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 HOUSE JUDICIARY COMMITTEE CHAIRMAN BOB GOODLATTE; SENATE FINANCE COMMITTEE RANKING MEMBER RON WYDEN; SENATORS MAGGIE HASSAN, JEANNE SHAHEEN, AND JON TESTER; REPRESENTATIVES STEVE CHABOT, RON DeSANTIS, ANNA G. ESHOO, JIM JORDAN, ANN McLANE KUSTER, ZOE LOFGREN, MARK MEADOWS, DANA ROHRABACHER, KURT SCHRADER, AND JIM SENSENBRENNER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

In the U.S. House of Representatives, the Committee on the Judiciary has jurisdiction over legislation addressing State taxation of interstate commerce. As Chairman of the Committee in the 115th Congress, Bob Goodlatte (R-VA) has conducted extensive hearings and markups of legislation addressing the interstate commerce concerns with Chapters 10-45 and 10-52 of the South Dakota Codified Laws and similar "kill *Quill*" laws of other States.[2] In his Committee leadership capacity he is currently deeply engaged in fashioning legislation to support States in collecting sales and use taxes by making compliance simple and ensuring that each State's tax and regulatory reach does not extend beyond its borders. He was the author of the House bill making the Internet Tax Freedom Act ("ITFA") permanent, which President Obama signed into law in 2016. The ITFA prohibits specific kinds of taxes affecting Internet commerce, including the South Dakota tax that is the subject of this litigation. He has more than two decades' experience as a Member of the

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[1] This brief is filed pursuant to the parties' blanket consent. No party or counsel for a party has authored or contributed monetarily to the preparation or submission of any portion of this brief.

[2] State efforts to undermine the physical presence rule of *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), have led to the enactment of statutes in several states that deliberately violate the rule in that case. For a contextual description of "kill *Quill*" laws generally, see *The GOP's Internet Tax*, WALL ST. J. (Mar. 15, 2018), https://www.wsj.com/articles/the-gops-internet-tax-1521153858.

Judiciary Committee working on the issues of Internet commerce and State taxation.

In the U.S. Senate, Ron Wyden (D-OR) serves as Ranking Member on the Committee on Finance. In this capacity he has responsibility for revenue measures affecting commerce over the Internet. Senator Wyden was co-author of the original Internet Tax Freedom Act, enacted in 1998. In addition to protecting remote Internet commerce from burdensome tax compliance demands by multiple States, the ITFA established a process by which Congress and the States can address the question of sales and use tax collection responsibilities of out-of-state vendors. Senator Wyden has for many years been a leading participant in that ongoing process and in congressional deliberations on these issues.

The additional Senators and Representatives who have joined as *amici* in this brief have all been deeply involved in considering the economic, competitive, and fiscal policy questions surrounding State taxation of remote electronic commerce. Each is concerned with the unintended consequences of a potential decision by this Court to deem "virtual presence" sufficient for jurisdictional purposes. *Amici* strongly disagree with South Dakota's contention that the courts, rather than Congress, should establish the future rules for the regulation of interstate commerce in this area.

Amici are thus able to bring to the attention of the Court relevant matters not already addressed by the parties.

SUMMARY OF ARGUMENT

Taxes are a burden. Tax compliance can be an even greater burden. The Framers knew first-hand the consequences of individual States saddling interstate commerce with burdensome regulation and taxation, and so they wrote the Constitution's Commerce Clause to give Congress ultimate authority over all regulation and taxation of interstate commerce.

Fifty years ago, amid a shift in the Court's Commerce Clause jurisprudence from clear, formal rules to less predictable substantive standards, the Court announced an astonishingly simple rule to control State taxation of interstate commerce: only sellers physically present in a State can be compelled by the State to collect its taxes. See *Nat'l Bellas Hess Inc.* v. *Dep't of Revenue*, 386 U.S. 753 (1967). To that rule's naysayers, the Court pointed across First Street: "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Id.* at 760.

For years, Congress has legislated on the subject of Internet taxes, most recently in 2016 through the

permanent Internet Tax Freedom Act ("ITFA"),[3] and consistently has sided with interests of interstate commerce and against the parochial interests of States and their taxing subdivisions. See, *e.g.*, Kelsey Snell, *Web access tax vote hurts sales tax*, POLITICO (July 15, 2014).[4] Unhappy with their failure to get their way from Congress, the naysayers have reemerged. This case, like others since *Bellas Hess*, tests the Court's commitment to the rule of law—not just the particular rule of law announced in *Bellas Hess*, but to *stare decisis*, "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). As it did in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), the Court should reaffirm "that Congress has the ultimate power to * * * evaluate the burdens that use taxes impose on interstate commerce," *id.* at 318.

