Nos. 13-252 and 13-259

IN THE

Supreme Court of the United States

OVERSTOCK.COM, INC.,
Petitioner,
v.
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL.
Respondents,

AMAZON.COM LLC AND AMAZON SERVICES LLC,
Petitioners,
v.
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SETH L. COOPER
Counsel of Record
AMERICAN LEGISLATIVE EXCHANGE COUNCIL
2900 Crystal Drive, Suite 600
Arlington, VA 22202
(703) 373-0933
sethcooper@alec.org

Counsel for Amicus Curiae

September 19, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether Section 1101(b)(8)(vi) violates the Commerce Clause by imposing tax-collection obligations on out-of-state retailers that have no physical presence in New York.

2. Whether Section 1101(b)(8)(vi) violates the Due Process Clause by adopting an effectively irrebuttable evidentiary presumption that the prerequisites for taxation under the Commerce Clause have been satisfied.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES Page(s)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case involves a first-of-its-kind attempt by a state to impose sales tax collection obligations on an out-of-state online retailer that has no physical presence within the taxing state, contrary to the Commerce and Due Process Clauses of the United States Constitution. In 2008, the New York Assembly passed Assembly Bill 9807, amending New York's legal definition of "vendors" to include out-of-state retailers who pay sales commissions for website ad referrals by third-party New York residents. *See* New York Tax Law section 1101(b)(8)(vi) (hereinafter "AB 9807"). This new law effectively forces out-of-state online retailers who pay sales commissions to New York residents to register as vendors with New York tax officials and to collect and remit sales taxes to New York.

AB 9807 has been called the "Amazon tax" because it is targeted at out-of-state retailers who use advertising models such as Amazon.com or Overstock.com. Under the "Amazon Associates" program, for instance, persons who sign up for the program place click-through advertisements on their own websites, and earn a small commission for each ad-click referral resulting in a purchase at Amazon.com. Although Amazon.com and Overstock.com have *no* physical

---

[1] In accordance with Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus and its counsel has made a monetary contribution to the preparation or submission of this brief. And in accordance with Rule 37.2, amicus states that more than ten days before the due date counsel for amicus provided all parties with notice of its intent to file this brief. All parties consented to the filing of this brief.

presence in New York (nor do they have any employees or agents working in the state), AB 9807 subjects both retailers to sales tax collection obligations.

AB 9807 is an unconstitutional overextension of state taxing authority because it purports to impose state sales tax collection obligations on businesses with no "physical presence" in New York—and hence no "substantial nexus" with New York. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 313-314 (1992). The presence of a third-party resident website owner who participates in a click-through ad sales commission program does not make the online retailer physically present in New York. In such circumstances, a "continuous local solicitation" does not exist to constitute a "substantial nexus" with New York. *Id.* Nor can the presence of a third-party website owner be considered "significantly associated" with the out-of-state retailer's ability to do business in New York. *Tyler Pipe Indus., Inc. v. Wash. Dep't of Rev.*, 483 U.S. 232, 250 (1987) (internal cite omitted). Thus, AB 9807 imposes unconstitutional tax-collection obligations on out-of-state retailers such as Amazon.com and Overstock.com. It unduly intrudes on other states' sovereign powers to set taxing policies pertaining to economic activities taking place substantially within their own borders.

Unfortunately, the New York Court of Appeals erred by concluding (or presuming) that a New York resident's placement of click-through ads on websites as part of an associate advertising program satisfies constitutional nexus requirements. *Overstock.com v. New York Dept. of Taxation and Finance et al.*, 20 N.Y.3d 586 (2013). The New York Court of Appeals' ruling misapplied precedents such as *Tyler Pipe*, 483 U.S. at 250, and *Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960). Moreover, the logic of the bright-line "physical presence" rule for state sales taxation of interstate transactions affirmed by this Court in *National Bella Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753, 760 (1967), and reaffirmed in *Quill*, 504 U.S. at 313-14, should apply with equal force to online retail purchases prompted by website click-through ads. The "safe harbor" is provided to vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail," *id.* and also to the licensing of software. The logic of the safe harbor likewise extends to retailers conducting interstate commercial transactions through the Internet and whose only connection with the taxing state is the residency of a third-party website ad affiliate.

