No. 12-374

In The
Supreme Court of the United States

SCHOLASTIC BOOK CLUBS, INC.,

Petitioner,

v.

RICHARD H. ROBERTS, COMMISSIONER OF TENNESSEE DEPARTMENT OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Tennessee, Middle Division

BRIEF OF *AMICUS CURIAE* INTERNATIONAL READING ASSOCIATION IN SUPPORT OF PETITIONER SCHOLASTIC BOOK CLUBS, INC.

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CORPORATE DISCLOSURE STATEMENT

International Reading Association, Inc. (IRA), incorporated in Pennsylvania, is a non-profit corporation with its headquarters at 800 Barksdale Road, Newark, Delaware. IRA's mission is to promote reading by continuously advancing the quality of literary instruction and research worldwide. IRA is a global network of individuals and institutions committed to worldwide literacy. More than 70,000 members strong, the Association supports literacy professionals through a wide range of resources, advocacy efforts, volunteerism, and professional development activities. IRA's members promote high levels of literacy for all by improving the quality of reading instruction, disseminating research and information about reading, and encouraging the lifetime reading habit. No single person/entity owns 10% or more of the stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

International Reading Association's ("IRA") mission is to promote literacy and reading. IRA believes that Scholastic Book Clubs, Inc. ("Scholastic") serves a valuable function in encouraging the distribution of books to children and the formation of a lifetime reading habit.

IRA's experience is that Scholastic's sales of books to children have created a very real longstanding educational benefit. Scholastic's mailing of its catalogs to classrooms gets them in the hands of children and gives them the ability to choose books of interest to them. Quite simply, the effort has placed books in the hands of children for decades and thereby supported IRA's mission to encourage children to read. Scholastic's classroom sale of books has another important and valuable element, *viz.,* it has provided children with access to books that they *want* to read, because they choose them; evidence supports that

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[1] Counsel for both parties to this proceeding were given timely notice under Rule 37 of IRA's intent to file an *amicus* brief in support of Petitioner and have consented in writing to the filing of an *amicus* brief.

Copies of the written consents have been filed with the Clerk.

This brief was not authored in whole or in part, by counsel for a party. No such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or party other than the *amicus curiae* made such a monetary contribution.

children read more when the topic or subject has a high degree of relevance or interest to them.

Traditionally, Scholastic's books are soft-bound and relatively low-price products. IRA understands from the briefs of *amici* filed in the Supreme Court of Tennessee, that Scholastic also provides free books to children. Since the decision of the Court of Appeals of Tennessee[2] will impose significant financial burdens on Scholastic, IRA sees a logical reduction in the number of free books that will be made available in the future. The consequences of the Tennessee and Connecticut decisions will redound to the detriment of the nation's children and, in turn, the nation.

SUMMARY OF THE ARGUMENT

The Court of Appeals of Tennessee has conflated and confused the "minimum contacts" requirements of the Due Process Clause and the "substantial nexus" requirements of the Commerce Clause. This court's precedents have affirmed and never retreated from the ruling that the Commerce Clause requires that a corporation engaged in interstate commerce must have a "physical presence" in a state before that state

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[2] And, also that of the Supreme Court of Connecticut which is the subject of a petition for certiorari in case *Scholastic Book Clubs, Inc. v. Connecticut Commissioner of Revenue Services,* No. 11-1532 in this Court.

can subject it to the burden of collecting and paying sales and use taxes.

This court's precedents have declared and reiterated that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." Despite the Commissioner's agreement that Scholastic used only mail to send its catalogs to Tennessee and mail or common carrier to deliver books, the Tennessee court nevertheless, ignored this court's precedents and concluded that an incidental "use" of state school contacts was sufficient to allow imposing the tax burden. In doing so, the Tennessee court failed to appreciate that even if Scholastic had made use of school facilities, this would satisfy only one-fourth of the requisite test and did not establish the required substantial nexus.

