No. 17-494

IN THE

# Supreme Court of the United States

SOUTH DAKOTA,
*PETITIONER,*

v.

WAYFAIR, INC., OVERSTOCK. CO, INC.
AND NEWEGG, INC.
*RESPONDENTS.*

On Petition for a Writ of Certiorari
to the Supreme Court of South Dakota

## BRIEF OF AMICUS CURIAE OF FOUR UNITED STATES SENATORS AND TWO UNITED STATES REPRESENTATIVES IN SUPPORT OF THE PETITION

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## INTEREST OF THE AMICI CURIAE[1]

Amici are four United States Senators and two United States Representatives who support the Petition asking this Court to overturn its decision in *Quill Corp v. North Dakota*, 504 U.S. 298 (1992). Heidi Heitkamp is a United States Senator from North Dakota, Lamar Alexander is a United States Senator from Tennessee, Richard Durbin is a United States Senator from Illinois, and Michael Enzi is a United States Senator from Wyoming. Two are Democrats, and two are Republicans. Kristi Noem is a United States Representative from South Dakota. John Conyers, Jr. is a United States Representative from Michigan and the Ranking Member of the House Committee on the Judiciary. They are a Republican and Democrat, respectively. The Senators and Representatives maintain a vital interest in the laws affecting their states' ability to assess and collect sales and use taxes by state and local governments. They are among the co-sponsors of S. 976, the Marketplace Fairness Act of 2017, and H.R. 2193, the Remote Transactions Parity Act, as well as other versions of those bills in prior Congresses. Senator Heitkamp previously served as the State of North Dakota's Tax Commissioner and represented the State of North Dakota in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amici and their counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. On October 18, 2017, counsel provided counsel of record for all parties the notice required by Rule 37.2.a.

*Amici* are filing this brief in support of the Petition in this case. The States which they represent have sales and uses taxes that this Court's decision in *Quill* prevents them from enforcing. It is estimated that, as of 2015, total sales and use taxes uncollected because of *Quill* amounted to almost $26 billion annually.

Not only does *Quill* cause a loss in revenue to their States, but it also places merchants with physical locations in their States at an economic disadvantage because they must, in effect, charge a higher price for a product also sold by an out-of-state retailer that does not have to collect a tax that is imposed on in-state buyers and must be collected by in-state sellers. For states like Illinois, North Dakota, Tennessee, and Wyoming, which rely heavily on state sales taxes for revenue, respondents have a price advantage of up to 11% in Illinois, 8.5% in North Dakota, 9.75% in Tennessee, and 6.0% in Wyoming over businesses with a physical presence in the respective States simply because they cannot be required to collect those State taxes.

*Amici* are filing this brief to provide an anticipatory response to the inevitable objection that respondents will make that this Court should stay its hand and allow Congress to address the serious unfairness problems created by *Quill*.

## SUMMARY OF ARGUMENT

Congress has plenary authority under the Commerce Clause to permit States to require interstate sellers of products to collect sales and use taxes imposed on the recipients of those products who reside in their State. It also has the power to do what *Quill Corp v. North Dakota*, 504 U.S. 298 (1992), currently does – forbid States from collecting such taxes unless the seller has a physical presence in that State. And it has the power to allow States to collect such taxes, but impose conditions on doing so, as the Marketplace Fairness Act of 2017, and the Remote Transactions Parity Act of 2017, of which *amici* are co-sponsors, would do. But despite these powers, and despite the enormous increase in Internet commerce in the 25 years since *Quill*, with resulting loss of billions of dollars, and the ever-increasing unfairness to local merchants, Congress has been unable to reach a consensus on a legislative solution. That impasse is, in our view, largely due to the structural advantages and disadvantages created by the *Quill* decision. As a result, this inaction continues to benefit respondents and other out-of-state sellers.

Moreover, declining to re-visit *Quill* does not make the Court a neutral party in this very contentious matter. *Quill* is the law of the land, and it is the status quo against which all federal legislation must be considered. In the typical situation, a party interested in receiving an advantage from Congress must persuade both Houses and the President to agree. Here, as was

recognized at the time *Quill* was decided, the advantage was instead granted by this Court, and it is therefore the States that must persuade Congress and the President to take it away. Given the built-in, indeed intended, difficulties in enacting federal laws, the current *Quill*-determined status quo places a very large thumb on the scales on the side of out-of-state sellers. This is especially problematic on federalism grounds because the States are being forced to surmount these hurdles in order to obtain permission from the federal government to use their own taxing powers.

To redress this legislative imbalance, the Court should grant the Petition and overturn *Quill*. At that point, Congress can act if it concludes that legislation is necessary, in light of what States do with their ability to protect their fiscal interest and to level the playing field for their local merchants. Moreover, overturning *Quill* would not render this Court powerless to redress any perceived overreaching by a State. The decision in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), adequately protects respondents from any overreaching by the States if the "burden imposed [by state laws] is clearly excessive in relation to the putative local benefits."

