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 STATE OF NEW HAMPSHIRE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), this Court held in the context of sales and use taxes that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992). The Court reaffirmed this holding in *Quill*, which has now shaped sales-and-use-tax dormant Commerce Clause jurisprudence for the past 51 years.

Amicus curiae, the State of New Hampshire, has a compelling interest in supporting *Bellas Hess*'s physical-presence requirement for sales and use taxes for at least the following reasons. First, New Hampshire has a long, proud history of frugality and limited taxation. It does not impose a sales tax on retail goods and its retail businesses have never had to face the burden and expense of attempting to collect, hold, and account for the sales taxes of different jurisdictions. Second, abrogation of *Bellas Hess*'s physical-presence requirement will harm New Hampshire's sovereign interests by permitting other States to reach across its borders and impose sales tax collection compliance on New Hampshire retail businesses. Such a result threatens brick-and-mortar border businesses, as well as small Internet retailers, within New Hampshire with sales tax obligations that promise to be extraordinarily difficult for them to detect and may expose them to unknown tax liability in other States. Permitting other States to extend their sales tax collection obligations

into New Hampshire will also dilute an important economic advantage that New Hampshire possesses as a non-sales tax State in attracting new business to open and settle within its borders. Finally, imposing increased sales tax collection compliance obligations on New Hampshire businesses will likely increase the price of retail goods for New Hampshire consumers, as New Hampshire retailers pass the cost of collections and compliance with out-of-state taxing jurisdictions onto local customers. Accordingly, for at least all of the above reasons, the State of New Hampshire has a compelling interest in supporting *Bellas Hess*'s physical-presence requirement for sales and use taxes.

SUMMARY OF THE ARGUMENT

1. *Stare decisis* applies with enhanced force in this case and requires *Bellas Hess*'s physical-presence requirement to be retained. Significant property and contract rights have developed around and in reliance on this physical-presence requirement, which has been in place for over 50 years. Congress retains the power to relax this physical-presence requirement in prospective, nuanced ways that this Court cannot. Congress is acutely aware of *Bellas Hess*'s physical-presence requirement and has proposed legislation concerning it on many occasions. Congress's refusal to modify *Bellas Hess*'s physical-presence requirement is a powerful indication that Congress believes that this

Court has struck the correct balance. Also, *Bellas Hess*'s physical-presence requirement creates a bright-line rule in the unique and complex area of sales and use taxation. A bright-line rule in this context provides confidence to small business owners and private individuals regarding their sales and use tax obligations and enables them to do business over the Internet without the need to invest in expensive software and other professional services in order to discern and meet thousands of different sales and use tax obligations.

2. No special justifications of any significance justify abandoning *Bellas Hess*'s physical-presence requirement. Changes in law have not undermined *Bellas Hess*'s physical-presence requirement. Rather, this Court's jurisprudence and the jurisprudence of other States has developed around and in reliance on *Bellas Hess*'s physical-presence requirement. State-by-state innovation and creativity in taxing large Internet retailers is also enabling States to identify physical presences potentially substantial enough to permit the imposition of sales and use taxes, consistent with *Bellas Hess*'s physical-presence requirement. *Bellas Hess*'s physical-presence requirement is not a detriment to coherency in the law. It is instead consistent with this Court's substantial nexus jurisprudence, while recognizing the uniqueness of sales and use taxes and the complexities that surround individual compliance with them. *Bellas Hess*'s physical-presence requirement is also not badly reasoned, but is a sensible, workable rule that is capable of being adapted and applied to large Internet retailers, while insulating small

Internet retailers, small brick-and-mortar businesses, and private individuals from overly burdensome, multitudinous sales and use tax obligations. To the extent the States believe that *Bellas Hess*'s physical-presence requirement should be changed or modified to better accommodate the reality of Internet sales and mobile transactions, those concerns are better addressed by Congress than this Court.

3. In short, a "superpowered form of *stare decisis*" attaches to *Bellas Hess*'s physical-presence requirement for sales and use taxes that is not outweighed by any special justifications. *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2410 (2015). Accordingly, *Bellas Hess*'s physical-presence requirement should be retained on *stare decisis* grounds. The judgment below should therefore be affirmed.

