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 WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH DAKOTA

BRIEF OF AMERICANS FOR TAX REFORM AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief in support of Respondents' position is filed by the Americans for Tax Reform ("ATR"). ATR is a non-profit 501(c)(4) organization that represents the interests of the American taxpayers at the federal, state, and local levels. ATR has no parent companies, subsidiaries, or affiliates, other than the Americans for Tax Reform Foundation, with which it shares board and staff. No publicly held corporation has an ownership stake of 10% or more in ATR.

ATR is based in Washington, D.C. and represents the interests of taxpayers across the country. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates citizens and government officials about sound tax policies to further these goals. This case involves an important tax policy issue on which ATR has testified and otherwise written extensively about the taxpayer burdens of expanded tax nexus. As such, ATR has an institutional interest in ensuring that the physical-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certify that no counsel for any party to this matter authored this brief in whole or in part. Counsel also certifies that no person other than amicus curiae, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by *amici curiae*.

presence standard is upheld and that the U.S. Supreme Court continues to defer to Congress in the regulation of interstate commerce. Such deference is essential in order to protect taxpayers from taxation without representation.

SUMMARY OF THE ARGUMENT

In the telling of the State of South Dakota and its *amici curiae*, collecting use tax in 2018 is as easy as obtaining free software and "turning on" collection in every jurisdiction into which a business makes sales. But this picture is removed from reality and overlooks the substantial costs that a lower nexus threshold will impose on businesses. If this Court overturns *Quill*, retailers with no presence in a taxing State will face complex and costly collection obligations, the threat of expensive and intrusive audits from thousands of taxing jurisdictions, and potential retroactive tax assessments. For service providers, such obligations may arise when a seller has neither solicited sales nor agreed to provide services in a state, simply by virtue of the purchaser's decision to pass on the benefit of the service to employees located across the country. These are heavy burdens on interstate and international commerce, and the economic nexus thresholds imposed by South Dakota are insufficient to alleviate them.

A ruling for South Dakota in this matter would suffer from two other procedural concerns: namely, that the Court cannot prevent states from subjecting taxpayers to retroactive state tax liability, and that the Court cannot rule for South Dakota without legislating a new nexus standard—*i.e.*, without performing the task that this Court assigned to Congress in 1992. While South Dakota suggests that other states are "likely" not to apply a ruling in its favor retroactively, it offers no guarantees. Similarly, more than 40 states and territories filed an amicus brief with the Court in this case, and they noted their "incentives" not to apply a ruling in South Dakota's favor retroactively but stopped well short of promising not to do so. The states' history of retroactive tax assessments provides substantial reason to doubt that the "incentives" toward fairness will hold the states back from a money grab if the Court eliminates the physical-presence rule on which businesses have relied for more than 50 years.

The Court also must recognize that a ruling for South Dakota would have the effect of new national nexus legislation. South Dakota's economic nexus thresholds involve judgments about the proper balance of the interests of States, remote sellers of property and services, in-state businesses, individual and business buyers, international businesses, and other constituencies—all of which adds up to a quintessentially *legislative* choice about how best to balance those interests. In 1992, this Court held that Congress was the right party to determine a new standard (if any) for sales and use tax collection nexus—and Congress has indeed been engaged in a robust debate about potential replacements. It would be a giant step in the opposite direction to decide, 26 years later, that the

South Dakota legislature is the right party to establish that new standard. The briefs of numerous *amici* in this case serve to underline that the case before this Court involves a *legislative*, rather than judicial, choice.

Finally, the Court should pause to consider what message it would send to the country if it were to reward South Dakota for passing an intentionally-unconstitutional law with a fast-track appeal mechanism in an effort to get this case before the Court. To rule for South Dakota would be a dangerous precedent that would encourage other states to pass unconstitutional laws to force the reconsideration of numerous other constitutional issues.

ARGUMENT IN SUPPORT OF RESPONDENTS

I. South Dakota's economic nexus thresholds are not sufficient to prevent the imposition of undue burdens on multistate and international sellers of property and services.

In its brief, South Dakota dismisses the burdens on interstate commerce of remote use tax collection as "marginal" and offers tax collection software as a singular and complete solution to these burdens. Pet. Br. at 44–47. South Dakota goes so far as to suggest that retailers can *profit* from collecting sales tax with the right tax collection software. *Id.* at 47. South Dakota's portrayal of comprehensive, multistate use tax collection for remote retailers is far too simplistic and vastly understates the actual burdens that compliance will place on retailers. If this Court overturns *Quill*, retailers with no presence in a taxing State will face complex and costly collection obligations, the threat of expensive and intrusive audits from thousands of taxing jurisdictions, and potential retroactive tax assessments. For service providers, such obligations may arise when a seller has neither solicited sales nor agreed to provide services in a state, simply by virtue of the purchaser's decision to pass on the benefit of the service to employees located across the country. These are heavy burdens on interstate and international commerce, and the economic nexus thresholds imposed by South Dakota are insufficient to alleviate them (and in the case of international sellers and service providers, do not even address them).

The sales and use tax system in the United States is convoluted. Forty-five States, the District of Columbia, and thousands of municipalities, counties, and special taxing districts impose sales and use taxes. In *Quill*, this Court determined that the threat of complying with 6,000 taxing jurisdictions imposed a burden on interstate commerce. *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.6 (1992). Since *Quill*, the number of jurisdictions has increased to nearly 10,000.[2] Contrary to South Dakota's suggestion, complying with the requirements of each one of these jurisdictions is not as simple as plugging an address into a piece of software. That might identify a tax *rate*, but it will not help a retailer deal with the wide variation in taxability, interpretation, and administration that exists among taxing jurisdictions.

Tax software is imperfect at identifying what is subject to sales tax, and shedding light on this question is no easy task. Take sales of flags, for example. In Wisconsin, the U.S. flag and the Wisconsin state flag are exempt from sales tax, while all other flags are taxable.[3] Wisconsin is not an isolated case: at least 14 states have distinct rules for determining which flags are taxed and which are not.[4] The story is the same for other goods and services: for example, many States exclude candy

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[2] Joseph Bishop-Henchman and Richard Borean, *State Sales Tax Jurisdictions Approach 10,000,* Tax Foundation (Mar. 24, 2014), https://taxfoundation.org/state-sales-tax-jurisdictions-approach-10000/.

[3] Wisc. Stat. § 77.54(46).

[4] Joseph Bishop-Henchman and Steven Pahuskin, *Happy Flag Day! 14 States Exempt Flags from Their Sales Tax*, Tax Foundation (June 24, 2011), https://taxfoundation.org/happy-flag-day-14-states-exempt-flags-their-sales-taxes-0/.

from their sales tax exemption for food,[5] but others do not.[6] Moreover, determining *what* qualifies as "candy" can be challenging. New Jersey considers a granola bar "candy"—unless it contains flour.[7] By contrast, neighboring New York exempts all granola bars from sales tax.[8] Detailed classification problems are rampant in the American sales and use tax system, and retailers must solve these problems to stay in full compliance. If this Court overturns *Quill*, multistate and international sellers will be burdened with understanding the specific way that dozens—if not hundreds—of jurisdictions tax (or do not tax) their merchandise.

The varying administrative procedures among jurisdictions provides an additional burden on interstate commerce. For example, some rely on origin-based sourcing (taxing to the location of the seller), while others rely on destination-based sourcing (taxing to the location of the buyer).[9] This

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[5] *See, e.g.*, N.J. Division of Tax'n Reg. Servs. Branch Technical Bull., TB-70, Sales and Use Tax ("The sales of candy are subject to tax.").

[6] *See, e.g.*, 18 Cal. Code. Regs. 1602(a)(1) (exempting "candy, confectionary, and chewing gum").

[7] *Id.*

[8] *See See* N.Y. State Dep't of Taxation and Fin., Tax Bulletin ST-103 (June 1, 2014) (excluding "granola or cereal bars" from the definition of "candy and confectionary").

[9] *Contrast* 86 Ill. Admin Code 130.605(a) ("Where tangible personal property is located in this State at the time of its sale (or is subsequently produced in Illinois), and then

variation presents the possibility that a retailer must decide which competing jurisdiction should receive the tax it collects. Jurisdictions also apply different rules for how a retailer's customer may claim a tax exemption. Some accept multistate exemption certificates, while others require their own unique certificate—or no certificate at all.