South Dakota and its *amici*—including the Solicitor General—all approach this case as if this Court truly was their last resort. It isn't. Congress is the branch of government constitutionally entrusted to decide whether the physical presence rule of *Bellas Hess* should stay or go. Congress also is the branch of government best able to measure and weigh the exceptionally difficult policy questions presented by South Dakota's plea for greater taxing authority. Because of Congress's station and institutional capacity, the

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[3] Pub. L. No. 105-277, § 1100, 112 Stat. 2681-719 (1998), which was made permanent in Pub. L. No. 114-125, § 922(a), 130 Stat. 281 (Feb. 24, 2016) and codified at 47 U.S.C. § 151 note.

[4] Available at https://www.politico.com/story/2014/07/internet-access-tax-vote-108960.

holdings of *Bellas Hess* and *Quill* deserve the greatest strength of *stare decisis* and can be overruled only *after* intervening action by Congress.

Congress has acted—and not contrary to *Quill*. Beginning in 1998 and on eight occasions since, it has enacted successive iterations of its most sweeping policy pronouncement on the taxation of remote Internet sales, the ITFA, ultimately making the law's tax proscriptions and national policy on Internet commerce permanent in 2016. During the same period, Congress has continuously investigated new compromises that might get South Dakota most (or all) of what it is asking this Court to give.

The Solicitor General's suggestion that the Court restrict the rule of *Bellas Hess* and *Quill* to catalog sales and obliterate the physical presence rule for everyone else would be a blatant violation of the ITFA. Reinterpreting *Quill* in this way would run headlong into the ITFA's statutory prohibition on taxes that treat e-commerce worse than other forms of commerce. And in the face of the ITFA's prohibition on treating the mere maintenance of a website as a basis for nexus, it would have the Court embrace the fiction that out-of-state e-tailers are "virtually" present inside a State. They aren't, and it is for Congress—not the Solicitor General, this Court, or the States—to decide the best interstate taxation scheme for Internet sales.

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ARGUMENT

I. THE ISSUE BEFORE THE COURT RAISES COMPLEX POLICY QUESTIONS, LEGISLATIVE IN NATURE.

The question before the Court is, nominally, whether to overrule its precedents in *Bellas Hess* and *Quill*. A review of the Petitioner's arguments, however, makes clear that the true issues under debate involve economics, the efficacy of software, trends in the retail industry, and myriad other non-legal questions that resist proof in a court of law. Dozens of *amici* have weighed in on these questions; their contributions, too, are laden with policy prescriptions more properly addressed to the Congress.

Members of Congress are accustomed to reviewing economic and fiscal claims like those South Dakota has included in its brief before this Court. We are also familiar with the maxim that there are "lies, damned lies, and statistics." Congressional committees spend much of their time in hearings and on field investigations listening to experts defend their data and findings. Many if not most of the economic assertions presented to the Court, by contrast, do not come from experts or serious studies but come directly from counsel in the form of pure argument, or from lightly sourced "studies," many of them tendentious. Throughout the course of this litigation, these latter-day Brandeis briefs have been immune from any test of their veracity, thanks to South Dakota's fast-track procedure designed specially to speed the admittedly unconstitutional law to this Court's docket.

This is not to say that none of the information South Dakota and its sister States have presented to the Court is true. The problem is knowing what information is true and what isn't. A novel interpretation of the Commerce Clause should not be predicated on such infirm "science" and a nonexistent factual record. These provide a weak basis indeed for abandoning *stare decisis* and the obvious reliance that Internet enterprises across the country have placed on this Court's rulings, and a sore substitute for thorough, considered congressional fact-finding and deliberation.

Even many of those who counsel overturning *Quill* admit the difficulties inherent in States taxing and regulating beyond their borders. For example, the Tax Foundation has submitted a brief supporting South Dakota's "kill *Quill*" law, but only because it includes some progress toward needed simplifications (*e.g.*, a simpler tax base and a reduction to two local rates). The brief further notes that it is "hard to overstate the * * * hard decisions" that still must be made to simplify State sales tax collection. Br. of Tax Foundation as *Amicus Curiae*, at 12. That is one reason most States have not acted to simplify their sales and use tax regimes for remote sales, complicating congressional efforts to enact a balanced solution that will support State tax collections while at the same time protecting interstate commerce from excessively burdensome tax compliance demands that could come from more than 12,000 State, county, municipal, and tribal taxing subjurisdictions. See Gov't Accountability Office, *Sales Taxes: States Could Gain Revenue from Expanded*

Authority but Businesses Are Likely to Experience Compliance Costs ("GAO Report"), 3 (Nov. 2017).

