IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28160

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

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

Defendants and Appellees.

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

THE HONORABLE MARK W. BARNETT
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This reply brief will use the same references as set forth in the Preliminary Statement of the State's initial brief. References to the Defendants' Brief of Appellees will be denoted by "DB" followed by the appropriate page number. References to the State's initial Appellant's Brief will be cited as "SB" followed by the appropriate page number.

The State relies on the Statement of the Issues and Authorities, Jurisdictional Statement, Statement of the Case, Statement of the Facts, and Standard of Review presented in its initial brief. SB 1-9.

ARGUMENT

The parties agree that the decision below must be affirmed in this Court because, at least in this forum, *National Bellas Hess, v. Department of Revenue of Illinois*, 386 U.S. 753, 87 S.Ct. 1389 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992)

remain binding precedent. The parties also apparently agree that, pursuant to the Legislature's directive, *see* App. 15 (§ 4), this appeal should be decided as speedily as possible; Defendants do not suggest otherwise, do not dispute the (quick) timetable necessary to allow the U.S. Supreme Court to consider this case during its October 2017 Term, or provide any ground for rejecting the statute's own call for expedition. The only thing they disagree about is whether the U.S. Supreme Court should overrule *Quill* in this case, and relatedly, whether this Court ought to encourage reconsideration of *Quill* as part of its decision to affirm. On the latter point, there are a few assertions in Defendants' brief that require clarification.

The first, and perhaps most important, is a passing suggestion that this appeal "does not present any genuine and justiciable controversy." DB 2. Defendants do not actually press this argument, but if they did, it would necessarily fail for the reasons explained below. Most importantly, Defendants acknowledge (DB 5) that the State ultimately seeks a very different judgment from the circuit court than the court entered below. *See* I, *infra*.

The second is Defendants' core complaint—namely, that the presentation of this case as an isolated legal question on summary judgment makes this "not an appropriate case for the review of the *Quill* physical presence standard." DB 14, II. Remarkably, Defendants fault the State for sparing them the expense of an audit and extensive

discovery, and then bemoan the shape of the record *they* created by moving for immediate summary judgment. *See* DB 9, 16-18. Given Defendants' control of the process below—and the many ways it benefitted them—these process objections lack any force.

Even if they did not, however, Defendants' underlying premise is decidedly backwards. The U.S. Supreme Court *prefers* that cases be presented as isolated legal questions, and will "usually deny certiorari when review is sought of a lower court decision that turns solely upon an analysis of the particular facts involved." Robert L. Stern et al., SUPREME COURT PRACTICE § 4.14, at 249 (8th ed. 2002). Indeed, the summary judgment posture only helps to clarify the stakes: Having successfully moved for summary judgment, Defendants must necessarily believe that *Quill* prevents the State from enforcing the Act *despite* the facts found by the Legislature, described in the State's Complaint (SR 1-20), and universally recognized by accomplished academic researchers. No matter how serious the harms to the State—and Defendants concede they are quite serious—*Quill* stands in the way. The question the U.S. Supreme Court must decide is thus ideally framed here for its review. *See* II, *infra.*

Finally, there is Defendants' newfound effort to contest both the legal analysis and the economic realities that motivated Justice Kennedy's call for *Quill*'s reexamination in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J. concurring), then-

Judge Gorsuch's similar analysis in *Direct Marketing Association v. Brohl*, 814 F.3d 1129, 1147 (10th Cir. 2016) (Gorsuch, J. concurring) (hereinafter "*Brohl*"), and the Legislature's decision to pass the Act itself. Defendants' efforts in this regard rely almost entirely on "studies" by interested entities—including papers authored by Defendants' own counsel. *See* DB 22, 25, 27-28. But, ultimately, both the factual and legal arguments Defendants press only end up confirming the State's point that *Quill* is in urgent need of reconsideration. *See* III, *infra*.

I. This Case Presents A Justiciable Controversy.

Defendants suggest the absence of a controversy in passing (at DB 2), but do not actually press such an argument. Indeed, the relief they ask for—affirmance, rather than dismissal—confirms that they believe the Court has jurisdiction to decide this case. *See* DB 35; *State v. Texley*, 275 N.W.2d 872, 875 (S.D. 1979) (Henderson, J., concurring specially) (without jurisdiction, "this Court cannot affirm").

