No. __________

IN THE

Supreme Court of the United States

SCHOLASTIC BOOK CLUBS, INC.,

Petitioner,

v.

RICHARD H. ROBERTS,
COMMISSIONER OF REVENUE SERVICES,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI WITH INCORPORATED APPENDIX

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QUESTIONS PRESENTED

Scholastic Book Clubs, Inc. ("Scholastic") is a mail order company with a long tradition of selling books to both teachers and students via catalogs mailed to classrooms. After many decades of reliance on its Commerce Clause rights, the company now faces inconsistent Commerce Clause decisions in states where it has no physical presence. State courts ruling against Scholastic have concluded that schoolteachers should somehow be deemed a "physical presence" of the company solely because they voluntarily assist their young students to purchase books as part of a classroom order.

Against this backdrop, Scholastic respectfully seeks review of three questions:

1. Did the lower court—unlike courts in Arkansas and Michigan—err in deeming Scholastic's customers (schoolteachers) to be a physical presence of the company, even though the company does not retain, compensate, or control them in any way?

2. Did the lower court err by denying Scholastic's Commerce Clause defense despite recognizing that schoolteachers do not act "on behalf of" the company when they help their young students buy books as part of a classroom order?

3. Was it error for the lower court to establish a new Commerce Clause standard for the exercise of state taxing authority over non-resident retailers, rather than deferring to Congress to enact legislation under its Commerce Clause powers?

PARTIES TO THE PROCEEDING

Scholastic Book Clubs, Inc. ("Scholastic" or "Petitioner") and Tennessee's Commissioner of Revenue Richard H. Roberts (the "Commissioner") are the sole parties to this proceeding.

RULE 29.6 CORPORATE DISCLOSURE

Scholastic Inc., a publicly traded company, owns 100 percent of the shares of Scholastic Book Clubs, Inc.

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OPINIONS BELOW

The decision of the Court of Appeals of Tennessee, review of which is sought here, is reported at *Scholastic Book Clubs, Inc. v. Farr*, 2012 WL 259979 (January 27, 2012), and republished in the Appendix at App. b2 – b14. The June 22, 2012 decision of the Supreme Court of Tennessee denying discretionary review is republished in the Appendix at App. a1. The *Judgment and Final Order* of the Chancery Court of Davidson County, the summary judgment ruling reversed by the court of appeals, is reproduced in the Appendix at App. c1 – c7.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Tennessee was entered on January 27, 2012. A timely application for review by the Supreme Court of Tennessee was denied on June 22, 2012. The United States Supreme Court has jurisdiction to hear this Petition for *Certiorari* under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Commerce Clause of Article I, Section 8, cl. 3 of the United States Constitution, which provides, relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and

> general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.
>
> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes; …

App. at d1.

The state statutes involved are Tenn. Code Ann. ("TCA") §§ 67-6-102 (25) and 67-6-501, relevant portions of which are reproduced in the Appendix at App. d1 – d2. Under TCA § 67-6-102 (25), a remote seller must register for, collect, and remit Tennessee's use tax if it:

> [h]as any representative, agent, salesperson, canvasser or solicitor operating in this state, or any person who serves in such capacity, for the purpose of making sales or the taking of orders for sales …

App. at d1.

STATEMENT OF THE CASE

This case involves the application of the "substantial nexus" requirement of the Commerce Clause of the United States Constitution to Scholastic, a company that lacks a physical presence in the taxing state. *See, e.g., Quill Corp. v. N. Dakota,* 504 U.S. 298, 315, 112 S. Ct. 1904, 1914-15, 119 L. Ed. 2d 91 (1992). As the lower court recognized, "[t]he parties acknowledge that our sister jurisdictions that have considered whether [Scholastic's] activities satisfy the substantial nexus requirement are split on this matter." *Scholastic Book Clubs, Inc. v. Farr*, 2012 WL 259979 (January 27, 2012); App. at b12 (footnote omitted).

A. THE UNDISPUTED FACTS

Since the 1950's, Scholastic has sold books by mail order to nursery, elementary, and secondary school teachers and their students (including home schools) throughout the United States. *Scholastic Book Clubs, Inc. v Farr, supra*; App. at b2. Teachers and students place their orders together. *Id.*; App. at b10.