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan individual membership association of state legislators. ALEC has approximately 2,000 members in state legislatures across the United States. It serves to advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty. ALEC has a number of interests in this litigation, reflected in its official policies and publications. In addition, ALEC filed an *amicus curiae* brief in New York State courts during an earlier stage of this case.

This brief addresses constitutional principles and public policy considerations relevant to both the Court's Commerce Clause and Due Process Clause analyses, with particular focus on the former. Although the relationship between federal and state power is typically the focus in cases implicating constitutional federalism, ALEC believes that power dynamics *between states* also require careful consideration. Extraterritorial taxation by one state undermines the sovereign equality of other states, contrary to the Constitution's structural design.

Through its official statements of principle, resolutions, model state legislation and publications, ALEC has adopted important constitutional and policy positions concerning the scope of state taxing power. This includes an understanding of how a state's taxing power relates to other states as well as the interstate economy. ALEC recognizes that states are rivals in an interstate competition for jobs and growth, and it has published *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index* (hereinafter "*Rich States, Poor States*") to highlight the importance of state taxation policy in assessing state economic competitiveness.[2] In ALEC's view, robust tax competition between states is an essential and beneficial component of constitutional federalism that is safeguarded by dormant Commerce Clause nexus limits and Due Process limits on state taxing power.

Through its official policies and publications, ALEC has specifically addressed the appropriate limits on states' power to tax electronic commercial ("e-commerce") transactions conducted through the Internet. As a matter of official policy, ALEC believes

[2] *See* Arthur B. Laffer, Stephen Moore & Jonathan Williams, *Rich States Poor States: ALEC-Laffer State Economic Competitiveness Index* (6th ed.) (2013), available at http://alec.org/docs/RSPS-6th-Edition.

that this Court correctly held in *Quill* that the Commerce Clause forbids a state or locality from forcing an out-of-state retailer to collect sales tax unless the retailer has "substantial nexus" with the taxing state. ALEC also believes that the *Quill* decision's "safe harbor" for retailers transacting sales through the mail or common carrier is equally applicable to Internet sales. A retailer should collect sales tax on Internet sales only in those states where the retailer has "physical presence."

It is ALEC's view that mere placement of a click-through advertisement on a website by a resident of the taxing state who receives a commission from an out-of-state retailer with no "physical presence" in the taxing state does *not* make the retailer physically present in the taxing state. Under such circumstances, the imposition of sales tax collection obligations constitutes an unconstitutional, extra-territorial exercise of state taxing power under the dormant Commerce Clause and the Due Process Clause.

ALEC has repeatedly expressed its serious constitutional and policy concerns about the sales-tax collection obligations contained in AB 9807 and interpreted by New York officials. ALEC has raised similar concerns about legislation introduced in other state legislatures that that have been emboldened by the passage of AB 9807. In fact, more than a dozen states have followed New York by passing similar legislation. Meanwhile, numerous other states have considered but rightfully rejected legislation similar to AB 9807.

Unfortunately, the New York Court of Appeals ruling blurred the constitutional limits of state taxing power. This has increased confusion about the scope of states' powers to subject Internet commercial transactions involving associates or affiliates programs to sales taxes. By granting petitions for certiorari, this Court can address the New York Court of Appeals' error and also reaffirm the "physical presence" bright-line rule it set out in *Quill*. State legislatures and state tax departments seeking to ascertain the inherent limits of state taxing power would benefit from such a reaffirmation. And States seeking to establish state sales tax policies relating to the Internet would likewise benefit from a ruling by this Court that dispels the confusion now created by New York Court of Appeals' ruling.

ALEC respectfully requests that the petitions for writ of certiorari be granted.

REASONS FOR GRANTING THE WRIT

I. THERE ARE CONSTITUTIONAL STRUCTURAL LIMITS ON THE SCOPE OF STATES' TAXING POWER VIS-À-VIS OTHER STATES

The New York Court of Appeals' decision all but severs the critical constitutional links between a state's taxing power, its people, and its territorial boundaries. ALEC's *Rich States, Poor States* considers it a "Golden Rule of Effective Taxation" that "[i]f A and B are two locations, and if taxes are raised in B and lowered in A, producers and manufacturers will have a greater incentive to move from B to A." *Id*. at xiv. Of course, this axiom of political economy presupposes that B cannot tax producers and manufacturers with a physical presence in A. When it comes to the scope of state taxing power, the structure of Constitution provides important limits on the ability of state A from taxing economic activities in state B.

