No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR AMICI CURIAE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INVESTMENT PROGRAM ASSOCIATION, NAREIT, NATIONAL ASSOCIATION OF REALTORS®, REAL ESTATE ROUNDTABLE, NATIONAL MULTIFAMILY HOUSING COUNCIL, NAIOP, AMERICAN FARM BUREAU FEDERATION, AND SOUTH DAKOTA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry, and represents over 70,000 shopping center owners, developers, managers, investors, retailers, brokers, academics, lawyers, and public officials. ICSC represents the interests of all 124 shopping centers in South Dakota, which employ over 43,870 people and generate approximately $137.5 million in state sales tax revenue.

The Investment Program Association is a nonprofit organization that engages in advocacy and education relating to portfolio diversifying investment products, including Real Estate Investment Trusts.

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners, and investors of office, industrial, retail, and mixed-use real estate.

Nareit is the global association of Real Estate Investment Trusts and publicly traded real estate companies with an interest in U.S. real estate and capital markets.

The National Association of REALTORS® is a trade association that represents 1.2 million members, including residential and commercial brokers, salespeo-

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties giving blanket consent to the filing of amicus briefs are on file with the Clerk.

ple, property managers, appraisers, counselors, and others engaged in the real estate industry.

The National Multifamily Housing Council is a national association representing the interests of the apartment industry in the United States. Its members include owners, developers, managers, and financiers of large apartment firms.

The Real Estate Roundtable is a non-profit public policy organization that brings together business and trade association leaders to address policy issues relating to real estate and the overall economy.

The American Farm Bureau Federation is a voluntary organization that represents the business, economic, social, and educational interests of American farmers and ranchers. Its mission is to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities.

The South Dakota Farm Bureau Federation is a grassroots membership organization established in 1917 and dedicated to representing, upholding, and improving South Dakota's agricultural industry. It represents more than 16,000 farm, ranch, and rural member families across South Dakota. It is a member of amicus American Farm Bureau Federation.

Collectively, amici and their members seek to promote the economic and social vitality of communities across the country—through retail centers, housing developments, and family farms. All of amici's members have an interest in seeing brick-and-mortar stores succeed: Main Streets and shopping malls draw new residents, create jobs, and generate state and local tax revenue by providing local opportunities to obtain goods and services. By the same token, amici's members suffer when the competitive advantage *Quill* confers on online retail reduces the viability of brick-and-mortar stores. Store closings, for example, mean fewer tenants for members that own, operate, and/or finance retail real estate. And a shrinking sales tax base means higher property tax rates, which severely burdens real estate interests, farmers, and ranchers alike.

Amici's members also benefit greatly when online retailers establish storefronts, warehouses, and distribution centers in their communities. These investments generate new business for the retail and commercial real estate industry that many amici represent. And, more generally, they revitalize struggling communities and provide much-needed employment, particularly in the nation's rural areas. Amici thus have an interest in incentivizing online retailers to expand their physical presence into new areas across state lines—an interest that *Quill* impedes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Brick-and-mortar retail stores across the country have long collected state and local sales taxes as a necessary cost of doing business. At the register, in-store customers pay not just the price of their merchandise, but also an amount ranging anywhere from 3 percent to 10 percent of the purchase price, depending on state and local tax rates.

As a result of this Court's decisions in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967), online and mail-order customers very often do not pay the same taxes. Shielded by *Quill*, out-of-state retailers, including online companies, cannot be required to collect sales taxes unless they have a "physical presence" in the State. While their customers still owe an equivalent "use" tax, they rarely pay it and instead mistakenly view the transaction as being tax-free. As other amici explain in greater depth, the direct harm this rule inflicts on brick-and-mortar retail is considerable. Local businesses struggle and increasingly fail to compete against online retailers that can offer customers identical goods for what is in effect up to a 10 percent discount.

Quill's distorting effects reach far beyond brick-and-mortar stores themselves. *First*, the loss of physical stores, many of which are integral to the social fabric of their communities, increases unemployment and creates a sense of dislocation among community residents. *Second*, the decline in the retail sector reduces the value of retail real estate, discourages further development of retail properties, and impedes innovation in the retail sector. *Third*, the lost revenue from sales, property, and income taxes threatens the ability of state and local governments to provide much-needed public services, including those that benefit online retailers. *Finally*, although the decline in brick-and-mortar retail affects all communities, the impact on the nation's rural areas is particularly acute: As local grocery stores, pharmacies, and shops disappear, rural communities struggle to maintain access to basic goods and to replace important sources of off-farm income.