When it passed 15 U.S.C. § 381, disallowing the imposition of income taxes on sellers whose only contact with a state involved solicitation of orders that were approved out of state and shipped from out of state, Congress flagged its policy choice of not burdening interstate commerce with taxes on mail order or internet sales. Congress has not acted in over 20 years despite this court's clear message that it is free to do so. Accordingly, Tennessee should not be permitted to substitute its judgment for that of Congress or to override this court's precedents.

Tennessee has a reasonable alternative and need not burden interstate commerce to collect sales or use

taxes. It has already put into effect a law requiring its citizens to pay use taxes on purchases from out of state mail-order and Internet retailers. Given the policy constraints expressed by this court and by Congress' refusal to pass laws changing the status quo, Tennessee should enforce its collection from the citizens on whom it imposes the tax rather than burdening interstate commerce.

ARGUMENT

I. The Tennessee Court Has Conflated "Due Process Minimum Contacts" And "Commerce Clause Substantial Nexus" To Circumvent This Court's Opinion In *Quill Corp. v. North Dakota* And Usurped This Court's Place As The Final Arbiter Of The Constitution.

This Court has made it clear that in our federal system the taxing power of states in the context of interstate commerce is delimited not only by the Due Process Clause of the Constitution, but also by the Commerce Clause. *See Quill Corp. v. North Dakota,* 504 U.S. 298, 305 (1992).

In this context, the Due Process Clause requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax before a state can exercise jurisdiction over a foreign corporation in order to impose tax-related obligations on it. *Id.* at 306.

In contrast, the Commerce Clause comprises both the positive authority granted to Congress to regulate interstate commerce, and the implied prohibition on states – the negative or dormant aspect of the clause – that they not impose burdens on interstate commerce. *Id.* at 309 A state can justify imposing a tax burden on transactions in interstate commerce, only if it satisfies the four-part analysis enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Two of the requirements necessary to uphold such a tax, at issue in this case, are that the tax can only be "applied to an activity with a substantial nexus with the taxing State," and be fairly related to the services provided by the State." *Id.* Both these prongs of the four-part analysis "require a substantial nexus and a relationship between the tax and State provided services, [and] limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce." *Quill, supra,* 504 U.S. at 313.

Whereas *Quill* clarified that the Due Process Clause does not require a corporation's *physical presence* in a state before that state may impose tax obligations on it, *Quill* also reiterated that the substantial nexus requirement of the Commerce Clause *does require physical presence*. *Id.* at 314.

The point stated repeatedly by this court could not have been missed by the Appeals Court of Tennessee. *First,* this court clearly stated that in *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 559 (1977), it had "affirmed the

continuing vitality of *Bellas Hess*' 'sharp distinction . . . between mail order sellers with [a physical presence in the taxing] State and those . . . who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.'" *Second,* this court rejected the idea that *Complete Auto* had undercut the rule in *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967). *Third,* this court rejected the contention that the nexus requirements of the Due Process and Commerce Clauses are equivalent. Therefore, a mail order house that lacks a physical presence in the taxing State may satisfy the due process "minimum contacts" test, but not necessarily the Commerce Clause "substantial nexus" test. *Fourth,* this court did not share the North Dakota court's conclusion that its commerce clause jurisprudence had marked a retreat from a stringent physical presence requirement. *Fifth,* this court pointed out that it had never retreated from the *Bellas Hess* physical presence rule in any case involving sales or use taxes. *Sixth*, this court expressly reaffirmed that the *Bellas Hess* physical presence was a bright line rule that is still good law: "In sum, although in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright line, physical presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes. To the contrary, the continuing value of a bright line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law." *Quill, supra,* 504 U.S. at 314-15.

Nor did this court leave any doubt as to what *Bellas Hess* means: "*Bellas Hess* . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause. *Id.* at 311.

The opinion of the Court of Appeals recites the facts stipulated by Tennessee's Commissioner of Revenue which include that catalogs were mailed to classrooms as well as homes of home-schooled children and that they and the teachers would place orders for books. *See Appendix to Petition for Certiorari* ("*App.*"), at b9-b10. All of these purchases are by mail order.

