

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: QUILL CORPORATION, Petitioner V. NORTH
DAKOTA BY AND THROUGH ITS TAX
COMMISSIONER, HEIDI HEITKAMP

CASE NO: 91-194

PLACE: Washington, D.C.

DATE: January 22, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 QUILL CORPORATION, :
4 Petitioner :
5 v. : No. 91-194
6 NORTH DAKOTA BY AND THROUGH ITS :
7 TAX COMMISSIONER, HEIDI :
8 HEITKAMP :
9 - - - - -X

10 Washington, D.C.

11 Wednesday, January 22, 1992

12 The above-mentioned matter came on for oral
13 argument before the Supreme Court of the United States at
14 1:58 p.m.

15 APPEARANCES:

16 JOHN E. GAGGINI, ESQ., Chicago, Illinois; on behalf of the
17 Petitioner.

18 NICHOLAS J. SPAETH, ESQ., Attorney General of North
19 Dakota, Bismarck, North Dakota; on behalf of the
20 Respondent.

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1 PROCEEDINGS

2 (1:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-194, the Quill Corporation v. North Dakota.

5 Mr. Gaggini, you may proceed.

6 ORAL ARGUMENT OF JOHN E. GAGGINI

7 ON BEHALF OF THE PETITIONER

8 MR. GAGGINI: Mr. Chief Justice, and may it
9 please the Court:

10 This case involves North Dakota's refusal to
11 apply this Court's decision in Bellas Hess. By that
12 refusal, North Dakota is asking this Court first to
13 abrogate the historic standard for State taxation which
14 has resulted in an orderly growth of an open national
15 economy, and second, to ignore stare decisis and overrule
16 a construction of the commerce clause that is based on 50
17 years of case law.

18 The irony of this case is that while the
19 European Community is eliminating locally erected tax
20 barriers in order to complete the creation of a European
21 Common Market, North Dakota and other States are
22 advocating a balkanization of the American market.
23 Overruling Bellas Hess will destroy the interstate
24 marketplace that we now know it.

25 Quill is a mail-order company. It sells more

1 than 9,000 office supply items ranging from paper clips to
2 computer accessories.

3 QUESTION: I suppose you concede that if Quill
4 had an office in North Dakota that -- and solicited out of
5 there, and they had an inventory, there wouldn't be any
6 problem, would there?

7 MR. GAGGINI: Your Honor, we would not before
8 this Court. Quill conducts its business exclusively by
9 mail, telephone --

10 QUESTION: That has hardly balkanized
11 the American market.

12 MR. GAGGINI: No, the balkanization occurs
13 because North Dakota and other States are suggesting to
14 this Court that National Bellas Hess is no longer the
15 jurisprudence to determine what is subject to tax. Under
16 National Bellas Hess, this Court in 1966 --

17 QUESTION: Only where mail order houses are
18 concerned.

19 MR. GAGGINI: Yes, sir. Well, mail order houses
20 and any business that conducts an interstate market that's
21 not covered by a statute such as you've just heard 86272.
22 In a service industry, an accountant, an architect,
23 communicating with a customer by telephone or mail in
24 another jurisdiction is not covered by 86272. New Mexico,
25 in briefs filed in this case, would suggest they might be

1 able to tax that activity.

2 New Mexico files a brief in this case supporting
3 a gross receipts tax. New Mexico suggests that they're
4 not bound by National Bellas Hess. It's no longer a
5 legitimate authority. So the panorama of this case is
6 much more than the direct mail order or market industry,
7 and it's much more than merely collecting taxes.

8 QUESTION: Is that on the assumption that
9 there's a due process component to Bellas Hess?

10 MR. GAGGINI: Bellas Hess, Justice Kennedy,
11 involves two aspects, commerce and due process. And we
12 submit that this Court weighed those tests in 1967, when
13 Justice Stewart for the majority and Justice Fortas for
14 the dissenting, looked at the Illinois market. The
15 Illinois market at that time was a target, a market that
16 National Bellas Hess was aiming at. It was sending its
17 mail catalogues; it was sending its merchandise.

18 And this majority said that looking at prior
19 case law dating back to 1940, the Sears case, that this
20 Court has never imposed tax obligations on an out-of-State
21 vendor unless that vendor conducted in-State business
22 activity.

23 QUESTION: Suppose we were to conclude that our
24 reading of Bellas Hess is that it's simply a commerce
25 clause case. From that, then, we simply have an

1 allocation problem, don't we, and the parade of horrors
2 that you present to us is --

3 MR. GAGGINI: Justice Kennedy, I would submit
4 that under this Court's analysis in National Bellas Hess,
5 Complete Auto, National Geographic, and every case
6 preceding and succeeding, that there is both a commerce
7 and due process nexus question.

8 QUESTION: I'm just saying suppose we disagree
9 with that?

10 MR. GAGGINI: Your Honor, you would have to
11 overturn National Bellas Hess. National Bellas Hess
12 requires as the first component that there be --

13 QUESTION: You're saying then that if we find
14 that there is no due process component, at least no viable
15 due process component, then we must overrule National
16 Bellas Hess.

17 MR. GAGGINI: Your Honor, I'm suggesting that
18 the commerce clause and the due process component -- when
19 we speak of due process, there are two aspects. There's
20 the State's view of due process, which is personam
21 jurisdiction, and there is this Court's application of due
22 process in the tax area. Both standards are different.

23 But I'm suggesting to you, Your Honor, that the
24 commerce clause aspect of this case in Complete Auto
25 requires the first analysis to -- the first finding to be

1 that there be a substantial nexus in the taxing forum.

