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

REPLY BRIEF

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REPLY

Several Justices of this Court have criticized *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), or its doctrinal underpinnings. *See, e.g.*, *Direct Mktg. Ass'n (DMA) v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring); *Comptroller v. Wynne*, 135 S. Ct. 1787, 1809, 1811 (2015) (Scalia, J., and Thomas, J., dissenting); *DMA v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Accordingly, when Justice Kennedy called for vehicles to reconsider *Quill*'s sales-tax-only, physical-presence rule, South Dakota answered. The vehicle it pursued is not a "manufactured" case that "manipulated" the courts or respondents (*contra* Opp. 4, 6); it is a clean vehicle that isolates the precise Question Presented without introducing extraneous issues or case-specific factual disputes. The State's declaratory judgment action will immediately resolve the parties' rights and obligations, and the unique features of South Dakota's legislation and litigation were provided for taxpayers' benefit—to spare them unnecessary costs and interim compliance burdens while the Question Presented made its way to this Court. That South Dakota took such care to protect respondents and avoid freighting this case with ancillary issues is a reason to grant certiorari, not deny it.

Meanwhile, the overwhelming *amicus* participation confirms that now is the time to reconsider *Quill*, and this is the vehicle to do it. Taxpayer groups (including one that has never supported an enforcement effort, *see* Tax Found. Br. 2), thirty-seven disinterested tax and economics professors, affected businesses, and Members of Congress have called for this Court's review. Even the six *amici* supporting respondent

confirm this case's importance. Yet while Justice Kennedy called it "unwise to delay [reconsidering *Quill*] any longer," 135 S. Ct. at 1135, respondents hope to delay indefinitely. So, for example, while they suggest there may be better vehicles in other States, Opp. 37-39, all those States (and many more) endorse certiorari here. *See* Colo. Br. 20.

Respondents' arguments are not really case- or record-specific—they follow from the nature of any litigation that challenges existing precedent. In reality, this case's summary-judgment posture is perfectly suited to the narrow question whether *Quill*'s physical-presence rule should be abrogated; respondents are just trying to delay the end of their "judicially sponsored … 'tax shelter.'" *DMA*, 814 F.3d at 1150-51 (Gorsuch, J., concurring). Meanwhile, *Quill* causes daily harms to state treasuries, communities, and interstate commerce itself. It is time it washed away. *See id*.

I. This Case Is Properly Presented.

Respondents clothe objections about the record in vague justiciability concerns, Opp. 12-13, but neither the underlying record-related complaints nor their jurisdictional window-dressing have any substance.

1. First, this case in no way seeks an "advisory opinion." *Contra* Opp. 5, 13. Article III denies "federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). But the declaratory judgment sought here will immediately affect these litigants' rights: If the State's suit prevails, respondents must start collecting tax the next day. This is a prototypical "case or controversy."

That conclusion is unaffected by the State's candid acknowledgement of respondents' *Quill* defense below. This Court has recently granted petitions identical in posture, over similar objections about their factual records. *See, e.g.*, *Janus v. AFSCME*, No. 16-1466, Madigan Opp. 5, 7-8; *Friedrichs v. Cal. Teachers Ass'n.*, No. 14-915, Harris Opp. 6, 12. Unlike in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), petitioner did not seek voluntary dismissal; instead, *respondents* sought summary judgment—and won—precisely because of *Quill*. *Contra* Opp. 14 & n.5. Both the posture and record necessarily follow from respondents' summary-judgment motion and *Quill*'s bright-line rule.[1]

Respondents so recognize by admitting that their "advisory opinion" theory is, essentially, that this "Court lacks the power to offer opinions on assumed … facts." Opp. 12. The rule is the opposite: Every case where this Court grants certiorari after dismissal or summary judgment requires it to "*assume* th[e] veracity" of a party's allegations. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added). In fact, the kind of isolated legal question appropriate for certiorari is often best presented on summary judgment, precisely because that posture makes contested facts immaterial. So too here.

2. Indeed, to the extent respondents' real complaint is simply that this case is a poor vehicle because

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[1] *ASARCO Inc. v. Kadish* would answer any colorable justiciability concerns anyway. *See* 490 U.S. 605, 617-24 (1989) (holding normal Article III requirements inapplicable on certiorari to state court).

it lacks a factual record (Opp. 13-17, 38-39), that argument is unavailing or backwards.

