No. 16-458

In the

Supreme Court of the United States

BARBARA J. BROHL, in her capacity as Executive Director of the Colorado Department of Revenue,

Petitioner,

v.

THE DIRECT MARKETING ASSOCIATION,

Respondent.

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

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) was formed by the Multistate Tax Compact in 1967 and is composed of the heads of the revenue agencies of the states that have adopted the Compact by statutory enactment.[1] Today, forty-eight states and the District of Columbia participate in the Commission's activities.[2]

This case concerns an issue of the utmost importance to the Commission and its members: the increasing disruption of state sales and use tax enforcement caused by the physical presence jurisdictional ("nexus") standard established in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). This standard artificially restricts the states' ability to require out-

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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. 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, 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, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

of-state sellers to collect and report use tax. The need to mitigate the enforcement problems caused by *Quill* has been at the core of a number of the Commission's activities for the last two decades—including work by the Commission's Uniformity Committee to develop a model law imposing information reporting requirements similar to those here.[3]

SUMMARY OF ARGUMENT

The Commission, as *amicus curiae*, respectfully submits this brief in support of the conditional cross-petition of Barbara Brohl, Executive Director of the Colorado Department of Revenue (Colorado). If the Court grants the petition of the Direct Marketing Association (the DMA) in *Direct Marketing Ass'n. v. Brohl*, Docket No. 16-267, we ask that it also reconsider its decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

Quill's holding has been raised and contested by the parties and addressed by the lower courts in the instant case. There are ample reasons to believe *Quill* was questionable when decided and that its nexus standard, the physical presence standard, has outlived any useful purpose. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015)(Kennedy, J., concurring)("*DMA I*"). Nor has Congress acted to alter the physical presence standard, despite the *Quill*

[3] *See* the Multistate Tax Commission's Model Sales and Use Tax Notice and Reporting Statute, http://www.mtc.gov/Uniformity/Project-Teams/Model-SU-Notice-and-Reporting-Statute

Court's removal of the due process obstacle. *Quill*, 504 U.S. at 318-319. While Colorado could not expect the courts below to overrule *Quill*, the state has been defending against the expansion and application of its holding in the face of a determined opponent. The parties to this case have disputed how *Quill*'s physical presence standard was intended to apply, whether broadly to the information reporting requirements at issue here, or only narrowly to the tax collection requirements at issue in *Quill*. They have also questioned how *Quill*'s standard affects both the discrimination and the undue burden claims.

There are other reasons why this would be an appropriate case for reexamining *Quill*. This case highlights a significant problem given no consideration by the Court in *Quill*—the difficulty that states have in effectively enforcing use taxes where sellers do not collect those taxes from customers. Also, because Colorado does not seek to impose taxes here, if the Court were to overrule *Quill*, it could do so while protecting sellers' reasonable reliance interests. Finally, the particular question of whether the physical presence standard remains workable is one that must be determined by this Court—taking notice of facts and circumstances beyond the four corners of any particular case. Numerous examples show that the physical presence standard is not the "bright line" the Court hoped it would be and is ill-suited to modern commerce.

ARGUMENT

I. Should the Court grant the DMA's petition, this case is well-suited for it to reconsider *Quill*.

A. *Quill*'s reasoning, scope, and application were raised and contested below and the circuit court specifically addressed whether this Court intended *Quill* to apply broadly or narrowly.

A review of the pleadings, briefs, and opinions below reflect that *Quill* was central to this case. The DMA raised two closely-related Commerce Clause claims: first, that Colorado's information reporting requirements discriminated against interstate commerce, and secondly, that those requirements imposed undue burdens on interstate commerce. The DMA sought to rely on *Quill* for both claims. For example, in its district court briefs, the DMA referred to Colorado's information reporting requirements generally as an "end run around *Quill*." DMA's Response in Opposition to Defendant's Motion for Partial Summary Judgment, at 30, *Direct Mktg. Ass'n v. Huber*, 2012 WL 1079175 (D. Colo. 2012) ("*DMA*"), *rev'd sub nom*. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016) ("*DMA II*"). While noting that *Quill* was an undue burden case, the federal district court also found that "its holding drives the analysis of the [information reporting] Act and the Regulations in relation to the plaintiffs' discrimination claim." *See* Order Concerning Cross Motions for Summary Judgment, *DMA*, 2012 WL at *4.