2 This Court has never held otherwise. We can go
3 back to 1940 with Sears, Your Honor, and in the Sears
4 analysis, the Court specifically said that there was no
5 way to impose the obligation on the foreign business that
6 didn't have a presence. That was repeated in National
7 Geographic 1 month after Complete Auto. Complete Auto
8 held the first part -- the first component of the
9 four-part commerce test to require a substantial nexus.

10 QUESTION: Well, if you want to argue the case
11 on the theory that Bellas Hess must rest on a due process
12 analysis --

13 MR. GAGGINI: I'm arguing --

14 QUESTION: -- I suppose that that's your choice.
15 But it seems to me that our due process jurisprudence has
16 progressed to the point where it's very clear that your
17 clients could be held liable for products, liability, et
18 cetera, and that if Bellas Hess rested on due process at
19 one point -- if it did, and I'm not sure that it did --
20 that that has been superseded by our jurisprudence.

21 MR. GAGGINI: Your Honor, I --

22 QUESTION: If you want to say that Bellas Hess
23 then must be overruled, I suppose you're at liberty to
24 argue that.

25 MR. GAGGINI: I may have been misunderstood. I

1 am suggesting to this Court that National Bellas Hess
2 relies on commerce clause concerns. And commerce clause
3 concerns require a finding of substantial nexus, a
4 physical presence, in the taxing forum. That has been
5 consistently applied in every case this Court has decided.
6 From 1941 until this Court decided Goldberg, it required a
7 finding of substantial nexus for commerce clause. And
8 that's what I am suggesting to Your Honor.

9 QUESTION: Well, that's exactly the point, that
10 is we're forced to address here, whether that physical
11 presence requirement should exist anymore after Complete
12 Auto and the cases following it.

13 MR. GAGGINI: Yes, Your Honor. And may I
14 suggest that the State in this case --

15 QUESTION: I would have thought you might want
16 to rest your argument just on the commerce clause and say
17 it is better left to Congress to change. I'm a little
18 surprised, as is Justice Kennedy, to hear your argument.

19 MR. GAGGINI: Your Honor, again, I must be
20 misspeaking because I am suggesting to you that Bellas
21 Hess relies on the commerce. It -- there are due process
22 underpinnings in that case, but we're saying based on the
23 commerce clause, North Dakota may not impose these tax
24 obligations on Quill because Quill has no physical
25 presence in North Dakota.

1 National Bellas Hess doesn't stand alone. This
2 Court has used National Bellas Hess in Complete Auto. The
3 State suggests that Complete Auto overturns Bellas Hess --
4 15 years after -- that Bellas Hess has been overturned for
5 15 years.

6 Complete Auto applied a Mississippi gross
7 receipts tax to a business that was conducted exclusively
8 in Mississippi. Complete Auto received automobiles in
9 Mississippi at its facilities. Those automobiles were
10 moved by Complete Auto's personnel to dealers in
11 Mississippi, and this Court held that there must be a
12 substantial nexus with that activity. There was no
13 question that that activity occurred in Mississippi and
14 that Complete Auto had that nexus.

15 The State suggests that this Court has abandoned
16 the physical presence test and applied a due process test
17 in determining nexus. That due process test they they're
18 suggesting is a Burger King analysis, which -- which
19 suggests minimum contact. There's no authority that the
20 State can point to for that argument. One month after
21 Complete Auto was decided, this Court juxtaposed, hand in
22 hand, Bellas Hess and Complete Auto in answering the
23 question in National Geographic.

24 The question in National Geographic was was that
25 entity taxable in the State. The California Supreme Court

1 suggested that the slightest presence rule would create a
2 nexus. And this Court, the National Geographic Court,
3 looked at that and refused to adopt that analysis,
4 suggesting that National Geographic's presence in the
5 State was sufficient. And in that opinion, this Court
6 said there are entities, direct marketers, that do not
7 have the requirement to file returns or pay tax. Those
8 are those that have no nexus -- analyzing National Bellas
9 Hess 1 month after Complete Auto was decided. The --

10 QUESTION: Was the -- in the opinion in Complete
11 Auto, was National Bellas Hess cited?

12 MR. GAGGINI: No, Your Honor. The nexus
13 question wasn't at issue. And that's the -- that's the
14 problem of the State's analysis in this case. They're
15 citing cases where the nexus issue wasn't a concern. If
16 you go back to the cases where nexus was involved, and we
17 might start just looking at what was argued in National
18 Bellas Hess.

19 In National Bellas Hess, the State of Illinois
20 in response to Justice Harlan's question, you have to have
21 some kind of rule, a rule that businessmen can understand.
22 The State, Attorney General McCarthy arguing for Illinois
23 suggested, oh, definitely, I think there should be some
24 kind of rule they should understand.

25 And that rule, I suggest, should be distilled

1 from the cases of this Court is a rule which businessmen
2 should well understand. And that is simply where a
3 business is successful in a State from a business point of
4 view, that should be equated with presence from a legal
5 point of view. That was Justice Fortas' analysis. That
6 was the State of Illinois' argument. That was the
7 presentation that any sale, any economic activity in
8 Illinois would be sufficient. Justice Fortas, in a very
9 eloquent dissent, went through an analysis of the benefits
10 that Illinois provided to Bellas Hess, a Missouri company.

11 This Court can juxtapose the recitation of those
12 benefits against the benefits suggested by the State in
13 this case. They're virtually identical. Those benefits
14 have never changed. The rules, the education of the
15 consumer, that still exists, but this Court analyzed that.

