17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari
to the South Dakota Supreme Court

BRIEF FOR *AMICUS CURIAE* STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICUS CURIAE* STREAMLINED SALES TAX GOVERNING BOARD, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The Streamlined Sales Tax Governing Board (the "Governing Board") is the body that administers the Streamlined Sales and Use Tax Agreement (the "Agreement" or "SSUTA"),[2] a multi-State agreement that "simplif[ies] and modernize[s] sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102.

Forty-four States, the District of Columbia, Puerto Rico, and numerous members of the business community participated in the development of the Agreement. The Governing Board is currently comprised of twenty-four States. Twenty-three of these States (the "Streamlined States") are full members of

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[1] Petitioners and Respondents filed Blanket Consents to the filing of *amicus* briefs with the Clerk's office on January 31, 2018 and February 5, 2018, respectively. On March 1, 2018, *Amicus* notified the parties of its intention to file this brief. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

[2] The Streamlined Sales and Use Tax Agreement may be found at http://tinyurl.com/SSUTA. This brief describes in general terms certain material provisions of the Agreement. There are of course more detailed elements to all of the provisions described below, and this brief is not intended as a comprehensive summary of all aspects of the Agreement.

the Governing Board. SSUTA § 801.[3] One State, Tennessee, has "achieved substantial compliance with the terms of the Agreement taken as a whole, but not necessarily each provision," and is an associate member. SSUTA § 801.3. In addition, twenty States, the District of Columbia, and Puerto Rico serve the Governing Board as non-voting advisor States. SSUTA § 801.4.[4] The Governing Board is also advised by members of the private sector through the Business Advisory Council, and by representatives of local government through the Local Government Advisory Council. SSUTA §§ 811, 812.[5]

The Streamlined States have all made the sovereign choice to obtain a significant component of their total revenue from sales taxes. Those States, which include Petitioner South Dakota, have enacted the requirements of the Agreement by modifying their sales tax laws and adopting numerous uniform

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[3] The full member states are 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. A map of the Streamlined States can be found at http://tinyurl.com/StreamlinedStatesMap.

[4] The advisor states are Alabama, Arizona, California, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Mexico, New York, Puerto Rico, South Carolina, Texas, and Virginia.

[5] The members of the Local Government Advisory Council are the Government Finance Officers Association, National Association of Counties, National League of Cities, and U.S. Conference of Mayors.

definitions and administrative provisions. In doing so, these States allow remote and local sellers alike to take advantage of simplified sales tax administration and compliance, overcoming any undue burdens identified by this Court in *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and *Quill v. North Dakota*, 504 U.S. 298 (1992). Streamlined States have also designed and implemented technological solutions to address compliance and enforcement problems, and they work together through the Governing Board to monitor compliance with Agreement. SSUTA § 809.

Since 1999, the group of States that eventually became the Governing Board (including Petitioner), along with numerous members of the business community, have devoted countless hours to developing a program that addresses the practical and pragmatic concerns identified by the Court in *Bellas Hess* and *Quill*. Beyond those concerns, the Governing Board focuses its work on lessening burdens on participating sellers. The Business Advisory Council and Local Government Advisory Council assisted the Governing Board at every step, ensuring that the final Agreement covered the full range of participants in the sales tax system. In turn, the legislatures of Petitioner and the other Streamlined States took the baton from the Governing Board and revised their statutes and regulations to come into compliance with the Agreement.

This enormous undertaking, spanning States from coast-to-coast and border-to-border, has resulted

in a truly streamlined system of calculating, collecting, and remitting sales taxes. With this wealth of experience and full understanding of the modern practicalities of sales tax collection, the Governing Board has a significant interest in this Court reconsidering and rejecting the long-outdated assumptions underlying *Bellas Hess* and *Quill*. In particular, the Governing Board has a strong interest in this Court recognizing that the undue burden envisioned in those cases has been eliminated by the Streamlined States. As Justice Kennedy indicated in *Direct Mktg. Ass'n v. Brohl,* "[a] case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Beyond harming States, *Quill* also harms local businesses and the economies of cities, towns, and villages that support those local businesses by placing a thumb on the competitive scale for remote sellers. *Quill's* foundational premise no longer holds, and the decision of the South Dakota Supreme Court should be reversed.

SUMMARY OF ARGUMENT

As with its namesake writing device, *Quill* belongs to another century and is entirely unsuited to today's business world. When *Quill* and *Bellas Hess* were decided, the thought that retailers in one State could feasibly calculate, collect, and remit sales taxes owing to far-flung jurisdictions was as unthinkable as the idea that we would all soon walk around with supercomputers in our pockets or even on our wrists.

