In the Supreme Court of Ohio

Crutchfield Corp.,	:	Case No. 15-0386
Appellant,	:	
v.	:	Appeal from the Ohio Board of Tax Appeals
Joseph W. Testa, Tax Commissioner of Ohio,	:	BTA Case Nos. 2012-926, 2012-3068, 2013-2021
Appellee.	:	

BRIEF OF *AMICUS CURIAE* THE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

Martin I. Eisenstein (PHV 1095-2015)
(Counsel of Record)
David W. Bertoni (PHV 2436-2015)
Matthew P. Schaefer (PHV 2399-2015)
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Tel: (207) 786-3566
Fax: (207) 783-9325
meisenstein@brannlaw.com
mschaefer@brannlaw.com

Edward J. Bernert (0025808)
BAKER HOSTETLER
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Tel: (614) 462-2687
Fax: (614) 462-2616
ebernert@bakerlaw.com

Counsel for Appellant, Crutchfield Corp.

Bruce Fort (PHV 7779-2015)
(Counsel of Record)
MULTISTATE TAX COMMISSION
444 North Capitol St., NW
Suite 425
Washington, D.C. 20001
Tel: (202) 650-0300
bfort@mtc.gov

Counsel for *Amicus Curiae*, Multistate Tax Commission

Mike DeWine (0009181)
Attorney General of Ohio
Christine T. Mesirow (0015590)
Daniel W. Fausey (0079928)
Assistant Attorneys General
Office of the Attorney General
Taxation Section, 25th Floor
Rhodes Tower
30 East Broad Street
Columbus, OH 43215
Tel. (614) 466-5967
Fax (614) 466-8226
christine.mesirow@ohioattorney
general.gov
daniel.fausey@ohioattorneygeneral.gov

Counsel for Appellee, Joseph W. Testa,
Tax Commissioner of Ohio

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, the Multistate Tax Commission (Commission), respectfully submits this brief in support of the Appellee, Ohio, urging the court to hold that R.C. 5751.01(I)(3), which imposes the state Commercial Activity Tax (CAT) on businesses with more than $500,000 in annual gross receipts from interstate sales, does not violate the Commerce Clause.

Created by the Multistate Tax Compact in 1967,[2] the Commission is made up of the heads of the revenue agencies of the states that have adopted the Compact by statutory enactment. Other states participate in Commission activities as sovereignty and associate members.[3] The Compact and the Commission serve to protect state sovereign authority to establish fair tax systems free from unwarranted federal interference and constraint.

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, (2) promote uniformity or compatibility in

---

[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 the State of Ohio.

[2] *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 98 S. Ct. 799, 54 L. Ed. 2d 682 (1978)(upholding the Compact).

[3] The Commission is composed of the heads of the tax agencies of states that have adopted the Compact. In addition to the sixteen compact members, thirty-two states are sovereignty or associate members. 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, 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, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation.[4] One of the ways the Commission fulfills these purposes is through its National Nexus Program, which assists states by conducting nexus investigations and providing training and advice, and also provides businesses with an opportunity to voluntarily register with states where they have nexus and to settle back taxes owed. The Commission, through its Uniformity Committee, also drafts model laws and regulations.

The Commission has a fundamental interest in this case. If the Constitution were found to impose a physical presence jurisdictional standard (or "nexus" standard) for business activity taxes, it would be impossible for states to create a fair business tax system for our modern economy. The decision of the Ohio legislature to apply a nondiscriminatory tax to all businesses that derive a substantial amount of gross receipts from activities or markets in a state does not test the limits imposed by the U.S. Supreme Court's dormant Commerce Clause jurisprudence. To the contrary, since rejecting outdated notions of the dormant Commerce Clause in the 1970's, the Supreme Court has been careful not to needlessly constrain the sovereign authority of the states to set their own tax policies, even where those policies place some burden on businesses operating in interstate commerce. Specifically, the Court has limited any physical presence standard to the state imposition of a sales and use tax collection obligation.