First, it ignores the procedural consequences of respondents' own summary-judgment request. The South Dakota Legislature made clear findings regarding all the issues respondents now dispute, Pet.App. 22a-24a, and the State's complaint and briefing focused on them.[2] Respondents nonetheless sought summary judgment *without* contesting those facts because they themselves believed them immaterial to their *Quill* defense. *See* Opp. A1-A3. And they were right: So long as *Quill*'s bright-line, physical-presence rule remains, the only material fact is respondents' lack of physical presence. The State was thus compelled to acquiesce when respondents sought summary judgment, particularly given this Court's instruction to "leav[e] to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989).

But this only highlights the narrow Question Presented and the extreme nature of "*Quill*'s sales-tax-only, physical-presence requirement." Pet. i. Respondents' own motion proves that, *even assuming* all the facts the Legislature found are true, the State cannot prevail under *Quill*. No other case can or should have a different factual record precisely because, as respondents themselves (correctly) believed, *Quill* makes additional facts irrelevant.

Respondents also get it backwards in complaining that this case does not present retroactivity concerns

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[2] *See* D.S.D. Dkt. #16-3019, Doc. 1, Exhibit A (complaint); Doc. 27 (summary judgment response).

that future cases might, Opp. 34-36, or fails to develop a record regarding compliance costs for (all other) businesses throughout the Nation. Opp. 13-17. Even if such issues could have been developed (somehow) in the record below, it *is* a virtue of this petition (*contra* Opp. 16) that it concerns only the bright-line, physical-presence rule, and reserves for lower courts the case-specific arguments of any "small [or] medium-sized companies" (Opp. 2) who claim to be unreasonably burdened by States that—*unlike* South Dakota—might impose sales-tax collection duties on smaller businesses, or do so retroactively. Even respondents may argue on remand that, per *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 278 (1977), "undue burdens exist in fact" for them under South Dakota's law, notwithstanding their huge size and present collection activities in much more complex States. *See* Opp. 32. Helpfully, however, such case-specific arguments do not affect the Question Presented here.

The "record facts" respondents now say they want developed are further irrelevant because this Court does not decide issues of nationwide import by relying on case-specific records. This Court cannot evaluate *Quill*'s vitality by relying on the fact-findings of one state tax judge on a "fact-intensive" national issue, resolved by weighing dueling experts' credibility or the like. *Contra* Opp. 15, 38. Indeed, this Court *avoids* cases that rest on a case-specific, factbound record, not the other way around.

In reality, any facts bearing on this case are not adjudicative facts of the kind elucidated in an adversary trial record, but *legislative* facts, on which the judgment of the State's legislature is presumptively correct. That dormant commerce clause doctrine

implicates such legislative facts may be a point against it. *See Wynne*, 135 S. Ct. at 1810 (Scalia, J., dissenting) (criticizing dormant commerce clause cases that "require[] us to balance the needs of commerce against the needs of state governments" because "[t]hat is a task for legislators, not judges."). But it cannot be a reason to deny the only venue for reconsidering a doubtful precedent to the State whose legislative judgment is set aside.

It should also be unacceptable *to respondents themselves* to force States to produce a detailed trial record to obtain review in a case like this. Respondents seem to want the State to have put them through the expense of an assessment, audit, full-blown discovery, dueling expert reports, and a tax-court trial, notwithstanding the immateriality of all this to any final judgment below. *See* Opp. 16, 18 n.6, 38-39. That the State's procedures were too easy on taxpayer-respondents would be an ironic ground for denying certiorari.

Indeed, the underlying theme of respondents' opposition is backwards. Respondents call South Dakota's statutory process "an unprecedented manipulation of the court system," resulting in an "oddly-manufactured" appeal, where South Dakota acknowledged from the outset that its case "require[d] the abrogation of *Quill*." Opp. 4, 6, 13. But these procedures and litigation positions were all undertaken *for taxpayers' benefit*—it spared them unnecessary expenses and difficult decisions about interim compliance, as the legislature carefully explained. Pet.App. 23a-24a. Meanwhile, South Dakota acknowledged *Quill*'s validity below because that's what this Court *told it to do*. *See supra* p.4. This Court certainly should not signal to States that this solicitousness towards defendants and

the doctrines that currently protect them is somehow a bad idea.

