Nos. 13-252 and 13-259

IN THE

Supreme Court of the United States

OVERSTOCK.COM,

Petitioner,

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 Court of Appeals of New York

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

This brief of *amicus curiae* in support of the Petitions for a Writ of Certiorari is filed on behalf of the Council On State Taxation ("COST").[1]

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents more than 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

As *amicus curiae*, COST has participated in many of this Court's most significant state tax cases over the past 40 years, including *Mobil Oil Corp. v. Commissioner of Vt.*, 445 U.S. 425 (1980); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Quill Corp. v. North Dakota* ex rel. Heitkamp, 504 U.S. 298 (1992); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U. S. 768 (1992); *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U. S. 458 (2000); and *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16 (2008).

COST has a history of advocating for fair and equitable state and local taxation in the context of

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus'* intent to file this brief. Petitioners' consent is on file with the Court and Respondent's consent is attached hereto.

our federal system, and COST's distinctive status representing the taxpayers most directly impacted by state efforts to tax interstate business operations provides COST a unique perspective in regard to state and local tax jurisdiction issues.

Amicus' members include companies with varied perspectives regarding the extent of state tax jurisdiction for sales and use tax purposes. While some of *amicus'* members welcome the expansion of nexus for sales and use tax purposes on the grounds that it more equitably distributes state tax burdens among all retail market participants, others have resisted the expansion on the grounds that state tax authority should not and, under the U.S. Constitution, cannot extend beyond their borders to reach those without a "physical presence" within the taxing state. All, *amicus'* members, however, agree there have been significant and rapid changes in the manner commerce is conducted nationally and globally since *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504, U.S. 298 (1992). With the enhanced connectivity capabilities of the Internet, businesses no longer need to be large to have customers anywhere in the United States or the world.

Mere sales, however, have never been sufficient to establish "substantial nexus" under the Commerce Clause, or even to establish the necessary "minimum contacts" under the Due Process Clause. Some states, however, have created statutory "nexus" thresholds based on little more than sales. Other states, purporting to interpret this Court's precedent in light of changing markets have expanded their jurisdictional reach through third parties by concepts such as "attributional," "affiliate," or "click-through" nexus. The result is a patchwork of jurisdictional nexus standards, producing the confusion and uncertainty this Court's "bright line" test for "substantial nexus" in *Quill* was intended to avoid.

Amicus' membership has a significant interest in the Court's determination of the standard for state tax jurisdictional reach, whatever it might be, in light of the substantial changes in the way interstate commerce is conducted since this Court last considered the matter in 1992 (*Quill*). Without the Court's updated guidance, businesses are subject to unpredictable and potentially retroactive assessments as a result of inconsistent state rules. The uncertainty significantly burdens interstate commerce and the compliance costs for multistate businesses.

STATEMENT OF THE CASE

The Petitions concern a decision by the New York Court of Appeals upholding the State's expanded use tax collection authority against a challenge that it violated the Commerce Clause[2] and the Due Process Clause[3] of the United States Constitution. *Overstock.com, Inc. v. New York State Dept. of Tax'n and Fin.*, 20 N.Y.3d 586, 987 N.E.2d 621 (2013).

Under New York law, "vendors" collect and remit sales or use tax on sales of taxable goods and services to New York residents. N.Y. TAX LAW §§1131(1), 1132(a)(1). In 2008, the New York Legislature added N.Y. TAX LAW §1101(b)(8)(vi) to create a *presumption*, that a seller who (1) enters into an agreement with a New York resident under which the resident "directly or indirectly refers potential customers, whether by link on an internet website or otherwise, to the seller" and which provides the New York resident "a commission or other consideration" for the referrals; and (2) has gross receipts over the previous four quarters from sales to New York customers referred to the seller that exceed ten thousand dollars," is a "vendor" subject to sales and use tax collection for sales to customers in the State.

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[2] U.S. CONST. art. I, § 8, cl. 3.

[3] U.S. CONST. amend. XIV.

The "presumption" can only be overcome if a seller submits "proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question." *Ibid.*

Petitioners are Internet retailers and have no physical presence in New York. Their New York customers order products through Petitioners' web sites. The only contact Petitioners have with their customers in New York is through the Internet (including electronic mail), by phone, or by common carrier. Petitioners contract with owners of websites, some of whom reside within New York, to place passive "links" on their websites which direct users to Petitioners' websites where they can make purchases from Petitioners.