ARGUMENT

I. *Stare decisis* demands adherence to *Bellas Hess*'s physical-presence requirements for sales and use taxes.

Stare decisis is the "foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014). It "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne*

v. Tennessee, 501 U.S. 808, 827 (1991). In this way, *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals. . . ." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

While *stare decisis* is flexible to a point, like all self-policing measures, it furthers its intended goals only if it is applied in a consistent and principled manner over time. Thus, by necessity, "[r]especting *stare decisis* means sticking to some wrong decisions." *Kimble*, 135 S. Ct. at 2409. "Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Id.* An argument that the Court got it wrong "cannot by itself justify scrapping settled precedent." *Id.* Rather, a " 'special justification' – over and above the belief that precedent was wrongly decided" must be shown. *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)).

Whether a "special justification" exists and whether that "special justification" is sufficient to supplant existing precedent is evaluated on a case-by-case basis. The analysis has three components. First, the Court determines the strength with which *stare decisis* applies. Second, the Court determines the strength of the "special justifications" asserted. Third, the Court balances the *stare decisis* considerations against the "special justifications" to determine whether to adhere to or abandon a particular precedent. This Court's

opinion in *Kimble* follows that basic analytical framework. 135 S. Ct. at 2409-15 (assessing strength of *stare decisis* considerations and balancing them against the special justifications asserted).

A. *Stare decisis* applies with enhanced strength in this case.

The doctrine of *stare decisis* applies with enhanced strength in this case for at least the following four reasons.

1. Overturning *Bellas Hess*'s physical-presence requirement for sales and use taxes will unsettle existing property and contract rights.

Stare decisis is at its "acme" where overturning precedent means unsettling existing property and contract rights. *See*, *e.g.*, *Kimble*, 135 S. Ct. at 2410; *Payne*, 501 U.S. at 828. "That is because parties are especially likely to rely on such precedents when ordering their affairs." *Kimble*, 135 S. Ct. at 2410; *see Printup v. Kenner*, 180 N.W.2d 512, 513 (S.D. 1920) (applying *stare decisis* to uphold incorrect decision of statutory construction because that decision established a rule of property in the state for 16 years). "The maxim of *stare decisis* has generally been strictly applied where titles to real estate have been acquired or commercial usages have been established under decisions of the court; even where such decisions may have been erroneous, for the reason that a reversal of such decisions would

disturb property rights already acquired and would work harm and mischief upon those who have honestly invested their means upon the faith of such decisions." *Williams v. Fiat & Slagle Co.*, 42 A. 431, 438 (Del. 1899).

This Court's dormant Commerce Clause jurisprudence lies inescapably at the confluence of property and contract rights. Its purpose is to establish the boundary between congressional power to regulate interstate commerce and State power to burden interstate commerce. "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, State tariffs and other laws that burdened interstate commerce." *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

This Court recognized early on that, absent some limits on the States to impose tax burdens on interstate commerce, goods in one part of the country could be effectively excluded from the markets of another part of the country by a crush of multitudinous State taxes. *Case of the State Freight Tax*, 82 U.S. 232, 280 (1872); *see also McCulloch v. Maryland*, 17 U.S. 316, 431 (1819) (recognizing that "the power to tax involves the power to destroy"). As a result, this Court's dormant Commerce Clause jurisprudence has not just engendered significant reliance interests, it has shaped and formed industries and, in some cases, has permitted the creation of businesses that might not

otherwise exist. It is therefore critical that the Court treat its dormant Commerce Clause jurisprudence as establishing clear, fixed, decisional boundaries that, if they are to be moved at all, move slowly, incrementally, and almost imperceptibly over time, without irreparably damaging the property and contract rights of established businesses and private individuals, or, even worse, wiping them out entirely.

Quill reaffirmed *Bellas Hess* at the dawn of the e-commerce boom. Since then, many businesses, including small businesses, have established an online presence in order to generate wealth and compete in the marketplace. Brick-and-mortar retail establishments have been steadily declining, either by shifting to an e-commerce business model in whole or in part or by going out of business. Society has similarly been devoting more resources to educating private citizens on how to create, develop, and sustain businesses that rely in whole or in part on retail sales driven by the Internet.

This massive shift in how America does business has been aided in part by *Bellas Hess*'s physical-presence requirement. Under *Bellas Hess*, small business owners can solicit customers via e-mail at little to no expense and sell their goods to customers over the Internet without having to worry about collecting sales or use taxes from jurisdictions in which they do not have a physical presence. Undoing *Bellas Hess* makes the sales and use tax obligations of these small businesses highly uncertain.

