No. 17-494

In the

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Multistate Tax Commission (the Commission) respectfully submits this brief as *amicus curiae* in support of the Petitioner, the State of South Dakota, urging this Court to grant certiorari to review the decision of the Supreme Court of South Dakota.[1]

The Commission is composed of the heads of the tax agencies in states that have adopted the Multistate Tax Compact (the Compact) by statute. Forty-eight states and the District of Columbia currently participate in the Commission's activities.[2] As the Court itself has described it, the Commission's history is bound up with the Court's shifting dormant commerce clause and state tax nexus jurisprudence. *See U.S. Steel Corp. v. Multistate Tax*

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state other than South Dakota. Counsel of record for the parties received timely notice of the intent to file this brief and have granted consent.

[2] *Compact members* are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington.

Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia.

Associate Members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

Comm'n, 434 U.S. 452, 555–556 (1978). In 1959, the Court in *Northwestern States Portland Cement Co. v. Minnesota* found that an out-of-state corporation's small Minnesota sales office provided a constitutionally sufficient nexus for the state to impose its income tax. 358 U.S. 450, 464 (1959). Almost immediately, complaints from the business community over the uncertainty created by this decision prompted Congress to enact a statute setting out certain minimum standards for states to follow when imposing business income taxes. *U.S. Steel* at 455; and *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 221–22 (1992). A congressional committee (the "Willis Committee"), established to further study the matter, also recommended more comprehensive requirements,[3] which were debated for several years, but never adopted. *U.S. Steel* at 454–5. In a later case, the Court rejected a challenge to the reasoning of *Northwestern States*, and explicitly overruled earlier, conflicting precedent. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)(overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1950)).

The Compact, which was formed in 1967, was one response by the states to the concerns raised by the Willis Committee that, "as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer." *Id.* at 456. The Compact's stated purposes are: (1) prop-

[3] *See State Taxation of Interstate Commerce*: Report of the Special Subcomm. on State Taxation of Interstate Commerce of House Comm. on the Judiciary, 89th Cong., 1st Sess., H. Rept. 565 (1965)(referred to as the Willis Committee for its Chairman, Representative Willis).

er determination of state and local tax liability of multistate taxpayers, (2) promoting uniformity and compatibility, (3) facilitating taxpayer convenience, and (4) compliance, and avoiding duplicative taxation. *Id.* at 456–57. Since its creation by the Compact, the Commission has sought to achieve these purposes and thereby preserve the states' sovereign authority to fairly impose taxes on interstate businesses, free from federal interference.

SUMMARY OF ARGUMENT

At issue in this case are two decisions, *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which exempt all sellers lacking physical presence in a state from having to collect sales and use tax on sales made into that state. The seller-collection mechanism, on which the sales and use tax system relies, is an essential component to the fair administration and enforcement of every consumption tax.[4] Attempts to find an adequate substitute for the seller-collection mechanism have failed. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015)(Kennedy, J. concurring). So the inevitable effect of exempting certain sellers from tax-collection obligations is to give them an unfair competitive advantage. This very same effect was raised by North Dakota and its *amici* twenty-five

[4] *See Mechanisms for the Effective Collection of VAT/GST Where the Supplier Is Not Located in the Jurisdiction of Taxation*, Report of the Organisation for Economic Co-operation and Development, Oct. 24, 2017, *available at* https://search.oecd.org/tax/tax-policy/mechanisms-for-the-effective-collection-of-VAT-GST.pdf (last visited Oct. 28, 2017).

years ago in *Quill*. But instead of counting it as an unfortunate but unavoidable cost of the physical presence standard, the *Quill* Court treated it as important grounds for retaining that standard, saying: "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." *Quill* at 316. While we question whether the Court may enlist the states' own tax systems in achieving an economic purpose not intended by state lawmakers, *see Quill* at 331 (White, J., concurring in part and dissenting in part), this brief merely asks the Court to discard such dubious grounds of support, and instead, subject the physical presence standard and its performance to more exacting constitutional scrutiny.