In the face of this court's clear explanation and admonitions, the Appeals Court of Tennessee nevertheless chose to ignore *Bellas Hess,* as well as *Quill.* The route to get that result is circuitous, illogical and disingenuous.

Tennessee's Commissioner of Revenue tried different approaches in an effort to establish the necessary substantial nexus. He argued to the Chancery Court that the teachers acted as agents for Scholastic. *App.* b3. He then argued that an "implied agency relationship existed." *Id.* However, by the time the case got to the Court of Appeals, the Commissioner had changed his argument and asserted that "regardless of whether an agency relationship exists between SBC and Tennessee teachers, SBC's use of Tennessee teachers to effectuate sales is sufficient

under *Quill Corp.* and its progeny to sustain the assessment of sales and use taxes against it." *Id.* at b10. The Court of Appeals agreed that "the issue in this case is not whether Tennessee teachers may be considered agents of SBC, but whether SBC's connections with Tennessee's schools and teachers establishes a 'substantial nexus' such that the Commissioner's assessment may be sustained under the Commerce Clause." *Id.* at b12.

Therefore, the *physical presence* requirement of *Bellas Hess* and *Quill*, would necessarily have to be found from something other than agency.

In justifying its decision, the Appeals Court of Tennessee did not address directly, this court's analysis in *Quill.* Rather, the Tennessee court sought solace in the conclusion of another Tennessee Appeals Court judge in a previous tax case, *Arco Bldg. Systems, Inc. v. Chumley*, 209 S.W.3d 63 (Tenn. Ct. App. 2006), that this court, in *Quill,* had "used the phrase 'physical presence' as a term of art to describe the connections that it had previously found sufficient to support the imposition of state sales and use taxes on out-of-state companies." *App.* b12. And further characterizing its own ruling in *Arco*, the Appeals Court said that it had noted that this court "had upheld the assessment of sales and use taxes against out-of-state vendors using 'non-employee representatives who are not regular agents to conduct business activities in the taxing state." *Id.,* citing *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue,* 483 U.S. 232, 249-51 (1987).

But that is too much for *Quill* and *Tyler Pipe* to bear. *Quill* is not a case that can fairly be said to use the phrase "physical presence" as a term of art. Far from being as equivocal as the Tennessee court intimates, *Quill* expressly noted that *Tyler Pipe* did *not* signal a retreat from the stringent physical presence rule and described it as a case which involved a taxpayer which had a physical presence in the state. In *Tyler Pipe*, this court recited the State Supreme Court's summary of factual findings which, in part, were:

> The sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders. They have long-established and valuable relationships with Tyler Pipe's customers. Through sales contacts, the representatives maintain and improve the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe." *Tyler Pipe, supra,* 483 U.S. at 249.

Nothing of the sort obtained in this case. The undisputed facts recited by the Appeals Court included the following:

> Scholastic conducts its mail order business by mailing catalogs monthly during the school year to classrooms at primary, secondary and nursery schools across the United States, including in the State of Tennessee. It also mails catalogs to the homes of home-schooled students. . . .

> Students give their book orders to their teachers and parents, together with payment for the books. The teachers and parents, in turn, enter their own orders and those of their students on a master form. The teachers and parents can forward the order, along with total payment for the order, to Scholastic's offices in Missouri, or the teachers and parents can submit the total order over the telephone to Scholastic's offices in Missouri and submit the payment by mail. . . . .
>
> Scholastic accepts and fulfills these orders at its facilities in Missouri and delivers the books, by common carrier, to the classes or homes that ordered them. In the case of student orders, the books are distributed to them by teachers and parents to the students who ordered them. *App.* b9-b10.

These undisputed facts establish that the only contacts Scholastic had with its customers, whether, students, their parents, or teachers, was by mail order catalogs. This court's precedents establish that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." No other contact was shown.