Scholastic is a traditional mail order company. It sends catalogs to classrooms across the country and awaits orders by mail and telephone at its offices in Jefferson City, Missouri. From its facilities in Jefferson City, Scholastic sends ordered books by common carrier to the classrooms that ordered them. The parties agreed that Scholastic has "no employees, agents, salesmen, independent contractors, or representatives" in Tennessee, and that it neither owns nor leases any property in the state. *Id.*; App. at b9 – b10 ("The Commissioner does not dispute these facts.").

As with other catalog companies, consumers (whether teachers, parents, or students) have no obligation to read or respond to Scholastic's catalogs. If a classroom teacher or parent in a home school decides to order books from Scholastic, orders are placed on a single order form that is sent to the company with payment. To the extent that teachers and parents help students purchase and receive books from Scholastic, they do so voluntarily and on behalf of their students, not Scholastic.[1]

For over sixty years, the company did not register for, collect, or remit Tennessee's use tax. In following this practice, Scholastic relied upon a long line of United States Supreme Court decisions holding that a remote seller must have a physical presence in a state before use tax collection obligations can be

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[1]Every Scholastic catalog explains that:

> [t]his Scholastic Book Club offer is presented for the exclusive benefit of student groups and teachers in schools within the United States and its possessions. Teachers, parents, class secretaries, or others handling student orders act only on behalf of their students, without obligation to Scholastic. They do not represent or act under the authority of Scholastic.

App. at c3 – c4.

imposed. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967).

It was not until August of 2008, after decades of unchanged business operations by the company, that the Commissioner first notified Scholastic that it was liable for millions of dollars of uncollected use taxes for prior years on its sales to teachers, parents, and students. The Commissioner then assessed Scholastic $3,647,908.42 in taxes, $905,239.76 in penalties, and $1,151,939.31 in interest (the "Assessment"). App. at b2 – b3.

B. THE CHANCERY COURT DECISION

Scholastic timely appealed the Assessment to the Chancery Court of Davidson County, Tennessee raising, among other issues, its Commerce Clause challenge to the assessment. On the basis of an undisputed factual record, the Chancery Court entered summary judgment in favor of Scholastic and against the Commissioner. *Judgment and Final Order*; App. at c1 – c7.

In ruling in favor of Scholastic, the Chancery Court found that "Scholastic neither directly nor indirectly maintained any employees, agents, representatives, or independent contractors in the State of Tennessee, nor did it directly or indirectly maintain or use any real or tangible personal property located in the State." *Id.* ¶ 5; App. at c2.

The court further found—"based upon an undisputed record"—that:

> Tennessee schoolteachers and parents who home-school their children are not the agents, affiliates, independent contractors, or representatives of Scholastic for any purpose, and do not act on behalf of Scholastic.

Id.; App. c2 – c3. In vacating the Assessment on Commerce Clause grounds, the court quoted with approval a prior decision of the Court of Appeals of Michigan that also found in favor of Scholastic:

> The teachers are not a sales force that works for plaintiff. Rather, they are analogous to parents who order from a mail order catalog for their children; no one would seriously argue that parents are a 'sales force' for mail order vendors.

Id.; App. at c3 (quoting *Scholastic Book Clubs, Inc. v. Dep't of Treasury*, 223 Mich. App. 576, 567 N.W.2d 692, 696 (1997), *app. denied*, 457 Mich. 880 (1998)).

C. THE COURT OF APPEALS DECISION

The Tennessee Court of Appeals reversed the Chancery Court decision, but not before confirming the following undisputed facts:

- Scholastic's only connection to customers in Tennessee "is by mail order," App. at b9;

- Scholastic "neither owns nor leases any real or personal property in Tennessee," *Id.*;

- Scholastic "has no employees, agents, salesmen, independent contractors or representatives in this State," *Id.*; and

- Scholastic "maintains no bank accounts, data, telephone listing, web address or mailing address in Tennessee." *Id.*

App. at b10 ("The Commissioner does not dispute these facts.").

Likewise, the appeals court confirmed that Scholastic's business is limited to mailing catalogs to "primary, secondary, and nursery school classrooms" and "the homes of home-schooled children," and that it is entirely up to teachers and parents to decide whether to place orders with Scholastic or to help children in their classes to do so. App. at b9 – b10 ("[T]eachers and parents are under no commitment to assist their students in purchasing books").

While the court of appeals recognized that "our sister jurisdictions that have considered whether SBC's activities satisfy the substantial nexus requirement are split on the matter," it declined to discuss or distinguish those inconsistent holdings. App. at b12.