We live in a world where marketing efforts can be tailored to individual consumers on a minute-by-minute basis, where talk of Big Data has long ago replaced talk of Big Brother, and where "free one-day shipping" has become a primary driver in consumer purchasing decisions. It beggars belief to conclude that anything other than a physical presence test is unduly burdensome as a matter of Constitutional law.

Today, thanks to the hard work of State legislators, tax administrators, local government officials, and their partners in the business communities, the Streamlined Sales and Use Tax Agreement has dismantled each of the practical roadblocks identified by this Court in *Quill* and *Bellas Hess.* Through this Agreement, sales tax administration now includes centralized administration, simplified rate and exemption structures, and streamlined recordkeeping. The Agreement also provides remote sellers[6] with the option to use Certified Service Providers, paid for by the participating States, that eliminate the burdens on the sellers related to determining the taxability of products, calculating the appropriate tax, preparing and filing the required returns, making the remittances, and resolving any audits or notices received by those sellers.

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[6] The term "remote seller(s)" as used in this brief has the same meaning as the term "volunteer seller" as defined in Section D.2.(b) of the contract the Governing Board has with the Certified Service Providers (the "CSP Contract"). The contract may be found at http://tinyurl.com/CSPContract.

As described in detail in the Petitioner's brief, *Quill* is no longer consistent with modern Commerce Clause jurisprudence from this Court. As discussed below, the Streamlined Sales and Use Tax Agreement demonstrates that not even *stare decisis* should provide a basis for reaffirming *Quill*'s anachronistic standard. The practical considerations that provided a foundation for that case have entirely eroded.

In our federal system, the States possess an undeniable sovereign interest in collecting the sales taxes duly enacted by their legislatures. The fairest and most efficient means to collect those taxes is to require all sellers to collect the taxes from their customers at the time of purchase. Through the use of Certified Service Providers, who handle all of the calculation, reporting, and remittance obligations, this process is made easier still. Any burden on interstate commerce arising from such a system pales in comparison to the burden imposed by mandating that tens of millions of individual purchasers track, report, and remit sales taxes on every untaxed purchase they make. As other *amici* have explained, the real-world consequence of this burden is that vanishingly few individuals track and remit these taxes. Indeed, it would not be a stretch to say that a substantial portion of Americans have come to believe, incorrectly, that purchases from remote sellers are always a bargain because they are "sales tax free."

Whatever justification for a physical-presence test may have once existed, its time has long passed. Rather than protecting commerce, it has distorted

markets and created a nation of unwitting tax evaders. Practical, elegant solutions, such as those achieved through the Agreement, demonstrate that *Quill's* physical-presence test has outlived its usefulness. Accordingly, this Court should explicitly hold that physical presence is no longer mandated by dormant Commerce Clause jurisprudence.

ARGUMENT

The Streamlined Sales and Use Tax Agreement Has Eliminated Any Undue Burden on Interstate Commerce.

A. The Practical Burdens of Compliance Formed the Foundations of *Bellas Hess* and *Quill.*

In 1967, with both the postal zip code system and the nationwide direct dial telephone system only a few years old, this Court struck an Illinois law requiring out-of-state mail order companies to collect Illinois sales taxes on sales into Illinois. *Bellas Hess*, 386 U.S. at 759–60. The Court grounded its holding in the practical burdens that would derive from every State and municipality requiring sellers in every other State and municipality to collect their taxes. "The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" *Id.* (footnotes omitted). In light of the many different local and State tax regimes, the Court

held that "if just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable." *Id.* at 759 n.14 (internal quotations omitted).

In 1992, two years before the world's first secure retail transaction over the Web, this Court revisited the issue of cross-State sales tax collection in *Quill,* 504 U.S. 298. Although the Court recognized that modern Commerce Clause jurisprudence might not dictate the same result, it reaffirmed *Bellas Hess* on *stare decisis* grounds. *Id.* at 311, 317. In doing so, it calculated the number of taxing jurisdictions to be more than 6,000 and again noted the burden on sellers that would result from a collection requirement in all of those jurisdictions. *Id.* at 313 n. 6.

B. The Streamlined States Have Eliminated Any Undue Burdens On Sellers.

The forty-four States, the District of Columbia, Puerto Rico, and the members of the business community who participated in the development of the Agreement studied *Bellas Hess* and *Quill,* determined to create a voluntary multi-State agreement that would address the Court's concerns. They recognized that this Court was concerned with the variations in sales tax rates, allowable exemptions, and administrative and recordkeeping requirements in States and local jurisdictions throughout the country. They also realized that a cooperative system of sales tax administration would benefit not only the State

and local economies, but also the nation's consumers and Main Street businesses, who were being forced to shoulder the full weight of tax compliance. Working with input from States, municipalities, and the business community, the Governing Board created the Agreement guided by a statement of purpose that directly answered the Supreme Court's concerns: "It is the purpose of this Agreement to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102.

