted, the transformative forces of the internet, e-commerce, the supply chain revolution, and other developments over the past 25 years. Such advances may sometimes

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[4] Clifford Stoll, *Why the Web Won't Be Nirvana*, Newsweek (Feb. 25, 1995, 7:00 p.m.), http://www.newsweek.com/clifford-stoll-why-web-wont-be-nirvana-185306.

[5] *Id.*

destroy individual business, but on the whole they make America's economy stronger.

But the tax shelter provided to absentee e-commerce retailers by the physical-presence requirement is something else entirely. That kind of tax distortion does not make the economy stronger; rather, it encourages practices that make little business sense but nevertheless confer a bottom-line advantage. (See Pet. 18.) *Quill* itself recognized that "the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." 504 U.S. at 316. But because *stare decisis* caused the Court to look backwards to *Bellas Hess*, the Court could not see ahead to just how unjustified and destructive that tax "exemption" would become.

Twenty-five years later, it has become easier than ever to operate as an absentee retailer: far from posing extraordinary challenges, it is now in many ways cheaper to sell and ship goods from afar than to do so as a part of the local community. Of course, there remain benefits to operating on Main Street rather than simply on the Web. But businesses cannot strike a sensible balance because absentee retailers are able to hold themselves out as duty-free, giving them an apparent discount in comparison to stores that remain in the community. Thus, while the Commerce Clause is meant to encourage economic integration among the States, see *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979), the dormant Commerce Clause ruling in *Bellas Hess* has had the perverse effect of encouraging Balkanization and isolation, with companies hunkering in a single State to avoid collecting sales taxes when they sell their products elsewhere. The tax advantages of

that business form are, with ever-growing speed, driving businesses off Main Street and away from local communities. Faced with these mounting harms, Justice Kennedy called for "an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *DMA*, 135 S.Ct. at 1135.

South Dakota answered that call. With South Dakota's petition, the Court now has the opportunity, and indeed the obligation, to do the same thing it did in *Quill*: look back at what has happened over the past quarter century (in *Quill*, 1967-1992; here, 1992-2017) and determine whether enough has changed to revisit the lonely precedent of *Bellas Hess*. The 25 years leading up to *Quill* eroded *Bellas Hess*'s legal foundation. The last 25 years have eroded its economic assumptions as well. Now, it is the brick-and-mortar stores whose reliance interests should be vindicated: namely, reliance on the commonsense notion that they would not suffer competitive disadvantage merely for being a physical part of the communities they serve. It is past time to stop exempting absentee retailers from the general Commerce Clause rule that "interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988).

The Court should grant South Dakota's petition and eliminate the physical-presence requirement.

ARGUMENT

I. THE RETAIL ECONOMY HAS TRANSFORMED SINCE *QUILL*, UNDERCUTTING *STARE DECISIS* AND UNDERSCORING THE NEED TO REEVALUATE THE PHYSICAL-PRESENCE REQUIREMENT

As explained in South Dakota's petition (Pet. 21-27)—and as recognized in *Quill* itself, 504 U.S. at 311—the physical-presence requirement established in *Bellas Hess* is inconsistent with the rest of the Court's Commerce Clause jurisprudence. Then-Judge Gorsuch described *Quill*'s increasingly eccentric and anachronistic character in his concurrence in *DMA II*, 814 F.3d at 1150-51. The primary basis for retaining the physical-presence requirement in *Quill* was thus *stare decisis*. But, given the changed circumstances since *Quill*, *stare decisis* cannot justify keeping the rule any longer, and it certainly does not justify denying South Dakota's petition for certiorari.

As this Court has long recognized, *stare decisis* is not an inexorable command, and when the world changes, it is appropriate to consider whether the law should change as well. For instance, in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), the Court rejected *stare decisis* as a basis for hewing to existing dormant Commerce Clause precedent. Justice O'Connor dissented, urging that "the reliance interest sought to be protected by the doctrine of *stare decisis* ha[d] grown up around the settled rule." *Id.* at 300. But she agreed with the majority in principle that

"[s]ignificantly changed circumstances can make an older rule, defensible when formulated, inappropriate, and [this Court has] reconsidered cases in the dormant Commerce Clause area before." *Id.* at 301-02. The Court is particularly willing to engage in such reconsideration when technological changes have made prior dormant Commerce Clause rules obsolete and counterproductive. For instance, in *Granholm v. Heald*, 544 U.S. 460, 492 (2005), the Court departed from prior precedent allowing discrimination against out-of- state liquor sellers because "improvements in technology have eased the burden of monitoring out-of- state wineries." As the Court has explained in the antitrust context, "[a]lthough we do not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error," neither should the Court maintain "*per se*" bright-line rules that "remain[] forever fixed" while the world moves on. *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (internal citation and quotation marks omitted).