[4] Multistate Tax Compact, Art. I.

Not only is Ohio's bright-line nexus standard consistent with U.S. Supreme Court precedent, such a standard properly respects the constitutional concerns expressed in previous Supreme Court decisions. The benefit of the physical presence standard, the Court has noted, is that it provides taxpayers with certainty (as to when they will be responsible for collecting sales tax). But states have long litigated what constitutes "physical presence."[5] And as methods of doing business change, the particular activities that may be seen as establishing "physical presence" also change.[6] The CAT nexus standard, requiring $500,000 in receipts from Ohio before the tax can generally be imposed, is also a bright-line standard, but is far less susceptible to dispute.

Even more important than whether a nexus standard creates a "bright line" is its effect on the national economy. A physical presence standard means that some businesses, while operating in interstate commerce, will be subject to the tax, but others, also operating in interstate commerce, will not, solely because of the ways in which the two groups of businesses choose to operate. In contrast, the CAT substantial receipts

[5] See, for example, just some of the cases questioning whether instate affiliates of Internet sellers may create nexus for those sellers, including: *New Mexico v. Barnesandnoble.com LLC*, 2013-NMSC-023, 303 P.3d 824 (N.M. 2013)(holding that the affiliate does create nexus); *Borders Online, LLC v. State Board of Equalization*, 129 Cal. App. 4th 1179, 1184, 29 Cal. Rptr. 3d 176, 178 (2005)(same); *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 222, 585 A.2d 666, 668 (1991)(holding that the affiliate does not create nexus); *SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St.3d 119, 652 N.E.2d 693 (1995)(same); *Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue*, 130 Pa. Cmwlth. 190, 567 A.2d 773 (1989) *aff'd*, 527 Pa. 347, 591 A.2d 1047 (1991)(same).

[6] The Commission has recently drafted a model nexus standard for sales and use taxes, relying on the physical presence standard, which addresses a number of these evolving issues. *See* Multistate Tax Commission Sales & Use Tax Subcommittee Draft "Engaged in Business" Model Statute, http://www.mtc.gov/getattachment/Uniformity/Project-Teams/Sales-Use-Tax-Nexus-Model-Statute-Project/Nexus-Model-as-of-July-1-2015.pdf.aspx

nexus standard levels the playing field, eliminating state law-created advantages and disadvantages.

It was for these same reasons—to promote both certainty and fairness—that the Commission in 2002 recommended a model business activities nexus statute to the states, using a substantial sales threshold of $500,000.[7] This type of standard has subsequently been adopted by a number of states.[8] An adverse decision in this case would likely discourage other states from adopting what has become an important tool for achieving fairness, predictability, and uniformity.

LAW AND ARGUMENT

Proposition of Law No. 1: Only the Supreme Court's 1992 decision in *Quill* (declining to overturn *Nat'l Bellas Hess*) can be cited for the proposition that the Commerce Clause imposes a physical presence nexus standard, and even then, only when states seek to impose a sales and use tax collection burden on remote sellers who come within its safe harbor. In *Quill*, the Court unmistakably signaled that it intended the holding to be narrowly construed, acknowledging that it had never found such a standard to apply to other state taxes, and justifying the result on the basis of stare decisis, reliance interests, and the specific burdens imposed on sellers who must collect sales and use taxes. While the Supreme Court has never revisited its holding in *Quill*, either to expand, or further limit it, many state appellate courts have been asked to apply its holding to other taxes. In the overwhelming majority of decisions, those courts have concluded that *Quill's* physical presence standard was intended to be applied to sales and use taxes only. Ohio's CAT is not a sales and use tax. Nor does it raise the kinds of concerns that the imposition of a sales and use tax collection burden might raise.

