No. 16-267

IN THE

Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, US CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND GOVERNMENT FINANCE OFFICERS ASSOCIATION SUPPORTING DENIAL OF CERTIORARI

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BRIEF OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief in support of respondent Barbara Brohl, urging that the Court deny review in No. 16-267.

INTEREST OF *AMICI*

The present *amici* are organizations representing state and local elected and appointed officials from throughout the United States, up to and including state governors. These organizations regularly file amicus briefs in cases, like this one, raising issues of concern to their members. Additional information on each of the *amici* is available in the attached appendix.

Notably, *amici* supported respondent Brohl in this case's previous iteration here, *see* Brief of *Amici* National Governors Association et al., No. 13-1032, and likewise supported respondent below, s*ee* Brief of *Amici* National Governors Association et al., CA10 Dkt. No. 12-1175 (filed May 20, 2015). As in those proceedings, *amici* maintain a vital interest in the

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[1] The *amici* include the National Governors Association, National Conference of State Legislatures, Council of State Governments, National Association of Counties, US Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, and Government Finance Officers Association. *Amici* hereby certify that no party's counsel authored this brief in whole or in part and that no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice of *amici's* intent to file this brief, and all parties consented to the filing.

rules governing the assessment and collection of sales tax by state and local governments.

In short, those revenues fund essential benefits and services provided to the citizens *amici* represent. Accordingly, *amici*'s previous brief in this Court laid out the research regarding the harms caused by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) which Justice Kennedy's concurrence cited in calling for that case's swift reconsideration. *Amici* strongly agree that this Court needs to speedily take up an appropriate vehicle for reconsidering *Quill* in order to prevent further harm to state revenues. They write, however, to inform the Court that such vehicles are coming soon, and to urge the Court not to grant the plainly uncertworthy petition of the Direct Marketing Association (DMA) in this case in a premature effort to reach that important issue.

SUMMARY OF ARGUMENT

To begin with the bottom line, *amici* largely agree with respondent Brohl that: (1) DMA's petition presents questions unsuited for this Court's review; (2) correctly understood, those questions are actually about the reasonable steps states have taken to address the harmful effects of *Quill*, and not the "non-discrimination" principle of the dormant commerce clause; (3) the only interesting and important question is thus whether *Quill* should be overturned, as Justice Kennedy has suggested; and (4) this Court should speedily grant a case that allows it to take up *that* question. *See* Pet. No. 16-458 (cross-petition). Several cases raising that question are already coming this way, however, and those cases raise the question of *Quill*'s remaining

vitality far more cleanly and directly than this one. *Amici* thus believe the Court should deny DMA's petition, and leave the critical *Quill* question for another, better day that is soon to come.

1. When this case was last before the Court, Justice Kennedy concurred to highlight the harms caused to state and local governments from the continued application of the rule announced a half-century ago in *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and half-heartedly left in place in 1992 by *Quill*. Calling *Quill* a "case questionable even when decided," Justice Kennedy explained that while "[t]he instant case [*i.e.*, *DMA v. Brohl*] does *not raise this issue* in a manner appropriate for the Court to address it …. [t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*," and those decisions "should be left in place only if a powerful showing can be made that [their] rationale is still correct." *See DMA v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy J., concurring) (emphasis added). *Amici* wholeheartedly agree: The Court should speedily grant a case that permits it to finally inter *Bellas Hess*'s "physical presence" requirement. This case just isn't it.

That is evident from DMA's own petition, which frames its Questions Presented in vague terms of "non-discrimination" and affirmatively eschews any direct reliance on *Bellas Hess* or *Quill*. That strategic decision not only prevents this case from serving as an adequate vehicle for reconsidering *Quill*, but also destroys any certworthiness it might have had. Among other things, DMA's *own* petition recognizes that the issues it has chosen to frame are novel,

splitless, and certain to percolate back up to this Court if they ever matter outside Colorado. There is no reason for this Court to reach out to decide such an uncertworthy case. Indeed, that is so obviously true that, if these were the only questions lurking in the case, there would be no cause for respondent's *amici* below to brief their support for denying certiorari.