In any event, there is a live controversy here. If the State ultimately prevails, the Act will become immediately applicable to Defendants, and they will be required to collect and remit sales tax to the State. If Defendants prevail, they will not have to collect and remit. That is a prototypical legal case or controversy. *See, e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477, 60 S.Ct. 693, 698 (1940) (economic injuries to party provide standing and controversy for

appeal even if economic factors do not affect the legal basis for the decision appealed).

To be sure, the legal consequence of *Quill* is that—*for now*—the State cannot prevail, and the State has forthrightly acknowledged as much. That does not destroy the controversy between the parties, however, which concerns the State's effort to reverse the *judgment* below in the final analysis. *See Campbell v. Fritzsche*, 78 S.D. 593, 595, 105 N.W.2d 675, 676 (1960) (There is an "actual controversy . . . where the judgment appealed from, if left unreversed, will preclude an appellant as to a fact vital to its rights"). The circuit court can clearly provide the State with the relief it seeks if the State is successful in encouraging the courts to reconsider *Quill* and reverse the circuit court's judgment; at that point, the circuit court can enter a declaration for the State and require Defendants to collect and remit. *See* DB 5 (acknowledging that the State seeks "a declaration that the Defendants *are* required to register for, collect, and remit South Dakota sales tax") (emphasis added). And while binding precedent from the U.S. Supreme Court prevents this Court from providing reversal that only makes it *more* plain that this Court's role, in a case like this one, is to highlight the need for the U.S. Supreme Court to reconsider that precedent.

II. Defendants' Objections Regarding The Record Lack Merit.

The core of Defendants' brief involves a scattershot process complaint, which they believe undermines this case as a vehicle for

reconsidering *Quill*. Describing the Legislature's expeditious alternative of declaratory judgment litigation as somehow "unfair," DB 9, Defendants suggest that it would have been better for the State to audit Defendants, seek an assessment against them, require them to bear the expense of protest and appeal, and use the entire process for expensive discovery into the myriad details of Defendants' businesses. *See* DB 16-18. Rather than exhaustively addressing Defendants' misunderstandings regarding the development of the Act and this litigation,[1] the State will focus on three key problems with Defendants' suggestion.

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[1] Defendants' argumentative "Statement of the Case" involves some odd characterizations. For example, it faults the State for sending "demand" letters notifying potentially affected sellers of the change in the law and explaining that they may be sued for a declaratory judgment if they fail to register. *See* DB 4. But the real purpose of these letters was entirely benign: They were meant to provide *extra* notice beyond the sufficient notice provided by the Act's mere passage, and to ensure that the State did not bring this action against defendants who intended to comply with the law rather than invoke their constitutional defense. *See* SR 29-36. Notably, Defendants' apparently preferred alternative would be for the State to *not* send direct notice to potentially affected parties, and then put them through the substantially greater expense of an audit and assessment case if they failed to register.

Other inconsistencies abound. Defendants say it is "not a proper use of the state's judicial system" for the Legislature to acknowledge that *Quill* must be abrogated before the Act can be enforced, and, relatedly, that the State's forthright approach to this litigation "treats this Court as a waystation on the State's quest" for a U.S. Supreme Court reversal. *See* DB 3. But Defendants then argue that if a precedent—like *Quill* here—"has direct application in a case, lower courts should follow the case which directly controls, leaving to [the U.S. Supreme] Court the prerogative of overruling its cases." DB 14, n.1 (quoting U.S. Supreme

(continued . . .)

First, Defendants cannot credibly suggest that the State has acted "unfairly" or failed to create an adequate record by bringing this pre-enforcement, declaratory judgment action in lieu of an audit and assessment. Among other things, Defendants' own counsel has brought a pre-enforcement declaratory judgment challenge designed to cut off audits and assessments in this State, and in the several other states that have recently adopted similar sales tax collection measures. *See American Catalog Mailers Association and NetChoice, v. Gerlach,* Civil File No. 16-0096, Hughes County, S.D. Sixth Judicial Circuit; *see also American Catalog Mailers Association and NetChoice, v. Heffernan,* Commonwealth of Massachusetts, 1784-CV-01772, Superior Court, Suffolk County; *American Catalog Mailers Association and NetChoice, v. Tennessee Department of Revenue,* No. 17-307-IV, In the Chancery Court for the State of Tennessee, 20th Judicial District, Davidson County, Part IV, at Nashville. That is hardly surprising; companies like Defendants and the trade associations litigating such cases on their behalf would surely prefer that members be spared the expense and uncertainty of audits and assessments in favor of a highly simplified

