No.

IN THE

Supreme Court of the United States

AMAZON.COM LLC AND AMAZON SERVICES LLC,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; ROBERT L. MEGNA, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; AND THE STATE OF NEW YORK,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Commerce Clause prohibits States from imposing sales and use tax collection burdens on out-of-state retailers that lack a physical presence in the taxing state. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 302, 313-15 & n.6 (1992); *accord Nat'l Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 754-55, 758 (1967). Against that "bright-line" physical-presence rule, *Quill*, 504 U.S. at 316, the Court of Appeals of New York in this case upheld New York Tax Law Section 1101(b)(8)(vi), which establishes an effectively irrebuttable evidentiary presumption that out-of-state Internet retailers that have no physical presence in the State—such as Petitioners—are in-state "vendors" and therefore must collect New York sales and use taxes on all of their sales to New Yorkers.

The questions presented are:

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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, David A. Paterson, in his official capacity as the Governor of the State of New York, was a defendant in the Supreme Court of New York. Overstock.com, Inc. was the plaintiff in a constitutional challenge in the Supreme Court of New York that is similar to that brought by Petitioners in this proceeding, was an appellant before the Appellate Division of New York in this proceeding, was an appellant before the Court of Appeals of New York in this proceeding, and has filed with this Court a petition for a writ of certiorari seeking review of the court of appeals' decision in this case.

Pursuant to this Court's Rule 29.6, undersigned counsel state that the parent company of Petitioners Amazon.com LLC and Amazon Services LLC is Amazon Corporate LLC. Amazon.com LLC has the following subsidiaries: (a) AF Retail Services LLC and (b) AmazonFresh LLC. Amazon Services LLC has no subsidiaries. The ultimate parent of Amazon.com LLC and Amazon Services LLC is Amazon.com, Inc. Amazon.com, Inc. has no parent company, and no publicly held company owns 10% or more of Amazon.com, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Amazon.com LLC and Amazon Services LLC respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of New York.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 987 N.E.2d 621. The opinion of the Appellate Division of New York (App., *infra*, 18a-49a) is reported at 81 A.D.3d 183. The opinion of the Supreme Court of New York (App., *infra*, 51a-66a) is reported at 23 Misc. 3d 418.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2013. On June 14, 2013, Justice Ginsburg extended the time for filing the petition to and including August 23, 2013. *See* No. 12A1205. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the Appendix, *infra*, at 67a-68a.

STATEMENT

In this case, the Court of Appeals of New York upheld against constitutional challenge a state law that imposes tax-collection obligations on out-of-state retailers that merely advertise in the State. App., *infra*, 1a-12a. The Commerce Clause, however, prohibits States from imposing such burdens on out-of-state retailers that lack a "substantial nexus" with the taxing jurisdiction. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 313-14 (1992). This Court has held that a substantial nexus exists only if the out-of-state retailer has a "physical presence" in the taxing state, such as a sales force engaging in active solicitation, a plant, or an office, *see id.* at 314-15; advertising in the taxing state, by contrast, does not create a "substantial nexus," *see id.* at 302, 313 & n.6; *accord Nat'l Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 754-55, 758 (1967). The New York statute cannot be reconciled with this settled caselaw.

The statute compounds this constitutional violation by adopting an effectively irrebuttable presumption that an out-of-state retailer has established a sufficient nexus with New York when third-party websites post passive advertisements that include Internet "links" to the retailer's website. But this Court has recognized that "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). New York cannot, consistent with due process, escape the limitations of its taxing authority simply by presuming that those limits have been satisfied. This Court's review is warranted.

1. Petitioners are Internet retailers. *See* Compl. ¶ 4. Petitioners have no physical presence in New York—they do not own property there, do not maintain any New York offices, and do not employ New York personnel. *Id.* ¶¶ 4, 20-21. Neither Petitioners nor anyone working on their behalf perform solicitation activities that are significantly associated with Petitioners' ability to generate sales to customers located in New York. *Id.* ¶¶ 4, 20-21, 26.

New York customers order products through Petitioners' website, www.Amazon.com, and place orders only through Petitioners. Compl. ¶¶ 20-22. The only contact customers have with Petitioners is through the Internet or by phone, mail, or e-mail. *Id.* ¶¶ 20-21. Products sold by Petitioners are shipped directly to customers from fulfillment centers located outside of New York. *Ibid.*

Like many Internet retailers, Petitioners use "Affiliate Marketing" as one method of advertising. Under Affiliate Marketing agreements, Internet retailers compensate some independent New York residents for posting passive advertisements on their websites that include "links" to the retailers' websites. Under Petitioners' version of Affiliate Marketing—called the "Associates Program"—Petitioners pay independent third parties located around the world to post advertisements for the Amazon.com website on the Internet that are not geographically targeted. Compl. ¶¶ 21-22, 25. Thousands of these third parties have New York addresses. *Id.* ¶ 25.

