No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF *AMICI CURIAE* REPRESENTATIVE ROBERT W. GOODLATTE, CHAIR OF THE HOUSE COMMITTEE ON THE JUDICIARY, SENATOR RON WYDEN, REPRESENTATIVE F. JAMES SENSENBRENNER, JR., REPRESENTATIVE ANNA G. ESHOO, SENATOR MICHAEL S. LEE, AND REPRESENTATIVE STEVEN J. CHABOT IN OPPOSITION TO THE PETITION

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Curiae, United States Congressman Robert W. Goodlatte, is the Chairman of the United States House of Representatives Committee on the Judiciary, which has jurisdiction over legislation that would address the interstate commerce and state tax nexus issue presented in this case. He also is the sponsor of bipartisan draft compromise legislation to address the issues presented in this case.

Amicus Curiae, United States Senator Ron Wyden, is the former Chairman and current Ranking Member of the United States Senate Committee on Finance which has jurisdiction over legislation that would address the interstate commerce and state tax nexus issues presented in this case.

Amicus Curiae, United States Congresswoman Anna G. Eshoo, is a senior Member of Congress representing the State of California. She is the sponsor, along with Chairman Goodlatte, of bipartisan draft compromise legislation to address the issues presented in this case.

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[1] This Brief is filed pursuant to a blanket consent filed by all parties. No person other than the *Amici* and their counsel has authored this Brief in whole or in part, or made a monetary contribution toward its preparation or submission. Counsel in the Birmingham, Alabama office of Waller Lansden Dortch & Davis represents Newegg, Inc. in a separate matter pending in Alabama Tax Court. However, Newegg, Inc. has not contributed financially to the preparation of this Brief. On November 27, 2017, counsel provided counsel of record for all parties the notice required by Rule 37.2.a.

Amicus Curiae, United States Congressman F. James Sensenbrenner, is a former Chairman and current senior member of the House Committee on the Judiciary. He has played an active role in helping the Committee on the Judiciary resolve the issues presented in this case and also is the sponsor of relevant legislation.

Amicus Curiae, United States Senator Michael S. Lee, has played an active role in helping to resolve the issues presented in this case.

Amicus Curiae, United States Congressman Steven J. Chabot, is the Chairman of the House Committee on Small Business and a senior Member of the House Committee on the Judiciary. He has played an active role in addressing the issues presented in this case in light of the interests of small businesses.

SUMMARY OF ARGUMENT

The Court should deny Certiorari. The Constitution assigned to Congress the domain and power to regulate and control commerce among the States, and the House of Representatives' committee with jurisdiction over this issue has been working diligently and assiduously to find legislative means by which remote vendors may be required to collect use taxes from residents of States in which the vendors have no physical nexus, but which avoids violating the fundamental principle against States regulating activity that occurs

beyond their borders. *Amici* refer to this principle as that of "No Regulation Without Representation."

Petitioner seeks to have the Court take this authority from Congress and impose a judicial mandate that for the first time ever would require a vendor residing in another State to collect use tax from its customers in a State in which it has no substantial physical presence. Were the Court to do so, it would have to breach its rule of *stare decisis*, overrule its prior decisions in *Quill Corp. v. North Dakota*[2] and *National Bellas Hess v. Illinois*,[3] as well as a long, consistent line of authorities upon which the decisions in those cases rest, and, ultimately, sanction States taxing and regulating the conduct outside of their borders of persons with no physical presence in the State by seeking to tax or regulate that conduct. In short, Petitioner in this case asks the Court to authorize "regulation without representation," contrary to Constitutional tradition.

The fact that Congress thus far has not enacted a federal solution to the problem of the collection of State use taxes on sales by remote vendors should not be seen by the Court as a reason to give up on Congress. Rather, the Court should recognize that a lasting solution will require compromise, and respect and accommodate the ongoing, diligent efforts of Congress to find a fair solution consistent with Constitutional norms. The Court also should recognize, as it did in *Quill*, that the only tool with which it might address this problem

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[2] 504 U.S. 298 (1992).

[3] 386 U.S. 753, 760 (1967).

is a binary one, while Congress has not only the power to legislate, but the greater variety of tools needed to reach a compromise that takes into account the constitutional and practical nuances behind an acceptable compromise.

South Dakota, in another context, has taken a position diametrically opposed to its position in this matter, and, in doing so, has elsewhere affirmed its belief that there should be "No Regulation Without Representation." In that instance, South Dakota strongly opposed California's efforts to regulate activity in South Dakota in the context of California's Low Carbon Fuel Standard, by asserting that California's action was an attempt to invade South Dakota's sovereignty.

Even as Congress has worked towards a solution, the actual magnitude of the problem posed by use tax collection for sales by remote vendors has significantly lessened. Seventeen of the top eighteen online retailers have already begun collecting sales tax on both online and in-store sales. This development means that the problem Congress is confronting is becoming progressively less difficult to solve through legislation, and that the Court has even less reason now to intervene, short-circuit Congress' efforts, and overturn *Quill*.

While Congress is making progress based on the principles set forth herein, a key obstacle to the parties' agreement on a final legislative compromise is the pendency of this case. States that prefer *Quill*'s limitation on cross-border taxation to be eliminated have

diminished incentive to compromise with Congress while they pursue *Quill*'s reversal by this Court. As a result, South Dakota's Petition has hindered Congress' ability to fulfill the duty the Court in *Quill* recognized to belong to Congress.

For these reasons as well as those others set forth in Respondent's Brief in Opposition to Granting the Petition, this Court should deny the Petition and leave it to the Congress to forge a lasting solution to the problem of the collection of use taxes on sales by out-of-state vendors who do not have a substantial physical presence in the taxing state.

REASONS FOR DENYING THE WRIT

Amicus, Representative Robert W. Goodlatte, is the Chairman of the House of Representatives Committee on the Judiciary, the House committee with jurisdiction over proposed legislation which deals with the issue sought to be presented in this case. He and the other *Amici* agree with the reasons presented in Respondents' Brief in Opposition to the Petition regarding why the Court should not grant Certiorari in this case. But they present this Brief to bring before the Court their unique insight into the work that the House Committee on the Judiciary and other concerned members of Congress working with the Committee have undertaken to date, in a sustained effort to carry out the Constitutional duty assigned to Congress to regulate commerce among the States with

regard to the issues presented in this case. These on-going efforts have been directed at finding a way in which use taxes not currently being collected, due to a State from a citizen who buys from a remote vendor not physically present in the State, can begin effectively to be collected by the State in which the remote vendor resides. The linchpin of this effort has been to accomplish that end while avoiding legislation that would violate the principle of "No Regulation Without Representation," because doing so would allow the taxing State to impose requirements of conduct upon the remote vendor, who lacks physical presence and rights to legislative representation in the taxing State.

Were the Court to reverse its decision in *Quill* and require a remote vendor to collect use taxes due on sales to a consumer located in a State in which the vendor does not reside and has no physical presence, its decision would upset long-settled Constitutional authority, be at odds with the fundamental principle of "No Regulation Without Representation," be in derogation of Congress' predominant authority to regulate interstate commerce – authority which embodies the principle of "No Regulation" of interstate commerce "Without Representation" in Congress – and hinder on-going efforts by Congress to reach a compromise solution that would allow collection of use taxes on cross-border sales without violating this important principle.

I. Constitutional Tradition and the Principle of "No Regulation Without Representation."

A. In General

It has been understood since the earliest days of the Republic that States do not have the power to regulate beyond their borders. In his "Commentaries on the Conflict of Laws," Justice Story wrote in 1834 that "no State . . . can, by its laws, directly affect, or bind . . . persons not resident therein."[4]

Writing for a unanimous Court, Justice Waite observed that "[n]o State can legislate except with reference to its own jurisdiction."[5]

In 1895, the New York Court of Appeals stated, it is "a principle of universal application, recognized in all civilized states, that the statutes of [one] state have . . . no force or effect in another."[6]

In 1945, the Court said "It was the vision of the Founders" that: "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . and no foreign state will by . . . regulations exclude them."[7]

This bedrock principle of "No Regulation Without Representation" keeps governmental regulation in

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[4] Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC § 20 (Boston, Hillard, Gray, & Co. 1834).

[5] *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

[6] *Marshall v. Sherman*, 42 N.E. 419, 423 (N.Y. 1895).