## REASONS FOR GRANTING THE WRIT

The Petition fully explains why this case is a proper vehicle to re-visit *Quill* and reconsider its prior decision that physical presence is a necessary precursor to a State's authority to require a retailer

to collect sales and use taxes on products that are sold to the State's citizens. Respondents will undoubtedly contend that this Court should decline review and leave the matter to Congress to repair the ever-increasing fiscal damage that *Quill* causes to the 45 States and the District of Columbia that have sales and use taxes and retailers in those states that suffer a competitive harm.[2] As Senators and Representatives who have tried to enact laws such as the Marketplace Fairness Act of 2017, and the Remote Transactions Parity Act of 2017, *amici* urge the Court not to accept the suggestion to stay its hand and remain neutral. Several reasons support this position.

First, in his dissenting opinion in *Quill*, Justice White correctly observed that the decision "creates an interstate tax shelter for one form of business — mail-order sellers — but no countervailing advantage for its competitors." 504 U.S. at 329. Unlike the typical Dormant Commerce Clause case, in which the issue is whether a state has erected a barrier that unduly burdens out-of-state businesses, the barrier here was created by the Court, and it advantages those very out-of-state businesses at the expense of physically present in-state retailers. Because *Quill* is the source of this barrier, it would be inappropriate for this Court to decline to reconsider that decision on the ground that another branch of Government –

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[2] *See* State and Local Sales Tax Rates in 2017, Tax Foundation, https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017.

the Congress – is also empowered to remedy the problems caused by it.

Second, the majority in *Quill* never disputed that the result was unfair to North Dakota's retailers and deprived the State of the means of collecting taxes to which everyone agreed it was lawfully entitled. Whatever the basis for giving Congress an opportunity in 1992 to find an appropriate remedy for these problems, it no longer applies 25 years later. Attached as an addendum to this brief is a history of the principal efforts in Congress from 2001-2017 to secure passage of legislation to overrule *Quill,* like S. 976, the Marketplace Fairness Act of 2017, and the House version, H.R. 2193, the Remote Transactions Parity Act. In those 16 years, through numerous changes in the party leadership of both Houses and the Administration, a legislative solution has not been reached. Congressional committees have held five hearings on the topic, and the Senate has conducted three roll call votes on the matter including passage of S. 743, the Marketplace Fairness Act (sponsored by Senator Enzi) by a vote of 69 to 27 in May 2013.

Indeed, as can be seen from the vigorous opposition in the 2013 debate from Senators whose states do not have sales taxes, and the stakes for the out-of-state sellers that would have to collect those taxes if *Quill* were set aside, see, *e.g.,* 159 Cong Rec. S2273-78 (Mar. 22, 2013), respondents and their allies have very strong incentives to keep *Quill* in place. This conclusion is confirmed by the willingness of the industry trade association to sue

over Colorado's reporting-only law that was applicable to its members and to take the case to this Court, not once but twice. *Direct Marketing Ass'n v. Brohl,* 135 S. Ct. 1124 (2015), *on remand,* 814 F.3d 1129 (10th Cir.), *cert denied,* 137 S.Ct. 591 (2016).

Third, it is particularly appropriate for this Court to take the case to consider the constitutional issue because overturning *Quill* would not only redress the harms to South Dakota and its local merchants, but would also restore the usual situation in Congress, with state sovereign power as the default. As a result, both sides would have equal incentives to try to persuade Congress to support their policy preferences in this area. As it is now, out-of-state businesses have the status quo on their side in an institution in which inertia generally results in nothing happening. Thus, if the Court declines to accept the Petition, that will continue the *Quill*-based advantage that respondents currently have in Congress.

Fourth, overruling *Quill* would not remove Congress from the process; instead, Congress would be in the rightful position of being asked to determine whether state laws like South Dakota's interfere with interstate commerce by creating improper barriers, and if so, what to do about the problem. In that situation, Congress would also be able to consider any state laws enacted after a post-*Quill* reversal in deciding whether its intervention was needed. Congress would retain its authority to consider any concrete evidence that out-of-state sellers presented of actual burdens caused by such

laws. Congress would still be able to consider which laws would be necessary to protect sellers, without eliminating the ability of States to collect sales and use taxes that are conceded to be constitutional, although very difficult to collect after *Quill.* In our federal system, the burden of persuading Congress to act is generally on those who object to what a State has done, not on a State to justify actions taken within its powers as a sovereign. Overturning *Quill* would restore the legislative posture to that constitutional norm, without preventing Congress from acting as necessary.