II. CONGRESS IS INSTITUTIONALLY BEST SITUATED TO ADDRESS THE ISSUES IN THIS LITIGATION.

As *amici*, we are bipartisan and represent both the House and the Senate. We have particular leadership responsibilities to resolve the competing policy interests at issue in this litigation. As may be seen in the other *amicus* briefs submitted by our colleagues, some of them agree with South Dakota's argument and some do not. That is to be expected in the political process that leads to legislated outcomes. As outlined in Part IV below, six different legislative solutions have been offered in recent years to address various aspects of these issues. The complexity and nuance of these bills are testament to the complexities of the actual details of multistate taxation of interstate remote commerce. Only legislation can reliably resolve these complexities, taking into account the many competing interests among commercial entities of various sizes and rapidly evolving business models, as well as the fiscal interests of the States. As Justice Ginsburg recently observed, Congress "can write a statute that takes account of various interests," whereas there is "nothing nuanced about" what the Court can do. Oral Argument Transcript, *United States* v. *Microsoft*, No. 17-2, at 6.[5]

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[5] Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-2_9pl4.pdf.

If this Court rewards South Dakota for intentionally violating its rulings, overturning the settled precedent of *Quill* and opening the way for the next wave of extraterritorial regulatory expansion by the States, there will no longer be any incentive for the States to simplify their sales and use tax regimes for interstate sales. Yet that is something Congress, and the Advisory Committee on Electronic Commerce which it established, have been encouraging them to do for many years.[6] The result will be needless continuation of these already too-burdensome compliance impositions, multiplied more than a thousandfold once every tax jurisdiction in America is greenlighted to levy and enforce its own idiosyncratic system far beyond its borders.

Congress is best positioned to address these issues, which are inherently legislative in character. They arise due to the rapid evolutions in e-commerce. See Part IV, *infra*. Initially, this shift increased the number of remote sellers that were not required to collect sales or use taxes, but more recently, Internet retailers led by Amazon have created physical presence everywhere as competition increasingly focuses on speed of delivery to the customer. The trend among large- and medium-size retailers now is to collect in every jurisdiction. This is rapidly eliminating the remote collection issue even while the convenience of Internet commerce is adding to the State's domestic

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[6] See generally Report to Congress of the Advisory Commission on Electronic Commerce (2000), https://govinfo.library.unt.edu/ecommerce/acec_report.pdf.

product. With the contours of the retail industry continuously in flux, Congress is far better equipped than the courts to gather the latest facts, attend to details, and respond to ongoing market developments.

The Court will receive hundreds of pages of briefs in this case, but little in the way of solid evidence since there is no factual record from the courts below. Congress has received and gathered many thousands of pages of information, heard thousands of hours of testimony, spoken with countless witnesses, experts, and interested constituents, and devoted thousands of hours to understanding and resolving these very issues. Congress has both an information advantage and, via legislation, finer tools to address these issues.

This is a rare case. Billions of dollars ride on the Court's decision to reaffirm or overrule *Quill*. Parties and *amici* have filed dozens of briefs. Questions largely of policy, not law, are at the fore. Yet no group, including e-commerce businesses, continues to oppose a federal legislative solution. It is simply a matter of striking the proper balance regarding the terms of legislation, a challenge on which both the House and Senate are currently hard at work.

This work entails finding facts, choosing among policy alternatives, and crafting workable technical solutions for complex commercial and administrative problems. The fast-track nature of this litigation has deprived the Court of even the most elemental factual bases to begin these tasks, most of which in any case are typically the responsibility of legislative bodies.

Nor is the judiciary ordinarily jealous of these responsibilities. Time and again, this Court has affirmed Congress's superior institutional competence to undertake the quintessentially legislative tasks that South Dakota begs this Court to usurp. *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980) ("Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.").

Consider the specific issues raised by Petitioner and its *amici*. South Dakota asserts that "state revenues have decreased." *State* v. *Wayfair, Inc*., 901 N.W.2d 754, 756 (S.D. 2017). This questionable assertion is based solely on the "finding" to that effect in the South Dakota law. But that claim is demonstrably false, belied by the State's own data showing that sales and use taxes have been rising for years, at a rate faster than the growth in the State's economy.[7] South Dakota asserts that the burdens of various tax-collecting obligations will have no meaningful impact on

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[7] See South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf; South Dakota Department of Revenue Annual Reports, 13 (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/; *South Dakota GDP*, DEPARTMENT OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ (reporting data from Bureau of Economic Analysis, U.S. Department of Commerce). Effective for the second half of 2016, the State increased its sales tax rate by 0.5%; the trends were well established before that. Further evidence of this is that the State's projected 4% revenue increase for 2018 is based on no change in sales tax rate from 2017.

various types of Internet sellers. This claim is also false. Significant data to the contrary exist, including studies demonstrating that software such as that proffered by South Dakota can actually increase rather than reduce regulatory compliance costs. See Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUE SIMPLIFICATION OF TAXATION (Sept. 2013).[8]

This Court will have trouble sorting through these disputed issues in the context of an expedited test case with a threadbare factual record. In contrast, "Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match, joined with the authority of the commerce power to run economic risks that the Judiciary should confront only when the constitutional or statutory mandate for judicial choice is clear." *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 309 (1997); see *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983) (Congress "may inform itself through fact-finding procedures such as hearings that are not available to the courts"). Congress has the power to subpoena witness upon witness in order, for example, to assess whether e-commerce software has truly become a panacea, as South Dakota and its *amici* breezily proclaim.