Given the above, it is perhaps unsurprising that, in the other cases respondents suggest might provide superior vehicles, Opp. 38, they or their (mutually represented) *amici* have resisted the discovery they now say they wanted here. *See, e.g.*, Addendum 1a-3a & n.5 (discovery opposition denying relevance of all facts to this constitutional issue and seeking to *delay that case* pending disposition of this petition). In any event, as various *amici* explain (Retail Litig. Ctr. Br. 19-22; Nat'l Gov. Ass'n Br. 1-2), the multiplying *Quill*-related cases in other States are not only lagging behind this one, but come with jurisdictional and other issues that could confound review. The States pressing these other challenges thus ask, unanimously, that this Court take *this* case. Colo. Br. 20. It should do so; no other vehicle—let alone better vehicle—is coming soon.

II. This Case Presents A Constitutional Question For This Court, Not Congress.

For 25 years, Congress has not responded to *Quill*'s explicit invitation for action. Respondents nonetheless try to avoid this Court's review by promising that Congress can still fix *Quill*'s problems, pointing to an *amicus* brief from the House Judiciary Chairman for support. Opp. 1, 2, 5, 10-12. Respondents' goal is not congressional *action*, however; they seek only to maintain the status quo, which is a constitutional default rule under which congressional *in*action preserves their "judicially sponsored … 'tax shelter.'" *DMA*, 814 F.3d at 1150 (Gorsuch, J., concurring). It is therefore notable that the many bills respondents identify as being "tirelessly" pursued (at 10)

have never received a vote—or even a *hearing*—in the House Judiciary Committee.[3] That includes the Marketplace Fairness Act, which passed the Senate with bipartisan support. *See* Professors' Br. 4-5. As this experience shows, this case is not about *Congress's* power at all; it is about whether *Quill* has unduly empowered those on the side of doing nothing, including respondents and their political allies.

Notice, for example, that despite respondents' protestations, Opp. 5, this case cannot "thwart" anything in Congress. Whatever this Court says about *Quill*, Congress will retain its authority under the Commerce Clause to affirmatively enact any nationwide policy it chooses. Congress can also solve, at any time, any problems it perceives in the States' implementation of collection obligations. Even without *Quill*, the courts will retain the ability to police unduly burdensome obligations under *Complete Auto*, and Congress will retain *all* the options it has now. The only change is that this Court will return to the States the initial policy decision *it* took away in *Quill*.

That respondents' congressional *amici* have taken the time to urge denial here nonetheless demonstrates the *practical* importance of the constitutional question only this Court can decide. Respondents and their *amici* know that, in practice, the default rule this Court set in *Quill* makes all the difference. So long as *Quill* is in place, the States must beg Congress for the

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[3] *See* H.R. 2193 (Remote Transactions Parity Act), https://goo.gl/ovuRGj; H.R. 2887 (No Regulation Without Representation Act), https://goo.gl/mjuEdv; S. 743 (Marketplace Fairness Act of 2013), https://goo.gl/fu9SFm. (For each, "last action" is referral to subcommittee).

taxing power that properly belongs to them under the Constitution, and that creates inordinate power at the many "veto points" in our constitutional design—among them, the House Judiciary Committee. *See* Professors' Br. 4 (explaining that, for similar reasons, Congress cannot be deemed to have "acquiesced" to *Quill* rule). Logic and twenty-five years of experience confirm that anyone genuinely seeking a congressional policy solution should welcome *Quill*'s reconsideration, not oppose it.

Relatedly, *even if* Congress suddenly reverses its quarter-century of inaction, *Quill*'s federalism harms will not be erased. Instead, whatever congressional compromise emerges will bear scars from where *Quill* affected negotiations by cutting into State authority. As in *other dormant commerce clause cases* where this Court has reversed its precedent, this is a problem only this Court can fix. *Id.* (collecting cases overruling dormant commerce clause precedents, and explaining limited force of *stare decisis* in this context).

