Nos. 13-252, 13-259

IN THE

Supreme Court of the United States

OVERSTOCK.COM, INC.,

Petitioner

and

AMAZON.COM, LLC, ET AL.,

Petitioners,

v.

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

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREW D. BING
STEVEN C. WU
Deputy Solicitors General
WON S. SHIN
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov

**Counsel of Record*

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Under long-standing and unchallenged New York law, out-of-state retailers that solicit business in the State—whether through employees, independent contractors, agents, or other representatives—must collect and remit taxes due on New York sales. New York Tax Law § 1101(b)(8)(vi) establishes a rebuttable presumption that an out-of-state retailer engages in such solicitation if, under an express agreement, the retailer pays commissions to a New York resident for referring customers to the retailer, and such referrals generate more than $10,000 of sales per year. The questions presented are:

1. Whether the statute is invalid on its face under the dormant Commerce Clause, when it requires tax collection by out-of-state retailers that use New York residents to solicit sales in exchange for commissions.

2. Whether the statute is invalid on its face under the Due Process Clause, when the statute reasonably presumes that sales representatives who are paid by commission only when they generate sales for a retailer will solicit sales for the retailer. (Amazon's petition only.)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES (cont'd)

Miscellaneous Authorities **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Miscellaneous Authorities **Page(s)**

STATEMENT

1. New York consumers are required to pay a sales tax for products purchased within the State or delivered into the State, and a corollary use tax for products purchased out of the State and used within the State. *See* N.Y. Tax Law §§ 1105, 1110, 1131(1), 1132(a). Although the individual consumer is responsible for paying sales and use taxes, the practical impossibility of collecting from millions of individual purchasers has led New York, like most other States, to require "every vendor of tangible personal property" to collect the taxes from the consumer at the point of purchase, and then to remit the tax to the State. *Id.* § 1131(1); *see also id.* § 1132(a) (vendor's duty to collect tax from customer). "The constitutionality of such state schemes is settled." *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 555 (1977).

For many years, the obligation to collect New York sales taxes has extended to any retailer "who solicits business . . . by employees, independent contractors, agents or other representatives . . . and by reason thereof makes sales to persons within the state of tangible personal property or services," Pet. App. 72a (N.Y. Tax Law § 1101(b)(8)(i)(C)(I)).[1] No party here has challenged the validity of this long-standing statute.

In April 2008, the New York Legislature supplemented this provision by adding the rebuttable

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[1] "Pet. App." refers to the appendix to Overstock's petition for certiorari. The state court opinions and certain statutory provisions appear in the appendix to each of the petitions in this case. To avoid duplicate citations we refer to the Overstock appendix for material that appears in both appendices.

presumption that is at issue in this case. The new provision (the Statute) provides that a retailer "shall be presumed to be soliciting business through an independent contractor or other representative" if two conditions are met: (1) under an express agreement, the retailer pays commissions to a New York resident for referring customers to the retailer, and (2) such referrals generate more than $10,000 of sales per year. Pet. App. 77a-78a (N.Y. Tax Law § 1101(b)(8)(vi)). The Legislature expressly provided that the Statute's solicitation presumption "may be rebutted" if the retailer shows that its in-state, commission-paid sales representatives do not in fact engage in solicitation that "would satisfy the nexus requirement of the United States constitution." *Id.*

The Statute serves an important function in facilitating the collection of millions of tax dollars that would otherwise be lost each year. Although sales taxes are indisputably owed when a New York resident purchases goods from an out-of-state retailer for delivery in-state, the overwhelming majority of those purchases are never reported to the state taxing authorities, and hence taxes on them are never collected. The Statute also seeks to restore a level playing field between in-state brick-and-mortar stores and their out-of-state Internet-only counterparts. *See Nat'l Geographic Soc'y*, 430 U.S. at 555 (use taxes restore "competitive parity" between local and out-of-state retailers); Br. for Amicus Curiae Council on State Taxation at 2 (some members "welcome" a "more equitabl[e] distribut[ion] [of] state tax burdens among all retail market participants").

2. Shortly after the Statute was enacted, the New York State Department of Taxation and Finance (DTF)

issued two memoranda offering guidance on the meaning and enforcement of the Statute. In an initial memorandum ("First TSB-M"),[2] DTF confirmed that the solicitation presumption is triggered only by *commission-based* referral agreements (not flat-fee arrangements), and that the presumption is *not* triggered by mere advertising. Pet. App. 84a, 87a. The First TSB-M also explained that the presumption may be rebutted if the seller establishes that "the only activity" of its in-state representatives consists of placing Internet links to the seller's website, and "none of the resident representatives engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller." Pet. App. 87a-88a.

