No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

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

Respondents.

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

BRIEF OF NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Retail Federation (NRF) is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes all types of retailers, including brick-and-mortar-only sellers, Internet-only sellers, and those that do both. NRF represents retailers of all sizes within these different channels of sale.

Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. U.S. members of NRF include discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, and chain restaurants. As the association representing the interests of such varied businesses in this vital industry, NRF advocates for fairness and opportunity for *all* sectors of retail.

Sales and use tax fairness has been a priority policy issue for NRF for over fifteen years because it is vitally important to all of its members. The current tax system favors online retailers over brick-and-mortar businesses, and undermines fair and open competition in the marketplace. This

[1] Petitioner and Respondents have consented to the filing of this brief in blanket consents that have been lodged with the Clerk, and counsel of record for all parties received timely notice of the National Retail Federation's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

particularly impacts small businesses, which represent the overwhelming majority (over 98%) of retailers. It also has negative consequences for communities that depend on tax revenue to fund government operations and services.

NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government. As the industry umbrella group, NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues that are important to the retail industry.

Discriminatory sales and use tax treatment between channels of sale is harming the entire retail sector. NRF believes it is time for this Court to allow the states to address and reform their current tax systems to prevent further erosion of robust and fair competition among America's retailers.

SUMMARY OF ARGUMENT

The Court should grant South Dakota's petition for a writ of certiorari because today's interstate commerce and the technological resources available to businesses look nothing like they did in 1992 when *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), was decided. *Quill* is preventing free and fair competition among retailers, which is harming all businesses in the industry. Rather than protecting out-of-state retailers from overly burdensome state sales and use tax collection requirements, *Quill's* physical presence test operates as an unfair advantage for online businesses vis-à-vis brick-and-mortar stores. Because of e-commerce's dramatic expansion, this discrepancy in tax treatment has become an issue of vital importance for all retailers.

Although sales and use taxes are applied to the item sold and are paid by the consumer, not the retailer, the existing tax system directly impacts businesses (by, for instance, driving consumers from one channel of sale to another because of price advantages based on remote sellers not having to collect sales and use taxes from many customers).

Even remote retailers that may benefit from *Quill* (i.e., through a competitive pricing advantage by not collecting sales tax for many of their sales) are facing significant uncertainty and risk under the current legal framework. Several states have changed their nexus standards from physical presence to economic presence in order to require more out-of-state retailers to collect sales and use taxes, and state courts are adopting varying—sometimes expansive—interpretations of *Quill's* physical presence requirement. If a business does not collect sales and use taxes on its sales and the state later determines that the business was wrong in its interpretation of the state's taxation requirements, the *retailer*—usually having no ability to collect the tax from customers after the fact—may owe substantial back taxes and face serious penalties.

It is time to reconsider *Quill's* physical presence requirement, which no longer makes sense in our increasingly Internet-based economy. Online retailers of all sizes already are performing dynamic calculations based on consumers' locations at online points of sale, including calculating delivery availability and fees, and voluntarily collecting state and local taxes. There are numerous accessible and affordable resources available to businesses, large and small, to perform these functions. The burdens associated with state sales tax collection in the mail-order catalogue context simply are not present in today's Internet sales environment.

The same technology developments that have blurred physical boundaries in commerce and elevated the importance of sales and use tax fairness for all businesses have provided the tools necessary for retailers of all sizes, regardless of actual physical location, to play by the same taxation rules with minimal burden. The rationales for the physical presence requirement simply are no longer supported by the realities of e-retail.

For the foregoing reasons, the Court should grant South Dakota's petition and reconsider *Quill*.

ARGUMENT

I. SALES TAX FAIRNESS IS AN ISSUE OF VITAL IMPORTANCE

There are compelling reasons for the Court to grant South Dakota's petition for a writ of certiorari. State courts—here, the Supreme Court of South Dakota—are deciding an important question of federal law amidst doubts regarding the continued relevance of *Quill* and its progeny. While technological developments have changed interstate commerce since *Quill* was decided in 1992 and generated uncertainty in this area of law, the U.S. courts of appeals and state courts of last resort are bound to follow *Quill*, making it all but impossible for there to be a split among lower courts.