16 There were three dissenters: Justice Fortas,
17 Black -- Justices Black, and Justice Douglas. And the
18 dissenters argued that National Bellas Hess should be
19 required to collect the Illinois tax. But the majority
20 suggested that, in analyzing prior precedent, no case ever
21 supported that argument. Yes, there's a market, yes,
22 there's a target, and people can shoot at that target, but
23 if you shoot at it using communication -- telephone, U.S.
24 mail, common carrier -- that the shooting at that target
25 is insufficient to create a nexus. That's a commerce

1 clause analysis. That's not a due process clause analysis
2 in the context of Burger King or International Shoe.

3 International Shoe, at that time, was a service
4 of process case. The question, an out-of-State company,
5 who -- which had employees in the State, could that
6 company be served. The question -- the underlying
7 question in that case was tax.. It was an unemployment
8 tax. This Court previously held that unemployment taxes
9 were not commerce clause, were not protected by commerce
10 clause. And this Court held that in a service of process
11 case, that International Shoe could be served. I'm
12 suggesting to Your Honors that in 1945, International Shoe
13 was decided.

14 In subsequent years, McGee was decided, which
15 was an insurance company issue, no commerce clause
16 question. McGee sold a contract to an insured in
17 California. California served, by mail, that insurance
18 company which brought that company into the State. The
19 State of Illinois argued to this Court that the standard
20 adopted by this Court in McGee should be used to support
21 taxation of Bellas Hess. This Court never applied that
22 standard. That was an in personam, personal jurisdiction
23 test.

24 Justice Douglas, in a concurring opinion in
25 Travelers, suggested that there may be different levels of

1 due process. Your Honors, I'm not arguing due process in
2 this case. I will not suggest to this Court that Quill
3 could not be served if there was a tort or personal injury
4 problem in Quill -- in the State of North Dakota. What
5 I'm suggesting is that there is a different standard under
6 the commerce clause.

7 QUESTION: Well, what's the reason for the nexus
8 requirement under the commerce clause? Is it to prevent
9 discrimination against out-of-State companies?

10 MR. GAGGINI: It's not only for discrimination,
11 Your Honor, it's for the national marketplace. If each
12 State could impose restrictions on trading with customers
13 in that State, we wouldn't have the national market that
14 we currently have. This Court has analyzed that, the
15 openness of the national market -- has applied that test.
16 It's the two different --

17 QUESTION: You think we have a national market
18 only for mail order businesses?

19 MR. GAGGINI: No, sir. No, Your Honor, I do
20 not. I'm suggesting --

21 QUESTION: Well, I mean that's very strange.
22 But that's what your argument comes down to, that the
23 great national market that the commerce clause set up
24 really only works for mail order business, because
25 certainly, everybody else can be taxed by the individual

1 States that they do business in.

2 MR. GAGGINI: Oh, Your Honor, I suggest
3 otherwise. The briefs of filed -- amicus briefs filed in
4 this case at this time, States are not imposing tax
5 liabilities as a result of the commerce clause in Bellas
6 Hess in all of these service industries where their
7 communication is by mail or by telephone or common
8 carrier. This concept of a national market exists for all
9 of that.

10 QUESTION: I'm saying that seems to me a very
11 limited notion of what the founders' vision was. But if
12 that's what you think it was.

13 MR. GAGGINI: The founders' vision?

14 QUESTION: We want a national mail order
15 telephone market.

16 MR. GAGGINI: No, no. No, I'm not suggesting
17 that. I'm suggesting the ability of out-of-State vendors
18 to communicate with customers in a State without being
19 burdened by the various burdens of tax compliance.

20 Your Honor, we talk about the burdens in this
21 case, and they're talked about in a very amorphous
22 concept, as if all that needed to be done is an amount
23 added to the bottom of an invoice. But Your Honor, there
24 are 6,500 taxing jurisdictions. It's not disputed. The
25 ACIR Report, the Advisory Commission of Intergovernmental

1 Relations, suggests that there are over 6,000 taxing
2 jurisdictions. If we look at the number of tax returns
3 that have to be filed, we're talking about over 5,000 tax
4 returns.

5 QUESTION: Yes, but you're missing my point.
6 The same thing -- the same objection could be made by the
7 company that doesn't use the telephone, but uses drummers.

8 MR. GAGGINI: Yes, sir.

9 QUESTION: And says, my goodness, we send these
10 salesmen out into the so-called national market, and we're
11 going to be taxed by every one of these jurisdictions.
12 And you say that's okay.

13 MR. GAGGINI: No, Your Honor, I don't say that's
14 okay.

15 QUESTION: You don't say national market for
16 that, do you?

17 MR. GAGGINI: I'm not saying that's okay. I'm
18 saying this Court in 1967, Justice Stewart and the
19 majority said that looking at this national market,
20 looking at the target, the market of Illinois, that
21 Illinois could not impose extraterritorial burdens on the
22 out-of-State vendor. This Court said that in 1967. That
23 decision has be followed by 70 State court decisions, by
24 this Court as citing National Bellas Hess in six other
25 decisions. The law drawn in 1967 was physical presence

1 was necessary. This Court's exact words were: we have
2 never imposed a tax obligation on a vendor who has
3 communicated only by common carrier, mail, and
4 electronics.

5 QUESTION: I'm not sure you're understanding me.
6 I want you to tell me why this is worse for somebody who
7 operates by telephone or mail than it is for somebody who
8 operates by sending business representatives into all of
9 the States.