It is hard to imagine circumstances more profoundly changed than those of the retail economy from 1992 to 2017. When *Quill* was decided, less than 2% of Americans had some form of internet access,[6] and Amazon.com did not even exist; today, that number is about

[6] The World Bank, *Individuals using the Internet (% of population)*, https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US (last visited Oct. 31, 2017). The overwhelming majority of these few users would have been connecting to text-only interfaces via 2400-baud modems.

89%,[7] and Amazon.com is the single largest retailer in the world.[8] Not only was this transformation unforeseen in *Quill*, it was largely unforeseeable. Indeed, even in 1998, six years after *Quill* was decided, Nobel Prize-winning economist Paul Krugman famously declared that "[b]y 2005 or so, it will become clear that the Internet's impact on the economy has been no greater than the fax machine's."[9] The internet defied predictions precisely because it was so revolutionary.

By aggregating retail offerings into a single point of access, the internet enabled a form of online e-commerce that is different from mail-order not only in scale—almost $6 trillion annually for e-commerce versus $180 billion annually for mail-order in *Quill*—but also in kind. In 2010, a group of academics at MIT and Northwestern studied the effect of exempting absentee retailers from sales tax collection, and they concluded that e-commerce sales work quite differently

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[7] *United States Internet Users*, http://www.internetlivestats.com /internet-users/us/ (last visited Oct. 24, 2017).

[8] Shan Li, *Amazon overtakes Wal-Mart as biggest retailer*, Los Angeles Times (July 24, 2015, 1:06 p.m.), http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html. This year, Amazon began collecting sales tax nationwide irrespective of its physical presence. Kelly Phillips Erb, *Tax Free No More: Amazon To Begin Collecting Sales Tax Nationwide on April 1*, Forbes (March 27, 2017, 4:22 p.m.), https://www.forbes.com/sites/kellyphillipserb/2017/03/27/tax-free-no-more-amazon-to-begin-collecting-sales-tax-nationwide-on-april-1/#5bcf92414e59.

[9] Jay Yarow, *Paul Krugman Responds To All the People Throwing Around His Old Internet Quote*, Business Insider (Dec. 30, 2013, 9:06 a.m.), http://www.businessinsider.com/paul-krugman-responds-to-internet-quote-2013-12.

from catalog sales. See Eric T. Anderson, et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, J. of Mktg. Research, Vol. 47, No. 2 (April 2010), pp. 229-239. While there was no apparent "reaction to sales taxes in the catalog channel," there was a considerable benefit to the tax exemption in e-commerce. *Id.* at 236. This is so, at least in part, because of the ease of "comparison shopping" on the internet. *Id.* at 235-37. E-commerce thus cannot be seen simply as an extension or expansion of mail-order; it is something materially different, with a far greater effect on the retail industry.

The transformation of retail wrought by the internet, computers, and digital technology is in no sense over; rather it is an ongoing, likely accelerating, process. Internet access statistics tell only part of the story. Even a decade ago, Americans went online almost exclusively from their computers, but today, almost 80% of Americans own smartphones.[10] Thus, the choice is no longer between shopping at home via a computer and shopping in person at a store; now, the great majority of Americans can remotely shop *at any time* via smartphone apps or web browsers. Already, "[m]obile commerce is expected to account for 34.5% of total e-commmerce sales this year, and it's further anticipated to surpass 50% by 2021.[11]" Other changes,

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[10] Mobile Fact Sheet, Pew Research Center, http://www.pewinternet.org/fact-sheet/mobile/ (last visited Oct. 24, 2017).