Therefore, the Tennessee court needed something other than *Tyler Pipe* to justify its decision. That court's error was in concluding that simply because it had stretched its analysis of the case to the point of saying that Scholastic was using the State's school facilities, *App.* b14, it had also satisfied the

substantial nexus requirement of the commerce clause. Even accepting this flawed analysis, at best, the Tennessee Appeals Court's erroneous reasoning had managed to satisfy only one-fourth of the four-part test set forth in *Complete Auto*.

Even so, given that the teachers' activities were completely voluntary, and done to promote reading by their students, it is hard to understand how, the Appeals Court could have transformed this into a "use" of school facilities by Scholastic. The Appeals Court overlooked the educational benefit for students as a motivating force for the teachers' actions and somehow attributed to them a "representative" status vis-à-vis Scholastic.

Moreover, as the briefs of *amici* in Tennessee stated, the teachers are involuntarily being designated "agents" or "representatives" of Scholastic. This casts aspersions on the teachers' professionalism and raises the specter of code of ethics violations by them for such "participation." From IRA's point of view as *amicus,* this means that children will lose the impetus to read that Scholastic's programs and efforts have generated. This country can ill afford another dent in its quality of education and reading skills.

In *Quill,* this court noted that having a bright line test has an important benefit "for as we have so frequently noted, our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of

precise guides to the States in the exercise of their indispensable power of taxation.'" *Quill, supra,* 504 U.S. at 315.

This concern is well illustrated in the companion Connecticut case which is the subject of a petition for a writ of certiorari in Case 11-1532. The Connecticut Supreme Court's opinion also elides the distinctions between the Due Process Clause and the Commerce Clause requirements. That court, in faux-analysis, determines that the state's Commissioner of Revenue Services has the power to levy and collect from Scholastic, Connecticut's use tax for which the ultimate consumer or user is liable. That court reached its result by

(i) finding ratification for its desired result in *Scholastic Book Clubs, Inc. v. Board of Equalization,* 207 Cal. App. 3d 734, 255 Cal. Rptr. 77 (1989) and *In re Scholastic Book Clubs, Inc.,* 260 Kan. 528, 920 P.2d 947 (1966) noting that the Kansas court had found the California case persuasive, and that both courts had found implied agency,

(ii) rejecting the result of the Michigan Court of Appeals in *Scholastic Book Clubs, Inc. v. Dept. of Treasury,* 223 Mich. App. 576, 567 N.W.2d 923 (1998), and of the Arkansas Supreme Court in *Pledger v. Troll Book Clubs, Inc.,* 316 Ark. 195, 871 S.W.2d 189 (1994) merely because they were based on the agency law of their respective states,

(iii) treating the Connecticut legislature's use of the undefined word "representative" as "provid[ing] the *presence* necessary to justify imposition of sales and use taxes,"

(iv) concluding that the activities of the *Connecticut schoolteachers* "provide the necessary nexus under the commerce clause to justify imposition of the taxes at issue in this case."

(v) dismissing this Court's admonition in *National Bellas Hess, Inc. v. Dept. of Revenue,* 386 U.S. 753, 87 S. Ct. 1389, 18 L.Ed. 2d 505 (1967) and *Quill*, that *Scripto, Inc. v. Carson,* 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 660 (1960) "extends taxation to its constitutional limit" as "no more than an observation concerning the state of the law at that time, and . . . not necessarily intended to mean that a substantial nexus between the out-of-state retailer and the state could not be found in other, as of yet undefined, circumstances."

Appendix A-26-31 to *Scholastic's Petition* in Case 11-1532 (emphasis added).

First, the last point mentioned, represents an inexplicable disregard by the Supreme Court of Connecticut, of its obligation to accept that it is bound by this Court's "observation concerning the state of the law." Without suggesting that anything has changed since *Scripto, Bellas Hess* and *Quill* were

decided, that court, like the Tennessee court, simply ignores this Court's clear statement that *Bellas Hess* is still good law. *Quill, supra,* 504 U.S. at 314. This is untenable.