10 MR. GAGGINI: The -- the physical presence that
11 -- this Court has drawn the mark --

12 QUESTION: I know what we've done, but you're
13 elevating it to a point of principle and not mere fact.

14 MR. GAGGINI: The --

15 QUESTION: You're saying that this has something
16 to do with our national market.

17 MR. GAGGINI: The benefit --

18 QUESTION: But you're perfectly willing to have
19 the national market fragmented by allowing these -- how
20 many thousands of jurisdictions -- tax drummers, except
21 for the benefit of a Federal statute.

22 MR. GAGGINI: Oh, Your Honor, the presence of a
23 drummer, the warehouse, the retail outlet in the State,
24 the out-of-State vendor is now in State. It's no longer
25 an out-of-State vendor. It's an in-State vendor receiving

1 benefits from the State.

2 This Court has clearly held that in Tyler
3 Pipeline, for example, where a full-time employee. We
4 have no question that if there was a physical presence.
5 But this Court drew the line, it weighed the test in '67.
6 And it said the physical presence test was the rule. The
7 rule can be justified based on the benefits received with
8 that physical presence.

9 QUESTION: And would you say that they're part
10 of a local market? It seems to me that your national
11 market argument works against you. It seems to me that
12 this statute vindicates the idea that there's a national
13 market, which takes many forms, which has many sorts of
14 structures, but that all should be treated the same. So
15 that the L.S. Bean Company, or whatever it's called, can
16 pay a sales tax, just as -- or use tax, just as a company
17 does if it has small warehouse within the State. It seems
18 to me that they're quite the same. They're all part of a
19 single national market.

20 MR. GAGGINI: Oh, but I think, Your Honor, that
21 when you juxtapose the benefits derived from the vendor in
22 the State, those are clear benefits. There is no benefit
23 that is directly available to Quill, no benefit
24 distinguishable from those amorphous benefits identified
25 in Bellas Hess. They're offered to every vendor who is

1 out there communicating.

2 And by the way, North Dakota does not tie it to
3 an economic basis; North Dakota ties it to three
4 communications, three advertisements. No sale. Three
5 advertisements as nexus. We're talking about burdens here
6 about local taxes. The State's brief suggests there's no
7 tax liability for local jurisdictions. That brief is
8 contrary to a Tax Commissioner Bulletin issued in January
9 of '91 which says there is local taxes.

10 And, Your Honor, one other aspect of this about
11 discriminatory burdens, a vendor selling into the State,
12 in many States is obligated to collect at the point of
13 destination, where the local retailer is only obligated to
14 collect tax based on the point of sale. That's a
15 discriminatory burden.

16 The requirement imposed on the out-of-State
17 vendor to collect in a disparate number of jurisdictions,
18 the ability of a local retailer to collect over-the-
19 counter taxes that the out-of-State vendor cannot collect,
20 the reporting of these multiple jurisdictions. We're
21 speaking of not 6,500 returns that are filed monthly, but
22 6,500 entries. I am repeating burdens that the ACIR
23 Report and Congress Today have considered and said are
24 indistinguishable from the burdens this Court weighed in
25 1967.

1 Footnote 14 of National Bellas Hess is a
2 footnote where this Court looked at the Willis Report and
3 identified -- which identify the burdens. If you
4 juxtapose that Willis Report against the ACIR Report and
5 congressional hearings, you will find that the burdens are
6 identical.

7 QUESTION: Well, I'm sure they are. But maybe
8 we were wrong in 1967. Is there some reason why we would
9 -- should be more reluctant to change in this case than we
10 ordinarily would be, or less reluctant? What kind of a
11 case -- this is -- was a constitutional decision, right?
12 And we have opinions that say that ordinarily where we
13 think we've gotten it wrong there and are wrongly
14 preventing the States here from doing something they ought
15 to be able to do that we should 'fess up and change our --
16 change our opinion.

17 MR. GAGGINI: Yes, Your Honor, and I would agree
18 with you except this case is distinguishable. In this
19 case, we submit that based on the jurisprudence, Bellas
20 Hess was well reasoned in 1967. There may be a dispute as
21 to which way the Court should have gone, but it was well
22 reasoned. It provided a workable framework, a framework
23 where taxpayers, State administrators, and courts have
24 followed for over 25 years.

25 QUESTION: Well, you might go beyond that, Mr.

1 Gaggini, rather than just saying the merits were rightly
2 decided. This, unlike a lot of our constitutional
3 decisions, Bellas Hess is a decision which Congress can
4 overrule, the same way it provided in the case we heard
5 argued earlier. Congress -- if Congress wants to change
6 the result in Bellas Hess, it can do so, and it's been
7 asked to do so by the State.

8 MR. GAGGINI: Thank you, Your Honor. That was
9 my second point, that Bellas Hess --

10 (Laughter.)

11 MR. GAGGINI: That Bellas Hess --

12 QUESTION: Provided it's not on due process. If
13 it's on the commerce clause, Congress can do that.

14 MR. GAGGINI: Your Honor, --

15 QUESTION: That's why I share the two Justice's
16 comments that we're a little concerned that you're putting
17 it on both pins.

18 MR. GAGGINI: Well, I am not suggesting this
19 Court doesn't retain its right to analyze any
20 congressional legislation. But I have deference to
21 Congress, especially the considerations they have given to
22 this case. When I say this case, I don't mean to Quill,
23 I'm talking about the issue of Bellas Hess. The States
24 have petitioned Congress a few years ago, hoping to elicit
25 a change. And Congress looked at that and said --

1 initially they said, well, let's go with an origin tax.
2 That is, the State from which the sale is shipped would
3 collect the revenue. And the State said no, we -- we're
4 not too pleased with that because then the tax would be
5 distributed to the States that were selling, and Congress
6 went into a destination tax.