These third parties typically enroll in Petitioners' Associates Program by submitting an application electronically through Amazon's website. Compl. ¶ 21. If the application is accepted, Petitioners grant the third party a revocable license to place one or more different Amazon.com advertisements on that party's website. *Ibid.*; *see also* R.850, 857 (Operating Agreement).

These passive advertisements typically have links enabling visitors to click through to Petitioners' website. Compl. ¶¶ 21-22. These links function as advertisements either for Amazon.com itself or for specific products available on Amazon.com. *See ibid.* Once a visitor to a third party's website clicks through to Amazon.com via the advertisement, any purchase made by that visitor takes place solely through Petitioners, all customer inquiries are handled only by Petitioners, and all products are shipped directly to the customer by Petitioners, their corporate affiliates, or other sellers, without any involvement of the third party or its website. *Ibid.*

Petitioners do not control the activities or content of such third-party websites. R.857 (Operating Agreement). For example, Petitioners do not require the owners of these websites to advertise only for Petitioners. R.715 (Comfort Affidavit ¶ 11). As a result, many of the third-party websites that advertise on behalf of Amazon.com also display other companies' advertisements. *Ibid.* (Comfort Affidavit ¶¶ 11-12). Petitioners simply require third parties who display Petitioners' advertisements on their websites not to "misrepresent or embellish" their relationship with Petitioners. R.857 (Operating Agreement).

As with other forms of advertising—such as that conducted in print, on television, and over radio—the third parties who display Petitioners' advertising links on their websites play no role in Petitioners' sales transactions. Compl. ¶¶ 21-22. They do not solicit sales on Petitioners' behalf, they do not consummate sales on Petitioners' behalf, and they are not authorized to act as Petitioners' agents. *Id.* ¶¶ 20-22. The advertisements posted on these third parties' websites are not geographically targeted, as the Internet is available worldwide.

Petitioners pay third parties on a "pay-per-purchase" basis—that is, when a visitor to the third party's website clicks on the Amazon advertisement (taking the visitor to Amazon.com) and then makes a purchase directly from Petitioners. Compl. ¶ 23.

Petitioners and other Internet retailers are unaware of the independent business activities undertaken by the third-party advertisers that participate in Affiliate Marketing. *See*, *e.g.*, R.714-15 (Comfort Affidavit ¶¶ 8-10). Internet retailers also lack the ability to monitor the activities of each third party's employees. *Ibid.* (Comfort Affidavit ¶¶ 8-10). These entities operate their own websites for a wide variety of purposes and display a vast array of different content. *Id.* at 715 (Comfort Affidavit ¶ 12). As a result, any two websites displaying advertisements will typically be operated in a substantially different way from one another. *See ibid.* (Comfort Affidavit ¶¶ 11-12).

2. Enacted in April 2008, New York Tax Law Section 1101(b)(8)(vi) provides that a seller of taxable goods "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 . . . directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller." N.Y. Tax Law § 1101(b)(8)(vi). The statute purports to make that presumption rebuttable with "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 [C]onstitution." *Ibid*. If a seller cannot rebut that presumption, however, then it is deemed a "vendor" under the statute and therefore must collect sales and use taxes on its New York sales. *See id.* §§ 1131(1), 1101(b)(8)(i)(C)(I).

a. Under Section 1101(b)(8)(vi), Petitioners and other out-of-state Internet retailers that employ Affiliate Marketing are presumed to have engaged in constitutionally sufficient (for Commerce Clause purposes) "solicitation" of New York customers and, thus, must collect New York sales and use taxes on all of their sales to New Yorkers. Failure to satisfy these tax-collection obligations would subject Petitioners and other similarly situated vendors to criminal and civil penalties. N.Y. Tax Law §§ 1145, 1817.

Shortly after enactment of Section 1101(b)(8)(vi), Petitioners filed suit in New York state court alleging that the statute is facially unconstitutional under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. *See* R.20 (Complaint); R.743-44 (Summons). Petitioners argued (Compl. ¶¶ 42-44) that Section 1101(b)(8)(vi) violates the Commerce Clause by imposing tax-collection obligations on out-of-state Internet retailers that—because they do not have a physical presence in New York—lack the requisite "substantial nexus" to that State. *Quill*, 504 U.S. at 313-14. Petitioners further contended that the statute attempts to camouflage this unconstitutional expansion of taxing power through an irrational and effectively irrebuttable evidentiary presumption that treats out-of-state Internet retailers who pay for Internet advertising in New York as having the equivalent of an on-the-ground, in-state sales force soliciting business from in-state residents for the retailers. Compl. ¶¶ 48-49. This presumption, Petitioners maintained, violates the Due Process Clause. *Ibid.*

