No. 06-1228

IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A., FKA MBNA AMERICA BANK, N.A.,

Petitioner,

v.

TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF DIRECT MARKETING ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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The Direct Marketing Association, Inc. ("DMA") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by FIA Card Services, N.A., fka MBNA America Bank, N.A. ("MBNA").

INTEREST OF THE AMICUS[1]

I. DMA: AN OVERVIEW

DMA, a not–for–profit corporation, is the leading national trade association representing mail order and online sellers and advertisers. Since the late 19th century, direct marketers have relied upon the Commerce Clause, U.S. Const. art. I, § 8, to establish an unobstructed nationwide marketplace for their goods. Founded in 1917, DMA today has more than 3,600 members from all fifty states and fifty foreign countries. Members of DMA market their products directly to consumers, via catalogs, magazine and newspaper advertisements, broadcast media, and the Internet.

In the last two decades, DMA has filed *amicus curiae* briefs with this Court in state tax cases that have raised constitutional questions directly affecting its members in the conduct of their interstate businesses, including in *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 n.10 (1992) (citing DMA's brief), *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995), and *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988).

II. DMA'S INTEREST IN THIS CASE

In this case, the court below acknowledged that, for the purpose of imposing a duty on out-of-state sellers to collect sales and use taxes, *Quill* reaffirmed the "physical

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* provided any monetary contribution to its preparation or submission.

presence" requirement of substantial nexus under the Commerce Clause, first expressly articulated in *National Bellas Hess, Inc. v. Illinois Department of Revenue,* 386 U.S. 753 (1967). The Court concluded, however, that the "physical presence" standard set forth in *Quill* did not apply to other forms of state taxes, including business franchise and corporation net income taxes. For these taxes, the Supreme Court of Appeals of West Virginia held that a "significant economic presence" was sufficient to satisfy the substantial nexus prong of the test established in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977) to determine whether a state tax violates the Commerce Clause.

If the MBNA decision is allowed to stand, numerous DMA members without any physical presence in West Virginia, and with only a limited volume of sales to consumers in that state, will nonetheless face exposure to West Virginia income and franchise taxes. Moreover, because out–of–state businesses provide an attractive target for state legislatures seeking to raise additional revenue, the West Virginia economic presence standard is likely to spread quickly to other states. Indeed, some states, such as Ohio, have already adopted their own unique versions of a non–physical presence standard in regard to gross receipts taxes. While the tremendous uncertainties associated with multiple versions of a so–called economic presence standard would make compliance with business activity taxes undoubtedly burdensome for larger companies, the impact on small and medium–sized businesses would be especially onerous. DMA estimates that there are more than 479,500 businesses in the United States with annual revenue of ten million dollars or less that engage in remote marketing in one or more states in which they have no physical presence. This group of small businesses collectively had an estimated combined annual revenue of $299.4 billion dollars in 2006, and employed an estimated total of 1.13 million people. It is these smaller businesses which will be hardest hit by widespread use of West Virginia's self–declared economic presence standard.

Forced into costly and confusing compliance obligations arising from tax impositions by multiple government authorities, smaller retailers may choose simply to retreat from their bold ambitions to reach a national marketplace.

Clearly, if a variety of new Commerce Clause standards – all based on some kind of amorphous "economic presence" concept – are substituted for the traditional physical presence standard in regard to direct state tax impositions on non–resident companies, many of DMA's members will be affected in an immediate and adverse manner. At a time when the Internet has enabled start–up companies and home town businesses to access a national marketplace and to realize the benefits of a single, unified economy, a crazy quilt of state and local tax compliance obligations will effectively erect a barricade across the electronic highway. The Commerce Clause was intended to protect interstate commerce from such diverse and burdensome state regulations and taxation. The core objectives of the Commerce Clause are undermined by the West Virginia court's ruling.

The *Quill* decision was based upon this Court's finding that an obligation to collect state and local use taxes, without a retailer having an in–state physical presence, would impose impermissible burdens on participants in interstate commerce. The same reasoning applies here. Without the clear, bright–line limitation of a physical presence requirement, compliance with the nuances of varying state and local business franchise and corporate income taxes – not to mention gross receipts taxes and other forms of business activity taxes which may be implicated – would present serious obstacles to small companies engaging in business across state lines.