Last, overturning *Quill* would not preclude this Court from entertaining claims by out-of-state businesses that particular requirements of a state law created undue burdens on them. In such a challenge, the case would be decided by the principles enunciated in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970, rather than those in *Complete Auto Transit Inc. Brady,* 430 U.S. 274 (1977), which was relied on in *Quill*. *Complete Auto* involved the legality of a tax imposed by a State, whereas here no one questions the authority of South Dakota to impose these taxes, but only the means by which they may be collected. For that reason, this South Dakota law is more like laws regulating the manner in which a business may be conducted, which was the issue in *Pike.* Thus, under *Pike*, the South Dakota law in this case would "be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," 397 U.S. at 80. As such, the case involves the same kind of

inquiry as if the state law being challenged required, for example, certain disclosures in connection with the sale of a complex financial product to South Dakota residents, or that specified safety features that had to be included in a potentially dangerous product sent into the State. Although *amici* are confident that this South Dakota law would pass the *Pike* test, the more important point is that out-of-state sellers would still have an opportunity to seek redress from the federal courts if they contended that state laws involving the collection of sales and use taxes imposed undue burdens on them. And they would still retain the right to seek to persuade Congress that such laws should be preempted or that conditions should be imposed on their continued use.

## CONCLUSION

For the foregoing reasons, in addition to those in the Petition, the writ should be granted, and the Court should not stay its hand to await Congressional action.

Respectfully submitted,

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# ADDENDUM

## MARKETPLACE FAIRNESS TIMELINE

**107th Congress (2001-2002)**

S. 512, Internet Tax Moratorium and Equity Act
Senator Byron Dorgan - introduced 3/9/2001
Referred to: Senate Finance
Finance Committee hearing – 8/1/2001

S. 1542, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/11/2001
Referred to: Senate Commerce

S. 1567, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/18/2001
Referred to: Senate Commerce

Senate Amdt. # 2156 to H.R.1552
Motion to table amendment was agreed to – 57-43 on 11/15/2001

**108th Congress (2003-2004)**

S. 1736, Streamlined Sales and Use Tax Act
Senator Michael Enzi - introduced 10/15/2003
Referred to: Senate Finance

**109th Congress (2005-2006)**

S. 2152, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 12/20/2005
Referred to: Senate Finance

S. 2153, Streamlined Sales Tax Simplification Act
Senator Byron Dorgan - introduced 12/20/2005
Referred to: Senate Finance

Senate Finance Subcommittee on International Trade hearing on sales tax fairness and other state/local tax issues – 7/25/2006

**110th Congress (2007-2008)**
S. 34, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 5/22/2007
Referred to: Senate Finance

Senate Commerce Committee hearing on "Communications, Federalism, and Taxation" where it was discussed – 5/23/2007

**111th Congress (2009-2010) -** No bill introduced

**112th Congress (2011-2012)**
S. 1452, The Main Street Fairness Act
Senator Dick Durbin - introduced 7/29/2011
Referred to: Senate Finance

S. 1832, The Marketplace Fairness Act
Senator Michael Enzi – introduced 11/9/2011
Referred to: Senate Finance

11/30/2011 – House Judiciary Committee hearing on "Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce."

1/31/2012 – Official letter requesting Finance Committee hearing on S. 1832

4/25/2012 – Senate Finance Committee hearing on state and local tax issues, including S. 1832

8/1/2012 – Senate Commerce Committee hearing on Marketplace Fairness: Leveling the Playing Field for Small Business

11/29/2012 – S. Amdt. 3223 filed to the National Defense Authorizations Act

**113th Congress (2013-2014)**

S. 336, The Marketplace Fairness Act
Senator Michael Enzi - introduced 2/14/2013
Referred to: Senate Finance

3/21/2013 – S. Amdt. 578 (Enzi 2nd Degree S. Amdt. #656) – Deficit Neutral Reserve Fund enabling Congress to pass the Marketplace Fairness Act
Senate Record Vote # 62 - Enzi Amendment agreed to 75 to 24
S. 743, Marketplace Fairness Act of 2013 (revised)
Senator Michael Enzi – introduced April 16, 2013
Referred to: Senate Finance

05/06/13 – S. 743 was passed by the Senate in a vote of 69 to 27

S. 2609, Marketplace and Internet Tax Fairness Act
Senator Michael Enzi – introduced July 15, 2014
Referred to: Senate Finance
March 2014: Hearing entitled "Exploring Alternative Solutions on the Internet Sales Tax Issue" before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary.

**114th Congress (2015-2016)**

S. 698, Marketplace Fairness Act of 2015
Senator Michael Enzi – introduced March 10, 2015
Referred to: Senate Finance

H.R. 2775, Remote Transactions Parity Act of 2015
Congressman Jason Chaffetz – introduced June 15, 2015
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

**115th Congress (2017-2018)**

S. 976, Marketplace Fairness Act of 2017
Senator Michael Enzi – introduced April 27, 2017
Referred to: Senate Finance

H.R. 2193, Remote Transactions Parity Act of 2017
Representative Kristi Noem – introduced April 27, 2017
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

July 2017: Hearing entitled "No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders" before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary.