No. 13-259

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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This case squarely presents the important question whether New York Tax Law Section 1101(b)(8)(vi) violates the Commerce Clause by imposing tax-collection burdens on out-of-state retailers that have no physical presence in the State. The State does not contest that this issue is important, that a departure from this Court's bright-line physical-presence rule will sow widespread confusion and uncertainty, or that the decision below will burden interstate commerce. Indeed, the State hardly defends the merits of the court of appeals' Commerce Clause holding at all: It mentions *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992)—this Court's leading decision on the Commerce Clause question here—only in passing and does not seriously attempt to reconcile the decision below with *Quill* or this Court's other cases affirming the physical-presence rule. *See* Opp. 13-14, 21, 25.

The State instead insists that Section 1101(b)(8)(vi) burdens only out-of-state retailers that engage in constitutionally adequate in-state solicitation—not those who merely advertise in the State. *See* Opp. 7-10. The State's wishful view conflicts with the plain text of the statute. On its face, Section 1101(b)(8)(vi) imposes tax burdens on out-of-state retailers based only on those retailers' contractual relationships with independent, non-employee third parties that *merely advertise* the retailers' products or services through an Internet link. *See* N.Y. Tax Law § 1101(b)(8)(vi) (applying to those who "refe[r] potential customers" "by a link on an internet website"); *cf. Performance Mktg. Ass'n, Inc.* v. *Hamer*, __ N.E.2d __, 2013 WL 5674845, at *5 (Ill. Oct. 18,

2013) (rejecting argument that links like those here "are not advertising" (internal quotation marks omitted)). The State repeatedly brands such advertising as constitutionally adequate *in-state* "solicitation," but the State cannot shirk constitutional limits through artful labeling. Moreover, the State concedes that Petitioners—who are indisputably shouldering tax-collection burdens because of the statute—pleaded that they do not possess the constitutionally required physical presence (through solicitation or otherwise) in New York. Compl. ¶¶ 4, 20-22, 25-26; *see also* Opp. 4. This case thus squarely presents the Commerce Clause question identified in the petition for certiorari, and the court of appeals' erroneous conclusion on that important question warrants this Court's review.

Review is also warranted because the court of appeals refused to strike down Section 1101(b)(8)(vi) even though it attempts an end-run around this Court's Commerce Clause jurisprudence through an effectively irrebuttable evidentiary presumption of in-state solicitation based on mere advertising, in violation of due process. *See*, *e.g.*, *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *W. & Atl. R.R.* v. *Henderson*, 279 U.S. 639, 642 (1929). Indeed, the State never explains why it is entitled to violate the physical-presence rule through an evidentiary presumption, it fails to show that the purportedly rebuttable presumption imposed by Section 1101(b)(8)(vi) can be rebutted in practice, and it barely acknowledges the due process caselaw invoked by Petitioners.

Finally, none of the "ongoing developments in the courts, industry, and Congress" identified by the State (Opp. 18) counsels against granting review now. Section 1101(b)(8)(vi) and similar statutes are

already inflicting significant harm on interstate commerce. Neither further lower-court consideration nor industry developments would alleviate the intractable confusion and uncertainty caused by such statutes. Nor does the State's speculation that Congress might act counsel against review. It has been more than 20 years since *Quill* extended to Congress the invitation to act in this area. This Court should step in now to alleviate the burdens on interstate commerce imposed by the erroneous decision below.

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

As the petition explained, the court of appeals' decision conflicts with the rule that States may not impose tax-collection obligations on out-of-state retailers that lack a physical presence in the State. Pet. 10-15; *see also Quill*, 504 U.S. at 313-15 & n.6. The State's arguments to the contrary are unavailing.

A. The State contends that, under *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960), States may impose tax burdens based on "in-state solicitation." Opp. 13, 25; *see also id.* at 13-14, 25-26. *Scripto* held that the substantial nexus requirement was satisfied where an out-of-state company hired several "salesmen" who engaged in "activ[e]," in-person, "continuous local solicitation" in the State. 362 U.S. at 209, 211 (internal quotation marks omitted).

In contrast, the websites operated by New York residents here merely passively refer customers to the websites of Internet retailers and have no active involvement in sales transactions. *See* Compl. ¶¶ 21-22. Nor are the residents agents of Petitioners. *See*

ibid. Moreover, in contrast to activities directed specifically at in-state residents, the websites here are available to anyone on the Internet anywhere in the world. This case thus lacks the targeted "continuous" and "activ[e]" "local solicitation" necessary to satisfy the nexus requirement. 362 U.S. at 209, 211.