After Petitioners filed suit, the New York State Department of Taxation and Finance issued two so-called "informational" memoranda addressing Section 1101(b)(8)(vi). The first memorandum, issued in May 2008, purports to clarify that advertising alone will not trigger the statutory presumption. *See* R.824-29 (TSB-M-08(3)S ("First TSB-M")). That memorandum defines "advertisement" narrowly, however, to exclude Affiliate Marketing arrangements, under which retailers compensate third parties for posting passive Internet advertisements that contain links on a pay-per-purchase or commission basis. *See id.* at 825-28 (First TSB-M). The second memorandum, issued in June 2008, maintains that an out-of-state retailer can "rebut" the presumption if it can establish both that (a) a contract exists between the retailer and all of the third parties that post advertisements on the retailer's behalf, prohibiting various "solicitation" activities, and (b) the retailer has collected certifications from all of these third parties stating that they have not, in fact, engaged in solicitation. R.831-32 (TSB-M-08(3.1)S ("Second TSB-M")). The contractual prohibition requires retailers to include, in their Affiliate Marketing and similar contracts, language prohibiting the affiliate "from engaging in any solicitation activities in New York State that refer potential customers to the seller." *Id.* at 831 (Second TSB-M). The certification component requires each third party to submit an annual certification to the retailer stating that it has not engaged in any such solicitation activities that year. *Ibid.* (Second TSB-M).

b. The state trial court dismissed the case for failure to state a cause of action. *See* App., *infra*, 65a-66a. The Appellate Division affirmed the dismissal of Petitioners' facial challenges under the Commerce Clause and Due Process Clause. *See id.* at 47a-48a. In a divided decision, the Court of Appeals of New York affirmed. *See id.* at 1a-17a.

First, the majority concluded that Section 1101(b)(8)(vi) satisfied the "in-state physical presence" requirement under the Commerce Clause. App., *infra*, 8a-9a. Emphasizing the physical presence of the website owners paid under Affiliate Marketing and similar agreements, the majority concluded that, under such agreements, out-of-state retailers "pa[y] New York residents to actively solicit business in" New York. *Id.* at 9a. By agreeing to compensate website owners for posting their advertisements, the court of appeals concluded, retailers covered by Section 1101(b)(8)(vi) effectively create "in-state sales force[s]" that satisfy the physical-presence requirement under the Commerce Clause. *Ibid.* In reaching that conclusion, the court of appeals observed that "[t]he world has changed dramatically in the . . . two decades" since this Court decided *Quill*, and opined that "it may be that the physical presence test is outdated." *Id.* at 8a. "An entity may now," the court added, "have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet." *Ibid.*

Second, the court of appeals held that Section 1101(b)(8)(vi) satisfies due process. The court concluded that the presumption imposed by Section 1101(b)(8)(vi)—namely, that advertising alone establishes that an out-of-state retailer is actively engaging in constitutionally sufficient solicitation of New York customers—is not irrational. App., *infra*, 11a-12a. The court also concluded that the presumption, which on its face can be rebutted only if an out-of-state retailer establishes that no New York-based website owners with whom the retailer had an agreement solicited on the retailer's behalf, was not irrebuttable. *Ibid.* In reaching that conclusion, the court relied on the Second TSB-M, observing that

that memorandum "set[s] forth a method (contractual prohibition and annual certification) through which . . . retailers will be deemed to have rebutted the presumption." *Id.* at 12a.

Judge Smith dissented. In his view, the presumption imposed by Section 1101(b)(8)(vi) "does not make sense." App., *infra*, 14a (Smith, J., dissenting). The statute, he explained, "tries to turn advertising media into an in-state sales force through a presumption," even though "there is no basis for inferring that" owners of those advertising media (*i.e.*, websites) "are actively soliciting for . . . out-of-state retailers." *Ibid.* That presumption, he emphasized, effectively "nullif[ies]" the constitutional requirement "that advertising in in-state media is not the equivalent of physical presence." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

Review is warranted because the decision below raises issues of national importance and conflicts with the express direction of this Court. By upholding a statute that imposes tax-collection obligations on out-of-state retailers based on those retailers' mere display of passive Internet advertisements in the State, the New York Court of Appeals disregarded the "bright-line" physical-presence requirement established by this Court and contravened the settled rule that advertising alone is insufficient to give rise to the "substantial nexus" required under the Commerce Clause. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 313-16 & n.6 (1992); *accord Nat'l Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 754-55, 758 (1967). The court of appeals' decision also conflicts with this Court's due process caselaw by, among other things, upholding Section 1101(b)(8)(vi) even though it attempts an end-run around this

Court's Commerce Clause jurisprudence through an effectively irrebuttable (and hence unconstitutional) evidentiary presumption of in-state solicitation based on mere advertising. *See*, *e.g.*, *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *W. & Atl. R.R.* v. *Henderson*, 279 U.S. 639, 642 (1929).

