No. 12-1175

In the

United States Court of Appeals

for the

Tenth Circuit

DIRECT MARKETING ASSOCIATION,

Plaintiff-Appellee,

– v. –

BARBARA BROHL, in her capacity as Executive Director,
Colorado Department of Revenue,

Defendant-Appellant,

– and –

MULTISTATE TAX COMMISSION,

Amicus Curiae.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DENVER, CASE NO. 1:10-CV-01546-REB-CBS
(ROBERT E. BLACKBURN, U.S. DISTRICT JUDGE)

MOTION OF RETAIL INDUSTRY LEADERS ASSOCIATION, RETAIL LITIGATION CENTER, INC. AND COLORADO RETAIL COUNCIL FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 29, the Retail Industry Leaders Association, the Retail Litigation Center, Inc., and the Colorado Retail Council hereby move for leave to file the attached brief as *amici curiae* in support of Appellant Barbara Brohl in her capacity as Director of the Colorado Department of Revenue. Counsel for the Department of Revenue has consented to this motion; counsel for the Direct Marketing Association opposes this motion.

As explained in the attached brief, *amici* are three organizations consisting of retailers of every size and description, including some of the largest and most innovative retailers in the Nation, as well as many local Colorado retailers. These members strongly oppose legal doctrines that accord a privileged status to retailers who lack a physical presence in a particular state or locality but nonetheless conduct substantial retail business in that jurisdiction. These doctrines skew the economic playing field in a way that disfavors local retailers with a physical connection to their markets, and prevents those retailers from competing on level ground with out-of-state (mostly, Internet) retailers.

Accordingly, *amici* have a strong interest in the outcome of this litigation. A*mici* collectively represent the private parties most severely damaged by any extension of the rule laid down in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) that state laws cannot compel out-of-state retailers to collect state sales or use taxes. *Amici* and their members have thus been active in seeking legislative solutions to existing disparities in the tax treatment of local and out-of-state retail, and closely monitor (and, where appropriate, participate in) litigation on these issues. Indeed, because *amici*'s members have many physical locations in Colorado, they have a very tangible interest in Colorado's ability to enforce its use taxes effectively and to inform consumers fully that out-of-state retailers cannot legitimately offer tax privileged sales to Colorado residents.

The attached *amicus* brief explains how the privileged status of out-of-state retail harms local retailers both by providing an effective subsidy to their competitors and by promoting the inefficient allocation of resources in the economy. This harm is separate from, and in addition to, the dramatic loss of state tax revenues described in the existing briefs. Any legal doctrine that further prevents Colorado from remedying the situation by effectively enforcing its use tax and informing its citizens about their obligations exacerbates these harms.

As a legal matter, *amici* agree with the Department that Colorado's notice and reporting law neither discriminates against out-of-state retailers (who *continue* to enjoy a privileged status), nor unduly burdens interstate commerce by simply requiring out-of-state retailers to track and report their sales into Colorado. Moreover, *amici* strongly oppose the district court's reasoning, which extends *Bellas Hess* well beyond its limited scope of prohibiting laws that require state sales- and use-tax *collection* by out-of-state, mail-order retailers. *Amici* believe that any extension of *Bellas Hess* beyond its precise context is contrary to *Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992), where the Supreme Court refused to overturn *Bellas Hess* solely on the grounds of *stare decisis* and the value of retaining certain bright-line rules.

Counsel for the Direct Marketing Association has informed us that they believe this motion and attached brief are untimely under FRAP 29 because it was not filed within seven days of the Department's "principal" brief. This is an overly technical (mis)reading of FRAP 29(e). This Court's order of April 13, 2015 directed the parties to file new, *full-length* briefs on any merits issues of their choosing in this appeal, providing the time and space for a full-length response brief and a full-length reply. *See also id.* (referring to this as "full briefing on the Commerce Clause claims, … the doctrine of comity, and any other issues the parties consider pertinent to this appeal"). The attached brief is less than half of the allowed length of the opening supplemental brief of the party it supports, *see* FRAP 29(d), and has been filed within seven days thereof, *see id.* 29(e).

CONCLUSION

Leave to file the attached brief as *amici curiae* should be granted.

Respectfully,

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May 20, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* disclose the following: The Retail Industry Leaders Association, Retail Litigation Center, Inc., and Colorado Retail Council are not publicly held corporations or publicly held entities; none has a parent corporation; and no publicly held company owns 10% or more stock in any of the above.

Respectfully Submitted,

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STATEMENT OF INTEREST[1]

The Retail Industry Leaders Association ("RILA") is a public policy organization consisting of retailers of every size and description. It promotes consumer choice and economic freedom through public policy advocacy. Its members include the largest and fastest growing companies in the industry—including retailers, product manufacturers, and service suppliers—together accounting for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers.