---

[7] *See* Factor Presence Nexus Standard for Business Activity Taxes, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/FactorPresenceNexusStandardBusinessActTaxes.pdf

[8] *See* CAL. REV. & TAX. CODE § 23101(b) (lesser of $500,000 or 25 percent of total sales); CONN. GEN. STAT. § 12-216a (adopting an "economic nexus" standard); Conn. Informational Pub. No. 2010 (29.1), Dec. 28, 2010, ($500.000 of receipts); MICH. COMP. LAWS ANN. § 206.621(1) ($350,000 of gross receipts); NY TAX LAW § 209.1(b) ($1,000,000 of receipts); TENN. CODE ANN. § 67-4-702(a)(27).

A. Nothing in the Supreme Court's decision in *Quill* indicates that the Court intended to enshrine in the Constitution a strict prohibition on the states, limiting them to taxing only businesses that have a physical presence within their borders. Rather, *Quill's* holding is clearly confined to the imposition of a state sales and use tax collection obligation.

The taxpayer in this case contends that the Commerce Clause, U.S. Constitution Art. I, Sec. 8, cl. 3, contains an implicit prohibition preventing Ohio from imposing a tax on its gross revenues derived from Ohio because it lacks a physical presence in the state. The U.S. Supreme Court's holding in *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (upholding its prior decision in *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967)) is the only case to have found that the dormant commerce clause doctrine supports a physical presence requirement. In *Quill*, the Court declined to overturn its prior ruling that a catalog seller without physical presence in a state could not be subjected to that state's sales and use tax collection obligations. The Court expressly acknowledged that this holding was limited to sales and use taxes, not once, but twice. The Court also made clear that its decision was a pragmatic one, creating a bright, albeit artificial, safe harbor for reasons of *stare decisis* and reliance concerns unique to the particular circumstances of the case.

To understand why the Supreme Court would uphold a seemingly outdated and artificial physical presence standard in *Quill*, it is necessary to understand the history leading up to that case. In 1968, in *Bellas Hess*, the Supreme Court was asked for the first time to rule specifically on whether "a State may impose <u>the duty of use tax collection</u>

and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." *Bellas Hess,* at 758 (emphasis added). Because affirming that tax would have allowed "every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes" to impose those taxes on out-of-state sellers and subject them to the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements," the Court feared this "could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions." *Id.* at 759. The Court therefore found that sellers using only the mail and common carriers, with no other physical presence in a state, could not be made to collect and remit sales taxes.

Three justices dissented from the decision in *Bellas Hess,* saying:

> It is hardly worth remarking that appellant's expressions of consternation and alarm at the burden which the mechanics of compliance with use tax obligations would place upon it and others similarly situated should not give us pause. The burden is no greater than that placed upon local retailers by comparable sales tax obligations; and the Court's response that these administrative and record keeping requirements could 'entangle' appellant's interstate business in a welter of complicated obligations vastly underestimates the skill of contemporary man and his machines."
>
> *Id.* at 766 (Fortas, J. dissenting).

In many ways, *Bellas Hess* was an anachronism when decided and is clearly the vestige of an earlier split in the Supreme Court over the ability of states to tax interstate commerce generally. This brief will return to this history below. Here, it is sufficient to note that less than a decade after *Bellas Hess,* the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), renounced much of its prior dormant commerce clause jurisprudence concerning state taxation of interstate commerce. In *Complete Auto*, the Court held that the states could impose a tax on interstate commerce if it satisfied a four-part test, the first part being a "substantial nexus" between the activity or person being taxed and the taxing state. *Id.*at 279.

After the Court in *Complete Auto* rejected the rigid formalistic rules imposed in some of the Court's earlier state tax decisions, many assumed *Bellas Hess* was no longer good law. Eventually, North Dakota brought a case seeking to directly overturn *Bellas Hess*. When that case, *Quill*, came before the Supreme Court, the Court acknowledged that the state clearly had jurisdiction over Quill under the Due Process Clause by virtue of the company's continuous and widespread solicitation, saying: "In 'modern commercial life' it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Quill*, 504 U.S. at 308.