DTF subsequently issued a Second TSB-M setting forth a "safe harbor" procedure that sellers can use to preemptively rebut the presumption. Specifically, the solicitation presumption does not apply if out-of-state sellers (1) include in their business-referral agreements a provision prohibiting their in-state representatives from "engaging in any solicitation activities in New York State that refer potential customers to the seller"; and (2) require each in-state representative to submit a signed certification each year, stating that he or she has not engaged in any such solicitation during the prior year. Pet. App. 91a-92a.

3. Petitioners Amazon and Overstock are Internet retailers that sell billions of dollars of products

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[2] TSB-M stands for "Technical Services Bureau Memorandum." Pet. App. 20a.

online. *See* Pet. App. 2a. Although both allege that they have no physical presence in New York, they rely on affiliate programs under which they pay hundreds of thousands of representatives across the country—including thousands in New York—to drum up sales. S*ee* Pet. App. 2a-3a.

Petitioners' affiliate programs are essentially identical. Under each program's governing agreement, affiliates agree to refer business to the respective petitioner by placing special links to petitioner's products on their own websites. Affiliates are not paid for placing those links. Nor are they paid when people click on those links and visit petitioners' websites. Instead, affiliates are paid only after a customer clicks through from the affiliate's website to petitioner's website and then purchases a product. Only at that point does the affiliate earn a commission, which takes the form of a percentage share of the proceeds of the sale. Pet. App. 2a-3a. As Amazon tells its affiliates, "[t]he higher your referrals, the greater your earnings will be." Pet. App. 33a.

Overstock is not currently operating its affiliate program in New York. It alleges that it severed its relationship with all of its New York affiliates in May 2008—less than a month after the Statute was enacted—in order to avoid collecting sales taxes. *See* Pet. App. 3a, 51a. By contrast, Amazon has maintained its affiliate program and as a result is currently collecting sales taxes from New York consumers.

4. Days after enactment of the Statute, and before DTF could investigate or audit the solicitation and tax-collection practices of any out-of-state seller, petitioners preemptively filed the underlying state-

court lawsuits. As relevant here, petitioners' complaints asserted that the Statute is unconstitutional—both on its face and as applied, Pet. App. 5a—for two reasons. Petitioners alleged that the Statute's presumption of solicitation from the existence of a commission-based incentive scheme violates due process because it is irrational and "effectively" irrebuttable, and claimed that the Statute violates the dormant Commerce Clause by requiring out-of-state sellers to collect sales taxes even though they do not have a "substantial nexus" with the State. Pet. App. 51a-52a, 58a.

In January 2009, the trial court dismissed petitioners' facial and as-applied constitutional claims. Pet. App. 50a-69a. In November 2010, the intermediate appellate court affirmed the dismissal of the facial claims but reversed the dismissal of the as-applied claims on the ground that they could not be evaluated without more fact-finding. The court accordingly remanded for additional discovery into (among other things) whether petitioners' affiliates in fact solicit other New Yorkers, or instead merely display passive advertisements; and whether petitioners can as a practical matter keep track of their affiliates' activities in New York. Pet. App. 42a-45a.

On remand, petitioners declined to present any additional facts in support of their constitutional claims. Instead, they deliberately "entered into stipulations of discontinuance withdrawing their as-applied constitutional challenges with prejudice." Pet. App. 5a. That tactical decision enabled petitioners to satisfy the finality requirement for an appeal as of right to New York's highest court, the Court of

Appeals, but left the evidentiary record undeveloped. *See* N.Y. C.P.L.R. 5601(b)(1), (d).

5. The Court of Appeals affirmed. The court observed that because petitioners "elected to forgo" their as-applied claims, they had "chosen to limit [the court's] review to a facial challenge." Pet. App. 5a, 11a. The court concluded that the Statute's presumption of solicitation from commission-based business-referral agreements was "plainly rational": in-state affiliates would naturally seek to maximize their commissions by generating more sales. Pet. App. 11a. Applying "the binding precedents of [the Supreme] Court," the court also concluded that the Statute "plainly satisfies" the dormant Commerce Clause's substantial nexus requirement as a facial matter because it applies only when out-of-state sellers have a sufficient physical presence in New York, in the form of in-state affiliates who "actively solicit business in this State." Pet. App. 8a-9a. Both conclusions were supported by evidence in the record of affiliates engaged in "[a]ctive, in-state solicitation" by urging local consumers to make purchases from petitioners through the links posted on the affiliates' websites. Pet. App. 9a, 11a.

One judge dissented. He acknowledged the evidence of affiliates engaged in solicitation, but he nevertheless would have deemed the links posted on the affiliates' websites to be mere advertising. He accordingly would have held the Statute invalid under the dormant Commerce Clause. Pet. App. 13a-14a, 16a.

