

No. 16-458

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In the  
**Supreme Court of the United States**

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BARBARA J. BROHL, IN HER CAPACITY AS EXECUTIVE  
DIRECTOR OF THE COLORADO DEPARTMENT OF REVENUE,  
*Cross-Petitioner,*

v.

THE DIRECT MARKETING ASSOCIATION,  
*Cross-Respondent.*

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On Petition for Writ of Certiorari to the United States Court  
of Appeals for the Tenth Circuit

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**BRIEF FOR ALABAMA, AND 10 OTHER STATES  
AS AMICI CURIAE SUPPORTING CROSS-PETITIONER**

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## QUESTION PRESENTED

In *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), this Court reaffirmed the “physical presence rule,” which forbids a State from requiring a retail business to collect sales and use taxes unless the business has a physical presence in the State. Courts and commentators agree that the rule lacks doctrinal justification, given that States may impose other regulations on businesses that lack a physical presence within the regulating State’s borders. And, with the explosion of e-Commerce to a multi-trillion dollar industry, the physical presence rule has caused a “startling revenue shortfall in many States.” *Direct Mktg. Ass’n v. Brohl* (“*Brohl II*”), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

Should *Quill* be overturned?

**TABLE OF CONTENTS**

Question Presented ..... i

Table of Authorities.....iv

Interest of *Amici Curiae*.....1

Introduction and Summary of Argument.....1

Argument.....5

I. The physical-presence requirement prevents States from collecting legally owed taxes, leading to budget shortfalls and reduced services .....6

II. The physical-presence requirement reaffirmed in *Quill* has no place in today’s economy .....9

    A. The nexus between the States and e-Commerce vendors is significant .....11

    B. The Internet revolutionized the economy after *Quill* was decided .....13

    C. The physical-presence requirement discriminates between online and brick-and-mortar retailers .....15

III. The practical justifications for the bright-line physical-presence requirement do not stand up to scrutiny .....17

    A. Readily available software can easily calculate tax owed in any jurisdiction .....17

    B. The bright-line rule has not prevented litigation.....18

1. Notification Requirements.....	19
2. Common Ownership .....	19
3. The Affiliate Tax .....	20
4. Economic Presence.....	21
C. <i>Stare decisis</i> does not require the Court to continue to enforce a rule that no longer makes sense.....	22
Conclusion .....	23

**TABLE OF AUTHORITIES**

**Cases**

*Borders Online, LLC v. State Bd. of Equalization*,  
129 Cal. App. 4th 1179 (2005) .....19

*Complete Auto Transit, Inc. v. Brady*,  
430 U.S. 274 (1977).....11

*Direct Mktg. Ass’n v. Brohl*,  
135 S. Ct. 1124 (2015)..... passim

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556 U.S. 778 (2009).....22

*Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of State  
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386 U.S. 753 (1967)..... passim

*New Mexico Taxation & Revenue Dep’t v.  
Barnesandnoble.com LLC*,  
303 P.3d 824 (N.M. 2013) .....20

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Taxation & Fin.*,  
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Barnesandnoble.Com*,  
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James Greiff, *Goodbye, Malls of America*, BLOOMBERG, July 3, 2014 .....13

John W. Schoen, *These States are a Bigger Fiscal Mess Than Illinois*, CNBC, June 1, 2016.....9

Kayla Webley, *A Brief History of Online Shopping*, TIME, July 16, 2010 .....3

Kelly Clay, *Amazon.com Goes Down, Loses \$66,240, Per Minute*, FORBES, Aug. 19, 2013.....14

Kerry Close, *Blame Amazon for the Retail Slump*, TIME.COM, May 13, 2016.....15

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## **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

Alabama, Hawaii, Illinois, Kansas, Maryland, Michigan, Mississippi, Oregon, Pennsylvania, Tennessee, and Vermont, are States that believe that the physical-presence requirement for state sales and use tax collection announced in *Bellas Hess* and reaffirmed on *stare decisis* grounds in *Quill* should finally receive “the complete burial it justly deserves.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 322 (1992) (White, J., concurring in part and dissenting in part). The physical-presence requirement—adopted two years before the moon landing—is incompatible with a 21<sup>st</sup> Century, Internet-based economy. As e-Commerce has boomed and brick-and-mortar stores have shuttered, States have found themselves starved of the tax revenue they need to provide even the most basic services. Internet retailers’ ability to conduct trillions of dollars of business without collecting a sales and use tax also discriminates against local businesses and their customers. *Quill* thus undermines the foremost purpose of the dormant Commerce Clause—to prevent discrimination and unfair tax treatment. The time has come for the Court to overrule *Quill*.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The limitations on state power encompassed by the Commerce Clause are animated “by structural concerns about the effects of state regulation on the