From the evidence it collects, Congress can decide not only *whether* to overrule *Quill*, but also *how* to implement or effectuate a change in the status quo. The

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[8] Available at http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

ultimate question in this case, about States' power to compel collection of taxes by sellers who have no physical presence in a state, is one the Court can answer only Yes or No. Congress has more options. It can confront and address the "equally difficult questions concerning the design and scope" of a new Internet taxation regime. *Patsy* v. *Bd. of Regents of State of Fla.*, 457 U.S. 496, 513 (1982). Congress can design a process for collection and remittance that does not entail direct payments to foreign States. Congress can iterate; it can tweak and tinker after observing how things work in the real world.

Importantly, Congress can exempt small merchants for whom collecting taxes on behalf of 12,000-plus separate jurisdictions is simply too burdensome. The failure of South Dakota's law to include a meaningful small business exception is one of its most troubling features; were the Court to extend the State its constitutional blessing, the law would quickly envelop thousands of small and micro enterprises with what heretofore could not have amounted to the requisite minimum contacts under the Due Process Clause.[9] And once this Court decides states may, consistent with the Due Process and Commerce Clauses, exercise taxing jurisdiction over small Internet retailers, it would throw open the door to the exercise of other

[9] The law's threshold of 200 transactions per year, independent of any dollar amount, would reach even a merchant selling 99-cent song downloads. Thus an out-of-state seller with less than $200 of sales in South Dakota would be subjected to its *in personam* jurisdiction. S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016).

forms of jurisdiction as well. Indeed, the challenge of crafting a meaningful and balanced small business threshold is a significant reason the Congress has not yet come to final agreement on Internet sales tax legislation. Were the Court to address this issue, by way of Due Process and Commerce Clause analysis or another constitutional rubric, its ruling would necessarily be wholly arbitrary—lacking, as it must, the evidentiary basis for a specific threshold and the specialized knowledge to craft it.

For all of these reasons, Congress is institutionally best situated to address the issues in this litigation.

III. THE HOLDINGS IN *BELLAS HESS* AND *QUILL* SHOULD BE ACCORDED THE GREATEST *STARE DECISIS* FORCE BECAUSE CONGRESS IS EMPOWERED TO AUTHORIZE STATE TAXATION OF REMOTE SALES.

South Dakota isn't the first State to ask this Court for the power to conscript out-of-state merchants into collecting and remitting use taxes that in-state purchasers are supposed to be paying (but aren't). Twenty-five years ago, North Dakota asked and got no for an answer in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). And twenty-five years before that, Illinois asked and also got no for an answer in *National Bellas Hess Inc.* v. *Dep't of Revenue*, 386 U.S. 753 (1967).

Complaining about the "sharp distinction" between States' power over in-state sellers and out-of-state sellers, *id.* at 758, has become something of a regular event. But in our system, a precedent's life expectancy is longer than a quarter century. Precedents like *Bellas Hess* and *Quill* are expected to live indefinitely.

That is *stare decisis*—"the idea that today's Court should stand by yesterday's decisions" without regard to whether a different or better rule could be devised. See *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). *Stare decisis* is fundamental to the rule of law. Most of the time, it is "more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Only when maintaining a precedent *subverts* the rule of law may overruling that precedent be warranted. See *Kimble*, 135 S. Ct. at 2409–11.

With those rule-of-law considerations in mind, the Court has recognized two types, or strengths, of *stare decisis*. In constitutional cases, where this Court's say is final, *stare decisis* has less strength; precedents may be overruled for a variety of (rare) reasons. In statutory cases, however, *stare decisis* has more strength because "Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172–73 (1989); see *Ill. Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). Statutory holdings are overruled more infrequently than constitutional holdings—mostly after there has been an "intervening development of the law, through either the growth of judicial doctrine or

further action taken by Congress." *Patterson*, 491 U.S. at 173. When Congress hasn't taken further action, complaints about a precedent's unworkability or aspersions that the precedent has become outdated aren't enough to cause this Court to revisit a holding that Congress is able to revisit. See *id.* at 174.[10]

Superficially, *Bellas Hess* and *Quill* may seem to deserve only the relatively weaker *stare decisis* of constitutional cases. After all, the Commerce Clause is a major obstacle to South Dakota's making tax collectors out of all merchants who do business with South Dakotans. See Pet. Br. 53. But the Commerce Clause is one area of constitutional law where this Court's holdings deserve the extra *stare decisis* strength accorded to this Court's statutory interpretations. For, in Commerce Clause cases (just as in statutory cases), Congress is the ultimate backstop. Congress can authorize State laws that would otherwise offend the Commerce Clause and, thereby, override any Commerce Clause