The Retail Litigation Center, Inc. ("RLC") is a separate public policy organization representing national and regional retailers in the United States. The RLC identifies and engages in legal proceedings that have a national impact on the retail industry. Its members include many of the country's largest and most innovative retailers, employing millions of people throughout the United States and accounting for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the industry-wide consequences of significant pending cases.

1 No counsel for any party authored this brief in whole or in part, and no entity or person, other than *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

The Colorado Retail Council (CRC) was founded as a not-for-profit organization in 1966 by concerned retailers that desired a stronger voice in governmental and law-making processes. CRC's mission is to promote an environment that encourages profitable retail growth through strong advocacy on government actions concerning the Colorado retail industry.

As further explained below, *amici*'s members strongly oppose doctrines that accord a privileged status to retailers who lack a physical presence in a particular state or locality but nonetheless conduct substantial retail business in that jurisdiction. The issue is one of basic fairness in our Nation's system of free-market competition. The privileged status of out-of-state retailers frequently allows remote—largely Internet-based—retailers to operate at a tremendous price advantage over local businesses. In particular, Internet-based retailers neither collect sales taxes nor assist states in collecting alternative use taxes, which gives consumers the (incorrect) perception at checkout that their purchases from these sellers are tax-free. This effective subsidy to out-of-state retailers harms local businesses of every description, but falls hardest upon small, family-owned retailers and others operating on razor-thin margins. Such businesses simply cannot compete with an apparent tax discount of several percentage points for shopping online.

As a matter of policy, *amici* do not favor statutes like those at issue here, which could surprise unwary consumers with unexpected tax bills while failing to resolve the unfair disparity between local and out-of-state retailers at the point of sale. But as a matter of constitutional law, *amici* unequivocally support the power of the states to enact reasonable measures that promote evenhanded compliance with valid tax laws. The law before this Court takes merely a small step in that direction, and its validity is of critical importance to the retail community at large.

SUMMARY OF ARGUMENT

The present regime for taxation of local and out-of-state retail in Colorado is manifestly unfair to local retailers. Today, local retailers (including national retailers with in-state stores) collect and remit the State's sales tax at all their physical locations in Colorado. Out-of-state retailers with no physical stores in Colorado—predominantly operating through the Internet—do not, although they sell the exact same products to the exact same people, and those people have a (concededly valid) obligation to pay a use tax of the exact same rate on the transaction. Moreover, major retailers with stores *anywhere* in the State must collect the same taxes that physical retailers do when they make online sales to Colorado residents, even though the transaction is identical to an out-of-state retailer's online sales, and the major retailer's only Colorado store may be several hours away. This is effectively a tax subsidy to certain online retailers who can and do structure their operations to obtain this advantage. The harm to local retailers—including small, family-run businesses operating on small margins—is plain as day.

As this Court noted, this situation has its origin in Supreme Court cases that prohibit Colorado from requiring out-of-state retailers to collect and remit sales or use taxes under the "dormant" Commerce Clause. *See Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904, 907 (10th Cir. 2013). Accordingly, Colorado enacted a partial solution that would allow it to more effectively collect the use taxes its citizens are supposed to pay themselves on their untaxed online sales without imposing any collection burden on out-of-state retailers. That regime requires retailers who do not collect sales or use taxes to notify citizens of their use-tax obligations, and to report the sales to Colorado's Department of Revenue. This effort to protect the Colorado tax base leaves much of the unfairness between online and local retail in place: In particular, consumers still do not pay the sales tax at the point of sale, and remote sellers need only track and report information whereas local retailers must collect and remit the taxes themselves. But the district court nonetheless held that Colorado's law discriminated *against* out-of-state retailers and imposed undue burdens on interstate commerce, and so invalidated Colorado's regime under the dormant Commerce Clause.

In fact, Colorado's effort to protect its tax base through a minimal notice and reporting requirement is manifestly constitutional. The one precedent that supports the district court's contrary holding is *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967)—a case that has survived subsequent repudiation in the Supreme Court exclusively on the grounds of *stare decisis* and the value of bright-line rules. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992). Given the present realities of the retail industry, *Bellas Hess* makes even less sense today than it did when it received such shaky support almost twenty-five years ago. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J. concurring) (noting that, as one who supported *Bellas Hess* on *stare decisis* grounds in *Quill*, both cases should now be overruled in light of legal and practical changes). But even if that were not true, *Quill*'s decision to adhere to *Bellas Hess* on these limited grounds does not constitute an endorsement of any broader principle, and this Court should avoid exacerbating the harm that *Bellas Hess* creates by extending it to new and different state-law regimes.