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<sup>1</sup> Consistent with Rule 37.2(a), the *amici* States provided notice to the parties’ attorneys more than ten days in advance of filing.

national economy.” *Quill*, 504 U.S. at 312. But even as the development and growth of the Internet sparked a revolution in the structure and nature of the national economy, this Court’s jurisprudence on the effect of the Dormant Commerce Clause on state taxation has remained locked in the 1960s. *See Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of State of Ill.*, 386 U.S. 753, 760 (1967).

Twenty-five years after *Bellas Hess* said that States could tax sales only from businesses with a physical presence within their borders, the Court had an opportunity to reconsider the basis for that rule. The Court acknowledged that Commerce Clause jurisprudence had developed to a point that the Court would not likely reach “the same result were the issue to arise for the first time today.” *Quill*, 504 U.S. at 311. “In other words, the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided.” *Brohl II*, 135 S. Ct. at 1134 (Kennedy, J., concurring).

But the Court did not correct the *Bellas Hess* mistake. Rather, it concluded that the “value of a bright-line rule in this area and the doctrine and principles of *stare decisis*” were sufficient to overcome its doctrinal infirmity and justify its continued enforcement. *Quill*, 504 U.S. at 317. In doing so, the Court compounded its error, setting the stage for consequences it could not foresee.

Two years later, a consumer made the first documented secured online purchase—a pepperoni pizza with mushrooms and extra cheese from Pizza Hut. Kayla Webley, *A Brief History of Online*

*Shopping*, TIME, July 16, 2010.<sup>2</sup> A year after that, on July 16, 1995, Amazon.com opened for business.

In the intervening two decades, the Internet has revolutionized the economy at every level in ways the *Quill* Court could not have imagined. The *Quill* Court referred to the “dramatic growth” of the \$180-billion-a-year mail-order industry. 504 U.S. at 316, 330. But by 2008, the Internet alone accounted for sales of “\$3.16 trillion per year in the United States.” *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring). As of 2014, that number had more than doubled to \$6.52 trillion. U.S. CENSUS BUREAU, *E-Stats 2014: Measuring the Electronic Economy*, June 7, 2016.<sup>3</sup>

*Quill* was “questionable even when decided . . . .” *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Today, it is untenable. The modern economy is incompatible with an artificial, bright-line rule handed down fifty years ago about how States should regulate business models that no longer exist. Now the States—and in particular their most vulnerable citizens—suffer the consequences.

State revenues reached their peak in 2007, but the financial crisis that followed has left many States struggling to balance their budgets. With State expenditures expected to increase dramatically in the years to come—driven by rising healthcare costs and greater spending on Medicaid—States will soon face a

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<sup>2</sup><http://content.time.com/time/business/article/0,8599,2004089,00.html> (last visited Oct. 27, 2016).

<sup>3</sup><http://www.census.gov/content/dam/Census/library/publications/2016/econ/e14-estats.pdf> (last visited Oct. 27, 2016).

stark choice. Either find new sources of revenue or slash government services. While removing *Quill*'s limitations on state power is no panacea, it would allow States to collect billions of dollars in taxes already owed to them from Internet sales.

Repealing *Quill* would empower the States while doing no harm to this Court's jurisprudence. Preventing discrimination by a State against interstate commercial activity is at the heart of the dormant Commerce Clause. There is not a hint of interstate discrimination in States' efforts to collect taxes on Internet sales. Rather, the States seek to treat all retailers in the same manner, including online entities that are pervasive in every jurisdiction. In fact, the *Quill* rule does little more than to discriminate against one sector of interstate commerce—brick-and-mortar retail—in favor of another—e-Commerce.