Petitioners argue that the New York statute violates the "bright-line" "physical presence" requirement of the Commerce Clause required by this Court in *Quill*. New York's highest Court, however, found that the "physical presence of resident website owner[s]" was sufficient to sustain the statute because the websites of many resident website owners are "geared toward predominantly local audiences" and such website owners were compensated by encouraging others to "click-through" their online links to Petitioners' websites which the Court equated to having "established an in-state sales force." *Overstock.com,* 20 N.Y.3d at 595.

Petitioners also challenged the statute as violating the Due Process Clause by creating a presumption that is effectively irrebutable. The court sustained the statute against this challenge as well, noting that the New York Department of Taxation and Finance established a methodology for rebutting the presumption, and while "[o]btaining the necessary information [to rebut the presumption] may impose a burden on the retailers, inconvenience does not render the presumption irrebutable." *Id.* at 597.

SUMMARY OF ARGUMENT

Nearly two centuries of judicial precedent have recognized that the Commerce Clause is more than an affirmative grant of power to Congress; it includes an inherent restriction on state power even in the absence of Congressional action. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Chief Justice Marshall articulated the principal rationale for the limit in *Brown v. Maryland*, 25 U.S. 419, 448-49 (1827): "[T]he taxing power of the States must have some limits…" While the scope of the Commerce Clause's reach has certainly varied in the intervening years, Justice Marshall's basic premise has endured for the simple reason that state interference with interstate commerce was the chief contributor to national disharmony after the revolution and the immediate cause for the constitutional convention.[4] "The very purpose of the Commerce Clause [is] to ensure a national economy free from... unjustifiable local entanglements." *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 760 (1967).

[4] *See Gibbons*, 22 U.S. (9 Wheat.) at 223 – 225 (Johnson, J., concurring). "For a century, the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce which they had so long been deprived of and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures from which grew up a conflict of commercial regulations destructive to the harmony of the States and fatal to their commercial interests abroad. This was the immediate cause that led to the forming of a convention."

The "dormant" Commerce Clause standard is a four part test: (1) Does the activity taxed have a "substantial nexus" with the taxing state? (2) Is the tax fairly apportioned? (3) Does the tax discriminate against interstate commerce? And (4) Is the tax fairly related to services the state provides the taxpayer? *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

In *Quill*, this Court further clarified *Complete Auto's* "substantial nexus" requirement by reaffirming the principle, established 25 years earlier in *Bellas Hess,* that the Commerce Clause limits State taxing authority to those business enterprises which establish a "physical presence" in the taxing jurisdiction. *Quill,* 504 U.S. at 301-11.

The principal rationale for adhering to the *Bellas Hess* "bright line rule" of requiring a seller to have a physical presence in the taxing state was that it "encourages settled expectations, and in doing so, fosters investment by businesses and individuals. . . the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry." *Id.* at 317.

As noted by the New York Court of Appeal in this case, however, "[t]he world has changed dramatically in the last two decades" since this Court decided *Quill*. *Overstock.com,* 20 N.Y. at 595. The States have addressed these changes since this Court last considered the "physical presence" standard by pushing the boundaries of their tax jurisdiction. Through judicial, legislative, and administrative action, states have adopted expansive nexus theories with ever more attenuated links to the physical presence of the out-of-state retailer. The present controversy is just one variant of this trend, where states have used the commercialization of the internet as justification to bend *Quill's* bright-line to its breaking point.

The result is a patch-work of State tax jurisdictional standards based on competing assumptions about the application of this Court's precedents to new economic realities. The resulting confusion has revived the "quagmire" of "controversy and confusion" in the "application of constitutional principles to specific state statutes" that this Court's ruling in *Quill,* and before it in *Bellas Hess*, was intended to resolve. *Quill*, 504 U.S. at 315-316, citing *Northwest States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959).

The New York Court of Appeals decision should be reviewed by this Court to address this uncertainty and a growing impediment to our national economic health. Whether the Court's answer is to redefine dormant Commerce Clause standards or reaffirm *Quill's* and *Bellas Hess'* "bright line" physical presence standard, this Court's guidance is needed to avoid further uncertainty and litigation.