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(. . . continued)
Court precedents) (internal quotation marks omitted). Defendants do not explain how their consternation regarding the State's approach to this litigation can be squared with their own statement of the law. Again, their apparently preferred alternative would be for the State *not* to acknowledge the Act's tension with *Quill*, and to put Defendants through the time and expense of trying claims raising a host of colorable distinctions between this case and the binding precedent.

legal vehicle for the State to obtain a final word from the U.S. Supreme Court on *Quill*'s continuing force. What *is* surprising is to see Defendants now suggest the State ought to have enforced the Act against them in the most onerous way possible—not only auditing them and calculating an assessment, but forcing them to develop and defend against a trial, replete with expert reports, regarding not only their own businesses, but the state of the entire American economy. DB 16-18. This process complaint amounts to nothing more than a debater's point; it is the kind of argument a party only makes when it is certain that it will not suffer the consequences of being right.

Moreover, an audit and assessment will not ordinarily develop *any* of the factual issues Defendants say are lacking on the record here. The point of the audit is to determine and assess the extent of any tax liability, not to inquire into facts that may potentially relate to the question of whether the U.S. Supreme Court should overturn its controlling precedent. Defendants' proposed "straightforward" alternative is anything but.

Perhaps more important, Defendants ignore their own complete control over the case's current posture. As Defendants acknowledge (DB 15, n.2), the Legislature made detailed findings describing both the State revenue concerns and the changes in the national economy that the Legislature believed called for *Quill* to be overturned. App. 17 (§§ 1-9). If Defendants wanted to challenge those findings, they could have

done so; they were not required to move for immediate summary judgment. But having moved for summary judgment and denied the existence of any material factual disputes, Defendants cannot now complain that what they really need is a chance to contest the Legislature's factual determinations. Defendants' legal position in this case is quite clear: In denying the existence of any *material* disputed facts, Defendants necessarily believe that *Quill* prevents the State from prevailing here *in spite of* the facts as found by the Legislature and recited at length in the State's Complaint. *See* SR 1-20. And that is correct—as the State has acknowledged—precisely because *Quill* sets up a "bright-line" rule that is "artificial," "formalistic," and wholly insensitive to these critical concerns. *See, e.g.*, *Brohl*, 814 F.3d at 1149 (Gorsuch, J., concurring). That is a vivid demonstration of just how out of step the *Quill* rule is with the modern economy, and how indifferent it is to the increasing harm it is visiting on States like South Dakota. The summary judgment posture thus ideally presents this case for the U.S. Supreme Court's review.

Indeed, apart from faulting the State for Defendants' own litigation strategy, Defendants also argue from a faulty premise: The lack of case-specific or defendant-specific facts is a *strength* of this case as a vehicle for U.S. Supreme Court review, not a weakness. As the leading treatise on U.S. Supreme Court practice explains, if the U.S. Supreme Court determines that the holding in the case may turn on

case-specific factors, it is "the kiss of death" for the petition. *See* Stern, *supra*; "Certiorari Practice: The Supreme Court's Shrinking Docket" (Mayer Brown, 1995), *https://www.mayerbrown.com/certiorari-practice-the-supreme-courts-shrinking-docket-06-12-1995* ("'Fact-bound' cases also fall quickly by the wayside"). In fact, because the U.S. Supreme Court sets rules of general applicability through the process of case-by-case adjudication, it strongly prefers that the petition isolate a legal issue in a way that is abstracted from the case's particular factual record, and will thus apply broadly to future disputes. This is especially so where the question presented asks the U.S. Supreme Court to consider overruling one of its own precedents—an issue of obviously generalized and national importance that should not depend on how the record of one particular case was developed between two particular litigants. Notably, on the most recent occasion that the U.S. Supreme Court granted such a question, it did so in precisely this posture: The petitioner acknowledged in the Ninth Circuit that it could not win unless the U.S. Supreme Court changed its rule. *See* Reply Brief, *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095 (9th Cir. Mar. 29, 2016) at 5 (appellant asking Ninth Circuit to "affirm the district court's judgment as quickly as is practicable . . . so that Appellants may take their claims to the [U.S.] Supreme Court"); *Friedrichs v. Cal. Teachers Ass'n*, 135 S. Ct. 2933 (June 30, 2015) (granting certiorari).