Moreover, the practical reasons given to support the physical-presence requirement in *Bellas Hess* and reiterated in *Quill* are no longer compelling. Today's computers can easily handle the "virtual welter of complicated obligations to local jurisdictions . . . ." *Bellas Hess*, 386 U.S. at 760. And to the extent the Court hoped that the "artificial" physical-presence rule would firmly establish the boundaries of state taxation and reduce litigation concerning those taxes, time and experience have dashed that hope. *Quill*, 504 U.S. at 315. This very lawsuit challenges but one of the portfolio of rules the States have adopted to address the artificial and outdated barriers raised by *Bellas Hess* and *Quill*.

*Quill* was a mistake, one that stripped States of the basic sovereign power to tax transactions between sellers and their citizens. The Court should no longer wait on Congress to correct that error. The Court should put the physical-presence requirement to rest, once and for all.

### ARGUMENT

Colorado's cross-petition provides an appropriate vehicle for this Court to bring its Commerce Clause jurisprudence in line with the realities of the modern world. If the Court grants the petition on the scope of the physical-presence rule, the Court should also grant the cross-petition to address whether the physical-presence rule has any place in a global, Internet-based economy.<sup>4</sup>

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<sup>4</sup> The States support granting the conditional cross-petition for certiorari only in the event the Court decides to reexamine the physical-presence requirement discussed in *Bellas Hess* and *Quill*. The States would not support granting on the question presented in the petition for certiorari itself. The States also acknowledge that there will likely be additional opportunities in the future to reconsider this rule. *See* Amicus Brief of the National Governors Association, et al., Supporting Denial of Certiorari, No. 16-267 at 15–24 (opposing DMA's petition for certiorari). But the Court need not wait. Correcting the mistake reinforced in *Quill* is of great importance to the States, and this case offers an opportunity for the Court to do so.

**I. The physical-presence requirement prevents States from collecting legally owed taxes, leading to budget shortfalls and reduced services.**

The physical-presence requirement for tax collection announced in *Bellas Hess* and retained in *Quill* has dealt a severe financial blow to the States, hollowing out their tax base and threatening critical services. In *Brohl II*, Justice Kennedy recognized the consequences of *Quill*, writing, “The result has been a startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay taxes at the register. . . . States’ education systems, healthcare services, and infrastructure are weakened as a result.” 135 S. Ct. at 1135. The numbers bear him out.

State tax revenues as a percentage of GDP hit their peak in 2007. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-260SP, STATE AND LOCAL GOVERNMENT FISCAL OUTLOOK, 2015 UPDATE (2016). But the fiscal crisis that followed the next year dealt a heavy blow to States’ budgetary health, a blow from which they will not soon recover. The GAO’s model predicts that tax revenues “will not return to the 2007 historical high until 2047.” *Id.*

Although revenues are stagnant, expenditures are not. These increases are primarily driven by the rising cost of providing healthcare to children and the poor through Medicaid. *Id.* “[A]bsent any intervention or policy changes, state and local governments are facing, and will continue to face, a gap between receipts and expenditures in the coming years.” *Id.*

GAO warns that States will need to “make substantial policy changes to avoid fiscal imbalances in the future.” *Id.* Thus, the States will either need to raise new forms of revenue or cut services to balance their budgets, a constitutional or statutory requirement in 49 states.<sup>5</sup> But unless something changes, sales taxes will not be a part of this effort. GAO projects, “Sales tax receipts on the other hand, are shown in our simulations to gradually decline as a percentage of GDP [through 2064].” *Id.* In conducting this evaluation, GAO specifically excluded “electronic and mail order sales.” *Id.*

GAO excludes this revenue because even though it is legally owed to the States through use taxes, the collection rate is vanishingly low. Justice Kennedy noted in *Brohl II* that California “is able to collect only about 4% of the use taxes due on sales from out-of-state vendors.” 135 S. Ct. at 1135 (Kennedy, J., concurring). In 2011, only 20,000 Alabamians indicated on their tax forms that they owed use taxes, remitting a total of \$700,000, or \$35 per filer. Robert A. Robicheaux, *Estimates of Alabama Loses Due to E-Commerce*, E-FAIRNESS.ORG 9 (Feb. 21, 2012).<sup>6</sup> This total was far less than the estimates on what these filers should have paid, resulting in “an average level

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<sup>5</sup> Vermont is the only state that has no legal requirement to balance its budget. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE BALANCED BUDGET REQUIREMENTS: EXECUTIVE SUMMARY (1999) <http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx> (last visited Oct. 27, 2016).