REASONS FOR GRANTING THE PETITION

I. The World has Changed.

In 1992, when this Court handed down its decision in *Quill*, "remote sellers" were largely mail-order based retailers who "solicit[ed] business through catalogs and flyers, advertisements in national periodicals, and telephone calls." *Quill*, 504 U.S. at 302. Delivery of their merchandise was achieved "by mail or common carrier from out of state locations." *Id.* at 302.

The combination of the unprecedented connectivity capabilities of the Internet, the exponential growth of computer processing power, and ever expanding network capacity has substantially altered the ability of remote sellers to engage with new customers. No longer must remote sellers rely on catalogs to display their products to consumers in distant locations; now remote sellers can simply create a website on the Internet where consumers from around the globe can browse, place orders, and have the product shipped to them by common carrier (or with digital goods, instantaneously downloaded to the purchaser's computing device) wherever they might be located.

While physical presence is largely irrelevant for commerce conducted via the Internet, has it alone necessitated a change in Justice Marshall's basic premise that this Court has adhered to for nearly two hundred years? Does it necessitate abandoning this Court's "bright-line" physical presence standard that states must respect before attempting to exercise tax jurisdiction?

States justifying their expansion of nexus standards are quick to note that these same technological improvements are what have essentially eliminated any significant burden on interstate commerce created by forcing remote sellers to collect and remit their sales tax. Similar arguments were raised in *Bellas Hess*[5] and *Quill.*[6] These arguments fail to acknowledge, however, that even with the advancements in technology substantial complexity and compliance burdens continue to exist for remote sellers.[7] Moreover, the

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[5] *Bellas Hess*, 386 U.S. at 766 (J.Fortas, dissenting) ("[The majority] vastly underestimates the skill of contemporary man and his machines.")

[6] *Quill,* 504 U.S. 298 at 303. The North Dakota Supreme Court "observed, advances in computer technology greatly eased the burden of compliance with a "'welter of complicated obligations' imposed by state and local taxing authorities."

[7] For example, the taxability determination of a specific product often requires an intimate knowledge of the individual product and can only be made by the seller/manufacturer. That burden magnifies with the increase in tax jurisdictions in which the seller must comply. States also continue to struggle even now with identifying rates based on zip codes due to the myriad of overlapping state and local taxing jurisdictions. There are a myriad of others: assessing use tax on internally produced property; maintaining exemption certificates for each taxing jurisdiction; locally administered sales and use tax regimes; treatments of returns, drop-shipments, bad debt allowances, electronic payment rules, filing methodologies, and multiple audits are not a few but hardly exhaustive. Even this list does not address the additional complexities raised by the sale of digital goods and on-line services.

fundamental principles animating this Court's adoption of a "bright-line" test in *Quill* and *Bellas Hess* have not changed in the last two decades. These decisions were made to provide certainty to those engaged in interstate commerce grappling with the welter of tax laws promulgated by thousands of tax jurisdictions. Today, thousands of taxing jurisdictions remain, promulgating laws that have made tax compliance as complex as it was in 1992, if not more so. A modicum of certainty has once again eluded taxpayers engaged in interstate commerce and this Court's review of the Petition is necessary to restore it.

The State's arguments that a borderless Internet justifies expanded nexus rules also fails to acknowledge that State sovereignty, so often cited in defense of state action, is itself a physical jurisdictional standard. See *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996) ("Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States"); *Allied-Signal, Inc. Director, Div. of Taxation*, 504 U.S. 768, 769 (1992)("The principle that a State may not tax value earned outside its borders rests on both Due Process and Commerce Clause requirements.")

Ultimately, these questions cannot be resolved without this Court accepting the Petitions. If the Court fails to grant the Petitions, uncertainty will continue to exacerbate interstate commerce, controversy and litigation will continue to grow, and the national economy will be the lesser as a result.