Despite noting that both its own prior decisions and those of the United States Supreme Court required that activities of third parties must be "carried on in the taxing state on the taxpayers [sic] behalf," the court below declined to apply that standard. App. at b13 (citations omitted). Instead, and despite acknowledging that teachers did *not* act on Scholastic's behalf, the court of appeals concluded that, by mailing catalogs to classrooms, Scholastic "has created a *de facto* marketing and distribution mechanism within Tennessee schools and utilizing [sic] Tennessee teachers to sell books to schoolchildren and their parents." App. at b14. In support of this holding, the court of appeals noted that "this State's school facilities are, in large part, funded by taxpayer dollars." *Id.*

REASONS FOR GRANTING THE WRIT

A. OVERVIEW

Petitioner faces irreconcilably inconsistent state court decisions concerning its Commerce Clause rights. This conflict does not arise out of factual differences: the facts of each case, as here, are identical and wholly undisputed.

In some states, Scholastic's Commerce Clause rights have been upheld and assessments stricken. In others, like the court below, the company's claim of Commerce Clause protection has been rejected. The net result is that direct marketers face the looming risk of state tax liability even in those states where they—like Scholastic—have carefully avoided establishing a physical presence and retained *no* third parties to act on their behalf. If this conflict is left unaddressed, mail order sellers would be unable to predict their Commerce Clause rights from state to state, a "quagmire" for which "the Framers intended the Commerce Clause as a cure." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312, 112 S. Ct. 1904, 1913, 1915, 119 L. Ed. 2d 91 (1992).

Indeed, permitting each state's unique jurisprudence to govern its application of *Quill*'s "bright line rule" would "change[d] the uniform 'law of the land' into a crazy quilt," *Kansas v.* Marsh, 548 U.S. 163, 185, 126 S. Ct. 2516, 2531, 165 L. Ed. 2d 429 (2006)(Scalia, J., concurring), rendering the rule "utterly 'vague and unpredictable.'" *Rothgery v. Gillespie County*, 554 U.S. 191, 199 n.9, 128 S. Ct.

2578, 2584 n.9, 171 L. Ed. 2d 366 (2008)(quoting *Virginia v. Moore*, 553 U.S. 164, 175, 128 S. Ct. 1598, 1606, 170 L. Ed. 2d 559 (2008)).

On the twentieth anniversary of *Quill*, Scholastic submits that this case offers an excellent vehicle to resolve an important question of federal constitutional law on the basis of (1) clear and undisputed facts; (2) a record free of procedural or evidentiary difficulties; and (3) a refusal by the lower court both to follow the Supreme Court's clear precedent and defer to Congress to expand state tax powers. For all of the reasons set forth in this Petition, Scholastic respectfully asks the Court to grant *certiorari*.

B. SCHOLASTIC FACES INCONSISTENT COMMERCE CLAUSE DECISIONS.

Petitioner confronts a split among the states as to whether the Commerce Clause protects it from the obligations to register for, collect, and remit state use taxes on its sales to schoolteachers, parents, and students.

Decisions adverse to the company rest on state-specific common law agency principles, *see, e.g., In the Matter of Scholastic Book Clubs, Inc.*, 260 Kan. 528, 920 P.2d 947 (1996)(retroactive agency by implication); state-specific statutory concepts, *see, e.g., Scholastic Book Clubs, Inc. v. Comm'r of Revenue Services*, 304 Conn. 204, 38 A.3d 1183 (2012)(schoolteachers fall within the broad scope of the statutory term "representative"); or, as here, a finding that mere *customers* can create a "substantial nexus" even though they do not act "on behalf of" the mail order company.[2]

In contrast, cases finding in favor of Scholastic's assertion of Commerce Clause protection hold that schoolteachers and parents cannot create a "substantial nexus" for Scholastic absent a legal relationship of *some* kind under which they act on the company's behalf. *See*, *e.g.*, *Scholastic Book Clubs, Inc. v. Dep't of Treasury*, 223 Mich. App. 576, 567 N.W.2d 692, 696 (1997), *app. denied*, 457 Mich. 880 (1998); *Pledger v. Troll Book Clubs, Inc.,* 316 Ark. 195, 871 S.W.2d 389 (1994).

Thus, Scholastic finds its Commerce Clause rights protected in Arkansas, Michigan, and Ohio, but rejected in Kansas, Connecticut, and Tennessee. As explained earlier, these conflicting outcomes are *not* based upon different facts—Scholastic's operations are identical in all states—but, for example, on vagaries of state statutory or common law principles, most notably in the area of agency law. Combined, these decisions create confusion and uncertainty, rather than uniformity of Commerce Clause protection across a national marketplace. *Quill Corp., supra*, 504 U.S. at 315 – 16, 112 S. Ct. at 1914 – 15 (extolling "the benefits of a clear rule").