1. The State maintains that Petitioners mischaracterize the statute and the record. Opp. 7-10. That is incorrect.

First, the State contends that Petitioners "ask this Court to grant review to address the constitutionality of a hypothetical statute that is not the law of New York" because—according to the New York Tax Law, the State's Department of Taxation and Finance, and the state courts—Section 1101(b)(8)(vi) does not impose tax burdens on out-of-state retailers that merely advertise in the State. Opp. 8; *see id.* at 7-10. The State's argument might have merit if it limited tax-collection burdens to the active and continuous "solicitation" that this Court has held necessary to satisfy the nexus requirement. *See*, *e.g.*, *Scripto*, 362 U.S. at 209, 211. But the statute is not so limited. Instead, Section 1101(b)(8)(vi) radically redefines "solicitation," in a manner unmoored from this Court's precedents, to provide that "solicitation" can be *presumed* based *only* on an out-of-state retailer's contractual relationships with independent, nonemployee third parties that *merely passively advertise* the retailers' products or services through an Internet link. N.Y. Tax Law § 1101(b)(8)(vi). Whatever label the State, its agency, and its courts may affix to the activities covered by Section 1101(b)(8)(vi), that provision imposes tax burdens based on mere advertising—especially because, under the statute, the burden of rebutting the presumption falls on the

out-of-state retailer. *See* Pet. App. 15a (Smith, J., dissenting) (explaining that, even "[w]hen an advertisement takes the form of a link on a website," "the link is still only an ad"); *see also*, *e.g.*, *Hamer*, 2013 WL 5674845, at *5 (rejecting arguments that affiliate marketing through Internet links is "not advertising" and that it constitutes "active efforts to solicit sales on behalf of out-of-state retailers" (internal quotation marks omitted)). The decision below accordingly did not merely "interpre[t] [a state] statute incorrectly," Opp. 9, but instead upheld a statute that—however characterized by the State—imposes tax-collection burdens on out-of-state retailers that lack any physical presence in the State. Moreover, although the Department of Taxation and Finance has purported to clarify that "an agreement to place an advertisement does not give rise to the [statutory] presumption," its crabbed definition of "placing an advertisement" excludes third-party Affiliate Marketing advertisements. *See* R.826 (TSB-M-08(3)S).

Second, the State insists that Petitioners "waived" any argument that third-party Affiliate Marketing advertisers "do not in fact solicit sales" because Petitioners did not pursue as-applied challenges to Section 1101(b)(8)(vi). Opp. 9. But Petitioners' suit was dismissed for failure to state a cause of action. Pet. App. 66a. At the motion-to-dismiss stage, a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Nonnon* v. *City of New York*, 874 N.E.2d 720, 722 (N.Y. 2007) (internal quotation marks omitted); *see also Edmond* v. *Int'l Bus. Machs. Corp.*, 694 N.E.2d 438, 439 (N.Y. 1998). Petitioners did not "waive" the allegations that they

pleaded, and they pleaded that they do not perform constitutionally sufficient solicitation activities in New York because they have only contracted with third parties to post passive advertisements. *See* Compl. ¶¶ 4, 20-22, 25-26; *see also* Pet. 3-5. Although the State disputes those allegations, *see*, *e.g.*, Opp. 9, 23, it may not do so at this stage.

2. The State also maintains that Petitioners cannot satisfy the criteria applicable to a facial constitutional challenge. Opp. 10. This too is mistaken. Petitioners have demonstrated that Section 1101(b)(8)(vi) threatens a host of unconstitutional applications. *See*, *e.g.*, Pet. 13, 19-20. This satisfies the facial analysis set forth in *Quill*. *See*, *e.g.*, 504 U.S. at 313 n.6. There is no reason—and the State does not attempt to provide one—to think that tests that have sometimes been applied in different contexts (such as certain due process challenges, *see United States* v. *Salerno*, 481 U.S. 739, 745 (1987), or First Amendment challenges, *see Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008)) apply to Petitioners' Commerce Clause arguments here. *See* Opp. 10.