Federalism's framework implies a fundamental principle of equality among the states and among their respective citizenries. *See, e.g*., *Saenz v. Roe*, 526 U.S. 489, 501-511 (1999). This principle of state equality provides an important backdrop to understanding Commerce Clause and Due Process prohibitions on extraterritorial state taxation.

Through constitutional limits on the states' ability to regulate interstate commerce, and constitutional prohibitions on state taxation reaching beyond state lines, states are assured equal sovereign status in the national marketplace. *See, e.g., BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("No state can legislate except with reference to its own jurisdiction") (quoting *Bonaparte v. Tax Court*, 104 U.S. 592 (1881)); *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982) ("As a general principle, a state may not tax value earned outside its borders").

In particular, "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism'—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). Dormant Commerce Clause limitations on states thereby facilitate an effective national marketplace of competing state marketplaces. In particular, nexus requirements prohibit states from overextending their power. Those requirements prohibit a state from subjecting economic activities substantially related to other states to extraterritorial taxation and unduly burdening interstate commerce.[3]

As ALEC's *Rich States, Poor States* study of state economic competitiveness suggests, "[w]hen a state changes policy, for better or worse, it immediately affects the incentive structure for individuals and businesses alike, and the change in incentives directly influences the state's competitiveness." *Id*. at 2. Businesses and citizens are drawn to states with low entry costs and low tax rates. One of the long recognized attributes of federalism is an interstate exit-right, whereby businesses and citizens can "vote with their feet" and relocate to more hospitable economic and regulatory climates. However, extra-territorial state taxation holds captive those out-of-state retailers and consumers with no substantial nexus to the taxing state. To the extent a state imposes tax obligations on out-of-state retailers engaged in interstate commerce based on only the "slightest presence," the tax competitiveness of all other states is undermined. But no state should be able to impose extraterritorial sales tax collection burdens on out-of-state retailers because it perceives a need to compensate for its internal fiscal problems.

Constitutional nexus limits on state taxing power preserve interstate tax competition. The requirement

---

[3] *See* Michael S. Greve, "If it Aint Broke, Why is Everyone Trying to Fix It?" in *Who Rules the Net? Internet Governance and Jurisdiction* (Adam Thierer and Clyde Wayne Crews Jr, eds.) (2003) at 290 ("Constitutional, competitive federalism does not bar all forms of extraterritorial taxation … The constitutional line is plainly crossed, however, when State A asserts jurisdiction and coercive authority over a company in state B solely on the grounds that that company has established a Web site accessible to consumers in State A").

that an out-of-state retailer have a "substantial nexus" with the taxing state that involves active and ongoing "solicitation" efforts in order to establish and maintain a place in the taxing state's market protects the competitive dynamism of the interstate market. Moreover, *Quill*'s bright-line "physical presence" rule protecting out-of-state retailers relying upon the mail or common carriers similarly helps preserve the states' ability to establish their own competitive state marketplaces, free from undue interference by extraterritorial state tax adventurism.

By approving New York's attempt to tax the entrepreneurial success of out-of-state online retailers, the decision by the New York Court of Appeals undermines the ability of other states to exercise their taxing powers in ways that attract investment and promote economic growth. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340, 343 (1954) (noting that extraterritorial taxation "raises questions of great importance" stemming from the "appropriation by other states of tax resources properly belonging" to competing states). AB 9807 requires remote online retailers to collect and remit sales tax, even though their only connection to New York is through a contractual relationship with third-party local website owners. Because they are already physically absent from the state, such retailers lack the ability to "vote with their feet" and escape New York's taxing jurisdiction. And because remote online retailers lack physical presence in the State, they lack the political influence to change New York's law through the legislative process. (As a result, such retailers may feel compelled to take extra measures to prevent any New York website owners from participating in such contractual relationships.) New York's extraterritorial sales tax adventurism cries out for this Court's review.