[7] *H.P. Hood and Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

check by allowing citizens, through the franchise, to ensure accountability between the regulator and those who are regulated. It is also a sensible way to protect States' rights. States speak of sovereignty, but as a prominent scholar has written, the "idea of a 'states' right' to exercise extraterritorial authority is incoherent. If equal states are to retain autonomy over their own affairs, they must refrain from regulating each other's affairs."[8]

The importance of this principle, and the ingenuity required to adhere to it while devising legislation to facilitate the effective collection of use taxes on sales by remote vendors, are at the heart of why Congress, although it has diligently tried to date, has thus far not been able to reach a consensus solution to the problem of use tax collection on remote sales – what Petitioner posits as "the *Quill* issue." The solution insisted on by the Petitioner and other States – to allow a State to impose on remote vendors with no physical presence in the taxing State an obligation to collect use tax from customers who are residents of the taxing State – causes concern among Members of Congress who do not wish to take congressional action further opening the door to allowing States to tax and regulate businesses beyond their borders. Many Members, from both parties and many States from all parts of the

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[8] Michael S. Greve, *Government By Indictment: Attorneys General and Their False Federalism* 6 (The American Enterprise Institute, Working Paper No. 110, May 24, 2005), *available at* https://www.aei.org/wp-content/uploads/2011/10/20050525-GrevenewAug09.pdf.

country, are simply unwilling to abandon this principle for the sake of finding an expedient solution to the problem of use tax collection on remote sales.

However, States have not yet been sufficiently willing to compromise their position in order to accommodate this principle, and even bristle at any suggestion that they should have to compromise. They instead see this Court's holding in *Quill* as "constitutional error" and "an affront to their sovereignty," and resist being "forced," as they say, to negotiate a legislative solution with Congress' help in lieu of fully exercising the sovereign authority they say the Constitution already grants them.

That Petitioner would have the Court accept its interpretation of the Constitution as inherently correct seems rather an odd position, given that until 1950 the accepted rule was that States could not tax interstate commerce at all. Even though that rule has been somewhat relaxed in some instances, in no case has the power to impose a duty to collect sales and use taxes ever been extended to include vendors with no physical presence in the taxing State. In enunciating this rule in *Quill*,[9] the Court was merely upholding its prior ruling in *Bellas Hess*, which itself was yet one more iteration of the rule taken from a long line of earlier cases.

In *Bellas Hess* the Court said:

> The very purpose of the Commerce Clause was to ensure a national economy free from

[9] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

> such unjustifiable local entanglements. Under the Constitution, ***this is a domain where Congress alone has the power of regulation and control***. (Emphasis added).[10]

And, further in its decision in *Bellas Hess* the Court pointed out that:

> [I]n order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn 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. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.[11]

This Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connections with customers in the state are by common carrier or the United States Mail.[12]

The primary constraint on State regulatory and taxing power, other than the Commerce Clause, is the democratic franchise within each State – the ballot box. When a state overtaxes or overregulates, its

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[10] *Bellas Hess*, 386 U.S. at 760.

[11] *Id.* at 759.

[12] *See Miller Bro. v. Maryland*, 347 U.S. 340 (1954).

citizens are empowered by the franchise to resist in opposition to those in government who persist in doing so. But this check on governmental overreach is undone when the burdens and consequences of the overreach are shifted away from voting citizens and onto non-residents. When the burden of state regulation falls on interests outside of the State, it is unlikely to be alleviated by the operation of the political constraints normally exerted when the interests of residents within the State are affected. Not surprisingly, as the needs and appetite for revenue have increased, States have become increasingly aggressive in exporting tax compliance burdens onto residents of other States, and the risks of overreaching have also increased. This concern is not limited to administrative actions, but applies as well to state court proceedings that often follow. There is a reason why federal courts have been given diversity jurisdiction, but this additional safeguard for non-residents is not available in the state tax arena, due to the Tax Injunction Act.

B. Petitioner and Other States, in Other Contexts, Have Strongly Advocated for Respect for the Principle of "No Regulation Without Representation."

Ironically, outside of the sales tax context, South Dakota has shown that it keenly perceives the dangers of permitting States to violate the principle of "No Regulation Without Representation" and attempt to regulate beyond their borders. South Dakota and other states, for example, joined in an *Amicus* Brief filed in a

suit challenging California's Low Carbon Fuel Standard ("LCFS"), which seeks to regulate the out-of-state production of ethanol sold in California, in order to reduce carbon emissions. In its Brief, South Dakota acknowledged California's sovereignty within its own borders, but saw California's attempt to regulate ethanol as impinging South Dakota's sovereignty.