That is because "*[s]tare decisis* is a doctrine of preservation, not transformation," and while it "counsels deference to past mistakes, [it] provides no justification for making new ones." *Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring). Accordingly, while this Court is bound to the holding of *Quill*, which refused to overrule the "bright-line exemption from state *taxation* created in *Bellas Hess*," *Quill*, 504 U.S. at 316 (emphasis added), it has no obligation to extend that holding to Colorado's very different set of rules for merely reporting out-of-state sales. As the Supreme Court has recently clarified, Colorado's law does not involve any taxation of out-of-state retailers at all. *Direct Mktg. Ass'n*, 135 S. Ct. at 1133 (holding that injunction against Colorado statute would not "restrain" the "collection" of taxes). Because that puts Colorado's regime outside the rule of *Bellas Hess*, and that regime otherwise places burdens on interstate commerce that are far *less* onerous than on in-state retail, this Court should reverse.

ARGUMENT

I. The Present Tax Regime, Which Exists In Colorado And Other States Because of *Bellas Hess*, Is Plainly Unfair To Local Retailers.

The essence of the present sales- and use-tax regime in Colorado is that any "[r]etailers with a physical presence in the state are required by law to collect sales tax from purchasers and remit it to the Department" of Revenue, while retailers without a physical presence are not. *See Brohl*, 735 F.3d at 906-07 (footnote omitted). Instead, Colorado citizens are required by law to pay use taxes at an equal rate on purchases that they make that are not taxed at the point of sale. *Id.* This distinction exists because "*Quill* prohibits Colorado from forcing retailers with no in-state physical presence to collect and remit taxes on sales to Colorado consumers." *Id.* at 907. Voluntary compliance with the consumer-based use-tax regime is wanting, however: "Most Colorado residents do not report or remit use tax despite the legal obligation to do so," and, for 2012, the uncollected taxes were estimated to exceed $172 million in Colorado alone. *Id.*

The law at issue here responds by imposing a limited notice and reporting obligation on businesses that do not collect Colorado sales taxes but nonetheless have gross sales of over $100,000 in the State. These "non-collecting" retailers must provide notice to consumers of their tax obligations along with an annual summary of their purchases (only if they exceed $500), and must send a record of the purchases to the Department of Revenue. The model is akin to a Form W-2 or 1099 reporting regime for sales and use taxes (rather than income), and the hope is that when consumers have the summary level information—and know that Colorado does, too—they will be more likely to comply voluntarily with their obligation to pay the use tax. *See id.* at 907-08. From the State's perspective, the main goal is to protect the public fisc by preventing (further) erosion of the sales tax base.

The State's concerns are very real. On a national level, the compliance rate for sales tax collection by in-state retailers approaches 100%, while the compliance rate for citizens paying the use tax currently approaches zero. *Compare* WASH. DEP'T OF REVENUE, DEPARTMENT OF REVENUE COMPLIANCE STUDY (2010), http://dor.wa.gov/Docs/Reports/Compliance_Study/compliance_study_2010.pdf (indicating that registered retailers properly collected and remitted 99% of all sales taxes due in 2006), *with* GAO, SALES TAXES: ELECTRONIC COMMERCE GROWTH PRESENTS CHALLENGES; REVENUE LOSSES ARE UNCERTAIN (2000), http://www.gao.gov/new.items/g600165.pdf (noting widespread consensus that use taxes typically go unpaid). The problem is structural: Sales taxes are collected at the point of sale by retailers, who have practices in place to track, report, and remit the taxes as a part of their regular daily business; use taxes are levied directly on consumers, who do not have any such practices and likely do not even realize they have a use-tax obligation. Thus, absent some kind of method for tracking and reporting the untaxed sales, non-compliance with the use tax by individual citizens is almost certain to be the norm.

Because use-tax non-compliance is so quotidian, local retailers effectively operate at a massive disadvantage to their out-of-state competitors—most of whom are currently online retailers rather than the mail-order catalogs the Supreme Court considered in *Quill* and *Bellas Hess*. As the state and local *amici* explain, after the recent explosion in out-of-state, online retail, the best current estimate is that the uncollected use taxes nationwide exceed $23 billion per year. This is essentially a $23 billion subsidy from state governments to online retailers, allowing them to charge their consumers less money at the point of sale than a local retailer for the exact same goods.

That tax advantage unfairly skews the playing field of economic competition, dooming local retailers who should be allowed to compete in a fair fight. And, indeed, while the effect is easy to recognize as a matter of common sense, it is also well-documented as a matter of economic research.

To begin, purchasers are highly sensitive to price differences between online sellers and brick-and-mortar retailers. The so-called "price elasticity" between these suppliers is about 1.55, meaning that "an increase in retail prices of 1 percent raises the overall likelihood of buying remotely by 1.55 percent." *See* Austan Goolsbee, *Competition in the Computer Industry: Online vs. Retail*, 46 J. INDUS. ECON. 487, 488, 495 (2001). This very high substitution rate indicates that online shoppers are very attuned to price, and—as common sense indicates—are more sensitive to price competition than other factors when they finally push the button to complete their transaction.

