Nos. 13-252 & 13-259

IN THE

Supreme Court of the United States

OVERSTOCK.COM, INC.,
Petitioner,
AND

AMAZON.COM LLC AND AMAZON SERVICES LLC,
Petitioners,
v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL.,
Respondents.

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

BRIEF OF NEWEGG, INC. AND THE DIRECT MARKETING ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION AND STATUTES

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amicus Newegg, Inc. ("Newegg") is a leading retailer of computers, components, consumer electronics, software, and electronic games marketed and sold exclusively on the Internet, primarily through the website www.newegg.com. Founded in 2001 by four immigrants pursuing the American dream, Newegg now employs some 2,600 individuals globally, and had sales in 2012 of approximately $2.8 billion. Newegg is headquartered near Los Angeles, California, and provides online shopping experiences to over 22 million customers.

Newegg has been able to grow its business from its inception only 12 years ago as a result of its ability to market to a national audience through the use of the Internet, free from undue and excessive regulation. Using as a guide the bright line, physical presence standard of "substantial nexus" established in *Na-*

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* Newegg, Inc. and the Direct Marketing Association, Inc. represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date and that all parties have consented to the filing of this brief. The parties have provided separate written consents to the filing of this brief. Petitioners Overstock.com, Inc. and Amazon.com, Inc. provided blanket consents to the filing of briefs by *amici*, by letters dated August 27, 2013 and August 20, 2013, respectively, copies of which are on file with the clerk. The Respondent New York Department of Taxation and Finance provided its consent via email to counsel for *amici* on September 10, 2013, as reflected in the letter from counsel for *amici* dated September 11, 2013. A copy of the September 11 letter confirming Respondent's consent is submitted with the brief of the *amici*.

tional Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967), and reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), Newegg can determine whether undertaking certain business activities will create the obligation to collect and remit sales and use taxes in other states. It then weighs the burden of tax collection and remittance in those states against the business objectives associated with the proposed activity.

Under this Court's "physical presence" nexus standard, Newegg is able to assess its state tax obligations because there is a "discrete realm of commercial activity that is free from interstate taxation," *see Quill*, 504 U.S. at 314–15. So long as Newegg limits its activities to this protected zone of commercial conduct, Newegg is assured that it will not be subject to the imposition of use tax collection and remittance requirements by states and localities where it lacks a physical presence.

Without such clarity, Newegg would be forced to speculate as to its tax obligations and run the risk of inadvertently establishing nexus, with the consequence of incurring substantial liability for the use tax that is owed by its customers, but that Newegg, as a retailer, did not collect from these consumers at the time of sale. Although sales and use taxes are in the first instance an obligation of the purchaser of the products, the retailer is ultimately responsible and liable for payment of the use tax to the states where it has nexus, if the retailer did not collect the tax from its customers. In order to avoid this potential exposure, Newegg would likely forego the business activities under consideration.

Amicus The Direct Marketing Association, Inc. ("DMA") is a not-for-profit corporation with headquarters in New York, New York and offices in Washington, D.C. Founded in 1917, the DMA is the leading trade association of businesses and nonprofit organizations using and supporting multichannel marketing methods, with approximately 1,600 members from all fifty states. The DMA has members that market their products directly to consumers via catalogs, print advertisements, broadcast media, and the Internet. There are numerous DMA members that, like Newegg, lack any facilities, employees or other physical presence in New York and, as a result, do not collect New York sales or use tax on their sales to residents in the state. Just as with Newegg, the bright line physical presence test has permitted the DMA's members to judge with relative certainty the tax consequences of undertaking various activities involving states where they have not previously collected state and local sales and use taxes.

Newegg and many DMA members employ a variety of marketing strategies, including the dissemination of Internet advertising displayed by operators of other websites (referred to as "publishers" or, alternatively, "Internet affiliates"), to reach consumers located throughout the nation and, indeed, the world. The effect of the decision of the New York Court of Appeals in *Overstock.com, Inc. v. New York Dep't of Taxation and Fin.*, 20 N.Y.3d 586, 987 N.E.2d 621 (2013), is to create a gray zone of uncertainty for Newegg and DMA members, and thereby discourage these retailers from engaging in certain marketing activities, lest they become liable for huge use tax assessments on sales to residents of New York and of other states that have adopted statutes similar to the New York "click through nexus" statute upheld by the Court of Appeals.