STATEMENT OF THE CASE

DMA relies on the Statement Of The Case set forth at pages 5 through 11 of the Petition for Writ of Certiorari filed by MBNA. DMA notes the following critical aspects of the decision of the Supreme Court of Appeals of West Virginia:

1. Despite its recognition that a Tennessee appellate court had reached the contrary conclusion on a similar set of facts, the court below found that *Quill* applies only to state sales and use taxes and, therefore, did not control the present case, which involves state business franchise and corporation net income taxes. This interpretation of *Quill* relied on: (a) a finding that *Quill's* affirmance of the physical presence test for sales and use taxes was based in large part on *stare decisis* and the mail order industry's reliance on *Bellas Hess*; (b) a view that this Court expressly limited *Quill* to sales and use taxes; and (c) a recognition that compliance with administrative regulations in the collection of sales and use taxes places an undue burden on interstate commerce. The court concluded that the franchise and income taxes at issue in this case "do not appear to cause the same degree of compliance burdens." App. 16a.

2. The West Virginia court found that "significant economic presence" was a better indicator of whether substantial nexus exists for Commerce Clause purposes, in part because, according to the majority, the *Bellas Hess* physical–presence test makes "little sense" in today's world. The court rejected MBNA's argument that the adoption of any substantial nexus requirement short of showing actual physical presence is in fact simply applying a Due Process minimum contacts standard in violation of the express language of *Quill*. *See* App. 17a-20a.

SUMMARY OF ARGUMENT

This case involves the decision of a state's highest court which radically weakens the protections of the Commerce Clause by creating a nebulous constitutional standard that disregards decades of Supreme Court precedent. It is a decision which dramatically expands the state's authority to tax companies beyond its borders, at the expense of the free and open market created by the Commerce Clause. It is a decision which places DMA members, as well as all other retailers making sales over state lines, at risk for business activity taxes in every state in which they merely have customers, even though they may have no physical facilities or employees in many of those states. While this exposure is problematic for large companies, it is perilous for smaller ones. Such smaller companies, facing crippling and uncertain compliance obligations imposed by numerous jurisdictions, may be forced to abandon their dreams of reaching a nation–wide market.

ARGUMENT

In support of its conclusion that a physical presence test is constitutionally required, the *Quill* decision emphasized the undue burden that sales and use tax collection would impose on interstate commerce, noting that the North Dakota tax at issue imposed a collection duty on every vendor which advertised in the State three times in a single year, and that "similar obligations might be imposed by the Nation's 6,000–plus taxing jurisdictions." *See Quill*, 504 U.S. at 313 n.6.

Mindful of these difficult compliance duties, *Quill* recognized a practical compromise between state authority to tax and the need to protect an open, accessible, and unfettered national market. This balance was struck in the form of a clear, bright–line, physical presence rule, which provided certainty to businesses and state governments alike. Such a rule "furthers the ends of the dormant Commerce Clause," as undue burdens on interstate commerce can be avoided by "the

demarcation of a discrete realm of commercial activity that is free from interstate taxation." *See id.* at 314–15. While such a rule might be "artificial at its edges", such artificiality is "more than offset by the benefits of a clear rule." *Id.* at 315.

> Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."

Id. at 315–16 (internal citation omitted). Moreover, a bright–line rule encourages settled expectations and fosters investment by businesses and individuals. *See id.* at 316. *Quill* closed by suggesting that if the bright–line rule is to be lifted, it should be done by Congress, which "may be better qualified" and has, at any rate, the ultimate power to resolve the matter. *See id.* at 318.

Now the West Virginia court has concluded that the reasoning of *Quill* should apply only to sales and use taxes; and it has adopted a different constitutional test for other forms of state taxation. West Virginia is not alone in confronting this issue. As recognized in the decision of the Supreme Court of Appeals of West Virginia, a Tennessee appellate court has decided this same question in precisely the opposite manner. *J.C. Penney Nat'l Bank v. Johnson*, 195 S.W.3d 831 (Tenn. Ct. App. 1999). The unsettled status of this critical constitutional question concerning the scope of state taxing authority, and the direct split in authority on this issue, warrant granting *certiorari* in this case.

Moreover, other state legislatures and revenue departments have chosen either to ignore the *Quill* standard or

adopt a similarly narrow view of its application to state tax jurisdiction. For example, the Ohio Department of Taxation has recently begun to issue assessments to a number of direct marketers for that state's new Commercial Activity Tax. The Ohio Department of Taxation maintains that *Quill* does not apply because this is a gross receipts tax and not a sales or use tax.[2]

Intervention by this Court is necessary to ensure that DMA's members, and businesses in general, have a clear understanding of the rules of engagement when it comes to their state and local tax obligations. It is essential for the health of the national economy that businesses can rely on a clear and consistent constitutional standard respected by all state and local governments.