Even worse, economic research shows that sales taxes have an outsized effect on consumers when they make a purchasing decision. Because the sales taxes are a headline item on the final bill, consumers will try very hard to avoid them, and are ultimately more sensitive to changes in the tax than they are to changes in the underlying purchase price itself. According to one study, "customers are approximately twice as sensitive to changes in … sales tax as they are to changes in item price." Michael D. Smith & Erik Brynjolfsson, *Consumer*

Decision-Making at an Internet Shopbot: Brand Still Matters, 49 J. INDUS. ECON. 541, 549-50 (2000) ("[O]ur result seems to suggest that customers are much more sensitive to $0.01 of sales tax than they are to $0.01 of item price even though both values have the same effect on the total price."). Accordingly, "purchases by interested buyers fall by roughly two percent for every one percentage point increase in the sales tax charged by the seller," and purchasers appear to substitute most heavily towards other untaxed items. Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 AM. ECON. REV. 1, 24 (2014) ("[A] one percentage point increase in a state's sales tax leads to an increase of just under 2 percent in online purchasing from other states, and a 3-4 percent decrease in online purchasing from home-state sellers.").

Economists have verified these effects through a set of convenient natural experiments. For example, there has been a consistent finding that online sales are highest in states with the highest sales taxes. This finding begins with a foundational study by noted economist Austan Goolsbee. *See* Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. ECON. 561 (2000). Remarkably, the magnitude of the effect is so large that it "suggests that applying existing sales taxes to the Internet might reduce the number of online buyers by as much as 24 percent or more." *Id.* at 573.

Consistent with Goolsbee's findings, a more recent study concluded that "sales taxes typically have a positive and statistically significant impact on the probability of buying online." James Alm & Mikhail I. Melnik, *Sales Taxes and the Decision to Purchase Online*, 33 PUB. FIN. REV. 184, 209 (2005). So too did another recent study of tax sensitivity and online retail, which succinctly states the bottom-line point: "Our most basic conclusion on sales taxes is that they are an important driver of e-retail activity. Our state-level regressions clearly show that sales are higher in states that levy higher sales taxes on traditional retail purchases. … [There] is strong evidence that what we are picking up is a tax effect and not some artifact of unobserved heterogeneity." Glenn Ellison & Sara Fisher Ellison, *Tax Sensitivity and Home State Preferences in Internet Purchasing*, AM. ECON. J.: ECON. POL'Y, Aug. 2009, at 53, 70. Simply put, one of the principal drivers of the growth in online retail is tax avoidance.

The most vivid natural experiment comes from a recent paper analyzing how consumers have responded to Amazon's decision to begin collecting sales taxes in some jurisdictions. An Ohio State University study shows that in states where Amazon started collecting sales taxes, Amazon sales dropped 11% overall, 25% for purchases greater than $250, and fully *32.5% for big-ticket purchases* (where customers are, predictably, most willing to search for savings). Brian Baugh et al., *The "Amazon Tax": Empirical Evidence from Amazon and Main Street Retailers*

2-3 (Fisher Coll. of Bus. Working Paper No. 2014-03-05, Mar. 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422403 ("We find strong evidence that the effect of the Amazon Tax increases with the size of the purchase, suggesting that households are particularly likely to utilize Internet shopping to avoid sales tax for large purchases."). The results suggested that a significant portion of Amazon's lost sales shifted back to brick-and-mortar retailers. *Id*. at 3.[2] Notably, an earlier version of this same study attracted substantial attention in the business press because the tax subsidy for Amazon and other online retailers seems to be an important driver of their business models and expected returns. *See, e.g.*, Adam Satariano, *Amazon Sales Take a Hit in States with Online Tax*, BLOOMBERG (Apr. 21, 2014), http://tinyurl.com/lyhcwde (noting that "Amazon has enjoyed an edge against brick-and-mortar retailers because consumers didn't have to pay a sales tax for purchases from the e-commerce site, yet that has eroded as states including California and Texas have unveiled the levies").

One of the most discouraging facts in the study is that Amazon's agreements with various states to charge sales taxes on Internet orders it fulfills itself have diverted substantial sales to the so-called "Amazon Marketplace," where other remote retailers offer goods through the Amazon system. "These outfits pay

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[2] The exact amount of substitution back to local retailers as compared with other online competitors depended on various economic models, and the models lacked sufficient power to demonstrate statistical significance. *Id.*

Amazon a fee to offer products through the Amazon website, yet don't collect taxes," and they saw the "biggest sales uptick—61 percent for big-ticket items," in response to Amazon's decision to collect the taxes on its own orders. *Id*. Put otherwise, Amazon's willingness to work with states to collect sales taxes has mostly diverted consumers into other forms of remote retail tax avoidance, much of which appears to be happening directly on Amazon's own website. Like water finding the lowest point, online sales seem to readily flow to whatever tax-free sources are available. Accordingly, every legal barrier that prevents Colorado from effectively enforcing its complementary use tax almost certainly harms local retailers who should be able to compete for that flow of sales on level ground.