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[2]Scholastic has filed a Petition for Certiorari seeking review of the decision of the Supreme Court of Connecticut, Docket No. 11-1532, which Petition is fully briefed and pending before the Court.

1. Arkansas, Michigan, and Ohio Have Upheld Scholastic's Commerce Clause Rights.

Scholastic's position—that the voluntary acts of customers of its mail order business (schoolteachers) do not satisfy the "substantial nexus" requirement of the Commerce Clause—has been upheld in Arkansas, Michigan, and Ohio. In each instance, it was found that schoolteachers who help students place orders were doing so for the same reason that parents help children place orders. As the Michigan Court of Appeals explained, "[t]he teachers are not a sales force that works for plaintiff. Rather, they are analogous to parents who order from a mail order catalog for their children; no one would seriously argue that parents are a 'sales force' for mail order vendors." *Scholastic Book Clubs, Inc. v. Dep't of Treasury*, 223 Mich. App. 576, 567 N.W.2d 692, 696 (1997), *app. denied*, 457 Mich. 880 (1998).

In *Pledger v. Troll Book Clubs, Inc.*, the Supreme Court of Arkansas addressed whether schoolteachers acted as "agents" of Troll Book Clubs, Inc. ("Troll")—a company with operations *identical* to Petitioner's—and thereby created "the 'substantial nexus' required by the federal Constitution in order to be taxed by Arkansas." 316 Ark. 195, 198, 871 S.W.2d 389. 391 (1994). The state argued that:

> Troll exercised control over the teachers through the language contained in its brochures. The brochures describe the books, set dates to tally and return the

> order forms and money, and instruct the teachers on distributing the enclosed newsletter and filling out the master order.

Id., 316 Ark. at 200, 871 S.W.2d at 392.

Relying upon Arkansas' common law rules of agency, the Supreme Court of Arkansas rejected the state's argument, and found in favor of Troll, concluding that the Director fell far short of establishing the requisite "authorization and control" necessary for an agency relationship to be proven. *Id.* (citing *Hinson v. Culberson-Stowers Chevrolet, Inc.,* 244 Ark. 853, 427 S.W.2d 539 (1968), for these "two essential elements of an agency relationship").

Similarly, the Michigan Court of Appeals, in a case in which review was denied by the Supreme Court of Michigan, rejected the argument that schoolteachers created the requisite "substantial nexus" for Scholastic, finding that "[u]nder Michigan law, they are … not plaintiff's agents." *Scholastic Book Clubs, Inc. v. Dep't of Treasury,* 223 Mich. App. 576, 583, 567 N.W.2d 692, 695 (1997), *appeal denied,* 457 Mich. 880 (1998). As the Michigan Court of Appeals explained:

> There is no indication that Michigan teachers have the authority to bind plaintiff. Further, plaintiff has no control over the teachers; the teachers are under no obligation to participate in plaintiff's program. See *Meretta v.*

> *Peach,* 195 Mich. App. 695, 491 N.W.2d 278 (1992). Indeed, teachers are invited to be consumers of plaintiff's materials, just as are their students.

Id. 223 Mich. App. at 583 – 84, 567 N.W.2d at 695.

The Michigan court of appeals cited with approval *Pledger v. Troll Book Clubs, Inc.*, *supra,* explaining:

> We also agree with the *Pledger* court that the requirement of *Quill, supra,* that an out-of-state vendor have an actual physical presence in the taxing state, is not satisfied by plaintiff's contacts with Michigan teachers. … As stated previously, the teachers are primarily plaintiff's customers and are under no control by, and vested with no authority to act on behalf of, plaintiff.

Id., 223 Mich. App. at 584, 567 N.W.2d at 695-96.

The Ohio Board of Tax Appeals in *Troll Book Clubs, Inc. v. Tracy,* Case No. 92-Z-590, 1994 WL 456090 (Ohio Bd. Tax. App. 1994), also concluded that Troll did not have a "substantial nexus" in Ohio under *Quill Corp. v. North Dakota*, finding that:

> teachers are not in the business of selling Troll's books, they are in the vocation of educating the children entrusted to their charge.