If *Bellas Hess*'s physical-presence requirement is abandoned, small Internet retail businesses will have to navigate and comply with the sales-and-use tax requirements of approximately 10,000 to 12,000 different jurisdictions. The task will be significantly burdensome, if not impossible, for many small Internet retail businesses to meet. There exists no uniform system of laws for sales and use taxes. Every State has its own exemptions, deductions, credits, and rates and some declare temporary tax holidays. Small businesses will have to employ sophisticated, expensive software to manage these various different tax obligations and will have to invest additional resources, including potentially seeking legal and accounting advice, to determine what precisely their sales-and-use tax obligations are. *See Bellas Hess*, 386 U.S. at 759-60 (observing that the "many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations").

The prevalence of remote Internet transactions only complicates matters. For example, it is not uncommon in today's world that a customer who is domiciled in California may review an e-mail solicitation that exists on a computer server in Virginia on her iPhone while traveling through Kansas. She may then purchase a product based on that solicitation using her iPhone from a New Hampshire business, provide her California address as her billing address, and have the product shipped to her college dormitory at Kentucky

State University. Let's say all of foregoing jurisdictions except for New Hampshire have a sales tax potentially applicable to the transaction. The seller has to collect and remit the tax. In the absence of *Bellas Hess*'s physical-presence requirement, the following questions arise: does this small New Hampshire business have a "substantial nexus" to any of the sales and use taxing jurisdictions mentioned and, if so, to which ones? If the small business owner cannot divine the answers to these questions, it can never meaningfully meet its sales tax obligations and, more importantly, can never feel secure that someday a particular State will not assess it for years of back sales taxes it could not identify and collect from customers in real time.

Perhaps the answer to the above questions is that a small business in this scenario has no "substantial nexus" to any of the sales and use taxing jurisdictions mentioned above, other than the jurisdiction in which the small business is physically present. This Court's existing jurisprudence would appear to support that result. *See*, *e.g.*, *Quill Corp.*, 504 U.S. at 315 n. 8 (suggesting that having "title to 'a few floppy diskettes' present in a State" in addition to common carrier contacts does not constitute a "substantial nexus" under the Commerce Clause); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) ("We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call."); *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977) (refusing to endorse a "'slightest presence' standard of constitutional nexus"); *United*

Air Lines, Inc. v. Mahin, 410 U.S. 623, 631 (1973) (holding that State has no nexus to tax an airplane based solely on its flight over the State).

But that result will effectively create a mobile customer exception in place of *Bellas Hess*'s physical-presence requirement. Such an exception will inevitably permit certain types of businesses to flourish over others. It may also cause industries to restructure and adapt their business models in different ways to try to ensure a "substantial nexus" is not created with any particular sales tax jurisdiction other than the sales tax jurisdiction in which the business itself is physically located. Then, in another 25 to 30 years, this Court will be asked by another State to overrule that exception and further dilute dormant Commerce Clause requirements in the sales and use tax space. That does not seem like the preferred course.

Perhaps instead the answer to the above hypothetical is that Kansas, in addition to New Hampshire, has a "substantial nexus" to the sale sufficient to tax it. After all, a sales tax is a tax on the incidence of a particular transaction, *i.e.*, the passing of title in exchange for consideration. If the sale of the retail good is deemed consummated in Kansas, then Kansas sales tax should apply. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) ("It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by the State.").

But that begs the next question: How does the small business Internet retailer in New Hampshire know the sale was consummated in Kansas, as opposed to California (the billing address) or Kentucky (the delivery address)? After all, the purchaser was simply passing through Kansas at the time the purchase was consummated and may have only been technically present in Kansas for a short period of time. If the small business Internet retailer cannot discern where the sale was consummated, it cannot appropriately collect, account for, and remit the sales tax owed.

The problem of "sourcing" – the way in which the location of the consummation of the sale is determined – would be exacerbated by overruling *Bellas Hess* and *Quill*. "Every state imposing sales and use taxes provides sourcing rules to identify the location of a sale and to determine which jurisdiction is entitled to the revenue generated from the transaction." Bloomberg BNA, 2017 Survey of State Tax Departments, Special Report, Multistate Tax Report, Vol. 24, No. 4 at S-357 (Tax Management Inc. 2017). "Yet sourcing has become a complicated endeavor for taxpayers." *Id.* "Sourcing rules vary from state to state and may depend upon the object of the transaction; they may be further complicated by the type of transaction and mode of delivery." *Id.* As complicated as these varying sourcing rules may be now, they will only get worse without the bright-line test which currently bounds the question in the sales and use tax realm.