2. As respondent Brohl's cross-petition correctly recognizes, however, these are not the only questions lurking in the case. *See* Pet. No. 16-458 at 12-16. Instead, the *real* question is whether, essentially, the holding of *Bellas Hess* and *Quill* should be expanded to prevent the reasonable steps states have taken to ameliorate the problems those decisions have caused. *Id.* Even if DMA had framed its Question Presented that way, however, there would still be every reason to deny review: This Court has in fact denied petition after petition asking it to expand the reach of *Quill*, and nothing recommends changing course now. In fact, as both opinions below thoughtfully clarify, *Quill* itself actually recommends against expanding the "physical presence" test beyond the narrow context in which it was announced. *See* Pet App. A17-A19, A35-A37 (majority); A42-A47 (Gorsuch, J. concurring). And that in turn explains why petitions seeking one or another expansion of *Quill* are so oft and recently denied.

3. Having correctly recognized that the real question DMA presents is whether *Quill* should be expanded, respondent's conditional cross-petition asks the Court to take up that question only if it will also consider whether *Quill* should be overruled. In contrast to the questions above, *that* is at least an

important and timely question that could be the basis of a certworthy petition: As Justice Kennedy's previous concurrence in this case explained, the rule that out-of-state sellers cannot be required to collect state sales taxes is causing acute harm to state and local governments because of the massive "changes in technologies and consumer sophistication" that have occurred since *Quill* was decided, making it "unwise to delay any longer a reconsideration of" *Quill* and *Bellas Hess*. 135 S. Ct. at 1135. *Amici* endorse the view that "the legal system should find an appropriate case" to reconsider those holdings as soon as possible. *Id.* To the extent *amici* part ways with respondent Brohl at all, it is only over whether this case is the right one for the Court to take that important step.

In fact, the Court should be aware that "the legal system" is answering Justice Kennedy's call with both expedition and precision. Three states have already taken affirmative steps to challenge *Quill* head on, passing carefully tailored legislation or administrative rules that precisely frame the question whether *Bellas Hess*'s "physical presence" standard should be replaced with an "economic nexus" rule under which sellers can be required to collect state sales tax if they transact a large amount of business in a given state. South Dakota, for example, passed a law with detailed legislative findings about the harms *Quill* is causing, and which requires sellers to collect South Dakota sales tax if they transact over $100,000 annually in the State (which, based on South Dakota's size, equates to national revenues of about $40 million). That law's validity has already been raised in multiple suits,

and in one of them, (1) the parties have agreed that the only determinative issue is whether *Quill* retains force in the modern digital economy; and (2) the State has conceded that summary judgment is appropriate against it on that issue because only this Court has the power to decide the continuing force of *Quill*. Perfect vehicles like that one are soon to arrive in this Court, will present concrete opportunities for reconsidering *Quill*, and will be free of ancillary issues. *Amici*'s view is thus that the Court should deny this case—which seeks factbound and splitless review of a correct, unanimous decision—and then grant, *very soon*, a clean vehicle for reconsidering *Quill*.

ARGUMENT

I. DMA's Petition As Framed Lacks Any Semblance Of Certworthiness

Under *Quill* and *Bellas Hess*, retailers lacking a physical presence in a particular state are exempt from the otherwise universal obligation to collect taxes on sales made to customers in that state. Across the country, these holdings have created an irrational tax preference for retailers who avoid physical presence within any given state. Meanwhile, the massive expansion in online retail since *Quill* was decided in 1992—two years before Amazon.com started selling *books*—has caused state and local governments to lose billions in annual sales tax revenue, "inflicting extreme harm and unfairness on the States." *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J. concurring).