Other than variations in tax rates, South Dakota does not address any of this complexity in its brief. But even when it comes to rates, South Dakota vastly underestimates the cost of its proffered solution to that problem—tax software. The sticker price of tax software may be affordable, but retailers confronting multistate tax collection will face significant implementation costs. They must hire staff to install, monitor, and maintain the software. There are costs involved with coordinating tax software with their existing systems and updating the software. For example, the owner of Garage Flooring (an online business with around $1,000,000 in annual revenue) calculated that it would cost around $40,000 to collect tax accurately in multiple states—a figure that is exclusive of additional

delivered in Illinois to the purchaser, the seller is taxable if the sale is at retail") *with* 20 N.Y. Comp. Codes R. & Regs. 525.2(a)(3) ("Except as specifically provided otherwise, the sales tax is a 'destination tax.' The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.").

annual costs related to training and operations.[10] The CEO and co-founder of Scrapbook.com estimated that his small online business would be subjected to $60,000–$80,000 in integration costs alone to comply with additional use tax collection obligations.[11]

More generally, the "at no charge" software solutions touted by South Dakota (Pet. Br. at 46) are estimated to cost between $80,000–$290,000 in initial setup and integration, and approximately $57,500–$260,000 per year to maintain.[12] This high cost could destroy small businesses. The average mid-market retailer stocks between 2,000–30,000 separate products.[13] These items must be logged and classified to determine whether they are taxable in each particular taxing jurisdiction. This could take

[10] James Gattuso, *Taxing Online Sales: Should the Taxman's Grasp Exceed His Reach?* The Heritage Foundation (June 19, 2013), https://www.heritage.org/taxes/report/taxing-online-sales-should-the-taxmans-grasp-exceed-his-reach.

[11] eMainStreet *, The Costs of "Free" Software – An Important Study by TruST,* (Oct. 12, 2013), https://www.emainstreet.org/articles/the-costs-free-sales-tax-software.

[12] Larry Kavanagh and Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax for Mid-Market and Online Catalog Retailers,* True Simplification of Taxation (Sept. 2013) at 1, http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

[13] *Id.*

anywhere between 100 and 2,500 hours—a tremendous expense of labor.[14]

If this Court overturns *Quill*, burdensome compliance with sales and use tax collection will be only part of the story. In a world governed by economic nexus standards, retailers will be open to a multitude of intrusive audits from thousands of potential jurisdictions. Florida can audit a coffee retailer in Hawaii. The revenue department of Montgomery, Alabama, can compel the production of sales data from a SaaS provider in Vermont, California, or, in some cases, an international location. Simply by selling its wares over the internet, a retailer exposes its books and records to the eyes of government agencies across the nation. The cost for this increased audit attention is significant: one study estimates that businesses who are newly exposed to multistate tax collection will need to add one-half of one full-time position to deal with the increased governmental inquiries.[15] This is an easier pill for large retailers to swallow, but as audit expenses increase the costs of participating in the online marketplace, smaller companies will be pushed out. Far from creating a level playing field, removing *Quill*'s physical presence standard gives

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[14] *Id* at 5.

[15] *Id.* at 7.

an advantage to large businesses because of the common fixed costs of compliance software.

The Court must also recognize that South Dakota's low economic-nexus thresholds would have international tax implications. Traditional tax policy has been based on territorial taxation (*i.e.,* businesses are only taxed in jurisdictions in which they have a presence). However, the European Union is aggressively pursuing American businesses with a proposed "interim digital tax" on revenues that, according to the EU, result from interactions with European customers through digital channels.[16] The Court's decision regarding the circumstances under which a state may impose a tax collection obligation on a remote seller will affect the EU's thinking regarding its own ability to impose tax obligations on American companies that earn income from foreign sources without establishing any "physical presence" there.

South Dakota attempts to give the Court comfort that its economic nexus standard—$100,000 in sales or 200 transactions in a year—provides a safe-harbor for small retailers from the burdens of interstate sales and use tax compliance. This claim is questionable in its own right. (A retailer whose

[16] *See, e.g.,* Press Release, European Commission, "Digital Taxation: Commission proposes news measures to ensure that al companies pay fair tax in the EU," at http://europa.eu/rapid/press-release_IP-18-2041_en.htm (Mar. 21, 2018, *last accessed* Mar. 30, 2018).

average sale is $10 has nexus with South Dakota with sales of only $2,000.) But unless this Court is willing to set a bright-line standard that definitively protects small businesses, the elimination of *Quill*'s physical-presence standard will create a race to the bottom. Given the opportunity, the States will turn "substantial nexus" under *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), into nothing more than constitutional due process, under which any directed commercial activity (maybe even one sale over the internet) provides a State the power to tax. Use tax collection in *all* 10,000-plus jurisdictions could become the de facto rule. That is a rule that small- and medium-sized online retailers cannot bear.