1994 WL 456090 *6. Finding that the terms "agent" and "representative" were synonymous under Ohio law, the board held that "the activities of the teachers do not rise to the level necessary for us to imply an agency relationship at law. In fact, the teachers are the consumers, just as their students. We find that the teachers are not agents or representatives of this foreign bookseller." *Id.* at 8.

2. Connecticut and Kansas Have Rejected Scholastic's Commerce Clause Rights.

In contrast, the Connecticut and Kansas courts have concluded, like Tennessee, that schoolteachers created a "substantial nexus" for book club companies. They rested their holding either on nuances of their state common law of agency (Kansas) or unique state statutory concepts (Connecticut), rather than a uniform, nationwide Commerce Clause standard.[3]

The Supreme Court of Kansas, in rejecting Scholastic's Commerce Clause defense, cited to and

[3]The California Court of Appeal also ruled against the company in *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, a decision based expressly upon a finding of an agency relationship between schoolteachers and Scholastic. 207 Cal. App.3d 734, 740, 255 Cal. Rptr. 77, 81 (1989). However, that decision involved a bonus point program that awarded points to teachers based upon the size of classroom orders—and which was terminated in 1990. 207 Cal. App. 3d at 737 – 38, 255 Cal. Rptr. at 79 – 80. That defunct bonus point program is not a part of the case at bar, nor was it part of any of the other cases discussed herein.

relied upon Kansas' common law rules of agency in finding that schoolteachers created a "substantial nexus" for Scholastic. *In the Matter of Scholastic Book Clubs, Inc.*, 260 Kan. 528, 920 P.2d 947, 955-56 (1996). The court found—in contrast to the common law of Arkansas applied in *Pledger*, *supra*—that:

> [a]gency is a comprehensive term embracing an almost limitless number of relations between two or more persons or entities by which one party, usually called the "agent" or "attorney," is authorized to do certain acts for, or in relation to rights or property of, the other, who is denominated the "principal," "constituent," or "employer." The relationship of agency may be expressly created or arise by inference from the relation of the parties without proof of any express agreement, or may be created by law.

260 Kan. at 540, 920 P.2d at 955.

The Supreme Court of Kansas skipped entirely the question of whether schoolteachers acted "on behalf of" Scholastic, instead finding an implied agency imposed retroactively—a concept recognized in no other state. 260 Kan. at 541, 920 P.2d at 955-56. Specifically, the Kansas court reasoned that, by accepting classroom orders, Scholastic retroactively created an agency relationship with its customers (schoolteachers). In doing so, the Kansas court rejected the holding of the Supreme Court of

Arkansas in *Pledger v. Troll Book Clubs, Inc., supra*, because "the Arkansas standard for proving the existence of an agency relationship is stricter than that required by Kansas law," and, therefore, "[u]nder the circumstances, *Pledger* does not apply." 260 Kan. at 546, 920 P.2d at 958.

More recently, the Connecticut Supreme Court rejected Scholastic's Commerce Clause claims based not upon nuances of agency law, but upon its exceedingly broad interpretation of the statutory term "representative." *Scholastic Book Clubs, Inc. v. Comm'r of Revenue Services*, 304 Conn. 204, 38 A.3d 1183 (2012). The court concluded that because a Connecticut tax statute did not require "a legal or agency relationship" between schoolteachers and Petitioner—*or that they act on behalf of SBC*—in order to impose use tax registration, collection, and remittance requirements on the company, neither did the Commerce Clause. *Id.*[4]

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[4]In reversing the trial court's decision, the Supreme Court of Connecticut held that the undefined statutory term "representative" did not require *any* "legal or agency" relationship between the "representative" and the party it "represented." *Id.*, 304 Conn. at 219. Further still, it concluded that the term encompassed persons who are "merely customers who act entirely on their own without compensation for the benefit of their classrooms and students." *Id.* at 221 (schoolteachers fall under the statutory definition of "representative" even though they "may be customers when they purchase books from the plaintiff and participate in the bonus point system to obtain additional materials"). Indeed, the Supreme Court of Connecticut found that even if schoolteachers acted solely *in loco parentis*, *i.e.,* acting in the capacity of parents on behalf of their young students and not on behalf of SBC, they would *still* qualify as statutory "representatives"

The Connecticut and Kansas court decisions reflect a striking departure from this Court's pertinent "substantial nexus" cases which—in every instance—have involved instate personnel acting "on behalf of" the nonresident seller under a legal relationship of *some* kind, whether as employees, agents, or independent contractors. *See, e.g., Scripto, Inc. v. Carson*, 362 U.S. 207, 209, 80 S. Ct. 619, 621, 4 L. Ed. 2d 660 (1960)(finding that the instate activities of its commissioned independent contractors were "activities of the appellant" on whose behalf they solicited sales); *accord Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue,* 483 U.S. 232, 250, 107 S. Ct. 2810, 2821, 97 L. Ed. 2d 199 (1987)(instate activities must be performed "on behalf of the taxpayer," whether through agents, independent contractors, or employees).