II. UNDER THE DORMANT COMMERCE CLAUSE, STATES CANNOT IMPOSE SALES TAX COLLECTION OBLIGATIONS ON RETAILERS LACKING AN IN-STATE "PHYSICAL PRESENCE"

The New York Court of Appeals not only disregarded the important constitutional principles and public policy consideration discussed above, it also ran afoul of settled Commerce Clause precedents. When out-of-state retailers engaged in interstate commerce have only the "slightest presence" in a taxing state, the dormant Commerce Clause prohibits imposition of sales tax collection obligations. *See Quill*, 504 U.S. at 315 n.8 (noting that the Court "expressly rejected a 'slightest presence' standard of constitutional nexus" in *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977)). Under the four-part test set out by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), a state tax is permissible under the Commerce Clause only if the tax "[1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." "[T]he Commerce Clause and its nexus requirement are informed…by structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312. The substantial nexus requirement "limit[s] the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Id.*. at 313. It is "a means for limiting state burdens in interstate commerce." *Id*. A substantial nexus exists only if the out-of-state retailer has a "physical presence" in the taxing state, such as real estate, employees, or sales representatives engaged in "continuous local solicitation." *Id*. at 314 (1992); *Scripto*, 362 U.S. at 210; *see also Tyler Pipe*, 483 U.S. at 249–50.

Here, the New York Court of Appeals erred by finding that a "substantial nexus" exists between New York and out-of-state Internet retailers Amazon.com and Overstock.com based only on the in-state presence of online ad affiliates. The New York Court of Appeals erroneously analogized this case to dissimilar cases involving retailers that themselves engaged in significant solicitation efforts designed to establish an in-state market. It also failed to apply the "physical presence" safe harbor to the out-of-state retailer in this case. A closer reading of those precedents and important public policy considerations demonstrates that the New York Court of Appeals' ruling should be reversed.

A. Click-through Website Ads Placed Via Sales Commission Agreements with in-State Residents Do *Not* Establish a "Substantial Nexus" Between an out-of-State Retailer and the Taxing State

The New York Court of Appeals' ruling was premised on the erroneous presumption that advertisements placed on websites by New York residents give out-of-state retailers such as Amazon.com and Overstock.com a "physical presence" in the state. But mere placement of such ads on websites fails to satisfy this Court's standards for what constitutes a "physical presence."

As this Court has determined, a "physical presence" in the taxing state requires in-state real estate, employees, or sales representatives engaged in "continuous local solicitation." *Quill*, 504 U.S. at 314. However, in-state advertising is insufficient to give rise to a substantial nexus. *See id*. at 302, 304, 313 n.6; *Nat'l Bellas Hess*, 386 U.S. at 754–55, 758; *Miller Bros. v. Maryland*, 347 U.S. at 347. Constitutionally significant "solicitation" involves more than mere advertising; it requires direct, in-person, local sales-support activities by the retailer or its agents that include involvement in the actual sale transaction. *See Tyler Pipe*, 483 U.S. at 249–51; *Scripto*, 362 U.S. at 210–11.

Online advertising is still advertising. The placement by an in-state resident of website ads for an out-of-state retailer that are accessible on the Internet to citizens in all states and to persons around the world does *not* constitute the "continuous local solicitation" contemplated by this Court. Retailers such as Amazon.com and Overstock.com are merely modern-day, Internet-based versions of the mail-order retailer that was held to lack a substantial nexus by this Court in *Quill*. Such out-of-state retailers, which merely advertise through in-state advertising, cannot be subjected to tax-collection obligations. *See Quill*, 504 U.S. at 301, 315.

An in-state representative's activities must not only constitute "solicitation" for nexus purposes; they also must be "significantly associated" with the retailer's ability to do business in the taxing state. *Tyler Pipe*, 483 U.S. at 250. The "crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Tyler Pipe*, 483 U.S. at 250 (cite omitted). According to this Court's rulings, however, placement of website advertisements accessible on the Internet by an in-state resident is *not* "significantly associated" with an out-of-state retailer's ability to do business in the taxing state. Nor do New York residents placing ads on their websites perform the sorts of services that this Court has found to constitute constitutionally adequate "solicitation" activities that are "significantly associated" with a retailer's ability to maintain a market in the taxing jurisdiction. Accordingly, such out-of-state retailers have no "physical presence" in New York based on any in-state website advertisers' "solicitation," nor is such advertising "significantly" associated with out-of-state retailers' ability to establish its retail market.