REASONS TO DENY THE PETITIONS

The petitions for certiorari should be denied for three reasons. First, the principal grounds on which petitioners seek certiorari either mischaracterize the Statute or raise new arguments not litigated or preserved below. Petitioners may not unilaterally transform the only legal questions resolved by the state courts into different questions, in an attempt to create issues worthy of this Court's review. Second, the decision below does not conflict with any decision of this Court or any state supreme court or federal court of appeals, and pending industry, judicial, and legislative consideration of taxation of online sales is likely to further develop the issues raised here—or moot them altogether. Third, the Court of Appeals' decision is clearly correct and breaks no new ground. The Statute's presumption satisfies the Due Process Clause because it relies on the commonsense notion that affiliates who are paid only when a purchase is made will tend to encourage their contacts to make such purchases. And in-state solicitation, even by only a handful of sales representatives (let alone the thousands that petitioners have here), has always satisfied the dormant Commerce Clause's requirement of physical presence. Accordingly, this case does not merit the Court's review.

A. Petitioners Mischaracterize the Statute and Misstate the Issues Decided Below.

Petitioners ask this Court to decide whether New York law properly "imposes tax-collection obligations on out-of-state retailers that merely advertise in the State," Amazon Pet. 1, or that "merely . . . enter[] into a contract with a third party in the State," Overstock

Pet. 25. Neither characterization accurately describes the Statute at issue here, as construed by the State's courts and taxing authorities. Petitioners thus ask this Court to grant review to address the constitutionality of a hypothetical statute that is not the law of New York.

1. New York law does not impose tax-collection obligations on the basis of mere advertising. Instead, as relevant here, the Tax Law unambiguously limits tax-collection obligations to those retailers who engage in *solicitation* within the State. Pet. App. 72a (N.Y. Tax Law § 1101(b)(8)(i)(C)(I)). And the Statute at issue employs an evidentiary presumption to identify when such in-state solicitation is likely to occur: specifically, when out-of-state retailers use commission payments to encourage referrals. Pet. App. 77a-78a (N.Y. Tax Law § 1101(b)(8)(vi)).

Contrary to petitioners' assertion here, New York law does not consider mere advertising sufficient to require out-of-state retailers to collect sales taxes. The Tax Law specifically excludes online advertising standing alone as a basis for finding a tax nexus, *see* N.Y. Tax Law § 12(c), and DTF has confirmed that "an agreement to place an advertisement" will not trigger the statutory presumption at issue here, Pet. App. 84a. Following this statutory and regulatory guidance, the state trial and intermediate appellate courts unambiguously explained that "mere advertising does not implicate the statute," Pet. App. 36a; *see id.* 62a-63a, and the Court of Appeals likewise embraced DTF's interpretation as a basis to uphold the Statute, Pet. App. 9a, 11a, 15a. Petitioners thus ask this Court to interpret New York law in a manner rejected by New York courts and the state

agency charged with administering the Statute, and to rule on the constitutionality of that rejected interpretation of the law. But it is well settled that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Certiorari is not warranted to address the claim that New York has interpreted its statute incorrectly, or to address petitioners' challenge to their hypothetical statute.

Petitioners and their amici nevertheless insist that the Statute applies to mere advertising because, they assert, petitioners' in-state sales affiliates do not in fact solicit sales. Amazon Pet. 13-15; Overstock Pet. 23-24; Br. for Amici Curiae Newegg, Inc. et al. at 7; Br. for Amicus Curiae Performance Mktg. Ass'n at 9, 17. But that argument rests on a disputed factual claim that petitioners waived in the state courts. New York's intermediate appellate court remanded petitioners' then-pending as-applied claims for additional discovery into whether petitioners' affiliates in fact solicit other New Yorkers. Pet. App. 42a-44a. Petitioners deliberately "elected to forgo their as-applied challenges" and any further discovery in support of those claims, and thus "chose[] to limit [the Court of Appeals'] review to a facial challenge" based on the sparse facts in the record—a record that, as the Court of Appeals found and even the dissenting judge acknowledged, contains specific examples of in-state solicitation by petitioners' affiliates. Pet. App. 5a, 9a, 11a, 14a. Petitioners cannot now invoke a disputed factual assertion that they abandoned below to support an interpretation of the Statute that neither DTF nor any New York court has accepted.

Furthermore, even if petitioners could demonstrate that the Statute might apply to retailers who merely advertise in the State—and they have not—such a showing would not sustain the facial challenges that are the only claims remaining in this case. Petitioners' facial attacks can succeed only if they demonstrate that there is "no set of circumstances" in which the Statute may be applied constitutionally, *United States v. Salerno*, 481 U.S. 739, 745 (1987), or at the very least that the Statute lacks a "plainly legitimate sweep," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quotation marks omitted). But the evidence of in-state solicitation in the record precludes any such demonstration by petitioners, and the Court of Appeals was not required to "strain" to facially invalidate a Statute that plainly has legitimate applications merely because petitioners could "posit a potential constitutional infirmity" without any factual support—particularly when DTF "has expressly acknowledged that mere advertising is beyond the scope of the provision." Pet. App. 9a, 11a. If petitioners wished to pursue as-applied claims, they should not have abandoned them. But they did, and the Court of Appeals' application of settled principles governing facial challenges does not merit this Court's review.