These cascading effects call for abrogating *Quill*. As *Quill* all but acknowledged, the physical-presence rule is out of step with developments in this Court's dormant commerce clause jurisprudence. The Court has now repeatedly held that the dormant commerce clause is meant to level the playing field so that businesses can compete fairly, not skew the playing field toward one subset of interstate actors and away from others. By mandating differential treatment of in-state and out-of-state interests that are competing for the same customer base, and by stifling commerce rather than promoting it, *Quill* offends the clause's animating principles.

Stare decisis does not justify retaining the physical-presence rule. Many of the reasons this Court has recognized for departing from precedent apply with special force here. Most notably, the dramatic economic and technological changes over the past 25 years have substantially undermined *Quill*'s reasoning and made its unfairness to retailers, States, and others all the more apparent.

The Court should abrogate the physical-presence rule and uphold South Dakota's economic-nexus law as consistent with the dormant commerce clause.

ARGUMENT

I. THE *QUILL* RULE HARMS THE ECONOMIC AND SOCIAL VITALITY OF COMMUNITIES ACROSS THE COUNTRY, PARTICULARLY IN RURAL AREAS

Quill effectively discriminates against brick-and-mortar retail stores, which must collect sales taxes, in favor of online and mail-order companies, which need not. As explained below, tilting the playing field in this way imposes severe, concrete harms not just on brick-and-mortar retailers, but also on related industries, the communities that surround them, and the state and local governments that support those communities. These downstream effects demonstrate the importance of abrogating *Quill*'s physical-presence rule to ensure that all retailers play by the same rules.

A. *Quill* Directly Harms Brick-And-Mortar Retailers

As a direct result of *Quill*, customers often do not pay sales taxes when making purchases from out-of-state mail-order and online companies. Although they technically owe *use* taxes at exactly the same rate, online and mail-order customers overwhelmingly (albeit wrongly) perceive their purchases to be tax-free—and thus substantially cheaper than if they had bought the same items in person. This ostensible subsidy can add up quickly. For high-priced items like jewelry, electronics, and appliances, a 5 or 10 percent difference in the effective price can translate to hundreds of dollars.

Unsurprisingly, then, brick-and-mortar stores are losing sales as a result of this competitive disadvantage. *See Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (acknowledging that *Quill* unfairly harms "local retailers and their customers who do pay taxes at the register"). One study estimates that, in 2010, brick-and-mortar stores in California alone lost $4.1 billion in sales to online retailers—a number expected to reach $14.3 billion by 2020.[2] Several factors, including convenience, have contributed to the rise of online shopping. But tax avoidance has played an important role. The most commonly cited reason for online shopping is the perception that online retailers offer lower prices than

[2] Parker, *Flawed System: Online Sales Tax Collection: Economic Impact upon California Businesses and Employers* 11 (Aug. 2010) [hereinafter *California Study*], *available at* https://media.gractions.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/1d71e284-6837-4452-a1f4-0a2f90faaf4c.pdf.

their brick-and-mortar counterparts—a perception directly tied to *Quill*.[3]

Several studies confirm that customers, including online shoppers, are sensitive to changes in sales tax. As an obvious example, consumers who live near state lines often shop across the border to take advantage of lower sales-tax rates. Amazon observed a similar phenomenon when it began collecting sales taxes in certain States. Households in those States reduced their Amazon purchases by 9.4 percent (or more, for low-income families and larger purchases).[4] The study concluded that at least some of those sales were likely diverted to online-only competitors that continued to enjoy a tax advantage.[5]

Consistent with those findings, one influential study estimated that approximately 24 percent of online buyers and 30 percent of online purchases would shift back to brick-and-mortar stores if online retailers were required to collect sales taxes.[6] In other words, in a fair, competitive environment, a substantial portion of online shoppers would return to shopping at local stores. That should not be surprising. Even as online

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[3] PwC, *Total Retail 2015: Retailers and the Age of Disruption* 6 (Feb. 2015), *available at* https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf.

[4] Baugh et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* 4-5 (Apr. 2014, revised Sept. 2016), *available at* http://www.nber.org/papers/w20052.pdf.

[5] *Id.* at 21.

[6] Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce* 16 (Dec. 1998), *available at* http://www.nber.org/papers/w6863.pdf; *see also California Study* 9-10, *supra* note 2.

commerce increases, the phenomenon of "showrooming"—in which prospective customers visit stores to ask questions and to see, feel, and try on merchandise—confirms that customers still value the in-person shopping experience.[7]

As long as customers can order the same items online at lower effective prices, however, local businesses will continue struggling to remain profitable. A growing number of national retailers have in fact filed for bankruptcy, and stores, large and small, are shuttering at an alarming rate. In the first half of 2017 alone, an estimated 5,300 retail locations closed around the country,[8] putting the industry "on pace … to eclipse the number of stores that closed in the depths of the Great Recession of 2008."[9] This upheaval results not just from shifting consumer preferences and evolving technology but also from *Quill*'s market-distorting rule.