<sup>6</sup><http://www.efairness.org/pdf/Alabama-Losses-From-Ecommerce.pdf> (last visited Oct. 27, 2016).

of untaxed e-commerce retail buying by the compliant reporters of \$875 per filer and altogether \$1.75 million in e-purchases.” *Id.*

But at least they paid something. Alabama will lose an estimated \$185.56 million in tax revenue in 2016 due to consumers’ noncompliance with the legal duty to pay use taxes. *Id.* at 13. A comprehensive report on the impact of e-Commerce on state budgets estimated that between 2007 and 2012 alone, noncompliance resulted in a loss of more than \$52 billion in revenue. Donald Bruce, et al., *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* 11 (Apr. 13, 2009).<sup>7</sup> These taxes are revenues the States need to continue to adequately serve their citizens.

Alabama, like many other States, has faced recent budget shortfalls. In fact, for the last two years, Alabama has required special sessions of the legislature to close budget gaps and keep state government running. In 2015, the legislature raised taxes and cut services to close a \$200 million budget shortfall. Brian Lyman, *Finally: \$1.7 Billion General Fund Budget Approved*, MONTGOMERY ADVERTISER, Sept. 17, 2015.<sup>8</sup> Earlier this year, the legislature used funds from the State’s settlement related to the BP Gulf oil spill to restore millions of dollars in cuts made to Medicaid. Brian Lyman, *Ala. Legislature Approves*

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<sup>7</sup> <http://cber.utk.edu/ecomm/ecom0409.pdf> (last visited Oct. 27, 2016).

<sup>8</sup> <http://www.montgomeryadvertiser.com/story/news/2015/09/16/general-fund-budget-gets-final-legislative-approval/32536919/> (last visited Oct. 27, 2016).

*BP Bill, Ends Special Session*, MONTGOMERY ADVERTISER, Sept. 7, 2016.<sup>9</sup>

Alabama's story is not unique. *See, e.g.*, John W. Schoen, *These States are a Bigger Fiscal Mess Than Illinois*, CNBC, June 1, 2016.<sup>10</sup> States around the country face these challenges and must make difficult decisions to balance their budgets. But the artificial and outdated physical-presence requirement reinforced by *Quill* prevents them from using the billions of dollars in taxes that should have been collected on sales made on the Internet.

## **II. The physical-presence requirement reaffirmed in *Quill* has no place in today's economy.**

The dead hand of *Quill* continues to make it more difficult for States to meet budgetary challenges even though its legal and factual justifications no longer stand up to scrutiny. In the past, the Court has shown a willingness to discard outdated prudential rules when they have outlived their usefulness. The history of Commerce Clause jurisprudence is marked by this Court's efforts to adapt to our nation's ever changing economy. *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“[O]ur interpretation of the Commerce Clause has changed as our Nation has developed.”). In *United States v. Lopez*, the Court explained that the evolution

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<sup>9</sup><http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2016/09/07/ala-legislature-approves-bp-bill-ends-special-session/89943524/> (last visited Oct. 27, 2016).

<sup>10</sup> <http://www.cnbc.com/2016/06/01/these-states-are-a-bigger-fiscal-mess-than-illinois.html> (last visited Oct. 27, 2016).

of the Court’s interpretation of the Commerce Clause was driven in part by “a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope.” 514 U.S. 549, 556 (1995).

But when it comes to the *dormant* Commerce Clause, the Court has failed to keep up with the times and the rapid changes in our economy. Instead, it has remained stuck in an age of door-to-door salesmen and mail order catalogue companies “whose only connection with customers in the State is by common carrier or the United States mail.” *Bellas Hess*, 386 U.S. at 758.

*Bellas Hess* rested the physical-presence requirement on two clauses of the Constitution—the Due Process Clause and the Commerce Clause. *Quill*, 504 U.S. at 305. The *Quill* Court, recognizing that Due Process Clause jurisprudence had “evolved substantially” in the intervening 25 years, knocked that leg out from under the physical-presence-requirement stool. *Id.* at 307–08. But despite similar changes in the Court’s Commerce Clause jurisprudence over the same period of time, the Court allowed the physical-presence requirement to stand.

The Court pointed to the four-part test established in *Complete Auto Transit, Inc. v. Brady* to support its decision. *Complete Auto* applied a practical test to tax challenges, finding that a tax that “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is

fairly related to the services provided by the State” will survive a challenge. 430 U.S. 274, 279 (1977). The *Quill* Court found that *Bellas Hess* “concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.” 504 U.S. at 311.