Finally, and relatedly, Defendants simply misunderstand the kind of "facts" that are supposedly at issue here. Defendants omit from their brief South Dakota's statutory standard, which clarifies that the *only* facts that must be of record to be considered—and which might require judicial notice if they are not—are "adjudicative fact[s]." *See* SDCL 19-19-201(a). These are precisely the kinds of facts the U.S. Supreme Court seeks to avoid in finding appropriate vehicles for certiorari: As this Court explained just this year "[a]djudicative facts are those which relate to the *immediate* parties involved—the who, what, when, where[,] and why *as between the parties*." *See Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419 (emphasis added) (citations omitted). The facts about which Defendants now complain are classic *legislative* facts—indeed, they are materials that bear directly on the factual judgments reached by the Legislature itself. And as explained in the committee note to Federal Rule of Evidence 201, on which SDCL 19-19-201(a) was modeled verbatim:

> This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level.

The legislative facts that bear on whether *Quill* should be reconsidered have been recited in the State's filings in this case going back to April 2016—and back to the Legislature's findings before that. Defendants

have had every opportunity they could possibly want to "hear and be heard" and to exchange briefing on these questions. They have simply chosen not to challenge the facts as Justice Kennedy described them and as the Legislature found here.

In fact, Defendants' real complaint boils down to a footnote where it casts aspersions on the Legislature for not conducting more extensive hearings on the Act, suggesting this makes its findings unreliable. *See* DB 15, n.2. As an initial matter, this footnote is simply incorrect: There were committee hearings on the bill, and live testimony was offered and received—all of it in favor of the Act. http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016. And, of course, the Legislature heard from every witness who came forward to testify: The lack of testimonial support for Defendants' position is certainly not the Legislature's fault.

Moreover, even if Defendants accurately describe the legislative process surrounding the Act (which they do not), their picture of the legislative process remains a distorted caricature. The Legislature passed the Act after years of studies by disinterested economists demonstrated the harms the *Quill* rule was causing, a Justice of the U.S. Supreme Court drew attention to that scholarship in calling for *Quill* to be overturned, and Congress worked to no avail to address the issue. *See, e.g.*, Marketplace Fairness Act of 2013, S.743, https://www.congress.gov/bill/113th-congress/senate-bill/743. It also

acted in light of *years* of deliberation in the State Capitol and at legislative conferences around the country about how best to address the harms that *Quill* has caused. The Legislature also passed the Streamlined Sales Tax project, and is familiar with the simplification it enables in filing South Dakota sales taxes. Accordingly, the Act met with near-unanimous support in both houses and the strong backing of the Governor, all of whom were informed by their extensive experience on this issue. The judgments of the State's political branches cannot be so cavalierly dismissed.

Ultimately, there is a rich irony in Defendants' position on the expedited and simplified litigation structure the State adopted here. As the State has consistently explained, *see* SB 9, 36-37, the design of the statute and of this litigation was carefully calculated to *minimize* the compliance burden on taxpayers and limit any dislocations caused by the unusual circumstances of this case—namely, that the State must take an action that conflicts with current precedent as the only possible means of obtaining reconsideration of that precedent. If Defendants wanted to develop the record further, notwithstanding the Legislature's effort to minimize the cost this litigation would impose upon them, they were free to do so. Indeed, they could have conducted extensive expert research or other record development during the delay occasioned by

their unsuccessful effort to remove this case to federal court.[2] Instead, *they* asked that it move forward without making any factual submissions or contesting the findings of the Legislature. The time for Defendants' complaints has passed and this case is ready to expeditiously move toward review by U.S. Supreme Court as requested by the Legislature.