But there is no question that this case fits well within the confines of Supreme Court Rule 10(c). Here, the South Dakota Supreme Court has decided that South Dakota's tax law must be struck down based on *Quill*. As explained below, the ability of South Dakota and other states to require that remote sellers collect sales and use taxes on sales into their jurisdictions is of vital importance not only to the states themselves, but also to companies in all channels of the retail industry. Given the changing interstate commerce landscape and states' efforts to modernize their tax laws to keep pace with those changes, the parameters of *Quill's* physical presence requirement are uncertain. Only this Court can settle these questions and provide certainty to the states and the retail industry.

A. Interstate Commerce has Dramatically Changed since 1992

Thanks to the Internet, the volume and nature of interstate commerce today look nothing like they did when the Court decided *Quill*. Indeed, the first known online retail sales trace back only as far as 1994.[2] In 1992, there were approximately ten websites on the Internet; today, there are more than one billion.[3] And global Internet traffic has exploded from 100 gigabytes (GB)[4] per day in 1992 to, now, over 20,000 GB per *second*.[5]

With this tremendous growth in Internet usage, e-commerce has come to play a major role in interstate commerce. In 1992, online giant Amazon did not exist. Now the country's e-commerce leader, Amazon did over $90 billion in online sales in 2016,[6]

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[2] *See, e.g.*, Kayla Webley, *A Brief History of Online Shopping*, Time (July 16, 2010), content.time.com/time/business/article/0,8599,2004089,00.html (citing an online pizza order in 1994 as one of the first known Internet purchases).

[3] *Total number of Websites*, Internet Live Stats, http://www.internetlivestats.com/total-number-of-websites/ (last visited Oct. 30, 2017).

[4] One byte is one typed character. A gigabyte is about a billion bytes.

[5] Microsoft (@Microsoft), *Global internet traffic*, Twitter (May 10, 2017 8:07 AM), https://twitter.com/microsoft/status/862323182916616194?lang=en.

[6] Jonathan Camhi, *Walmart's online sales soar*, Business Insider (May 19, 2017), http://www.businessinsider.com/walmarts-online-sales-soar-2017-5.

up from $79.2 billion in 2015.[7] Wal-Mart—perhaps better known for its brick and mortar presence—did an estimated $13.7 billion in online sales in 2015[8] and between $15 billion and $16 billion in 2016.[9]

As a piece of the overall retail sales economy, the e-commerce channel is booming. According to one estimate, 14.6 percent of all non-food retail sales in the U.S. were made online in 2016.[10] Estimates of online sales are even higher for some retail categories (27.5 percent for consumer electronics and 15.5 percent for apparel and footwear).[11]

The way in which people and goods move in commerce has changed dramatically. Consumers and goods are mobile and physical presence simply matters less in retail transactions. Consumers can and do access virtually anything they want (e.g., diapers, groceries, furniture, bedding, personal care products, etc.) from a computer or smart phone—even while they themselves are on the move—and businesses have adapted their sales and delivery

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[7] *2017 Top 50 E-Retailers Chart*, National Retail Federation, https://nrf.com/2017-top-50-e-retailers-chart (last visited Oct. 30, 2017).

[8] *Id.*

[9] Matt Lindner, *Wal-Mart's Online Sales Grow 29% in Q4*, Digital Commerce 360 (Feb. 21, 2017), www.digitalcommerce360.com/2017/02/21/wal-marts-online-sales-grow-29-q4/.

[10] Deborah Weinswig, *Fung Global Retail & Technology, Analyst Opinion: Why E-Commerce Is Not "Just 10%" of Retail Sales*, Fun Global Retail & Tech, 2 (July 22, 2017), https://www.fungglobalretailtech.com/research/analyst-opinion-e-commerce-not-just-10-retail-sales/.

[11] *Id.* at 3.

models to provide consumers nationwide what they want, when and how they want it.

For example, a consumer who lives in South Dakota can order goods to be delivered to her home from a retailer based in Seattle while riding a train between Washington, DC and New York with different aspects of the transaction—from the selection of goods to final payment—occurring in different states along the train's route. In fact, transactions like this one play out many times every day. Some Internet retailers have physical locations in every state, while others have almost no physical presence at all, but the reality is that retailers' physical locations are of little to no import in the common commercial scenario described above.