Not only is this system plainly unfair to local retailers, it is also a rather senseless way to organize a national economy. Under this regime, a retailer with a physical presence only in Albuquerque, New Mexico, can advertise televisions with tax-free prices to Colorado residents in Denver on an Internet marketplace, and a retailer with a physical presence only in Denver can do the same with respect to the exact same televisions for Albuquerque residents, all over the exact same website. This can result in two identical televisions in Denver and Albuquerque being packed and shipped a total of 900 miles so that two citizens who live only a few miles from the respective stores can avoid hundreds of dollars in sales taxes. This is despite the fact that: (1) a use tax *still* is owed and should be paid on these purchases; and (2) it would be a trivial matter for that same website to both identify the relevant taxes and/or rearrange the fulfillment to avoid the enormous waste involved. At a practical level, however, it is plain that individual consumers will opt for the money-saving option, whatever waste and costs might be borne by others elsewhere in the system.

This results in two serious harms for local retail. At the most obvious level, there is the lost business. Total losses attributable to tax avoidance are difficult to calculate, but a reasonable estimate would be around $30 billion in 2014 alone. For example, the U.S. Census Bureau estimated the e-commerce segment at about $300 billion in revenue for 2014, *see* U.S. Census Bureau, Quarterly Retail E-Commerce Sales: 1st Quarter 2015 (May 15, 2015), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf, and the Ohio State study discussed above indicated about 11% substitution away from Amazon as a result of its beginning to collect and remit sales taxes. That equates to an estimated loss to local retailers of about $33 billion from tax avoidance.

Losing roughly $30 billion *a year* solely because of a slanted playing field is hard enough for the industry to swallow, but the harms are often felt more painfully at the individual level based on a variety of particularized factors. For example, the literature shows (and common sense confirms) that purveyors of bigger-ticket items will face far more diversion to online sellers because consumers who purchase an expensive piece of home electronics or a major appliance online can save hundreds of dollars at once. Stores that specialize in these items (like a Best Buy or Home Depot) will experience an outsized share of the already outsized losses driven by their tax disadvantage to online retailers.

Separately, the margins in retail are frequently too small to absorb anything approaching the tax subsidy to online retailers, especially for smaller local stores and independent, family-run businesses. Census data indicates that gross retail margins—the difference between the wholesale product cost and final price—average about 28% for the industry as a whole. *See* Annual Retail Trade Survey, *Estimated Annual Gross Margin as a Percentage of Sales of U.S. Retail Firms by Kind of Business: 1993 Through 2013*, U.S. CENSUS BUREAU, http://www2.census.gov/retail/releases/current/arts/gmper.xls. That figure excludes overhead, lost and unsold inventory, payroll for employees, applicable taxes, interchange fees to credit card companies, and all the other costs of doing business. Meanwhile, average state and local sales taxes amount to about 7%, and are higher in many locations—including some where the rents are higher, too.[3]

A factor representing *at least a quarter* of gross margin is an enormous consideration for businesses. If local retailers tried to discount their goods to

[3] For example, state and local sales tax in New York City is 8.875%. In the portion of Denver surrounding the Tenth Circuit, it is 7.65%; in Cheyenne, Wyoming—less than an hour and a half away by car—it is only 6%.

achieve parity with online retailers' tax advantage, most would operate at a large loss—*net* margins in retail average about 3%. *See* Aswatch Damodaran, *Margins by Sector (US)*, NYU STERN, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html (last updated Jan. 2015). This is particularly so for small businesses that lack the scale effects that allow big-box stores to drive down costs (although most of those savings are already passed on to consumers in this highly competitive segment). Because there is no available net margin with which to compete against the massively tax-subsidized online competitor, the inevitable result is lost revenue, and/or the complete failure of the local seller.

The unfairness of the tax subsidy not only drives significant lost business, it also results in a very harmful phenomenon called "showrooming." Showrooming occurs when consumers are shopping for items—frequently more expensive purchases—for which they have a lot of price sensitivity but also a strong desire to see the product in person to judge its look, feel, and use. This could be a costly television or home appliance, a riding mower, an expensive tuxedo or dress, or a pair of high-end shoes. Many consumers will not order these kinds of products without trying them first, and frequently, they will need a salesperson to help them understand what they are looking for and to explain the features available with different products or to try on different fits and sizes. The overhead necessary to maintain a physical retail location that has all of the preferred options in stock, and the labor costs associated with a qualified set of customer service personnel, are both very high. But once consumers identify what they want, they can now frequently purchase the *exact* same item from an online retailer from their smartphone while they are standing in the local retailer's facility. In essence, the physical retailer operates as a no-cost showroom for the online seller, which can easily beat out the physical retailer on price because of its commensurately lower cost.

This is already gratuitously unfair, given that the online retailer need not pay for the same amount of overhead and labor. Adding in a 7% tax advantage makes this situation impossible to maintain.