The district court held that the information reporting requirements were both discriminatory against and placed an undue burden on interstate commerce. The Tenth Circuit has now reversed on both claims. *DMA II*, 814 F.3d at 1132. But, like the district court, the Tenth Circuit found *Quill* to be at the heart of the DMA's case. The court began its analysis of both claims saying, "The outcome of this case turns largely on the scope of *Quill*." *DMA II* at 1136. The court then proceeded to discuss how both of DMA's claims were affected by the court's conclusion that *Quill* should be narrowly interpreted. The circuit court also reasoned that "Whether the Colorado Law works a discriminatory effect on interstate commerce turns on the reach of *Quill*." *Id.* at 1144.

The DMA has not petitioned this Court to review the undue burden issue, to which *Quill* is indispensable. It has also steered away from relying on *Quill* in its petition to this Court on the discrimination issue. But as Judge Gorsuch noted, "The plaintiffs' attempt in this case to topple Colorado's statutory scheme depends almost entirely on a claim about the power of a single dormant commerce clause decision: *Quill Corp. v. North Dakota." Id.* at 1148 (10th Cir. 2016)(concurring)(internal citations omitted). And it is undeniable that the circuit court's reading of this Court's intent, that *Quill* be strictly limited, was essential to that court's determination of the issues in this case. By granting Colorado's conditional cross-petition, this Court would be taking up an issue that has been raised and addressed below.

B. This case epitomizes the degree to which states have had to compensate for *Quill* in use tax collection.

The *Quill* physical presence standard has never commanded widespread analytical support, either on this Court or academically *See, e.g.*, John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343 (2003). Four justices of this Court rejected the *Bellas Hess/Quill* rulings from their inception. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753, 760-767 (1967) (Fortas, Black, Douglas, JJ, dissenting); *Quill* at 321-333 (White, J, dissenting). Three justices concurred in the *Quill* ruling solely on *stare decisis* grounds. *Quill*, 504 U.S. 319 (Scalia, Kennedy, Thomas, JJ, concurring). As the dissenting judges in both cases foresaw, the standard has also created a persistent barrier to collecting taxes on the vast majority of remote sales. This is a problem that appears not to have been contemplated by the majority in *Quill*. And this problem makes the standard unworkable in a much larger sense—a fact that this case highlights particularly well.

Colorado adopted the information reporting requirements at issue because of the effect of *Quill*'s physical presence standard, which requires that states collect use taxes on "remote sales" (sales made into the state by sellers without physical presence) directly from consumers. This fact has never been disputed. Nor can it reasonably be disputed that one of the problems with collecting taxes directly from consumers is that most do not keep sufficient relia-

ble records of all their purchases from which to verify that taxes have been properly paid. States have attempted various methods to facilitate collection of tax directly from consumers. For example, California has provided "lookup" tables to help residents estimate the tax they may owe and report that on their personal income tax returns. But of an estimated $6.3 billion in remote sales made to California residents in one period, the state received reports of tax related to only $249 million, or approximately four percent.[4] It is possible that a lack of reliable records contributes to the low rates of tax reporting by consumers.

What states have done or could do to enforce use taxes, in the absence of seller-collection, was also a central issue in this case. To support its claim that Colorado's information reporting requirements are unconstitutionally discriminatory, the DMA argued that the state must show it had no other adequate alternatives to collect the tax. But if the standard for adequacy is the level achieved with seller-collection, then there is simply no other alternative method in use anywhere that comes close. And finding such an adequate alternative seems as unlikely as finding a replacement for having employers withhold income

[4] California State Board of Equalization, *Revenue Estimate: Electronic Commerce and Mail Order Sales*, Rev. 8/13, at 7 tbl.3 (2013), *available at* https://www.boe.ca.gov/legdiv/pdf/e-commerce-08-21-13F.pdf (last visited Oct. 28, 2016).28, 2016).

taxes on wages. Third-party collection requirements are often simply indispensable.[5]

Although the alternatives states have adopted to collect use tax have been far less effective, states have no choice but to do what they can to curb widespread tax avoidance, which exists because sellers do not collect the tax. The information reporting requirements at issue here are untested (they have not even been implemented due to this litigation), and may not solve the problem, or may raise other problems. But if the Tenth Circuit's ruling stands, other states will likely follow Colorado's lead. Ultimately, this could result in a two-tiered system in which some sellers collect and report tax on sales to in-state consumers and others report information which consumers must then use to report and pay tax.