2. Overstock (but not Amazon) further asks this Court to decide whether "the in-state activities of third parties who are not agents of the seller . . . satisfy *Quill*'s physical-presence requirement." Overstock Pet. 10. But Overstock never argued below that the common-law agency status of its in-state sales affiliates was the dispositive legal issue. Nor

did it ever contend, as it does now, that agency status matters because "the presence of a non-agent is not legally attributable to the seller" under New York's common law. Overstock Pet. 10-11. Unsurprisingly, no state court in this case has addressed the state-law questions whether in-state sales affiliates are common-law agents and whether their actions are attributable to out-of-state retailers, and the courts' holdings did not rely on the specific answers to those questions. Because this "Court will not decide federal constitutional issues raised here for the first time on review of state court decisions," *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), certiorari is not warranted to address Overstock's new argument.

B. The Issues Presented by Petitioners Are Not Ripe for This Court's Review.

Petitioners have identified no federal- or state-court conflict warranting this Court's review. Moreover, in light of recent developments in the retail industry, in the state courts, and in Congress, this Court would be better served deferring review until further events either develop or render irrelevant the issues petitioners ask this Court to review. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J., respecting the denial of certiorari) ("allow[ing] the various States to serve as laboratories in which the issue receives further study" will enable this Court "to deal with the issue more wisely at a later date").

1. Petitioners have identified no conflict warranting this Court's review.

a. Petitioners do not attempt to identify a state-court or circuit split on the rationality of a statutory presumption under the Due Process Clause. Indeed, Overstock does not seek certiorari on the Court of Appeals' due process holding. *See* Overstock Pet. i. And Amazon asserts a conflict only with this Court's decision in *Speiser v. Randall*, 357 U.S. 513 (1958). *See* Amazon Pet. 18-20.

But *Speiser* is wholly inapposite. That case involved a free speech challenge to a statutory presumption that required a taxpayer to prove that he did not advocate overthrow of the government. This Court found the presumption unconstitutional because the First Amendment requires "speech [to] be unencumbered until the State comes forward with sufficient proof to justify its inhibition." 357 U.S. at 529. But *Speiser* never indicated, and this Court has never held, that this unique rule applies to civil proceedings outside of the First Amendment context. To the contrary, this Court has recognized that the operation of a rebuttable statutory presumption "is normally not an issue of federal constitutional moment" because, as here, it typically does no more than adjust "the locus of the burden of persuasion." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). *Speiser* thus has no bearing on the issues presented in this case.

b. Once the Statute's presumption is accepted as valid and in-state solicitation is thereby established, the question under the dormant Commerce Clause is whether in-state solicitation by an out-of-state

retailer's representative is sufficient to establish that retailer's physical nexus with New York. Contrary to petitioners' assertions, the Court of Appeals' decision below does not conflict with this Court's previous nexus cases; instead, the court below straightforwardly applied this Court's precedents to uphold the Statute. Pet. App. 8a.

In *Scripto, Inc. v. Carson*, this Court squarely upheld the imposition of a tax-collection duty on out-of-state sellers because they had arranged for in-state solicitation by ten "advertising specialty brokers" who referred business to the out-of-state sellers in return for a "commission . . . on the sales made." 362 U.S. 207, 209 (1960). Like petitioners here, the out-of-state sellers in *Scripto* attempted to minimize their in-state presence by asserting that the brokers were not full-time regular employees, did not work exclusively for the sellers, did not themselves handle any money or execute any sales, and were not under the sellers' direct control. Br. for Appellant at 7, *Scripto*, 362 U.S. 207 (No. 59-80) (arguing that manufacturer had "no control whatever over the broker"), 1959 WL 101491. This Court rejected those arguments and found sufficient nexus to support the sellers' obligation to collect sales taxes. 362 U.S. at 209-11. And several decades later, *Quill* confirmed *Scripto*'s holding that "in-state solicitation . . . performed by independent contractors" establishes substantial nexus. *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992).