B. The Commerce Clause Imposes a Bright-Line Rule Prohibiting Sales Tax Collection Obligations Based Only on the in-State Advertising Activities of an out-of-State Retailer, Even if those Advertising Activities Take Place on the Internet

Quill's bright-line "safe harbor" rule applies to Internet sales. Accordingly, an out-of-state retailer can be required by a state to collect sales taxes on Internet sales only if the retailer has a "physical presence" in the taxing state. In ALEC's view, *Quill* prohibits a state from imposing sales tax collection obligations on an out-of-state retailer where a taxing state's residents receive commissions for Internet sales prompted by ad-click referrals from the residents' respective websites. The logic of the bright-line "physical presence" rule recognized in *Quill* extends to this case, prohibiting the type of tax collection obligations contemplated by AB 9807. Important public policy considerations related to the interstate nature of the Internet and its importance to the 21st Century e-commerce marketplace also support the application of *Quill* in this context.

1. *A Bright-Line Rule Protects Interstate E-Commerce from Unduly Burdensome State Taxation*

Quill's bright-line physical presence rule makes sense in light of the Internet's ready accessibility and its lack of clear geographical limitations. A single state's overeager taxation of transactions conducted through such a pervasively interstate channel and instrument of commerce can too easily become a choke point. The bright-line "physical presence" rule was designed specifically to guard against improper burdens on interstate commerce. Indeed, the "substantial nexus" requirement "limit[s] the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313 & n.6. Out-of-state retailers would be severely burdened if multiple states were to assert that any one interstate e-commercial transaction triggers their respective sales tax collection obligations. *See Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) ("Without the limitations imposed by the Commerce Clause, . . . inconsistent regulatory schemes could paralyze the development of the Internet altogether"). Importantly, "the Framers intended the Commerce Clause as a cure for [the] structural ills [created by state taxes and duties]." *Quill*, 504 U.S. at 312.

Interstate e-commerce is especially susceptible to burdensome regulation by the multiplicity of state and local jurisdictions that could conceivably claim some kind of minimal jurisdictional link with a given Internet transaction. *Quill*'s bright-line rule requiring an out-of-state retailer have a "physical presence" in a taxing state before it can be subjected to sales tax collection obligations significantly reduces the likelihood that interstate e-commercial transactions will be subjected to multiple taxation by multiple jurisdictions with only tenuous connections to such transactions. The "physical presence" rule thereby prevents over-taxation that could overwhelm interstate e-commerce with unduly burdensome tax bills and compliance costs.

Unfortunately, AB 9807 presents precisely the kind of extraterritorial state sales tax burden that the "physical presence" rule was designed to prevent. A logical application of *Quill* provides safe harbor to out-of-state retailers who merely use website advertising. Review is needed to make clear to state legislators and taxing officials that the *Quill* bright-line safe harbor prohibits such burdensome taxation.

2. *A Bright-Line Rule Prohibits Improper Extraterritorial State Taxation*

Quill preserves the states' status as co-equal sovereigns by setting clear boundaries on state taxing power to prohibit onerous extraterritorial state taxes. But should the "physical presence" rule be undermined or effectively abandoned in favor of some sort of economic nexus rule – as the New York Court of Appeals' decision implied – "there is a danger that geographical limits will be abandoned, resulting in states unfairly subjecting nonresidents to excessive taxation."[4] *Id.*

Considering the situation of nonresidents who are subject to state taxation but lack the ability to vote for the legislature of the taxing state, one commentator has gone so far as to suggest that "physical presence serves as a rough, but serviceable, proxy for political voice."[5] Certainly, *Quill*'s physical presence standard stands for more than a mere proxy for political voice. But in terms of disciplining state taxing power to respect the sovereign equality of other states, the political voice proxy rationale supporting *Quill* is true as far as it goes: "[a] physical presence test for dormant Commerce Clause nexus thus mitigates the modern version of taxation without representation."[6] The "physical presence requirement" for a taxing state to impose sales tax collection obligations reduces the likelihood of extraterritorial state tax adventurism targeting online retailers.

In this respect, AB 9807 allows New York to impose tax collection obligations on a particularly unpopular political constituency: out-of-state retailers that have neither a vote for the state legislature nor a physical presence. *Quill*'s "physical presence requirement" protects out-of-state retailers who merely use website

---

[4] Joseph Henchman, "Why the *Quill* Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction," Tax Foundation (Nov. 5, 2007). Available at http://www.taxfoundation.org/research/show/22785.html.

[5] Edward A. Zelinsky, "Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause, 28 *Va. Tax Rev*. 1, 51 (2008).