Nor might this be the only way in which states will seek to adapt their tax systems to the limitation imposed by *Quill*. The Tenth Circuit's decision supports the position, taken by some states, that *Quill*'s physical presence standard does not apply to certain kinds of gross receipts taxes. While such taxes might be similar to traditional sales and use taxes in terms of their general economic effect, because they are imposed directly on the seller and are not required to

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[5] *See* Internal Revenue Service Tax Gap for Tax Year 2006 – Overview, Jan. 6, 2012 http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf (last visited Nov. 3, 2016) and IR-2012-4 (2012)(estimating that 56% of income not subjected to withholding or information reporting goes unreported) http://www.irs.gov/uac/The-Tax-Gap (last visited Oct. 22, 2014).

be collected from the purchaser, *Quill*'s physical presence standard would appear not to apply. *See Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788 (Wash. 2011), *cert. denied*, 132 S.Ct. 95 (2011); *see also Crutchfield Corp. v. Testa*, Case No. 2015-386 (Ohio Mar. 6, 2015)(pending)[6]; *Newegg, Inc. v. Testa*, Case No. 2015-483 (Ohio, filed Mar. 25, 2015)(pending)[7]; *Mason Cos., Inc. v. Testa*, Case No. 2015-794 (Ohio, filed May 19, 2015)(pending).[8] Whether states exchange their traditional sales and use taxes for gross receipts taxes in order to avoid *Quill*'s enforcement restriction, or whether they simply replace lost revenues by increasing other taxes that can be effectively enforced, it would not be the first time such adaptations were necessitated by this Court's Commerce Clause precedent. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284-85 (1977)(observing that states had imposed taxes that were economically similar to those that did not pass constitutional muster in order to circumvent prior formalistic Commerce Clause holdings of the Court).

Suffice it to say, the longer the physical presence standard remains in place, the more states will have

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[6] Docket for Case No. 2015-386 available at http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2015/386

[7] Docket for Case No. 2015-483 available at http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2015/483

[8] Docket for case No. 2015-794 available at http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2015/794

to make adaptations in their laws and policies and even in their tax systems to accommodate that standard. And these revisions will generate more practical and legal challenges. *See Amazon.com LLC v. North Carolina Dep't of Revenue*, 758 F. Supp. 2d 1154 (W.D. Wash. 2010)(where a successful First Amendment challenge was brought to North Carolina's information request).

As the Chief Justice has said, "The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent's ability to contribute to the stable and orderly development of the law." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 380 (2010)(concurring). *Quill* is now threatening to affect the development of state tax law in fundamental ways. Colorado's cross-petition provides the Court with the opportunity to "address the matter with a greater willingness to consider new approaches capable of restoring [its] doctrine to sounder footing." *Id.*

C. Because Colorado does not seek to impose a use tax liability in this case, the Court may overrule *Quill* without giving rise to retroactive liabilities.

If this Court overrules *Quill*, it must also consider the retroactive effect of that decision under *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) and whether sellers who have not collected tax in reasonable reliance on *Quill* would owe taxes for past periods under state statutes. We believe that any decision to overrule *Quill* on the grounds that its

physical presence standard has become unworkable must necessarily be applied from the date this Court determines that it is unworkable—that is, it must generally be prospective.

Further, under *Harper*, a prior ruling of this Court is required to be given retroactive effect only if it was so applied to the parties in the case. So, for example, because the Court had granted a tax refund to a party in a prior case, the Court in *Harper* held that the holding of that case gave other taxpayers with pending claims the right to retroactive remedies as well. *Harper*, 509 U.S. at 98-99. But because Colorado does not seek to impose a liability for uncollected taxes here, were the Court to overrule *Quill* in this case, the Court's order would not establish retroactive liability and its holding would not need to be given retroactive effect for that purpose. The Court's ruling would be prospective, thus protecting the reasonable reliance interests of sellers who have not collected use taxes.