7 The destination tax initially proposed just
8 said, we're going to allow the States to impose this. And
9 with consideration of the compliance burdens, et cetera,
10 Congress came in and started drafting a provision that
11 provided for uniform rates, limitation on returns, the
12 limitation on audits.

13 Congress was familiar with these burdens and
14 tried to tailor legislation that would eliminate the due
15 process concerns. If Congress enacts legislation, I am
16 confident that Congress will enact legislation that is
17 carefully tailored to consider due process. But this
18 Court has retained jurisdiction to analyze that.

19 QUESTION: Counsel, refresh my recollection.
20 How many of the States have passed legislation that if
21 National Bellas Hess were to be reversed, would mandate
22 retroactive application of State tax laws to situations
23 that had been previously exempt under National Bellas
24 Hess?

25 MR. GAGGINI: Your Honor, there was an excellent

1 compilation which is attached to --

2 QUESTION: Well, how many States? About 36?

3 MR. GAGGINI: Thirty-two States, Your Honor.

4 QUESTION: Thirty-two.

5 MR. GAGGINI: Thirty-two have adopted
6 legislation. Of the 32 -- and again, we have to put that
7 in historical perspective, if you're interested. That
8 legislation didn't come about because the law changed, it
9 came about first because Congress was considering
10 legislation and they wanted to be lined up. If Congress
11 enacted this, they wanted to be behind the locomotive
12 pulling out so that they had effective --

13 QUESTION: And if we were to overrule National
14 Bellas Hess all those things would have kicked in for
15 several years back, I assume.

16 MR. GAGGINI: Yes, Your Honor, there -- there's
17 a horrendous -- historical -- the retroactive liability is
18 so dramatic in this case because it's not the tax
19 liability of the vendor we're talking about. We're
20 talking about the consumer. And we see States out there
21 that have alternative procedures for collecting. And
22 they've been implementing this.

23 First of all, in our case, Quill sells to
24 businesses. The State has been auditing returns filed by
25 those businesses. But instead of assuming that obligation

1 in North Dakota, they're transporting it to an out-of-
2 State vendor. It's very expedient. Maine has done the
3 same -- has initiated a procedure for consumers. They
4 have a line on the income tax return, as a number of
5 States have, and there's a report in the amicus brief
6 filed by Direct Marketing Association in this case, which
7 reports the success that Maine has had.

8 So, Your Honor, in going back to the question
9 that Justice Scalia asked, the first question I responded
10 to; the second factor Chief Justice Rehnquist took my
11 thunder, but it was that Congress may correct this
12 legislation because it's a commerce clause question, and
13 they can correct any misapplication. And that the third
14 point was that North Dakota advances no compelling reason.
15 Many other States have alternative methods of collecting.

16 And I will -- I would like to reserve the
17 remainder of my time for rebuttal.

18 QUESTION: Thank you, Mr. Gaggini.

19 General Spaeth, we'll hear from you.

20 ORAL ARGUMENT OF NICHOLAS J. SPAETH

21 ON BEHALF OF THE RESPONDENT

22 MR. SPAETH: Chief Justice Rehnquist, members of
23 the Court, may it please the Court:

24 I suppose I ought to begin with a disclaimer.
25 This is not a Buffalo Bills tie.

1 The question presented in this case is whether
2 the Court should abandon the physical presence test set
3 out in its 25-year-old decision of National Bellas Hess in
4 favor a standard that focuses on the economic realities of
5 direct marketing sales transaction.

6 This case --

7 QUESTION: Are you asking that Bellas Hess be
8 overruled?

9 MR. SPAETH: Yes, I am, Justice Blackmun. This
10 case arose when North Dakota sued Quill when it refused to
11 collect our use tax. Quill, of course --

12 QUESTION: Of course, of the present members of
13 the Court, I think only Justice White was here at the
14 time, and he was a member of the majority.

15 MR. SPAETH: Exactly, and that's why I wore this
16 tie today. As you can see, I'm going to use everything I
17 can to sway that last vote. It is a Colorado buffalo.

18 MR. SPAETH: And as you surmised, our --

19 QUESTION: Do you have any better reasons?

20 (Laughter.)

21 MR. SPAETH: If you give me a minute, Justice
22 Kennedy, I'll think of some.

23 As a matter of fact, Quill does have some small
24 economic presence in the State. As we argue in our brief,
25 they maintain ownership interest in software that their

1 customers use. We also believe they own these catalogues
2 that they ship unsolicited into our State to thousands of
3 people.

4 But the fact that this case could turn on things
5 that small suggests to me the absurdity of the physical
6 presence test, and that's why we're asking this Court
7 today to overrule National Bellas Hess in favor of a
8 standard that takes into account the economic realities of
9 selling today.

10 QUESTION: Would that involve potential
11 retroactive liability covering several years and in a
12 large number of the States, General Spaeth?

13 MR. SPAETH: It might. And obviously I can't
14 speak for all the States on this. And it would, of
15 course, depend --

16 QUESTION: It would be a very substantial in
17 amount, would it not?

18 MR. SPAETH: It could be. And of course it
19 depends on how the States, and this Court ultimately,
20 because I suspect it would come back here, would apply
21 Chevron and Jim Beam, and in a way to determine --

22 QUESTION: Well, I suppose you've seen the
23 handwriting on the wall there?

24 MR. SPAETH: Yes. And we're quite pleased with
25 the handwriting so far.

1 (Laughter.)

2 MR. SPAETH: But the retroactivity issue, of
3 course, is not in front of you. This case arose in a
4 declaratory judgment action. We have not assessed Quill
5 for anything at this point in time.