The Court of Appeals' decision hews closely to these precedents. The court rejected petitioners' facial dormant Commerce Clause challenge because it interpreted the Statute as requiring sales-tax

collection only when an out-of-state retailer's representatives engage in "[a]ctive, in-state solicitation that produces a significant amount of revenue." Pet. App. 9a. Because both *Scripto* and *Quill* expressly recognized this basis for nexus, petitioners have identified no split with this Court's precedents that requires further review.[3]

c. Overstock asserts that state courts of last resort are divided about whether an agency relationship is required to establish an out-of-state retailer's substantial nexus with a State based on a third party's in-state activities. *See* Overstock Pet. 10-11. As discussed above, that issue was not raised below and is thus not fairly presented here. But even if it were, Overstock has failed to identify any genuine conflict—instead, it has merely cobbled together disparate dormant Commerce Clause decisions in which the business activities and statutory schemes at issue were nothing like the circumstances of this case. These inapposite cases do not demonstrate that another court would reach a

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[3] Amazon's contention that *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 250 (1987), imposes the separate requirement that an out-of-state seller's in-state activity be "significantly associated" with the seller's "ability to do business in the State" is incorrect. *See* Amazon Pet. 15-17. The language it cites is actually a quotation from the lower state court's characterization of a state law—not part of a constitutional rule. *See Tyler Pipe Indus., Inc. v. State of Wash., Dep't of Revenue*, 105 Wash. 2d 318, 323, 715 P.2d 123, 126 (1986). And such a rule would conflict with *National Geographic Society*'s express holding that there need not be any association "between the activity of the seller sought to be taxed and the seller's activity within the State," 430 U.S. at 560.

different result on the same or a very similar set of facts.

The most analogous decisions cited by Overstock involve out-of-state mail-order book retailers who rely on teachers at in-state primary and secondary schools to solicit orders from their students. The only state supreme courts to squarely address the Commerce Clause issue *upheld* the mandatory collection of taxes in such circumstances, even though the retailer and teachers had no formal agreement and the teachers received no direct personal compensation from the retailer. *See Scholastic Book Clubs, Inc. v. Comm'r of Revenue Servs.*, 304 Conn. 204, 233-34, 38 A.3d 1183, 1199-1200, *cert. denied*, 133 S. Ct. 425 (2012); *In re Scholastic Book Clubs, Inc.*, 260 Kan. 528, 546, 920 P.2d 947, 958 (1996).[4]

Pledger v. Troll Book Clubs, Inc., 316 Ark. 195, 871 S.W.2d 389 (1994), does not hold otherwise. The parties in *Pledger* stipulated that agency was required under the Commerce Clause, and in light of that stipulation the court expressly declined to reach the question "whether a 'substantial nexus' might be found with proof of something less than agency." *Id.* at 198-99, 871 S.W.2d at 391-92. In the absence of a

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[4] *Ex parte Newbern*, 286 Ala. 348, 239 So. 2d 792 (1970), and *Topps Garment Manufacturing v. State*, 212 Md. 23, 128 A.2d 595 (1957), are similar. The courts held that out-of-state mail-order retailers could be required to collect use taxes on the basis of in-state representatives who solicited sales for commissions, even though the retailer had no written contracts with them in *Newbern*, 286 Ala. at 354, 239 So. 2d at 798, and the retailer did not supervise or control them in *Topps*, 212 Md. at 25, 28, 128 A.2d at 596, 598.

square ruling on the issue, *Pledger* does not support petitioners' claim of a conflict. Just last Term this Court denied two petitions for certiorari seeking review of decisions assertedly in conflict with *Pledger*. *See Scholastic Book Clubs, Inc. v. Conn. Comm'r of Revenue Servs.*, 133 S. Ct. 425 (2012); *Scholastic Book Clubs, Inc. v. Roberts*, 133 S. Ct. 663 (2012).

Overstock also cites several decisions regarding the mandatory collection of taxes by an out-of-state catalogue or online retailer based on the activities of in-state brick-and-mortar stores operated by a sister corporation. *Compare N.M. Tax. & Revenue Dep't v. Barnesandnoble.com LLC*, 2013-NMSC-023, 303 P.3d 824 (N.M. 2013) (upholding mandatory collection), *with SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St. 3d 119, 652 N.E.2d 693 (1995), *and SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666 (1991) (both invalidating mandatory collection). While these decisions may well conflict with each other, none of them is inconsistent with the New York Court of Appeals' opinion in this case. Those decisions turned on the relationship between the retailer and the sister corporation, and on the activities of the in-state brick-and-mortar stores, such as the processing of customer returns on behalf of the retailer. None of those decisions involved affiliates who solicited sales on behalf of the retailer pursuant to written contracts—indeed, one decision acknowledged that activities from in-state "solicitors" *would* satisfy the nexus requirement. *Bannon*, 217 Conn. at 236 n.12, 585 A.2d at 674 n.12.