In an effort to partially ameliorate those harms, Colorado enacted legislation providing out-of-state

retailers with two options. On the one hand, they could collect and remit the applicable taxes just like all physically present retailers; alternatively, they could simply summarize annual sales above a certain threshold to particular Colorado customers, so that the State could seek applicable use taxes directly from customers themselves.[2] This operates somewhat like the W-2 reporting scheme for federal income tax: The third-party report encourages voluntary compliance by Colorado's taxpayers, and also facilitates collection if they don't voluntarily comply. Colorado's reporting law accordingly represents one available method for the State to partially assess and collect the applicable use tax owed on remote sales—a very small palliative for the harm caused by its inability to impose a direct collection requirement on remote sellers under *Quill*.

Below, the Tenth Circuit rejected DMA's dormant commerce clause challenge to that regime. The dormant commerce clause forbids state laws that (1) discriminate against or (2) impose undue burdens on interstate commerce. The Tenth Circuit held that Colorado's scheme was not discriminatory because it imposed its reporting requirement not on interstate retailers as such, but on retailers that failed to collect

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[2] Sales and use taxes are complimentary: If sales tax is not collected on a transaction, the buyer typically owes an offsetting use tax. Thus, one of the ironies of *Quill* is that the applicable tax is *already owed*; *Quill* merely requires the inefficiency of separate use-tax returns for every consumer in Colorado who buys from Amazon.com, rather than one return from Amazon itself. What's really going on is that the use tax is rarely paid and very hard to enforce.

sales taxes. Pet. App. A23-A26. It concluded that, to the extent that distinction tracked one between in- and out-of-state retailers, it corresponded to a way in which those groups were not similarly situated. *Id.* A26-A31. *Quill* was relevant to this analysis only because the reason out-of-state retailers do not collect sales taxes is rooted in *Quill* itself. *See id.* A30-A31.

With regard to undue burdens, the Tenth Circuit reversed the district court, which had found such a burden by applying the bright-line "physical presence" standard from *Quill* and *Bellas Hess*. In contrast to the lower court, the Tenth Circuit recognized that *Quill*'s bright-line, physical-presence rule only applies where states require out-of-state retailers without a physical presence to *collect sales taxes*. *Id.* A35-A37. Given this Court's holding that this case does not concern the *collection* of sales taxes, *see id.* A36 (quoting *DMA*, 135 S. Ct. at 1130-31), and without "any good reason to sua sponte extend the bright-line rule of *Quill*," the court held that any burden imposed by Colorado's notice and reporting requirements was reasonable and non-discriminatory. *Id*. A36-A37; *see also id.* A31-A33 (noting that burdens on out-of-state retailers were lighter than on in-state retailers). Notably, DMA's petition does not even challenge this undue-burden holding, which gave rise to the principal discussion of *Quill* below.

Judge Gorsuch concurred. He noted that the case for expanding the reach of *Quill*'s bright-line physical-presence rule to this new context was particularly weak because *Quill* grounds its own holding solely in *stare decisis*, and even affirmatively doubts that the Court would reach the same result if

asked to consider *Bellas Hess*'s physical-presence rule anew. *Id.* A42-A43 (discussing "the exceptional narrowness of *Quill's ratio* [*decidendi*]"). Judge Gorsuch went on to explain that the core dormant-commerce clause concern of discrimination was "easily rejected" here because

> [t]he plaintiffs haven't come close to showing that the notice and reporting burdens Colorado places on out-of-state mail order and internet retailers compare unfavorably to the administrative burdens the state imposes on in-state brick-and-mortar retailers who must collect sales and use taxes. If anything, by asking us to strike down Colorado's law, out-of-state mail order and internet retailers don't seek comparable treatment … they seek more favorable treatment, a competitive advan-tage, a sort of judicially sponsored arbitrage opportunity or "tax shelter." *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part).

Pet. App. A45. Precisely because, in his view, *Quill* had become a sword for out-of-state retailers to seek unfair advantage rather than a shield against unfair burdens, Judge Gorsuch believed that any legitimate claim of "reliance interests" associated with *Quill* was "erod[ing] over time" or reaching its "expiration date." *Id.* A46. Accordingly, he concluded that the result in this case was plainly consistent with *Quill* because "*Quill*'s very reasoning … seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Id*. A47.