6 QUESTION: Of course it bears on it in this way:
7 if National Bellas Hess rests on the -- dormant commerce
8 clause, certainly Congress can take care of this problem,
9 and it could rightfully weigh the really massive concerns
10 here for retroactive liability and try to sort it out in a
11 fair and reasonable way.

12 MR. SPAETH: That's the problem --

13 QUESTION: Now, that's not going to happen if
14 this Court decides to jump the gun and turn the tide.

15 MR. SPAETH: The problem, Your Honor, is that
16 Congress is, as this Court well knows, ill suited the
17 weigh the complexities of this decision.

18 QUESTION: They're much better suited to do than
19 we are because they can deal with the retroactivity
20 problem.

21 MR. SPAETH: But every time this issue has been
22 presented to Congress it's been stalemated -- in no small
23 part because the Direct Marketing Association has argued
24 Bellas Hess is a due process case.

25 QUESTION: But that doesn't mean the Congress is

1 ill suited to do it, just because it doesn't pass the law
2 that you want.

3 (Laughter.)

4 MR. SPAETH: I was speaking about the political
5 realities, Chief Justice Rehnquist. There are so many
6 special interest groups involved in this. And that -- in
7 a situation where there's a lot of money at stake for
8 Congress --

9 QUESTION: Well, that's the way the game goes.

10 MR. SPAETH: That's right. But the problem is
11 not Congress. The problem is this Court and a 25-year-
12 old decision, which the Direct Marketing Association uses
13 today to tell Congress that it's a due process case and
14 you don't have the power to change the result through
15 legislation.

16 QUESTION: Well, if we were to reverse the
17 Supreme Court of North Dakota here, say that Bellas Hess
18 is still good law, but that was based on the commerce
19 clause, not the due process clause, would that solve some
20 of your problems?

21 MR. SPAETH: Well, that would give me half a
22 loaf, Chief Justice Rehnquist.

23 QUESTION: Better than none.

24 MR. SPAETH: It's better than none, but as you
25 might understand, I'm hoping for the whole loaf here

1 today.

2 And there's been a lot that's happened in this
3 country since Bellas Hess was decided. There was a
4 \$2.4 billion market in direct marketing at that point in
5 time. It's grown to as much \$180 billion today. It's as
6 much as 25 percent of the retail market in America today.
7 It continues to grow rapidly at about 15 percent a year.
8 I'm sure all of you get hundreds of catalogues every year,
9 and some of you probably order products from them. It's
10 resulted in about a \$3.1 billion a year erosion of State
11 taxes.

12 QUESTION: As Mr. Gaggini would say, that shows
13 you what a free market will do.

14 (Laughter.)

15 MR. SPAETH: I think it shows you what big 5 or
16 6 percent tax advantage does as well. They have a
17 competitive advantage over in-State marketers. They have
18 a competitive advantage over their other competitors, like
19 Sears, Roebuck and Montgomery Ward that do collect the tax
20 in spite of the parade of horrors of difficulty that my
21 noble opponent has said about collecting this tax.

22 QUESTION: Is it correct, General Spaeth, that
23 as the record seems to disclose, Quill is only the number
24 6 in North Dakota?

25 MR. SPAETH: That's correct.

1 QUESTION: Who are the other five? I thought
2 this was a big operator. Why did you pick on Quill?

3 MR. SPAETH: I think they are the largest direct
4 marketer of office equipment in the State. We started
5 going against Spiegel, but they gave up. And so then we
6 went after Quill. And I'm not sure --

7 QUESTION: You mean they're collecting the tax?

8 MR. SPAETH: Yes, they agreed to do it after we
9 went after them. I think they saw, hopefully, the
10 handwriting on the wall.

11 QUESTION: Are you just saying we were flat
12 wrong in Bellas Hess, or do you think there have been
13 developments since then that make Bellas -- that undermine
14 Bellas Hess, or both?

15 MR. SPAETH: Well, in all due deference, Justice
16 White, I think you were flat wrong in National Bellas
17 Hess. But I also would have to acknowledge that there's
18 been a lot that's happened since then that focuses, or
19 that changes the view of this case from the standpoint of
20 collectibility.

21 You can now buy computer software, and many
22 direct marketers use it right now, that automatically
23 calculate the tax and add it on to a bill. That
24 software's available. It takes into account the
25 complexities of every jurisdiction in the country. And

1 that's what other national marketers are using today.
2 It's not expensive; Quill could easily purchase it. This
3 case is not about the complexities of collection, it's
4 about a tax advantage that they enjoy that they don't want
5 to give up.

6 QUESTION: Why does North Dakota deserve to
7 collect the tax? That's the real -- sort of the question,
8 I would think. What do you want for nothing?

9 MR. SPAETH: We don't provide them anything.
10 First of all, we facilitate the transaction for them.
11 They use phone lines in our State; they use our roads to
12 deliver their products.

13 QUESTION: Is that the State?

14 MR. SPAETH: Yes. We build those roads. And we
15 also regulate those phone lines.

16 QUESTION: How about the phone lines?

17 MR. SPAETH: We regulate the phone lines. We
18 provide landfills where their product goes. But most
19 importantly, we provide the customer base for them. We're
20 not asking them to pay the tax, you understand, we're
21 asking them to collect it and give it to us.

22 QUESTION: That's the argument that was rejected
23 in *Bellas Hess* after being quite eloquently portrayed by
24 the dissent.

25 MR. SPAETH: I agree with you, Chief Justice

1 Rehnquist. It was directly presented in that case and
2 rejected. But I still think it's the right argument.
3 It's an argument that focuses on the economic realities of
4 sales transactions by large companies like Quill.