Thus, even setting aside the burden each State's substantive sales and use tax laws will impose on

small businesses and private individuals, the added burden on those entities and persons to understand and comply with the various State sourcing rules for sales and use taxation without a bright-line physical-presence rule could force those businesses and persons out of the Internet retail market. Such a potential result militates strongly in favoring of retaining *Bellas Hess*'s physical-presence requirement.

Brick-and-mortar border businesses in New Hampshire also face the loss of their property and contract rights if *Bellas Hess*'s physical-presence requirement is overturned. New Hampshire borders Vermont, Massachusetts, Maine, and the Province of Quebec. New Hampshire has no sales tax, a feature which draws residents of neighboring States across the border to make purchases from New Hampshire border businesses. These border businesses may advertise into these bordering jurisdictions, but otherwise lack a physical presence in them. If *Bellas Hess*'s physical-presence requirement is overturned, these border stores may now be faced with the burden of having to collect, account for, and remit sales tax to those neighboring States. That obligation will likely force those businesses to increase their prices to consumers, including New Hampshire consumers, who have chosen through their elected representatives to keep the price of retail goods in their State low by not imposing a statewide sales tax on retail goods.

In short, significant reliance interests, including significant property and contract rights, have developed around *Bellas Hess*'s physical-presence requirement

over the past 51 years. *Bellas Hess* and *Quill* cannot be overturned without unsettling those property and contract rights and potentially putting certain small businesses or private individuals out of business. Moreover, to the extent there is even uncertainty as to whether overturning *Bellas Hess*'s physical-presence requirement will unsettle existing property and contract rights (and the *amicus curiae* suggests that there is plenty), this Court has held that such uncertainty cuts in favor of *stare decisis*. *See Kimble*, 135 S. Ct. at 2410 ("[E]ven uncertainty . . . cuts in Marvel's direction. So long as we see a reasonable possibility that parties have structured their business transactions in light of *Brulotte*, we have one more reason to let it stand.").

Accordingly, *stare decisis* considerations should be given great weight in this context because of the significant property and contract rights that have developed around and in reliance on *Bellas Hess*'s physical-presence rule.

2. Congress retains the power to relax *Bellas Hess*'s physical-presence requirement in prospective, nuanced ways that this Court cannot accommodate.

This Court has recognized that *stare decisis* carries special weight where Congress retains the power to resolve the matter. *See*, *e.g.*, *Kimble*, 135 S. Ct. at 2409; *Quill Corp.*, 504 U.S. at 318. Congress possesses the legislative tools necessary to resolve the debate

regarding *Bellas Hess*'s physical-presence requirement in a responsible manner without unduly harming small businesses and private individuals. For example, Congress can set an effective date for a law lifting *Bellas Hess*'s physical-presence requirement out far enough to ensure that persons have enough time to restructure their businesses to comply with any new sales and use tax obligations they might face. Congress can also hear testimony and review evidence related to the impact any proposed legislation may have on the States, the e-commerce industry, large businesses, small businesses, and private individuals. Congress can then weigh the various interests involved and fashion a solution that is far more comprehensive, nuanced, and protective of existing property and contract rights than this Court is capable of crafting. Among other things, Congress could provide tax deductions, compensatory schemes, or other forms of financial relief to small businesses and private individuals to help them shoulder the cost and burden of compliance with any new sales and use tax obligations.

But Congress cannot cede authority to the States that this Court deems Congress never had in the first place. Thus, if overturning *Bellas Hess*'s physical-presence requirement for sales and use taxes turns out to be a problematic economic decision, only this Court will be able to correct that decision and only in an appropriate case. Accordingly, *stare decisis* considerations should be given considerable weight in this case because Congress retains the power to relax *Bellas*

Hess's physical-presence requirement in prospective, nuanced ways that this Court cannot.