INTRODUCTION

As the Court emphasized in *Quill*, one of the principal virtues of the bright line physical presence rule is that it promotes "settled expectations" and allows for planning and business investment by companies doing business in interstate commerce. *Quill*, 504 U.S. at 315–16. Thus, Newegg and DMA members have been able to rely upon *Quill's* bright line standard when engaging in new marketing initiatives through the Internet, including Internet affiliate advertising. The presumption contained in the New York click through nexus law decreases such benefits, forcing Newegg and other retailers to curtail and even discontinue interstate business activities. Moreover, the likelihood that similar presumptions will be adopted in multiple jurisdictions creates the prospect of precisely the kind of excessive burdens on interstate commerce that the physical presence rule of *Quill* is designed to prevent.

1. Petitioners Overstock.com, Inc., Amazon.com, Inc., and Amazon Services LLC, have requested a writ of certiorari to the Court of Appeals of New York for review of its decision upholding the constitutionality of New York Tax Law § 1101(b)(8)(vi). *Overstock.com, Inc. v. New York Dep't of Taxation and Fin.*, 20 N.Y.3d 586, 987 N.E.2d 621 (2013). Petitioners challenged the New York statute on the grounds that it violates both the Commerce Clause and Due Process Clause of the United States Constitution.

The New York Court of Appeals rejected both claims. With regard to the Commerce Clause, the Court explained that, under the statute, a retailer that enters into agreements for advertising on the websites of New York publishers is "deemed to have established an in-state sales force." 20 N.Y.S.3d at 595. The Court of Appeals also determined that the presumption of solicitation by in-state publishers contained in the statute passes constitutional muster under the Due Process Clause, because the Court found it rational to presume that New York Internet affiliates who are compensated by retailers on a commission basis will actively solicit friends, family and other individuals in New York in order to increase referrals to the retailer. *Id.* at 597. The Court rejected the Petitioners' argument that the statutory presumption is effectively irrebuttable, citing a procedure outlined by the New York Department of Taxation and Finance in a technical service bulletin issued in connection with the statute. *Id.* (referencing the "contractual prohibition and annual certification" requirements described in Department of Taxation & Finance Memorandum No. TSB-M-08(3.1)S (June30, 2008)).

The Court of Appeals' understanding and interpretation of the statutory presumption contained in the New York law is at the core of its rulings on each of Petitioners' constitutional claims. The presumption violates the due process rights of retailers, inasmuch as it has the effect of shifting the burden of proof regarding nexus onto the retailers and thereby indirectly narrowing the zone of constitutionally protected interstate business activity under the Commerce Clause. Newegg and the DMA are concerned that, if allowed to stand, the Court of Appeals' decision will curtail commercial activity protected for decades under the Commerce Clause (*i.e.,* advertising in interstate commerce), and embolden additional states to employ improper statutory presumptions to circumvent established limitations on state taxing power.

2. The Internet advertising arrangements at the core of the Petitioners' challenge to the New York click through nexus statute represent a modern form of traditional interstate marketing, designed to maximize the effectiveness of advertising dollars spent. Traditionally, retailers have struggled to evaluate the efficacy of their advertising investment, creating inevitable inefficiency and waste. As pioneering retailer John Wanamaker is credited with explaining: "Half of money I spend on advertising is wasted; the trouble is I don't know which half."[2]

While methods for tracking the success of advertisements have long been used offline, Internet advertisers may now arrange to pay publishers of their ads, who are known in the industry as "affiliates," only for promotions that actually generate customer response. Rather than spend advertising dollars on newspaper or magazine ads, with mailing addresses and telephone numbers to enable consumers to request additional information, a retailer can arrange with the operator of a website for the placement of an advertising link, enabling a prospective customer to reach and explore the retailer's website.

In a typical arrangement, a retailer contracts with a publisher/affiliate for display of an advertisement on the publisher's website. The advertisement may be comprised of a retailer's logo, text, or other content together with a hypertext link that connects an Internet user who "clicks" on the advertisement to the retailer's website. Computer technology permits the retailer to determine from which publisher's website a customer has accessed the retailer's website and to set the fee paid to the publisher based on

[2] http://www.quotationspage.com/quotes/John_Wanamaker/

the action of the Internet user in response to the advertisement. For example, fees may be paid based on the act of clicking through to the retailer's website (*i.e.*, "pay-per-click") or as a percentage of completed sales made by the retailer (*i.e.*, commissions).

The flexibility, economic efficiencies, and performance metrics available to retailers using Internet affiliate advertising foster growth for retailers in an international marketplace. New marketing approaches and experiments can be tested at greatly reduced expense and minimal risk. Indeed, such Internet advertising is a prime example of entrepreneurial innovation and the tremendous opportunities resulting from a readily accessible and unencumbered national marketplace.