It is with no small amount of pride that the Governing Board can today say that the Streamlined Sales and Use Tax Agreement has fully addressed the practical problems identified in *Bellas Hess* and *Quill* relating to multiplicity of jurisdictions, rates, exemptions, and record-keeping requirements.[7] For proof that the Agreement, along with technological innovations, has removed the collection and reporting burdens, this Court need look no further than the list of over 3,800 active sellers who, as of February 1, 2018, have voluntarily registered to collect and remit taxes in all of the Streamlined States, regardless of any physical presence in those States. These active sellers hail from every one of the fifty States (including States that do not themselves impose a sales tax), the

[7] All of the provisions discussed below, which remove any undue burdens on sellers, apply fully to remote sellers that voluntarily register under the Agreement and make sales into the State of South Dakota (and all other Streamlined States).

District of Columbia, and several foreign countries. This Agreement is working.

1. State and Local Taxes Are Administered at the State Level.

The keystone simplification required by the Agreement is State-level administration for *all* sales and use taxes imposed by the State or its political subdivisions. SSUTA § 301. Sellers are only required to register with, file returns with, and remit funds to the State-level authority, and can only be audited by that central authority. The central authority, then, is responsible for distributing any applicable local taxes to the appropriate jurisdictions. There is no risk that a seller's interstate business will be subject to "a virtual welter of complicated obligations to local jurisdictions." *Bellas Hess*, 386 U.S. at 760.

2. Tax Rates Are Standardized at the State Level.

The Agreement has reduced the number of sales tax rates in place in each jurisdiction. In selecting its sales tax rate, each State must generally select a single State-wide rate, and the same is true for each local jurisdiction.[8] SSUTA § 308.

The Agreement also requires each State to provide an easily-accessible, searchable, and current

[8] The Agreement provides exceptions for food, food ingredients and drugs (State-level only), and other types of products sold by sellers located within that State, such as motor vehicle fuel, electricity, and piped natural gas.

database of all the sales tax rates for all of the jurisdictions levying taxes within the State. SSUTA § 307. Streamlined States agree to provide at least 60 days' notice to sellers (120 days in the case of catalog sellers) of local rate changes and to set the effective date of all changes to the first day of a calendar quarter. SSUTA at § 305.

Critically, Streamlined States relieve sellers from all liability for any errors in the database. SSUTA § 306. In short, the Member States and their local partners have made every effort to relieve retailers' burden in this area.

3. Exemptions Are Standardized at the State Level.

Streamlined States also generally agree to a single statewide set of tax exemptions that apply to both State and local taxes. As a result, rather than hundreds or even thousands of sets of exemptions that vary across municipalities, there is generally only one set of exemptions per State. SSUTA § 316.

For exemptions based on the status of the purchaser (such as an exemption for charitable organizations), or the use of the purchased item (such as an item used in manufacturing), Streamlined States agree that the seller need only require the purchaser to provide an electronic or written exemption certificate. SSUTA § 317. Absent some type of fraud on the part of the seller, if the seller obtains and retains the necessary information, it is absolved of any liability if the customer is later deemed to have

claimed the exemption improperly. *Id.* Thus, the basis for the Court's concern in *Bellas Hess*, 386 U.S. 759 n. 14, that the application of exemptions "especially for the industrial retailer – turns on facts which are often too remote and uncertain for the level of accuracy demanded by the prescribed system" has been eliminated.

Product-based exemptions (such as exemptions for food or health care items) have been similarly standardized State-wide. These exemptions are subject to uniform definitions and are downloadable in a "taxability matrix." SSUTA § 328. As with many other provisions of the Agreement, a retailer who relies on the taxability matrix is absolved of liability for under-collection of tax resulting from erroneous data in the taxability matrix. SSUTA § 328.C.

4. State and Local Tax Bases Are Standardized.

The Agreement requires the tax base for local jurisdictions to be identical to the State tax base unless prohibited by federal law, with very few exceptions. Most of these exceptions relate to products that are only sold by local sellers. SSUTA § 302.