III. Defendants' Efforts to Contest *Quill*'s Legal and Economic Infirmities Are Unavailing.

When Defendants do turn to contesting the propositions laid out by the Act, the Complaint, and the State's brief, their arguments prove empty. The plain, consensus view among disinterested academics and legal thinkers is that *Quill*'s "ad hoc," "artificial," and "formalistic" exception is both bad economics and bad law.

Regarding the law, the best Defendants can say is that, even as *Quill* took the very unusual step of calling its own result into question on the merits, a narrow majority of the U.S. Supreme Court was willing to describe the *Bellas Hess* rule as "not inconsistent" with *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076 (1977). DB 30 (quoting *Quill*). The U.S. Supreme Court chose its words carefully; this conspicuous double-negative does not help Defendants.

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[2] That effort *directly* conflicted with a unanimous holding of the United States Supreme Court. *See Franchise Tax Bd of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22, 103 S.Ct. 2841, 2852 (1983) ("[A] State's suit for a declaration of the validity of state law is . . . not within the original jurisdiction of the United States district courts," and "not removable either").

That is particularly true because time has proven *Quill* even more "artificial" and "formalistic" than predicted. *See Brohl*, 814 F.3d at 1149 (Gorsuch, J.) (describing it as already "a matter of precedent for this court and many others" to treat *Quill* as "pretty 'artificial' and 'formalistic'" and refuse to extend it even to "*comparable* tax and regulatory obligations") (emphasis added). Defendants attempt to explain recent cases minimizing the *Quill* rule by noting that courts put the taxes at issue in those cases in "a different category" from sales taxes. *See* DB 31-33. But Defendants cannot explain *why*, for example, a Commercial Activity Tax calculated by reference to gross receipts "occupies a different category" from sales taxes, and made no effort to do so. Notably, the courts do *not* look to the functional differences among various state taxes in the burdens they actually create on interstate commerce in determining which kinds of regimes pass muster, and which do not. *See Brohl*, 814 F.3d at 1149 (Gorsuch, J. so noting). Instead, they characterize the taxes as sales taxes or something else (like an income tax), and then apply *Quill*'s exception as narrowly as possible. Notably, that makes *Quill* not only an exception from *Complete Auto*'s general test of substantial nexus—a test that is surely satisfied by doing large amounts of business in a state—but also an exception to the function-over-form approach that *Complete Auto* expressly adopts. *See, e.g.*, *Complete Auto*, 430 U.S. at 279 (rejecting

rule that prefers the "formal language of the tax statute" to its "practical effect" and thus "stands only as a trap for the unwary draftsman").

Nor is there any force to Defendants' suggestion that the issue presented is for Congress rather than the courts. Not only has Congress failed to resolve this issue in the 25 years since *Quill*, this assertion also begs the very constitutional question presented: There is certainly a policy question for Congress to answer in this realm, but the issue in this case is what form that question takes. The State's view—reflected in the Tenth Amendment and the text of the commerce clause itself—is that the relevant policy question is not whether Congress should devolve to the states a power that the Constitution never vested exclusively with the federal government in the first place, but, rather, whether Congress should oust the states from the power to regulate sales to consumers within their borders. This in no way denies that commerce clause doctrine properly prohibits discriminatory laws or laws of protectionist intent, nor does it deny that the commerce clause may have some other negative force. *Contra* DB 10, 33-35. Instead, the simple point is that states regulating sales within their borders in an evenhanded and ordinary fashion are presumptively exercising the powers reserved to them by the Constitution, and that changing the default rule to require congressional action before states can exercise those powers has warped the very political forces on which Defendants ask the Court to rely.

Defendants remarkably fair even worse in attempting to controvert the existing economic consensus against *Quill*. Tellingly, many of the "studies" they cite come from interested parties: They cite an electronic tax preparer that profits by "simplifying" the allegedly "complicated" system for taxpayers for the proposition that sales tax compliance is too complicated. *See* DB 23. They cite an article published by sales tax collection opponent NetChoice for the proposition that the tax losses in the materials relied on *by Justice Kennedy himself* are overstated. *See* DB 18. To support the proposition that the Streamline Sales Tax project has insufficiently simplified state tax compliance, they cite a paper by their own counsel *in this case*, DB 25, and a study published by a group that "represents American businesses in the fight to keep interstate commerce and competition free from unfair tax burdens imposed by states where our businesses have no operations or representation." *See* DB 24; http://truesimplification.org/about/ (describing "TruST"). And in a marked contrast to the distinguished academics who have researched and published peer-reviewed articles respecting the economic dislocations and harms to State revenue caused by *Quill*, *see* SB 24-35, Defendants spend pages discussing a phenomenon called "webrooming" based on articles published in the advertising trade press. *See* DB 27-28 (citing Adweek and Marketing Land).