The benefits of Internet affiliate advertising are not connected to a particular geographic area. The Internet is borderless. Advertisements presented on a publisher's website can be viewed by Internet users anywhere in the world, whether the publisher operates in New York, New Mexico or New Delhi. Conversely, the geographic location of the Internet user is irrelevant to the compensation paid to the publisher. An Internet publisher in New York who is paid for publishing advertisements on a commission basis derives no more compensation from a sale to an Internet shopper in Albany than it does from a sale to an Internet shopper in Albuquerque.

Indeed, in the vast majority of cases, the Internet publisher and Internet user will be strangers to one another. The identity of the user who clicks on an advertisement and accesses the retailer's site is not provided by the retailer to the publisher, and tracking of the Internet user by the publisher is routinely forbidden by retailers in their contracts with affiliates.

As is true for traditional print publishers and broadcasters of offline advertisements that display a phone number or an address for a retailer, Internet affiliates that publish ads containing hypertext links have no further contact with a customer that chooses to contact the retailer through the advertisement. The interaction on the retailer's website occurs entirely between the Internet user and the retailer, with no involvement by the publisher of the advertisement. If the customer chooses to make a purchase, the retailer completes all aspects of the transaction. The affiliate does not receive or transmit customer orders, process customer payments, deliver purchased products, or provide pre–sale or post–sale customer service.

Finally, just as the economic benefits of Internet affiliate advertising enjoyed by retailers are not geographically focused, the harm done by the New York click through nexus statute is likewise not local, but is instead inflicted upon interstate commerce.

Newegg and the DMA are concerned that retailers who are confronted with the prospect that mere passive Internet affiliate advertising may, by operation of the statutory presumption, expose them to liability for uncollected use tax, will choose to abandon such advertising altogether. In fact, the response of numerous members of the DMA to the New York click through nexus law has been to terminate all of their Internet affiliates located in the state, because of the uncertainty of being able to disprove the presumption that the activities of companies who are neither their agents, nor under their control, create nexus.

ARGUMENT

Amici Newegg and DMA agree with the Petitioners that the 2008 amendment to New York Tax Law § 1101(b)(8)(vi) upheld by the New York Court of Appeals improperly infringes upon the zone of protected interstate commerce prescribed by the dormant Commerce Clause, stifling innovation and growth by companies doing business on the Internet. Through an improper legislative presumption, the New York statute is crafted to circumvent these established limits on state tax authority by simply presuming facts the state has not established, and requiring retailers to "prove the negative." As the Supreme Court has long ago made clear, however, a state "may not [through the use of a presumption] interfere with matters withdrawn from its authority by the Federal Constitution." *Bailey v. Alabama*, 219 U.S. 291, 239 (1911). Because the State of New York cannot, consistent with procedural due process requirements, set aside the established constitutional limits on its authority to tax under the Commerce Clause, review by the Supreme Court is required.

I. THE NEW YORK CLICK THROUGH NEXUS STATUTE IMPROPERLY EMPLOYS A LEGISLATIVE PRESUMPTION TO EXPAND STATE TAXING POWER INTO AN AREA OF PROTECTED INTERSTATE ACTIVITY UNDER THE COMMERCE CLAUSE.

The New York click though nexus statute provides, in pertinent part:

> a person making sales of tangible personal property or services taxable under this article ("seller") *shall be presumed to be soliciting business through an independent contractor or*

> *other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller,* if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November. *This presumption may be rebutted by 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.

N.Y. Tax Law § 1101(b)(8)(vi) (italics supplied).

The New York law thus uses Internet affiliate advertising as the basis for its presumption that an out-of-state retailer is engaged in solicitation activities within the state sufficient to satisfy the nexus requirement of the Constitution. In so doing, the statute violates the procedural due process rights of out-of-state retailers, and impermissibly intrudes upon an area of protected commercial activity under the Commerce Clause.

A. The Physical Presence Standard of Nexus Creates a Zone of Protected Activity for Retailers, Free From the Burdens of State Use Tax Collection.

It is well-established that the Commerce Clause restricts the authority of a state to impose undue burdens on interstate commerce. U.S. CONST., Art. 1, Sec. 8, Cl. 3; *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). This inherent limitation upon the power of a state to regulate interstate commerce further requires that "some aspects of trade generally must remain free from interference by the States." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669 (1981); *see also Quill*, 504 U.S at 314–15 (describing the "demarcation of a discrete realm of commercial activity" that is free from interstate taxation or regulation under the bright line, physical presence standard of substantial nexus).