Second, the Supreme Court of Connecticut, like the Appeals Court of Tennessee sidestepped the agency question because obviously agency could not be established. Both the Commissioner in this case and the Connecticut Supreme Court disavowed any reliance on a determination that the schoolteachers in their respective states were the *agents* of Scholastic. But the Tennessee court then illogically found that the teachers were a *de facto* sales force for Scholastic. And it is illogical for the Connecticut court to have found solace in the California and Kansas cases which it asserted were based on theories of *implied agency.* It is even more illogical for that court to then say that it would not apply the reasoning of the Arkansas and Michigan cases insofar as they "relied on agency law." A-2-29 to *Scholastic's Petition* in Case 11-1532. Moreover, both Tennessee and Connecticut court acknowledged but ignored the fact that both the Arkansas and Michigan courts based their determinations on the fact that the constitutionally required substantial nexus could not be found because the requisite "physical presence" did not exist. A-27-28 to *Scholastic's Petition* in Case 11-1532.

These cases represent a clear conflict in state-by-state legal analysis and creates the kind of controversy and confusion which this court sought to avoid by its decisions in *Bellas Hess* and *Quill.* Only this

court can once again reaffirm the rule that "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, supra,* 504 U.S. at 315.

Third, the Connecticut Supreme Court concludes that simply because the Connecticut legislature has determined that persons acting as "representative[s]" of out-of-state retailers "may provide the presence necessary to justify imposition of sales and use taxes," (i) it is justified in ignoring the reasoning of the Arkansas and Michigan cases, (ii) an adequate "presence necessary to justify the imposition of sales and use taxes" is established and (iii) it "need not consider whether the teachers and the plaintiff in this case had an express or implied agency relationship." A-28-29 to *Scholastic's Petition.* Apart from this entirely circular reasoning, what is never explained is why the term "representative" makes the Connecticut schoolteacher the missing link necessary to establish physical presence and hence create the required constitutional level of a substantial nexus. The Connecticut Supreme Court's failure to consider the agency question is all the more surprising because Connecticut's tax statutes included the concept of an *authorized agent*:

> Each person subject to a tax imposed under this chapter shall file a return on or before the last day of each month setting forth the amount of tax due for the preceding month

> and such additional information as the commissioner may require. Each return shall be signed by the person required to file the return or his *authorized agent* but need not be verified by oath. Any return required to be filed by a corporation shall be signed by an officer of such corporation or his *authorized agent*. Connecticut General Statutes § 12-547 (italics supplied).

Fourth, whereas the questions whether an out-of-state company has minimum contacts with a state or a substantial nexus with a state, have hitherto been determined by the activities performed *by that company,* the Tennessee and Connecticut courts, in a departure from precedent, simply declared that the independent activities of *their state's citizens* (perforce in-state actors), could be attributed to Scholastic to justify forcing Scholastic to be the collector of a *use* tax due from a resident (the student reader) who had no contact whatsoever with Scholastic. This approach is not consonant with the "substantial nexus" requirements of the Commerce Clause and indeed, taken to its limits, offends even the "minimum contacts" requirements of the Due Process Clause.

In dealing with Constitutional principles, the debate should not be about whether the approach of the Appeals Court of Tennessee, or the Supreme Court of Connecticut or the approach of Michigan and Arkansas courts is correct. That debate must yield to the fundamental idea that the correct approach is for Congress to decide, not for each state or each state

court to decide as it sees fit. If the approach of the Tennessee court and of the Connecticut court to lawmaking and analysis is sanctioned, then every state will be free to attribute the in-state activity of every incidental purchaser to an out-of-state entity and the Commerce Clause would lose all meaning. Indeed, each state could go so far as requiring each out-of-state retailer to appoint the Secretary of Corporations or equivalent officer as its agent in order to solicit by mail order or on the Internet. *Quill* teaches that this approach is unavailing but the Tennessee and Connecticut courts attempt to undo *Quill* in one stroke.