In any event, the questionable authorities Defendants do marshal typically hurt their case on inspection, rather than help it. For example, the expert Defendants cite to regarding "webrooming" says, in the very article quoted, "showrooming is a flight risk and *a bigger problem for retailers*." *See Adweek*, http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/ (emphasis added). And while Defendants spend several pages making assumptions in order to calculate the taxes lost to *Quill* at a lower number than the best estimate of the State's political branches, even they ultimately calculate the loss at over $20 million. *See* DB 21. The significance of such amounts to South Dakota's fiscal soundness is plain; Defendants' own best version of the facts proves the State's key point.

Moreover, as to this argument and others, Defendants trade incorrectly on the happenstance that Amazon.com recently agreed to begin collecting sales taxes throughout the Nation. *See, e.g.*, DB 20, 26. The fact that one of the largest players in the industry has abandoned *Quill*'s outdated tax advantage does prove that the sky will hardly fall on Internet retail if *Quill* is finally overturned. But it also cannot possibly support the proposition that sales tax avoidance by Internet retailers is unproblematic. Voluntary compliance can be abandoned; absent the relief sought in this case, jurisdictions like South Dakota could suffer immediate budgetary shortfalls if Amazon suddenly decided to reassert

its rights under *Quill*. In addition, this is simply not how public policy analysis works: No one would conclude that restaurants should not have to pass mandatory health inspections because the largest chain or franchise has decided to voluntarily welcome in health inspectors.

There are other problems in Defendants' "factual" arguments. For example, the State did not have to force Systemax to stay in the case and testify about how quickly it was able to comply with South Dakota's collection obligations in order for the ease of its very-next-day compliance to be patent. *See* DB 23. Occam's razor is sharp enough to do the work. Defendants suggest that perhaps Systemax was working furiously for a month to prepare for compliance, and yet (for some reason) failed to notify the State that it intended to register and comply, as the notice invited. *See* SR 30, 32, 34, 36 ("Because the State may file this declaratory judgment action without undertaking an audit . . . it is important that you notify us immediately if you intend to comply with the Act"). The facts regarding the ease of compliance were entirely within Defendants' control; if they wanted to contest them, they could have done so.

In the end, the balance of the scholarly and legal thought regarding *Quill* is a remarkable testament to its vulnerability. Celebrated economists from both the Reagan and Obama administrations are united in finding, through detailed research, that *Quill* harms state revenue, distorts economic efficiency, and undermines

the proper functioning of retail markets. Meanwhile leading legal scholars in both the state and federal courts bemoan its bad fit with contemporary commerce clause doctrine. This case provides this Court with an opportunity to lead the way for U.S. Supreme Court review by adding its voice to the chorus calling upon the U.S. Supreme Court to reconsider *Quill*'s outdated rule. It should take that opportunity here.

CONCLUSION

The State respectfully asks this Court to affirm the judgment below as expeditiously as possible, so as to facilitate review by the U.S. Supreme Court during its upcoming Term. *See* SB 11 (explaining that a decision by August 2017 is likely necessary for the U.S. Supreme Court to make a final determination by June 2018). Defendants do not contest this expedited timetable but do, inconsistently, ask for oral argument while also asserting there is nothing for the Court to address in this case. *See* DB 35. The State respectfully suggests that the briefing is sufficient for this Court to fully consider this appeal and to craft an opinion identifying this case as an appropriate vehicle for the U.S. Supreme Court to reconsider its holdings in *Bellas Hess* and *Quill*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 4,856 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 22nd day of June 2017.

Kirsten E. Jasper
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of June, 2017, a true and correct copy of Appellee's Reply Brief in the matter of *State of South Dakota v. WAYFAIR INC., OVERSTOCK.COM. INC., and NEWEGG INC.* was served via electronic mail upon:

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