III. Respondents' Background, "Factual" Arguments Are Overstated.

Respondents suggest that "small and medium-size" businesses will be overborne by the complexities of collecting tax in "16,000+ jurisdictions," and question the scale of the problem facing cash-strapped States. These "factual" concerns are insubstantial.

Begin with respondents' arguments attacking the evidence Justice Kennedy himself used to identify the increasing problem facing the States. Opp. 25-29. Respondents suggest this evidence was "debunked" by another study. Opp. 29 (citing Jeffrey Eisenach & Robert Litan, *Uncollected Sales Tax on Electronic*

Commerce (Feb. 2010), https://goo.gl/m9xN9U. That paper was avowedly paid for by respondents' *amicus* NetChoice, whose "mission" is "to protect e-commerce" from "taxes on … goods through the Internet," https://netchoice.org/, and subsequent U.S. Census Bureau measurements have proven its "projections" quite understated.[4] But even that paper estimated uncollected sales tax revenues at *$3.9 billion* nationally in only 2008. Eisenach & Litan at ii. Respondents themselves calculated South Dakota's loss at $21 million annually, and do not dispute that this equates to $900 million in California. *See* Pet. 14. Any dispute here lies at the margins; the parties and their sources *agree* the problem is huge.

Meanwhile, the argument that this problem is shrinking because of Amazon's voluntary compliance is doubly unacceptable. First, a company's voluntary compliance is no reason to abandon concerns about its competitors; we would not abandon mandatory health inspections at fast-food restaurants just because McDonald's is voluntarily scheduling them. Second, it is untenable to set up a situation where States are dependent on Amazon's *voluntary* remittance for a large chunk of their annual budgets. What happens if, faced with some disfavored policy, Amazon changes views?

Respondents' "16,000+" jurisdictions number and related arguments are similarly meritless. Even

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[4] In 2010, this paper predicted $164 billion in retail e-commerce by 2012; the Census found it was over $224 billion. Eisenach & Litan at 24; U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2012*, at 1 (Feb. 15, 2013), https://www2.census.gov/retail/releases/historical/ecomm/12q4.pdf.

accepting this figure, it shows that the number of taxing "jurisdictions" has only doubled in the last 25 years, while the change in computing power from *Quill*'s *pre-Internet* period is far more profound. As evidenced by Systemax's overnight compliance, Pet. 30, in the age of cloud computing, the marginal cost of adding additional tax jurisdictions beyond 6,000 (or even, say, 50) is functionally zero.

The 16,000-jurisdictions number is also substantially overstated; it counts separate "jurisdictions" wherever rate variations are theoretically possible, even in the many States (like South Dakota) where sales-tax collection and audit functions are centralized at the State level, and sales-tax bases have been harmonized across localities. *Compare* Opp. 27 & n.9, *with* https://taxfoundation.org/state-and-local-sales-tax-rates-2016/ ("Forty-five states and the District of Columbia collect statewide sales taxes."). It also ignores that out-of-State collectors can use the uniform, Streamlined system in South Dakota and many other States, *see* Streamlined Sales Tax Br. 7-8, and qualify for special, simplified treatment in others. Respondents' only source suggesting that compliance is costly comes from a lobbying organization whose sole purpose is "[a]dvocating that Congress oppose any federal legislation that would overturn the physical presence standard in *Quill*," http://truesimplification.org/about and even this study (over)estimates annual software costs at only $25,000-$50,000—or 0.1-0.2% of sales for the smallest national retailer likely to meet South Dakota's threshold. It also acknowledges that most States will (like South Dakota) "provide 'free' software

to retailers" if it allows them to obtain collection compliance.[5]

Respondents also take (widely varying) numbers about compliance difficulties from several different companies all *offering to help*. Opp. 26. Those companies have an obvious incentive to upsell the complexity involved. But, more importantly, their number and availability demonstrate that lots of competing companies can supply the necessary technology at reasonable cost. Respondents simply don't want to do their "fair share," *see D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)—not because collection is too costly, but because it costs them their sales-tax advantage.