While it is true that the Commerce Clause is no longer viewed as vesting powers exclusive to Congress,[3] this does not mean that states are free, willy-nilly to burden interstate commerce with loose definitions of "agent" and "representative" varying from state to state and transaction to transaction.

The Appeals Court of Tennessee and the Supreme Court of Connecticut conflate "minimum contacts" with "substantial nexus" and, by attributing, without reasoning or explanation, the activities of *Connecticut residents* to an out-of-state entity, declares that the term "representative" is in effect, more expansive than "agent." The undefined word "representative" is thus used to justify this constitutional intrusion. In *Quill*, this court rejected North Dakota's attempt to

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[3] *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 613 (1997) (Scalia, J., dissenting).

create its own lexicon when it redefined the word "retailer" to mean "every person who engages in regular or systematic solicitation of a consumer market in th[e] state." *Quill, supra,* 504 U.S. at 302.

Similarly, this court should reject Tennessee's and Connecticut's attempts to make the word "representative" mean whatever their courts think necessary to sustain their imposition of tax burdens on businesses engaged in mail order activities in interstate commerce.

II. Congress Has Signaled That It Would Likely Not Permit Imposition Of Taxes On Mail Order And Internet Sales Where The Seller Does Not Have A Physical Presence In The Taxing State.

While the Constitution grants Congress plenary power to regulate interstate commerce, Congress has no power to authorize states to violate the Due Process Clause. In contrast, as *Quill* recognized, Congress may grant to states authority to impose taxes on transactions in interstate commerce, even to the extent of permitting a taxation of isolated sales: "No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions." *Quill.* This court noted that before *Quill* was decided, Congress had considered several bills that would "overrule" the "*Bellas Hess* rule" which until then "indicated that the Due Process Clause requires physical presence

in a State for the imposition of duty to collect a use tax. . . .” *Quill, supra,* 504 U.S. at 318.

Whereas Congress’ decision not to pass such legislation may have been motivated, as this court observed, out of respect for this court’s decision in *Bellas Hess,* Congress has still not acted in the twenty years since *Quill* was decided. Congressional silence is all the more striking because there is no mistaking this court’s express declarations that it had “put the [*Bellas Hess*] problem to rest” and that “Congress is now free to decide whether, when, and to what extent the States may burden interstate mail order concerns with a duty to collect use taxes.” *Id.*

In *Quill* this court wisely deferred to Congress. Petitioner’s brief states that it is up to Congress to change the law in this field. True enough, but this court’s opinion in *Quill* offers an additional reason for such deference. As this court noted, Congress has indicated a policy choice in its approach to regulation of state taxation:

> In response to this Court’s indication in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959), that, so long as the taxpayer has an adequate nexus with the taxing State, “net income from the interstate operations of a foreign corporation may be subjected to state taxation,” Congress enacted Pub. L. 86-272, codified at 15 U.S.C. § 381. *Quill, supra,* 504 U.S. at n. 9.

The statute, 15 U.S.C. § 381 provides:

> **(a) Minimum standards**
>
> No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> **(1)** the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> **(2)** the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Interestingly, Congress used the word "representative" and nevertheless, even if the teachers are deemed "representatives" of Scholastic, "orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." It is highly unlikely that

Congress would adopt a standard different from this for sales and use taxes.

III. Tennessee Has A Reasonable Alternative That Would Allow It To Collect Use Taxes Without Burdening Interstate Commerce.

It cannot be gainsaid that the tax at issue is one levied on the ultimate consumer, here the child or the parent whichever is deemed the purchaser, rather than on the schoolteacher. Tennessee's sales tax law makes this clear:

> **67-6-203. Property used, consumed, distributed or stored.** (a) A tax is levied at the rate of the tax levied on the sale of tangible personal property at retail by the provisions of § 67-6-202 of the purchase price of each item or article of tangible personal property when the tangible personal property is not sold, but is used, consumed, distributed, or stored for use or consumption in this state; provided, that there shall be no duplication of the tax. Tennessee Code § 67-6-203.

