IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST
OF BARNESANDNOBLE.COM LLC,

BARNESANDNOBLE.COM LLC,

Defendant-Appellant,

v.

No. 33,627

NEW MEXICO TAXATION AND
REVENUE DEPARTMENT,

Plaintiff-Appellee.

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Multistate Tax Commission (Commission) files this brief in support of the Commissioner of Revenue of the New Mexico Taxation and Revenue Department.[1] The Commission agrees with the Department that Barnes&Noble.com ("Taxpayer") has sufficient nexus with New Mexico for the state to impose its gross receipts tax; a state's jurisdiction to levy a tax on gross receipts realized from certain activities within the state is not limited by the dormant commerce clause to only those taxpayers with a physical presence in the State.

The Commission is the administrative agency for the Multistate Tax Compact (Compact), which became effective in 1967. *See* RIA All States Tax Guide ¶ 701 *et seq.*, (2005). Today, forty-six States and the District of Columbia are members of the Commission. Nineteen states have legislatively established full membership. Six additional states are sovereignty members and twenty-two are associate members.[2]

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[1] All parties received timely notice of our intent to file this brief by email of September 25, 2012, more than 14 days prior to the due date of the brief, with attached electronic letter also dated September 25, 2012 and on the same day deposited into the U.S. mail.

[2] This brief is filed by the Commission, and not on behalf of any particular member state, except New Mexico. Compact Members are: Alabama, Alaska, Arkansas,

The purposes of the Compact are: (1) facilitation of proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes; (2) promotion of uniformity or compatibility in significant components of tax systems; (3) facilitation of taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoidance of duplicative taxation. *See* Compact, Art. I.

The importance the Commission attaches to the present case, and our motivation for filing this brief, lies in the goal of facilitating proper determination of state and local tax liability of multistate taxpayers and in protecting states' sovereign authority to impose their legislated taxes unencumbered by erroneously expansive interpretations of federal constitutional limitations.

In today's modern economy, it is not necessary for a taxpayer to maintain a physical infrastructure within a state in order to realize substantial benefits from that state. In *National Bellas Hess, Inc. v. Dep't. of Revenue,* 386 U.S. 753 (1967)

Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. Sovereignty Members: Georgia, Kentucky, Louisiana, Maryland, New Jersey, South Carolina, and West Virginia. Associate Members: Arizona, California, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Wisconsin, and Wyoming.

and in *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992), the United States Supreme Court nonetheless created a narrow safe harbor from state use tax collection requirements for sellers whose activities within the taxing state are limited to the solicitation of orders for tangible personal property which are delivered into the state by U.S. mail or common carrier. The Commission has an interest in ensuring that this limited nexus safe harbor is not expanded by judicial application to situations that are not subject to *Quill,* including situations in which the imposition is something other than a use tax collection duty, or situations where the extent of activities in the taxing state do reflect a physical presence or its equivalent. In the modern Internet economy, an overly expansive reading of *Quill* would undermine states' sovereign authority to tax activities with a substantial connection to the taxing state leading to erosion of the state's tax base and creating inequitable commercial advantages for large multi-state enterprises in competition with small and primarily local business.

In furtherance of the goals of the Compact, the Commission seeks a correct and common understanding of the constitutional nexus standard for non-transaction based taxes such as New Mexico's gross receipts tax. A correct nexus standard is important because it ensures interstate businesses pay their fair share of state taxes on the income they've earned from activities in the State. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995). It is important for interstate businesses to pay their fair share to avoid creating a tax advantage, and thus a competitive advantage, relative to local commerce. And a common understanding of constitutional nexus standards is important to faciliate taxpayer convenience and compliance.

Longstanding U.S. Supreme Court precedent does not limit a state's jurisdiction to impose non-transaction-based taxes on just those taxpayers that are physically present in the State. In this case, the New Mexico Court of Appeals correctly found that the joint use of trademarks by taxpayer's online business and affiliated in-state stores, in conjunction with numerous cross marketing activities and shared trademarks, enabled taxpayer to increase its goodwill in New Mexico, therefore meeting the representational nexus test of *Tyler Pipe Industries, Inc. v. Washington Dep't. of Revenue,* 483 U.S. 232, 250-251 (1987). The Commission files its brief to urge this Court to recognize the continued correctness and vitality of the *Tyler Pipe* rule in the context of a gross receipts tax imposed on an online retailer whose affiliate operates stores within the state under the same trademarks.