Finally, exposure to tax audits from far-flung jurisdictions highlights a deeper concern, one rooted in the American system of government. South Dakota is asking this Court for increased permission to impose its taxes on businesses who have no ability to influence the imposition and administration of those taxes through representative government—a classic case of exporting the tax burden to impose taxation without representation.[17] The physical

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[17] *See* Katie McAuliffe, *Top Five Reasons Conservatives Oppose the Marketplace Fairness Act*, Townhall, (Mar. 25, 2013), https://townhall.com/columnists/katiemcauliffe/2013/03/25/top-five-reasons-conservatives-oppose-the-marketplace-fairness-act-n1548461; Americans for Tax Reform, *Marketplace Fairness Act, Exposing your business to Every State's IRS*, Posted by Katie McAuliffe, (April 29, 2013),

presence rule of *Quill* provides a connection (albeit approximate) between the taxing power of the government and the political power of the taxpayer: retailers with physical locations in a State are likely to have employees and owners who reside in the State and who can participate in the State's political process. The pure economic nexus standard offered by South Dakota obliterates this connection. For all of these reasons, South Dakota's low economic-nexus thresholds are insufficient (on their own or in comparison to the existing physical-presence threshold) to protect multistate and international sellers of property and services from the undue burdens of complying with multi-jurisdictional sales and use tax collection obligations.

II. A ruling for South Dakota would subject taxpayers to substantial retroactive state tax liability.

In addition to the prospective burdens that taxpayers would face if the Court were to reverse *Quill*, online retailers would face an additional burden: a real risk of retroactive tax assessments. Although *South Dakota* has chosen not to seek the collection of taxes for periods prior to the enactment of S.B. 109 (Pet. Br. at 48), other states will not be so generous. South Dakota does not even suggest that its sister States cannot impose retroactive sales

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https://www.atr.org/marketplace-fairness-act-exposing-business-states-a7586.

tax assessments, only that they will "likely follow suit." *Id.* at 48.

South Dakota proffers several "safeguards" against retroactive tax liability: sister-state retribution, prohibitions against enacting retroactive state laws, political pressure, and acts of Congress. Pet. Br. at 48–49. None of these is compelling. On the contrary, states have demonstrated a voracious appetite for retroactive tax laws. For example, after an unfavorable court decision against its Department of Revenue, the Washington State Legislature enacted legislation with 23 years of retroactive application. *See Dot Foods Inc. v. Dep't of Revenue*, 372 P.3d 747 (Wash. 2016), *cert. denied*, 137 S. Ct. 2156 (2017). Likewise, the Michigan Legislature recently enacted retroactive income tax legislation to deny corporate taxpayers the financial benefit of a decision by the State's highest court. *See, e.g.*, *Gillette Commercial Operations N. Am. and Subsidiaries v. Mich. Dep't of Treasury*, 878 N.W. 2d 891 (Mich. Ct. App. 2015), *cert. denied*, 137 S. Ct. 2157 (2017). In an ironic twist, the attorneys general of both of those States—along with the AGs of other states that have issued egregious retroactive tax assessments in recent years, including Arizona and Kentucky—signed on to an amicus brief in this case. In that brief, they acknowledge the "thorny" issues of retroactivity raised by the possibility of reversing *Quill* but assert that existing guidance would "limit retroactive enforcement" and add that "other legal and pragmatic safeguards will address any constitutional concerns."[18] Yet those "legal and pragmatic safeguards" have done nothing to stop those same States in numerous cases of retroactive tax liability in the years since *Quill*.[19]

Precedent from this Court demonstrates plainly that an abrogation of *Quill*'s physical presence rule would have retroactive application. Just a year before the *Quill* decision, this Court held that when the court has applied "a rule of law . . . in one case it must do so with respect to all others." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1992). Justice Scalia believed it beyond the Court's power to apply rules on a purely prospective basis. *Id.* at 549 (Scalia, J., concurring); *see also Am. Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 201 (1990) ("Either enforcement of the statute at issue . . . was unconstitutional, or it was not; if it was, then so is enforcement . . . whether occurring before or after our decision."). The impact of the Court's holding in *Quill* was retroactive, and any adjustment to *Quill*'s

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[18] *See* Brief for Colorado and 40 Other States, Two United States Territories, and the District of Columbia as *Amici Curiae* Supporting Petitioner, at 19.