Finally, there is no "division among state courts" regarding application of the dormant Commerce Clause to online commerce more generally. *See*

Overstock Pet. 33. Only three other state supreme court decisions have addressed such claims by online sellers required to collect sales or use taxes, and the statute was upheld in each case. One court held that an online book retailer could be required to collect taxes based on the activities of a sister corporation operating several brick-and-mortar bookstores in the State. *Barnesandnoble.com*, 2013-NMSC-023, 303 P.3d 824. And two other courts held that a company offering online hotel reservations could be required to collect taxes based on its contracts with, and employees' visits to, in-state hotels. *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 106, 705 S.E.2d 28, 37 (2011); *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 690-91, 681 S.E.2d 122, 128 (2009). The Court of Appeals' decision below does not conflict with these rulings.[5]

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[5] The remaining state supreme court decisions cited by Overstock involve circumstances that have nothing to do with this case or each other. One decision addressed whether an in-state common telecommunications carrier (rather than an out-of-state retailer) could be required to collect taxes on information sold by out-of-state "900 number" vendors to in-state consumers. *AT&T Commc'ns of Md., Inc. v. Comptroller*, 405 Md. 83, 950 A.2d 86 (2008). Another decision involved an attempt to require an out-of-state carpet retailer to collect sales taxes on the basis of unaffiliated installers who came in-state to install carpets, but who (unlike here) received no compensation from the retailer for that work. *Miss. State Tax Comm'n v. Bates*, 567 So. 2d 190, 193 (Miss. 1990). And a third decision is altogether irrelevant because it addressed a nexus challenge under the Due Process Clause—a claim that petitioners do not make in this case. *Ill. Commercial Men's Ass'n v. State Bd. of Equalization*, 34 Cal. 3d 839, 843, 671 P.2d 349, 350 (1983).

2. Review is not warranted at this time because of ongoing developments in state taxation of sales by out-of-state retailers.

In the absence of a well-developed split on the constitutional issues petitioners present, the issues are not ripe for this Court's review, and the orderly consideration of these issues would be illuminated by awaiting the outcome of several ongoing developments in the courts, industry, and Congress. In particular, three ongoing developments support denying certiorari while the issues here continue to percolate.

a. Other courts are just beginning to be presented with challenges to statutes similar to the New York statute at issue here, Overstock Pet. 31-32; Amazon Pet. 24-25,[6] and this Court would benefit from their legal analysis and factfinding. Aside from this case, state supreme courts have not yet squarely addressed whether those statutes comport with the Commerce and Due Process Clauses. For example, the Illinois Supreme Court recently considered a dormant Commerce Clause challenge to a statute deeming an out-of-state retailer's nexus with the State established by a contract to pay in-state affiliates for online referrals "by a link on the [affiliate's] Internet website." 35 Ill. Comp. Stat. § 105/2.[7] But the court

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[6] *See, e.g.*, Cal. Rev. & Tax. Code § 6203(c)(5); Ga. Code § 48-8-2(8)(M); Minn. Stat. § 297A.66(4a); N.C. Gen. Stat. § 105-164.8(b)(3).

[7] Unlike the New York Statute, the Illinois enactment does not appear to permit the retailer to rebut application of the

(*continues on next page*)

declined to reach the constitutional issue, holding instead that the statute was preempted by the federal Internet Tax Freedom Act's moratorium on "discriminatory taxes on electronic commerce," 47 U.S.C. § 151 nt. *See Performance Mktg. Ass'n v. Hamer*, 2013 IL 114496, ¶ 23, 2013 Ill. LEXIS 1354, ¶ 23 (Oct. 18, 2013). As the dissenting justice observed, that moratorium is scheduled to expire in 2014—a development that would "revive[] and reinstate[]" the Illinois statute by operation of law and permit the court to confront the Commerce Clause challenge "[a] year from now." *Id.* ¶¶ 43-44.

The Illinois Supreme Court, and courts addressing potential challenges in other States, may ultimately agree with the New York Court of Appeals, creating nationwide uniformity and making this Court's intervention unnecessary. If, however, courts were to disagree with the decision below and create a genuine conflict, this Court's review at that time would benefit from the reasoned opinions of multiple courts. As petitioners' amici acknowledge, "[t]here is strong likelihood that litigation over these statutes will reach this Court in future years." Br. for Amici Curiae Tax Found. et al. at 12. That is precisely why this Court can and should deny review of these petitions now.

b. Developments in the retail industry may eliminate the need for this Court to review the constitutional issues petitioners claim are presented

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collection obligation by showing that the in-state affiliates do not engage in solicitation. Connecticut law appears to follow Illinois in this respect. *See* Conn. Gen. Stat. § 12-407(a)(12)(L).