With respect to the discrimination issue—which is the exclusive basis for DMA's petition—the holding below is obviously correct. The only reason Colorado treats in-state and out-of-state retailers differently is because one of them isn't collecting any sales tax; indeed, Colorado even offers that group the choice to do so in lieu of complying with the reporting regime. *Id.* A31. And the minimal reporting task placed upon out-of-state retailers in fact pales in comparison to the burdens carried by local retailers, who must not only report information, but also calculate, collect, and remit the taxes owed on every single one of their transactions. Simply put, out-of-state retailers remain in a substantially better position in Colorado than retailers with a local presence.

Indeed, Colorado's modest effort to protect its tax revenues by gathering information about remote sales to its residents actually does very little to reduce the substantially privileged status that out-of-state retailers enjoy. Among other things, Internet and other remote sales still look substantially cheaper to Colorado consumers at the point of sale and, again, remote sellers can simply choose collection if they prefer it to reporting. That resolves the whole case: "Discrimination" in this context does not just mean "different" treatment, it means *worse* treatment. Any other use of the word "does not accord with ordinary English usage" because, if adopted, "*both* competitors could claim to be disfavored—discriminated against—relative to each other." *Ala. Dept. of Revenue v. CSX Transp.*, 135 S. Ct. 1136, 1143 (2015).

The Tenth Circuit's decision on this point is both obvious and factbound. The majority opinion and

concurrence stress that the responsibility to show an unfair or outsized burden on out-of-state retailers is on the plaintiffs, and that plaintiffs here failed to "point to *any* evidence" on this issue. Pet App. A33 (emphasis added); *see id.* A45 (Gorsuch, J., concurring) ("[P]laintiffs haven't come close to [this] showing[.]"). That holding does not even foreclose the possibility that future plaintiffs could make the required showing in a case about a very similar law. Accordingly, the fundamental complaint in DMA's petition is almost embarrassingly technical: DMA still does not even try to show that Colorado's law actually leaves out-of-state sellers worse off than their in-state rivals; instead, it argues only that the law somehow relieves them of making any such showing at all. *See id.* A24-A37 (majority) (rejecting any "comparative burden" analysis).

Apart from being factbound and correct, there are several further reasons the decision below does not merit review, all of which appear on the face of DMA's petition. First, and most importantly, DMA does not even attempt to demonstrate a circuit split; instead, it pitches the decision below as somehow inconsistent with "settled law," *id.* A14-A15—the exact kind of error correction this Court normally avoids. Second, the petition consistently characterizes the Tenth Circuit's decision as "novel," *id.* A2, A25, A31, A34, A39—a sure sign that percolation is appropriate, rather than immediate review. Third, far from alleging any reason why this Court cannot await future vehicles, the petition's first non-merits argument virtually promises that other states will follow Colorado's suit—allowing this Court plenty of opportunity to review DMA's questions in

the unlikely event that a split ever develops. *Id*. A37-A38.

That is a weighty tally against certiorari: DMA's *own* framing asks for (1) splitless, (2) factbound, (3) error correction, to avoid (4) a technical rather than substantive injury to the plaintiff caused by (5) a unanimous decision applying (6) settled law in (7) a novel context that (8) the Court will have every opportunity to review after appropriate percolation. Without much of anything on the other side of the scale, DMA's petition should plainly be denied.