> As sovereign states, Amici recognize California's ability to regulate conduct that occurs wholly within its borders. . . . But here, the LCFS reaches out, across the Rockies and into the Plains, to regulate Amici States' ethanol industry, corn farming, and a host of activities that are far removed from California. . . . It is none of California's business how farmers [in other states] choose to grow their corn. The United States is a common market.[13]

What is "sauce for the goose, is sauce for the gander," and the principle South Dakota asserts in the context of LCFS – "No Regulation Without Representation" – applies with equal if not greater force in the context of cross-border state taxation and tax collection requirements.

Similarly, in 2015, the State of Utah filed an *Amicus* Brief challenging a California law that applied California cage-size requirements to laying hens outside

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[13] Brief of States of Nebraska, Iowa, et al., at 4-6, as *Amici Curiae* in Opposition to Appellant's Motion for a Stay of the District Court's Preliminary Injunction Order and 54(b) judgment pending appeal, *Rocky Mount Farmers Union, et al. v. Goldstene, et al.*, 730 F.3d 1070 (2012) (No. 12-15131).

the latter state. The Brief explained that Utah's interests in the case included:

> Federalism concerns regarding policy that each State should not expect that their internal policies are dictated by another State where citizens of different States have no democratic representation. Indeed, California regulators have already inspected egg producers for compliance outside of California.[14]

These examples, including one from the very State formally seeking to have this Court reverse *Quill*, neatly illustrate why South Dakota and other States should insist that Congress respect the "No Regulation Without Representation" principle as it strives to help resolve the sales tax issue, and why this Court should refrain from granting South Dakota's Petition for a Writ of Certiorari in the instant case.

II. Solutions Are Available to the States That They Could Adopt at Their Own Instance Without Disturbing or Offending the Principle of "No Regulation Without Representation." Meanwhile, the Problem Sought to be Addressed is Diminishing.

Importantly, the States also have available to them less offensive means to achieve collection of use taxes on remote sales on their own – while respecting the

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[14] Brief for the State of Utah as *Amicus Curiae* in Support of Appellants at 5, *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (2015) (No. 14-17111).

principle of "No Regulation Without Representation," and without disturbing *Quill* – either individually or through collective action. Use tax States could, for example, more vigorously enforce their use tax laws on their own residents, within their own borders, such as by legislatively enhancing their reporting-and-collection regimes, then more actively pursuing collection and auditing. States could also enter into an interstate compact, through which each party State could regulate its own in-state sellers, require those sellers to collect tax, and then forward taxes collected to the customers' states. Under such a compact, all regulated entities would always have legislative recourse, through the franchise, to hold accountable those who impose burdens upon them. States similarly could enter into an interstate compact through which each party State could impose reporting, rather than collection, burdens on sellers within their jurisdictions. In either of these examples, the need to disturb *Quill* would be completely obviated and the principle of "No Regulation Without Representation" would be respected.

The States have not chosen to devote their efforts to the implementation on their own of such solutions. Perhaps it is because they would prefer the Court or the members of Congress to be held accountable to their citizens, rather than themselves. But, whatever the States' reasons for not pursuing these other paths, the availability of these paths strongly suggests that it would be improvident for the Court to grant the Petition and unnecessarily revisit the *Quill* issue.

Further, even as the States have refrained from pursuing these solutions, the magnitude of the problem they confront has lessened. E-commerce today is dominated by large retailers that have a physical presence in almost all of the States and, therefore, collect use tax in almost all of the States.[15] These retailers include Amazon, with its warehouses, and major, multi-channel "clicks-and-mortar" retailers such as Wal-Mart, Target, Best Buy, and Lowes, who sell both in traditional stores and online.[16] Seventeen of the top eighteen online retailers collect use tax on all of their online sales.[17] This development means both that Congress is confronting a problem that is becoming progressively less difficult to solve through legislation, and that the Court has less reason than ever to intervene, short-circuit Congress' efforts, and overturn *Quill*.

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[15] *See* Brief of National Retail Federation as *Amicus Curiae* in Support of Petitioner at 23, *South Dakota v. Wayfair, et al.*, No. 17-494 (Nov. 2, 2017) (Amazon's current market share is over 40 percent, and will reach 50 percent by 2021); Chris Isidore, *Amazon to start collecting state sales taxes everywhere*, CNN.com (Mar. 29, 2017); http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

[16] *See* Arthur Zaczkiewicz, *Amazon, Wal-Mart Lead Top 25 E-commerce Retail List*, WWD, Mar. 7, 2016; http://wwd.com/business-news/financial/amazon-walmart-top-ecommerce-retailers-10383750/.

[17] *Id.*

III. Since The States Refuse To Solve Their Use Tax Collection Problem Themselves, the Only Provident Decision for This Court To Take Is To Deny the Petition and Leave It To Congress to Pursue Its Fuller and More Appropriate Means of Arriving at a Solution.

Congress, in contrast to the States, is living up to its responsibility to use the means available to it to address the remaining problem of use tax collection on remote sales and its effects on interstate commerce. Despite Petitioner's suggestions to the contrary, Congress has been far from derelict in its duties. The inability to reach a compromise solution to the problem at hand has not been for lack of significant effort. Congress has been working persistently for several terms to find a solution that lies between the poles of exclusive state action, such as adopting effective means of collecting use taxes from use tax States' own residents or forging a workable interstate compact, and this Court's overturning of *Quill*, as Petitioner urges. In the process, Congress has considered several approaches[18] and has been making steady incremental progress over at least the past three terms of Congress.

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[18] Among the proposals being considered are the Online Sales Simplification Act (OSSA), draft, 114th Cong. (2016), *available at* http://www.mtc.gov/getattachment/2016-08-25-Online-Sales-Simplification-Act-of-2016-(OSSA).pdf.aspx; Remote Transactions Parity Act (RTPA), H.R. 2193, 114th Cong. (2016); Marketplace Fairness Act (MFA), S. 976, 115th Cong. (2017); and No Regulation Without Representation Act (NRWR), H.R. 2887, 115th Cong. (2017).

Since Chairman Goodlatte assumed the Chairmanship of the House Committee on the Judiciary in 2013, under his leadership, the Members and staff of the Committee have devoted thousands of hours in an effort to find a resolution of this issue satisfactory to all interested parties, recognizing that all parties and their constituents and customers have significant and legitimate interests at stake.[19]

In this process, the Committee has produced multiple iterations of a draft compromise bill.[20] Each successive draft has brought the interested parties closer together, and in the process has won the support of numerous internet retailers and consumer groups that previously had opposed any change in the *status quo*.[21] Over 100 online retailers wrote to Congress in support of the 2016 draft.[22] Meanwhile, even as Congress has worked towards forging a compromise solution, the magnitude of the problem has lessened, as seventeen of the top eighteen online retailers collect use tax on all of their online sales.[23] It is estimated that, if enacted, the most recent version of the proposed bill would result in collection of between 80 to 100 percent

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[19] *See* Statement of Chairman Robert W. Goodlatte, at 1-3 (Dec. 4, 2017); https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.

[20] *Id*.

[21] *See id*.

[22] Press Release, NetChoice, Businesses United Behind Goodlatte Sales Tax Plan (Sept. 1, 2016); https://netchoice.org/library/businesses-unite-behind-goodlatte-sales-tax-plan/.

[23] Zaczkiewicz, *supra*, note 16.

of the sales/use tax revenue on cross-border sales not currently being collected.[24]

The approach taken in the Committee's drafts has been to respect the principle of "No Regulation Without Representation" and simplify compliance burdens by ensuring that, in collecting tax, remote sellers are responsible only to their home states and states within which they have a physical presence or have voluntarily registered as "dealers."[25] Remote sellers without a physical presence in the buyer's State and who have not voluntarily registered with the buyer's State to collect and remit the State's tax, would collect tax and remit it to the remote sellers' home state taxing authorities, who would then be responsible for forwarding it to the customer's State using a proven clearinghouse method similar to that used in the fuel tax context.[26]

Under each successive Committee draft, audits to assure compliance with tax collection obligations would be conducted by appropriate officials in the State of the vendor's place of business, and the proceeds received would be remitted by the vendor's State tax collecting authorities to the sales and use tax

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[24] Statement of Chairman Robert W. Goodlatte, at 2 (Dec. 4, 2017); https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.https://protect-us.mimecast.com/s/7GwWBJTD210YSk.

[25] *See id*. at 1-3.