ARGUMENT

I. Introduction

Citing to *Quill*, Taxpayer identifies the "sole question" in this case as whether it "is subject to New Mexico gross receipts tax despite lacking the physical presence in the State of New Mexico required by the Commerce Clause of the United States Constitution." (Taxpayer Brief-in-Chief, p.3) The answer is "yes," for a number of reasons.[3] We discuss two of them. First, Taxpayer does have a physical presence in New Mexico through its participation in a single unitary business that, among other things, operates brick-and-mortar bookstores in the state. Second, and more fundamentally, a physical presence is not required because the *Quill* limitation does not apply to gross receipts taxes.

II. Taxpayer Has a Physical Presence in New Mexico through its Participation in a Single Unitary Business

The Court of Appeals found that by operating three brick-and-mortar bookstores in New Mexico under Barnes & Noble trademarks, Taxpayer's affiliate, Booksellers, strengthened the goodwill attributable to those trademarks, and by doing so, created significant benefits for Taxpayer's on-line business, which represented itself using the same trademarks. *In re Barnesandnoble.com LLC*, 283 P.3d 298, 305-306 (N.M. Ct. App. 2012); *See also, Inwood Labs, Inc. v. Ives Labs, Inc.,* 456 U.S. 844, 854 (1982)(discussing the relationship of trademarks to goodwill). In addition, the Court of Appeals found that specific "cross marketing" activities engaged in jointly by both Taxpayer and the in-state stores increased the

[3] See New Mexico Taxation and Revenue Department's Answer Brief for several additional arguments that we support and see no need to repeat here.

profitability of Taxpayer's on-line business.[4] *In re Barnesandnoble.com LLC*, 283 P.3d at 306. Moreover, "[t]he goodwill developed both directly, by in-store activities promoting Taxpayer's website, and indirectly, by consumers' increased awareness of Barnes & Noble due to the presence of in-state stores, helped to establish and maintain a market in New Mexico for Taxpayer." *Id.* at 306-307.

As a result of these joint marketing activities and shared trademark assets, the lower Court found that "*in fact, consumers saw only one entity: Barnes & Noble,*" and that by licensing the trademarks to Taxpayer and the in-state bookstores, the parent of these affiliates "was in effect telling customers *to consider Taxpayers and [the in-state stores] to be one and the same*." *Id.* at 306 (emphasis added).

The Court of Appeals is describing what the U.S. Supreme Court has called a "unitary business." The hallmark of a unitary business is that it operates as a single business enterprise. *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 438-439 (1980). Each portion of a unitary business contributes to and operates for the benefit of all other portions of the business. Here, the intra-

[4] Both the Taxpayer and the stores sold and accepted gift cards displaying the Barnes & Noble trademarks, which explicitly mentioned the Barnes& Noble website and could be redeemed at either the stores or through the website. And both the Taxpayer and the stores sold and honored Readers' Advantage memberships, which entitled customers to discounts at either the stores or through the website, and which also explicitly mentioned the Barnes & Noble website.

state and extra-state activities conducted by the Taxpayer and its affiliated in-state bookstores formed part of a single unitary business; the out-of-state activities were not "unrelated business activity" and did not constitute a "discrete business enterprise." *See Allied Signal, Inc. v. Dir. of Taxation*, 504 U.S. 768, 773 (1992), in turn quoting *Mobil Oil Corp v. Commissioner of Taxes of Vermont* at 439.