B. *Quill* Undermines The Social Fabric Of Local Communities

The decline in the retail industry tangibly impacts the economic and social vitality of local communities in various ways. Some are obvious: Shuttering local

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[7] *Cf.* Rigby et al., Bain & Co., *Digical® Retail and Why Stores Matter*, Dec. 18, 2015, http://www.bain.com/publications/articles/retail-holiday-newsletter-2015-2016-4.aspx (noting that in-store conversion rates are 25% to 45%, while online conversion is only 2% to 5%).

[8] Isidore, *Store Closings Have Tripled So Far This Year*, CNN Money, June 23, 2017, http://money.cnn.com/2017/06/23/news/companies/store-closings/index.html.

[9] Corkery, *Is American Retail at a Historic Tipping Point?*, N.Y. Times, Apr. 15, 2017, https://www.nytimes.com/2017/04/15/business/retail-industry.html.

stores causes unemployment to rise and forces residents to travel greater distances to purchase groceries, clothing, and other basic items.

And communities lose more than sources of jobs and merchandise. As one architect stated, "the physical world of the marketplace—unlike the Internet—captures the vitality of civic life, which can yield a potentially unparalleled and needed experience for customers."[10] The physical space provided by retail stores—particularly Main Streets and shopping malls—helps foster and maintain a sense of community in an increasingly mobile and disconnected world. Shopping is often a social activity, and retail centers serve as important "third places" that bring people together outside the home and the workplace.[11] Retail centers also often draw other "third places"—like coffee shops, restaurants, and bars—to the area, further enhancing the community environment.[12]

In fact, studies have shown that home prices increase significantly in areas surrounding new brick-and-mortar retail developments.[13] People will naturally pay more to live in a vibrant, walkable area with

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[10] International Council of Shopping Centers, *Shopping Centers: America's First and Foremost Marketplace* 11 (Oct. 2014) (quoting Eric Kuhne), *available at* https://www.icsc.org/uploads/research/general/America-Marketplace.pdf.

[11] *Id.*

[12] Jeffres et al., *The Impact of Third Places on Community Quality of Life* (2009), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1011&context=clcom_facpub.

[13] Wiley, *The Impact of Commercial Development on Surrounding Residential Property Values* 3-4, 15-16 (Apr. 2015), *available at* https://www.gamls.com/images/jonwiley.pdf.

easy access to stores, restaurants, and markets. New retail development is thus considered a "neighborhood amenity and an important aspect to community revitalization."[14]

Store vacancies, by contrast, have the opposite effect. As South Dakota has noted (Br. 37), empty storefronts can signal a community in decline, increasing anxiety among community members and discouraging new residents from settling in the area. As the area becomes less attractive to new residents, home prices and property values will likely decline. New businesses, too, are less likely to move into a community where stores have already begun to close, as unemployment in the area is likely higher and disposable income lower.[15] The community thus loses important "third places," and vacant stores and strip malls instead become places to avoid—potentially even places of vandalism and criminal activity. The overall level of social interaction in the community decreases. Neighbors no longer run into each other at their local stores, and the social fabric frays.

Relatedly, the loss of a locally owned store means the loss of a crucial community resource. Retail stores provide daily opportunities for local business owners to build relationships with their neighbors and benefit from their patronage. These interactions build a sense of loyalty and accountability to the community, and make locally owned stores substantially more likely

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[14] *Id.* at 3-4.

[15] Velasco, *America's Stores Are Closing. Why Isn't That Raising a Jobs Alarm?*, Christian Science Monitor, Aug. 4, 2017, https://www.csmonitor.com/Business/2017/0804/America-s-stores-are-closing.-Why-isn-t-that-raising-a-jobs-alarm.

than faceless online retailers to invest in their neighborhoods. Their activities run the gamut from granting scholarships to local students; donating to local charities, schools, civic groups, and little leagues; and hosting workshops, fundraisers, and other philanthropic events. By actively participating in civic life, businesses give back to the communities that support them while also "generating goodwill and enhancing [their] image."[16] Online retailers with no physical presence in the area—the companies benefited by *Quill*—are substantially less likely to serve this role.

C. *Quill* Severely Burdens The Retail Real Estate Industry

The decline in brick-and-mortar retail stores also predictably impacts the retail real estate industry that provides the space these stores use. By 2015, the growth in online commerce had reduced the demand for retail space by 133 million square feet.[17] As stores close down, retail operators expect to see lower occupancy rates and lower rents.[18] These trends drive down property values.[19]

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[16] Lund et al., *Brick vs. Click: A Resource Based View of Community Engagement*, *in* Society for Marketing Advances, Advances in Marketing 379 (VanMeter & Weiser eds., 2015), *available at* http://c.ymcdn.com/sites/www.marketingadvances.org/resource/resmgr/2015_Forms/2015_SMAProceedings-V2.pdf#page=379.