3. Congress has foregone multiple opportunities to change or otherwise modify *Bellas Hess* and *Quill*.

Considerations favoring *stare decisis* also apply with added force where Congress "has spurned multiple opportunities to reverse" the decision. *Kimble*, 135 S. Ct. at 2404; *see*, *e.g.*, *Watson v. United States*, 552 U.S. 74, 82-83 (2007) ("What is more, in 14 years Congress has taken no step to modify *Smith*'s holding, and this long congressional acquiescence has enhanced even the usual precedential force we accord to our interpretations of statutes.") (internal quotations omitted); *Shepherd v. United States*, 544 U.S. 13, 23 (2005) ("In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed since *Taylor* came down, without any action by Congress to modify the statute. . . .").

Congress has been well aware of *Bellas Hess*'s physical-presence requirement for over half a century and has proposed legislation concerning the requirement on many occasions, including very recently. *See*, *e.g.*, H.R.2193, Remote Transactions Parity Act (2017-2018); H.R.2887 – No Regulation Without Representation Act of 2017 (2017-2018); S.976 – Marketplace Fairness Act of 2017 (2017-2018); *see also Quill Corp.*, 504 U.S. at 318 n.11. Congress is therefore acutely aware of *Bellas Hess*'s physical-presence

requirement and has nonetheless spurned multiple opportunities to change or alter it. This state of affairs also cuts in favor of applying *stare decisis*.

4. *Bellas Hess*'s physical-presence requirement creates a bright-line rule of taxation that creates business confidence.

This Court has recognized that bright-line rules in the area of transaction taxation are preferable over more amorphous balancing or factor-driven tests. *See*, *e.g.*, *Quill Corp.*, 504 U.S. at 315-16; *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113-14 (2005) ("The application of the interest-balancing test to the Kansas motor fuel tax is not only inconsistent with the special geographic sovereignty concerns that gave rise to that test, but also with our efforts to establish 'bright line standard[s]' in the context of tax administration.") (quoting *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999)). Indeed, this Court identified the bright-line test *Bellas Hess* created as a virtue in *Quill*: "Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." *Quill Corp.*, 504 U.S. at 315-16.

Approximately 10,000 to 12,000 different jurisdictions exist in the United States capable of levying a sales and use tax on retail goods. The sale of retail goods is commonplace throughout the United States

and is engaged in daily by millions of small businesses and consumers. Sales taxes differ substantially from income taxes and other kinds of taxes, and this Court has properly recognized sales and use taxes as unique. The incidence of a sales tax "is not the property itself or its presence within the State," but "is the transfer of title for consideration, a legal act which can be accomplished without the property ever entering the State." *Sullivan v. United States*, 395 U.S. 169, 175-76 (1969); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("A sales tax is a tax on the freedom of purchase. . . ."); *see Jefferson Lines*, 514 U.S. at 186 ("A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which the buyer is taxed.").

Moreover, with a typical retail sale, the consumer pays the sales tax and the seller is responsible for holding the funds as a trustee for the State or local jurisdiction permitted to collect it. *See Jefferson Lines*, 514 U.S. at 190 (differentiating from an income tax on a seller and a sales tax which "falls on the buyer"). The seller becomes, in effect, an agent for the State tax collector, to move tax dollars from the buyer to the State. At the same time, in many jurisdictions, the consequences to a seller who does not faithfully fulfill their obligations with respect to such "trust fund taxes" can be severe. Typically, failure to comply encompasses personal liability, stiff penalties, and, potentially, criminal jeopardy. The seller must therefore know precisely

which States or local jurisdictions are taxing the transaction, account carefully for the collected funds, and appropriately remit those collected funds for a multitude of individual transactions.

The same burdens do not accompany income taxes, which are levied by a small fraction of the number of jurisdictions that can levy a sales or use tax and which are based on the gross taxable income or receipts of the business, subject to deductions, credits, etc., and are apportioned based on the extent of the business' activity in the State. The distinction and the justification for the bright line *in sales and use taxes* is manifest. If the State wishes to require the seller to serve as its agent for tax collection and expose the seller to the kinds of consequences noted above, it must establish a solid jurisdictional basis to fix liability, and a bright-line rule makes it fair and puts the seller on notice of what it may be getting itself, and the individuals involved, into. *See*, *e.g.*, *Quill Corp.*, 504 U.S. at 315-16 (explaining that, though a bright-line rule in the sales and use tax space may be artificial, its "artificiality . . . is more than offset by the benefits of a clear rule"); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211-13 (1960) (discussing need for due process when tasking seller to be State's sales and use tax collector).