In *Bellas Hess* and *Quill*, this Court, having weighed the relevant burdens imposed on mail-order sellers, found that the presence of "retail outlets, solicitors, or property" in a state served as a "sharp distinction" and a useful bright-line between those mail-order sellers that could be required to collect sales and use taxes and those that could not, concluding that the standard thus alleviated the need for case-by-case evaluation in this area. *See Bellas Hess* at 758 and *Quill Corp*. at 317. But if physical presence is to continue to function as a general nexus standard, then it must do more than serve as a line of demarcation between distinct business models used in a particular industry. It must adequately reflect the underlying constitutional principles. But the standard has not proven useful in weighing the relative burdens of tax collection, nor has it provided consistent, predictable results outside the traditional mail-order industry. It cannot, therefore, reliably distinguish the tax burdens that states have the constitutional authority to impose, from the tax burdens that, under this Court's dormant commerce clause jurisprudence, may be impermissible. If the standard is now found unworkable as a general nexus standard, the doctrine of *stare decisis* does not require that it be retained. Nor can the Court simply defer to Congress to relieve the states from a standard that does not adequately protect their sovereign interests.

Of course, the *Quill* Court had another reason to defer to Congress. The Court's own rulings are generally given retroactive effect, *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991)(opinion of Souter, J., joined by Stevens, J.) which raised concerns for the mail-order industry's reasonable reliance interests. *See Quill* at 317 and 332 (White, J., concurring in part and dissenting in part)("The Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability.") Overruling *Bellas Hess* by legislative enactment, which would be given prospective effect, would have allowed for these reliance interests to be protected. But here, the Court is not being asked to apply its ruling retroactively to the parties, and if the Court finds that physical presence has proven to be unworkable as a general nexus standard, it should apply that ruling prospectively.

Even if the Court agrees that the physical presence standard is unworkable as a general nexus standard, it is reasonable to ask whether a sales threshold, like the one adopted by South Dakota, would be a more workable alternative. We argue that this sales threshold standard is, by its nature, better able to reflect the factors that tend to increase relative tax collection burdens. We also expect that the application of this kind of threshold will lead to more predictable and consistent results. But we anticipate certain criticisms of this threshold standard which we briefly note, and we conclude that this Court is more than capable of providing any guidance to the states that may be needed to address these concerns

ARGUMENT

I. The physical presence standard is unworkable as a general nexus standard and now, increasingly, impinges on state sovereignty. As the Court's creation, it must be limited or eliminated by the Court.

A. While Quill's physical presence standard provided a bright line "demarcation" within the mail-order industry, whose specific burdens the Court had twice weighed, if the standard is to continue to apply as a general nexus standard, it must be effective at differentiating constitutionally permissible and impermissible burdens, and its application must lead to predictable and consistent results.

To discern whether any standard has, with time and changed circumstances, become unworkable, it is necessary to first consider the standard's purpose and intended operation. But here, both the question and its answer are obscured by the bifurcation of *Quill's* holding between due process and the dormant commerce clause.

The inherent function of a bright-line rule is to provide notice, which is a purpose that sounds in due process, a doctrine that focuses on fairness and foreseeability. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). The *Quill* court made similar observations about the general nature of a bright-line test, saying it "reduces litigation" and "encourages settled expectations." *Quill* at 315–16. But the *Quill* Court held that: "to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process." *Quill* at 308. Moreover, there was no question that Quill, despite having no physical presence in the state, had received sufficient benefits from access to the state's markets to be subjected to a tax collection burden under due process. *Id.*

The *Quill* Court, instead, grounded the physical presence standard in the Court's dormant commerce clause doctrine, and in particular, in the burdens' analysis required by that doctrine. *Id.* at 309–315. But the specific connection it drew between physical presence and the relevant burdens' analysis was a very simple one:

> Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual

> burdens imposed by particular regulations or taxes, but also, *in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation.*

Id. at 314–15 (emphasis added).