**A. The nexus between the States and e-Commerce vendors is significant.**

The nexus between e-Commerce vendors and the States is far more substantial than “a vendor whose only contacts with the taxing State are by mail or common carrier.” *Id.* These companies aren’t passively sending catalogues into the States and waiting to see what happens; they are actively engaged with the citizenry at a never-before-seen level. Wal-Mart, for instance, collects 2.5 petabytes of data every hour from its customers—the equivalent of 20 million filing cabinets’ worth of text. Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARVARD BUSINESS REVIEW, Oct. 2012.<sup>11</sup> Online advertising is now targeted, showing consumers ads for products companies already know they want to buy. In fact, Amazon has so much data on consumers that it has patented the idea of “anticipatory shipping,” which uses consumer data “to predict what customers want and then ship the products automatically.” Praveen Kopalle, *Why*

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<sup>11</sup><https://hbr.org/2012/10/big-data-the-management-revolution> (last visited Oct. 27, 2016).

*Amazon's Anticipatory Shipping Is Pure Genius*,  
FORBES, Jan. 28, 2014.<sup>12</sup>

These companies also have a “physical presence” throughout the country, albeit unlike anything that could have been imagined by the *Quill* Court. More than two-thirds of all adult Americans own a smart phone, many of which come preloaded with apps that allow for instant online shopping. Monica Anderson, *Technology Device Ownership: 2015*, PEW RESEARCH CENTER, Oct. 29, 2015.<sup>13</sup> Amazon’s app allows consumers to scan the barcodes of products in a brick-and-mortar store, compare the prices—minus the sales tax, of course—and complete the order, all from the palm of the consumer’s hand. Lance Whitney, *Amazon PriceCheck app: Use it, Get a Discount*, CNET, Dec. 7, 2011.<sup>14</sup> In 2015, online retailers including Roku, Google, and Amazon sold 12.7 million streaming media players. Mike Snider, *Amazon Fire TV Gains Market Share, Voice Upgrades*, USA TODAY, May 17, 2016.<sup>15</sup> These devices plug into the users television and allow for consumers to instantaneously purchase and stream movies and television programs.

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<sup>12</sup><http://www.forbes.com/sites/onmarketing/2014/01/28/why-amazons-anticipatory-shipping-is-pure-genius/#306f7c152fac> (last visited Oct. 27, 2016).

<sup>13</sup><http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/> (last visited Oct. 27, 2016).

<sup>14</sup><https://www.cnet.com/news/amazon-pricecheck-app-use-it-get-a-discount/> (last visited Oct. 26, 2016).

<sup>15</sup><http://www.usatoday.com/story/tech/news/2016/05/17/amazon-fire-tv-gains-market-share-voice-upgrades/84482470/> (last visited Oct. 27, 2016).

*Id.* Finally, online vendors operate affiliate programs, where ordinary web users can include product links on their local websites and receive a commission on any resulting sales. Ryan Singel, *Shady Web of Affiliate Marketing*, WIRED, Feb. 10, 2005.<sup>16</sup>

**B. The Internet revolutionized the economy after *Quill* was decided.**

Today's economy would be unrecognizable to the *Bellas Hess* or even the *Quill* Court. The mail order catalogue industry may have been a \$180 billion dollar business when *Quill* was decided, but it was still a niche market among the mighty brick-and-mortar stores that flourished in shopping malls around America. But that world is gone. New mall openings reached their peak in 1990, two years before *Quill* was decided, when 16 million square feet of mall space opened. James Greiff, *Goodbye, Malls of America*, BLOOMBERG, July 3, 2014.<sup>17</sup> Malls have been in decline ever since, and “2007 was the first year in more than four decades when no large malls opened in the U.S.” *Id.* Instead shopping, and much of the economy in general, has gone online.

Today, the most valuable companies in the world are Apple, Alphabet (Google), Microsoft, Amazon, and Facebook—all in the Internet and Technology sector. Kif Leswing, *The 5 Most Valuable Public Companies*

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<sup>16</sup><https://www.wired.com/2005/02/shady-web-of-affiliate-marketing/> (last visited Oct. 27, 2016).