II. *Quill*'s physical presence standard has not proven to be a workable "bright line" rule.

The Court in *Quill* justified the physical presence standard almost entirely on the grounds that it created a "bright line" for determining nexus. *Quill,* 504 U.S. at 315-16. But the *Quill* physical presence standard has, over the years, raised vexing questions for taxpayers, regulators, legislators, and courts—generating an assortment of rulings, regulations, statutes, and case law. As the examples here demonstrate, physical presence analysis is particularly ill-suited to Internet and electronic commerce. This is

perhaps to be expected given that the standard upheld in *Quill* was one that, until that time, had only been applied to mail-order sellers. In particular, it appears that the *Quill* Court could not foresee that it would be not just the quantity of physical presence that might create issues but also the quality, or nature, of the presence.

The following examples demonstrate the manner in which the states have been required to flesh out the content of the physical presence standard, lacking any guidance from this Court, in order to determine the nature and amount of in-state activity necessary to create nexus. The states have attempted to do so through statutes, regulations, and litigation—approaches that have all met with decidedly mixed results and have not succeeded in fostering uniformity, clarity, or ease of application.

A. The physical presence standard may have been a necessary bright line for mail-order sellers, but has lost any usefulness in the context of electronic commerce.

The bright line test was designed as a limitation on a state's authority to impose a use tax collection obligation on mail-order sellers whose only connection to the taxing state was delivery by common carrier or the U.S. mail. Such a limited bright line test was workable in theory, and perhaps served another purpose. Catalog sellers typically have no connection with, or control over, the purchaser's calculation or payment of the use tax. Quill's argument that the problems of collection were too burdensome for mail order vendors appears to have been predicated en-

tirely on the fact that the customers might fail to include the tax, leaving the seller with no means of subsequently collecting the tax. Brief for Petitioner Quill Corporation at 40, *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992) (No. 91-194).

Electronic commerce was in its infancy in 1992. "In 1992, . . . no one had yet made an online purchase. The first World Wide Web server and browser . . . opened for commercial use in 1991, the year litigation began in *Quill*." Lila Disque and Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1182 (2016). But with the explosive growth of the Internet and e-commerce, the use tax collection safe harbor which was designed for catalog sellers, is now largely used to insulate sales made through electronic commerce from use tax collection. "[T]echnological and economic changes since *Quill* was decided—most notably the ascendance of the internet and e-commerce—have undercut *Quill*'s *stare decisis* rationale." John A. Swain, *Quexit: The Time Has Come*, 81 STATE TAX NOTES 695 (Aug. 29, 2016).

Reflecting the growth of electronic commerce, state use tax nexus cases are increasingly dominated by state efforts to collect the tax from online retailers. *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)(online retailers), *Travelocity.com LP v. Wyoming Dep't of Revenue*, 329 P.3d 131 (Wyo. 2014)(hotel lodgings purchased through online travel companies). Unlike mail order sellers of the past, who relied on their

customers to compute any use tax due, online retailers who have nexus with the taxing state can use software programs to calculate and charge the tax at the point of sale. Amazon.com, one of the principal plaintiffs that challenged the New York so-called "click-through" or "affiliate nexus" law at issue in *Overstock*, supra, currently charges and collects use tax in 29 states. *See* Amazon Help & Customer Service, "About Sales Tax," https://www.amazon.com/gp/help/customer/display.html?nodeId=468512 (last visited Oct. 19, 2016). The safe harbor for catalog sellers, who rely on their customers for the calculation and payment of the tax, cannot be justified as applied to online retailers, who routinely calculate and charge the tax at the point of sale.

B. Efforts to apply the physical presence standard have given rise to vast amounts of state litigation, and have resulted in inconsistent rulings as to the quantity and quality of in-state contacts required to establish nexus.

In the absence of any guidance from this Court as to what "physical presence" means as applied to artificial business entities such as corporations, state courts have been compelled instead to determine the nature and quantity of contacts that are sufficient to establish nexus in each case; an approach that has inevitably led to subjective results that are difficult to reconcile, even within the same state. *Compare In re Intercard, Inc.,* 14 P.3d 1111 (Kan. 2000)(eleven in-state installation visits to company's largest Kansas customer over three month period held to be too

isolated, sporadic, and insufficient to establish substantial nexus), *with In re Family of Eagles, Inc.*, 66 P.3d 858 (Kan. 2003)(use of Kansas independent sales representatives who take sale orders for acceptance at company's Texas office held sufficient to establish substantial nexus. *Intercard* distinguished).