It might be possible to read this statement as suggesting that the relevant burdens' analysis is a one-way inquiry, geared solely to alleviate undue burdens on interstate commerce, and that any bright-line rule will therefore suffice. What that reading obviously omits, however, is that some burdens are constitutionally permissible, meaning, the constitution protects state sovereign authority to impose those burdens. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."); *see also New York v. United States*, 505 U.S. 144, 157-159 (1992) (explaining that the federal government is one of limited powers and this, as well as the Tenth Amendment, preserve the core sovereignty of the states). Nor did *Quill* attempt to alter this fundamental tenet of our federal system. *See Quill* at 309 (explaining that the Court long ago rejected the view that states could not tax interstate commerce and had also renounced formalistic distinctions between so-called direct and indirect burdens). Therefore, to the extent the *Quill* Court also claimed that the physical presence standard itself "establishes the boundaries of legitimate state authority," *see Quill* at 315–16, that claim cannot stand. What establishes the boundaries of legitimate state authority are the constitution's explicit limitations of the federal government's authority and the Tenth Amendment, which confirms those limitations. As this Court has acknowledged, the federal government must respect these limits, otherwise the exercise of federal powers might "undermine the status of the States as independent sovereigns." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012). Instead, this statement connecting physical presence to the Court's burdens' analysis must be read as directed to two members of the same traditional mail-order industry, whose burdens would have been virtually identical. In weighing those particular burdens, the Court had found a "sharp distinction" between "mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier." *Bellas Hess* at 758. If the burdens on these two companies merited protection under the dormant commerce clause, based on their lack of physical presence, then the Court could certainly extend that same protection, on the basis of the same physical-presence distinction, to all similarly situated mail-order sellers, without the need to weigh their individual burdens.

But the states have had to apply *Quill's* physical presence standard to circumstances increasingly removed from those of traditional mail-order sellers. Nor has this Court revisited the particular burdens under the state sales and use tax system for 25 years. For the physical presence standard to be considered workable when applied outside the traditional mail-order industry, it must not only demarcate a consistent and predictable bright line, but must reasonably differentiate between constitutionally permissible and impermissible burdens. Yet, it is inherently unsuited to this.

B. The physical presence standard is unworkable as a general nexus standard because a seller's physical presence has little or no bearing on the relative burdens that tax collection may place on that seller, and because the nature of physical presence, which can be intermittent or impermanent, and may vary in quantity or quality, confounds its use as a consistent or predictable bright-line rule.

As the sole means for determining whether interstate sellers may be protected from, or subjected to, state sales tax collection requirements, the physical presence standard has a demanding role to fill. It must not only stand in for the burdens' analysis required by the Court's dormant commerce clause jurisprudence, but must do so in a predictable and consistent way. Indeed, these two requirements are connected.

Whatever the absolute burden of collecting state sales taxes may be, that burden is not constitutionally impermissible when imposed on interstate commerce generally. *See Western Live Stock v. Bureau of Revenue*, 303 U.S. at 254. So the question is whether a seller's lack of physical presence in a state may effectively elevate that otherwise permissible burden to an unconstitutional level. The general factors that tend to affect the relative burden of sales tax collection are easily identified and include: (1) a seller's overall size—which affects its capacity to meet the administrative requirements; (2) a seller's volume and dollar amount of sales into each state—which affects the total variable costs of collection and the relative burden of the fixed costs as spread out over the total activity in the state; and (3) the nature of the seller's products or services (*e.g.*, whether its sales are wholesale or retail, the similarity or diversity of the items sold, etc.), which may require product-level analysis of whether sales are taxable or exempt. Not only is physical presence, itself, not a direct factor, but any indirect connection it may have had, historically, to these factors, has all but disappeared.

In what way, then, can physical presence, or the lack of it, reflect the factors that give rise to a potentially heightened burden? It can't. The physical presence standard says: regardless of the seller's size, the volume or amount of its sales, or the nature or type of those sales, if the seller lacks physical presence, no tax collection burden may be imposed. In short, the physical presence standard is not just artificial at its edges, but through and through. Given this inherent artificiality, it is hard to see how it can be generally employed as the sole test for undue burdens. Nor can it possibly protect the states' sovereign interests in imposing permissible tax collection obligations.

Numerous examples demonstrate that the physical presence standard has also proven to be incapable of producing consistent or predictable results, not just at its "artificial edges, but whenever the presence at issue is something other than the "retail outlets, solicitors, or property" that marks the difference between traditional mail-order sellers' primary business models. When the particular presence involves less permanent, intermittent contacts, or contacts of a different nature, the physical presence standard will not serve to avoid case-by-case analysis. *See Quill* at 315. Nor will the results of any one case be of particular use in predicting the results of another. *See, e.g., Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954 (N.Y. 1995), *cert. denied* 516 U.S. 989 (1995)(nexus established by 19 customer visits on an average of four times a year; nexus established by 41 service visits over three years); *Town Crier, Inc. v. Illinois*, 733 N.E.2d 780 (Ill. Ct. App. 2000)(nexus established by deliveries over two years, 30 of which were in company's trucks); *but see In re Intercard, Inc.*, 14 P.3d 1111 (Kan. 2000)(nexus not established by 11 in-state installation visits to the company's largest in-state customer over three month period).

Courts have also struggled to apply the physical presence standard to achieve consistent results where the physical presence at issue is that of a third party performing activities for the seller. In those cases, it is not only the quantity and quality of the physical presence itself that is at issue, but also the relationship with between the seller and the third party. *Compare Appeal of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996), *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 255 Cal. Rptr. 77 (Cal. Ct. App. 1989), *Scholastic Book Clubs, Inc. v. Farr*, 373 S.W.3d 558 (Tenn. Ct. App.

2012), *cert. denied*, 133 S.Ct. 663 (2012)(in-state school teachers taking and placing orders for books sold by out-of-state book club and delivered by US Mail held to be in-state representatives of book club creating substantial nexus with state), *with Scholastic Book Clubs, Inc. v. State, Dep't of Treasury, Revenue Div.*, 567 N.W.2d 692 (Mich. Ct. App. 1997), *appeal denied* 586 N.W.2d 923 (Mich. 1998), *Pledger v. Troll Books, Inc.*, 871 S.W.2d 389 (Ark. 1994)(such in-state teachers do not create substantial nexus with state).

Courts have also split over whether the activities of an in-state entity may create nexus for an out-of-state affiliate. In *New Mexico Taxation & Revenue Dep't v. Barnesandnoble.com LLC*, 303 P.3d 824 (N.M. 2013), involving a traditional in-state retailer and its out-of-state online affiliate, the court considered, among other things, the degree of affiliation, the sharing of brand names, common advertising and promotional materials, and merchandise return policies. Finding that the relationship between the in-state and out-of-state affiliates was sufficient to require the out-of-state affiliate to collect tax, the court also recognized "that courts in several states have reached a different conclusion, holding that the presence of affiliated brick-and-mortar stores in a state does not create a nexus that would allow the state to tax catalogue or online sales." *Barnesandnoble.com LLC* at 828–29 (citing *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 668 (Conn. 1991); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693, 695, 698 (Ohio 1995); *Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue*, 567 A.2d 773, 778-79 (Pa. Commw. Ct. 1989); and *St. Tammany Parish*

Tax Collector v. Barnesandnoble.com, 481 F. Supp.2d 575, 582 (E.D. La. 2007).

Online commerce is also giving rise to new kinds of activities that have created similar questions not clearly addressed by the physical presence standard. For example, online sellers may use links on the websites of in-state organizations and pay the organizations a commission for any sales consummated through those links. Laws imposing a sales-collection obligation in these circumstances have been challenged in state courts on the grounds that the practices do not create the kind of physical presence required by *Quill*. *See, e.g.*, *Overstock.com, Inc. v. New York State Dep't of Taxation & Fin*, 987 N.E.2d 621 (N.Y. 2013), *cert. denied*, 134 S.Ct. 682 (2013); and similarly, *Travelocity.com LP v. Wyoming Dep't of Revenue*, 329 P.3d 131 (Wy. 2014).

Finally, the uncertain nature of the physical presence standard can, at times, cause sellers to incur tax collection obligations before they are aware or can manage to respond and begin to collect the tax. The Commission, through its Multistate Voluntary Disclosure Program, provides a kind of "relief valve" in these situations.[5] Businesses that discover they owe unreported taxes in multiple states, due to activities that occurred in the past, can work through the Commission to reach voluntary disclosure agreements with those states and receive relief from penalties and interest, as well as some limita-

[5] See a description of the Nexus Program on the Commission's website at: http://www.mtc.gov/Nexus-Program/Multistate-Voluntary-Disclosure-Program.

tion of their back-period liabilities. The states participating in this program have recently considered whether an online marketplace offering the products of a third-party seller creates nexus for that seller in the states where the marketplace provider stores the seller's inventory. The consensus of the program states is that the third-party sellers have met the physical presence standard in those circumstances and should be collecting tax. But the nexus program states also recognized that many of these sellers failed to anticipate this circumstance and have not charged or collected tax from their customers. Therefore, the states authorized the Commission to provide a special one-time opportunity for these sellers to voluntarily come forward and receive relief, not only from penalties and interest, but from most back-period taxes.

All these examples demonstrate that the physical presence standard lacks the necessary content—other than what courts may be able to project onto it—to produce reliably consistent or predictable results, necessary for both states and taxpayers to have certainty. If it cannot faithfully serve this small purpose, it certainly cannot hope to serve the greater one, and reliably distinguish permissible from impermissible burdens in an interstate marketplace where, increasingly, physical presence simply does not matter.

C. If the physical presence rule has now proven unworkable as a nexus standard, then it cannot be defended under the doctrine of *stare decisis*, nor can this issue, so critical to state sovereignty, simply be deferred to Congress to correct.

If a rule has become unworkable, this Court has never hesitated to overturn it. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In *Seminole Tribe of Florida v. Florida*, this Court summarized the principle of *stare decisis*, and the interests that it serves, viz., "the evenhanded, predictable, and consistent development of legal principles, ... reliance on judicial decisions, and ... the actual and perceived integrity of the judicial process." 517 U.S. 44, 63 (1996)(citing *Payne* at 827). S*tare decisis* is a principle of policy and not an inexorable command. *Id.*

When appropriate, however, the Court may defer to Congress to correct any errors, assuming Congress has the power to act. *Id.* Of course, the *Quill* Court not only recognized the possibility of congressional action to alter the standard it affirmed there, but conceded that such action might be necessary to properly weigh the applicable burdens in this area. *Quill* at 318. And the concurring opinion in *Quill* went even further, expressing an expectation that Congress could change the rule of *Bellas Hess* "by simply saying so." *Quill* at 320 (Scalia, J., concurring).

But of course, it's not quite that simple. While the Court may find that there is "wisdom and valor" in respecting the judgments of Congress, *Quill* at 318-319, Congress, itself, may have "a strong and proper tendency to trust the courts to correct their own errors." *Cleveland v. U.S.*, 329 U.S. 14, 22-23 (1946) (Rutledge, J. concurring). Congress may also fail to take action to repudiate or correct a decision of the Court for a host of reasons, including the sheer pressure of other and more important business. *Id.* Imputing any meaning to the silence of Congress is especially fraught where the Court's decisions have taken "vacillating and contradictory courses," which, as Justice Rutledge notes, is particularly true of its dormant commerce clause cases. *Id.*

The majority in *Quill* acknowledged the physical presence standard to be "artificial at its edges," *Quill* at 315, but it did not conclude that the standard had become unworkable, at least in the context of mail-order sellers in the period between *Bellas Hess* and *Quill*. Indeed, as the opinion in *Quill* demonstrates, the Court's view was quite the opposite. We are confident that if the Court had serious doubts as to whether the physical presence standard could function as a general nexus standard, it would not have affirmed its prior ruling in *Bellas Hess* and simply depended on Congress to fix it. If, as we contend, *Quill's* standard has proven so unreliable that it impinges on state sovereign authority to impose permissible tax collection burdens, then failure of this Court to act effectively leaves the states without an adequate remedy.

One additional observation is important here. Considerations in favor of *stare decisis* have been found particularly compelling in cases involving property and contract rights, where reliance interests are involved. *Payne* at 828. No doubt this also motivated the *Quill* Court to retain the rule of *Bellas Hess*. As we discuss in Section II below, however, if the Court were to conclude that the physical presence standard has become unworkable, it would be appropriate to give that ruling prospective effect, which would also protect any reliance interests of sellers.

II. While the Court has determined that its rulings should generally apply retroactively, if it now finds that *Quill's* standard has become unworkable as a general nexus standard, it may take this case to overrule *Quill* and apply this ruling prospectively.

Quill came before the Court at the very same time when it was rethinking whether its rulings may ever be given prospective effect. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Virginia Dep't of Taxation*, 501 U.S. 1247 (1991) (*Harper I*); and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (*Harper II*). Ultimately, while the Court was split, a plurality agreed that if a ruling was to be applied to the parties in the case, then it should also be applied retroactively, even where it overturns existing precedent or implicates certain reliance interests. *Harper II* at 97. Here, however, South Dakota does not seek any form of retroactive relief. Nor would the state legislation in question provide for any.

Moreover, in *Quill*, North Dakota did not contend that the physical presence standard had become fundamentally unworkable. *See Quill* at 303–04 (noting that the state supreme court had based its decision to subject Quill to a tax collection obligation on "wholesale changes" in the economy and the law, including the remarkable growth of the mail-order industry, changes in technology, and the Court's ruling in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). Nor did the majority in *Quill* conclude that the standard had become unworkable in the traditional mail-order context. But the petition here raises a different question in our view: Whether the physical presence standard can continue to function as a general nexus standard despite growing evidence that it can neither distinguish impermissible burdens, nor provide predictable, consistent results. If the Court overrules *Quill* because it now finds the physical presence standard to be unworkable for these purposes, it would simply be inconsistent for it to apply that ruling retroactively to periods prior to the making of such a determination.

III. A sales threshold standard, like the one enacted by South Dakota, represents a fairer, more workable alternative to the physical presence standard, and, to the extent the Court deems it necessary, it can provide further guidance to the states for adopting and applying such standards.

A sales threshold standard is an example of the type of standard that not only draws a brighter line but, when fully implemented, is likely to lead to fairer and more workable results than the physical presence standard itself can now achieve. It also appears to be the obvious alternative—as evidenced by the adoption or proposal of similar kinds of thresholds in other states. *See* Petition for Writ of Certiorari at 8–11.

That said, we agree with the *Quill* Court that all bright-line tests are artificial at their edges—and threshold tests will be no exception. But as discussed above, the physical presence standard suffers from flaws that the threshold standard mitigates. The basis for the threshold standard, the amount of sales into a state, is a factor tending to directly affect the relative burden of complying with that state's tax collection obligations. Also, threshold standards set at a reasonable level will likely exclude many smaller remote sellers, for whom the relative burden of tax collection would be higher.

Nevertheless, we anticipate certain criticisms of the sales threshold standard, and we address the chief criticisms briefly here. One possible criticism is that statutory thresholds may require more specific guidance to allow them to be fairly and consistently implemented and applied. The fact that this needed guidance does not currently exist, however, is not a function of inherent inability to generate that guidance, but only of the fact that the states are still bound by the physical presence standard and have not had the opportunity to develop such guidance. A second possible criticism is that, since the sales threshold standard would only apply to sellers who lack physical presence, the practical difficulties inherent in applying that standard might continue to affect the determination of nexus. But, by demoting physical presence to a purely subordinate role in the determination of nexus, the need to push the standard to its inherently artificial limits is substantially mitigated. A third possible criticism is that a diversity of state thresholds might create somewhat more complexity than a single standard. Assuming that no state's threshold is impermissibly small, however, it is hardly possible to accuse a state of burdening interstate commerce simply because it chooses to impose a threshold higher than the minimum, even if it is different than other states. Finally, a sales threshold, strictly interpreted and applied, might potentially violate due process. But this is true of the physical presence standard as well. Therefore we assume that state administrators and state courts will interpret and apply such thresholds consistent with due process requirements.

In addition, we trust that the Court is capable of providing any needed guidance on these or other potential issues with a sales threshold standard, if it grants South Dakota's petition for certiorari.

CONCLUSION

As the Commission's own history demonstrates, if the Court now determines that *Bellas Hess* and *Quill* should be overturned, it would not be the first of its dormant commerce clause decisions to meet that fate. Nor would it be the first time the Court moved away from a formalist tax nexus rule toward more general principles, nor the first time that it permitted the exercise of state tax jurisdiction within an area previously considered constitutionally off-limits. *See Quill* at 309. And, as the history of the Commission also demonstrates, while these shifts may be met with predictions of the substantial damage state tax burdens may cause, these predictions have failed to materialize. So while the Court has, on occasion, temporarily reverted to formalist thinking, it has never found it necessary to re-impose substantial limitations on state tax nexus once removed.

In *Quill*, the Court recognized that "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government," meaning the future judgments of Congress. If the Court now concludes that the physical presence standard should be overturned, and that new rules must be developed to take its place, it need only exercise this same wisdom and valor in favor of the states' ability to accomplish that task.

Respectfully submitted,

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