To see how easy showrooming is in the Internet age, consider the following example. Right now, LG Electronics has begun offering a new television using organic LEDs (or "OLEDs"), which deliver a more vibrant range of colors than current LED options. You really have to see it to believe it. A consumer strolls into a local retailer in Denver on a Saturday and looks at all the televisions, and after a forty-five minute conversation about everything he is looking for with the ten-year veteran salesperson, he decides that the new LG 55-inch OLED TV is perfect for him. The retailer offers it for $2,499, plus sales tax (7.65% in Denver, which would amount to almost $200 more). The product number is right there so the consumer opens Google on his smartphone and types in 55EC9300. (One can try this at home, or—with a smartphone—anywhere else.) The very first result is a pull-down box from Google displaying various online retailers from which this TV can be ordered and their prices. Pulling down the list reveals that $2,499 is the prevailing price, but several discount online purveyors with little overhead are offering it for less. And even worse, right there on the very first screen, these options are prominently advertised as “Free shipping, no tax.” So even if this local retailer will match the price from the online seller who doesn’t pay to keep the lights on, doesn’t employ local, knowledgeable salespeople, and doesn’t do any work to advertise or promote the industry, she still won’t be able to compete with a tax break measured in the hundreds of dollars, and will lose the sale to an online competitor.

Economists call this “free riding,” and that’s exactly what it is. Online, tax-free purveyors of electronic goods that are susceptible to a large measure of “showrooming” externalize most of the costs of promoting and making a sale (meaning that they pass those costs off on others), while reaping all of the benefits.

The effect is widespread: Over 40% of Americans admit that they engage in showrooming behavior. *See, e.g.*, Katie Evans, *43% of U.S. Adults Participate in Showrooming*, INTERNET RETAILER (Dec. 10, 2012), http://tinyurl.com/l329tew. And when customers do go online to buy something they first sampled at a physical retailer, they end up buying from the retailer they visited in person *less* *than one in fifty times*—presumably because that retailer's physical presence ensures that they do not have the tax advantage. *See, e.g.*, Sebastian van Baal & Christian Dach, *Free Riding and Customer Retention Across Retailers' Channels*, J. INTERACTIVE MARKETING, Spring 2005, at 75, 82 ("A result that could be of strategic importance and even prove to be a substantial hazard for many brick-and-mortar retailers is that only 1.8% of customers completed their purchases in the online channels of the retailers whose stores they visited to gather information; these consumers contributed to the stores' costs by ordering online …. [F]or every fourth purchase on the Internet, a retailer provided unpaid-for information in its brick-and-mortar store."). Simply put, local retailers can ill-afford to provide *both* a showrooming subsidy *and* a tax subsidy to their online competition.

Notably, showrooming causes harms that fall beyond the local retailers. As with many behaviors rooted in distorted tax incentives, free riding on local retail harms a variety of players and the efficiency of the overall market. As physical retailers do not reap the benefits of retaining expert sales staff, they predictably divert business investment elsewhere and underinvest in customer service. That harms not only consumers, but manufacturers, distributors, and the industry as a whole, all of which rely on brick-and-mortar retail as an important aspect of the marketing process for many goods. The Supreme Court identified this exact problem in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877

(2007), in the course of holding that activities aimed at preventing showrooming can be pro-competitive. *See id.* at 890 (noting that "the retail services that enhance interbrand competition might be underprovided" when "discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate"). And economic literature focused on Internet retail bears out the concern: "In a market with a strong Internet presence and a high degree of free riding, the merchant's incentive to provide services can essentially collapse. The provision of services is vital to channel profits, and dependence on [brick-and-mortar] retailers to perform this traditional role, in the presence of E-commerce and free riding, may be disastrous for channel profits." Steven Strauss, *The Impact of Free Riding on Price and Service Competition in the Presence of E-Commerce Retailers* 50 (Yale Sch. of Mgmt. Working Paper Series PHD, No. 2, Jan. 14, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm ?abstract_id=296851; *see also* Dennis W. Carlton & Judith A. Chevalier, *Free Riding and Sales Strategies for the Internet*, 49 J. INDUS. ECON. 441, 442-43 (2001) (explaining that showrooming effects harm both traditional retailers and manufacturers because such free riding "erodes the incentive of any retail store to promote the product," resulting in lower total sales); S. Umit Kucuk & Robert C. Maddux, *The Role of the Internet on Free-Riding: An Exploratory Study of the Wallpaper Industry*, 17 J. RETAILING & CONSUMER SERVICES 313, 318 (2010) (concluding that online free riding likely contributed to the drastic decline in the wallcovering industry between 1990 and 2006).

Subsidizing out-of-state retail leads not only to underinvestment in customer service, but related losses in positive externalities like local jobs. Simply put, giving an advantage to out-of-state retail leads to less local hiring, harming the local job market and depressing the local economy as a whole. Separate studies concluded that taxing online retail would provide an increase of 13,000 jobs in Texas and over 8,500 jobs in Arizona by diverting revenue toward those companies that actually invest in customer service and employ local citizens. *See* AngelouEconomics, *Economic Impact Analysis: The Economic Benefits Achieved in Texas as a Result of Collecting Sales Taxes from Online-Only Retailers* (Mar. 2011), *available at* http://tinyurl.com/mneeb9h; Elliott D. Pollack & Co., *Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona* (Jan. 2012), *available at* http://tinyurl.com/n65euma. Thus, the current regime effectively subsidizes the destruction of local jobs.

