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 AMERICAN LIGHTING ASSOCIATION, AMERICAN SUPPLY ASSOCIATION, AMERICAN VETERINARY MEDICAL ASSOCIATION AND SEVEN OTHER NATIONAL TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

QUESTION PRESENTED

Should this Court abrogate the sales-tax-only, physical-presence requirement of *Quill Corp. v. North Dakota*, 504 U.S. 289 (1992)?

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INTEREST OF *AMICI CURIAE*[1]

Amici are national trade associations whose members sell goods and services from coast to coast in every category imaginable, from textbooks and lighting fixtures to snowboards and earrings. They have joined together to urge certiorari because this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), has had a direct, and increasingly urgent, negative impact on their businesses. That impact is widespread, as reflected in the diverse industries represented by *amici*:

The American Lighting Association (ALA) is a trade association representing over 3,000 members in the residential lighting, ceiling fan and controls industries in the United States, Canada and the Caribbean. Its members are manufacturers, manufacturers' representatives, retail showrooms and lighting designers who have the expertise to educate and serve their customers. There are over 650 retail showrooms in the United States that are impacted by the *Quill* decision.

The American Supply Association (ASA) is the national organization that serves wholesaler-distributors and manufacturers in the Plumbing, Heating, Cooling, and Piping and industrial Pipe, Valve Fittings industry. ASA represents more than

[1] All parties received advance notice of the intent to file this brief by October 23, 2017, S. Ct. R. 37(2)(a), and the brief is filed with the written consent of all parties through blanket letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

330 independent wholesaler distributors, many of which are family businesses that have been passed down from one generation to the next.

The American Veterinary Medical Association (AVMA), established in 1863, is the largest veterinary medical association, with more than 89,000 members in the United States. As a tax-exempt association created to advance the science and art of veterinary medicine, the AVMA is the recognized national voice for the veterinary profession. As part of their commitment to patient care, AVMA members advise pet owners about their choices with respect to pet food, over-the-counter treatments, and related products, and often sell those products directly to consumers.

The Auto Care Association is a national trade organization with 3,000 members representing more than 150,000 independent businesses that manufacture, distribute and sell motor vehicle parts, accessories, tools, equipment, materials and supplies, and perform vehicle service and repair. The independent auto care industry adds some $381 billion annually to the American economy (2% of Gross Domestic Product) and provides employment to more than 4.6 million workers.

The Home Furnishings Association (HFA), with roots dating back to 1920, is North America's largest organization devoted specifically to the needs and interests of home furnishings retailers. The HFA has more than 1,800 members representing more than 7,000 storefronts across all 50 states and several countries. Its members range from top 100 retailers and national chains and multi-generational family-owned businesses to smaller local merchants and emerging entrepreneurs.

Jewelers of America is the national trade association for businesses serving the fine jewelry marketplace. Its membership includes approximately 3,000 retailers and suppliers representing approximately 8,000 retail storefronts in all 50 states and the District of Columbia. It has represented the business interests of jewelers in the United States since 1906.

The National Association of Electrical Distributors (NAED) is the trade association for the $100+ billion electrical distribution industry. NAED's membership operates in more than 6,000 locations nationally and internationally.

The National Association of College Stores, headquartered in Oberlin, Ohio, is the professional trade association of the campus store industry. Serving nearly 4,000 campuses in the United States and approximately 1,000 industry-related companies, the association represents campus stores that supply course materials, merchandise and services to campuses across the country.

The National Ski and Snowboard Retailers Association (NSSRA) is a volunteer-led organization dedicated to growing snow sports participation and to supporting and educating specialty snow sports retailers. Since its founding in 1989, NSSRA has served as the voice of specialty retailers, representing their interests on issues that affect the specialty retail channel.

The National Sporting Goods Association (NSGA) has served as the leading voice for sporting goods retailers and dealers since 1929. NSGA's mission is to support its members' efforts to grow their businesses and to advocate on their behalf. NSGA represents owners and operators of more than 21,000 storefronts in the United States.

This case is important to these varied associations representing multifaceted markets because all of *amici*'s members face the negative consequences of *Quill* each and every day in their stores, showrooms, and clinics. Every day, customers avail themselves of the products *amici*'s members' stores display in convenient locations in high-rent areas, absorb the knowledge and information their highly-trained salespeople provide, and benefit from the education and product demonstrations they spend hours patiently offering. Consumers use these services to make informed decisions about high-value purchases that can be made best in person only after seeing, touching, and experiencing the product. But after gathering all that information, and taking advantage of all the resources provided by *amici*'s members, internet-savvy customers often opt to make their ultimate purchase from an out-of-state online seller because they can "save" the sales tax (as many do not remit the sales or use taxes themselves, even if required by state law).[2]

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[2] Most states impose a sales tax on items sold within the state and a corresponding "use" tax on property used or stored within the state for which sales tax was not collected by a retailer, requiring consumers to calculate and remit use taxes directly to

With the rise of mobile phones, the customers may even make that purchase—from someone else—while still touching *amici*'s members' merchandise, and before they've even left the store. This phenomenon is known as "showrooming," and its rise is the direct result of the sales-tax advantage conferred on out-of-state online retailers by *Quill*. Showrooming is having devastating effects on *amici*'s members.