[19] *See* Tom Cornett and Samantha Hesley, *Taxpayer Challenges to Retroactive State Tax Legislation*, STATE TAX NOTES 647, 652-58 (Feb. 29, 2016).

physical presence rule will apply retroactively as well.

The States and Territories that filed the amicus brief carefully avoid a promise not to apply a ruling in South Dakota's favor retroactively; rather, they note their "incentives" to implement regulatory changes "carefully and fairly" and weakly state that they "generally" provide advance notice of substantial legal changes.[20] This is little comfort to taxpayers familiar with the consistent pattern of retroactive state taxation.

III. Congress, rather than the South Dakota legislature, is the appropriate and best party to legislate the proper nexus standards for balancing the interests of States, businesses, individuals, and taxpayers.

South Dakota asks this Court to remove the physical-presence limitation upheld in *Quill* and in its place approve a test for substantial nexus crafted by its own state legislature (i.e., $100,000 of annual sales or 200 annual transactions into the State). In essence, South Dakota asks this Court to play the role of a legislature—by eliminating the physical-presence standard on which businesses have relied for half a century and replacing it with a specific new economic threshold suggested and approved by the

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[20] *See* Brief for Colorado and 40 Other States, at 19.

legislature of a single state. But South Dakota's nexus threshold—or any other specific economic nexus threshold—is inherently arbitrary and can be evaluated only by considering whether South Dakota has set forth a new rule that appropriately balances the competing interests of the States, remote sellers of property and services, in-state businesses, individual and business buyers, international businesses doing business in the United States, and others—an inherently and quintessentially *legislative* task. Viewed another way: in 1992, this Court stated that Congress was the right party to determine a new standard for sales and use tax collection nexus, if any. Now in 2018, South Dakota asks this Court to decide that the *South Dakota legislature* is the right party to establish that new standard.

Fortunately, this Court has already reached a much more sensible conclusion: Congress is the branch that should resolve this question. *See Quill*, 504 U.S. at 318 (noting that reaffirming the physical presence standard was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."). This case presents a question for which *Quill* gave a clear and cogent answer: if the States desire a rule other than physical presence, Congress must provide it. As *Quill* reminds, "the better part of both wisdom and valor is the judgment of the other branches of the

Government." *Id.* at 319 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 638 (1981) (White, J., concurring)).

Indeed, Congress has been in the midst of robust debate on this topic for years, with proposed legislation introduced in previous terms and in the current Congress. *See, e.g.,* H.R. 2887, 115th Cong. (2017-2018) (the "No Regulation Without Representation Act of 2017," which would codify the physical presence requirement for e-commerce); H.R. 2193, 115th Cong. (2017-2018) (the "Remote Transactions Parity Act of 2017," which would allow remote sellers who are members of the Streamlined Sales and Use Tax Agreement to collect and remit sales tax). That these proposed solutions differ in their approach to interstate sales and use tax collection demonstrates that Congress is engaged in a substantive discussion of potential solutions. Because the legislative process is in motion (as this Court intended), the Supreme Court should defer to Congress in this matter. If anything, this Court should remind Congress and the States that it is Congress's job to determine an appropriate standard in this arena, and that Congress's deliberation in doing so is a feature—not a failure—of that constitutional separation of powers.

The *Quill* Court's reliance on *stare decisis* to maintain the physical presence rule had much to do with the fact that Congress is the appropriate body to decide (i) what substantial nexus means; and (ii) to set any new standard in accordance with the legislative process, which allows for a collection, consideration, and balancing of differing viewpoints and priorities. The fact that Congress is *perhaps* taking longer than the Court envisioned in 1992 has no effect on the particular force of *stare decisis* in this case. It is far from a given that the Court in *Quill* expected Congress to change *Quill's* physical-presence standard before 2018 (nor is it clear that Court had any expectations at all regarding the timing of such a change). South Dakota and its *amici curiae* act as though the 26 years between *Quill* and this case have substantially altered the question before this Court. But this is not the case. Though the physical-presence standard may be imperfect, under *stare decisis* it remains the rule until Congress acts.