The Court also acknowledged that its dormant Commerce Clause thinking had evolved, saying: "*Complete Auto* emphasized the importance of looking past 'the formal language of the tax statute [to] its practical effect.'" *Id.* at 310. The Court even admitted that its contemporary Commerce Clause jurisprudence would not necessarily dictate the result in *Bellas Hess* were the issue to arise for the first time in *Quill. Id.* at 311. But the Court concluded *Complete Auto* did not implicitly overrule *Bellas Hess.* Just because it had rejected much of the formalism of its earlier rulings, "we have never intimated a desire to reject all established 'bright-line' tests," said the Court. *Id.* at 314.

What exactly was that bright line? According to the Court, "a safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.' . . . such vendors are free from state-imposed duties to collect sales and use taxes." *Id.* at 315 (emphasis added).

The Court also noted that the rule is "artificial at its edges." *Id.* But the Court justified the rule as follows: "This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." *Id.*at 315 (emphasis added). The Court noted that despite the benefits of bright-line tests, it had sometimes determined those benefits to be outweighed and had replaced them with tests that are less artificial and mechanical. *Id.* at 317. Ultimately, however, the Court concluded that the doctrine of *stare decisis* counseled against overturning the holding of *Bellas Hess*, concluding, "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. *Id.*at 317 (emphasis added).

The Supreme Court could not have been clearer. The rule it was upholding in *Quill* had never applied to state taxes generally, but only to the requirement to collect sales and use taxes, and were it not for past precedent relied upon by sellers, the Court might well have been persuaded by the other compelling reasons not to create a physical presence test even for that purpose.

B. Other state appellate courts have read *Quill* as limited to sales and use taxes and have found no reason to extend the decision's physical presence test to other taxes.

Despite the Supreme Court's own express limitations on its holding, businesses that conduct activities in states "remotely" have urged state courts to extend *Quill's* safe harbor to other types of taxes. These invitations to expand a narrow ruling into a broad dormant commerce clause principle have been almost universally rejected by state appellate courts, beginning with the seminal case of *Geoffrey, Inc. v. S. Carolina Tax Comm'n*, 313 S.C. 15, 437 S.E.2d 13 (1993).[9]

The taxpayer's brief mentions a few of the decisions that are contrary to its position, including *Geoffrey, supra*, *KFC Corp v. Iowa Department of Revenue*, 792 N.W.2d 308 (Iowa 2010) and *Capital One Bank v. Commissioner of Revenue,* 453 Mass. 1, 899 N.E.2d 76 (2009), but misses others, including *A&F Trademarks v. Tolson*, 167 N.C. App. 150, 605 S.E.2d 187 (2004) *cert. den*., 546 U.S. 821 (2005), *Kmart Corp. v. Taxation & Revenue Dep't*, 2006-NMSC-006, 139 N.M. 172, 131 P.3d 22 (2005), *Lanco, Inc. v. Dir., Div. of Taxation,* 379 N.J. Super. 562, 188 N.J. 380, 908 A.2d 176 (2006), *cert den*., 551 U.S. 1131 (2007), *Tax Com'r of State v. MBNA Am. Bank, N.A.*, 220 W. Va. 163, 640 S.E.2d 226 (2006), *cert. den*., 551 U.S. 1141 (2007), *Geoffrey, Inc. v.*

[9] It is true that a single appellate court concluded that Quill's physical presence nexus standard should be applied outside the sales and use tax context. *See J.C Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. App. Ct. 1999)(cited repeatedly in the taxpayer's brief). But the holding in *J.C. Penney* was later qualified and all but overruled by the same court just two years later in *Am. Online, Inc. v. Johnson*, No. M200100927COAR3CV, 2002 WL 1751434, at *1 (Tenn. Ct. App. July 30, 2002). Significantly, the Tennessee legislature this year adopted the same "factor presence" nexus standard for its franchise tax. Tenn. Code Ann. § 67-4-702(a)(27) (2015).