I. THE CORE COMMERCE CLAUSE PROTECTIONS ANNOUNCED IN THE *QUILL* AND *BELLAS HESS* CASES APPLY TO BUSINESS FRANCHISE, CORPORATION NET INCOME, AND GROSS RECEIPTS TAXES

Broad imposition of business franchise, corporation net income, and gross receipts taxes – commonly called Business Activity Taxes – on small and mid–sized direct marketers would constitute a tremendous new tax compliance burden. Currently, there are at least 3,300 separate state and local business activity taxes imposed by state and local governments, and over 12,600 jurisdictions have the authority

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[2] *See* Ohio Commercial Activity Tax Information Release, CT 2005-02 (September 2005) ("The United States Supreme Court has not yet decided whether the physical presence requirement mandated for sales and use taxes by *Quill Corp. v. North Dakota* (1992), 504 U.S. 298, applies to other taxes, such as the CAT"), *available at* http://tax.ohio.gov/divisions/communications/information_releases/CAT2005-02.stm (visited May 5, 2007).

to collect such a tax. *See* App. 78a, 83a. Just as *Quill* feared the burdens created if sales and use tax obligations similar to those of North Dakota were imposed by the nation's 6,000–plus sales and use tax jurisdictions, precisely the same burdens would result from allowing the thousands of state and local jurisdictions with the authority to impose a business activity tax the ability to extend their taxing authority across state borders to businesses with no stores, offices, factories, or employees within their territories.

Despite the summary assertion by the Supreme Court of Appeals of West Virginia that such taxes do not appear to cause the same degree of compliance burdens as sales and use tax collection, the reality is that compliance with state income taxes and gross receipts taxes is extremely complicated and varies greatly from state to state. Nearly every state imposes a corporate income tax. *See* Gupta & Mills, *Does Disconformity In State Corporate Income Tax Systems Affect Compliance Cost Burdens?* 56 Nat'l Tax J. 355 (June 2003) (reporting that 45 states, along with Washington D.C., impose such a tax). As outlined more fully in the Gupta & Mills study, states differ tremendously in how income is allocated and apportioned, in how the tax base is defined, in what tax rates apply, and in a host of other issues.

States also have varying rules regarding reporting and filing procedures, including which corporations must file a return, whether related entities should file together or separately, what due dates apply for filing and remitting taxes, and whether federal extensions are accepted. Roughly half the states allow combined reporting, whereas another half require or allow separate reporting by each entity within an affiliated group. Among the states that follow combined reporting of unitary businesses, there are dramatic differences regarding the level of combination.

A cause of considerable complexity is the fact that the states have different rules for allocating and apportioning a multistate corporation's income among the states in which it does business. Most states use a three–factor formula (sales,

property, and payroll) to apportion business income. Some states weigh all factors equally, other states double–weight the sales factor, and some states placing even more emphasis on sales. Furthermore, while sales are typically assigned to a particular state based on a destination test, some states use a "throwback rule" that reassigns sales to the state of origin if the corporation is not taxable in the destination state. States also differ in their definition of the tax base, including what items of income and deduction are included in taxable income. States have different depreciation rules, rules for deduction of net operating losses, and the list goes on. The Gupta article found that non–uniformity among the states substantially increases corporations' compliance costs (even allowing for such factors as number of tax returns filed, firm size and other firm–specific control variables), and concluded that state income tax compliance costs are largely driven by complexity and disconformity.

Large companies with accounting staffs and outside consultants may be able to navigate successfully their way through the labyrinth of state income tax compliance, but smaller companies do not have the resources to meet these compliance obligations. The differing apportionment standards among states place a business, especially a smaller company, at risk of duplicative over–taxation. This risk is increased by the fact that there is no centralized resource to which businesses can turn to ease their way in determining, let alone meeting, their obligations.