Attempts to give content to the physical presence standard have led to divergent results in a wide variety of cases. *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).

Quantity of in-state contacts required to establish nexus

A number of courts have ruled that "substantial nexus" test of *Quill* does not require "substantial physical presence". Rather, the substantial nexus is satisfied by a showing of "more than the slightest physical presence." However, even these cases do

not clearly resolve the issue of how many in-state contacts constitute "substantial nexus." Rather the cases simply enumerate the number of in-state contacts over a given period of time and declare that number to be sufficient, or in *Intercard*, *supra*, insufficient. *Compare Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954 (N.Y. 1995), *cert. denied*, *Vermont Information Processing v. New York Department of Taxation & Finance*, 516 U.S. 989 (1965)(forty-one service visits over three year audit period establishes substantial nexus), *Brown*'s *Furniture, Inc. v. Wagner*, 665 N.E.2d 795 (Ill. 1996), *cert. denied* 519 U.S. 866 (1996)(942 in-state deliveries over ten months establishes substantial nexus), *and Town Crier, Inc. v. Illinois*, 733 N.E.2d 780 (Ill. App. Ct. 2000)(54 deliveries over two years, 30 of which were in company's trucks, sufficient to establish substantial nexus).

Town Crier, coming as it did four years after *Brown*'s *Furniture*, illustrates the jurisprudential hollowness of relying on the number of visits to determine nexus. *Brown*'s *Furniture* had already established the principle that delivery to Illinois in the company's vehicles establishes nexus. But because the court relied on the number of visits in that case—942 over a ten-month period—the case was of no precedential value in the subsequent *Town Crier* case which involved far fewer deliveries (54) over a much longer period (two years). A nexus rule based on a court's subjective determination that the number is sufficiently high—or insufficiently high—is no rule at all. This Court's amorphous physical presence standard has inevitably led state courts down this judicial blind alley.

In-state activities by corporate affiliate

Courts have split over the issue of whether the in-state activities of a "brick and mortar" seller are sufficient to create nexus for its remote e-commerce affiliate. A recent case that encapsulates all the different factors that courts might be required to consider when addressing this question is *New Mexico Taxation & Revenue Dep't v. Barnesandnoble.com LLC*, 303 P.3d 824 (N.M. 2013), where the court considered, among other things, the degree of affiliation, the sharing of brand names, advertising and promotional materials, and merchandise return policies. Finding that the facts in that case were sufficient to conclude that the online affiliate had nexus in New Mexico, 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*, 303 P.3d 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)(coming to the opposite conclusion of the New Mexico Supreme Court, showing how the same seller may be held to have nexus in one state but not in another).

In-state service activities by an unaffiliated representative

In a number of cases involving Dell Computers, the courts have generally agreed that the in-state activities of an unaffiliated extended-warranty service provider were sufficient to create nexus. These courts, however, applied the same "bean counting" approach to nexus as the courts did in such cases as *Orvis*, *Brown*'s *Furniture*, and *Intercard*. This approach relies entirely on the court's subjective judgment of how many in-state contacts are "enough," unmoored from any principled consideration of the relationship between physical presence, however defined, and the burdens that supposedly justify that standard. *See Dell Catalog Sales L.P. v. Commissioner of Revenue Services*, 834 A.2d 812 (Conn. Super. Ct. 2003)(in-state visits by third-party extended service provider would create nexus but state failed to prove there were any service visits during the audit period), *Louisiana v. Dell Int'l Inc.*, 922 So. 2d 1257 (La. Ct. App. 2006), *cert. denied*, 930 So. 2d 979 (La. 2006)(30,000 service calls during the audit period), *Dell Catalog Sales, LLP v. Taxation and Rev. Dep't.*, 199 P.3d 863 (N.M. Ct. App. 2008), *cert. denied*, 189 P.3d 1215 (N.M. 2008), *cert. denied*, 556 U.S. 1148 (2009)(1,273 service calls during the audit period).

This is precisely the kind of individual case-by-case determination that *Quill's* "bright line" standard was meant to avoid. "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." *Quill*, 504

U.S. at 315. Twenty-four years of post-*Quill* litigation has shown that the Court's expectation of a firmly established boundary of legitimate state authority to impose a use tax collection duty was misplaced.