II. The Real Question Here, Which Respondent Correctly Identifies, Has Been Frequently Denied.

Perhaps because of the strong signals this case has engendered from Justice Kennedy and Judge Gorsuch, DMA's petition affirmatively eschews any effort to ground its argument in *Quill*'s bright-line, physical-presence rule. *See* Pet. A14 n.1 ("DMA does not seek review of the decision" that "*Quill* does not apply to a regulatory provision such as the Colorado Act."). Nonetheless, respondent Brohl is correct that the issues DMA attempts to raise ultimately boil down to whether states can try to address the inequalities and inefficiencies created by *Quill* and *Bellas Hess* through solutions that avoid actually requiring out-of-state retailers to collect sales tax. *See* Pet. No. 16-468 at 12-16. Respondent Brohl believes that this question "is of significant national importance," because states are right now undertaking various such efforts. *See id.* *Amici* agree that a decision *prohibiting* states from making reasonable efforts to even partially ameliorate the harms caused by *Bellas Hess* and *Quill* would be

quite important. The problem is that neither the decision below nor any other recent decision reaches that result, and in the many prominent cases *approving* such state laws, this Court has repeatedly denied review.

For example, in *Geoffrey v. South Carolina Tax Commission*, 313 S.C. 15, 18 (1993), the Supreme Court of South Carolina upheld a corporate income tax levied against out-of-state corporations. The court found *Bellas Hess* and *Quill* inapplicable, declaring it "well settled" that states can tax income without the taxpayer having a physical presence, explaining that "any corporation that regularly exploits the markets of a state should be subject to its jurisdiction to impose an income tax even though not physically present." *Id.* at 23 (citing *Int'l Harvester v. Wisc. Dep't of Taxation*, 322 U.S. 435, 441-42 (1944)). Although this decision was reached shortly after *Quill*, this Court denied certiorari on a petition supported by multiple *amici* asserting that the rationale of *Bellas Hess* and *Quill* should be expanded. *See Geoffrey v. S.C. Dep't of Revenue & Taxation*, 510 U.S. 992 (1993).

Next, in *Capital One Bank v. Commissioner of Revenue*, 453 Mass. 1, 12-13 (2009), the Supreme Judicial Court of Massachusetts similarly found *Quill* inapplicable to an income-based excise tax on an out-of-state financial institution because that decision was limited to sales and use taxes for its physical-presence requirement. The taxpayer and supporting *amici* sought certiorari, relying principally on *Quill*. This Court again denied review. *See Capital One Bank v. Comm'r of Revenue*, 557 U.S. 919 (2009).

In 2010, the Iowa Supreme Court likewise turned away an effort to expand the scope of *Quill* and *Bellas Hess* to capture a corporate income tax on out-of-state businesses. *See KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 323 (2010). Once again, the corporation sought certiorari, relying heavily on *Quill* and accompanied by a host of *amici*. And once again, this Court denied the petition. *See KFC Corp. v. Iowa Dep't of Revenue*, 132 S. Ct. 97 (2011).

Finally, just a few Terms ago, New York's highest court rejected an attempt by online retailers to deploy *Quill*'s holding to nullify legislation that required online retailers to collect tax on sales made using "affiliate" vendors with a physical presence in the State. *See Overstock.com v. N.Y. Dep't of Taxation & Fin.*, 965 N.Y.S. 2d 61, 65-67 (2013). Once more, the online retailers and a host of prominent *amici* sought certiorari. And, once more, this Court denied review. *See Overstock.com v. N.Y. Dep't of Taxation & Fin.*, 134 S. Ct. 682 (2013).[3]

Because DMA does not even attempt to frame its petition in terms of *Quill*, it of course makes no showing that the question as respondent Brohl reframes it would meet any of the certiorari criteria. At an absolute minimum, however, neither party provides any reason why this case should be granted

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[3] *See also Am. Target Advert. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (2000); *Tax Comm'r v. MBNA Am. Bank,* 640 S.E.2d 226, 232-34 (W. Va. 2006), *cert. denied sub nom. FIA Card Servs. v. Tax Comm'r*, 551 U.S. 810 (1996); *Couchot v. State Lottery Comm'n*, 659 N.E.2d 1225 (Ohio 1996), *cert. denied*, 519 U.S. 810 (1996).

where these previous petitions were denied. This case is, in fact, even further removed from *Quill* than those cases were, because it does not involve any tax collection at all. This Court should not abandon its consistent refusal to grant petitions that seek to extend *Quill*'s already harmful and unjustifiable restraint upon the states.