[26] *See id*.

collecting authorities in the States of residence of the customers from whom the taxes were collected.[27]

The Committee's successive drafts have raised successive issues, which were addressed as explained by Chairman Goodlatte:

> In 2015, we proposed a revised compromise, under which sellers would follow their home state rules on taxability (base), but would collect at the rates applicable in their customers' states, provided that the seller's home state incorporated those rates into its own tax laws. This approach achieved critical price parity for traditional retailers while keeping compliance simple for online sellers. In fact, because compliance would be so simple, no State-subsidized software would be necessary for sellers to identify taxability, saving States an estimated $2 billion annually as compared to other approaches. As before, Internet sellers would answer only to their home state taxing authority, so there would be no cross-border reach.[28]

This latest compromise proposal would level the playing field between remote vendors and brick-and-mortar vendors, and would also permit States to recover use tax revenues they are not now collecting from consumers residing in their State. At the same time, the proposal would not grant those States cross-border taxing and regulatory authority. Rather, it would allow

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[27] *See id*. at 1-2.

[28] *Id.* at 2.

remote vendors to be responsible to and audited only by their home-State authorities.[29] The proposal provides for remote sellers to apply tax rates applicable in their customers' states, but it makes that imposition dependent upon the sellers' states first adopting those rates into their own law, for use in remote sellers' sales.[30] This avoids the "No Regulation Without Representation" problem with respect to tax rates.

In addition, the proposal would avoid the costly administrative problem for sellers of having to comply with as many as 13,000 taxing jurisdictions, each with its own set of rules to follow – a requirement that is particularly burdensome on small vendors who wish to engage in the national market via the Internet, but might not be able to afford the costs of compliance.[31] This approach is a solution that is far simpler than previous alternatives, has the support of many small businesses, and does not require a *de minimis* threshold amount of sales.[32]

This novel approach has taken time to develop, and required thought and effort to educate the interested parties as to the underlying principles and framework of the solution. As with any new approach, questions have been raised about how this framework

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[29] *See id*.

[30] *See id*. at 1-2.

[31] *See id*. at 2 n.5.

[32] *See id*. at 2.

would operate.[33] The parties understandably still need time to work together to resolve these questions.[34]

Were either the Court to mandate or Congress to allow States to regulate or tax beyond their borders, that would be inconsistent with our Constitutional history, most particularly the Commerce Clause, and would open up a "Pandora's Box" of ills the Court cannot fully predict, at least not based on the inadequate and incomplete record in this case. *Amici* and the other members of the House Committee on the Judiciary, if not perhaps the whole membership of Congress, are keenly aware of the need for Congressional action to resolve the impasse. Their constituents have been vocal about the need for a solution, and they have been diligent in their attempts to find a fair and principled solution.

In its decision in *Quill*, the Court recognized that while it only has binary authority to rule on the case before it, Congress uniquely has the tools necessary to enable it to resolve the myriad of issues that create the burden on interstate commerce through crafting compromises and drafting rules that simplify procedures and minimize complexities and the expense of compliance.

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[33] The work by the House Committee on the Judiciary reflects Congress' active engagement to find a solution on remote sales tax collection. The discussion of that work and what it produced should not be interpreted as meaning that Senator Wyden supports the Goodlatte measure.

[34] *See id*. at 2-3.

> This aspect of our decision [the Commerce Clause issue] is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.[35]

This is precisely what various members of Congress, and specifically *Amici* and the other members of the House Committee on the Judiciary have been doing and should be permitted to continue to do until a compromise legislative solution can be reached that serves the needs of the States for revenue while preserving the principle of "No Regulation Without Representation."

Additionally, the Senate Committee on Finance has been actively engaged on these matters in recent years. Ranking Member Wyden has been closely following Chairman Goodlatte's efforts, recognizing that the Senate will have to reconcile its views with those of the House of Representatives. While there may be stakeholders that are frustrated that the Congress has not produced an enduring solution to the question of remote sales tax collection, it is important to bear in mind that it has legislated on matters related to interstate commerce and state and local tax collection, most recently by making permanent the Internet Tax Freedom Act, which prevents states from, for example,

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[35] *Quill*, 504 U.S. at 318.

imposing multiple and discriminatory taxes on electronic commerce.[36] Furthermore, a number of legislative initiatives have been proposed to address particular questions in the area. For example, Senators Ron Wyden and John Thune have advanced legislation to address uncertainty around where digital goods and services can be taxed, given that those goods may originate from a server in one state, and be consumed on a mobile device in another state.[37] Senator Wyden takes his oversight responsibility seriously and tasked the Government Accountability Office to investigate matters related to collection of sales and use taxes on remote sales. This more than year-long investigation draws to a close this month and will present Congress with potential options to resolve thorny questions that have vexed lawmakers for many years. In short, the House, the Senate and the entire Congress is considering matters that the Court would inject itself into, should it grant Certiorari.