[11] Dan O'Shea, *Mobile commerce to dominate online sales by 2021*, Retail Dive (Oct. 29, 2017), https://www.retaildive.com/news/mobile-commerce-to-dominate-online-sales-by-2021/508403/.

from virtual reality headsets to 3D printing, are also making headway. As one retail industry commentator noted:

> The Toys "R" Us bankruptcy is another reminder that retail is in a constant state of disruption, which is why only those retailers that relentlessly adapt and innovate have a chance of survival.[12]

America's traditional retailers, from the smallest mom-and-pop store to the largest chain, have lived and sometimes died by that dictum. While the *Wall Street Journal* has written about "2017's brick and mortar carnage,"[13] it is not all a story of decline. For instance, Target recently announced a $7 billion multi-year investment into its team and business that involves remodeling 1,000 stores across the country and opening hundreds of new ones around a novel, smaller floorplan.[14] Sears has opened new "concept stores," partnered with Amazon, and used its own "Shop Your Way membership platform, websites and mobile apps … to maintain [its] valued [customer] relationships

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[12] Robert Spector, *The Rise and Fall of Toys "R" Us*, The Robin Report (Oct. 18, 2017), http://www.therobinreport.com/the-rise-and-fall-of-toys-r-us/.

[13] See Valerie Bauerlein, *Retail Stores Made Elmira, N.Y., an Unlikely Success—Now They're Gone*, Wall Street Journal (Sept. 27, 2017, 11:23 a.m.), https://www.wsj.com/article_email/retail-stores-made-elmira-n-y-an-unlikely-successnow-theyre-gone-1506525802-lMyQjAxMTI3NTIyNzIyMDc0Wj/.

[14] Kavita Kumar, *Target will remodel more stores to compete with Amazon and Walmart*, Star Tribune (Oct 19, 2017, 9:39 p.m.), http://www.startribune.com/target-will-remodel-more-stores-to-compete-with-amazon-and-walmart/451633813/

long after a store closes its doors."[15] Best Buy's newly announced plan for growth includes expanding into new service offerings such as In-Home Advisors and Total Tech Support.[16] At the same time, online e-commerce has spread into areas where formerly it would have seemed impossible, such as Wayfair's recent push to sell sofas online.[17]

And these stories are drawn from a mere six-week slice of what is happening in retail.

These changes vindicate the prescient misgivings voiced by Justice White in *Quill*, namely that, "in today's [1992] economy, physical presence frequently has very little to do with a transaction a State might seek to tax," and that it was impossible "to attempt to justify an anachronistic notion of physical presence in economic terms." 504 U.S. at 328 (concurring in part and dissenting in part). But even Justice White did not, and could not, anticipate the degree to which "physical presence" and "sales" would be decoupled by 2017. In 1992, the majority in *Quill* could still write that "the

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[15] Ben Unglesbee, *Sears borrows $100M (more) from Eddie Lampert's hedge fund*, Retail Dive (Oct. 6, 2017), http://www.retaildive.com/news/sears-borrows-100m-more-from-eddie-lamperts-hedge-fund/506702/; Daphne Howland, *Sears Holdings to shutter another 20 stores*, Retail Dive (June 23, 2017), http://www.retaildive.com/news/sears-holdings-to-shutter-another-20-stores/445710/.

[16] *CEO Hubert Joly: Best Buy 2020 focused on growth*, CNBC (Sept. 19, 2017, 8:34 a.m.), https://www.cnbc.com/video/2017/09/19/ceo-hubert-joly-best-buy-2020-focused-on-growth.html.

[17] Julie Creswell, *Buy a Sofa Online? Wayfair Is Counting on It*, New York Times (Oct. 15, 2017), https://www.nytimes.com/2017/10/15/business/wayfair-online-furniture.html.

Bellas Hess rule appears artificial at its *edges*," *id.* at 315 (emphasis added), whereas today it looks artificial to its very core.

Consider, for example, that the physical-presence requirement relies not on the location of the *transaction* but on the location of the *retailer*. Thus, an identical online transaction—buying a product on Wayfair.com versus Walmart.com—is treated differently not because the Walmart.com server processing the transaction or the Walmart warehouse shipping the good is "physically present" in the State, but simply because *some* Walmart store or warehouse or office space, possibly wholly unrelated to the transaction, is in-state. Thus, a customer of Walmart.com has sales taxes collected at the on-line point of sale based purely on the coincidence of the retailer's real estate footprint.

To the extent there is any actual physical connection between a particular online transaction and the State, it is not the happenstantial existence of a store somewhere within the State's borders. Rather, it is the fiber-optic cables transmitting the purchase request, the concrete roads carrying the trucks that deliver the packages, and the flesh-and-blood law enforcement officers ensuring those packages are not stolen off a customer's porch. Indeed, it is precisely the local "last mile" that presents the greatest hurdle to absentee retailers,[18] a hurdle that would be insurmountable if States and communities did not provide such solid

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[18] See, e.g., Julie Jargon, Annie Gasparro, and Heather Haddon, *For Amazon, Now Comes the Hard Part*, Wall Street Journal (June 18, 2017, 7:07 p.m.), https://www.wsj.com/articles/for-amazon-now-comes-the-hard-part-1497827240 (describing Amazon's need to "solve the 'last mile' logistics puzzle").

infrastructure. Far from taking place solely in the ether, online sales are transacted across and upon the physical State. Absentee e-commerce depends upon modern, well-developed government and extensive public infrastructure to conduct its business.

Yet while a State may require Walmart to collect sales taxes when it conducts an online sale, *Quill* gives Wayfair constitutional immunity from that obligation. *Quill* incorrectly describes this as "exemption from state taxation." 504 U.S. at 316. In fact, the transaction is still taxed; Wayfair is exempt only from the *de minimis* cost of collecting the tax.

But the Court's own confusion reveals the real value to absentee retailers: the widespread misimpression that their sales are duty-free. (See Pet. 19.) Given the tight margins in the retail industry, these "no tax" sales have a huge advantage. States can, and do, struggle to collect those taxes. Witness Vermont's decision to send "close to 20,000 letters to Vermonters telling them they may owe sales tax for online and other purchases."[19] The practical reality is that *Quill* "creates an interstate tax shelter for one form of business," 504 U.S. at 329 (White, J., concurring in part and dissenting in part), while turning millions of online customers into unknowing tax cheats.

Even at the time of *Quill*, the Court recognized that *Bellas Hess*'s 25-year-old physical-presence requirement was contrary to "current Commerce Clause juris-

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[19] Morgan True, *State sending 20,000 letters to collect alternative sales tax*, Brattleboro Reformer (Sept. 4, 2017, 5:33 p.m.), http://www.reformer.com/stories/state-sending-20000-letters-to-collect-alternative-sales-tax,518443.

prudence," which expressly held that the Commerce Clause did not "relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business." *Id.* at 310 & n.5 (maj. op.) (internal quotation marks, citation, and brackets omitted). The Court justified this unfair discrepancy based on "settled expectations" and "reliance interests." *Id.* at 316-17. But such "reliance interests … cannot justify an inefficient [and narrow] rule," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007), particularly given that the oft-boasted "disruptive innovation"[20] of e-commerce logically precludes claiming reliance interests. Moreover, that reliance rationale has withered over the past quarter century even while the "just share of the state tax burden" left uncollected by absentee retailers has swollen enormously.

In fact, to the extent any retailers possess a reliance interest that merits the Court's recognition, it is the brick-and-mortar retailers that have—over the course of decades—invested billions of dollars in helping literally build up local communities, only to discover that this footprint carries with it an enormous competitive tax disadvantage when it comes to retail sales, whether in-store *or* online.

Take, for example, RLC member Petco. When Petco began in 1965, it was a mail-order business, and it did

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[20] See A.W., *The Economist explains: What disruptive innovation means*, The Economist (Jan. 25, 2015), https://www.economist.com/blogs/economist-explains/2015/01/economist-explains-15.

not expand beyond California until 1980.[21] By 1994, it had expanded into 13 States,[22] and by 2008, it had reached all 50 States.[23] This is, by any measure, a classic American success story, and exactly the kind of interstate economic integration that the Commerce Clause was designed to foster.

While Petco was investing millions in providing exemplary pet care and products to customers in communities in all 50 States, the internet e-commerce boom changed retail. Petco adapted by complementing its physical stores with a return to its mail-order roots via Petco.com. When Petco sells its goods via Petco.com, it accurately informs customers that, "[b]y law, we must collect applicable sales tax for orders shipping to states where we have retail stores."[24] By contrast, when petsupplies.com sells the same products, it poses the question, "Must I pay sales taxes?" and answers it, "We are required to collect sales tax for orders delivered in the states [where] we are located: PA, MO, OH, CT and NY," recommending that customers do their own research into their "state's tax regulations for online purchases, as petsupplies.com is not responsible

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[21] https://about.petco.com/1960s-80s-petcohistory (last visited Oct. 24, 2017).