III. This Case Is a Suboptimal Vehicle For The Only Certworthy Question—Whether *Quill* Should Be Overruled.

In addition to correctly framing the real issue in DMA's petition, respondent Brohl is also correct that: (1) this Court should not consider expanding *Quill* unless it is willing to also consider overturning it; and (2) this Court certainly should find an opportunity to consider the latter question. *See* Pet. No. 16-468 at 16-31. Unfortunately, the foregoing demonstrates that there is no good argument for this Court to actually grant DMA's petition and consider expanding *Quill*, and the denial of DMA's petition necessarily requires denying Colorado's *conditional* cross-petition seeking *Quill*'s abrogation as well.

To the extent the Court is at all tempted to take this case as an opportunity to overturn *Quill*, however, *amici* agree with that temptation but note that there are two additional and very strong reasons not to choose that course. First, this is at best a suboptimal vehicle through which to consider the question of *Quill*'s continuing vitality, which is only tangentially implicated by the decision below. Second, and perhaps most importantly, better vehicles are well on their way to the Court.

A. This is a suboptimal vehicle through which to reconsider *Quill*.

Although *amici* agree with respondent Brohl that DMA's petition should be granted only if the Court is willing to reconsider *Quill*, and particularly endorse her showing that *Quill* badly needs reconsideration in light of the harms it is causing to state and local governments, *see* Pet. No. 16-458 at 18-23, *amici* note that the question of whether *Quill* should continue to apply to the novel conditions of the new millennium's digital economy will be better presented in other cases than it is here. In that regard, there are at least four aspects of the decision below that make it a suboptimal vehicle through which to reconsider *Quill*.

First, overturning *Quill* is neither necessary nor obviously sufficient to decide this case. It is not necessary because, as the decision below amply demonstrates, Colorado's reporting regime can be upheld without abrogating *Quill* in any respect. And it is not obviously sufficient because, as respondent Brohl concedes, questions will remain regarding the validity of Colorado's law (and other laws) under the ordinary "substantial nexus" standard for the dormant commerce clause, even if *Quill* is overturned. *See* Pet. No. 16-468 at 34 (citing *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977)). Respondent suggests, however, that overturning *Quill* could still represent an alternative basis for deciding this case because "DMA's allegations of discrimination will be mooted" following *Quill*'s abrogation, in light of a *separate* Colorado law which would once again require remote sellers to collect sales tax—effectively relieving those out-of-state sellers from the reporting requirement at issue.

Suffice it to say that considering an additional Question Presented in a conditional cross-petition as a means of mooting a judgment in the *respondent's* favor would be an unusual way to approach any case, let alone one that asks the Court to overturn existing precedent. Indeed, given the importance of that kind of question, it would be far better to follow the ordinary course and take a case in which deciding the continued applicability of *Quill*'s rule was both necessary and sufficient to decide the case at bar.

Second, and relatedly, it is not clear that this case offers a concrete alternative to the physical-presence rule that the Court could endorse in overturning *Quill*. In the other vehicles described below, states have asserted the power to require out-of-state sellers to collect sales tax on the basis of the extensive amount of business they transact within the state—sometimes referred to as "economic nexus." Here, respondent asks the Court to overrule *Quill*, but isn't even defending a tax-collection measure, so that doing what respondent asks will not clarify for other states what kinds of tax-collection measures they can adopt. The Court might prefer to reconsider *Quill* in a setting where it could clearly endorse an alternative—thereby finally clarifying this deeply confused area of law.

Third, taking up a delicate question like overturning precedent in such a confused posture does not guarantee adequate adversarial presentation. Importantly, DMA's view is that *Quill* is unnecessary to decide this case because Colorado's reporting regime is discriminatory on its face. Pet. 19-24. In contrast, if the sole issue dividing the parties was the applicability of *Quill* in the modern

economy, that would be the win/lose issue for both sides, and it would receive the full and undiluted briefing it deserves.