As the U.S. Supreme Court has acknowledged, and as the Court of Appeals decision in this case suggests, a unitary business may be carried out by a single legal entity or by multiple affiliated entities operating together. *See, e.g., Mobil Oil Corp., at 439*; *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159 (1983). The Appellate Court's findings support a conclusion that Taxpayer and its affiliates are engaged in a single unitary business. Considering this decision *in pari materia* with N.M.S.A. § 7-2A-2(Q), the shared trademarks and joint marketing operations of these separate corporations constitute a unitary business because they are "dependent upon or contribute property or services to one another individually or as a group" and exhibit "unity of operations evidenced by central purchasing, advertising, accounting or other centralized services."[5]

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[5] N.M.S.A. § 7-2A-5(Q) also requires common ownership greater than 50%. Though the record is not clear as to the percentage of ownership for any discrete period of time during the assessment period, the Court of Appeals found that all relevant times, the parent corporation of both Taxpayer and bookseller owned anywhere between 40% and 100% of Taxpayer. Taxpayer has never contested either that its sales are subject to gross receipts tax or the amount of the

In *Container*, the Supreme Court noted that the due process and commerce clauses of the Constitution impose "...the obvious and largely self-executing limitation that a State not tax a purported 'unitary business' unless at least some part of it is conducted in the State." 463 U.S. at 167; *citing to Exxon Corp. v. Department of Revenue of Wisconsin,* 447 U.S. 207, 220 (1980) and *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Here, a portion of this unitary business was conducted in New Mexico. It was conducted with the aid of physical property – three brick and mortar bookstores. By definition of the unitary business principle, the activities carried out by this brick and mortar affiliate were carried

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assessment. Nor has it suggested that the existence of nexus depended in any way on the degree of common ownership of bookseller and taxpayer. An assessment issued by the Department is presumed to be correct. N.M.S.A 1978, § 7-1-17(C). Under New Mexico's Gross Receipts and Compensating Tax Act, "it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax." N.M.S.A. 1978, § 7-9-5(A). The burden of proof of nexus, as an immunity from taxation, is on the taxpayer. *Norton Company v. Department of Revenue of State of Illinois,* 340 U.S. 534, 537 (1951)("The general rule … is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption"); *General Motors Corporation v. Washington,* 377 U.S. 436, 441 (1964)(same); *In the Matter of Orvis Company, Inc., et al., v. Tax Appeals Tribunal of New York,* 654 N.E. 2d 954, 961 (N.Y. 1995), *cert. den. sub nom, Vermont Information Processing, Inc. v. Commissioner, New York State Dep't. of Taxation and Finance,* 516 U.S. 989 (1995) (citing *General Motors* and *Norton); Brown's Furniture, Inc. v. Wagner,* 665 N.E.2d 795, 801 (Ill. 1996), *cert. den. sub nom., Brown's Furniture, Inc. v. Zehnder,* 519 U.S. 866 (1996) ("The party challenging the validity of a statute bears of burden of clearly establishing any constitutional invalidity"). If the degree of ownership is in any way relevant to the determination of nexus, the absence of evidence on this point should be chargeable to the taxpayer and not to the state.

out for the benefit of the unitary business as a whole, including the Taxpayer's benefit.

Moreover, even had the portion of this unitary business that was conducted in the state not performed activities *directly* related to the establishment or maintenance of Taxpayer's on-line business, the business as a whole nonetheless has a physical presence in the state sufficient to establish nexus for the entire business, including Taxpayer. In *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), the U.S. Supreme Court applied the physical presence test established in *Bellas Hess*, later upheld in *Quill*, to hold that two offices in California gave that state nexus to require use tax collection by National Geographic's mail-order business, even though the buildings made *no* contribution to the establishment or maintenance of a market for the mail-order business.

In reaching its holding, the Court in *National Geographic* pointed to *Nelson v. Sears, Roebuck & Co*, 312 U.S. 359 (1941), and made clear that although Sears had argued its mail-order department was separate from its in-state stores, and that the in-state stores had not assisted directly with the mail-order sales, the basis for the Court's holding that the state had nexus to require use tax collection on mail-order sales had nothing to do with whether or not there was direct in-state assistance with respect to those sales. Rather, the holding in *Sears* was simply that "the fact Sears' business was departmentalized[, and] the mail-order and retail stores operations were separately administered[,] did not preclude the finding of sufficient nexus." *National Geographic* at 560. The Court in *Sears* found that:

> Respondent cannot avoid that [tax collection] burden *though its business is departmentalized*. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. *They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them*.

Sears at 364. (emphasis added).