Oklahoma Tax Comm'n, 2006 OK CIV APP 27, 132 P.3d 632, *as corrected* (Apr. 12, 2006), and *Prince v. State Dep't of Revenue*, 55 So. 3d 273 (Ala. Civ. App. 2010).[10]

In each of these cases, the appellate courts reasoned that the jurisprudence leading up to *Quill* and the nature of the concerns expressed in *Quill* compelled a conclusion that *Quill's* "physical presence" test should not be extended beyond sales and use tax collection. The taxpayer's brief, tellingly, makes no real attempt to challenge this reasoning, asserting instead that the CAT is a gross receipts tax, not an income tax. Not only is this a distinction without a difference, it is not much of a distinction—given that one tax applies to gross revenue and the other applies to net. In any case, concerns which animated the Supreme Court's ruling in *Quill*, and its predecessor, *Bellas Hess*, are specific to sales and use tax collection burdens, and these concerns are simply absent in the Ohio CAT.

[10] *See also* J. Hellerstein & W. Hellerstein, *State Taxation*, Third Edition (Warren, Gorham & Lamont, 2001) ¶ 6.11[4]: "More than two decades have passed since the South Carolina Supreme Court's landmark decision in *Geoffrey*. Judicial and administrative reaction to the decision across the country has overwhelmingly supported the opinion's position that *Quill*'s physical-presence test of Commerce Clause nexus does not extend to income taxes, although there are a few decisions to the contrary. In most states where the issue has been addressed, courts, administrative tribunals, and tax administrators have embraced *Geoffrey*'s theory that an economic rather than a physical presence can satisfy the Commerce Clause's "substantial nexus" requirement. In a handful of other states, however, the economic presence theory of nexus has been rejected on the ground that *Quill*'s "bright-line, physical-presence" test applies to income as well as to sales and use taxes. In some states, the issue remains unresolved."

C. Ohio’s CAT is not a sales tax and imposes no equivalent burden on businesses since it does not require calculation of local tax rates or the charging and collecting of taxes from customers and is not imposed on a transaction-by-transaction basis.

This court has determined that the CAT is not a sales tax. *Ohio Grocers Assn. v. Levin*, 2009-Ohio-4872, 123 Ohio St. 3d 303, 916 N.E.2d 446. This court held that the CAT uses gross receipts to compute the amount of a privilege-of-doing-business tax generally imposed on businesses with activities in the state. It analogized the tax to the privilege tax on public-utilities that uses “gross earnings,” as opposed to net earnings, to measure the value of the privilege, and also to franchise taxes where the value of the franchised is measured in different ways, including the value of certain property held by a business. This court distinguished these kinds of taxes from taxes that are imposed on each separate transaction and aligned the nature of the CAT with the state’s general corporate franchise tax. *Id.*

Nor did this court conclude that the CAT was “substantively” like a sales tax. Rather, it is a tax on the privilege of doing business, imposed on each person with gross receipts, expressly forbidden to be billed or invoiced to customers, reported on periodic returns based on taxable gross receipts, and not based on taxable transactions. Moreover, the court recognized the tax was simply “computed using a broad measure of market access that is rationally related to the enjoyment of the privilege of doing business.” The tax was found not to be triggered by sales or purchases or computed on each transaction, but upon receipts according to a rate structure involving different levels of gross receipts. *Id.*

The requirement to collect transactional taxes can be seen as imposing a higher burden than direct taxes on business activities for a number of reasons. First, the seller must correctly compute and charge the tax on each transaction, giving the purchaser documentation that the tax has been collected. Second, the seller must make an effort to ensure that the purchaser pays over the tax and cannot accept an assertion by the purchaser that the sale is not taxable without some documentation. Third, the seller must make a specific report of its taxable and exempt transactions and show that the proper tax was collected on those transactions. Fourth, the seller may be obligated to return to its customer any tax improperly charged or collected. Fifth, the sales and use tax system is made up not only of state impositions, but also municipal and county impositions, which require the seller to keep track of rates in specific locations. The CAT, in contrast, does not impose these burdens but is much more akin to a business income tax, only measured by gross, rather than net, income.