[22] https://about.petco.com/1990s-petcohistory (last visited Oct. 24, 2017).

[23] https://about.petco.com/early2000s-petcohistory (last visited Oct. 24, 2017).

[24] https://www.petco.com/content/petco/PetcoStore/en_US/pet-services/help/help-payments-fees.html (last visited Oct. 24, 2017).

for [any other] individual state sales tax collection."[25] Far from vindicating "settled expectations" and "reliance interests," the interaction of *Quill* and e-commerce has instead turned Petco's amazing 50-state expansion into a competitive disadvantage against absentee retailers like petsupplies.com, which only collects sales tax in five States. Retailers now hesitate to expand into new states precisely to avoid such a disadvantage. See Anderson, *Sales Taxes*, *supra*, at 237-39.

This is just one small example of how the "significantly changed circumstances" of the past 25 years have not only eroded the economic premises of *Quill* but also imperiled far more legitimate expectation interests than the ability to inaccurately claim duty-free status or avoid the minimal cost of collecting sales tax. These "changed circumstances" require the Court's prompt attention. "It's no secret the retail industry is undergoing a transformational period that has many scaling back physical operations, shuttering stores, reorganizing mounting debt loads, and in some cases ending up in bankruptcy court."[26]

It is imperative that, as the retail industry adapts to the growing ubiquity of the internet and e-commerce, that transformation is driven by business efficiencies and not tax dodges, so that community-based retailers

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[25] https://www.petsupplies.com/CS/ShippingInfo.aspx#2 (last visited Oct. 24, 2017).

[26] Corinne Ruff & Ben Unglsebee, *The running list of 2017 retail apocalypse victims*, Retail Dive (July 5, 2017), http://www.retaildive.com/news/retail-bankruptcies-2017/446086/.

are not forced to abandon their physical presence in order to avail themselves of *Quill*'s "tax shelter." The invisible hand of the market, and not the visible thumb of *Quill* on the scales, should guide retail's growth.

II. FAR FROM PROMOTING STABILITY IN THE LAW, THE PHYSICAL-PRESENCE REQUIREMENT IS GENERATING A WELTER OF LEGISLATION AND LITIGATION

As Justice Kennedy noted—and as South Dakota's petition powerfully establishes—the "tax shelter" created by *Quill* is draining State and local coffers of desperately needed tax revenue. Unsurprisingly, the States are not sitting idly by. While South Dakota has enacted a direct and forthright challenge to the physical-presence requirement, other States have attempted "to find ways of achieving comparable results through different means," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring). Some States have done this by attempting to get as close to what *Quill* forbids as possible without coming within its literal terms, such that general Commerce Clause norms will permit the taxation. *Id.* And others have remained within *Quill*'s literal terms but, like Houdini in a straight-jacket, engaged in such contortions as to escape the decision's restraint. See, e.g., 830 Mass. Code Regs. 64H1.7 (defining "physical presence" to include, *inter alia*, "the use of in-state software (*e.g.*, 'apps') and ancillary data (*e.g.*, 'cookies') which are distributed to or stored on the

computers or other physical communications devices of a vendor's in-state customers").[27]

All of these legislative novelties impose far greater burdens than the nominal cost of collecting sales taxes at the point of sale, and all of them have spawned litigation as absentee retailers struggle to maintain "a competitive advantage over their brick-and-mortar competitors thanks to *Bellas Hess* and *Quill*." *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). The result is that the physical-presence requirement has the arbitrariness and harshness of Draconian law but not the consistency or stability. *Quill* was thus simply wrong when it concluded that the "artificiality" of the physical-presence requirement would be "more than offset by the benefits of a clear rule." 504 U.S. at 315. Present circumstances show that the physical-presence requirement does *not* "firmly establish[] the boundaries of legitimate state authority to impose a duty to collect sales and use taxes" or "reduce[] litigation concerning those taxes." *Id.*

The shifting boundaries of State taxation have given rise to litigation over *Quill*'s effect in Alabama, Colorado, Indiana, Massachusetts, South Carolina,

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[27] The real effect of *Quill* has been to encourage the States to adopt gerrymandered approaches to sales tax collection that violate basic principles of sound taxation recognized at least since Adam Smith wrote *The Wealth of Nations*: that like enterprises be taxed the same way; that taxes be obvious to the taxpayer at the time of the transaction; that taxes be collected at the most opportune moment for the taxpayer; and that governments employ the most efficient forms of tax collection. See Tyler A. LeFevre, *Justice in Taxation*, 41 Vt. L. Rev. 763, 769-70 (2017).