The Court in *Sears* found departmental divisions irrelevant for nexus purposes, which is the essence of the unitary business principle. Indeed, the principle has been applied in the context of corporate income tax to find corporate divisions irrelevant, as well. *See Container,* 463 U.S. 159 (1983)*; Barclays Bank PLC v. Franchise Tax Board of California,* 512 U.S. 298 (1994). In the context of corporate income tax, the concept that a taxpayer's choice of organization along departmental or even corporate lines has no bearing on constitutional nexus is well accepted for purposes of apportionment.

> Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise. Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964). Transforming the same income into dividends from legally separate entities works no change in the underlying economic

> realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.

Mobil at 440-441.

And there is no constitutional reason why this principle – looking past divisional and corporate lines to recognize a single economic enterprise for purposes of state corporate income tax nexus with respect to business activity – should not apply for purposes of other taxes, including taxes on gross receipts from certain activities attributable to a state. In fact, the principle arose in the late 1800's in the context of a capital stock tax, a type of property tax. *See, e.g., State Railroad Tax Cases*, 92 U.S. 575 (1876); *Adams Express v. Ohio State Auditor*,165 U.S. 194 (1897)). It was applied to business net income taxes in the 1920's. *See Underwood Typewriter Co. v. Chamberlain, Treasurer of the State of Conn.,* 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Limited v. State Tax Commission,* 266 U.S. 271 (1924). As a constitutional matter, the concept should apply in the context of a gross receipts tax as well. *See, e.g.,* P. Frankel, C. Fields, M. Pearl, R. Coll, *The Unitary Business Principle Applies to More than Net Income Taxes,* Tax Analysts (May 2012)(referencing *Reynolds Metals Co., LLC v. Department of Treasury,* Not Reported in N.W.2d, 2012 WL 954278 (Mich. Ct. App.), and commenting that "[a]lthough the court's decision comes as no surprise, it is significant because it reinforces the fact that the unitary business principle applies to more than corporate net income taxes; for example, it applies to gross receipts taxes or value added taxes as well … the U.S. Supreme Court developed the rationale of a unitary business to ensure that a state did not tax value or activity occurring outside the state. That rationale applies equally to VATs, gross receipts taxes, net worth taxes, or other business activity taxes [at least where apportionment is required].")

Two state court appellate decisions have rejected the unitary business principle in the context of use tax collection nexus involving mail order affiliates of companies operating stores within the taxing state, *SFA Folio Collections, Inc. v. Bannon*, 585 A. 2d 666 (Conn. 1991) and *SFA Folio Collections, Inc. v. Tracy*, 652 N.E. 2d 693 (Ohio 1995). Both cases are wrongly decided.

The Connecticut court in *SFA Folio v. Bannon* disallowed the application of the unitary business principle to use tax collection because Connecticut did not have a statute that explicitly authorized the application of the principle to sales and use tax. 585 A.2d 672-673. A number of state courts have rejected the proposition that the application of the unitary business principle requires specific statutory authorization. *See, e.g., Coca Cola Co. v. Oregon Department of Revenue*, 533 P.2d 788 (Or. 1975); *Montana Department of Revenue v. American Smelting & Refining Co.*, 567 P.2d 901 (Mont. 1977); *American Smelting & Refining Co. v. Idaho State Tax Com.*, 592 P.2d 39 (Id. 1979); *Caterpillar Tractor Co. v. Lenckos*, 417 N.E.2d 1343 (Ill. 1981); *PMD Investment Co. v. State Dep't of Revenue*, 345

N.W.2d 815 (Neb. 1984); *Pioneer Container Corp. v. Beshears*, 684 P.2d 396 (Kan. 1984).[6] These courts ruled that the unitary business principle is a constitutional construct inherent in the state's corporate income tax apportionment statutes and thus specific statutory recognition of the principle was not a prerequisite in order for the state to apply it and require combined reporting.[7] Likewise, this court may apply the unitary business principle to issues involving the New Mexico gross receipts tax without a specific statute authorizing its application.