The reasoning of the Court in *Quill* in this regard is consistent with the Court's reasoning in other cases that presented the same issue in somewhat different contexts. For instance, in *General Motors Corp. v. Tracy*, the Court declared it "lack[s] the expertness and the institutional resources necessary to predict the

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[36] Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 922, 130 Stat. 122, 281 (2015).

[37] *See* Press Release, U.S. Senator John Thune; Thune, Wyden Introduce Bill to Protect Innovative Digital Goods and Services from Multiple and Discriminatory Taxes (Mar. 24, 2015); https://www.thune.senate.gov/public/index.cfm/2015/3/thune-wyden-introduce-bill-to-protect-innovative-digital-goods-and-services-from-multiple-and-discriminatory-taxes.

effects of judicial intervention invalidating Ohio's tax scheme."[38] Should intervention by the National Government be necessary, Congress has both the "power and institutional competence to decide upon and effectuate any desirable changes in the scheme that has evolved. Congress has the capacity to investigate and analyze facts beyond anything the judiciary could match, joined with the authority of the commerce power. . . ."[39] Similarly, in *Patsy v. Board of Regents of Florida*, the Court stated that the "very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable."[40]

Ironically, a key obstacle to the parties being able to reach a final compromise is the pendency of this case. Petitioners and other opponents of the *status quo* who advocate obliterating the bright line physical presence standard enunciated in *Bellas Hess* 50 years ago, and reconfirmed in *Quill* 25 years ago, appear to believe they have little incentive to accept a proposed, compromise Congressional solution when they think they can wait and potentially get 100 percent of what they want from the Court in this case – including, from the States' perspective, the opening of the Pandora's box of the ability to regulate beyond their borders.[41]

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[38] *General Motors Corp. v. Tracy, Tax Comm'r of Ohio*, 519 U.S. 278, 304 (1996).

[39] *Id.* at 309.

[40] *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 513 (1982).

[41] As observed by Chairman Goodlatte,

> "[i]n 2017, at the start of the 115th Congress, the Committee resumed its work, but, frankly, the pendency of

For the Court to deny granting any Writ of Certiorari in a case presenting the issue of use tax collection on sales by remote vendors will provide all of the relevant parties with a greater incentive to remain creatively and diligently at the Congressional negotiating table in the effort to achieve a consensus legislative solution – an effort the *Quill* Court itself emphasized as the better path for resolution of the relevant issues. Indeed, affording more time for legislative action is all the more appropriate since a central issue in the resolution of the problem at hand is the principle of "No Regulation Without Representation." By contrast, for the Court to grant a Writ improvidently now would lead to a short-circuiting of the legislative process – an outcome that would come at the expense of Congress, the Court's sister branch, and an outcome that the Court should, out of comity, eschew.

CONCLUSION

The House Committee on the Judiciary has worked assiduously with concerned members in both the House and the Senate on resolving the issue before the Court

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> the litigation challenging *Quill* has hindered negotiations. In particular, States that oppose the limitations of *Quill* believe that the U.S. Supreme Court will overturn that decision if they simply wait for action by the Court and do not agree to a congressionally proposed solution. This leaves them less open to compromise with Congress."

Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017); https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1052.

and has made significant progress towards completion of an enactable Bill. That negotiations have been protracted is not due to neglect on the part of Congress, but to the *bona fide* concerns its Members have with extending the permissible cross-border reach of States. While the Court has two options – uphold or reverse the lower court, Congress uniquely has the tools required to achieve the dual goals of effectively enabling the collection of use taxes on sales by remote vendors and avoiding impermissible regulation by the States outside of their borders. The best way the Court can contribute to resolving this issue is to deny the Petition and leave it to the affected parties to make the compromises necessary to forge a lasting solution to the problem.

Respectfully submitted,

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