It is time for the law to reflect these dramatic changes to the commercial world in which we live and allow states to modernize their tax regimes to reflect these realities. Given technology's functional blurring of boundaries on maps, a nexus based on actual physical presence is no longer an appropriate measure for whether a state should be able to require collection of sales and use taxes owed.

B. E-Commerce and the Tax Rules Applicable to It Impact the Entire Retail Sector and Its Consumer Base

Retailers calculate and collect consumption taxes on sales in their physical stores in the 45 states that impose such taxes. Retailers then remit those tax amounts to the states. But the legal onus of these taxes falls on the consumers making the purchases. One problem, however, is that if the retailer does not collect and remit the taxes, it is exceedingly difficult for states to later collect the taxes owed directly from individual consumers—the information to do it typically does not exist and the costs of collection are very high.

Ultimately, then, if retailers do not collect and remit the taxes owed by customers, the vast majority of those customers do not ever pay the taxes due on their purchases. This is one of the many factors fueling growth in Internet sales to the detriment of brick-and-mortar retailers—the draw, practically speaking, of state tax-free shopping.

And of course, consumers have countless online shopping options at their fingertips twenty-four hours a day, seven days a week. Buying and receiving goods has never been more convenient; a consumer can pick up a cell phone, click a few buttons, pay with a stored payment method, and find her items on her doorstep tomorrow.

Retailers are accustomed to operating in a fiercely competitive environment and evolving to meet changes in consumer demands and expectations. They can only successfully do so, however, when competition is fair and all players are bound by the same rules. The current state tax system does not promote fair competition; in fact, it undermines it by arbitrarily tilting the playing field toward some retailers.

Main Street retailers in the 45 states with a sales tax are required by law to collect tax on virtually all of their sales. The same applies to online merchants selling to customers in states in which they happen to have physical locations. But with the continuing growth of the Internet, local stores face increasing competition from large out-of-state online sellers who easily undercut them on pricing for the simple reason that they need not collect sales tax from many of their customers.

The current sales and use tax system creates an unlevel playing field for sellers. It unfairly favors remote online retailers — who are not and currently cannot be required to collect state tax on most sales—to the detriment of local brick-and-mortar merchants. Even among online sellers, the current tax system favors some over others, undercutting online sellers that choose to also operate physical stores or distribution centers, and favoring online sellers that do not have those (or as many) physical locations. With sales and use tax rates amounting to 10 percent in some areas of the country, Main Street retailers are seeing increased evidence that their customers are buying online to avoid taxes. Many local retailers report the phenomenon of "showrooming," where consumers come into their stores to look at merchandise, and then order it online.

The disparity in sales and use tax rules undermines not only Main Street retailers, but also the communities they support. The billions of dollars in lost tax revenue is badly needed by cash-strapped state and local governments to pay the salaries of essential workers, such as police officers, firefighters, ambulance crews, and schoolteachers. State taxes also pay for road maintenance—including, of course, the roads by which products purchased online are delivered.

By imposing sales and use tax collection requirements on out-of-state Internet retailers, many states are attempting to level the playing field for all businesses and guard against the harmful effects unequal tax treatment has on retailers and communities. In fact, in recent years, several states have enacted legislation or implemented rules to expand or modify their "economic nexus" framework and trigger state sales and use tax reporting and/or collection requirements for more businesses selling to in-state customers.[12]

Sound business and policy principles favor equalizing sales tax treatment between retailers, particularly in our increasingly Internet-based economy. All businesses, regardless of size or channel of sale, should be afforded the opportunity to compete on a level playing field. Moreover, states should not be prohibited from facilitating a fair tax environment for businesses. While the dormant commerce clause may protect against undo state interference with interstate commerce, it should not be extended so far as to require states to *favor* interstate commerce and out-of-state businesses over local businesses.