II. The Growing Uncertainty of State Tax Jurisdiction.

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden." *Complete Auto,* 430 U.S. at 279. Neither are States permitted to tax interstate activities except when "the tax is applied to an activity with a substantial nexus with the taxing state." *Id.*

In *Quill*, this Court established two major principles in state tax jurisdiction. First, the requirements of Due Process and the Commerce Clause, while similar and often historically confused, are guided by different objectives and therefore have different standards. Due Process "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill,* 504 U.S. at 306 (citing *Miller Bros. v. Maryland*, 347 U.S. 340, 344-345 (1954)). The "furthest extension of [State tax] power was recognized in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), in which the Court upheld a use tax despite the fact that all of the seller's in state solicitation was performed by independent contractors." *Ibid.* While the protections afforded remote sellers by Due Process are lower than that for the Commerce Clause, Congress cannot abrogate the limits of Due Process on state tax jurisdiction. *Id.* at 305.

Second, the Court reaffirmed the "bright line rule" established 25 years earlier in *Bellas Hess,* that the Commerce Clause limits state taxing authority to those business enterprises which establish a "physical presence" in the taxing jurisdiction.[8] Such a physical presence can be established by in-state property, employees, or sales representatives engaged in "continuous local solicitation." *Quill,* 504 U.S. at 314. "The crucial factor governing nexus [for third party solicitors] 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 Indus. v. Washington State Dept. of Rev*, 483 U.S. 232, 251 (1987).

Applying these standards to the "new economy" characterized by real time communications free of geographic constraints has proven difficult. The foundation for the Court of Appeals' decision here is built on the view that the physical presence standard is an anachronism and the burden placed on remote sellers for sales tax collection is no longer meaningful. "[T]he world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet." *Overstock.com* 20 N.Y.3d at 595. While the Court goes on to note this question "would be for the United States Supreme Court to consider" the lens through which the Court analyzes the case is tainted by its view that the physical presence standard has simply lost its usefulness in an

[8] The *taxpayer's* in-state presence need not be associated with its sales activities in the forum state in order to justify sales or use tax collection obligations. *Nat'l Geographic v. California State Bd. of Equalization*, 430 U.S. 551 (1977).

economy increasingly devoid of meaningful physical boundaries. *Ibid*. *Quill's* physical presence standard while "necessary, it 'need not be substantial. Rather, it must be demonstrably more than a 'slightest presence'." *Ibid*. (citing *Matter of Orvis Co. v. Tax Appeals Trib. of State of N.Y.*, 86 N.Y.2d 165 (1995)).

The Court of Appeals' finding of something more than a "slightest presence", however, comes not from Petitioner's activities *per se* but that of unrelated third parties. "As a matter of constitutional law, *Scripto* and *Tyler Pipe* make it clear that nexus with an out-of-state seller may be established by the activities of unrelated third parties who act on behalf of the seller in the state."[9] What remains unclear is the nature of the relationship that must exist between remote seller and the in-state third party contractor and the extent of the activities that must occur in the taxing state by the third-party to constitute a "physical presence" *for the remote seller*.

The chief criticism of the New York statute at issue in this case is that it treats the activities of unrelated third parties as attributable to remote sellers despite any showing of an agency relationship between them. In both *Scripto* and *Tyler Pipe*, the independent contractors were the agents of the seller and conducting activities on behalf of the remote seller that were substantially more than a passive link on a web page directing Internet traffic to the remote seller's web site.

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[9] Walter Hellerstein, *State Taxation*, ¶19.02[2][a] (3d ed. 2008).

> "[A]s Florida points out, appellant has 10 wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods. The only incidence of this sales transaction that is nonlocal is the acceptance of the order. True, the "salesmen" are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance." *Scripto*, 362 U.S. at 211.

> "The sales representatives in Washington have helped Tyler Pipe, and have a special relationship to that corporation. The activities of Tyler Pipe's agents in Washington have been substantial." *Tyler Pipe,* 483 U.S. at 250.