This case raises issues of exceptional importance because the decision below leaves in place a state law that will significantly and unduly burden interstate commerce, provides a road map for other jurisdictions to inflict similar burdens on interstate commerce, and threatens to sow widespread confusion in an area that is—in the best of times—already "something of a quagmire." *Quill*, 504 U.S. at 315-16 (internal quotation marks omitted). The petition for a writ of certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE PRECEDENTS.

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. This Court has long recognized that the Clause "is more than an affirmative grant of power": "[B]y its own force," the Clause "prohibits certain state actions that interfere with interstate commerce." *Quill*, 504 U.S. at 309 (internal quotation marks omitted). Indeed, "[t]he very purpose of the Commerce Clause was to ensure a national economy free from . . . unjustifiable local entanglements" that can result from burdensome state regulation. *Nat'l Bellas Hess*, 386 U.S. at 760.

A. The "negative sweep" of the Commerce Clause limits state authority to impose tax burdens on interstate commerce. *See*, *e.g.*, *Quill*, 504 U.S. at 309-19; *Nat'l Bellas Hess*, 386 U.S. at 758-60.

1. Although a State may insist that "those engaged in interstate commerce" shoulder "their just share of state tax burden[s]," a state may impose tax burdens on out-of-state businesses only when "the tax is applied to an activity with a substantial nexus with the taxing state." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Under this Court's precedents, an out-of-state retailer has the constitutionally mandated "substantial nexus" with a state *only* if the retailer has a "physical presence" in the state, such as real estate, employees, or sales representatives engaged in "continuous local solicitation." *Quill*, 504 U.S. at 314; *see also*, *e.g.*, *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 210-11 (1960).

In *National Bellas Hess*, for example, this Court held that the Commerce Clause prohibited the State of Illinois from requiring an out-of-state mail-order firm to collect use taxes on items sold to Illinois residents. In reaching that conclusion, the Court emphasized that it "ha[d] never held that a State may impose" tax-collection obligations "upon a seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758. Before allowing a state to "deputize an out-of-state retailer as its collection agent for a use tax," the Court explained, the retailer must have a much stronger connection to the taxing state. *Id.* at 757.

In cases upholding "the power of a State to impose" tax-collection obligations on "an out-of-state seller," the seller had at least a physical presence in the taxing state—the seller's "sales were arranged by local agents in the taxing State," the seller "maintained local retail stores," or the seller had salesmen "conducting continuous local solicitation" in the taxing state. *Nat'l Bellas Hess*, 386 U.S. at 757-58 (discussing *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 (1939), *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941), and *Scripto*, 362 U.S. at 211) (internal quotation marks omitted). Those cases, the Court emphasized, reflect a "sharp" and "basic" distinction "between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 758. Refusing "to repudiate" that distinction, the Court held that a connection through common-carrier or U.S. mail was inadequate to authorize the State to impose tax-collection obligations on the out-of-state retailer. *Ibid.*

This Court reaffirmed *Bellas Hess*'s bright-line physical-presence rule 25 years later in *Quill*. In that case, the Court invalidated a state law that required out-of-state companies to pay use taxes on goods they sold for use in the State of North Dakota, even when the companies had neither outlets nor sales representatives in the state. 504 U.S. at 309-19. Because those companies lacked a physical presence in the taxing jurisdiction, the Court held, the Commerce Clause barred North Dakota from subjecting them to the tax. *See ibid.*

2. An out-of-state retailer may have a "physical presence" in a state if it has real estate there, employees in the state, or sales representatives engaged in "continuous local solicitation" in the state. *Quill*, 504 U.S. at 314; *Scripto*, 362 U.S. at 211. In addressing when physical presence can be established

through solicitation activities performed by third parties, the Court has made clear that solicitation alone does not automatically create a substantial nexus. Rather, solicitation by third parties creates a nexus only if it is "significantly associated" with the out-of-state retailer's ability to do business in the taxing state. *Tyler Pipe Indus., Inc.* v. *Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (internal quotation marks omitted).