At the end of the day, directing a further tax advantage at Internet retail—when it already benefits from the market failure of showrooming—is both unfair and bad public policy. It is unfair because there is just no way for local retailers, including the smallest independent stores, to compete with a tax-subsidized alternative that already attains price discounts from free riding on the local store's overhead and sales costs. And it is bad policy because that subsidy further skews the retail industry away from providing important customer service, causing all the inefficiencies that are typically associated with a government privilege directed at one particular way of doing business. It would make more sense to try to level the playing field by fully taxing out-of-state retailers, who do not support their local communities or the industry at large. But at an absolute minimum, a regime that affirmatively subsidizes retailers for avoiding a physical presence in as many locations as possible takes a bad problem and makes it far worse.

II. This Court Has No Obligation To Extend The "Bright-Line" Rule From *Quill* And *Bellas Hess* To New Settings.

As explained above, the present regime in Colorado and other states results from the distorting effect of the Supreme Court's 1967 decision in *Bellas Hess*, where the Court held that states cannot require out-of-state retailers to collect and remit state use taxes. That holding was reconsidered by the Supreme Court in 1992 in *Quill*, and received only a limited vote of confidence. In particular, the Supreme Court did not identify the practice as either (1) a form of discrimination against out-of-state retail, or (2) imposing any particular "undue burden" on interstate commerce—as the district court did here. Instead, the Supreme Court merely concluded that its dormant Commerce Clause holding from 1967 was not completely inconsistent with the evolution of the law over the intervening twenty-five years, and that there was *stare decisis* value in retaining the "bright-line" rule that *Bellas Hess* set out. *See Quill*, 504 U.S. at 311, 317-18. That "bright-line rule," in turn, is limited to state laws that require out-of-state retailers to actually collect and remit state taxes.

As the State's brief clearly explains, neither of the district court's conclusions makes sense as a matter of legal logic or first impression when it comes to Colorado's limited reporting regime. In particular, the foregoing demonstrates that the Colorado regime as a whole could not possibly be considered discrimination *against* interstate commerce—on balance, interstate commerce is clearly favored over local retail, and any out-of-state retailer who thinks local retailers have it better is free to collect sales tax and avoid the separate notice and reporting requirements. Colorado's effort to protect its own tax revenues at best only begins to redress the discrimination in favor of interstate retailers. While this solution imposes facially different regimes on local and out-of-state retail, there is nothing in that difference that makes it discriminatory. *See Ala. Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1143 (2015) (noting that, if imposing different regimes on two forms of commerce were sufficient to find the regime discriminatory, "both competitors could claim to be disfavored—discriminated against—relative to each other," and rejecting this result).

Nor is the burden on interstate commerce remotely "undue." The present touchstone of this inquiry is the baseline proposition 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); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981) ("[I]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business." (internal quotation marks and citation omitted)). Colorado's law only operates on those who provide over $100,000 worth of goods to Colorado citizens, and the burden it imposes is entirely commensurate with the value that out-of-state retailers realize from making sales in the Colorado market. As *Quill* itself suggests, the rule in *Bellas Hess* stemmed from a far more formalistic analysis that was far less attuned to achieving a fair outcome as between local and interstate commerce. *See* 504 U.S. at 310 & n.5.

Nor is compliance with the Colorado regime (or even full-blown sales taxation) particularly burdensome in the present technological environment. Remote retailers already need to verify that they are shipping to a jurisdiction in which they have no physical presence, and must comply with increasingly different rules in different states about what it means to have such a presence. Moreover, a simple Google search provides a number of third-party companies that already have free tools for calculating applicable sales taxes based on zip code with the push of a button, and such companies also offer affordable software that will automate the process entirely. *See, e.g.*, *Sales Tax Calculator*, TAX RATES, www.taxrates.com/calculator (last visited May 17, 2015). Compared to the externalities that exist in favor of online retail, the "burdens" associated with basic sales- and use-tax compliance are relatively minimal, and even less so in this case because Colorado doesn't require actually calculating, collecting, or remitting any taxes at all.