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[10] Citing *Pearson* v. *Callahan*, 555 U.S. 223 (2009), South Dakota argues that the traditional *stare decisis* dichotomy—which makes it harder to overrule holdings Congress can overturn and easier to overrule holdings Congress cannot—has broken down in recent years. See Pet. Br. 53. *Pearson* didn't upset any *stare decisis* norms. All *Pearson* recognizes is that holdings about judicial procedure are easier to overrule because, though Congress technically has final say over those rules, they are too central to the administration of the courts' business. See *Pearson*, 555 U.S. at 233–34. Insofar as *stare decisis* is a function of institutional capacity, *Pearson* makes sense: the Court, not Congress, is best able to "investigat[e], examin[e], and study" the pros and cons of different procedural rules because the Court, not Congress, has frontline experience with procedural rules. *Diamond*, 447 U.S. at 317.

decision that seems unworkable or outdated. Congress is able to "redefine the distribution of power over interstate commerce" by "permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." *S. Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); see *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 637 (1981) (White, J., concurring) ("Congress has the power to protect interstate commerce from intolerable or even undesirable burdens.").

Quill makes a nice example of these dual *stare decisis* principles in action. The *Quill* Court overruled the Due Process holding of *Bellas Hess*, a constitutional holding with less *stare decisis* strength, because minimum-contacts jurisprudence had "evolved substantially in the 25 years since *Bellas Hess*." *Quill*, 504 U.S. at 307. In contrast, the *Quill* Court did not overrule the Commerce Clause holding of *Bellas Hess*, even though those constitutional-law doctrines also had "evolved substantially over the years," *id.* at 309, because Congress was able to resolve the underlying issues, *id.* at 318. "Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Ibid.*

What the Court recognized in *Quill* remains true today. To overrule *Bellas Hess* would be to usurp Congress's role as final arbiter of major questions of interstate commerce. Whether or not *Bellas Hess* and *Quill* were right about the Commerce Clause, they surely were right that Congress has the institutional capacity

and constitutional authority to finally resolve *all* issues of interstate commerce. Congress, therefore, remains "better qualified," *ibid.*, to resolve South Dakota's plea for taxing authority over remote sellers who have no physical presence in the state.

IV. CONGRESS HAS REPEATEDLY EXERCISED ITS INTERSTATE COMMERCE POWER TO REGULATE STATE TAXATION OF THE INTERNET, AND CONTINUES TO DO SO.

South Dakota ignores Congress's unique capabilities and argues that "25 years of inaction" prove that Congress "cannot 'fix'" *Quill*. Pet. Br. 20–21. But *whether* it is desirable to "fix" (*i.e.*, overrule) *Quill* is the threshold question this formulation begs. That Congress has not authorized state taxation of Internet commerce is no sign of congressional incapacity. To the contrary, it indicates congressional approval of *Quill*'s physical presence rule. See, *e.g.*, S. Rep. No. 105-184, at 2 (1998)[11] (in crafting the ITFA, Congress expressly relied upon *Quill*'s physical presence rule for nexus); 144 Cong. Rec. E1288-03 (June 23, 1998)[12] (the ITFA is intended to provide "certainty" that *Quill*'s physical presence principles "will continue to apply to electronic commerce just as they apply to mail-order commerce,

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[11] Available at https://congress.gov/105/crpt/srpt184/CRPT-105srpt184.pdf.

[12] Available at https://www.congress.gov/crec/1998/07/14/CREC-1998-07-14-pt1-PgE1288-3.pdf.

unless and until a future Congress decides to alter the current nexus requirements").

In recent years, as the old paradigm of the pure "brick-and-mortar" store has given way to a ubiquitous e-commerce market that marries physical presence and technology, doubt about the consequences of expanding States' ability to tax and regulate businesses beyond their borders has given Congress pause. South Dakota's complaint is actually a backward-looking response to the decade after *Quill*, the first decade of e-commerce. Then, the proportion of sellers using the Internet remotely was large, and most of them were small businesses. It took many years for long-established brick-and-mortar businesses to respond by entering the e-commerce marketplace themselves. Now virtually every retailer uses the Internet to drive sales in some way. See generally Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis* (Mar. 15, 2018) ¶¶ 13–34.[13]

The evolution of the retail marketplace has dramatically changed the trajectory of congressional action by changing the nature of the problem that most needs Congress's attention. Revenue collection is decidedly *not* the biggest problem any longer (if it ever was). The GAO recently estimated that "about 80 percent of the potential revenue from requiring all Internet retailers to collect is already collectible." GAO

[13] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948.

Report, *supra*, at 9. Even this number is already out of date. Today, all but one of the eighteen largest Internet sellers are collecting state and local taxes. Richard Wolf, *Supreme Court will decide if online retailers must collect sales tax*, USA TODAY (Jan. 12, 2018, 2:51 PM).[14] In the second decade of the 21st century, the pressing problems are fairness and how to treat small businesses.

Congress has been exceptionally active in pursuing these issues. Just as previous Congresses considered many proposals to amend or overturn *Bellas Hess* in the years after it was decided, see *Quill*, 504 U.S. at 318, so did later Congresses consider many proposals to amend or overturn *Quill* in its wake. See Addendum to Br. of Four U.S. Senators as *Amici Curiae* in Support of Petitioner (collecting dozens of bills introduced since 2001).

Six years after *Quill*, Congress enacted the first of several iterations of the ITFA. The law was first signed by President Clinton in 1998. It has been amended and renewed by subsequent Congresses no fewer than eight times, and made permanent in 2016. See Trade Facilitation and Trade Enforcement Act of 2015 § 922, Pub. L. No. 114-125, 130 Stat. 122, 281.[15]

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[14] Available at https://www.usatoday.com/story/news/politics/2018/01/12/supreme-court-decide-if-online-retailers-must-collect-sales-tax/1021423001.

[15] An unfortunate feature of the "fast track" procedure South Dakota contrived to bring its Internet tax law before the Court is that there has been no discussion of how the State law violates the ITFA. Before this Court decides the underlying constitutional

The principal purpose of the ITFA is to prevent the thousands of state and local taxing authorities from burdening e-commerce with a confusing and cumbersome patchwork of tax-collecting duties. It does this primarily by prohibiting any "discriminatory tax" on Internet commerce, which is defined to include "any tax imposed by a State or political subdivision thereof on electronic commerce" that:

- "is not generally imposed and legally collectible" by the state or local taxing authority "on transactions involving similar property, goods, services, or information accomplished through other means";
- "is not generally imposed and legally collectible at the same rate * * * on transactions involving similar property, goods, services, or information accomplished by other means";
- "imposes an obligation to collect or pay the tax on a different person or entity

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questions, prudence dictates that some court should decide on the federal statute. Cf. *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 76–77 (1955) ("Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been [b]rought here in the first instance."); *id.* at 74 ("[W]here the issues involved reach constitutional dimensions, * * * there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."). Nonetheless, the ITFA evidences repeated congressional action and policymaking on the question of nexus for sales and use tax purposes, taking this case out of the realm of the dormant Commerce Clause.

> than in the case of transactions involving similar property, goods, services, or information accomplished through other means."

ITFA §§ 1105(2)(A)(i)–(iii).

The ITFA goes further. It also defines discriminatory taxes to include any state or local tax if:

- "the sole ability to access a site on a remote seller's out-of-state computer server is considered a factor in determining a remote seller's tax collection obligation; or
- "a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of" the Internet access service or online service provider's "display of a remote seller's information or content" or "processing of orders."

ITFA §§ 1105(2)(B)(i)–(ii).

In addition to expressing Congress's strong preference for protecting remote Internet retailers from multiple State tax collection burdens, the ITFA's initial and subsequent enactments demonstrate that Congress has been consistently active in legislating in this area. South Dakota and its sister States opposed the ITFA in each of its iterations, including the law signed by President Obama in 2016, but that hardly erases the fact that Congress has acted, and acted repeatedly. Despite this fact, South Dakota—while nominally

criticizing the dormant Commerce Clause—is actually proposing that the Court rely on it, by deciding the Commerce Clause question as if this were a case arising "in the absence of any action by Congress." *Quill*, 504 U.S. at 309. Manifestly, this is not such a case.

Overruling *Quill* (or reinterpreting it as the Solicitor General suggests, see Part V, *infra*) would function as a rejection of the clear congressional policy expressed in the repeated enactments of the ITFA. It would significantly increase the burden on remote sellers, by requiring them to comply with the tax and regulatory requirements of distant state and local governments. Beyond merely calculating an amount owed and collecting it from a buyer at the time of sale, the trope by which South Dakota and its *amici* trivialize the compliance burden, a small seller located in a single jurisdiction will have to contend with multiple auditing and reporting requirements. Different jurisdictions have different remittance requirements (monthly or weekly or immediately). Most time-consuming and expensive of all, different jurisdictions have densely reticulated rules governing which specific versions of an item are and are not subject to taxation.