B. Even if the activities of Petitioners and other out-of-state retailers could be deemed solicitation—and they cannot—Section 1101(b)(8)(vi) would still violate the Commerce Clause because there is no way to ensure that such solicitation is "significantly associated" with the retailer's ability to do business in the State. *Tyler Pipe Indus., Inc.* v. *Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (internal quotation marks omitted); *see also* Pet. 15-17.

The State contends that *Tyler Pipe* does not require that an out-of-state seller's in-state activity be "significantly associated" with its ability to do busi-

ness in the State before imposing tax-collection obligations on that seller. *See* Opp. 14 n.3. The "significantly associated" language, the State maintains, is "not part of a constitutional rule" because this Court drew that language from the Washington Supreme Court's "characterization of a state law." *Ibid.* The State is wrong. The quoted part of the Washington Supreme Court's opinion describes Washington State's approach to implementing the federal Constitution's nexus requirement. *See Tyler Pipe Indus., Inc.* v. *State of Wash., Dep't of Revenue*, 715 P.2d 123, 126 (Wash. 1986). This Court endorsed that language in reaching its *constitutional* holding: In "agree[ing] with th[e] [Washington Supreme Court's] analysis" of the "sufficient nexus" requirement imposed by the federal Constitution, the Court embraced the Washington Supreme Court's "determin[ation]" that "'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are *significantly associated* with the taxpayer's ability to establish and maintain a market in this state for the sales.'" 483 U.S. at 250 (quoting 715 P.2d at 126) (emphasis added).

Nor is the State correct that a "significantly associated" rule would conflict with the Court's prior "express holding" in *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551 (1977). Opp. 14 n.3. In *National Geographic Society*, this Court previewed the rule set forth in *Tyler Pipe*—that "there must exist a nexus or relationship . . . between the seller and the taxing State" for the State to impose tax burdens on the seller. *Nat'l Geographic Soc'y*, 430 U.S. at 560; *compare ibid. with Tyler Pipe*, 483 U.S. at 250. National Geographic established an in-state physical presence that justified a tax-collection obligation. *National Geographic So-*

ciety did, as the State notes, reject the need for the State to establish a *further*, heightened "relationship" before imposing tax burdens—a relationship "between the activity of the seller sought to be taxed and the seller's activity within the State." 430 U.S. at 560. But that is not the relationship *Tyler Pipe* addresses.

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

As the petition also demonstrated, Section 1101(b)(8)(vi) violates due process both by "transgress[ing] indirectly" this Court's physical-presence rule through "a statutory presumption," *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958), and by making that presumption effectively irrebuttable, *W. & Atl. R.R.* v. *Henderson*, 279 U.S. 639, 642 (1929). Pet. 19-22. The State's responses to these arguments (*see* Opp. 12, 24) are unavailing.

First, the State attempts to distinguish this Court's decision in *Speiser*. Emphasizing "the constitutional right to speak," *Speiser* invalidated a state-law presumption requiring a taxpayer to prove that he did not advocate overthrow of the government. 357 U.S. at 528-29. The State maintains that *Speiser* is "wholly inapposite" here because it "never indicated, and this Court has never held, that th[at] unique rule applies to civil proceedings outside of the First Amendment context." Opp. 12.

That argument is misplaced, however, because it ignores the proposition for which Petitioners cited *Speiser*. *Speiser* broadly 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.'" 357

U.S. at 526 (quoting *Bailey* v. *Alabama*, 219 U.S. 219, 239 (1911)); *see also* Pet. 2, 18. The Court did not suggest that this principle—which the State never addresses—applies only to proceedings concerning the First Amendment. Indeed, *Bailey*—which *Speiser* quoted for the principle—did not involve the First Amendment but instead concerned the Thirteenth Amendment's prohibition on involuntary servitude. *See* 219 U.S. at 239.