[17] American Booksellers Association et al., *Amazon and Empty Storefronts, 2015 Update: The Fiscal and Land Use Impacts of Online Retail* 3 (Sept. 2016) [hereinafter *Empty Storefronts*], *available at* http://www.civiceconomics.com/empty-storefronts.html.

[18] Bodamer, *Retail Real Estate Trends 2017, Part 3: Sliding Fundamentals*, National Real Estate Investor (Aug. 18, 2017),

Shopping centers in less desirable areas have been hit particularly hard, as the markets already reflect substantially lower property values.[20] Shopping centers in higher-income areas have been better able to adapt to the changing market—but only at considerable cost. These malls are undergoing fundamental transformations as they move toward "experiential" retail. High-end restaurants are increasingly important tenants, yet require significant capital expenditures before they can open.[21] Markets, fitness centers, grocery stores, and other non-traditional tenants are replacing department stores as anchors, but these, too, require substantial investments and come with additional risk. Thus, even in these shopping malls, *Quill*'s impact can

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http://www.nreionline.com/retail-cre-market-study/retail-real-estate-trends-2017-part-3-sliding-fundamentals.

[19] Baen, *The Effects of Technology on Retail Sales, Commercial Property Values, and Percentage Rents* 98-101 (2000), *available at* http://jrdelisle.com/JSCR/IndArticles/Baen_N100.pdf; *see also* Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* 10 (Oct. 2011) (estimating that retail real estate values in Ohio would decrease by $168 million in 2011 and $184 million in 2012), *available at* http://www.efairness.org/pdf/economicscenter-study.pdf; *California Study* 13-14, *supra* note 2 (estimating that retail real estate values in California would decrease by $3.4 billion in 2020).

[20] Shulman, *In the E-Commerce Revolution, Brick-and-Mortar Defenses Are Limited and Costly* (Oct. 2017), http://www.anderson.ucla.edu/Documents/areas/ctr/ziman/UCLA_Economic_Letter_Shulman_10.10.17.pdf; *see also* Fung, *Mall Dividends Soar Above 15%, Tempting Big Investors*, Wall Street Journal, Feb. 13, 2018 ("[S]econd-tier malls have little upside when online shopping is gaining prominence."), https://www.wsj.com/articles/mall-dividends-soar-above-15-tempting-big-investors-1518523200.

[21] Shulman, *supra* note 20.

readily be felt. That impact reverberates to real estate investors, including pension funds and investors in Real Estate Investment Trusts ("REITs").[22]

What is more, *Quill* actively impedes the industry's efforts to adapt. Retailers and real estate companies are experimenting with innovative ways to attract new tenants and customers notwithstanding the growth of online retail. One promising strategy is to cater to online-only retailers seeking to develop or expand their brick-and-mortar presence, either permanently or through "pop-up" shops.[23] These arrangements would undoubtedly be much more robust if not for *Quill*, which *expressly* penalizes physical presence. One study found that a 1 percent increase in a State's sales tax rate would decrease the probability that an online-only retailer would open a store in that State by approximately 4 percent.[24] And an online-only retailer seeking to open a temporary pop-up store in a new state might be even more hesitant to do so, given con-

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[22] Lerner, *Retail REITs in Adaptation Mode*, REIT, July 27, 2017 (noting that retail REIT investors earned approximately 10 percent less in dividends in early 2017 than in the same period in 2016), *available at* https://www.reit.com/news/reit-magazine/july-august-2017/retail-reits-adaptation-mode; Alster, *Investing in Malls, Despite Store Closings*, N.Y. Times, July 14, 2017 (noting 17 percent average negative return among retail REITs since last June), https://www.nytimes.com/2017/07/14/business/mutfund/real-estate-investment-malls.html?_r=0.

[23] *See, e.g.*, Hughes, *Pop Up Goes the Retail Scene as Store Vacancies Rise*, N.Y. Times, May 30, 2017, https://www.nytimes.com/2017/05/30/realestate/commercial/pop-up-stores-retail-vacancies.html.

[24] *See* Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 238 (Apr. 2010).

siderable uncertainty about how the physical-presence rule could affect its long-term operations (*e.g.*, whether a temporary pop-up store would be enough to trigger the tax-collection obligation and whether that obligation would continue even after the pop-up store had run its course).