C. COMMERCE CLAUSE RIGHTS SHOULD NOT VARY FROM STATE TO STATE.

While it has not expressly addressed this question in Commerce Clause cases, the United States Supreme Court has repeatedly noted the importance of a uniform, national standard for federal constitutional rights that does not ebb and flow based upon nuances of state law. This case—

because SBC markets to classrooms—and thus classroom teachers are the "channel" through which schoolchildren are reached. *Id.* at 223-24. It follows, *a fortiori*, that if teachers acting in the role of parents can be deemed "representatives" of a remote seller under the Connecticut statute, so, too, can parents themselves when they help children buy books.

involving a non-resident seller caught in a war between state courts over its Commerce Clause rights—presents an ideal opportunity to return uniformity to "substantial nexus" cases.

The need to establish consistency in the application of a federal constitutional right is an appropriate basis, on its own, for granting *certiorari*. Indeed, in *Kansas v. Marsh*, a case involving a state death penalty statute, Justice Scalia filed a concurring opinion defending the Court's grant of *certiorari* even if no other state "would have been required to follow the [lower court's] precedent," explaining that "[t]urning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt." 548 U.S. 163, 185, 126 S. Ct. 2516, 2531, 165 L. Ed. 2d 429 (2006). Scholastic respectfully submits that just such a "crazy quilt" has developed here, displacing the clear, bright-line rule confirmed and intended in *Quill*.

Cases in other contexts support Scholastic's views. For example, in criminal law cases dealing with Fourth and Sixth Amendment rights, this Court has refused to permit such rights to "founder on the vagaries of state criminal law, lest [such rules] be rendered utterly 'vague and unpredictable.'" *Rothgery v. Gillespie County,* 554 U.S. 191, 199 n.9, 128 S. Ct. 2578, 2584 n.9, 171 L. Ed. 2d 366 (2008)(quoting *Virginia v. Moore*, 553 U.S. 164, 175, 128 S. Ct. 1598, 1606, 170 L. Ed. 2d 559 (2008)).

Similarly, it has determined that uniform federal definitions must be used in the context of a *Bivens* action. *Carlson v. Green,* 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).

In *Carlson*, the Court faced the question of whether the estate of a deceased prisoner could bring a *Bivens* action against prison officials. *Id.*, 446 U.S. at 16, 100 S. Ct. at 1470. The Court concluded that "*Bivens* actions are a creation of federal law and, therefore, the question of whether respondent's action survived Jones' death is a question of federal law." *Id.*, 446 U.S. at 23. 100 S. Ct. at 1474. In doing so, the Court adopted the reasoning of the Court of Appeals:

> The essentiality of the survival of civil rights claims for complete vindication of constitutional rights is buttressed by the need for uniform treatment of those claims, at least when they are against federal officials. As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard [v. Robinson*, 563 F.2d 331 (7th Cir. 1997),] the Illinois statute permitted survival of the *Bivens* action. The liability of agents for violation of constitutional rights should not depend upon where the violation occurred. . . .

Id., 446 U.S. at 24, 100 S. Ct. at 1474 (quoting 581 F.2d 669, 674-675 (7th Cir. 1978)).

The need to avoid the "vagaries" of state law has also been recognized by United States Courts of Appeal in cases involving claims for vicarious liability under the Fair Housing Act. The Second, Fifth, Sixth, Seventh, and Ninth Circuits have all held that the "question of whether an agency relationship exists for purposes of the Fair Housing Act is determined under federal law, not state law. The policy reason underlying the application of federal law is to avoid predicating liability for Fair Housing Act violations on the vagaries of state law." *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999)(citing *Cabrera v. Jakabovitz*, 24 F.3d 372, 386 n.13 (2d Cir. 1994)); *see also Cleveland v. Caplaw Enters.*, 448 F.3d 518, 552 (2d Cir. 2006); *Cabrera, supra,* 24 F.3d at 386 n.13*; City of Chicago v. Matchmaker Real Estate Sales Center Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992); *Northside Realty Assoc., Inc. v. United States*, 605 F.2d 1348, 1354 n.13 (5th Cir. 1979); *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974).