Tennessee, and Wyoming.[28] Pennsylvania's legislature just passed a new online sales tax law that incorporates features of Colorado's reporting and the economic-nexus approach,[29] and Mississippi seems poised to adopt one as well.[30] These will no doubt yield challenges, too. Many of these State rules have already taken effect (or will soon), imposing registration, collection and remittance requirements—at least one imposes penalties for failure to act by October 1, 2017. See 830 Mass. Code Regs. 64H1.7. While Respondents may argue that such a ferment should cause the Court to wait and watch the development of the law, there are compelling reasons not to do so here.

First, as explained above, time is of the essence if community-based retailers are to maintain their physical presence. (See supra pp. 10-18.)

Second, waiting and watching as businesses and States maneuver around *Quill* is like watching to see how a badly broken bone knits on its own before deciding whether or not to set it back in proper alignment. The business and legal structures that are growing up around *Quill* are crooked. Some may prove workable,

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[28] The RLC has collected general information about this area of litigation, as well as pleadings from some of the cases, on its website. See http://www.rila.org/enterprise/retaillitigationcenter/efairnesslitigation/Pages/eFairness%20Litigation.aspx (last visited Oct. 24, 2017).

[29] *A dozen ways Pa.'s 2017-18 state budget may impact your life*, Penn Live (Oct. 27, 2017, 10:19 a.m.), http://www.pennlive.com/politics/index.ssf/2017/10/a_dozen_ways_pas_2017-8_state.html.

[30] https://s3.amazonaws.com/pdfs.taxnotes.com/2017/2017-77863_STTDocs-MS-Remote-Sellers-Rule-Economic-Statement.pdf (last visited Oct. 24, 2017).

after a fashion, but they will necessarily be inferior to the structures that would arise from a level playing field and a coherent Commerce Clause jurisprudence.

Third, none of the other cases arising from State efforts to address *Quill*'s distortion is as timely and unencumbered a vehicle as this one. For instance, Newegg's challenge to Alabama's sales tax raises issues of state law and good-faith reliance that are not present in this case.[31] The challenge to Massachusetts's new tax policy rests on state administrative procedure and the Internet Tax Freedom Act as well as on the Commerce Clause and *Quill*.[32] Moreover, a new challenge to Massachusetts's policy has just been filed *in Virginia*—with the inevitable jurisdictional issues that raises—adding yet another layer of complexity.[33]

Similar complexities exist in the other lawsuits as well. Moreover, those cases may take years to reach

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[31] Newegg Inc.'s Notice of Appeal of the Alabama Dept. of Revenue's Final Assessment of Seller's Use Tax, http://www.rila.org/enterprise/retaillitigationcenter/Documents/E-Fairness%20Files/Newegg-Inc.-Alabama-Tax-Tribunal-Notice-of-Appeal-filed-June-8-2016.pdf (last visited Oct. 24, 2017).

[32] American Catalog Mailers Association and Netchoice's Verified Complaint for Declaratory Judgment, http://www.rila.org/enterprise/retaillitigationcenter/Documents/E-Fairness%20Files/Verified%20Complaint%20for%20Declaratory%20Jud%206-13-17%20(1).pdf (last visited Oct. 24, 2017).

[33] Tracy Maple, *Crutchfield sues to block Massachusetts from collecting online sales tax*, Digital Commerce 360 (Oct. 25, 2017), https://www.digitalcommerce360.com/2017/10/25/crutchfield-sues-block-massachusetts-collecting-online-sales-tax/.

this Court. During that time, States will struggle to establish tax policy to address the internet's accelerating transformation of retail while bound by a rule made for mail-order long before the internet even existed. These are circumstances that call not for delay and "percolation," but for swift correction of a legal standard widely agreed to be wrong.