Fourth, and finally, while respondent suggests that this case now arises free from jurisdictional issues because this Court has resolved the Tax Injunction Act question, that is not entirely correct. DMA brought this case under 42 U.S.C. §1983, and this Court has unanimously held that Congress did not authorize Section 1983 relief in cases involving state taxation where an adequate remedy is available through state law. *See Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995). It may be that this limitation on Section 1983 is coextensive with the Tax Injunction Act, but it may not—at the very least, it has its own separate and important animating concerns, including the threat of attorneys fees against the states. At a minimum, this represents a novel and complicated jurisdictional issue that could prevent the Court from ultimately reaching a question it would be reaching far out to decide in the first place.

In short, there are reasons why reconsideration of *Quill* is unnecessary to decide this case, reasons why it may be insufficient to decide this case, reasons why it may be impossible in this case, and reasons to doubt that it will be fully and adequately briefed in this case. Given the serious step that overturning a precedent embodies, the Court should wait for a better vehicle to come.

B. Better vehicles for reconsidering *Quill* will soon be before the Court.

That is particularly true because those vehicles are well on their way. To be sure, *amici* strongly agree with respondent Brohl that *Quill* desperately needs reconsideration, and the Court should take up that question soon. But there are now several cases across the country that raise that issue directly and, in fact, were specifically built to answer Justice Kennedy's call to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *DMA*, 135 S. Ct. at 1135. The Court should deny this uncertworthy case, and take one of these vehicles instead.

1. South Dakota.

During its 2016 Legislative Session, the South Dakota Legislature passed and the Governor signed Senate Bill 106, "An Act to provide for the collection of sales taxes from certain remote sellers." SDCL §§10-64-1 *et seq*. The Act, which took effect May 1, 2016, requires out-of-state sellers to collect and remit sales tax as though they had a physical presence in South Dakota, provided they conduct $100,000 worth of business or 200 separate transactions annually with South Dakota citizens. *See id.* §10-64-2. This bill was designed as a direct challenge to *Quill* and *Bellas Hess* in response to Justice Kennedy's invitation. *See id.* §§10-64-1(7)-(8).

Following this enactment, South Dakota filed a declaratory judgment action in state circuit court seeking to require three out-of-state retailers to comply with its terms. *South Dakota v. Wayfair,* Hughes County Circuit Court, Civ. No. 16-92 (2016). The State's complaint in that action begins with the following statement:

> The State – through this declaratory judgment action – seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill* … and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

Complaint at 1-2, *available at* https://dor.sd.gov/Taxes/Business_Taxes/State%20v.%20Wayfair%20Inc.%20et%20al.pdf.

Shortly after South Dakota filed its declaratory judgment action, two trade associations represented by the same counsel as the defendants in the State's action (and in *this* case, too) filed their own declaratory judgment action in state circuit court against South Dakota, seeking pre-enforcement invalidation of the Act under *Quill*. *See Am. Catalog Mailers Ass'n v. Gerlach*, Hughes County Circuit Court, Civ. 16-96 (2016). Meanwhile, the State's case was removed to federal court, where fully briefed motions for summary judgment and remand remain pending. *South Dakota v. Wayfair*, No. 16-3019 (D.S.D. 2016). Notably, the State's summary judgment papers in that case confirm that it is *conceding* that the lower courts are obligated to enforce *Quill* as written, and that it is accordingly asking those courts to rule against it immediately, thereby placing the issue of *Quill*'s validity before this Court as soon as possible. South Dakota has only one level of appellate review, so once the state

trial court decides either case, it will proceed directly to the South Dakota Supreme Court.