Proposition of Law No. 2: The "substantial nexus" requirement of *Complete Auto* is animated by concern for the national economy and the effects of state taxation on that economy. But the Supreme Court has also long recognized that interstate commerce must pay its fair share of state taxes. So while burdens such as the requirement to collect and pay over state sales and use taxes have raised concerns for the Court, it has rejected any notion that simply operating in interstate commerce shields a business from fairly imposed state taxes. A physical presence standard may satisfy substantial nexus but it creates inequities among businesses operating in interstate commerce, especially in today's economy. The competitive advantage that the physical presence standard gives to some businesses operating in interstate commerce cannot be squared with the Supreme Court's concern for the national economy or its conclusion that interstate commerce should be made to pay a *fair* share of state taxes.

A. Substantial nexus does not equate to physical presence; rather, it reflects a concern for the national economy in our federal system in which interstate commerce can be made to pay its fair share of state taxes.

In *Complete Auto,* the Supreme Court reflected:

> It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. 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 business.

430 U.S. at 288 (internal citations omitted). The Court went on to observe that even when it had been split over the power of states to tax interstate commerce, it had found that state taxes could sustain a "Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State . . .." *Id.* at 279. In *Quill*, the Court reprised *Complete Auto's* substantial nexus test saying: [T]he Commerce Clause and its nexus requirement are informed <u>not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy</u>. . . . It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that that Clause prohibits discrimination against interstate commerce, *see, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), and bars state regulations that unduly burden interstate commerce, *see, e.g., Kassel v. Consolidated Freightways Corp. of Del.,* 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981)." 504 U.S. at 313 (emphasis added). The Court went on to say, "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Id.*

Had the Court wanted to, this would obviously have been an opportunity for it to equate substantial nexus with physical presence, but it did not. It noted instead that "substantial nexus," much like it sounds, requires a greater connection than "minimum contacts." Presumably, that greater connection is of the same type—that is, if an action creates minimum contacts, more of that action would create substantial nexus. Nor is it necessary that the substantial nexus test not be arbitrary or artificial in nature, since the Court in *Quill* admitted this was the nature of a physical presence standard also. The CAT's sales threshold is simply another way of establishing a bright line rule which both satisfies "substantial nexus" and gives potential taxpayers fair notice and certainty.

B. The Ohio legislature properly exercised its authority to set tax policy for the state when it enacted a substantial sales threshold for imposing the CAT, and this sales threshold also respects general dormant commerce clause concerns for the national economy.

The CAT was phased in beginning in 2005. Am.Sub.H.B. No. 66, 126th General Assembly. It was one of the "key components" of "a series of tax revisions generally designed to lessen the burden of taxation on Ohio's businesses." *Ohio Grocers*, 2009-Ohio-4872, ¶ 6. For many businesses, the CAT replaced the tax on personal property located and used in business in Ohio and the tax on the privilege of exercising the corporate franchise in this state. *Id.*

As part of that new law, the Ohio legislature adopted its own "bright-line" nexus test, a test which turned on an objective measure of the in-state business activity, based on the volume of gross receipts derived from within the state. Under the CAT, taxpayers with less than $500,000 in in-state receipts simply owe no tax; those with a greater presence in Ohio owe a flat rate of $150.00 on the next $500,000 in receipts. Taxpayers with more than $1 million of receipts from business activity within the state pay a tax measured by overall receipts at a very modest rate (0.26%). *Id.*

The Ohio legislature's adoption of a bright-line substantial receipts nexus standard based on this objective, easily-ascertainable and verifiable standard provides certainty to taxpayers and tax collectors alike, reducing litigation risk and audit costs. The high threshold amount of $500,000 in in-state receipts ensure that small businesses will not be disproportionately burdened by tax compliance costs. And most importantly, by basing the threshold amount on in-state receipts regardless of the manner in which a business operates, the legislature ensured that taxpayers with some physical presence in the state would not be unfairly disadvantaged when competing with those that, while lacking that presence, nevertheless exploit Ohio markets selling to Ohio customers. The creation of a level playing field is not only a legitimate interest of the state legislature, but also represents legitimate respect for the national economy and preventing the negative effects that state tax systems might otherwise have on that economy.