It is hard enough for a business to determine whether and, if so, how a particular item is taxed under the laws of a single jurisdiction. Multiplying that task by many items in a constantly changing product line, and by the thousands of jurisdictions making their own idiosyncratic demands, renders it herculean. Not only is this not a task that software alone can

accomplish, but software has been shown to be yet another source of cost and complexity which introduces its own errors. See GAO Report at 17.[16]

Mitigating the burdens of the regulatory requirements that accompany taxation is one of Congress's chief concerns. This is not only because those burdens may bog down interstate commerce, but also because taxing jurisdictions are not politically accountable to the out-of-state merchants who will bear the brunt of those burdens. Cf. *S. Pac.*, 325 U.S. at 768 n.2 ("[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

Thus, a key principle animating multiple congressional proposals is "No Regulation Without Representation," the idea that a seller's home-state taxing authorities, rather than the authorities of the myriad jurisdictions in which buyers may happen to reside, should control the seller's duty to collect taxes. The "No Regulation Without Representation" idea encapsulates bedrock understandings of state power and interstate commerce inherent in our constitutional

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[16] "For example, apparel is treated differently across states. Pennsylvania exempts clothing, except for formal apparel; items made of real, imitation, or synthetic fur; and athletic apparel. Across the border, New York State exempts clothing sold for less than $110; however, some jurisdictions do not apply these exemptions and charge a local sales tax on these items." GAO Report at 17.

structure. See Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC § 20 (Boston, Hillard, Gray, & Co. 1834) ("No State * * * can, by its laws, directly affect, or bind * * * persons not resident therein."); see also *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

Under the leadership of the House Judiciary Committee and Chairman Goodlatte, "No Regulation Without Representation" has become the starting point for developing a national framework for the taxation of Internet commerce. For example, a bipartisan proposal from Chairman Goodlatte and Representative Eshoo in the 114th Congress, the "Online Sales Simplification Act of 2016,"[17] would allow remote sellers to volunteer to collect and remit use taxes for foreign jurisdictions, as the vast majority of large online retailers already do. Other sellers would follow their home-state taxability rules but collect taxes at out-of-state rates. Payment would be remitted to home-state governments, who in turn would forward amounts to other governments through a clearinghouse. Audits would be performed locally, by the home-state taxing authorities.

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[17] For a detailed discussion of this proposal, see *House Judiciary Committee Chairman Bob Goodlatte on Efforts to Resolve the Remote Sales Tax Issue* (Dec. 4, 2017), https://goodlatte.house.gov/uploadedfiles/efforts_to_resolve_the_remote_sales_tax_issue.pdf. For the draft bill, see Online Sales Simplification Act (OSSA), 114th Cong. (2016), http://www.mtc.gov/getattachment/2016-08-25-Online-Sales-Simplification-Act-of-2016-(OSSA).pdf.aspx.

As Chairman Goodlatte explained:

> In 2015, we proposed a revised compromise, under which sellers would follow their home state rules on taxability (base), but would collect at the rates applicable in their customers' states, provided that the seller's home state incorporated those rates into its own tax laws. This approach achieved critical price parity for traditional retailers while keeping compliance simple for online sellers. In fact, because compliance would be so simple, no State-subsidized software would be necessary for sellers to identify taxability, saving States an estimated $2 billion annually as compared to other approaches. As before, Internet sellers would answer only to their home state taxing authority, so there would be no cross-border reach.[18]

The Online Sales Simplification Act of 2016 was a breakthrough and generated substantial discussion. An independent economic study estimated it would collect at least 80% of cross-border taxes that States are currently not collecting, exceeding the revenue estimates for the States' own legislative proposal by over $400 million in the first year of implementation.[19] But

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[18] Statement of Chairman Robert W. Goodlatte, at 1–3 (Dec. 4, 2017), https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.

[19] Sarah E. Larson, Ph.D., *Analysis of the Remote Transactions Parity and Simplification Act and the Remote Transactions Parity Act of 2017*, U. CENTRAL FLA. (2017), https://www.cohpa.ucf.edu/wp-content/uploads/2018/03/sl-use.pdf.

even with marathon committee sessions, the 114th Congress ran out of time.

That wasn't the end, though. In the current Congress, both the House and Senate have introduced legislation building on these concepts:

- The "No Regulation Without Representation Act of 2017," H.R. 2887, restricts sales and use tax only to buyers and sellers with in-state presence (defined so as to exclude persons with *de minimis* physical presence) and carves out "marketplace providers," that is, persons who facilitate sales between sellers and buyers.
- The "Remote Transactions Parity Act of 2017," H.R. 2193, authorizes states to require remote sellers to collect use taxes so long as there are simplified requirements for taxing, auditing, and remittance. There is an exception for small sellers (defined in terms of a seller's gross annual receipts) and for sellers who use online marketplaces.
- The "Marketplace Fairness Act of 2017," S. 976, is conceptually similar to the Remote Transactions Parity Act of 2017, and has different details (like a different definition for a small seller).

Unfortunately, the pendency of this case has put these proposals on hold, as one-half of the debate (that

is, South Dakota and its *amici*) hopes for a winner-take-all result in court they know they cannot obtain in Congress. The surest way to facilitate legislative progress is for the Court to affirm its commitment to *stare decisis* and its twin holdings, in *Bellas Hess* and *Quill*, that Congress alone can decide whether, when, and how States can require out-of-state sellers to collect and remit sales and use taxes.