South Dakota's law, and its pending petition, provide a clean, direct challenge to *Quill* and an excellent example of how the ordinary economic-nexus approach can provide a brighter line than the physical-presence requirement. Requiring retailers with more than $100,000 in in-state sales or 200 in-state transactions to collect sales tax is vastly more straightforward than, for example, requiring retailers to report transactions so that the State can send dunning letters to consumers, see, e.g., *DMA*, 135 S. Ct. at 1127 (describing Colorado's law), or determining whether electronic data stored on in-state devices constitutes a physical presence, see 830 Mass. Code Regs. 64H1.7. It also has the virtue of treating community retailers and absentee retailers the same way when they participate in e-commerce. The RLC respectfully submits that there will not be a better time, or a better vehicle, to set the Court's dormant Commerce Clause doctrine aright so that the retail industry and sales tax policy can develop as they should.

III. THE COURT SHOULD NOT EXPECT CONGRESS TO CORRECT THE CONSTITUTIONAL ERROR OF *BELLAS HESS* AND *QUILL*

The hope of congressional intercession is not a basis for this Court to decline to reconsider the judge-made physical-presence requirement.

In *Quill*, the Court left the physical-presence requirement in place because "even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence," the error was one that "Congress has the ultimate power to resolve." 504 U.S. at 318. That is not quite right. Only this Court has the power to correct the *constitutional* error that is the basis of *Bellas Hess* and *Quill*, namely the notion that the Constitution forbids the States from requiring that absentee retailers collect sales tax unless Congress grants them that power by largesse. Congress cannot overrule this Court's interpretation of the Commerce Clause. At most Congress can *bypass* the error by returning to the States as a matter of legislative grace the taxing power denied them by this Court as a matter of constitutional law.[34]

The Commerce Clause holdings in *Bellas Hess* and *Quill* are not political decisions, but legal ones about the default allocation of sales-taxing power between the States and Congress in our federal system of gov-

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[34] To be sure, dormant Commerce Clause rulings are the constitutional holdings most susceptible to congressional override, e.g., *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring), but they are nevertheless distinct from statutory interpretation or common-law rulings.

ernment. Were the Court to reevaluate the physical-presence requirement, it would be deciding not whether, as a matter of policy, States ought to require internet-only sellers to collect sales tax but whether, as a matter of law, States possess the inherent constitutional authority to do so absent congressional authorization. Conversely, were Congress to evaluate whether to bypass *Quill* through legislation enabling State laws such as South Dakota's, it would not be interpreting the Commerce Clause. Instead, it would be weighing myriad political considerations that have nothing to do with the Constitution.

While the constitutional and political questions are distinct, this Court's decisions in *Bellas Hess* and *Quill* exert enormous influence on the political process because of inertia and endowment effects. The same political body may be loath to strip States of their sovereign taxing power *and* loath to pass legislation that could be misinterpreted as a tax increase. Thus, this Court's legal ruling as to where the Constitution initially places the taxing power has been not just the first word, but also the last word on the political question over the past 50 years. Just as it is impossible for Congress to correct this Court's interpretation of the Commerce Clause, it may well be impracticable for Congress to remedy that ruling's consequences.

"[I]n the absence of congressional action this Court has prescribed the rules which determine the power of states to tax interstate traffic, and therefore should alter these rules if necessary." *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546 (1950), *abrogated on other grounds by Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990). As this Court has recognized, "it is hard to see how the judiciary can wash its hands of a

problem it created," even if the bottom-line outcome could be said to implicate policy considerations often left to political branches. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008). "[W]hen we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2426 (2014) (Thomas, J., concurring in the judgment).

The RLC respectfully submits that where the Court intervenes in interstate commerce with a "fixed" judge-made rule, it has the obligation to review from time to time whether that rule is reflecting or distorting current "economic realit[y]." See *Khan*, 522 U.S. at 21. That is exactly what the Court did in *Quill*, when it gave the physical-presence requirement a 25-year checkup. Now another 25 years have passed, and the need for another checkup is more pressing than ever. Regardless of how the Court ultimately resolves this case on the merits, *at a minimum* the retail sea change over the past quarter century requires that the Court give a hard, considered look at the physical-presence requirement to decide whether such an "artificial" constitutional rule must still be maintained on account of putative reliance interests. *Quill*, 504 U.S. at 315. Such review is the proper role of the Court, not Congress, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

CONCLUSION

The Court should grant South Dakota's petition for a writ of certiorari and eliminate the physical-presence requirement.

Respectfully submitted,

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