<sup>17</sup><https://www.bloomberg.com/view/articles/2014-07-02/goodbye-malls-of-america> (last visited Oct. 27, 2016).

*Are All Tech Companies*, BUSINESS INSIDER, Aug. 1, 2016.<sup>18</sup> Amazon alone is worth \$365 billion. *Id.*

Amazon is the largest online retailer, and its size and reach is instructive. In 1992, the Quill Corporation had annual sales of \$200 million, a million of which were “made to about 3,000 customers in North Dakota.” *Quill*, 504 U.S. at 302. In the second quarter of 2016 alone, Amazon recorded sales of \$30.4 billion. Krystina Gustafson, *Amazon Earnings: \$1.78 per Share, vs Expected EPS of \$1.11*, CNBC, July 28, 2016.<sup>19</sup> On one day in 2013, Amazon’s website experienced a thirty minute outage, costing it \$66,240 in sales—per minute—for a loss of \$2 million. Kelly Clay, *Amazon.com Goes Down, Loses \$66,240 Per Minute*, FORBES, Aug. 19, 2013.<sup>20</sup> On its busiest day of this year—its self-created holiday, Prime Day—Amazon sold 54.4 million items, or 629 items per second. Ben Fox Rubin, *Amazon’s Prime Day Breaks Single-Day Sales Record*, CNET, July 13, 2016.<sup>21</sup> Now, Amazon is moving into the grocery business.

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<sup>18</sup><http://www.businessinsider.com/4-most-valuable-public-companies-all-tech-companies-2016-8> (last visited Oct. 27, 2016).

<sup>19</sup><http://www.cnbc.com/2016/07/28/amazon-reporting-second-quarter-earnings.html> (last visited Oct. 27, 2016).

<sup>20</sup><http://www.forbes.com/sites/kellyclay/2013/08/19/amazon-com-goes-down-loses-66240-per-minute/#2ff95c243c2a> (last visited Oct. 27, 2016).

<sup>21</sup><https://www.cnet.com/news/amazons-prime-day-breaks-single-day-sales-record/> (last visited Oct. 27, 2016).

Shelly Banjo, *How Amazon Will Kill Your Local Grocer*, BLOOMBERG, April 8, 2016.<sup>22</sup>

As e-Commerce grows, brick-and-mortar stores shrink. See Kerry Close, *Blame Amazon for the Retail Slump*, TIME.COM, May 13, 2016.<sup>23</sup> Online retailers' ability effectively to discount their products by 5 to 10 percent gives them a decided competitive advantage. According to analysts, when an in-store price is 1 to 5 percent higher than online, 48 percent of consumers will wait and purchase the product on the Internet. When the price is 6 to 10 percent more, 82 percent will do so. Mark Esposito, *The End of Brick and Mortar Retail?* JONATHANTURLEY.ORG, Aug. 24, 2014.<sup>24</sup> In many jurisdictions, even national chains cannot compete.

**C. The physical-presence requirement discriminates between online and brick-and-mortar retailers.**

Online vendors are now ubiquitous and ever-present in every state. The success of e-Commerce is an American triumph and should be celebrated. But the law should treat these commercial giants like any other retailer.

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<sup>22</sup><https://www.bloomberg.com/gadfly/articles/2016-04-08/amazon-fresh-prime-now-aim-to-kill-your-local-grocer> (last visited Oct. 27, 2016).

<sup>23</sup><http://time.com/money/4329152/amazon-retail-slump-stores/> (last visited Oct. 27, 2016).

<sup>24</sup><https://jonathanturley.org/2014/08/24/the-end-of-brick-and-mortar-retail/> (last visited Oct. 27, 2016).

Instead, the *Quill* rule now discriminates against one sector of interstate commerce—brick-and-mortar retailers—in favor of another—e-Commerce. It also disproportionately benefits the wealthy, as they are more likely to purchase online than poorer Americans. See Emily Badger & Juliet Eilperin, *The Cruellest Thing About Buying Diapers*, THE WASHINGTON POST, March 14, 2016.<sup>25</sup> In doing so, the continued operation of *Quill* turns the Commerce Clause on its head. Instead of preventing discrimination, it enshrines it. Justice Kennedy has acknowledged the “unfairness to local retailers and their customers who do pay taxes at the register,” *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring), and Justice White called the physical-presence requirement “protectionist rules favoring a \$180-billion-a-year industry...” *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part). As the e-Commerce sector continues to grow, so too does the fundamental unfairness of the *Quill* rule.