The Ohio court in *SFA Folio v. Tracy* rejected the unitary business principle, again as applied to use tax collection, because the court viewed the principle as a limitation on the scope of state authority to tax the amount of business income properly attributable to the state. The court did not view the principle as applicable to the threshold determination of whether the state could tax the business at all. 652 N.E. 2d at 697-698. In doing so, the Ohio misapplied the following language from *Allied Signal, Inc. v. Dir. of Taxation,* 504 U.S. 768, 778 (1992): "The constitutional question in a case such as *Quill Corp.* is whether the State has the authority to tax the corporation at all. [The unitary business principle], by contrast,

[6] But see, *Polaroid Corp. v. Comm. of Rev.,* 472 N.E. 259 (Mass. 1984); *Sears Roebuck & Co. v. State Tax Assessor,* 561 A. 2d 172 (Me. 1989) (Specific statutory authorization required to apply unitary business principle).

[7] The New Mexico Uniform Division of Income For Tax Purposes Act is codified at N.M.S.A. 1978, § 7-4-1

focuses on the guidelines necessary to circumscribe the reach of the State's legitimate power to tax." An examination of the Supreme Court opinion in *Allied Signal*, however, makes clear that the Court viewed this distinction between the unitary business principle and the *Quill* nexus test as deriving entirely from the due process clause. The Court wrote:

> Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.

504 U.S. at 778.

In the instant case, as was true in *SFA Folio v. Tracy* (and in *Quill* itself), there is no question that taxpayer has sufficient minimum contacts with New Mexico to satisfy the due process clause, and taxpayer does not dispute that. The only question is whether New Mexico's imposition of gross receipts tax on taxpayer's receipts from certain of its activities attributable to New Mexico is consistent with the commerce clause. As the Supreme Court explicitly held in *Allied Signal*, *supra* at 786, the unitary business principle is "quite compatible" with the commerce clause. The Supreme Court has never addressed whether the in-state presence of a unitary affiliate using common trademarks and conducting cross-marketing activities (such as joint marketing through gift cards and book clubs) satisfies commerce clause nexus requirements.

To the extent the unitary business principle applies to this case, the entire unitary business would be viewed as a single economic enterprise. That enterprise involves the use of physical property in New Mexico, and the existence of physical property in the state certainly creates sufficient nexus for the state to impose a tax on the gross receipts from certain activities attributable to New Mexico.

III. A Physical Presence is Not Required Because *Quill* Does Not Apply to Gross Receipts Taxes.

In *Quill*, the U.S. Supreme Court considered a use tax collection requirement imposed by North Dakota on a seller with no physical presence in the state, and, citing to its precedent in *National Bellas Hess v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967), held that the collection requirement violated the commerce clause nexus standard of the United States constitution.[8] The *Quill* Court precisely limited this holding to sales and use taxes:

> In sum, although in our cases subsequent to *Bellas Hess* and concerning *other types of taxes we have not adopted a similar bright-line, physical-presence requirement*, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established *in the area of sales and use taxes*. To the contrary, the continuing value of a bright-line rule *in this area* and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law.

Quill, at 317 (emphasis added).

[8] The Court held North Dakota's collection requirement met the due process nexus standard of the United States Constitution.

The Court led up to this holding with an equally precise analysis, carefully distinguishing sales and use taxes from other state taxes. The Court referred to two cases – both state gross receipts tax cases – and agreed with North Dakota that *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and some of its decisions since, had signaled a "retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach." *Quill* at 314. Referencing the State's citations to *Standard Pressed Steel Co. v. Department of Revenue of Wash.*, 419 U.S. 560 (1975), and *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987). The Court stated: "we agree with the state court's assessment of the evolution of our cases." *Id.* Then, in explaining why it nonetheless did not share the State's conclusion that the physical presence test of *Bellas Hess* was no longer good law, the Court wrote that none of the subsequent cases created a conflict in fact (since physical presence existed) and that:

> [M]ore importantly, although our Commerce Clause jurisprudence now favors more flexible balancing analyses, we have never intimated a desire to reject *all* established "bright-line" tests. Although we have not, in our review *of other types of taxes,* articulated the same physical-presence requirement that *Bellas Hess* established *for sales and use taxes*, that silence does not imply repudiation of the *Bellas Hess* rule [altogether].

Id. (emphasis added).

The Court explained it would adhere to principles of stare decisis, saying "we have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years … and we have never intimated in our review of *sales or use* taxes that Bellas Hess was unsound …" *Quill* at 317 (emphasis added).