Mere advertising in the taxing state, by contrast, does not amount to "solicitation" and therefore does not create a substantial nexus. *Quill*, 504 U.S. at 302, 304, 313 n.6; *see also Nat'l Bellas Hess*, 386 U.S. at 754-55, 758; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 347 (1954). Instead, solicitation requires direct, in-person local sales-support activities that include involvement in the actual sale. *See Tyler Pipe*, 483 U.S. at 249-51; *Scripto*, 362 U.S. at 210-11.

B. Section 1101(b)(8)(vi) directly violates the bright-line physical-presence rule established in *Bellas Hess* and *Quill*. The statute imposes tax-collection obligations on out-of-state retailers based only on their contractual relationships with independent, non-employee third parties that merely advertise the retailers' products or services. Like the statute invalidated in *Quill*, Section 1101(b)(8)(vi) impermissibly imposes those burdens without regard to whether retailers have any physical presence in New York, such as real estate, employees, or sales representatives engaged in continuous local solicitation. *Quill*, 504 U.S. at 314. And the Internet-only connection between retailer and buyer required under Section 1101(b)(8)(vi) is akin to the "connection . . . by common carrier or the United States mail" deemed insufficient in *Bellas Hess*. 386 U.S. at 758.

1. The court of appeals emphasized the physical presence not of Petitioners and other out-of-state Internet retailers, but instead of New York "resident website owner[s]," concluding that Section 1101(b)(8)(vi) appropriately "deem[s]" an out-of-state retailer "to have established an in-state sales force"—and one that "actively solicit[s] business" in New York—by entering Affiliate Marketing agreements with New York residents to advertise in New York. App., *infra*, 8a-9a. But this reasoning ignores the fact that the third-party website operators are not employed by Petitioners; instead, they are an independent means by which Petitioners advertise. By upholding tax-collection obligations based on out-of-state retailers' mere advertising in the State, the court of appeals thus contravened the rule that advertising alone is insufficient to give rise to the "substantial nexus" required under the Commerce Clause. *Quill*, 504 U.S. at 313-15 & n.6; *Nat'l Bellas Hess*, 386 U.S. at 754-55, 758.

Although the court of appeals stated that it was "bound" by this Court's decisions in *Bellas Hess* and *Quill*, its holding and reasoning depart from those decisions and accord instead with the court of appeals' own view that "[t]he world has changed dramatically in the last two decades" and that the "physical presence test" may now have become "outdated." App., *infra*, 8a. Even if the court were correct that *Bellas Hess* and *Quill* rest on "moth-eaten foundations," *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997), that would provide no basis for departing from them.

Even more significantly, purportedly dramatic changes in the world would not warrant replacing the physical-presence rule: Indeed, in *Quill*, this

Court squarely rejected a similar state-court effort to evade the physical-presence rule in light of purportedly dramatic changes in the world. *See Quill*, 504 U.S. at 301 (refusing to overrule the physical-presence rule and thus rejecting the North Dakota Supreme Court's decision not to follow *Bellas Hess* on the ground that "the tremendous social, economic, commercial, and legal innovations of the past quarter-century ha[d] rendered [*Bellas Hess*'s] holding obsolet[e]" (internal quotation marks omitted; last alteration in original)); *see also id.* at 314-19 (refusing to overrule *Bellas Hess*). The Court did so even though it recognized that the physical-presence rule was in some respects "artificial," and even though the Court did not deny that the world had changed in the decades since *Bellas Hess* was decided. Review is warranted so that this Court can make clear once more that the constitutionally grounded "clear rule" reaffirmed in *Quill* (*id.* at 315) continues to bind the States, even if "[t]he world has changed dramatically." App., *infra*, 8a.

2. Even if the activities of Petitioners and other out-of-state retailers could be deemed to have moved beyond mere advertising and into solicitation—and they cannot—Section 1101(b)(8)(vi) would still violate the Commerce Clause. There is simply no way to ensure, as the statute requires, that such solicitation is "significantly associated" with the retailer's ability to do business in the State. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). And, of course, the advertisements posted on third parties' websites are readily viewable worldwide and are not geographically targeted towards New York or any other specific state.

In *Tyler Pipe*, for example, in-state sales representatives "acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders," had "long-established and valuable relationships with Tyler Pipe's customers," and "[t]hrough sales contacts, the representatives maintaine[d] and improve[d] the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe." 483 U.S. at 249 (internal quotation marks omitted). The representatives provided Tyler Pipe with "virtually all" of its information regarding its Washington market—"including: product performance; competing products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington market." *Id.* at 250 (internal quotation marks omitted). In other words, Tyler Pipe could not have done business in Washington without its local representatives.