C. Our economy is rapidly changing and a physical presence rule for the imposition of state business taxes would not only prevent the ability of states to fairly apply those taxes but would give an advantage to certain businesses that lack a physical presence, but are able to operate and compete successfully without such presence.

In 1992, when *Quill* upheld the bright-line physical presence rule of *Bellas Hess*, no one had ever made an online retail purchase. The first World Wide Web server and browser, created by Tim Berners-Lee in 1990, opened for commercial use in 1991, the year litigation began in *Quill*.[11] That year, the National Science Foundation lifted a ban on commercial businesses operating over the Internet, paving the way for Web-based e-commerce.[12] The first secured online purchase did not take place until 1994.[13] From there, internet sales skyrocketed, largely due to the development of security protocols and high-speed internet connections such as DSL, allowing for much faster connection speeds and faster online transaction capability.[14]

In 2010, the Boston Consulting Group determined that the Internet accounted for 4.7 percent of *all* United States economic activity, exceeding the contributions of the federal government (4.3 percent).[15] If it was considered its own separate industry, the Internet would also be larger than America's education, construction, or agricultural sectors.[16] According to a 2014 online retail sales forecast from Forrester Research Inc., United States e-retail sales (that is, consumer sales) are expected to grow from $263 billion in 2013 to $414 billion in 2018, a compound annual growth rate of 9.5 percent.[17] The study predicts that e-retail's share of total retail sales will continue to increase, from

---

[11] Dave Roos, *The History of E-commerce*, April 15, 2008. HowStuffWorks.com. http://money.howstuffworks.com/history-e-commerce.htm (last visited May 13, 2015).

[12] *Id.*

[13] The item purchased was a pepperoni pizza with mushrooms and extra cheese from Pizza Hut. Kayla Webley, *A Brief History of Online Shopping*, TIME.COM, July 16, 2010, http://content.time.com/time/business/article/0,8599,2004089,00.html (last visited May 15, 2015).

[14] Bill Hazelton, *History of E-Commerce*, August 19, 2009, http://www.spirecast.com/history-of-e-commerce/ (last visited May 15, 2015).

[15] Annalyn Censky, *Internet accounts for 4.7% of U.S. economy*, March 19, 2012, CNN.COM, http://money.cnn.com/2012/03/19/news/economy/internet_economy/ (last visited May 12, 2015).

[16] *Id.*

[17] Allison Enright, *U.S. online retail sales will grow 57% by 2018*, May 12, 2014, https://www.internetretailer.com/2014/05/12/us-online-retail-sales-will-grow-57-2018> (last visited May 13, 2015).

8 percent in 2013 to 11 percent in 2018. The dollar growth from the actual 2013 figure of $263 billion to the forecast $414 billion for 2018 is 57.4 percent.[18] Contrast these online sales with 1992's $180 billion per year in remote (mail-order) sales,[19] and it becomes clear that commerce has evolved via an entirely different platform than physical storefronts.

Internet retailers have some distinct competitive advantages over brick-and-mortar stores. Internet stores require minimal downtime, and can remain open 24 hours a day, year-round, largely unaffected by real-world issues like weather. Retail websites are a natural extension of the social networking community, since large online retailers generally offer customers the opportunity to post comments and see reviews on every aspect of a product.[20] Online shopping also offers easy price comparison—an ability that has overlapped into the real world: Amazon now offers a price-checking app that allows shoppers to scan a product at the mall and purchase it online.[21] Faced with the option to buy nearly anything without leaving home, shoppers have changed their habits: brick-and-mortar stores now suffer from a lack of foot traffic.[22]

---

[18] *Id.*

[19] *Quill* at 329 (White, J., concurring in part and dissenting in part).