Accordingly, the only way to find a dormant Commerce Clause violation in Colorado's minimal effort to promote use-tax compliance by its citizens is to avoid existing doctrinal questions and analogize directly to *Bellas Hess* and *Quill* instead. That was the district court's approach; as this Court explained in its previous opinion, the district court justified its undue-burden finding by reasoning that Colorado's reporting regime imposes obligations that are "inextricably related in kind and purpose to the burdens condemned in *Quill*." *See Brohl*, 735 F.3d at 909 (internal quotation marks and citation omitted). But the critical error in this analysis is to read *Quill* as "condemn[ing]" the burdens at issue there, and thereby extend its holding well beyond its facts—to other burdens that are "related in kind and purpose" to those at issue in *Quill* itself. Doing so is inappropriate because *Quill* was self-evidently rooted in *stare decisis* and the value of a *pre-existing* bright-line rule, and not in the belief that the regime at issue there was unconstitutional as a matter of basic Commerce Clause principles or doctrine.

The language of *Quill* is quite extraordinary in this regard. For one, the Supreme Court acknowledged that, while it would not ultimately agree with the North Dakota Supreme Court's conclusion that *Bellas Hess* should be overruled, it "agree[d] with much of the state court's reasoning." *See Quill*, 504 U.S. at 302. In particular, it affirmed the state court's view that, under subsequent precedent, the Due Process Clause plainly permitted state legislatures to regulate retailers who shipped into the state, *see id.* at 306-08. And it went far out of its way to cast doubt on *Bellas Hess*'s Commerce Clause holding as well, even saying that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." *Id.* at 311. The very most the Supreme Court would say about undue burdens was a footnote suggesting that North Dakota's (far more onerous) law "illustrate[d]" how a state tax "*might* unduly burden interstate commerce." *Id.* at 313 n.6 (emphasis added). That is not remotely an endorsement of the proposition that all regimes imposing burdens "related in kind and purpose" to those at issue in *Quill* or *Bellas Hess* should be "condemned."

The actual grounding of *Quill* is nothing more than the Supreme Court's decision to adhere—on the grounds of *stare decisis* and the value of bright-line rules—to the rule laid down in *Bellas Hess*. *See Quill*, 504 U.S. at 317-18. But among the benefits of bright-line rules is that they are bright on both sides of the line. *Bellas Hess* and *Quill* prevent states from requiring out-of-state retailers to actually collect or pay *taxes*. But this case does not involve taxation on out-of-state retail; indeed, the Supreme Court's holding confirms that enjoining the law at issue would not "restrain" the "collection" of taxes at all. *See Direct Mktg. Ass'n*, 135 S. Ct. at 1133. *Quill*'s preference for bright-line rules thus recommends *against* extending its holding to the very different context of non-tax regimes that ask out-of-state retailers to simply track and report their transactions with State citizens.

In other words, once the district court was asking whether the law in this case was *like* the kind of law presented in *Bellas Hess* and *Quill*, it could no longer claim that its decision was justified by either *stare decisis* or a bright-line rule, and so could claim no support from *Quill* itself. Instead, it was evaluating a new case, and making a new rule, by reference to the principles involved. "*Stare decisis*," however, "is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones." *Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring). And, if anything, *Quill* casts doubt on whether the relevant principles would require the result that obtained *in Quill itself* if the issue were being freshly considered. For this reason, the Court should feel no obligation to extend the rule in *Quill* to a case that is not covered by its "bright-line rule," and should in fact be very hesitant to extend a rule for which the Supreme Court has expressed little to no support on the merits for fifty years.

Notably, this argument is based solely on the reasoning of the *Quill* opinion itself, and becomes even stronger if one considers how vastly different the world has become since *Quill* was decided in 1992 (let alone *Bellas Hess* in 1967). As Justice Kennedy recently and persuasively observed, the rule from *Bellas Hess* is on even shakier footing today in light of the evolution of online commerce. *See Direct Mktg. Ass'n*, 135 S. Ct. at 1135 (Kennedy, J., concurring). In his words:

> The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront. Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.

Id. (citation omitted).

While Justice Kennedy—who voted for *Quill* on *stare decisis* grounds—would now vote to overturn it, that is not at all necessary here. Indeed, this Court need only apply *Quill* to reverse the district court and uphold Colorado's law. The bright-line rule in *Quill* forbids the *taxation* of out-of-state retailers, but *Quill* itself affirms that the Due Process Clause allows the states to *regulate* out-of-state businesses that transact substantial business with the state's citizenry, and that laws that do not discriminate or impose undue burdens on interstate commerce are constitutional. The Colorado reporting regime fits easily within these rules.

Ultimately, as Colorado has demonstrated, applying the basic principles of dormant Commerce Clause jurisprudence to this case is simple: Even with the new notice and reporting regime in place, the only disadvantaged entities remain the *local* retailers, who face a tax collection obligation that their out-of-state counterparts do not. For that reason, it is impossible to conclude that interstate commerce has been the object of "discrimination" or placed under an "undue burden." *Quill*'s bright-line rule against imposing a tax-collection duty on out-of-state retailers leads to the same result because this is not a tax-collection obligation and so falls on the permissible side of the line. Accordingly, the district court's decision to expand *Quill* to this context does not preserve an old mistake; it simply makes a new one. This Court should reverse.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 6,990 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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I hereby certify that on May 20, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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