Quill's physical-presence rule thus hampers the very innovation that retailers and real estate companies are undertaking in response to the rise of online retail (which *Quill* itself has helped fuel). What is innovative about these new arrangements is the seamless integration of online and in-store shopping experiences. The clothing company Bonobos, for example, now has over a dozen "guideshops" where customers can try on clothing in every size, color, fit, and fabric that the company offers, order their desired merchandise, and receive those items in the mail a few days later.[25] Similarly, Warby Parker's brick-and-mortar stores allow shoppers to try on dozens of pairs of glasses, assisted by employees with easy access to their online accounts. And at Rent the Runway's flagship store, employees can immediately see the options customers have been eyeing online and offer on-the-spot personal styling.[26]

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[25] Green, *Bonobos Is Opening Retail Stores—But You Can't Actually Take Any of the Clothes Home*, Business Insider, July 16, 2015, http://www.businessinsider.com/bonobos-opened-a-store-where-you-cant-physically-buy-anything-2015-7.

[26] Howland, *Rent the Runway Boosting Physical Store Strategy with New Flagship*, Retail Dive, Dec. 6, 2016, http://www.retaildive.com/news/rent-the-runway-boosting-physical-store-strategy-with-new-flagship/431747/; Gustafson, *As Online Sales Reach New Highs, Rent the Runway Goes Analog*, CNBC, Dec. 5, 2016, https://www.cnbc.com/2016/12/05/as-online-sales-reach-new-highs-rent-the-runway-goes-analog.html.

All these companies have combined the most valuable features of online shopping—convenience and selection—with the attentive, one-on-one customer experience that online companies cannot provide. These experiences also help recapture the sense of place and community that many retail centers are in danger of losing as traditional retailers close down. The results have been positive for the retail industry; companies that have both an online and a physical presence have proven more profitable than companies that rely on either channel alone.[27] The retail real estate companies that many amici represent also benefit significantly from this kind of innovation, as the unique experiences offered by online companies draw new customers and help revitalize their shopping centers.

The law should foster this kind of innovation. *Quill*, however, stifles it, by raising the costs and creating uncertainty for online companies experimenting with physical presence as a way to reach new markets. That provides yet another reason for this Court to abrogate *Quill*.

D. *Quill* Deprives State And Local Governments Of Much-Needed Revenue

All the consequences of *Quill* described above—on brick-and-mortar retail, on unemployment, on property values, and so on—have a concrete impact on public coffers. State and local governments derive an overwhelming percentage of their budgets from three key sources of tax revenue: sales, property, and income

[27] L2, *Intelligence Report: Death of Pureplay Retail* 39 (Jan. 12, 2016), *available at* https://www.l2inc.com/research/death-of-pureplay-retail.

taxes. *Quill* reduces all three revenue streams, with severe consequences for public services.

First, *Quill* directly and indirectly reduces sales-tax revenue in the 45 States that collect it by permitting—and even encouraging—widespread tax evasion. Sales tax is most easily collected at the point of sale, but *Quill* prevents States from requiring online and mail-order retailers to take on the responsibility of collecting it. While *Quill* does not absolve consumers of the obligation to pay taxes on their purchases (an online customer still owes the State a *use* tax set at exactly the same rate), few taxpayers are even aware of this obligation, and only 1.6 percent nationwide comply.[28]

As South Dakota has explained (Br. 34-35), state and local governments would have collected billions more in sales-tax revenue in recent years if not for *Quill*'s loophole. By one estimate, they lost $23 billion in sales-tax revenue in 2012—a number that is projected to rise to $33.9 billion in 2018 and $51.9 billion in 2022.[29] And the loss of brick-and-mortar stores drives that number up even higher by further eroding the tax base. Once shuttered, these businesses can neither

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[28] Joffe-Walt, *Most People Are Supposed To Pay This Tax. Almost Nobody Actually Pays It*, NPR, Apr. 16, 2013, http://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax.

[29] Marketplace Fairness Coalition, *Case for Fairness*, http://www.efairness.org/files/united-states.pdf (last visited Mar. 4, 2018); *see also* U.S. Gov't Accountability Office, GAO-18-114, *Sales Taxes: States Could Gain Revenue from Expanded Authority, But Businesses Are Likely to Experience Compliance Costs* 11-12 (Nov. 2017) (estimating that state and local governments would have gained between $8 billion and $13 billion in 2017 if not for *Quill*), https://www.gao.gov/assets/690/688437.pdf.

make additional sales themselves nor purchase goods from their own suppliers in other sectors. Although difficult to quantify, *Quill*'s total effect on sales tax revenues is undeniably significant.