[6] *Id*. at 54.

advertising pursuant to arrangements with in-state advertisers.

3. *A Bright-Line Rule Best Settles Expectations and Fosters Investment in Interstate E-Commerce*

Quill recognized that a bright-line rule prohibiting sales tax collection obligations based only on in-state advertising activities "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." 504 U.S. at 315-316. It similarly acknowledged that such a bright-line rule "encourages settled expectations and, in doing so, fosters investment by businesses and individuals." *Id.* at 315–16. The same is particularly true with respect to e-commerce, including transactions prompted by online advertising.

State sales taxes and compliance efforts constitute a significant cost of doing business for interstate retailers. Careful tax planning is therefore a necessity for interstate retailers. Such planning, in turn, requires clear and predictable state tax rules. "The physical presence standard provides taxpayers with an unchanging and easily verifiable guideline as to what will create taxable nexus, allowing them to plan their activities to maximize profitability."[7] Indeed, "[t]axpayers, mail order and Internet alike, rely on [physical presence] for 'settled expectations' in tax planning and compliance as do the states; any change in the standard would result in many taxpayers finding themselves liable in far more states than they

---

[7] Sidney S. Silhan, "Note: If It Ain't Broke Don't Fix It: An Argument for the Codification of the *Quill* Standard for Taxing Internet Commerce," 76 *Chi.-Kent L. Rev*. 671, 689 (2000).

planned for."[8] The ability of states to enhance their economic competitiveness by establishing clear and predictable tax policies regarding economic activities taking place primarily within their borders is bolstered by a bright-line rule. *Quill*'s "physical presence" rule thereby enables states to provide the legal certainty and predictability needed for tax planning by interstate online retailers.

AB 9807 blurs *Quill*'s bright-line rule and impose sales tax collection obligations absent the requisite physical presence. This upsets the settled legal and investment expectations of out-of-state retailers such as Amazon.com or Overstock.com. It also undermines the ability of states to craft tax policies that provide predictability to retailers and that improve their own economic competitiveness. But *Quill* was designed to ensure predictability for out-of-state retailers based on the presence or absence of a "physical presence" in the taxing state. If the New York Court of Appeals' decision is allowed to stand, AB 9807 – and the parallel taxes that are sure to follow in other states – will continue to undermine *Quill*'s bright-line requirement and frustrate the core purposes of the Commerce Clause.

In sum, AB 9807 is an unconstitutional attempt to impose state sales tax collection obligations on out-of-state retailers with no "physical presence" in New York—and hence no "substantial nexus" with New York. New York residents' website advertisements do

---

[8] *Id*. at 688. *See also* Henchman, "Why the *Quill* Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction" (contending that abandoning physical presence by "adopting an economic nexus standard would unsettle expectations and threaten retroactive application of taxes, endangering economic investments").

not rise to the level of "continuous local solicitation" that must be "significantly associated" with Amazon.com's or Overstock.com's ability to do business in New York in order to justify sales tax collection obligations. Internet e-commercial transactions prompted by website ads hosted by New York-based website operators do not constitute an out-of-state retailer's "physical presence" in the state. The bright-line rule reaffirmed in *Quill* gives such out-of-state retailers a safe harbor from extraterritorial state sales tax collection obligations. The New York Court of Appeals' misapplication of this Court's nexus precedents was in error and has led to increased confusion in numerous state legislatures about the scope of states' powers to subject Internet commercial transactions involving associates or affiliates programs to sales taxes.

By granting petitions for certiorari, this Court can address the New York Court of Appeals' error and also reaffirm the "physical presence" bright-line rule it set out in *Quill*. State legislatures and state tax departments seeking to ascertain the inherent limits of state taxing power would benefit from such a reaffirmation. And states seeking to establish sales tax policies relating to the Internet would likewise benefit from a ruling by this Court that dispels the confusion now created by New York Court of Appeals' ruling.

CONCLUSION

ALEC respectfully requests that the petitions for writ of certiorari be granted.

Respectfully submitted,

SETH L. COOPER
Counsel of Record
AMERICAN LEGISLATIVE
EXCHANGE COUNCIL
2900 Crystal Drive, Suite 600
Arlington, VA 22202
(703) 373-0933
sethcooper@alec.org

Counsel for Amicus Curiae

September 19, 2013