State courts are virtually unanimous in rejecting the opportunity to extend *Quill's* physical presence test beyond sales and use taxes. *See Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 114 S.Ct. 550 (1993); *Couchot v. State Lottery Comm.*, 659 N.E.2d 1225 (Ohio,1996)(individual income tax); *A&F Trademark, et al. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004), *review denied* (N.C., 2005), *cert. denied*, 126 S.Ct. 353 (2005); *Kmart Props., Inc. v. Taxation & Revenue Dep't*, 2006-NMCA-26, 139 N.M. 177, 131 P.3d 27 (2001), *cert. quashed* (N.M., 12/29/05); *Lanco, Inc. v. Director, Division of Taxation*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 127 S.Ct. 2974 (2007) ; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 132 P.3d 632 (Okla. Civ. App. 2005), *review denied* (Okla., 3/20/06); *Borden Chemicals and Plastics, L.P. v. Zehnder*, 726 N.E.2d 73 (Ill. App. Ct. 2000), *appeal denied*, 731 N.E.2d 762 (Ill. 2000); *Commissioner v. MBNA America Bank, N.A.*, 640 S.E.2d 226 (W.V. 2006), *cert. denied, FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 127 S.Ct. 2997 (2007); *KFC Corp. v. Iowa Department of Revenue*, 792 N.W.2d 308 (Iowa, 2010), *cert. denied, KFC Corp. v. Iowa Dept. of Revenue,* No.

10-1340, 10A918, 132 S.Ct. 97 (2011).().132 S.Ct. 97 (2011) (NO. 10-1340, 10A918).

J.C. Penney Nat'l Bank v. Johnson, 19 S.W.3d 831 (Tenn. Ct. App. 1999) *cert. denied*, 531 U.S. 927 (2000) is often cited as a counter example. However, the court in *Penney Nat'l Bank* wrote that "… it is not our purpose to decide whether 'physical presence' is required under the Commerce Clause." 19 S.W.3d at 842. And in a subsequent case, *America Online, Inc. v. Johnson*, Not Reported in S.W. 3d, 2002 WL 1751434 (Tenn. Ct. App. 2002), the court wrote, "[w]e do not think that it is conclusive that AOL does not have offices or employees in the state or that it does not own or rent real property here." Two states, Washington and Ohio, have found that *Quill* does not apply to a gross receipts tax. (*General Motors Corp. v. City of Seattle*, 25 P.3d 1022 (Wash. Ct. App. 2001), *cert. denied, General Motors Corp. v. City of Seattle*, 535 U.S. 1036 (2002) ("The tax at issue here is neither a sales or use tax, nor is it a franchise tax. It is a business and occupation tax for the privilege of engaging in business within the City of Seattle…We decline to extend *Quill's* physical presence requirement in this context." at 1029); *See also, Lamtec Corp. v. Department of Revenue*, 246 P.3d 788 (Wash., 2011), *cert. denied , Lamtec Corp. v. Department of Revenue of State of Washington*, 132 S.Ct. 95 (2011);) and *In re L.L. Bean, Inc.,* Ohio Dep't of Tax

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The New Mexico Supreme Court itself recognized the limits of *Quill's* application when it upheld the portion of the New Mexico Court of Appeal's opinion in *Kmart Properties, Inc.* that found "[c]onsidering ... the [U.S.] Supreme Court's narrow focus on the sales and use tax in *Quill,* we believe that *Quill's* physical-presence requirement was intended to apply to sales and use taxes only; it was not intended to apply to other taxes such as a state income tax." *Kmart Props., Inc. v. Taxation & Revenue Dep't*, 2006-NMCA-26, 139 N.M. 177, 185 (2001), *cert. quashed* (N.M., 12/29/05) (emphasis added). This Court vacated the portion of that same Appellate decision which had applied *Quill* to the New Mexico gross receipts tax, but it vacated on statutory grounds and thus did not reach the constitutional question of *Quill's* application to gross receipts taxes. *Kmart Corporation v. Taxation and Revenue Department*, 139 N.M. 172, 131 P.3d 22, 2006 -NMSC- 006 (N.M. 2005).