here. Petitioners argue that this Court's immediate intervention is necessary because compliance with the Statute creates undue burdens on online commerce. Overstock Pet. 30-33; Amazon Pet. 22-24. Yet as petitioners' amici acknowledge, the "unprecedented . . . capabilities of the Internet" and the "exponential growth of computer processing power" have "eased compliance" with state tax-collection obligations. Br. for Amicus Curiae Council on State Taxation at 10, 18. States have made compliance easier by providing electronic filing and online services. *See* Robert D. Plattner et al., *A New Way Forward for Remote Vendor Sales Tax Collection*, 55 State Tax Notes 187, 188-89 (2010) (discussing use of technology by DTF and other States' tax authorities). And private services are available to calculate and collect the taxes that retailers must collect (A.R. 1243-1244).[8] In fact, Amazon itself offers tax collection services to retailers who sell through the Amazon.com website and touts its ability to "calculate US sales and use taxes for all fifty states and the District of Columbia, and certain related local tax jurisdictions" and generate reports "for sellers to use in reporting and remitting taxes to the appropriate taxing authorities." *Amazon.com Help: How Our Tax Collection Services Work*, http://www.amazon.com/gp/help/customer/display.html ? nodeId=200787680.

c. Congressional action may definitively resolve the validity of the New York Statute and other state

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[8] "A.R." refers to Amazon's Record on Appeal in the New York Court of Appeals.

laws—and therefore make unnecessary any adjudication of the constitutional issues petitioners ask this Court to decide here. Under its "plenary power" to authorize States to impose tax-collection obligations that might otherwise violate the dormant Commerce Clause, *Quill*, 504 U.S. at 305, Congress is currently considering a proposal that would authorize States to mandate the collection of sales and use taxes by out-of-state sellers with at least $1 million in annual sales so long as the State adopts certain tax simplification requirements. *See* Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013). The bill has the support of Amazon and many other online retailers who would be subject to collection obligations under the proposal. Kyung M. Song, *Amazon lobbies heavily for Internet sales tax*, Seattle Times, Sept. 7, 2013, http://seattletimes.com/html/localnews/2021778597_amazonlobbyingxml.html. The Senate has passed the bill, which is now pending in a House subcommittee. If this particular bill is not enacted, alternative proposals are likely to be considered. *See* Cong. Research Serv., *State Taxation of Internet Transactions* 14-16 (2013) (describing proposals from prior congressional session). Passage of federal law requiring retailers to collect state sales and use taxes would render unnecessary any decision by this Court on the validity of the Statute.

C. The New York Court of Appeals Correctly Rejected Petitioners' Facial Due Process and Commerce Clause Claims.

The Court of Appeals correctly held that the Statute rationally presumes solicitation from petitioners' use of commissions to encourage New

York residents to refer sales. And having upheld the solicitation presumption, the court was likewise correct to reject the dormant Commerce Clause challenge: an out-of-state seller's use of thousands of New York residents to promote its products and solicit sales clearly gives the seller a substantial nexus with the State.

1. The Statute's solicitation presumption relies on a commonsense inference: when an out-of-state seller pays New York residents *only* for referring customers who in fact complete an order with that seller, then at least some of those residents will be encouraged to solicit business for that seller—*i.e.*, attempt to direct business to the seller. It is well established that a civil presumption must be upheld so long as there is "some rational connection between the fact proved and the ultimate fact presumed." *Mobile, Jackson & Kansas City R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910). Under this highly deferential standard, the Statute's solicitation presumption is "plainly rational," Pet. App. 11a, because a commission incentive scheme rewards the very outcome—a completed purchase—that solicitation is intended to achieve.

That structure closely parallels the compensation given to salespeople who indisputably engage in solicitation for purposes of the dormant Commerce Clause. Like petitioners' in-state affiliates, the salespeople in *Scripto* directed customers to an out-of-state seller and were paid only when the customer consummated an order with that seller—outside the salespeople's presence and without their involvement. *See* 362 U.S. at 209-10. Common sense dictates that in-state affiliates, like other salespeople, will respond to materially identical commission incentives

by doing precisely what they are paid to do: encourage people to purchase products from petitioners. And real-world experience backs up the presumption's rationality: in a recent survey, affiliates identified numerous methods of solicitation—including e-mail, social networks, blogging, and word of mouth—to enhance referrals and thus maximize revenue from commissions. *See* Affiliate Summit, *2013 Affiliate Summit AffStat Report: Affiliate Marketing Benchmarks* 11, http://issuu.com/affiliatesummit/docs/affstat-2013.