Moreover, the prospect of challenging an incorrect assessment in a remote jurisdiction is daunting. Take the hypothetical example of a small business located in Vermont which sells gourmet food products, such as jams and maple sugar candy, over the Internet. With a good website and a great set of recipes, there is no limit to the national, even international, markets this start–up business could reach. However, if one of New Mexico's 100–plus taxing municipalities issues an assessment against the company for a local gross receipts tax based on sales made to customers

there, *see* App. 81a, and this remote seller believes the measure of taxes is in error and decides to challenge the assessment, it will have to hire local counsel familiar with local tax law, and proceed first through the administrative protest and then, perhaps, through the judicial process. Furthermore, in many states the company must pay the tax before it can challenge the assessment in state court; and only then will it be permitted to sue for a refund. Such a procedure would be inordinately expensive for a small retailer. It would be left with little choice but to pay the tax and forget its objections. Faced with potentially hundreds of such improper—but practically incontestable—assessments, the small Vermont food company could fall victim to a "death by a thousand cuts."

Because the tax compliance burdens are so similar, the balance struck in *Quill* in favor of a bright–line rule should be recognized here as well. As acknowledged in the dissent in the lower court decision, "the United States Supreme Court has not generally treated the question of state authority to tax interstate commerce as turning on the specific type of tax involved." *See* App. 33a. The alternative to a bright–line rule, as recognized by *Quill,* is a "case–by–case evaluation of the actual burdens imposed by particular regulations or taxes." 504 U.S. at 315. Such a case–by–case method, usually implemented by state revenue departments and courts on a retrospective basis (i.e., after an assessment has been issued and a protest filed), offers no certainty to companies seeking to do business among the fifty states, and subsequently does not foster investment and growth. *See Quill,* 504 U.S. at 316 ("a bright–line rule … encourages settled expectations and, in doing so, fosters investment by businesses and individuals."). *Cf.* App. 20a (in reaching its decision, the West Virginia court conceded that "a substantial economic presence standard is by nature more elastic than the bright–line physical presence test").

Furthermore, because there has been no Supreme Court precedent upholding a state tax challenged on

Commerce Clause grounds absent some degree of physical presence in the State by the taxpayer, companies have come to rely on the physical presence standard in other state tax areas as well – an expectation which the West Virginia court has now upset, to the especial peril of small and mid–sized businesses.

II. UNLIKE THE PHYSICAL PRESENCE TEST, WEST VIRGINIA'S TEST DOES NOT STRIKE THE RIGHT CONSTITUTIONAL BALANCE BETWEEN THE STATES' AUTHORITY TO TAX AND THE NEED FOR A FREE AND OPEN NATIONAL MARKET

While the physical presence test strikes a balance between the states' authority to tax and the need for an unrestricted and accessible national market, the West Virginia court's economic presence standard deals a dangerous blow to the protections of the Commerce Clause. *First*, economic presence is not a fair test. Businesses which have no physical presence in a state do not receive meaningful benefits or protections from the state, such as police and fire protection, transportation infrastructure, government–sponsored employee training programs, economic development grants, and so on – and, therefore, they should not be required to pay taxes to support state and local government programs. Why should a small or medium–sized business located in Vermont pay taxes to support New Mexico's roads, schools, and hospitals, when not a single employee is located within the State and the company maintains no physical operation there?

Second, "significant economic presence" does not lend itself to a bright–line rule and would be subject to varying interpretations by different state courts. The West Virginia decision does not attempt to define the perimeters of its test, merely citing a commentator and noting that such a standard would involve an examination of the quality and

quantity of a company's economic presence and incorporate due process 'purposeful direction' considerations. *See* App. 18a. The use of the term "significant" poses particular difficulties for interpretation – and the confusion is exacerbated by the fact that the West Virginia court uses the word "significant" and "substantial" interchangeably. If West Virginia's version of an economic presence test becomes widespread, some states may choose to adopt a definition that is sensitive to the size of a company or the volume of a company's in–state sales. Other states, however, may set the bar very low and consider even a relatively small amount of sales to be "significant." If this Court declines to take this case, small businesses will have no reliable means of determining which, if any, of these diverse interpretations will be applied in various taxing jurisdictions. They will have no reliable means of determining whether they are subject to tax.