That unfairness ripples through the economy and has effects far beyond the States’ tax receipts. Dollars that would have been spent in-state are shifted elsewhere. The pressure increases on local retail stores, and many of them can’t compete. When retail stores can’t compete, they close, jobs are lost, and wages are depressed. Local taxes, spending, and investment fall even more, and the cycle begins anew. This year alone, retailers “are on track to lay off more than 37,000 people...” Lauren Zumbach, *Report: E-*

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<sup>25</sup><https://www.washingtonpost.com/news/wonk/wp/2016/03/14/the-cruellest-thing-about-buying-diapers/> (last visited Oct. 27, 2016).

*commerce Driving Rise in Retail Layoffs*, CHICAGO TRIBUNE, Apr. 26, 2016.<sup>26</sup> Of course, in the free market, some businesses will win and some will lose. But in retail, the rule in *Quill* keeps a thumb on the scale, benefiting one sector of the economy for no justifiable reason.

### **III. The practical justifications for the bright-line physical-presence requirement do not stand up to scrutiny.**

Time has undermined the practical justifications for the “protectionist rules” enshrined in *Bellas Hess* and *Quill*. *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part). There are essentially three such justifications. First, allowing states to require these business to collect taxes could entangle them in “a virtual welter of complicated obligations to local jurisdictions . . .” *Bellas Hess*, 386 U.S. at 760. Second, a bright-line rule encourages settled expectations and reduces litigation. *Quill*, 504 U.S. at 315. And third, *stare decisis*. *Id.* at 317. None of these justifications withstands scrutiny.

#### **A. Readily available software can easily calculate tax owed in any jurisdiction.**

The concern that retailers could not possibly comply with tax laws in the nation’s many jurisdictions was a cornerstone of *Bellas Hess*. But even when *Bellas Hess* was decided, this justification for the physical-presence requirement made little sense. Physical presence has nothing to do with the

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<sup>26</sup><http://www.chicagotribune.com/business/ct-retail-layoffs-0427-biz-20160426-story.html> (last visited Oct. 27, 2016).

ability of a retailer to comply with the tax laws in different jurisdictions. Under the rule, a company that merely has a warehouse and nothing more in one corner of a State would need to collect sales and use tax in every city and county, while a company with no warehouse but extensive knowledge of and sales in every jurisdiction would not.

This justification makes even less sense today. While it may be understandable that the *Bellas Hess* Court, two years prior to the moon landing, could not have imagined how vendors could calculate taxes in every jurisdiction, Justice Fortas was ultimately proven correct that the majority in that case “vastly underestimate[d] the skill of contemporary man and his machines.” 386 U.S. at 766. Software that can easily calculate sales tax on any sale is readily available. The Streamlined Sales Tax Governing Board, an organization that works to expand state sales tax compliance, currently certifies seven such software providers.<sup>27</sup>

**B. The bright-line rule has not prevented litigation.**

The *Quill* Court assumed that by enacting a rule that “firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes,” it would end state experimentation in this area and the concomitant litigation that goes with it. 504 U.S. at 315. And maybe it would have if the physical-presence requirement remained cabined to

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<sup>27</sup><http://www.streamlinedsalestax.org/index.php?page=Certified-Service-Providers> (last visited Oct. 27, 2016).

only cover the niche market of mail order sales. Instead, faced with revenue shortfalls and the growth of e-Commerce, States have looked to a number of ways to recover the tax revenue they are owed. And all of these alternative methods have resulted in ongoing litigation and legal uncertainty.

### 1. Notification Requirements

The current case arises from Colorado's implementation of notification requirements for remote sellers.

### 2. Common Ownership

Some states have attempted to establish the required substantial nexus by pointing to in-state brick-and-mortar businesses that have a common owner with Internet retailers. A California court found a sufficient connection between Borders Online, LLC and Borders, Inc. to allow the State to tax the company's online sales. *Borders Online, LLC v. State Bd. of Equalization*, 129 Cal. App. 4th 1179, 1201 (2005).