Similarly, this Court held in *Scripto* that a substantial nexus existed where an out-of-state company hired several "salesmen" who traveled throughout the State and were "actively engaged in [the State] as . . . representative[s] of [the company] for the purpose of attracting, soliciting and obtaining" in-state customers. 362 U.S. at 209, 211 (internal quotation marks omitted). The team of salesmen in *Scripto* engaged in "continuous local solicitation," and "[t]he only incidence of th[e] sales transaction that [was] nonlocal [was] the acceptance of the order." *Id.* at 211.*

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* *See also Gen. Trading Co.* v. *State Tax Comm'n*, 322 U.S. 335, 337 (1944) (substantial nexus created by seller's engagement of in-state sales agents for the purpose of establishing and maintaining a local market); *Felt & Tarrant Mfg. Co.*, 306 U.S.
[Footnote continued on next page]

By contrast, the activities of New York residents who post advertisements on their websites are not "significantly associated" with Petitioners' ability to do business in New York. The advertisements have no direct connection with New York except that they may have been posted by a third party with a New York address. In contrast to the local, in-person sales representatives in *Tyler Pipe* and *Scripto* who were targeting in-state customers, the websites operated by New York residents merely refer customers to Petitioners' website and have no involvement in actual sales transactions. *See* Compl. ¶¶ 21-22. Unlike the local sales force in *Tyler Pipe* and *Scripto*, moreover, an Internet advertisement posted on a New York resident's website has no effect on Petitioners' ability to maintain a New York market for its sales. The advertisement is posted on the Internet, is not geographically targeted, and can be viewed by anyone from anywhere in the world.

The decision below conflicts with this Court's Commerce Clause cases requiring that in-state solicitation activity be "significantly associated" with an out-of-state retailer's ability to do business in the State. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). This Court's review is warranted.

3. The decision whether to abandon the physical-presence rule is one that Congress "has the ultimate power to resolve" and one that Congress "may be better qualified to resolve" than are the courts. *Quill*,

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[Footnote continued from prior page]
at 64-68 (substantial nexus created by seller's engagement of in-state sales agents for the purpose of establishing and maintaining a local market).

504 U.S. at 318. This Court accordingly emphasized in *Quill* that its decision left Congress "free to decide whether, when, and to what extent the States" may impose tax-collection burdens on interstate retailers. *Ibid.* The court of appeals' decision below disregards the deference that this Court afforded Congress in *Quill*. Certiorari is warranted.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENTS.

The court of appeals' decision also warrants review because it conflicts with this Court's due process precedents.

A. Section 1101(b)(8)(vi) violates the due process principle that "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Speiser*, 357 U.S. at 526. As explained above, the statute violates the bright-line physical-presence rule established by this Court. *See supra* Part I. The State has attempted to circumvent that rule by camouflaging a blatant violation of the Commerce Clause with an evidentiary presumption. That presumption transforms mere advertising—which, under this Court's cases, does not give rise to a constitutionally adequate substantial nexus—into effectively dispositive proof that an out-of-state Internet retailer is actually engaged in constitutionally sufficient solicitation of New York customers, just as if it were going door-to-door and encouraging New Yorkers to purchase goods from Petitioners and other out-of-state retailers.

But "[t]he power to create presumptions is not a means of escape from constitutional restrictions." *Speiser*, 357 U.S. at 526 (internal quotation marks omitted). This Court has emphasized that state laws "creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973). A statutory presumption violates due process when—even if it purports to be rebuttable—the statute "operates to deny a fair opportunity to repel it." *W. & Atl. R.R.*, 279 U.S. at 642.

Section 1101(b)(8)(vi) runs afoul of that principle. The statute requires out-of-state Internet retailers to prove an impossible negative: that all of the in-state residents posting the retailer's advertising links on their own websites are taking no other affirmative steps to "solicit" customers on the retailer's behalf. Unless the retailer is able to collect and adduce this proof, the statute forces the retailers to collect taxes on all of its New York sales, including sales to customers who were not referred to the retailer through a third-party advertising link. N.Y. Tax Law § 1101.

To see that the burden imposed by the statute is effectively insurmountable, consider how a retailer would attempt to rebut the statutory presumption. A retailer would first need to identify all third-party residents compensated to post links on their websites—a group comprising potentially thousands of persons and companies maintaining a physical address in New York, maintaining a place of business in New York, incorporated under New York law, or doing business in New York. 20 N.Y. Comp. Codes R. & Regs. tit. 20, § 526.15; R.825-26 (First TSB-M). If the retailer could actually identify all New York residents with whom it has advertising relationships, it would still have to locate and gather a wide variety of evidence regarding the day-to-day activities of thousands of third parties, their websites, and all of their employees and members. If such evidence could somehow be collected, the retailer would *then* need to determine on whose behalf (if any) the website was communicating to the public. That itself is a practical impossibility because third-party affiliate websites exist for a wide variety of purposes—not just to advertise, and certainly not just to advertise on behalf of out-of-state retailers—and many of them have advertising relationships with many different in- and out-of-state retailers.