C. In the absence of Supreme Court guidance, the physical presence standard has not proven amenable to consistent rulemaking or administrative guidance.

The states have also attempted to give content to the physical presence requirement through rulemaking or administrative guidance. The results are a patchwork quilt of rules. Some examples follow, taken from a recent survey of the states.[9] It is important to remember when considering these rules that the quantity or quality of contacts indicated say nothing about whether the seller has significant sales in the state—because under *Quill*, the amount of sales is not relevant. So it is wrong to equate limited contacts with limited sales.

Temporary or Sporadic Presence

When surveyed, a majority of states take the position that merely attending a trade show or seminar is not enough to create use tax collection nexus. But in a bizarre inconsistency, a majority of states *also*

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[9] The state nexus positions contained in the following paragraphs are compiled in the 2016 survey of state sales tax nexus rules published by the Bureau of National Affairs. Survey, *Sales Tax Nexus*, 2016 TAX MGM'T MULTISTATE TAX REPORT, (Vol. 23, No. 4),), 365-454.

indicate that attending a one-day seminar is sufficient to create nexus. Thirty-four states maintain that making a sale or accepting orders at a trade show was enough to require the seller to collect the tax. Thirty-six states regard making sales while in the state for three or fewer days to be sufficient.

Click-Through Nexus

Twenty-eight states require remote sellers to collect the tax if they use an internet link with a third party in the state, provided that the relationship results in sales over $10,000 annually. Another 18 states regard similar third-party agreements to create nexus even if the sales volume is less than $10,000 annually.

Digital Property

A minority of states indicate that selling remote access to digital products will create nexus. Seven states regard the remote sale of access to canned software as creating nexus. If the software is considered to be customized under state law—which is itself subject to varying definitions—only four states require the seller to collect the tax. But if a representative of the seller visits the state to customize canned software, virtually all the states require the seller to collect tax. Vermont and Virginia are the only states that do not require tax collection in such cases. Selling the digital version of a tangible newspaper or magazine does not create nexus in most states, but selling data such as music files does create nexus in 23 states.

States' inability to extend the use tax collection obligation to remote sellers of digital products due to nexus limitations greatly exacerbates structural weaknesses in the sales tax base, confining it to the sale of tangible personal property. Books printed on paper and music recorded on disc are generally subject to the tax, but books or music distributed in digital form would not be, absent legislative enactment. Extending the base without a resolution of the nexus issue is extremely difficult politically because legislators are understandably reluctant to require local sellers of digital products to collect the tax when it is not clear that remote sellers of the same products can be compelled to do so. "The major limitation on collecting the tax [on digital goods] arises from . . . *Quill* . . . . By their very nature, most sales of digital goods and services can be delivered over the Internet without the seller's physical presence in the purchasers' states."[10]

Delivery By Contract Carrier

Fourteen states indicate that delivery into the state by contract carrier, versus common carriers, creates nexus.

These and other proxies for physical presence hardly encourage "settled expectations and . . . [fos-

[10] Michael Mazerov, *States Should Embrace 21st Century Economy by Extending Sales Tax to Digital Goods and Services,* CTR. ON BUDGET & POLICY PRIORITIES 1 (December 13, 2012), *available at* http://www.cbpp.org/research/states-should-embrace-21st-century-economy-by-extending-sales-taxes-to-digital-goods-and (last visited October 28, 2016).).

ter] investment by businesses and individuals," as the *Quill* Court had expected. *Quill*, 504 U.S. at 316. Nor has the supposed "bright line" test lived up to its name.

CONCLUSION

Whatever the merits of the *Quill* physical presence standard as applied to mail order sellers, it has never worked as applied to e-commerce. Justice White was prescient in *Quill* when he wrote that "it is a sure bet that the vagaries of 'physical presence' will be tested to their fullest in our courts." *Quill* at 331 (concurring in part and dissenting in part). Indeed, they have been, and they have failed the test of time. It is now time for this Court to recognize that *Quill* is grounded in an illusion and to overrule it. Since this case presents a unique opportunity to do so, we respectfully ask that, if the Court grants the petition in *Direct Marketing Assn. v. Brohl*, Docket No. 16-267, it also take the opportunity to reconsider its decision in *Quill Corp. v. North Dakota.*

Respectfully submitted,

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