In *National Bellas Hess,* and again in *Quill*, the Court applied these fundamental principles of Commerce Clause jurisprudence to reaffirm that a state may not impose sales and use tax collection obligations on an out-of-state company that lacks a physical presence with the state. In *National Bellas Hess*, the Court invalidated an Illinois statute that purported to require use tax collection by any retailer "[e]ngaging in soliciting orders within this state from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." 386 U.S. at 755 (quoting Ill. Rev. Stat. c. 120, § 439.2 (1965)). In striking down the Illinois tax provision, the Supreme Court upheld the "sharp distinction" established in prior cases between sellers with a physical presence in the state, and those without a presence who reached customers only via interstate commerce. *Id.* at 758. In addition, the Court found that a mere "advertising nexus" between the state and an out-of-state business was insufficient to support the imposition of a use tax collection obligation on mail order sellers with no physical presence in the state. *Id.* and n.11.

In 1992, the Court in *Quill* reaffirmed and applied the bright line physical presence requirement to a North Dakota statute. *Quill*, 504 U.S. at 313–19. In finding the statute violated the Commerce Clause's substantial nexus requirement, the Supreme Court emphasized that the bright line rule of *National Bellas Hess* furthers the ends of the dormant Commerce Clause:

> Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or United States mail."

Id. at 314–15 (brackets in original). The Court found that any "artificiality" at the edges of the bright line, physical presence test is more than offset by a rule that "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes" and encourages settled expectations among companies potentially subject to state tax obligations. *Id.* at 315–16. The New York statute's creation of a presumption moves these lines and upends these expectations. As a result, the statute curtails protected commercial activities.

Among the activities clearly protected under *National Bellas Hess* and *Quill* is interstate advertising by an out-of-state retailer. *See National Bellas Hess*, 386 U.S. at 758 n.11 (rejecting "advertising nexus"); *Quill*, 504 U.S. at 302–04, 313–19 and n.6 (rejecting imposition of tax collection obligation based primarily on advertising in the state). Indeed, as the New York Court of Appeals explained, "no one disputes that a substantial nexus would be lacking if New York residents were merely engaged to post passive advertisements on their websites." *Overstock.com,* 20 N.Y.3d at 596.[3]

The New York Court of Appeals nevertheless determined that N.Y. Tax Law § 1101(b)(8)(vi) properly "deems" the Internet affiliates with websites in New York to be acting as an "in-state sales force" for an out-of-state retailer whose advertisements they display.[4] On that basis, the Court concluded that the

[3] For purposes of the Commerce Clause's substantial nexus test, the manner of compensation paid for an advertisement can have no constitutional significance. The publisher's limited activity (displaying an advertisement) is no different whether the publisher of an online advertisement is paid $50 per day for displaying a retailer's ad, or instead is paid 5% of the purchase price of each sale made to a consumer who clicks on the ad.

[4] The activity of contracting for the posting of a link on a website, which is presumed to be sufficient under Section 1101(b)(8)(vi) to require an out-of-state retailer to collect New York use tax, is markedly different from the activities of in-state salespeople at issue in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), *i.e.*, calling on customers (often face-to-face), maintaining relationships, securing orders, and forwarding them on to the out-of-state retailer for fulfillment. *Id.* at 211. By contrast, Internet affiliates play *no role* whatsoever in a sales transaction beyond the posting of the link.

statute is consistent with the physical presence standard of nexus. The statute thus relies upon commercial activity that is expressly protected by the Commerce Clause, *i.e.*, entering into contracts with New York publishers of websites for the posting of advertisements that refer Internet users to the website of the retailer, via an Internet link, as the basis for presuming that the out-of-state retailer is required to report New York use tax, and then requiring the retailer to rebut the presumption.

The presumption contained in the New York statutes turns the Commerce Clause on its head. This powerful and consequential state law presumption, which restricts a federal constitutional right, has a chilling effect on those merchants availing themselves of the very trade that the Commerce Clause was intended to promote. Moreover, the presumption can only be rebutted by onerous evidentiary burdens, requiring massive documentary submissions obtained from organizations and individuals over whom the retailer has little or no control.