That places *Bellas Hess*'s physical-presence requirement in a unique context that other Commerce Clause precedents did not find themselves at the time this Court overruled them. *See*, *e.g.*, *Arkansas Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Public Util. Comm'n of Rhode Island v.*

Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). Indeed, the number of taxing jurisdictions that can legitimately tax a particular item or transaction has been a relevant consideration in this Court's dormant Commerce Clause jurisprudence since the beginning. *Case of the State Freight Tax*, 82 U.S. at 280. Additionally, the number of sales transactions that occur on a daily basis across the United States far exceeds the number of times during a year a State can levy an income tax on a particular entity. Thus, certainty for small businesses and private individuals in the area of sales and use tax obligations is critical as they may not have the resources to comply with multi-jurisdictional tax obligations or to purchase the software and other services needed to ensure compliance with those obligations, including the services necessary to facilitate the careful accounting for and remittance of trust fund taxes.

Consequently, for all of the above reasons, the same "superpowered form of *stare decisis*" that existed in *Kimble* exists in this case. 135 S. Ct. at 2410. Thus, to overcome it, there must be "a superspecial justification." *Id.* For the reasons described in detail below, no such justification exists.

B. No special justifications of any significance counsel overturning *Bellas Hess*'s physical-presence requirement.

This Court has recognized at least the following special justifications that may advise overturning existing precedent: (1) whether changes in the law have

undermined the precedent; (2) the need to bring the law into line with experience and newly ascertained facts; (3) whether the precedent has become a detriment to coherence and consistency in the law; and (4) whether the precedent is unworkable in practice or badly reasoned. *See Payne*, 501 U.S. at 828; *id.* at 842 (Scalia, J., concurring); *id.* at 849 (Marshall, J., dissenting). None of these special justifications counsels in favor of overturning *Bellas Hess*'s physical-presence requirement for sales and use taxes.

First, changes in law have not undermined *Bellas Hess*'s physical-presence requirement. Rather, this Court's jurisprudence has developed around and in reliance on *Bellas Hess*'s physical-presence requirement. Not only have many cases directly relied on *Bellas Hess* and *Quill*, but many have distinguished themselves from those cases in order to bring further clarity to the boundary between congressional authority to regulate interstate commerce in the area of sales and use taxes and State authority to impose such taxes. *See*, *e.g.*, *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977); *Travelocity.com, LP v. Wyoming Dep't of Revenue*, 329 P.3d 131 (Wyo. 2014); *Overstock.com, Inc. v New York State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013); *Scholastic Book Clubs, Inc. v. Commissioner of Revenue Servs.*, 38 A.3d 1183 (Conn. 2012); *In re Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996); *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 207 Cal. App. 3d 734, 738, 255 Cal. Rptr. 77 (Cal. 1989).

State-by-state innovation and creativity in taxing large Internet retailers is also enabling States to identify physical presences that may be substantial enough to permit the imposition of sales and use taxes. *See* Brief of the Tax Foundation as Amicus Curiae in Support of Neither Party at 19-26, 27-28. Indeed, if a business desires to grow beyond a certain point, it almost certainly needs to have some form of physical presence in many or all States, even if that physical presence is through unwritten agreements with in-state agents to promote their business on local websites or through downloadable "apps" or "cookies" or data-harvesting equipment or devices. These new forms of physical presence may be capable of meeting *Bellas Hess*'s physical-presence requirement and demonstrate that legislative innovation is capable of meeting and attempting to solve the challenges presented by new modes of doing business.

Moreover, to the extent *Bellas Hess*'s physical-presence requirement could be refined for the digital age, Congress is better equipped to bring it into conformance with current experience in a much more comprehensive and nuanced fashion than this Court.

Second, *Bellas Hess*'s physical-presence requirement has not become a detriment to coherence and consistency in the law nor is it unworkable in practice. Rather, as this Court observed in *Quill*, the physical-presence requirement for sales and use taxes is consistent with this Court's substantial nexus jurisprudence and creates a bright-line rule that provides

business confidence in a unique and complex area of taxation.

Additionally, overruling *Bellas Hess*'s physical-presence requirement will not make this Court's dormant Commerce Clause jurisprudence any more coherent or consistent. As technology advances and society changes, businesses will adapt and find new business models that seek to minimize tax obligations. It is therefore inevitable that the quandary this Court faces today will re-emerge in the future, even in the absence of *Bellas Hess*'s physical-presence requirement. Thus, this case presents a critical sub-question for this Court: is its dormant Commerce Clause jurisprudence an ongoing effort in national economic policymaking or is it an attempt to discern the boundary between congressional power to regulate interstate commerce and State authority to burden it? If this Court's dormant Commerce Clause jurisprudence is an ongoing effort in national economic policymaking, then coherency and consistency in the law with respect to it will never be achieved.