Second, *Quill*'s impact on the real estate industry reduces state and local property tax revenues. Shopping centers, for example, currently pay $27.8 billion in local property taxes nationwide.[30] But that figure will decrease as more and more retail real estate remains vacant and property values decline. A nationwide study estimated that, by lowering the value of retail real estate, the decline in demand for such real estate has resulted in foregone property taxes of $528 million dollars.[31] A California-specific study estimated that retail real estate value in that State alone will decrease by $3.4 billion by 2020, resulting in lost property taxes of approximately $34 million.[32] And, as explained above (at 9-10), the decline in retail also reduces residential property values in surrounding neighborhoods. That, too, will ultimately reduce the property taxes that state and local governments can collect.

Third, *Quill* further strains state and local coffers by contributing to rising unemployment in the retail industry. An estimated 89,000 employees in general merchandise stores lost their jobs between October 2016 and April 2017—a number that exceeds the entire

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[30] International Council of Shopping Centers, *How Do Shopping Centers Impact the U.S. Economy?*, https://www.icsc.org/uploads/t07-subpage/US-Economic-Impact-2017.pdf (last visited Mar. 4, 2018).

[31] *Empty Storefronts* 3, *supra* note 17.

[32] *California Study* 13-14, *supra* note 2.

workforce of the U.S. coal industry.[33] Again, *Quill* is responsible for at least some of this job loss: In California, for example, the ability of online retailers to avoid sales taxes will cause the loss of approximately 38,900 jobs in the retail sector (and 63,400 jobs total) by 2020.[34] The increase in unemployment decreases state income tax revenues and burdens state unemployment programs.

These budget shortfalls strain state and local governments' ability to provide much-needed public services. Notably, many of those services *directly benefit* online retailers. For example, approximately 8 percent of state spending and 4 percent of local spending goes toward building and maintaining highways and roads[35]—*i.e.*, the very infrastructure online retailers use to deliver their goods from distant States. *Cf. Quill*, 504 U.S. at 328-329 (White, J., dissenting in part) (noting that "out-of-state seller" may "creat[e] the greatest infrastructure burdens"). These improvements are often funded by sales-tax revenue. For example, Virginia's legislature hoped to fund its 2013 transportation bill with revenue from online sales taxes, but after Congress failed to pass the necessary leg-

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[33] Corkery, *Is American Retail at a Historic Tipping Point?*, *supra* note 9.

[34] *California Study* 15, *supra* note 2.

[35] Urban Institute, *State and Local Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-expenditures (last visited Mar. 4, 2018).

islation the State had to increase the state gas tax instead.[36]

Other state and local services that may suffer as a result of *Quill* include health care, fire protection, law enforcement, and, perhaps most importantly, education. In South Dakota, for example, the lost sales-tax revenue directly impacted the State's ability to pay teachers' salaries and forced the State to increase the sales-tax rate to make up the difference. Pet. Br. 16. *Quill* thus severely burdens state and local governments' ability to provide needed services and accurately plan for their futures.

E. *Quill* Inflicts Particularly Severe Harm On Rural Communities

The loss of brick-and-mortar retail and the resulting downstream effects are sobering nationwide. But they are particularly devastating in the nation's rural and agricultural communities, where the decline in employment opportunities and the rise in store closings have left rural families struggling.

As one rural economist explains, "[f]arm household well-being is very dependent on rural community prosperity," in part because "farm households have become more dependent on off-farm income."[37] As jobs in man-

[36] Portnoy, *Va. Gas Tax Set to Increase After Congress Fails to Pass Online Sales Tax Bill*, Wash. Post, Nov. 27, 2014, https://www.washingtonpost.com/local/virginia-politics/va-gas-tax-set-to-increase-after-congress-fails-to-pass-online-sales-tax-bill/2014/11/27/609952ea-74fa-11e4-9d9b-86d397daad27_story.html?utm_term=.46d4e18314c4.

[37] Testimony of Dr. Bruce Weber, Senior Economist, Rural Policy Research Institute, Before the S. Comm. on Agriculture, Nutrition, and Forestry, at 2, May 25, 2017 (emphasis omitted),

ufacturing and other non-farm industries dwindled, rural households increasingly looked to the retail industry for jobs. Now that brick-and-mortar stores are likewise closing or scaling back, residents have even fewer employment options. Online retail is unlikely to fill the void, particularly if *Quill* remains in place. As noted, the physical-presence rule discourages online retailers from opening warehouses, manufacturing facilities, or distribution centers in rural areas to avoid triggering new collection obligations.[38] Rural and small metropolitan areas enjoy only 13 percent of jobs relating to online commerce, compared to 23 percent of brick-and-mortar retail positions.[39]

The loss of brick-and-mortar stores also adversely affects day-to-day life in rural communities, as residents are forced to travel substantial distances to access essential goods and services. Wal-Mart, for example, recently closed over 100 stores, primarily in rural areas, leaving some rural towns with no grocery stores or pharmacies in a *50-mile* radius.[40] Again, online retail

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https://www.agriculture.senate.gov/imo/media/doc/Dr.%20Weber%20Testimony.pdf.