Even if a retailer could gather all of this evidence and make the requisite judgment calls, it *still* would not have enough evidence to actually *prove* the *lack* of solicitation by a preponderance of evidence in a judicial or administrative proceeding—as Section 1101(b)(8)(vi) requires in order to rebut the presumption. A retailer would have to prove that *none* of the third parties, their employees, or their members reached out to New Yorkers on behalf of the retailer through phone calls, e-mails, flyers, newsletters, in-person promotions, or other undefined activities (such as a post on Facebook, Twitter, or another social media outlet) that could constitute "solicitation" as New York interprets that term. R.831 (Second TSB-M).

This intractable web of burdens renders the statutory presumption effectively irrebuttable. The observation this Court made in *Speiser* v. *Randall* applies equally here: "How can a claimant . . . possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, . . . this procedural device must necessarily produce a result which the State could not command directly." 357 U.S. at 526.

B. The court of appeals disagreed that the presumption was irrebuttable because the Second TSB-M has "set forth a method (contractual prohibition and annual certification) through which . . . retailers will be deemed to have rebutted the presumption." App., *infra*, 12a. The contractual prohibition requires retailers to include, in their Affiliate Marketing and similar contracts, language prohibiting the affiliate "from engaging in any solicitation activities in New York State that refer potential customers to the seller." R.831 (Second TSB-M). The certification component requires each third party to submit an annual certification to the retailer stating that it has not engaged in any solicitation activities that year. *Ibid.* (Second TSB-M).

That method does not salvage the statute, however, because the statutory presumption remains effectively irrebuttable. Essentially no New York resident advertiser could comply with the contractual prohibition. Under Section 1101(b)(8)(vi), New York resident advertisers may not—without triggering tax-collection obligations for the out-of-state retailer—do anything that might "indirectly refe[r]" potential customers to the retailer's website through an Internet link "or otherwise." Thus, for example, a New York-based web company could *inadvertently* violate the contract prohibition as follows: (1) an employee of the company sends his sister (who lives in New York) an e-mail containing the company's website address; (2) the employee's sister reads the e-mail and goes on the Internet to learn about her brother's company; (3) while on the website, the employee's sister sees a book that interests her; (4) she clicks on the Amazon.com link and buys that book from Amazon; and (5) as a result, Amazon compensates the company with a percentage of the sale. In that scenario, the company has "indirectly" referred a New York customer to Amazon, and in doing so has violated the contractual prohibition. Because there is no limit to the types of activities that could constitute an impermissible referral, no reasonable third-party website could be expected to submit the annual certification. And even if such certifications could be collected, they would afford retailers no relief because, if just a single advertiser engages in "solicitation" then the retailer is responsible for collecting taxes on *all* of its New York sales. *See* N.Y. Tax Law § 1101(b)(8)(vi).

The method relied upon by the court of appeals for concluding that the presumption is rebuttable is thus illusory. Because Section 1101(b)(8)(vi) "operates to deny a fair opportunity to repel" the presumption that it imposes, it cannot be reconciled with due process. *W. & Atl. R.R.*, 279 U.S. at 642. The court of appeals erred in concluding otherwise, and this Court's review is warranted.

III. THIS CASE RAISES CONCERNS OF NATIONAL IMPORTANCE.

The court of appeals' erroneous decision raises several important concerns that warrant this Court's review for at least three reasons.

A. The decision below leaves in place a statute that will significantly and unduly burden interstate commerce. The decision subjects Internet retailers to significant burdens on pain of serious civil and criminal penalties. Indeed, Section 1101(b)(8)(vi) leaves out-of-state retailers who (but for the improper application of that provision) lack a "substantial nexus" with three options: (1) collect taxes on New York sales even though that obligation exceeds the

State's authority under the Commerce Clause; (2) spend time and money to try to muster evidence needed to rebut the presumption, which would be impossible in practice; or (3) halt all advertising in the State that could possibly be deemed a "referral" that would risk triggering the presumption of vendor status. Each of those options is patently inconsistent with *Quill* and will inflict significant harm on interstate commerce—by imposing significant costs, by exacting intractable administrative burdens, or by halting large swaths of commerce altogether.