INTRODUCTION AND SUMMARY OF ARGUMENT

"I am fine competing with online sellers, but I don't like to see them start with a 7% price advantage." So reports one of *amici*'s members, a jeweler in Pittsburgh, Pennsylvania. The sentiment is shared by *amici*'s members across the country, whether they sell dressers or faucets or pet medications. The pricing disadvantage for in-state brick-and-mortar retailers can be as high as 10% or more, depending on the state and local sales taxes the local seller is required to collect and that the out-of-state, typically online, seller is not. And this differential cannot be reduced by any effort to trim costs, reduce prices, or otherwise compete with out-of-state, online sellers.

Worse still, efforts to maintain market share by improving service or offering more product education for consumers within a local retailer's space often redound instead to the benefit of those same out-of-

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the state. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1127 (2015). But voluntary compliance with use-tax obligations is very low. *See id.*

state price-advantaged sellers. Consumers can now easily "showroom": go to local stores and examine, in person, different products that they're interested in; work with a local salesperson, possibly for hours or multiple visits, to learn details about the products and make their choices; and then ultimately choose to make their purchase with an out-of-state online seller to avoid paying sales tax. Even if brick-and-mortar retailers offer to match online prices, and many do, the online seller can be "cheaper" (sometimes even with higher base prices), because cost-conscious consumers know that the online seller will not collect sales tax.

Amici's members are prepared to compete with out-of-state online sellers on price, service, selection, and any other business factor within their control. But being forced to compete on an unlevel playing field because of differential tax treatment has had a serious and ever-more-urgent destructive impact. Simply put: sales tax differentials combined with a rise in mobile technology and e-commerce are putting local sellers out of business, emptying out the retail centers of our nation's towns and cities, destroying local jobs, and hurting small towns and communities.

Those negative consequences can be directly traced to this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As the Petition relates (Pet. 21-27), that decision was questionable when issued, and its infirmities have become only more obvious in the past 25 years. At the same time, the competitive harm caused by *Quill* for in-state brick-and-mortar businesses has worsened, as consumers' access to technology and e-commerce has increased. Because *amici*'s members have an in-state physical presence, they are bound to collect sales tax, while *Quill* frees their out-of-state online competitors from this burden. And that very same physical presence makes them ever more subject to showrooming and its negative consequences. This Court's attention is needed, now more than ever, to reconsider *Quill*.

ARGUMENT

I. One Aspect Of How *Quill* Unfairly Advantages Interstate Over In-State Commerce Is The Phenomenon Of "Showrooming."

A. In 1992, when the internet was predominantly a tool for government and scientists, not consumers; no one owned a smartphone; and e-commerce largely did not exist, the Court considered whether a State could "require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." *Quill*, 504 U.S. at 301. Adhering to a rule announced yet more decades earlier (in 1967), the Court declined to overrule *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and held—as a matter of *stare decisis*, although "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today"—that under the dormant Commerce Clause, sellers with no physical presence in a state "are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 311, 315.

As the Petition explains (Pet. 15-17), this rule no longer alleviates special burdens on interstate sellers, if it ever did. Rather, it serves only to give out-of-state sellers an unfair and artificial advantage over in-state sellers. That is ironic at best, because dormant Commerce Clause doctrine "is driven by a concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). In attempting to halt protectionism, the Court's dormant Commerce Clause jurisprudence requires only a level playing field. Whatever its specific contours might be, the Clause is most certainly not a command requiring States to adopt regulatory measures designed to *benefit* out-of-state competitors by burdening in-state interests. But that is precisely what the *Quill* rule orders States to do. Far from leveling the playing field, *Quill* unfairly tips the field in favor of out-of-state commerce.

B. The unfair advantage accorded out-of-state sellers under the *Quill* rule is manifest in a practice *amici*'s members face every day: showrooming.