Out-of-state retailers, such as Newegg and numerous DMA members, when considering engaging in Internet advertising, are confronted with the risk of not being able to meet their burden of overcoming the presumption created by the click-through affiliate nexus law, and thereby being subject to substantial use tax assessments – even though it was never established by the state's taxing authorities that these companies had a physical presence in the state, either directly or through soliciting sales agents. The Due Process Clause, however, prohibits a state from doing indirectly what it cannot do directly; therefore, a state cannot create a statutory presumption to avoid a restriction on the scope of state power under the Constitution. *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("The power to create presumptions is not a means of escape from constitutional restrictions.").

B. The Practical Effect of the New York Presumption Has Been To Chill Retailers from Engaging in Protected Advertising Activity.

The negative consequences of the statutory presumption of nexus contained in the New York law are severe. Before choosing to engage in interstate, online advertising activity that even the New York Court of Appeals acknowledges is insufficient to create nexus, retailers have to confront the very real prospect that they will be unable to rebut the presumption of nexus arising from such protected activity. The inevitable and necessary outcome is that protected commercial activity will be chilled. Instead of the assurance of the bright line rule, the retailer must include in the calculus of the relative benefits and costs of interstate marketing the risk that it would not be able to disprove solicitation because of lack of evidence.

The fact that the retailer may be afforded some opportunity to rebut the conclusion that it has a physical presence in the state is scant comfort for a retailer deciding whether to engage in the activity in the first place. Fact finding is an inevitably risky and uncertain process, in any context. As the Court noted in *Speiser*:

> The vice of the present procedure is that, where particular [conduct] falls close to the line separating the [protected] and the [unprotected], the possibility of mistaken factfinding-inherent in all litigation-will create the danger that the legitimate [conduct] will be penalized.

> The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.

357 U.S. at 526 (bracketed language added).

The risks to retailers are even more acute in the context of the New York click through affiliate nexus law. The New York statute creates a presumption, not that the retailer itself is engaged in nexus-creating conduct, but rather that unrelated third-parties – the publishers — engage in local solicitation activities on behalf of the retailer. The retailer, however, cannot control the actions of such third-parties. Affiliates are not the legal agents of the retailers with whom they contract. The publishers are not authorized to represent the retailers and likely have their own reasons for conducting activities that might later be deemed by the Department, or a court, to constitute solicitation sufficient to trigger nexus. *See Overstock.com*, 20 N.Y.3d at 588–89 (Smith, J.)(dissenting) (describing why Internet affiliates would seek to increase visits to their websites). Nor can the retailer compel the publishers to provide it with sufficient evidence to establish that they have not engaged in solicitation on the retailer's behalf.

The problem of the retailer's lack of control over the third-party publishers is compounded by timing. Evidence of non-solicitation must necessarily be collected after the fact. Indeed, even the annual certification process set forth by the Department for rebutting the presumption of nexus contemplates that retailers will seek such certifications each year at year-end, with respect to the preceding year's activity. *See* TSB-M-08(3.1)S. Apart from the obvious problem that unsanctioned, nexus creating conduct may already have occurred when the certificate is requested, there is no guarantee that the retailer will be able to secure certificates from all publishers.

The potential financial consequences to the retailer of being unable to rebut the presumption are severe. The New York sales tax is an obligation of the customer of the retailer. N.Y. Tax Law § 1132(a)(1). Nevertheless, if the retailer fails to collect the tax from the customer, the retailer is made liable for the tax owed by the customer. *Id.* § 1133(a).

Furthermore, the Department's review of whether the retailer's Internet affiliates may have engaged in conduct which the Department considers to be nexus creating may not occur until several years later, when the retailer is audited. There is no statute of limitations for an assessment against a retailer that did not file a tax return, even though the retailer believed it did not have nexus. The retailer, therefore, is exposed to the risk of a huge sales and use tax bill for taxes that were originally due from its customers.

Retailers unwilling to accept these risks have chosen not to engage in even the protected interstate advertising activity. Indeed, many DMA members have already elected to discontinue their affiliate advertising relationships in the state as a result of the New York click through nexus law.

C. The Legislative Presumption Contained in the New York Click Through Nexus Law Violates the Procedural Due Process Rights of Retailers.

Although the method employed by the New York legislature to expand the taxing authority of the State is a legislative presumption, rather than an express classification, that fact only serves to heighten the constitutional concerns with the New York law, rather than alleviate them. By selecting a fact which is acknowledged *not* to be an adequate basis in and of itself for nexus, and attaching to it a presumption that there is other, additional conduct that would fall outside the zone of protected activity, the New York statute runs afoul of established principles of due process.