[20] Matthew Townsend, *Millennials Shunning Malls Speeds Web Shopping Revolution*, June 25, 2014, http://www.bloomberg.com/news/articles/2014-06-25/millennials-shunning-malls-speeds-web-shopping-revolution (last visited May 15, 2015).

[21] *About the Amazon Price Check App*, http://www.amazon.com/gp/help/customer/display.html?nodeId=200777320 (last visited May 15, 2015).

[22] *See., e.g.*, Shelly Banjo and Drew Fitzgerald, *Stores Confront New World of Reduced Shopper Traffic*, WALL STREET JOURNAL, Jan. 16, 2014, http://www.wsj.com/articles/SB10001424052702304419104579325100372435802 ("Online sales accounted for just 5.9 percent of overall retail sales in the third quarter, according to the

That a seller's physical presence might not be a useful proxy in determining a seller's capacity to make sales into a state was recognized by Justice White in his dissent in *Quill*. He noted that: "in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax…. [P]urchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business." *Quill* at 328 (White, J., concurring in part and dissenting in part). Since many businesses" computer technology has further minimized the importance of physical presence, while allowing remote sellers to maximize their sales via data collection used for customer targeting.

In short, concern for the national economy, as it exists today, cannot be shown by adopting a physical presence standard. Since physical presence is irrelevant to the competitive success of many businesses, a physical presence standard simply creates winners and losers within the national economy. By adopting a substantial sales threshold Ohio has, instead, recognized this reality of modern commerce while respecting the burdens that state tax systems may impose. The Commerce Clause is not offended by this approach to establishing substantial nexus for state taxation.

Commerce Department, but they have an outsize impact on how shoppers use stores and what they will pay.")(last visited May 14, 2015).

CONCLUSION

The case is not a test of the constitutional limits of state taxation. The substantial receipts threshold under the Ohio CAT not only provides a fair and certain standard for when businesses will be subject to tax, it respects the Commerce Clause and its inherent concern for the national economy. Therefore, this court should find that the substantial receipts threshold does not violate the Commerce Clause but is well within the bounds of state sovereign authority.

Respectfully submitted,

/s Bruce Fort

Bruce Fort (PHV 7779-2015)
(Counsel of Record)
MULTISTATE TAX COMMISSION
444 North Capitol St., NW
Suite 425
Washington, D.C. 20001
Tel: (202) 650-0300
bfort@mtc.gov

Counsel for *Amicus Curiae*, Multistate Tax Commission

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief of *Amicus Curiae* the Multistate Tax Commission In Support of Appellee Joseph W. Testa, Tax Commissioner of Ohio was served by U.S. and electronic mail upon the following, on this 20th day of October, 2015:

Martin I. Eisenstein
David W. Bertoni
Matthew P. Schaefer
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Tel: (207) 786-3566
Fax: (207) 783-9325
meisenstein@brannlaw.com
mschaefer@brannlaw.com

Edward J. Bernert
BAKER HOSTETLER
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 432154260
Tel: (614) 4622687
Fax: (614) 4622616
Email: ebernert@bakerlaw.com

Mike DeWine
Attorney General of Ohio
Christine T. Mesirow
Daniel W. Fausey
Assistant Attorneys General
Office of the Attorney General
Taxation Section, 25th Floor
Rhodes Tower
30 East Broad Street Columbus, OH 43215
Tel. (614) 4665967
Fax (614) 4668226
christine.mesirow@ohioattorneygeneral.gov
daniel.fausey@ohioattorneygeneral.gov

/s Bruce Fort
Bruce Fort (PHV 7779-2015)
(Counsel of Record)
MULTISTATE TAX COMMISSION
444 North Capitol St., NW
Suite 425
Washington, D.C. 20001
Tel: (202) 650-0300
bfort@mtc.gov

Counsel for *Amicus Curiae*, Multistate Tax Commission