[38] *See, e.g.*, Adamy & Overberg, *Rural America Is the New Inner City*, Wall St. J., May 26, 2017 (noting that, over the past decade, "Amazon shifted its warehousing strategy," moving warehouses away from rural areas), https://www.wsj.com/articles/rural-america-is-the-new-inner-city-1495817008.

[39] Abrams & Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017, https://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html?_r=0.

[40] Wolff-Mann, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016, http://time.com/money/4192512/walmart-stores-closing-small-towns/.

is often a poor substitute. Even for residents who can afford regular Internet access and high shipping fees, online shopping is no substitute for the convenience of a nearby grocery store or pharmacy when an unexpected need for certain items—a pain reliever, for example—arises.

The lack of convenient access to food and other necessities accelerates economic decline in many rural towns. Younger generations of farm families are already less likely to remain in towns that have few retail stores and few of the restaurants, movie theaters, and other "third places" that retail often draws—the spaces that often give the community life. *See supra* pp. 9-10. Those generations are even more likely to move and raise their families elsewhere given the increasing prevalence of rural "food deserts"—areas where people have highly limited access to affordable, nutritious food, often with serious health consequences.[41]

Finally, reduced state and local tax revenues harm rural communities in all the ways already described—*e.g.*, by reducing funding for infrastructure, schools, and other critical public services. And the measures States take to make up for lost revenue often impose special burdens on agricultural communities. In particular, state and local governments often increase property tax rates—a burden that falls particularly heavily on land-based business owners like farmers and ranchers.

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[41] Morton & Blanchard, *Starved for Access: Life in Rural America's Food Deserts*, Rural Realities, Vol. 1 No. 4 (2007), https://www.iatp.org/sites/default/files/258_2_98043.pdf.

II. THIS COURT SHOULD ABROGATE *QUILL*'S PHYSICAL-PRESENCE REQUIREMENT

South Dakota has explained at length why *Quill* is out of step with modern dormant commerce clause principles and should be overruled. Amici focus on only two points, both of which follow from the discussion above. First, *Quill itself* violates the principles animating the dormant commerce clause by systematically discouraging investment across state lines. Second, *Quill*'s unfairness to brick-and-mortar retailers and its substantial spillover effects on local communities make adhering to *stare decisis* particularly unwarranted here. Accordingly, the Court should abrogate *Quill*'s physical-presence rule and approve South Dakota's statute—which focuses on *economic* presence instead—as consistent with the dormant commerce clause.

A. *Quill* Discriminates Against And Burdens Interstate Commerce, Unlike South Dakota's Economic-Presence Statute

As *Quill* itself acknowledged, the dormant commerce clause is meant to safeguard the national economy against the "structural ills" that afflicted it under the Articles of Confederation—namely, state taxes and duties that "hindered and suppressed interstate commerce." *Quill*, 504 U.S. at 312. Accordingly, this Court has applied the dormant commerce clause to promote a unified economy, striking down state regulations and taxes that "discriminat[e] against" or "unduly burden" interstate commerce. *Id.*; *see also Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

Quill, however, produces the very effects the dormant commerce clause was intended to avert. The physical-presence rule forces States to discriminate against interstate commerce by mandating "'differential treatment of in-state and out-of-state economic interests.'" *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). By its own terms, the decision "create[d] a safe harbor" for out-of-state online and mail-order retailers, retaining the "'sharp distinction'" between them and their in-state, brick-and-mortar counterparts. *Quill*, 504 U.S. at 307, 315.

Quill also directly stifles interstate commerce by skewing the playing field toward some interstate actors and away from others. Online and mail-order companies' interstate operations thrive thanks to the effective tax subsidy *Quill* provides. But other interstate companies suffer, including the retail real estate companies that many amici represent. These companies often own properties in multiple States that could be leased to out-of-state companies looking to open retail stores, office space, local distribution centers, or warehouses. Yet *Quill* gives out-of-state companies a powerful incentive to maintain all physical infrastructure in as few States as possible.

The incentive to minimize physical presence, in turn, burdens interstate commerce by hindering innovation that would ultimately benefit consumers, local communities, and online companies themselves. As amici have explained, the relationship between online and brick-and-mortar retail can and should be complementary. *See supra* pp. 13-15. But *Quill*'s bright-line rule systematically discourages online companies from experimenting with physical stores by exposing them to new tax-collection obligations every time they expand into a new State.