5 QUESTION: Have there been any other changes in
6 the national market? You mentioned computerized ability
7 to calculate the tax. Have there been any changes in the
8 nature of the market itself?

9 MR. SPAETH: Yes. And I think I mentioned it
10 briefly before. The fact of the matter is direct
11 marketing has become such a big player in the national
12 sales market. It is, depending on whose estimates you
13 use, 15 to 25 percent of total retail sales in this
14 country. And I think the combination of the changing
15 marketplace, the ease of communication that goes on that
16 facilitates this, and the fact that the collection burdens
17 have gone down substantially because of technological
18 developments, make the world a very different place in
19 1992 than it was in 1967 when Bellas Hess was decided.

20 At the same time, the law has changed. This
21 Court, in National -- in the Complete Auto Transit v.
22 Brady opened the door to the taxation of interstate
23 commerce as long as it met the four-factor test.

24 The same year, in the National Geographic test
25 -- case, which has been alluded to by the other side, this

1 Court severed the connection between the tax and the
2 physical presence. In that case, National Geographic
3 Society had two advertising offices in the State of
4 California where they solicited advertising. And the tax
5 at issue there was a tax on their direct mail sales to the
6 State of California from another location. And this Court
7 said it's okay because of those two offices, even though
8 there was no connection between the activities in those
9 two offices and the tax that was levied.

10 By severing the connection between the
11 transaction and the tax, all of the economic justification
12 for the physical presence test has been lost, as I think
13 any economist would tell you. And that's why we need a
14 new standard today, a standard that recognized the
15 realities of the American marketplace today.

16 And that's why this Court believes it's
17 appropriate for -- or the State believes it's appropriate
18 for this Court to adopt something like the standard
19 applied in ordinary civil jurisdiction. When a State
20 purposely avails itself of the privilege of doing business
21 in North Dakota, in other words, it markets in our State
22 and makes sales, it ought to at least bear the
23 responsibility of collecting the sales tax and remitting
24 it back to the State.

25 QUESTION: Do you think you could require the

1 out-of-State marketer to qualify to do business in the
2 State?

3 MR. SPAETH: To register as a business?

4 QUESTION: Yes.

5 MR. SPAETH: Yes, we could do that. And we
6 would as part of this. We --

7 QUESTION: If you win this case, you would.

8 MR. SPAETH: Yes, we would. But that only means
9 that we have notice of them and we send them reports to
10 fill out on the use tax. It doesn't trigger any other
11 responsibilities on their part, simply to pay the use tax.

12 You know, the physical presence test really
13 doesn't make any sense for at least three reasons. As I
14 mentioned before, it's got nothing to do with the economic
15 realities --

16 QUESTION: How do -- can you get jurisdiction
17 over these out-of-State sellers in your own courts?

18 MR. SPAETH: Yes, in a variety ways.

19 QUESTION: What, under your long arm statute?

20 MR. SPAETH: Yeah. Let me give you an example,
21 Justice White. Part of my office is the Consumer Fraud
22 Division in the State. We don't have a better business
23 bureau. We have jurisdiction over out-of-State marketers
24 like Quill all the time on consumer fraud claims. In
25 fact, 30 percent of the consumer --

1 QUESTION: Under your long arm statute?

2 MR. SPAETH: Right. Thirty percent of the
3 consumer fraud claims that come into my office are from
4 out-of-State marketers. It was mentioned before, tort law
5 would enable us to reach them if there were a defective
6 product. There are a variety of ways already in which we
7 have regulatory jurisdiction over them. And so this case
8 would not be a major development in the sense of due
9 process considerations. We already have jurisdiction over
10 them. The question is do we have jurisdiction to require
11 them to collect and remit a tax to us.

12 QUESTION: Well, how long has -- the North
13 Dakota law has been in its present form only since you
14 changed the regulations to redefine who a retailer was?

15 MR. SPAETH: That's correct.

16 QUESTION: How long has that been?

17 MR. SPAETH: Since 1987.

18 QUESTION: So '87. Suppose you win this case
19 and -- so you'll go back to '87, I guess, to collect?

20 MR. SPAETH: Well, that's not my decision, but
21 there's a possibility.

22 QUESTION: I know, but I suppose you'll try.

23 MR. SPAETH: Yeah, there's a theoretical --

24 QUESTION: Who would you try to collect from?

25 MR. SPAETH: From Quill.

1 QUESTION: And not from consumers.

2 MR. SPAETH: That's correct. Because when --
3 Quill had notice as of that date that it had this
4 responsibility. And of course, it chose to litigate. And
5 perhaps if I'd been advising them as their counsel, I
6 would have said the same. But the tax department will
7 make a decision, I suppose, on the retroactivity issue and
8 how far to go back --

9 QUESTION: Well, you're right now able to move
10 against the consumers, I guess. Right?

11 MR. SPAETH: If we knew who they were. I mean,
12 as this Court noted in National Geographic, it's virtually
13 impossible for the State to audit consumers.

14 QUESTION: Well, I just thought you told me --
15 you told us that all these marvelous computer developments
16 around, so everybody knows everything about everything.

17 (Laughter.)

18 QUESTION: You could find out in a flash from
19 them.

20 MR. SPAETH: I think it would be very difficult
21 for us to go to all the direct marketing companies that
22 market in the State and try to figure out if they made
23 sales in the State of North Dakota. And I think this
24 argument's been presented to this Court before. In
25 National Geographic it was, and this Court said States

1 don't have to do that. That's impractical.