These lower federal courts have thus fashioned a federal definition of agency, grounded in the Restatement (Second) of Agency:

> Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the

> undertaking and the understanding of the parties that the principal is to be in control of the undertaking.

Cabrera, *supra*, 24 F.3d at 386 (quoting Restatement (Second) of Agency § 1 cmt. b). In applying this federal law of agency, the courts have looked beyond "conclusory contractual language" to determine whether the requisite right of control by the principal exists. *Cleveland v. Caplaw Enters.*, 448 F.3d at 523. Here, the Court could similarly establish a uniform rule to resolve the clear conflict among state courts on when, and how, third party activities in a taxing state ought to be considered activities of the taxpayer.

While reported cases concern the protection of federal civil rights for individuals, rather than support for the structural concerns noted in *Quill*, this distinguishing feature does not lessen the need for uniform rules in the Commerce Clause context. *Quill, supra*, 504 U.S. at 312, 112 S. Ct. at 1913 ("[T]he Commerce Clause and its nexus requirement are informed 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."). Indeed, national uniformity and predictability was the critical "structural concern" to the *Quill* Court. As the *Quill* Court explained: "Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills." *Id.*

It was in light of these structural concerns that the Supreme Court reaffirmed the "bright-line" test in *Bellas Hess*, with the goal of "firmly establish[ing] the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and [reduce] litigation concerning those taxes." 504 U.S. at 315, 112 S. Ct. at 1915. The bright-line test reaffirmed in *Quill* was intended to eliminate the quagmire to the benefit of states and businesses alike. *Id.,* 504 U.S. at 316, 112 S. Ct. at 1915 ("[A] bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.").

Scholastic submits that the Supreme Court should take this opportunity to reaffirm the bright-line drawn in *Quill* by clarifying the standard for cases involving instate activities by third parties. If the Court does not rein in the states and provide guidance regarding the extent to which *Tyler Pipe*'s "on behalf of" requirement may be stretched, then state revenue departments will continue to expand their reach in unpredictable directions. This Court, alone, holds the key to resolving this Commerce Clause battle between the states.[5]

[5]*See* Journal of the Federal Convention Kept by James Madison, E.H. Scott ed., at 132 (Scott Foresman & Co. 1898, reprinted 2003 by the Lawbook Exchange)(At the Constitutional Convention, Madison urged that the federal government "must control the centrifugal tendency of the States which . . . will continually fly out of their proper orbits and destroy the order & harmony of the political system.").

D. ONLY CONGRESS CAN CHANGE THE "SUBSTANTIAL NEXUS" RULE.

The need for review by this Court is underscored by the lower court's failure to defer to Congress in deciding whether, and subject to what conditions, states should be permitted to expand the scope of their taxing authority over non-resident retailers. As this Court explained in *Quill*, "'Congress has the power to protect interstate commerce from intolerable or even undesirable burdens.' *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 at 637, 101 S. Ct. 2946 at 2964, (1981) (WHITE, J., concurring). In this situation, it may be that 'the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.'" *Id.,* at 638, 101 S. Ct., at 2964. 504 U.S. at 318-19, 112 S. Ct. at 1916.

Thus, *Quill* gave the states a clear path by which to obtain authority to impose use tax collection obligations on remote sellers lacking a physical presence in their state. Through federal legislation, Congress can weigh the competing considerations, measure the probable impact on interstate commerce, and fashion legislation that balances the interests of states in obtaining additional tax revenue with the interests of a national marketplace not overly encumbered by conflicting and confusing impositions on interstate commerce. Indeed, states have been working actively to obtain passage of such federal legislation, including at least four bills now pending before Congress. *See*, *e.g.*, H.R. 2071, 112th Cong., 1st Sess. (2012); S. 1452, 112th Cong., 1st Sess.