Tennessee requires consumers who have not paid the sales tax at the time of purchase, to pay a use tax on mail-order and Internet purchases. The Tennessee Department of Revenue explains the Consumer Use Tax Return required as follows:

> Tennessee, like other states that impose a sales tax, also taxes the use of property that is brought into the state untaxed when purchased. The purpose of the use tax is not

> only to raise revenue, but also to protect local merchants, who must collect the sales tax, from unfair competition from out-of-state sellers who do not collect Tennessee's sales tax. Effective January 1, 2009, the local use tax rate on purchases or downloads of digital videos, digital books, and digital music, as defined in Tenn. Code Ann. Section 67-6-102, is established at 2.50% regardless of the actual local tax rate in effect in the jurisdiction of the user and consumer.
>
> * * *
>
> If Tennessee sales tax is added to the price of your purchase, you DO NOT owe use tax. However, if you buy or ship merchandise to your Tennessee address and sales tax is not added to the price, then you are responsible for paying the use tax directly to the Department of Revenue. For example, sales tax is not always added to purchases through:
>
> - Internet
> - Telephone
> - Mail order catalogs, etc.

Found at https://apps.tn.gov/usetax/.

Similarly Connecticut requires purchasers to pay use taxes where sales taxes have not been collected. General Statutes § 12-411(2). In addition, the Connecticut Department of Revenue Services, like its Tennessee counterpart, has published an informational brochure titled "Q & A On The Connecticut

Individual Use Tax" which has, *inter alia,* the following:

> **7. How do I report use tax liability to DRS?**
>
> You are required to report your use tax liability on **Form OP-186**, *Connecticut Individual Use Tax Return,* **Form CT-1040**, *Connecticut Resident Income Tax Return,* or **Form CT-1040NR/PY**, *Connecticut Nonresident and Part-Year Resident Income Tax Return,* for purchases made during the preceding calendar year.
>
> As explained in Question 7 above, your use tax liability may be reported either on **Form OP-186, Form CT-1040** or **CT-1040NR/PY**. If you are not required to file a Connecticut income tax return, you must file and pay your use tax liability using Form OP-186 no later than April 15. You may file one Form OP-186 for the entire year or you may file several returns throughout the year.
>
> **10. What if I buy taxable goods or services from an out-of-state mail-order company, television shopping channel, or over the Internet and the vendor does not charge Connecticut tax?**
>
> If you buy taxable goods or services for use in Connecticut and did not pay Connecticut sales tax, you owe and must remit use tax to Connecticut on those purchases.

> **11. Is an out-of-state merchant misleading me if he tells me I do not need to pay Connecticut tax on my purchase?**
>
> Yes. While you may not have to pay sales tax in the state where you bought the goods or services, you **must** pay Connecticut use tax on taxable goods or services purchased for use in Connecticut.
>
> **12. Can an out-of-state business, such as a mail-order company, collect Connecticut use tax on taxable goods mailed or delivered into Connecticut?**
>
> Yes. If the business has registered to collect Connecticut use tax, it must collect the tax from you. If the business has not collected Connecticut use tax, you must report and pay the tax yourself.

See http://www.ct.gov/drs/cwp/view.asp?A=1510&Q=489242 (boldface in original).

Both Tennessee and Connecticut have the ability to make the user pay the use tax directly and, as described in their Internet postings, each has implemented forms on which reports of such liability can be made and the tax paid.

This is, therefore, not just a theoretical alternative, it is one actually already implemented and in existence under both Tennessee and Connecticut law.

Neither Tennessee nor Connecticut can justify imposing the burdens they seek to place on Commerce Clause where reasonable alternative measures

are available. *See Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.,* 511 U.S. 93, 101 (1994)*; Dean Milk Co. v. Madison,* 340 U.S. 349, 354-55 (1951).

CONCLUSION

For the foregoing reasons, IRA urges this Court to grant Scholastic's petition for a certiorari and this Court consider and reverse the decision of the Appeals Court of Tennessee in order to reinforce the substantial nexus requirements of the Commerce Clause.

Respectfully submitted,

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