The New Mexico gross receipts tax is not a sales or use tax. It is similar to a sales tax in some important ways.[9] Indeed, the portion of the *Kmart Properties,*

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[9] In one publication, the authors refer to the New Mexico gross receipts tax as a sales and use tax, albiet with some differences (*See* W. Hellerstein, M. McIntyre and R. Pomp, *"Commerce Clause Restraints on State Taxation after Jefferson Lines,"* 51 Tax L. Rev. 47, 90–92 (1995)). But other authors refer to the tax as the

Inc. decision upheld by this Court found the gross receipts tax "*similar* in structure to the sales and use tax at issue in *Quill.*" *Id.* (emphasis added). But being "similar" to a sales and use tax is not the same as being a sales and use tax – certainly not for purposes of applying *Quill*. And the ways in which the New Mexico's gross receipts tax differs from a sales and use tax are those most relevant to the *Quill* decision.

In *Quill,* the Court focused on *stare decisis* and burdens. Regarding *stare decisis*, the *Quill* Court was concerned with settled expectations from its 1967 decision in *National Bellas Hess*. That case established a physical-presence rule for sellers' use tax collection requirements; it simply did not address taxpayers' gross receipts tax payments any more than it addressed taxpayers' income, franchise, or other tax payments.

Regarding burdens, the Court's concern lay with the administrative difficulties that remote sellers would face in collecting tax obligations imposed not on the seller, but on their purchasers, on a transaction-by-transaction basis, in "the Nation's 6,000-plus taxing jurisdictions." *Quill,* 504 U.S. 313, n.6. New Mexico's

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New Mexico legislature correctly identified it – a gross receipts tax (*See* J. Piper and C. Eggen, *General Principles of Gross Receipts Taxes,* Tax Management Portfolio (BNA) 1610:0011 ns 68,69, 1610:6104-04). The confusion may arise because, as other commentators note, New Mexico combines its gross receipts, sales, and use taxes within one statutory framework in N.M. Stat. Ann. § 7–9 (Tax Management Portfolio (BNA) 1610.03 B.1).

gross receipts tax is distinguishable. It does not require sellers to collect tax liabilities imposed on others; rather it requires sellers that engage in business in the state to remit their own tax liability. N.M.S.A. § 7-9-4. It does not apply on a transaction-by-transaction basis; rather it applies to the taxpayer's total gross receipts from certain activities in the state. N.M.S.A. § 7-9-3.1. New Mexico's gross receipts tax is centrally administered and has only a single rate applicable to all remote sellers. N.M.S.A. § 7-1-14, N.M.A.C. § 3-1-4-13. And, in general, gross receipts taxes are not in place in 6,000 state and local jurisdictions. Nation-wide sellers collecting a use tax face forty-five states and the District of Columbia; in contrast, only ten states impose a generally applicable gross receipts tax (Arizona, California, Delaware, Michigan, Missouri, New Mexico, Ohio, Pennsylvania, Texas, Washington). Tax Management Portfolio (BNA) 1610.10 (gross receipts taxes), 1300.01 (sales and use taxes).

These distinctions suggest the administrative burden of New Mexico's gross receipts tax is less like that of the North Dakota use tax collection responsibility at issue in *Quill* and more like that of the gross receipts, individual income, and corporate income and franchise tax responsibilities at issue in the state court decisions following *Quill* – all of which involved remittance of the taxpayer's own tax liability based on an aggregate tax base, and all of which declined to apply *Quill*.

Aside from whether complying with New Mexico's gross receipts tax in 2012 is more or less burdensome than complying with North Dakota's use tax collection responsibility in 1992, the incontrovertible fact is that the burdens are different. And there is no constitutional compulsion for New Mexico to assume that these unique burdens pose the same concerns, even if they were to reach the same level, as those the U.S. Supreme Court found unconstitutional in 1992 in *Quill.* Even with respect to sales and use tax, the *Quill* Court acknowledged that "...contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." There is certainly no reason to expand the *Quill* decision now to, "for the first time today," envelope a gross receipts tax.

CONCLUSION

Amicus Multistate Tax Commission urges the court to uphold the conclusion of the Appellate Court, based on the rationale of that Court or of those offered by the Department or the Commission, all of which are supportable and each of which leads to the conclusion that the Taxpayer in this case has nexus with the state sufficient for it to impose its gross receipts tax.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Amicus Curiae* Brief of the Multistate Tax Commission was served by first class mail this 15th day of October 2012, to:

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