A number of State Courts have followed this line of reasoning requiring an *agency* relationship between in-state third-party contractors *soliciting* sales on behalf of the remote seller to trigger nexus.[10]

While the Court, "has never suggested that a contractual relationship with an unrelated third party in and of itself can provide the state with a basis for asserting jurisdiction over an out-of-state

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[10] *AT&T Commc'ns of Maryland, Inc. v. Comptroller of Treasury*, 950 A.2d 86 (Md. 2008); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995); *Pledger v. Troll Book Clubs, Inc.* 871 S.W.2d 389 (Ark. 1994); *Mississippi State Tax Comm'n v. Bates*, 567 So.2d 190 (Miss. 1990); *Bloomingdale's by Mail, Ltd. v. Dep't of Rev.*, 567 A.2d 773 (Pa. Commw. Ct. 1989).

taxpayer"[11] some Courts have found mere contractual relationships sufficient if the in-state activity constituted a continuing solicitation of sales on behalf of the remote seller.[12]

The New Mexico Supreme Court, however, has gone further than even New York, recently holding that "the case law does not require the in-state actor to have any particular relationship to the out-of-state taxpayer, so long as the in-state actor engages in activities on behalf of the taxpayer." *New Mexico Taxation and Revenue Department v. BarnsandNoble.com LLC*, 2013-NMSC-023, 303 P.3d 824, (2013). The Court noted that the Commerce Clause does not even require the in-state contractors to "act as sales agents" for the remote seller. *Id.* at 829. Citing *Tyler Pipe*, the Court held that the only relevant inquiry is whether activities performed on behalf of the remote seller are "significantly associated with [the remote seller's] ability to establish and maintain a market" in the taxing state. *Ibid.*

The uncertainty of the scope of this view, that merely contracting with in-state vendors may be viewed by States eager to require remote seller collection as associated with the remote seller's "ability to establish and maintain a market" in the taxing state, is a significant impediment to interstate commerce. The confusion and controversy

[11] Hellerstein ¶19.02[2][a].

[12] *Scholastic Book Clubs, Inc. v. Comm' of Rev. Servs., 38 A.3d 1183 (Conn. 2012), cert. denied,* 133 S.Ct. 425 (2012).

surrounding the scope of such "attributional nexus" standards is squarely at issue in these Petitions and warrants this Court's review.

III. State Tax Jurisdiction is of National Importance.

The free flow of commerce among the states is woven into the fabric of our nation. The explosion of commerce conducted online over the last twenty years has changed the face of interstate commerce. Given the entirely new world of digital products (*e.g.*, games, movies, music, and software) and online services (e.g., the whole array of "cloud" services), interstate commerce looks significantly different than it did twenty years ago when this Court last opined on the application of the "physical presence" standard. Some things, however, remain fundamentally the same. Physical goods ordered over the internet travel on trucks, trains, and airplanes across state lines to people, who, twenty years ago, would have initiated the same process through a catalog like the one at issue in *Quill*.

State taxing structures, however, have not kept pace. Their complicated and conflicting rules and obligations for sellers have become more burdensome, not less, particularly as they have attempted to extend their reach into sales of services and digital products.[13] While computers have eased compliance in some areas, the burdens created by

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[13] *See* What's Wrong With Taxing Business Services, COUNCIL ON STATE TAXATION (April 4, 2013) *available at* http://cost.org/WorkArea/DownloadAsset.aspx?id=83841

state tax systems are far from trivial, and—as this case clearly attests to—often require the assistance of the ablest accountants and attorneys. The Court need look no further than the streamlined sales and use tax agreement[14] (an effort among some states to collectively reduce the burdens on remote seller use tax collection) to see the complex compliance requirements – even when made more uniform – that are imposed by the existing sales and use tax regimes on those businesses that engage in interstate commerce.[15] Add to this complexity the number of small and medium sized business that are now engaged in commerce conducted via the Internet and the burden of uncertainty and complexity on interstate commerce becomes clear.

The New York statute at issue in the Petition raises important questions on the application (and ongoing vitality) of the limitations on state tax jurisdiction our founding fathers engrained into our constitutional system. As more states enact laws seeking to narrow or simply ignore *Quill's* application, it is critically important to the health of the national economy that this Court articulate the proper constitutional standard applicable to state tax authority. Although much has changed in the twenty years since *Quill* was decided, the need for certainty as to the reach of state taxation has not.

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[14] Streamlined Sales & Use Tax Agreement (May 24, 2012) *available at* http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205-24-12.pdf.

[15] The Agreement alone is 204 pages.

Much of the uncertainty that has arisen since can be addressed through consideration of the case at issue here.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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