Third, while some may believe that *Bellas Hess*'s physical-presence requirement established an economic error, *stare decisis* "does not ordinarily bend to wrong on the merits-type arguments; it instead assumes Congress will correct whatever mistakes [the Court] commit[s]." *Kimble*, 135 S. Ct. at 2413. In any event, far from an economic error, *Bellas Hess*'s physical-presence requirement represents a sensible, workable rule for the Internet age that is capable of being adapted and applied to large Internet retailers, while

insulating small Internet retailers, small brick-and-mortar businesses, and private individuals from overly burdensome, multitudinous sales and use tax obligations that threaten to make the price of doing business over the Internet too high for them. *Bellas Hess* was well reasoned and considered and should not be lightly overturned.

Moreover, any attempt by this Court to correct whatever economic problems it believes that *Bellas Hess* and *Quill* may have created is, at this stage, fraught with the same perils as the creation of that precedent in the first instance. *See*, *e.g.*, *Northwest States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954). Indeed, scrapping over 50 years of sales and use tax jurisprudence and attempting to reform a body of physical-presence precedent to accommodate the unique challenges and aspects those types of taxes present promises only to deepen the quagmire in which this Court's dormant Commerce Clause jurisprudence finds itself. *Northwest States Portland Cement Co.*, 358 U.S. at 458. Consequently, preservation of *Bellas Hess* and *Quill* ought to be the preferred course.

Fourth, the claim that *Bellas Hess*'s physical-presence requirement works a disadvantage on certain States and localities has not been clearly established and, in any event, is insufficient to overcome *stare decisis*. Legislative innovation is proving potentially capable of extending sales and use taxes to certain Internet retailers and should be given the room and opportunity to continue to expand within *Bellas Hess*'s

physical-presence requirement. Additionally, claims that a precedent capable of being changed by Congress may have harmful consequences on the economies of the States or its localities are more appropriately left to Congress to resolve. *See Kimble*, 135 S. Ct. at 2414. Congress is better equipped to weigh claims of harm by the States and localities against the harm private businesses and individuals may suffer and to develop innovative, nuanced policy solutions to resolve those competing interests. Congress is also better equipped to manage those solutions in order to mitigate any adverse effects on public and private parties. This Court does not make national economic policy and is therefore not well equipped to fashion a solution without risking the creation of further problems.

C. The considerations in favor of *stare decisis* outweigh any special justifications.

As explained above, a "superpowered form of *stare decisis*" attaches to *Bellas Hess*'s physical-presence requirement for sales and use taxes that is not outweighed by any special justifications. *Bellas Hess*'s physical-presence requirement has been in existence for approximately 51 years and, during that time, has engendered significant reliance interests, including the vesting of substantial property and contract rights. Congress retains the power to reverse, change, or otherwise modify *Bellas Hess*'s physical-presence requirement in ways that protect those important reliance interests.

In the meantime, *Bellas Hess* and *Quill* provide a bright-line rule in a complex, unique area of taxation that affects millions of American businesses every day, including many small businesses, private individuals, and consumers. Removing that bright-line rule has the potential of making the cost of doing business over the Internet too high and too uncertain for many small business owners and private individuals who rely to varying degrees on Internet-based retail sales made through websites like eBay or Etsy. It also has the potential of increasing consumer costs in States that have chosen through their elected representatives not to impose a sales tax on retail goods in order to keep retail prices low.

Given these established interests and expectations, no special justifications of any significance exist for departing from *Bellas Hess* and *Quill*. The States must work instead within *Bellas Hess*'s physical-presence requirement and, if they are concerned about their present inability to impose antiquated sales and use tax laws on large Internet retailers, they must employ innovative, legislative solutions capable of reaching those companies or otherwise persuade their federal representatives in Congress to change *Bellas Hess*'s physical-presence requirement through the legislative process.

CONCLUSION

For all of the above reasons, this Court should decline to overrule the physical-presence requirement for sales and use taxes established in *Bellas Hess* and reaffirmed in *Quill* on *stare decisis* grounds. The judgment below should therefore be affirmed.

Respectfully submitted,

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