III. IF THE PHYSICAL PRESENCE TEST IS TO BE LIFTED, CONGRESS SHOULD DO SO

Over the past several decades, the Supreme Court has recognized and reaffirmed the "physical presence" test for substantial nexus. In the *Quill* decision, the Court acknowledged that Congress has the authority under the Commerce Clause to modify the balance struck by the Supreme Court in establishing a bright–line physical presence rule. In recent years, Congress has held hearings on a number of bills that would expand sales and use tax jurisdiction. *See, e.g.*, S. 1825, 103rd Cong., Tax Fairness for Main Street Business Act of 1994; S. 545, 104th Cong., Consumer and Main Street Protection Act of 1995; S. 1586, 105th Cong., Consumer and Main Street Protection Act of 1997; H.R. 3184, 108th Cong., Streamlined Sales and Use Tax Act; S. 2152, 109th Cong., Sales Tax Fairness and Simplification Act; S. 2153, 109th Cong., Streamlined Sales Tax Simplification Act. Despite careful consideration, however, Congress has chosen not to disturb the physical presence test.

Now a state supreme court has disregarded Supreme Court precedent, and substituted its policy judgment in an area where Congress has declined to change existing Commerce Clause standards. Whereas even the most extreme proposals before Congress to expand state tax authority have recognized the competing considerations that come into play on this controversial subject, with provisions for *de minimis* exemptions for small businesses as well as mandatory simplification of state and local tax procedures, the West Virginia court decision provides none of these nuanced considerations.

Were Congress to legislate in this area, it would undoubtedly do so with such standards, procedure, exceptions, and oversight as it deemed appropriate to the interests of interstate commerce. In contrast, a general sweeping aside of all restraints on state taxing authority over non–resident companies by a state supreme court does not serve the interests of the national economy but only the parochial revenue interests of one state government. Any congressionally–authorized expansion of state business activity tax authority would necessarily be preceded by extensive hearing and studies on this subject – including its impact on interstate commerce – and, one would hope, be accompanied by requirements for greater uniformity of income apportionment schemes; simplification of filing, audit and appeal procedures; and an opportunity for non-resident taxpayers to obtain judicial review of tax assessments without first having to pay the tax and then suing for a refund. In contrast, the West Virginia court's decision presents an uncertain standard with no refinements regarding its scope and implementation.

If the scope of state taxing authority is to be expanded beyond its current Commerce Clause limitations, rather than allowing each state to adopt its own standards for expanding the geographic reach of its tax system, it would be far more appropriate for Congress to set a uniform standard. Congress has the ability, through carefully–crafted legislation, to fine

tune any grant of expanded state tax authority and to strike the proper balance between the states' fiscal needs and the burdens on interstate taxation. If West Virginia and other states are to be permitted to tax directly remote sellers, large or small, it should be based upon limitations that Congress adopts, mindful of the need to protect the vitality of interstate commerce and to mitigate the burdens that will be incurred by small and medium–size retailers. Until and unless Congress chooses to act, however, it is the duty of this Court to resolve the conflict in accordance with its past precedent, which provides a clear and manageable default rule – that of physical presence.

IV. WEST VIRGINIA'S TEST WILL MOST SEVERELY IMPACT DMA'S SMALL AND MEDIUM SIZE MEMBERS AND, IF ALLOWED TO STAND, MAY CRIPPLE SUCH BUSINESSES

Just as studies have shown that compliance costs of sales and use tax collection are disproportionately borne by small and medium size retailers, a study conducted by the Michigan Ross School of Business has concluded that "the compliance costs…[relating to income taxes for] small and mid–size businesses are large in an absolute sense, and larger relative to size than for the biggest businesses in America."[3] West Virginia's test, if allowed to stand and spread to other states, will have the greatest adverse impact on those small and mid–sized businesses which, in recent years, have taken advantage of the Internet as a way to expand their markets and enable consumers, including those living in rural and

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[3] *See* Slemrod & Venkatesh, *The Income Tax Compliance Cost of Large and Mid-Size Business,* Ross School of Business Working Paper Series, No. 914, 36 (September 2002), *available at* http://deepblue.lib.umich.edu/bitstream/2027.42/39364/1/914.pdf (visited May 5, 2007).

remote areas of the country, to purchase products that might not otherwise be available to them. If confronted with an array of state and local business activity taxes, from corporate income taxes to gross receipt taxes, many of these smaller companies will be deterred from expanding their businesses and limit their sales to local markets. Such a development would be to the detriment not only of DMA's members, but also of consumers and the national economy.

CONCLUSION

In light of the foregoing, *Amicus Curiae* The Direct Marketing Association respectfully submits that the petition for a writ of certiorari should be granted and the case be fully considered by this Court.

Respectfully submitted,

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