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[12] In addition to South Dakota, states include: Alabama, Indiana, Maine, Minnesota, North Dakota, Oklahoma, Rhode Island, Tennessee, Vermont, Washington, and Wyoming. Joe Crosby et al., *South Dakota v Wayfair: Three Maps*, Multistate (Oct. 4, 2017), https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

C. Businesses Are at Risk of Significant Financial Loss Due to New State Tax Laws and Varying Interpretations of the Physical Presence Requirement

Even businesses that theoretically benefit from the current state sales tax structure are at serious financial risk under the Court's physical presence rule. Although the physical presence requirement has been characterized as a useful "bright-line" rule, its present application is in fact anything but clear.

Take the example of one NRF member with stores in three states and Internet sales of about $60 million across the whole country. As more states adopt "economic nexus" laws (as noted above) and impose sales and use tax requirements on out-of-state retailers based on varying nexus criteria, this business has decided to start collecting sales taxes in the states that have adopted these laws. The risk associated with *not* collecting the taxes, this particular member has determined, is now too great because "physical presence" and "economic nexus" are subject to many different, evolving interpretations. This member fully recognizes, however, that some of its competitors do not believe they are legally subject to these state laws because of *Quill*, and therefore this member may be at a competitive disadvantage.

The Connecticut Supreme Court's decision in *Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services*, 38 A.3d 1183 (Conn.), *cert. denied*, 568 U.S. 940 (2012), is illustrative. There, the court found that school teachers participating in the well-known Scholastic Book program, by "bringing the plaintiff's products to the attention of the students" and "providing them with the means to order, pay for and receive delivery of those products," *clearly* served as the "substantial nexus" required under *Quill* and subjected plaintiff to the state's tax requirements. 38 A.3d at 1199. The court concluded *Quill's* physical presence test was satisfied, despite the trial court's findings that plaintiff:

> does not own or lease any real estate or personal property in Connecticut. The plaintiff also has no principal place of business, temporary facility, office, telephone number, mailing address or bank accounts in Connecticut. In addition, the plaintiff has no employees, representatives, independent contractors, salesmen, agents, canvassers, solicitors or other personnel in the state. It does not advertise in the local media or engage in direct advertising to Connecticut customers, and has not communicated with residents of Connecticut by means other than mail or Internet from locations outside the state. Moreover, it has never used state or local government services, such as the police or fire departments, and does not, and did not, use Connecticut vendors to design, prepare, print, store or mail catalogs describing its products. The plaintiff has not retained any security interests in any product sold to Connecticut customers and has no franchisees or licensees

> operating in Connecticut. The plaintiff does not conduct credit investigations or collection activities in Connecticut and does not solicit orders by telephone, computer, cable or other communication systems in Connecticut.

38 A.3d at 1185-86 (footnote omitted). The teachers, the court further acknowledged, had no oral or written agreement requiring them to serve as agents or sellers of plaintiff's products and did not receive direct compensation from the plaintiff. 38 A.3d at 1199.

The Connecticut court's broader characterization of *Quill* articulates the level of uncertainty now associated with the physical presence rule. It found that *Quill's* statements regarding the "furthest extension of the state's taxing power was no more than an observation concerning the state of the law at that time." *Id.* Moreover, it stated, *Quill's* language "was not necessarily intended to mean that a substantial nexus between the out-of-state retailer and the state could not be found in other, as of yet undefined, circumstances." *Id.*

Notably, state courts have reached different conclusions on *Quill's* applicability to the Scholastic Books program. For example, the Michigan Court of Appeals, when presented with the same facts as the Connecticut Supreme Court, came out the other way in its *Quill* analysis. The Michigan court concluded that *Quill's* physical presence requirement was not met by Scholastic Books' contact with Michigan teachers, reasoning:

> The teachers are not a sales force that works for plaintiff. Rather, they are analogous to parents who order an item from a mail-order catalog for their children; no one would seriously argue that such parents are a 'sales force' for mail-order vendors. . . . [T]he teachers are primarily plaintiff's customers and are under no control by, and vested with no authority to act on behalf of, plaintiff.

Scholastic Book Clubs, Inc. v. Michigan, 567 N.W.2d 692, 696 (Mich. Ct. App. 1997).

In other words, some courts have performed desperate mental gymnastics to try to avoid the inequitable conclusion that *Quill* would otherwise require, while other courts continue to adhere to a more literal interpretation of actual physical presence. The *Quill* rule can no longer be viewed as clear cut. Of course, if a business does not collect sales tax and a state court subsequently determines that the decision was wrong, the business could be liable for substantial back taxes and penalties. The business has no ability, after the fact, to collect the tax from its customers, so the full amount would come out of the retailer's pocket.

The risk of retailers misapplying the law and facing significant financial consequences is real, particularly with recent legislative action in the states. Some NRF members, therefore, are choosing to voluntarily collect state taxes, even though they do not believe they are technically required to do so under *Quill*. Others still are taking the risk of not collecting state sales taxes for the majority of their online transactions and, for the moment, have a commensurate pricing advantage over remote sellers who are asking customers to pay the tax. But if they collect the tax, they have a pricing disadvantage compared to competitors that do not collect. In both cases, the need for certainty and a test that comports with the complexities of modern commerce is paramount.

II. THE BURDEN ON RETAILERS TO COMPLY WITH STATE SALES AND USE TAX REQUIREMENTS, EVEN IN STATES WHERE THEY DO NOT HAVE A PHYSICAL PRESENCE, IS MINIMAL

A. Businesses of All Sizes Already Engage in Dynamic Communications and Calculations with Respect to Internet Sales Transactions

Businesses, including the roughly 26% of small businesses that use their own websites to sell their products and services,[13] have adapted to the ever-growing online economy by developing ways to quickly and effectively communicate with, and deliver products to, a customer base spread far and wide. This includes adopting tools to calculate payment totals for online orders based on dynamic criteria (e.g., delivery charges based on location, optional extra charges for faster shipping or gift

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[13] *Many Small Businesses Don't Have or Need a Website*, Sure Payroll- The Payroll Blog (May 24, 2017), https://www.surepayroll.com/resources/blog/may-2016-scorecard.

wrapping, etc.)—a scenario vastly different from distribution of pre-printed catalogues without such optionality on purchases.

Today, retailers, including small retailers, offer on their websites: 24-hour online chat rooms and other customer support services, a variety of delivery options and prices at the point of purchase, gift wrapping and other customized options for additional fees, the ability to change or cancel an order at any time, and targeted advertising for other, perhaps related products that may appeal to the customer, among other things.

This reality hardly resembles the mail-order catalogue scenario in *Quill*, when pre-printed catalogues of fixed product offerings and prices were sent to households nationwide and customers responded via phone or mail with their selections. At that time, catalogue sellers that had a physical presence, and therefore had to collect sales and use taxes, inserted a complex chart into their catalogues to show tax rates. Customers, in turn, had to do the math themselves to calculate the taxes they owed on their purchases. And, with payments made principally by check, miscalculations or errors on the amount due were relatively difficult to correct.

The task of calculating and collecting state sales taxes from a variety of states clearly would have been more onerous in the pre-Internet context of *Quill*. What was a very static and cumbersome remote sales environment has become one of constant, dynamic interaction between seller and buyer. Contemporary online businesses engage in multiple real-time adjustments and calculations for any given transaction based on a customer's location.

They determine, for instance, shipping timeframes and costs based on customers' addresses and selected preferences. They also, for purchases of regulated items such as alcohol, can determine whether it is legal to ship to a particular address, and if so, require appropriate age verification. Businesses also tailor promotions and offers to customers' locales. These functions are part and parcel of doing business on the Internet. Calculation and collection of state sales and use taxes is no different in terms of operational feasibility or burden on Internet retailers.

B. Sales and Use Tax Compliance Resources are Readily Available and Affordable for Businesses of All Sizes

Businesses have several resources to help them calculate and collect state sales and use taxes on Internet purchases. Software providers, online marketplaces that provide sales platforms for other businesses' goods (e.g., Amazon, Ebay, Etsy), and payment service providers all offer affordable—sometimes free—state sales and use tax tools for retailers of all sizes. Because these resources are automated, they are easily integrated with retailers' existing online sales platforms. And as businesses grow to reach customers in more states, there often is no additional cost to expand these capabilities to cover those additional jurisdictions.