The limited evidence introduced in the record (before petitioners abandoned their as-applied challenges) confirms that solicitation is the intended and actual consequence of petitioners' commission incentive scheme. For example, Amazon encourages its school affiliates to promote Amazon's products "far and wide to parents, teachers, students, family members, friends, acquaintances, and anyone else who might like to support the school" (A.R. 1163)—including through targeted e-mails, drafted by Amazon, that encourage the recipients to "shop at Amazon" (A.R. 1167; *see also* A.R. 1174, 1186 (giving examples of such solicitation)). And a cottage industry of books and websites advises affiliates to do precisely what commission payments encourage them to do: reach out to people and direct them to purchase products from the retailer.[9]

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[9] *See, e.g.*, Bruce C. Brown, *The Complete Guide to Affiliate Marketing on the Web: How to Use and Profit from Affiliate Marketing Programs* 41, 74 (2009) (urging affiliates to "sell to your existing customers" and "drive customers to your affiliate

(*continues on next page*)

Petitioners contend that the statutory presumption is unconstitutional because it is effectively irrebuttable. Amazon Pet. 21-22; *see also* Br. for Amici Curiae Newegg et al. at 15-17. But that is at base a factual claim, not a legal one—and one that petitioners have declined to support. As a matter of law, the Statute expressly provides that the presumption "may be rebutted." Pet. App. 78a (N.Y. Tax Law § 1101(b)(8)(vi)). And DTF has issued guidance on how out-of-state sellers may rebut the presumption, including an explicit "safe harbor." Pet. App. 91a-92a. Petitioners have never attempted to rebut the Statute's solicitation presumption or take advantage of the safe harbor. And although the intermediate appellate court remanded specifically for fact-finding into petitioners' practical ability to rebut the presumption, Pet. App. 44a, petitioners failed to present any concrete evidence that they are unable to prove the absence of solicitation to DTF's satisfaction—one reason, perhaps, that Amazon is reduced to far-fetched hypotheticals in support of its assertions. *See* Amazon Pet. 19, 21. Petitioners thus have no basis for claiming that the Statute's presumption is facially invalid because it is effectively irrebuttable. *See Dep't of Taxation & Fin.*

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links"); Rosalind Gardner, *Make a Fortune Promoting Other People's Stuff Online: How Affiliate Marketing Can Make You Rich* 49 (2007) ("Promoting quality products offered by reputable merchants is crucial to the success of your affiliate business."); Amazon Products, Affiliate Marketing - 3 Tips to Promote Amazon Products Successfully (Mar. 1, 2012), http://marketofamazon.blogspot.com/2012/03/affiliate-marketing-3-tips-to-promote.html (last visited Oct. 22, 2013).

of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 69 (1994) (facial challenge may not be based on "consequences that, while possible, are by no means predictable").

2. An out-of-state seller has a substantial nexus with a State so long as it has a physical presence there. *Nat'l Geographic Soc'y*, 430 U.S. at 556. Even a single in-state representative is sufficient to justify a State's application of its tax laws to all of an out-of-state seller's sales in the State. *See Standard Pressed Steel Co. v. Wash. Dep't of Revenue*, 419 U.S. 560, 561-62 (1975); *see also, e.g.*, *Nat'l Geographic Soc'y*, 430 U.S. at 554 n.2 (eight advertising salesmen). The Court of Appeals correctly held that, under these deferential standards, the Statute "plainly satisfies the substantial nexus requirement" as a facial matter. Pet. App. 9a.

The Statute expressly conditions out-of-state sellers' tax-collection responsibilities on a determination that they generate more than $10,000 in annual sales by "soliciting business" in New York "through an independent contractor or other representative." Pet. App. 77a-78a (N.Y. Tax Law § 1101(b)(8)(vi)). In *Scripto*, this Court squarely upheld the imposition of a tax-collection duty on out-of-state sellers based on this type of in-state solicitation. 362 U.S. at 209-11. Here, as in *Scripto*, the Statute comports with the dormant Commerce Clause because it properly hinges out-of-state sellers' tax-collection obligations on similar in-state activity by the sellers' representatives. *See also Quill*, 504 U.S. at 306 ("in-state solicitation . . . performed by independent contractors" establishes substantial nexus). Indeed, petitioners' nexus here is far more substantial: Amazon (like

Overstock, before it canceled its affiliate program in New York) does not have just a single New York affiliate—or eight, or ten—but has contracted with *thousands* of New York residents, Pet. App. 2a, and paid them commissions for "referring a *high volume* of traffic" to their online stores for completed sales (A.R. 1160 (emphasis added)). This substantial in-state activity easily meets the requirement that out-of-state sellers have a physical presence in New York. *See Nat'l Geographic Soc'y*, 430 U.S. at 556.

Requiring out-of-state sellers such as petitioners to collect sales taxes is neither onerous nor unfair. Many other Internet retailers already calculate and collect taxes for dozens of States (A.R. 1244), and indeed Amazon itself has been collecting taxes from New Yorkers for the past several years without any apparent difficulty or harm to its business. At base, the Statute does nothing more than require out-of-state sellers that solicit sales in New York through commissioned in-state affiliates to collect the same taxes that nearly every other retailer doing business in New York already collects. The Statute easily withstands this facial challenge under the dormant Commerce Clause.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREW D. BING
STEVEN C. WU
Deputy Solicitors General
WON S. SHIN
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov

**Counsel of Record*

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