A Louisiana district court rejected a similar attempt to collect taxes from barnesandnoble.com, LLC on the basis of its connection with Barnes & Noble Bookesellers, Inc.'s brick-and-mortar stores. *St. Tammany Par. Tax Collector v. Barnesandnoble.Com*, 481 F. Supp. 2d 575, 582 (E.D. La. 2007). The court concluded that despite a shared loyalty program, gift cards, cross-promotional advertising, and returns policy, traditional principals of corporate law made these connections insufficient for taxing purposes. *Id.* at 580 ("The existence of a close corporate relationship

between companies and a common corporate name does not mean that the physical presence of one is imputed to the other.”).

But the New Mexico Supreme Court unanimously found that the connection between *barnesandnoble.com* and Barnes & Noble Booksellers, Inc. *was* sufficient to subject the former “to New Mexico gross receipts tax on its sales to New Mexico residents without offending the federal Commerce Clause.” *New Mexico Taxation & Revenue Dep’t v. Barnesandnoble.com LLC*, 303 P.3d 824, 825 (N.M. 2013). The New Mexico Supreme Court specifically rejected the district court’s analysis in *St. Tammany Parish Tax Collector. Id.* at 829.

### 3. The Affiliate Tax

At least 13 states have enacted an affiliate tax—the so-called “Amazon tax”—that allows for tax collection from companies that contract with residents of a state to refer customers via customized Internet links. Pareesa Ashabi, *The Struggle over Internet Sales and Use Tax: Why the Marketplace Fairness Act Could Be the Hero for Wall Street, Main Street, and the Fifty States*, 49 U.S.F. L. REV. 543, 551 (2015). In 2008, New York was the first State to pass such a tax. Amazon and Overstock.com challenged the tax as a violation of *Quill*. The New York courts rejected that challenge.

The New York high court reasoned that while *Quill* required a physical presence, it need only be the “slightest presence.” *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, 987 N.E.2d 621, 625 (N.Y.

2013). The court concluded that by contracting with in-state website owners, the “vendor is deemed to have established an in-state sales force.” *Id.* at 626.

#### 4. Economic Presence

Economic presence is the most expansive theory for taxing out of state vendors. The West Virginia Supreme Court considered a case in which the vendor had “no real or tangible personal property and no employees located in West Virginia” and whose principal business “was issuing and servicing VISA and MasterCard credit cards.” *Tax Comm’r of State v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 227 (W. Va. 2006). The court narrowly interpreted *Quill*, finding that it continued the physical-presence test “based in large part on the mail order industry’s reliance” on *Bellas Hess*. *Id.* at 232. It then carefully distinguished the sales and use taxes at issue in *Bellas Hess* from income and franchise taxes the company arguably owed. *Id.* at 232–34.

The court also expressed serious doubts about the ongoing validity of the *Bellas Hess* rule, writing, “We believe that the *Bellas Hess* physical-presence test, articulated in 1967, makes little sense in today’s world.” *Id.* at 234. The Court concluded that “a significant economic presence test is a better indicator of whether substantial nexus exists” than a physical-presence requirement. *Id.*

Needless to say, *Quill*’s aim at reducing litigation has not come to pass.

**C. *Stare decisis* does not require the Court to continue to enforce a rule that no longer makes sense.**

The legal and practical arguments that informed *Bellas Hess* and *Quill* are no longer valid, and the Court likely would not reach the same conclusions in these cases were they to arise today. Thus, *stare decisis* is the last real justification for the continuation of the *Quill* physical-presence requirement.

The Court examines a number of factors when it considers overturning a prior precedent. These include “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). The Court also looks to whether the precedent has become unworkable and whether “experience has pointed up the precedent’s shortcomings.” *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

These factors support overturning *Quill*. *Quill* was “questionable even when decided.” *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring). And the physical-presence requirement has been criticized for decades, even before the Internet revolution rendered it unworkable. *Quill*, 504 U.S. at 323 (White, J., concurring in part and dissenting in part). The *Bellas Hess* Court could not have imagined the existence of the Internet, and the *Quill* Court could not have imagined how it would affect the economy. Experience has shown the great shortcomings of the physical-presence requirement, and the Court should take this opportunity to overturn it. Failure to do so would

leave the States stripped of their basic sovereign power to tax vendors doing business in their jurisdictions, while waiting on Congress to correct this Court's mistake. *Stare decisis* cannot justify that result.

### CONCLUSION

The Court should grant Colorado's conditional cross-petition for writ of certiorari.

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