(2012); H.R. 3179, 112th Cong., 1st Sess. (2012); S. 1832, 112th Cong., 1st Sess. (2012).[6]

E. THIS CASE RAISES A SUBSTANTIAL QUESTION ON AN ISSUE OF NATIONAL IMPORTANCE.

Direct marketers like Scholastic have, for the last half-century, relied on the bright line rule that they must have a physical presence in the taxing state—such as a "small sales force, plant, or office"—before that state can impose use tax collection obligations on them. *Quill, supra,* 504 U.S. 298 at 315, 112 S. Ct. at 1914. It is a rule intended to create "a safe harbor for vendors [like Scholastic] 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.'" 504 U.S. at 314-15, 112 S. Ct. at 1914. In upholding the bright-line physical presence requirement of the Commerce Clause, this Court underscored the importance of

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[6]In the wake of *Quill*, numerous prior attempts at federal legislation have been considered, but not enacted, by Congress, including, for example, H.R. 3396, 110th Cong., 1st Sess. (2007); S. 2152, 109th Cong., 1st Sess. (2005); H.R. 3184, 108th Cong., 1st Sess. (2003). As this Court recognized in *Quill*, the need for careful legislative balancing required to protect a vibrant national marketplace and the states' need for revenue is acute given the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations." *Quill*, *supra*, 504 U.S. at 313 n. 6, 112 S. Ct. at 1914 n. 6 (quoting *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753, 759-760, 87 S. Ct. 1389, 1393, 18 L. Ed. 2d 505 (1967)).

having a "clear rule" establishing "the boundaries of legitimate state authority. 504 U.S. at 315, 112 S. Ct. at 1914.

The importance of a clear, uniform rule is underscored by ever-increasing number of states and local governments that seek to tax retailers. Of the 30,000 state and local jurisdictions with authority to impose sales and use taxes, more than 9,600 have now adopted this kind of tax.[7] This plethora of jurisdictions generates an enormous variety of tax rates, taxable and exempt products, excluded transactions, filing requirements, audit arrangements, and appeals procedures. Mail order companies and remote sellers need clear guidelines to protect them from falling, unwittingly, into this costly morass.

The physical presence rule of *Quill* is the clear and predictable standard that allows companies to

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[7]Drenkard, Scott, Raut, Alex, & Duncan, Kevin, *Sales Tax Rates in Major U.S. Cities*, Tax Foundation, April 11, 2012, at http://taxfoundation.org/article/sales-tax-rates-major-us-cities This reflects 3,600 more taxing jurisdictions than existed at the time that *Quill* was decided. *Quill*, 504 U.S. 298 at 313, 112 S. Ct. at 1914 (referring to "the Nation's 6,000-plus taxing jurisdictions"); *see also Nat'l Bellas Hess, supra,* 386 U.S. at 760, 87 S. Ct. at 1393, 18 L. Ed. 2d 505 (referring to the then-existing 2,300 localities that imposed sales and use taxes). Indeed, since 2003, 2,109 new sales and use taxes were created, an average of 234 per year. Vertex Inc. 2011 Sales Tax Rate Report. http://www.vertexinc.com/PressRoom/PDF/2012/vertex-end-of-year-sales-tax-rate-report-11.pdf. 30 January 2012. During that same period, there were 3,757 changes to *existing* sales and use taxes, at an average of 417 per year. *Id.*

determine, in advance, the tax consequences of the business models they select. If the constitutional standard is made uncertain, including due to variations in state agency law or statutory principles, the "sharp distinction" of *Quill* is effectively obliterated. 504 U.S. at 758, 87 S. Ct. at 1392. *See, e.g., Griffith v. Conagra Brands, Inc.*, 229 W.Va. 190, 728 S.E.2d 74, 87 (2012)(BENJAMIN, J., dissenting)(an "amorphous test is practically useless in aiding an out-of-state entity in planning for its tax liability arising from its economic contact with this State").

As the conflicting state court decisions described by Scholastic demonstrate, it is no longer possible for businesses to rely upon unwavering Commerce Clause principles. Instead, tax planning becomes a high stakes gamble, with the potential for bankrupting tax liability if a company guesses wrong—and even if, like Scholastic, a company scrupulously avoids hiring any person to act on its behalf in the taxing state. Indeed, this is not a case of new and different business practices giving rise to uncertain tax consequences. In over sixty years of selling books to teachers, parents, and students, Scholastic has been and remains a traditional mail order company. What has changed is Tennessee's abandonment of *Quill's* "bright line rule" and, with it, the guidance and clarity that rule has long provided to an entire industry.

CONCLUSION

In expanding the concept of substantial nexus to envelop schoolteachers, the lower court joined with the courts of Connecticut and Kansas in holding that existence of mere *customers* in a taxing state create nexus. In stark opposition to this conclusion stand the states of Arkansas, Michigan, and Ohio. Only this Court has the power to make uniform the Commerce Clause principle of "substantial nexus" that lies presently in disarray.

For all of the reasons set forth herein, Scholastic respectfully asks that its Petition for *Certiorari* be granted.

Respectfully submitted,

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