NRF's small business members report that the burden associated with calculating and collecting sales taxes, regardless of whether they do or do not have a physical presence in the state into which they are selling, is modest. Some small business owners who voluntarily collect taxes in states where they ship products and handle such collection themselves say they can readily access state tax rates and rules online, and file returns on state websites. As detailed below, plenty of affordable assistance is available for business owners who do not wish to deal with state sales and use tax requirements on their own.

Given the ubiquity of affordable products that help businesses calculate, collect and remit state sales and use taxes, there is little to no burden imposed on remote sellers to trigger Commerce Clause concerns. Indeed, as a Commerce Clause matter, it would be difficult to conclude that the use of one of the many software packages designed to calculate taxes on a multi-state basis is any more burdensome than the use of a software package in a brick-and-mortar setting designed to calculate taxes in one state. Technology simply has eroded these distinctions.

1. Software resources

Several software providers offer automated state sales tax calculation, collection, remittance, and reporting tools. TaxCloud, for instance, is a free product that calculates sales tax for every tax jurisdiction (e.g., states and localities) in the United States based on a customer's address, and continuously updates its program to reflect changes in tax exemptions, rates, and holidays.[14] TaxCloud is compatible with over 85 e-commerce platforms

[14] *Welcome*, Tax Cloud, https://taxcloud.net/#Welcome.

(software programs that allow retailers to manage and run their online business).[15]

Another example, Avalara, Inc.'s AvaTax, provides a Cloud-based product which offers anytime-anywhere access to calculate, validate, and remit sales taxes based on continuously updated tax rates, boundaries for over 12,000 tax jurisdictions, and tax rules for millions of products and services.[16] Avalara's product is affordable for businesses of all sizes—starting at $50 per year for small businesses—with scaled pricing based on number of office systems to connect, sales transactions per month, and jurisdictions in which tax is being collected.[17] This tax compliance tool offers integration with over 500 sales software platforms (for brick and mortar and e-commerce systems).[18]

TaxJar offers a product that goes beyond calculation and collection of taxes and assists with state tax reporting and filing for multi-channel online sellers (businesses, for instance, that sell on Amazon or Wal-Mart, as well as their own website).[19] Businesses can connect all of their online carts to

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[15] *Id.*

[16] *Sales and Use Tax*, Avalara, https://www.avalara.com/products/sales-and-use-tax/ (last visited Oct. 30, 2017).

[17] *AvaTax Pricing*, Avalara, https://www.avalara.com/products/sales-and-use-tax/avatax-pricing/ (last visited Oct. 30, 2017).

[18] Mary Girsch-Bock, *2016 Review of Avalara AvaTax*, CPA Practice Advisor (13 June 2016), www.cpapracticeadvisor.com/review/12211385/2016-review-of-avalara-avatax.

[19] *Pricing*, TaxJar, https://www.taxjar.com/pricing/ (last visited Oct. 10, 2017).

TaxJar one time and the service will download the requisite data to prepare state filings on a monthly, quarterly, or annual basis, depending on how the business is required to file.[20] Again, the service is affordable for businesses of all sizes, beginning at $19 per month (for up to 1,000 transactions), going up to $99 per month for up to 10,000 transactions, and with increased sliding-scale fees up to unlimited transactions.[21]

The examples above represent a few of the commercial options available to businesses today. Many other state sales tax compliance programs exist, including: CCH SureTax and Sales Tax Office from Wolters Kluwer, Vertex SMB, BNA Sales & Use Tax Rates and Forms, and Thomson Reuters ONESOURCE Indirect Tax.

Additionally, free software resources are available from public sources to help businesses comply with state sales tax requirements. The Streamlined Sales Tax (SST) Governing Board, for example, is spearheading an initiative to standardize tax regimes (rates, definitions, exemptions, etc.) across states in order to simplify administration of state sales and use taxes.[22] This endeavor, with twenty-three states fully participating, is itself an important step toward easing state tax-related burdens on Internet sellers.[23] As an added benefit, companies

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[20] *Id.*

[21] *Id.*

[22] *About Us*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=About-Us (last visited Oct. 30, 2017).