Second, the State insists that the presumption imposed by Section 1101(b)(8)(vi) is rebuttable. Opp. 24. But as this Court recognized in *Henderson*—a case the State does not cite—a statutory presumption violates due process when the statute "operates to deny a fair opportunity to repel it." 279 U.S. at 642. It does not matter (as the State believes) that the statute *purports* to be rebuttable or that the Department of Taxation and Finance *purports* to provide a method of rebutting the presumption. Opp. 24. The method of rebutting the statutory presumption is illusory because (among other things) the statute bars New York advertisers from doing anything that might "indirectly refe[r]" potential customers to the retailer's website through an Internet link "or otherwise." N.Y. Tax Law § 1101(b)(8)(vi); *see also* Pet. 21-22. That capacious language makes limitless the types of activities that could constitute an impermissible referral. As a result, no reasonable third-party website could be expected to submit the annual certification necessary to rebut the presumption. *See* Pet. 21-22. This satisfies the criteria that this Court has applied to facial due process challenges to statutory presumptions, which ask whether they accord with "common experience" (*Leary* v. *United States*, 395 U.S. 6, 33 (1969) (internal quotation marks omitted)) and evaluate how accurate a

presumption is "in the run of cases" (*Cnty. Court of Ulster Cnty.* v. *Allen*, 442 U.S. 140, 159 (1979)).

III. THIS CASE RAISES CONCERNS OF NATIONAL IMPORTANCE THAT THIS COURT SHOULD ADDRESS NOW.

The State does not contest that the court of appeals' decision will burden interstate commerce, sow confusion, and encourage other States to enact laws like Section 1101(b)(8)(vi). Pet. 22-26. The State maintains, however, that the questions presented are "not ripe for this Court's review" in light of "ongoing developments in the courts, industry, and Congress." Opp. 18; *see also id.* at 18-21. The State is mistaken.

First, the State contends that this Court's review would be premature because "[o]ther courts are just beginning to be presented with challenges to statutes similar to the New York statute at issue here, and this Court would benefit from their legal analysis and factfinding." Opp. 18 (citations and footnote omitted); *see also id.* at 18-19. But, as the State does not dispute, the usefulness of mature lower-court consideration is vastly diminished when a statute erects "[b]arriers to interstate commerce," because such barriers "harm the national economy" in conflict with "the Framers' intent." Pet. 24 (internal quotation marks omitted). The court of appeals' decision threatens substantial harm to interstate commerce that should be addressed now. *See id.* at 22-24.

Second, the State suggests that "industry" developments that have "eased compliance with state tax-collection obligations"—such as "electronic filing and online services"—may reduce "burdens on online commerce" caused by the statute. Opp. 19-20 (internal quotation marks omitted). This argument woe-

fully misunderstands the benefits of the physical-presence rule and the burdens imposed by statutes like Section 1101(b)(8)(vi). The principal benefit of the physical-presence rule is that it "clear[ly]" and "firmly" "establishes the boundaries of legitimate state authority to impose" tax-collection obligations. *Quill*, 504 U.S. at 315. Statutes such as Section 1101(b)(8)(vi), by contrast, erode *Quill*'s bright line—creating uncertainty, scuttling settled expectations, and imperiling investment. *See id.* at 315, 316. It is *those* costs—not costs mitigated by "electronic filing and online services"—against which the physical-presence rule guards. And such costs are rising because statutes like New York's are taking hold across the country. *See* Pet. 24-25; *see also Direct Mktg. Ass'n* v. *Huber*, No. 10-cv-01546, 2012 WL 1079175, at *8-9 (D. Colo. Mar. 30, 2012) (holding unconstitutional, under *Quill*, tax-related burdens on retailers lacking an in-state physical presence), *vacated on other grounds*, *Direct Mktg. Ass'n* v. *Brohl*, __ F.3d __, 2013 WL 4419324 (10th Cir. Aug. 20, 2013). That development counsels strongly in favor of granting review now, rather than leaving out-of-state sellers deeply uncertain about what conduct creates a constitutionally adequate nexus.

Third, the State speculates that Congress might enact legislation that would make this Court's review unnecessary. *See* Opp. 20-21. But this Court has not hesitated to intervene to address serious burdens on interstate commerce—even when Congress could itself eliminate those burdens. In *Quill*, for example, this Court recognized that Congress "has the ultimate power to resolve" issues concerning tax burdens on interstate commerce, that Congress had for nearly twenty years considered legislation that would "'overrule'" the physical-presence rule, and that Con-

gress was "free to disagree with [this Court's] conclusions" about that rule. 504 U.S. at 318. Although the Court knew that Congress *could* eliminate the need to resolve the Commerce Clause question presented in *Quill*, it still granted certiorari, reaffirmed the physical-presence rule, rejected a State's effort to evade that rule, and recognized that Congress—if it wished—could "overrule" the Court's decision. The Court should do the same here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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