V. THE SOLICITOR GENERAL'S INVITATION TO DISCRIMINATE AGAINST INTERNET COMMERCE BY REINTERPRETING *QUILL* CONTRAVENES THE ITFA.

The Solicitor General urges the Court to restrict *Quill*'s physical presence standard to mail-order catalogs. This, the Solicitor General explains, will draw a line between retailers whose only contacts with a state are by mail, and those whose only contacts are by wired or wireless transmission. See U.S. Br. 24–28. This should be seen for what it is: an invitation to the Court to interpret the Commerce Clause in a way that violates an existing federal statute regulating interstate commerce.

Congress, exercising its ultimate authority in Commerce Clause matters, has already rejected the Solicitor General's proposal. The ITFA prohibits taxation that treats e-commerce sales differently from sales accomplished through means other than the Internet.

Specifically, the ITFA prohibits any state tax that is not "generally imposed * * * on transactions involving similar property, goods, services, or information accomplished through other means." ITFA § 1105(2)(A)(i). It also prohibits any state tax if the "obligation to collect or pay the tax" is imposed "on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means." ITFA § 1105(2)(A)(iii).

As the quoted statutory language makes clear, the ITFA requires that Internet commerce and all other commerce be treated the same, though the sales are accomplished by different means. Despite this explicit congressional command, the Solicitor General asks the Court to interpret the Commerce Clause so as to require remote Internet commerce to be treated differently from other forms of remote commerce.

In the Solicitor General's approach, retailers selling remotely via mail order would have no tax collection or payment obligations. Only retailers selling via the Internet would.

Thus, the Court would rely on the "dormant" Commerce Clause—that is, Art. I, § 8, cl. 3 acting "by its own force," *Quill*, 504 U.S. at 309 (quoting *S.C. State Highway Dep't* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938))—to overrule an express regulation of interstate commerce by the Congress. The enumerated power "to regulate commerce among the States" would be undone by ignoring Congress's clear actions when

interpreting the "dormant" Commerce Clause. *Id.* at 305.

In support of this upside-down approach to the Constitution, the Solicitor General advances his view that "virtual" presence should be enough to establish nexus. If a State's consumers can access a remote seller's out-of-state computers, he argues, then the out-of-state seller has "a continuous presence" inside the State. U.S. Br. 24. For good measure, he adds his view that in some ways visiting a website is "like shopping in a physical store." Or at least more "like" it "than ordering goods from a catalog." *Id.* at 25.

But here, too, the Congress has definitively exercised its power to regulate interstate commerce, and reached the opposite conclusion. The ITFA prohibits a state from "determining a remote seller's tax collection obligation" on the basis that the seller's website is accessible to consumers in the state. ITFA § 1105(2)(B)(i).

Whether or not South Dakota must, under the dormant Commerce Clause, "conform to standards which Congress might, but has not adopted," *Barnwell Bros.*, 303 U.S. at 187, there can be no question that it and its sister States must conform to regulations of interstate commerce that Congress has already enacted. This is not a case of dormant congressional power but its active use. Congress has "plenary power to regulate interstate commerce," and in the ITFA it has done so, deciding that certain tax compliance "burdens imposed on [that commerce] by state regulation, otherwise

permissible, are too great." *Id.* at 189–90. Moreover, making such determinations "is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce." *Id.* at 190.

Establishing "virtual presence" as a means of satisfying the Commerce Clause test and Due Process minimum contacts would open the door for the multiple States to exercise jurisdiction over out-of-state retailers in areas beyond tax collection. See Part II, *supra*. If small online retailers with physical presence in only one State are virtually present in *every* State by virtue of a website alone, not only could every State require they collect all state and local taxes, but they could be subject to *in personam* jurisdiction in every State for lawsuits and any other purpose. Indeed, they would be subject to foreign States' jurisdiction for all purposes *except* getting to vote in those States. But such a result would violate both the Due Process Clause *and* Congress's express policy determinations in the ITFA.

Despite the Solicitor General's invitation to do so, this Court should not expand and distort the dormant Commerce Clause to overturn a congressional regulation of interstate commerce. Refashioning *Quill* to discriminate against Internet commerce in direct violation of a statutory prohibition against doing so would stand the Court's Commerce Clause jurisprudence on its head. It would also require rejecting the rule of *stare decisis*, since a decision to limit a prior holding, though technically distinct from a decision to

overrule it, presents the same questions of judicial predictability and public reliance. Respecting the role the Constitution gives solely to Congress in this area, the Court should provide *Quill* the highest level of *stare decisis* respect.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the decision of the South Dakota Supreme Court.

Respectfully submitted,

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