5. Administrative Requirements Are Standardized Across All Member States.

The Agreement also addresses the Court's concern about multiple layers of administrative and recordkeeping requirements.

a. Uniform Definitions. The Agreement requires Streamlined States to adopt uniform definitions of

many administrative terms, such as "bundled transactions,"[9] "delivery charges," "direct mail," "lease or rental," "purchase price," "retail sale," "sales price," "telecommunications nonrecurring charges," and "tangible personal property." SSUTA Appendix C, Library of Definitions.

b. Simplified Electronic Returns. Multistate sales tax compliance is also greatly simplified through a simplified electronic return. *See generally* SSUTA § 318. No Streamlined State may require more than one return per State for each reporting period; each State return must include all local taxing jurisdictions in the State; and no State can require the return sooner than twenty days after the close of the reporting period. The return itself is in a uniform format approved by the Governing Board, and no State may require additional data elements. The Streamlined States also must adopt standardized processes for receiving the information returns and for accepting electronic payments. SSUTA § 319.

c. Centralized Registration. Each Streamlined State participates in a single central online registration system. SSUTA § 303. Thus, a retailer registers once on one site and is then automatically registered for all the Streamlined States. SSUTA § 401. Any change to a retailer's information, such as changes in address, contact information, or similar items, may be made for all jurisdictions by a one-time

[9] A "bundled transaction" is one where two or more items are sold for a single price, but the component items are not all subject to the sales tax. SSUTA § 330.

change on the central site. A retailer no longer has to update the information separately for every jurisdiction. SSUTA § 303.J.

d. Other Uniform Procedures. In addition to the simplifications outlined above, there are myriad other uniform procedures that the Streamlined States have agreed to, including, uniform sourcing rules to prevent double taxation (SSUTA §§ 309, 310, 310.1, 311, 313, 313.1, and 314), uniform rules for the enactment and administration of exemptions (SSUTA §§ 316 and 317), uniform rules for the recovery of bad debts (SSUTA § 320), uniform provisions governing sales tax holidays (SSUTA § 322), uniform limitations on caps and thresholds (SSUTA § 323), uniform rounding rules (SSUTA § 324), and standardized customer privacy requirements (SSUTA § 321).

6. Certified Service Providers Are Made Available to Remote Sellers at No Charge.

In an effort to further alleviate the burden on sellers, the Governing Board has contracted with Certified Service Providers to handle all sales and use tax functions for remote sellers, and the Streamlined States compensate the Certified Service Providers for providing these services to remote sellers.

Certified Service Providers perform all of the remote sellers' sales and use tax functions, other than the sellers' obligation to remit tax on their own purchases. SSUTA § 203 and CSP Contract § B.1. By using a Certified Service Provider, the remote seller is relieved of any burden to determine the taxability of

its products, calculate the rate of applicable tax, prepare and file the return, or respond to audits.

These Certified Service Providers must meet stringent requirements for accuracy, financial stability, and taxpayer confidentiality. SSUTA § 501. Critically, with limited exceptions, the remote seller who uses a Certified Service Provider is relieved of virtually all liability, in the absence of fraud, for any errors in compliance. SSUTA § 502.

C. *Stare* Decisis Provides An Insufficient Basis to Uphold Obsolete Precedent.[10]

The Governing Board is justifiably proud of the value this broad-based Agreement has brought to State and local economies across this country. Affirmation of *Quill* would discourage additional States from joining the Agreement, thereby stagnating the benefits streamlining provides to the States, the participating sellers, and the national economy. Worse, affirmance of *Quill* could well serve to chill these types of cooperative efforts and instead encourage each State and municipality to develop a "go it alone" approach that maximizes revenues in the short term, at the

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[10] Justice White noted in his *Quill* dissent that "[t]he Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability." 504 U.S. at 332 (White, J., dissenting). As Justice White noted, that conclusion need not follow, and in all events, retroactivity can be addressed directly by the Court. *Id.* Moreover, South Dakota has made every effort to protect sellers from retroactive liability. *See* Pet. Brief at 17.

expense of consistency and administrability. Overruling *Quill,* on the other hand, will be the most effective way to avoid the "welter of inconsistent obligations" that will undoubtedly arise.

Put simply, *Quill* should be overruled. The practical realities that explicitly or impliedly justified the physical-presence test no longer apply. Indeed, in these days of telecommuting, pop-up operations, and electronic commerce, the task of determining "physical presence" (and therefore a *Quill*-based obligation to collect) may well be more pragmatically difficult than simply collecting and remitting taxes through the mechanism set up by the Agreement.

As Justice Kennedy noted in his concurrence in *Direct Marketing Ass'n v. Brohl*, "[a] case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." 135 S. Ct. at 1135 (Kennedy, J., concurring).

The physical presence test can no longer be justified as a practical solution to an impossibly complicated problem. The Agreement demonstrates that fears of undue burdens are misplaced. Even under a system of voluntary compliance, this collection system is working.

For all of these reasons, the Governing Board fully agrees with Petitioner: *Quill* should be overruled, and South Dakota's law should be upheld.

CONCLUSION

The decision of the South Dakota Supreme Court should be reversed.

Respectfully submitted,

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