By contrast, South Dakota's law would neither discriminate against nor burden interstate commerce. By focusing on retailers' *economic* rather than physical presence, the law would level the playing field for all retailers with in-state sales above a certain threshold. *See* Pet. App. 19a; *see, e.g.*, *United Haulers*, 550 U.S. at 345 (no dormant commerce clause violation where local ordinances "treat[ed] in-state private business interests exactly the same as out-of-state ones"). That would certainly benefit local retailers, which stand to regain a considerable number of shoppers. *See supra* p. 7. But the law would also promote interstate commerce by removing disincentives to investing across state lines. Out-of-state retailers that previously enjoyed a price advantage if they had no physical presence in South Dakota would be more likely to open innovative storefronts across the state—thereby generating new jobs and tax revenue, boosting struggling malls, and revitalizing local neighborhoods.

South Dakota's "economic presence" law thus provides a reasonable, workable model for state taxation of remote sellers (although other models may well develop). Unlike *Quill*, an economic-presence rule achieves the primary goal of the dormant commerce clause: encouraging, rather than suppressing, interstate commerce. In addition to abrogating *Quill*, the Court should expressly approve the economic-presence model as consistent with the dormant commerce clause, providing needed guidance to state legislatures, lower courts, and regulated entities.

B. *Stare Decisis* Does Not Justify Retaining The Physical-Presence Rule

The Court has explained that *stare decisis* has considerably less force where the "facts have so changed

… as to have robbed the old rule of significant … justification." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-855 (1992); *see American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 302 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate[.]"). That is the case here. *Quill* rested on assumptions about technology that are no longer accurate and on a judgment that any costs of the physical-presence rule would be "offset by [its] benefits," *Quill*, 504 U.S. at 315. That, too, has proved incorrect.

Quill was decided in 1992, before the global internet boom. At that point, it may have been reasonable to conclude that a "'sharp distinction'" could be drawn between retailers with a physical presence in a State and retailers that "'[did] no more than communicate with customers in the State by mail or common carrier.'" *Quill*, 504 U.S. at 307 (quoting *Bellas Hess*, 386 U.S. at 758). In today's world, that distinction is illusory. As Justice Kennedy has observed, "cell phones, tablets, and laptops" now allow businesses to "be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Direct Mktg. Ass'n*, 135 S. Ct. at 1135 (Kennedy, J., concurring). A brick-and-mortar presence is thus no longer necessary to ensure an adequate "nexus" between the taxed activities and the taxing State.

Similarly, collecting sales taxes in multiple States is now a straightforward task, not a "'virtual welter of complicated obligations.'" *See Quill*, 504 U.S. at 313 n.6; *Bellas Hess*, 386 U.S. at 759-760. As one study explained: "Since *Quill*, we have witnessed a proliferation of more sophisticated technology through which sellers can affordably track sales tax collection rules, collect taxes owed, remit them to taxing jurisdictions, and comply with other requirements. The technology available today bears no resemblance to what existed in 1992."[42] Thus, that aspect of *Quill*'s reasoning cannot be squared with today's circumstances either.

Most notably for amici, the fundamental transformation of the retail industry has called into question *Quill*'s cost-benefit analysis—*i.e.*, its conclusion that the "artificiality" of requiring a physical presence "is more than offset by the benefits of a clear rule." *Quill*, 504 U.S. at 315. Those benefits are considerably weaker today. As noted earlier, the pop-up store phenomenon suggests that applying the rule in today's retail industry may not be as straightforward as *Quill* envisioned. Nor is it clear that the physical-presence rule still "encourages settled expectations" and "fosters investment." *Id.* at 316. As explained above, the physical-presence rule often *deters* investment. Brick-and-mortar stores facing an uncertain future are less likely to invest in their communities. *Supra* pp. 10-11. And online retailers seeking to minimize their tax obligations are less likely to expand to new states. *Supra* pp. 13-14.

The costs, by contrast, are undeniably greater than *Quill* anticipated. As Justice Kennedy explained, the physical-presence rule is "now inflicting extreme harm and unfairness on the States" in the form of "startling revenue shortfall[s]." *Direct Mktg. Ass'n*, 135 S. Ct. at 1134-1135 (Kennedy, J., concurring). And the harm extends well beyond States to encompass the diverse industries and communities that amici represent. The past 25 years of experience have thus amply "pointed

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[42] Yetter & Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 571 (2017).

up [the] shortcomings" of *Quill*'s physical-presence rule. *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). The Court should therefore depart from *stare decisis* and abrogate the *Quill* rule.

CONCLUSION

Quill's physical-presence rule should be abrogated and the judgment of the Supreme Court of South Dakota should be reversed.

Respectfully submitted.

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MARCH 2018