2 QUESTION: Mr. Gaggini mentioned that some
3 States require filling it out on their income tax returns.
4 Did you make any out-of-State purchases over, you know --

5 MR. SPAETH: He mentioned one State, Maine, and
6 I can explain that in two words: L.L. Bean. I mean,
7 they're a big player in the State of Maine. As you
8 notice, the State of Maine is not siding with the other
9 States in this particular case because of the importance
10 of L.L. Bean to that State.

11 I don't think we need to do that
12 constitutionally. There's a much easier way, and that's
13 to require companies like Quill to collect and remit the
14 tax.

15 The physical presence test makes no sense
16 whatsoever. As Justice Scalia eloquently put, what's the
17 difference between the drummer going through the State and
18 soliciting sales by mail? There isn't any economic
19 distinction between those two. When in fact, what's
20 happened, is it's given direct marketers a huge
21 competitive advantage in the State. They have the
22 advantage that they don't have to collect the tax.

23 What Bellas Hess did was turn the commerce
24 clause on its head. Instead of leveling the playing
25 field, it's given out-of-State marketers a competitive

1 disadvantage -- advantage over other marketers.

2 Finally, it's made it profitable for companies
3 to avoid the tax by setting up subsidiaries. That's how
4 Saks Fifth Avenue does it. They have stores and they have
5 direct mail. They have a subsidiary that does the direct
6 mail so that they don't have to collect the sales tax, or
7 use tax, in the States where they actually have stores.

8 That kind of thing doesn't make any sense. So I
9 urge this Court to the affirm the decision of the court
10 below to close that enormous tax loophole that exists.
11 It's unjustified by economic circumstances. I think the
12 apportionment and nondiscrimination requirements of
13 Complete Auto will be met, will ensure that the collection
14 of the tax doesn't violate any commerce clause
15 considerations, and due process will be satisfied by
16 forcing the seller to collect the tax, only when it
17 purposely avails itself of the privilege of doing business
18 in the State.

19 Mr. Gaggini mentioned the fact that North Dakota
20 doesn't tie this tax to its sales. Well, of course it
21 does. They don't have collect the tax unless they make a
22 sale. It's clearly tied to sales within North Dakota.

23 I urge this Court, therefore, in closing, to
24 affirm the decision of the North Dakota Supreme Court,
25 which I think was a finely reasoned decision.

1 Thank you.

2 QUESTION: Thank you, General Spaeth.

3 Mr. Gaggini, you have 3 minutes.

4 REBUTTAL ARGUMENT OF JOHN E. GAGGINI

5 ON BEHALF OF THE PETITIONER

6 MR. GAGGINI: Thank you, Chief Justice.

7 Just some quick points. First, National Bellas
8 Hess was larger than Quill. Quill's sales into North
9 Dakota were one-half when measured against National Bellas
10 Hess' sales in '62. If we adjust by inflation Bellas
11 Hess' sales, they were nine times the size of Quill.

12 This is a commerce clause case. I want to
13 repeat. It's a commerce clause case. The State treated
14 it as a commerce clause case, we treated it as a commerce
15 clause case, but the analyzed it under due process.

16 As to the consumer going outside the State to
17 buy merchandise, the State of North Dakota buys
18 merchandise from Quill. The State is exempt from tax.
19 And the State buys, and it's in our brief. It's
20 footnoted. We were surprised. It came up in a newspaper
21 article.

22 Due process adjudication, the indication that
23 the State has jurisdiction --

24 QUESTION: What's the -- I don't understand,
25 what's the significance of that?

1 MR. GAGGINI: It's that the consumer's decision,
2 and there's a citation to the Congress hearings, Justice
3 Stevens, that the consumer doesn't make a decision
4 necessarily on sales and use tax collection. And that has
5 been reported to Congress. And I wanted to emphasize it.
6 The only reason the State would be buying from us, because
7 they don't pay sales tax, is because either of a variety
8 of product or price.

9 QUESTION: Yeah, but you're not denying you have
10 a sales -- a competitive advantage over those who pay a
11 tax?

12 MR. GAGGINI: Your Honor, I'm saying that's not
13 a decision of the consumer.

14 May I just wrap a few points about adjudicatory
15 jurisdiction? We say that the State has powers, State
16 police powers, but those are not equated with tax
17 jurisdiction. As to the North -- as to the validity of
18 National Bellas Hess, we cite to the North Dakota
19 legislation, where the North Dakota legislators themselves
20 believed National Bellas Hess controlling in 1987, when
21 they enacted their law, and they petitioned Congress to
22 change.

23 The State's audit of the consumer -- this is not
24 a consumer question in this case. Quill sells to
25 businesses and the State audits those businesses.

1 As to one State, it's -- Your Honor, we cite in
2 our appendix, there are 16 States that have alternative
3 methods of collecting this tax.

4 Sears -- there's been mention that Sears
5 collects this tax. National Bellas Hess applies to the
6 company like Sears, because when Sears sells into local
7 jurisdictions where they don't have physical presence,
8 they're not collecting. The Sears-type out-of-State mail
9 order houses are not collecting the tax in the local
10 jurisdictions because they don't have nexus in those
11 jurisdictions.

12 Physical --

13 QUESTION: Thank you, Mr. Gaggini.

14 MR. GAGGINI: Thank you.

15 CHIEF JUSTICE REHNQUIST: Your time has expired.

16 The case is submitted.

17 (Whereupon, at 2:42 p.m., the case in the
18 above-entitled matter was submitted.)

CERTIFICATION

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NO. 91-194 QUILL CORPORATION, Petitioner, v.
NORTH DAKOTA BY AND THROUGH ITS TAX
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