These two pending South Dakota actions—one now in federal court and the other in state court—thus (1) directly challenge the premise of both *Quill* and *Bellas Hess*, (2) offer an alternative theory of economic presence with a meaningful sales threshold that this Court could endorse, and (3) ensure that the key question will reach this Court very soon in (4) a clean posture free from any confounding questions or jurisdictional concerns. The detailed findings of the South Dakota legislature regarding the harms caused by *Quill* will help to frame the matter for the Court, as will the real-world examples provided by the business models of the concrete, internet-retail defendants. Instead of the abstract presentation of the issue in this case—in which *Quill* is only tangentially related to the particular law at issue, and the plaintiff is a faceless trade association—the Court would consider whether *Quill* should be abrogated through the concrete question of whether a particular company with a particular business model can lawfully be required to collect a particular state's sales tax under the dormant commerce clause. That is the kind of ideal and familiar presentation that this important issue requires, and a decision in such a case would give much better guidance to states and lower courts going forward.

2. Alabama

Alabama has similarly enacted a regulation intended to directly challenge *Quill*. It provides that any seller, regardless of physical presence, is required to collect and remit sales tax if it is determined to have an "economic presence" in

Alabama. Ala. Admin. Code r. 810-6-2-.90.03 (effective Jan. 1, 2016). Economic presence is established where a seller (1) has sales of tangible personal property into the State of at least $250,000 per year; and (2) conducts one or more of the additional activities listed in Alabama Code Section 40-23-68. The second prong, however, specifically includes a long-arm provision encompassing "any other contact with [Alabama] that would allow this state to require the seller to collect and remit the tax due under the provisions of the Constitution and laws of the United States." Ala. Code. §40-23-68(b)(9). Accordingly, the effect of Alabama's rule is to require collection by out-of-state retailers who have an economic nexus of $250,000 of annual business in the State, assuming this Court holds such a requirement constitutional.

After Alabama levied an assessment against out-of-state retailer Newegg, Inc., Newegg challenged its constitutionality in the Alabama Tax Tribunal. This case is accordingly following a typical pathway to this Court involving a tax assessment, challenge, and initial state-court determination. The focused record likely to be developed along that pathway will be more relevant to the *Quill* question than the record below, and—like the findings of the South Dakota legislature—would again help to frame the issue for the Court. To the extent the Court has not already granted a case from South Dakota or another jurisdiction, this case will thus provide another certain opportunity for the Court to cleanly consider the question whether *Quill*'s physical-presence standard should give way to an economic nexus test

or another rule regarding sales-tax collection by out-of-state retailers.

3. Tennessee

Finally, Tennessee has proposed a regulation that would require remote sellers to collect and remit sales tax if they exceed $500,000 in annual sales and engage in "regular and systematic solicitation" of Tennessee residents. *See* Christopher Wilson, *Tennessee Department of Revenue Seeks to Adopt Economic Nexus Standard for Sales and Use Tax*, TSCPA.com, https://www.tscpa.com/news/103-tennessee-department-of-revenue-seeks-to-adopt-economic-nexus-standard-for-sales-and-use-tax. Tennessee's Department of Revenue held a hearing on that proposed rule in August, and it is expected to take effect next spring. A case challenging the rule and directly presenting the question of *Quill*'s viability should appear in short order thereafter, and given the importance of the issue, the State's Supreme Court could hear the case directly on appeal from the trial court. Moreover, the extensive rulemaking record is, again, likely to help frame the issues regarding *Quill*'s ongoing vitality for the Court.

* * * * *

In sum, this Court need not go out of its way in order to find a case that permits it to reconsider *Quill*: The states have heard the call, and those cases are headed straight here. *Amici* believe that the Court should wait for those cases—and should *certainly* grant one of them when they arrive—but should not force the issue, granting DMA's uncertworthy petition as a means of acquiring a bank-shot opportunity to reconsider *Quill* in this

case. The states have waited nearly 50 years since *Bellas Hess* was decided for relief from its incorrect rule. While Justice Kennedy is no doubt correct that the Court should not delay in taking up the question because of the acute harms that *Quill* and *Bellas Hess* are causing the states in the internet age, the legal system can wait one more Term (if that) for an ideal vehicle to come before the Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns

and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its

18,000 members are dedicated to the sound management of government financial resources.