Finally, the *amici curiae* briefs illustrate the broad recognition that the question before the Court is a quintessentially *legislative* task. Two briefs offered in support of neither party ask the Court to bless standards other than the one at issue. First, the Tax Foundation indicates that an economic-nexus threshold would avoid imposing undue burdens on interstate and international businesses—*if* it is scaled "in proportion to [states'] population or total economy relative to South

Dakota's . . . ."[21] Second, David Fruchtman argues that South Dakota's economic-nexus threshold is constitutional—but that the Court should create a carve-out for sellers of *services*.[22]

Separately, the Retail Litigation Center has written on behalf of a trade coalition in support of South Dakota. That brief notes the variety of economic-nexus thresholds that different states have chosen but acknowledges that if this Court rules for South Dakota, then South Dakota's thresholds will become the de facto standard.[23] Finally, the brief for the United States also acknowledges Congress's authority to resolve the issue in question but claims that Congress's ability to do so will somehow be "enhanced" if the Court

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[21] Brief of Tax Foundation as *Amicus Curiae* In Support of Neither Party," at 16–17 (suggesting that New York should impose an economic-nexus threshold of $2.28 million, which would be "comparable" to South Dakota's law based on their population differences).

[22] Brief for David A. Fruchtman as *Amicus Curiae* Supporting Neither Party, at 24–25 ("[U]ntil the states develop an efficient methodology for taxing interstate sales of services, this Court should continue to apply the physical presence requirement to service providers.").

[23] Brief of Retail Litigation Center, Inc. and 21 Retail and Wholesale Distribution Trade Associations as *Amici Curiae* in Support of Petitioner, at 33 (noting the different thresholds chosen by Alabama, Tennessee, and Wyoming and asserting that no state would seek to enact a threshold lower than South Dakota's).

narrows the scope of *Quill*.[24] The United States then concludes its brief by arguing that the Court should hold that a seller's "Internet presence in South Dakota" (whatever that means) is sufficient to permit South Dakota to impose a collection obligation on sellers there, without acknowledging that such a ruling would set a new standard across all states that would apply to national and international sellers of property and services.

By highlighting the variety of possible nexus standards for multistate use tax collection, these briefs demonstrate that the question before the Court is much more legislative than judicial. The Court should affirm its own "wisdom and valor" from 1992 when it held that Congress is the branch of government best suited to resolve this issue.

IV. Rewarding South Dakota for passing an unconstitutional law to challenge a Supreme Court precedent could have dangerous consequences for our constitutional order.

The majority in *Quill* extolled the "special force" of stare decisis in the context of the Commerce Clause, where Congress has the power to rewrite the rules. *Quill,* 504 U.S. at 320. That special force is doubly applicable in this case, because a reversal of

[24] Brief for the United States as Amicus Curiae Supporting Petitioner, at 32.

Quill would require the Court not only to undermine its own statements regarding the force of *stare decisis* but also to legislate from the bench and decide whether the new South Dakota economic nexus thresholds are sufficient to prevent the imposition of undue burdens on businesses. Congress's ability to set a new rule to replace the physical-presence standard was itself an important reason cited by the majority that decided *Quill*. It would therefore be a giant step in the opposite direction for the Court to reverse *Quill* and, in the process, usurp the undeniably legislative responsibility of determining the new nexus thresholds.

States have made clear that they believe the time for Congress to have replaced the physical-presence standard is long overdue. If this Court agrees, then it should take the opportunity of this case to remind Congress of the task that the Court assigned to it 26 years ago by urging Congress either to affirm the existing standard or to establish a new one. To rule for South Dakota, by contrast, would create a dangerous precedent with the potential to yield awful complications outside of the staid world of state tax, with consequences that could affect life and liberty instead of merely dollars and cents.

If successful, South Dakota will have established a blueprint for reversing a Supreme Court ruling (*i.e.,* pass a plainly unconstitutional law with a fast-track-appeal mechanism). South Dakota's success would surely embolden numerous other actors to try the same stunt. Unfortunately, it takes little imagination to think of efforts in other arenas that could quickly yield dangerous stand-offs in state capitals and state courts across the country (e.g., aggressive libel laws allowing prosecutors to bring charges against journalists for publishing inaccurate reports to challenge existing First Amendment rulings, or aggressive gun-restriction laws to try to force a new review of the scope of the Second Amendment).[25]

To reward South Dakota by reversing *Quill* under these circumstances would encourage and embolden other states to pass unconstitutional laws to force reconsideration of numerous other issues, potentially causing cracks in the rule of law and leading to constant efforts at the state level to upset long-settled constitutional issues.

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[25] *See, e.g.,* Editorial, *An Ohio Bill Would Ban All Abortions. It's Part of a Bigger Plan*, THE NEW YORK TIMES, Mar. 25, 2018, at A22.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Supreme Court of South Dakota and uphold *Quill*.

Respectfully Submitted,

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