These issues are of national concern because they have interstate effect and because of the prominent position that New York holds in the national economy. New York is the third largest economy in the country. *See* Bureau of Economic Analysis, United States Department of Commerce, *Widespread Economic Growth in 2012*, *available at* http://www.bea.gov/newsreleases/regional/gdp_state/2013/pdf/gsp0613.pdf (Table 1). Any burdens that New York imposes on interstate commerce will necessarily have an outsized effect on the national economy. *Cf.* Pet. for Writ of Cert. 25-26, *Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, No. 98-2043, *cert. granted*, 527 U.S. 1068 (1999) ("California is the world's seventh largest economy—with corporate franchise tax revenues alone of more than $5.8 billion. Even if the impact of the decision below [upholding a law burdening out-of-state corporations] were limited to California, it would warrant this Court's review because of the enormous effect it will have on multistate taxpayers, the overwhelming majority of which do business in California." (footnotes omitted)). Online retail commerce is, moreover, a fast-growing part of the national economy and thus the importance of the issues presented here will only increase. *See* United

States Department of Commerce, U.S. Census Bureau News Release (Aug. 15, 2013), *available at* http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (estimating that adjusted U.S. retail e-commerce sales during the second quarter of 2013 (1) increased 18.4% from the same quarter in 2012, and (2) accounted for 5.8% of total quarterly retail sales).

The effect of the decision below on the national economy is reason enough to grant certiorari. As the United States has emphasized, "[b]arriers to interstate commerce harm the national economy, contrary to the Framers' intent to create a nationwide 'area of trade free from interference by the states.'" Br. for the United States as *Amicus Curiae* 9, *Am. Trucking Ass'ns, Inc.* v. *Mich. Pub. Serv. Comm'n*, Nos. 03-1230, 03-1234 & 03-1250, *cert. granted in part*, 543 U.S. 1096 (2005) (quoting *Am. Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 280 (1987)). This Court has accordingly "granted certiorari in numerous other cases" involving burdens on interstate commerce "even in the absence of an asserted conflict among appellate courts." *Ibid.* (citing, among other cases, *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59 (2003), *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), and *Scheiner*, 483 U.S. 266).

B. In addition, the decision below provides a road map for other state legislatures to enact similarly burdensome legislation. Several States have already enacted laws similar to the statute here. *See*, *e.g.*, Ark. Code Ann. § 26-52-117(d); Cal. Rev. & Tax. Code § 6203(c)(5)(A); Conn. Gen. Stat. § 12-407(a)(12)(L), (15)(A)(x); 35 Ill. Comp. Stat. 105/2(1.1); N.C. Gen. Stat. Ann. § 105-164.8(b)(3);

R.I. Gen. Laws § 44-18-15(a)(2). Many other States will jump at the opportunity to tax out-of-state Internet retailers. *See*, *e.g.*, David Streitfeld, *New York Court Upholds Sales Tax for Online Retailers*, N.Y. Times, Mar. 29, 2013, at B3 (noting that "[o]ther states" have been "debating measures like New York's"). Other States can simply copy Section 1101(b)(8)(vi) to defy the physical-presence requirement. And if other States are able to do so, they will escalate the commercial and constitutional harm inflicted by the court of appeals' decision here, creating a regime under which every Internet retailer could be subjected to tax-collection obligations "by the Nation's 6,000-plus taxing jurisdictions," *Quill*, 504 U.S. at 313 n.6—precisely the result that *Quill* sought to avoid.

C. Finally, the court of appeals' decision will sow widespread confusion. In *Quill*, this Court explained that the "clear" physical-presence rule "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes." 504 U.S. at 315. "Th[at] benefit is important," the Court emphasized, because the "law in this area is something of a quagmire and the application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the State in the exercise of their indispensable power of taxation." *Id.* at 315-16 (internal quotation marks omitted). By upholding the statute here, however, the court of appeals rejected a clear marker of "the boundaries of legitimate state authority" in favor of an approach that will sow precisely such "controversy and confusion." *Id.* at 315. *Quill* and the cases preceding it set forth "a bright-line rule" in part to "encourag[e] settled expectations" and thus to "foste[r] investment by businesses and individuals." *Id.* at 316. The decision below undermines those goals.

Indeed, even if the court of appeals' decision were correct, which it is not, review would still be warranted so that this Court could provide legislators with authoritative guidance on the limits of state taxing authority. If, as Petitioners contend, laws in the mold of Section 1101(b)(8)(vi) "violate the Commerce Clause, the governing rules should be stated clearly so that states and localities may conform their taxes to constitutional requirements." Pet. for Writ of Cert. at *26, *Am. Trucking Ass'ns, Inc.* v. *Mich. Pub. Serv. Comm'n*, No. 03-1230, *available at* 2004 WL 389420, *cert. granted in part*, 543 U.S. 1096 (2005). And if such laws do not violate the Commerce Clause, "legislators should be so informed and permitted to exercise their taxing authority freely." *Ibid.* Either way, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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