Finally, respondents never explain why these expenses only matter for sales-tax collection. For example, the alternative "tools" respondents now embrace to encourage compliance, Opp. 36, could also be enacted in all alleged 16,000+ jurisdictions, even if they were equally costly. *See DMA*, 814 F.3d at 1149 (Gorsuch, J., concurring) ("*Quill* does nothing to forbid states from imposing … duties of comparable severity."). Meanwhile, as the professors explain (at 17-19), relying on these tools to increase use-tax compliance is far less efficient than asking sellers to collect, and so imposes a greater burden on interstate commerce—the very thing this doctrine is meant to avoid. Respondents' various "factual" disputes thus do not concern burdens on interstate commerce as such; they are

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[5] Larry Kavanagh & Al Bessin, *The Real World Challenges in Collecting Multi-State Sales Tax for Mid-Market Online and Catalog Retailers* 2, 3 (Sept. 2013), http://truesimplification.org/wpcontent/uploads/Final_Embargoed-TruST-COI-Paper-.pdf.

merely pleas to continue tax-sheltering *only* their business models as long as possible.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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December 20, 2017

ADDENDUM

ADDENDUM

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE 20TH JUDICIAL DISTRICT, DAVIDSON COUNTY PART IV, AT NASHVILLE

AMERICAN CATALOG MAILERS ASSOCIATION and NETCHOICE, Plaintiffs, vs.	
TENNESSEE DEPARTMENT OF REVENUE and DAVID GERREGANO, In his Capacity as the Commissioner of the Tennessee Department of Revenue, Defendants.	No. 17-307-IV

PLAINTIFFS' RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

Plaintiffs American Catalog Mailers Association ("ACMA") and NetChoice (together, "the Plaintiffs"), hereby oppose the Motion to Compel ("Motion"), filed June 30, 2017, by the Defendants, the Tennessee Department of Revenue ("Department") and Commissioner David Gerregano (together, "the Defendants").

The reasons for denying the Defendants' Motion are manifold. The Defendants' Motion lacks merit because (1) it seeks from the Plaintiffs documents and information about non-parties to the case (the Plaintiffs' members) that the Plaintiffs simply do not possess; (2) the information requested is not relevant to

this facial constitutional challenge, in which the Plaintiffs request a declaration that the plain terms of Tenn. Comp. R. & Regs. 1320-05-01-.129(2) ("Rule 129(2)") are unconstitutional as a matter of law; and (3) the Defendants demand member-specific information to support a rule that the General Assembly has recently prohibited the Department . . . .

* * *

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[5] The Defendants attach to their Memorandum a brief filed in the South Dakota Supreme Court by three individual retailers who have defended, successfully at the trial court, a suit brought against them by the state under a similar law enacted in South Dakota in 2016. *See* Memorandum, Ex. G. In that case, the individual retailers assert that the state had improperly failed to make a record with regard to the State of South Dakota's suit seeking a declaration that the statute *as-applied to the specific retailers* in question is constitutional. In this case, in sharp contrast, the Plaintiffs have brought a *facial challenge to the terms of Rule 129(2) as written.* The distinction demonstrates precisely why the Defendants' discovery requests are not relevant in this case.

The South Dakota suit is of significance to this case, however, in that the law at issue there reflects a similar standard for sales tax collection—nexus imposed on retailers without a physical presence in the state based upon a minimum level of sales to consumers in the state. The case is now fully-briefed and pending before the South Dakota Supreme Court. The state has, moreover, indicated its intention to petition the United States Supreme Court for review of the case. It would be appropriate for this Court to defer action pending resolution of the South Dakota appeal, particularly where the General Assembly has expressed an interest in reviewing the constitutionality of Rule 129(2) before allowing the Defendants to enforce it.

* * *

CONCLUSION

For the foregoing reasons, the Defendants' Motion to Compel should be denied. The Court should, instead, evaluate the best way to proceed in this action, in light of the unusual circumstances and posture in which this matter comes before the Court.

DATED this 24th day of July, 2017.

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ADDENDUM

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE 20TH JUDICIAL DISTRICT, DAVIDSON COUNTY PART IV, AT NASHVILLE

AMERICAN CATALOG MAILERS ASSOCIATION and NETCHOICE, Plaintiffs, vs.	
TENNESSEE DEPARTMENT OF REVENUE and DAVID GERREGANO, In his Capacity as the Commissioner of the Tennessee Department of Revenue, Defendants.	No. 17-307-IV

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DATED this 24th day of July, 2017.

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