The New York Court of Appeals scrutinized the presumption contained in the New York click through nexus statute only to determine whether there is a rational connection between the fact demonstrated (the existence of Internet affiliate advertising contracts with New York residents) and the fact presumed (in-state solicitation activity by the affiliates sufficient to satisfy the substantial nexus requirement). Newegg and the DMA agree with Petitioners, and with the dissenting member of the Court of Appeals, that it is not rational to presume that publishers passively displaying advertisements containing website links are also actively soliciting New York customers on behalf of the out-of-state retailer. *Overstock.com*, 20 N.Y.3d at 588–89 (Smith, J.) (dissenting). But the presumption contained in the New York statute suffers from a more fundamental defect.

As a general rule, a state may adopt presumptions to assign or shift the burden of production, and even the burden of persuasion, as it deems appropriate. *Speiser*, 357 U.S. 522. In those cases, due process may typically be satisfied based on the rational relationship standard applied by the Court of Appeals. But there are exceptions to this rule. In cases of constitutional restrictions on state authority, the state necessarily must bear the burden of persuasion.

Over one-hundred years ago, in *Bailey v. Alabama*, 219 U.S. 291 (1911), the Court noted that when the fact presumed by statute falls within the scope of a constitutional restriction on state authority, it violates due process for the state to shift the burden of persuasion. 219 U.S. at 239. In those cases, a state may not, by means of a statutory presumption, "interfere with matters withdrawn from its authority" by the Constitution. *Id.*

The Court later refined the contours of this heightened standard of procedural due process in *Speiser* in the context of a California state constitutional tax exemption for veterans. A California statute disqualified veterans potentially eligible for the tax exemption if they advocated the unlawful overthrow of the government. The statute placed the burden of persuasion on the affected veterans to prove non-advocacy, chilling, as the Court found, the exercise of their rights to freedom of speech under the First Amendment. 357 U.S. at 525–26. The Court concluded that the state could not, through the procedural device of shifting of the burden of persuasion, curtail constitutionally protected free speech. Concluding that the Due Process Clause prohibits a state from doing indirectly what it cannot do directly, the Court held that a state cannot by means of a presumption avoid an established constitutional restriction. *Id.* at 526 ("The power to create presumptions is not a means of escape from constitutional restrictions.").

While not of the same character as individual rights such as liberty and speech, the "structural" restriction on state authority to regulate interstate commerce under the Commerce Clause is likewise deeply rooted in the Constitution and a foundation of our national economy. *See Quill*, 504 U.S at 312–13 (substantial nexus requirement derives from the core objectives of the dormant Commerce Clause and is informed "by structural concerns about the effects of state regulation on the national economy," rather than concerns about fairness to any individual retailer). Since the effect of the New York statute is to chill protected interstate activity by shifting the burden of persuasion concerning nexus, the New York statute suffers from infirmities similar to the California statute in *Speiser*.

Whether the activities of an out-of-state business bring it within the scope of a state's authority to tax is necessarily an issue on which the state bears the burden of persuasion. Simply put, absent substantial nexus, the state lacks the power to tax. "The reason the Commerce Clause includes this limit is self-evident: In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy…" *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777–78 (1992).

As the Court has made clear, the Commerce Clause defines a "discrete realm" of interstate activity that is free from the scope of state taxing power. "The constitutional question in a case such as *Quill Corp.* is whether the state has the authority to tax the corporation at all." *Allied-Signal,* 504 U.S at 778. It is only *after* it is established that a company is present in a state that the state acquires the power to subject to the company to tax obligations. *See MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Department of Revenue*, 553 U.S. 16, 25 (2008) (after it is established that a taxpayer has done business in the state, then the “inquiry shifts from *whether* the state may tax to what it may tax”) (italics added).

The effect of the statutory presumption of Section 1101(b)(8)(vi) is to shift the burden of persuasion regarding the issue of physical presence onto an affected out-of-state retailer, and to require that the retailer disprove taxing authority that the State has never established. The inevitable and negative consequence of the presumption in this case is to infringe upon the zone of constitutionally protected activity under the Commerce Clause, resulting in real and undue burdens on interstate commerce. Retailers have discontinued protected interstate activity rather than take the risk that they will not be able to overcome the presumption that arises by virtue of the protected activity. If the New York statute is allowed to stand, New York will have done indirectly what it cannot do directly; *i.e.* regulate an activity within the zone of protected commercial conduct. As such, the Due Process Clause is violated.

CONCLUSION

Accordingly, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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