[23] States that are full members of the Streamlined Sales and Use Tax Agreement through laws, rules, regulations and

that voluntarily collect taxes in participating SST states can register through the SST Registration System to receive, free of charge: sales tax administration software, a single identification number to file in participating states, uniform filing forms and exemption certificates, tax boundary and rules information, and updates on rules changes.[24] Currently, there are 3,687 sellers registered with the SST program.[25]

2. Marketplace resources

Online marketplaces, such as Amazon, Ebay, and Wal-Mart, have designed their websites to allow for sales of other businesses' goods. This is an easy and common way for smaller businesses to sell online without having to build and maintain their own websites. It also allows small retailers to benefit

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policies include: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *State Info*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=state-info (last visited Oct. 30, 2017).

[24] *Streamlined Sales Tax*, Avalara, https://www.avalara.com/learn/whitepapers/streamlined-sales-tax/ (last visited Oct.30, 2017).

[25] *Total Active Registered Accounts,* Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=regiatration_3 (last updated Sep. 20, 2017).

from the brand power of large online companies that are trusted by consumers.

Amazon, Ebay, and Wal-Mart all have infrastructure to help businesses of all sizes that sell through their websites comply with state sales and use tax requirements. Amazon, which alone accounts for an estimated 34 to 43 percent[26] of U.S. online retail sales today and an expected 50 percent by 2021 (including sales from its own inventory and third-party sales on its marketplace),[27] now collects state sales tax on transactions from its own inventory and allows third-party sellers using its marketplace to opt into its automated sales tax collection service.[28]

Similarly, Ebay—another e-commerce giant that sells only third-party products (i.e., does not have its own product inventory) and did $20.5 billion in gross merchandise volume in the third quarter of 2017—allows sellers on its marketplace to automatically

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[26] Estimates likely vary because Amazon does not release data specific to its third-party marketplace sales, and thus the estimates are based on secondary sources.

[27] *Amazon accounts for 43% of US online retail sales*, Business Insider (Feb. 3, 2017), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2; *see also* Phil Wahba, *Amazon Will Make Up 50% of All U.S. E-Commerce by 2021*, Fortune (Apr. 10, 2017), http://fortune.com/2017/04/10/amazon-retail/.

[28] *Guide to Sales Tax Collection in Amazon*, Avalara, https://trustfile.avalara.com/guides/amazon/setting-up-amazon-sales-tax-collection/ (last visited Oct. 30, 2017); *Set up Tax Collection Services*, Amazon, https://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=201721890 (last visited Oct. 30, 2017).

calculate sales taxes based on shipping addresses.[29] And Wal-Mart, which allows third-party sellers to customize state sales tax preferences in their account settings, has partnered with TaxJar to offer (for a separate fee) its sellers help with state tax filing and reporting.

3. Payment service provider resources

Finally, payment service providers offer yet another avenue for state sales tax administration assistance. PayPal, for example, allows businesses that use its payment platform to set—in their business account preferences—different sales tax rates to be applied to purchases based on zip code.[30] Although the service does not perform the sales tax calculation for businesses, it is compatible with available software options like TaxJar (which would help with calculation, collection, filing, etc.).

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The bottom line is that the technological revolution that has so dramatically elevated the importance of the legal framework for tax on remote sales has also created a host of tools that make the standard in *Quill* an unnecessary anachronism. The

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[29] *Sales Tax*, Ebay, http://pages.ebay.com/help/sell/contextual/inframe/sales-tax.html (last visited Oct.30, 2017).

[30] *Sales Tax Guide for PayPal Users*, TaxJar, https://www.taxjar.com/guides/sales-tax-guide-for-paypal/#collecting-sales-tax-from-buyers (last updated Dec. 14, 2016).

tools available and being used in large numbers of transactions today allow sales tax calculations to happen during the purchase process so that the final prices displayed to consumers when they select their payment already include the appropriate tax amounts. These tools are in widespread use today and work well for the many retailers that are already collecting sales taxes for their online sales. The ability to collect these taxes online has nothing to do with the physical locations that a given business may or may not have, which demonstrates that the time is right to reconsider *Quill*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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