Showrooming is the "act of visiting a store or stores to examine and try a product before buying it online for a lower price." Cecillia Barr, *Growing Impact of Showrooming on Retail Businesses*, BFS Capital Blog (June 19, 2017).[3] It has been identified in recent years as a trend "hurt[ing] the bottom lines of traditional stores while benefiting online-only retailers,… which have the advantage of lower

[3] *Available at* https://www.bfscapital.com/blog/impact-of-showrooming-on-retail-businesses/.

overhead costs and mostly can skirt the collection of sales tax." Ann Zimmerman, *Can Retailers Halt 'Showrooming'? Stores Test New Services, Selection; It's About Price*, WALL ST. J., Apr. 11, 2012. And it has truly exploded with the increased use of mobile technology, including smartphones and mobile broadband internet. One study concluded that "the growth of smartphone ownership may be one method of forecasting the growth of [showrooming]." Terence A. Brown et al., *Showrooming and the Small Retailer*, 14 QUALITATIVE CONSUMER RES. 79, 81 (2017). Another study tracking Christmas shoppers' use of smartphones to price shop found such behavior increased from 15% in 2009 to 59% in 2011. *Id.* More recent data puts the prevalence of using mobile devices to comparison shop while in a store at 72% for some age groups (30 to 44). Barr, *supra*. The experience of *amici*'s members backs up the heavy prevalence of mobile smartphone usage in showrooming. Many report that when a customer shops, "his/her phone is out"—as a jeweler in Beaumont, Texas put it—plugging in specific make and model information and researching prices.

Surveys confirm that "in-store information search and online purchasing (i.e., showrooming)" has increased substantially, with 35% of consumers overall, and 50% of consumers in the 25-34 age group, reporting they had "showroomed." Adam Rapp et al., *Perceived Customer Showrooming Behavior and the Effect on Retail Salesperson Self-Efficacy and Performance*, 91 J. OF RETAILING 358, 360 (2015). Many consumers "have begun to view retail stores simply as places to handle products prior to purchase *via* other channels." *Id.* at 359. And one study estimates that showrooming has a "$217 billion negative impact on retail sales." *Id.*

As the broad range of *amici* here can attest, showrooming's negative impact spans all kinds of markets. Electronics and appliances, books and music, sporting goods and toys, clothing and shoes, furniture and home furnishings, and home improvements are all sectors where more than a fifth of consumers stated they "almost always or frequently" engage in mobile-device-assisted comparison shopping. Matthew Quint et al., Columbia Bus. Sch. Ctr. on Glob. Brand Leadership, Showrooming and the Rise of the Mobile-Assisted Shopper 11 (2013).[4]

And there is little doubt that showrooming is driven by the *Quill* sales-tax advantage. The overwhelming majority (69% in one study) of consumers who make purchases online after viewing and interacting with goods at a retail store report that their choice is driven by lower prices. *Id.* at 12. Lower prices, in turn, are—at least in part and sometimes in full—made possible by the fact that many online sellers do not collect sales tax. Consumers connect the two in their minds, responding to surveys about why they showroom with responses like "Prices are better too – no sales tax." Brown, *supra*, at 88. And an additional group of them (16%) specifically cite the

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[4] *Available at* https://www.aimia.com/content/dam/aimiawebsite/CaseStudiesWhitepapersResearch/english/Aimia_MobileAssistedShopper.pdf.

lack of sales tax as a reason for showrooming. Quint, *supra*, at 12.

Amici's members have suffered first-hand from this sales tax disadvantage. In the words of one of *amici*'s members—a furniture store that has been in business for more than 100 years in Baton Rouge—when customers "showroom," "[i]nvariably, the no sales tax issue of online purchases is mentioned." An example from one of American Supply Association's members is all too commonplace:

First Supply was first incorporated in 1897 as a family owned supplier of pumps and windmills, and has evolved into the single source provider that most Midwestern contractors rely on for plumbing supplies and related supplies. Now in the fifth generation of family ownership, First Supply operates 29 locations, including 14 showrooms, across the Midwest. At a promotional event at a showroom in Milwaukee, Wisconsin, a customer requested information about bathroom vanities, typically the centerpiece in a home's remodeled bathroom. The customer proceeded to measure various models in the showroom, and spent more than an hour taking detailed notes. When the customer was approached about placing an order, she informed First Supply's staff that Respondent Wayfair.com was cheaper due to no sales tax; so while she appreciated being able to see, feel and measure the product, she would be placing her order online. Although First Supply waives shipping and handling to remain competitive (at a cost to its profits), the apologetic customer nonetheless made her purchase online. First Supply is confident that if its showrooms had managed to close just a fraction of the sales like this one that it believes were lost to "tax-free," out-of-state online competition in the past year, it would have been able to add 25 new jobs.

A family-owned San Diego furniture retailer that has been in business since 1937 has a similar story to share: Three weeks ago, a customer came into the store's showroom and worked with one of the designers on a dining room table and chairs for her home. After spending about two hours in the showroom, she settled on a wood dining table with matching chairs. After returning home to think about the purchase, the customer advised the designer that she had found the same table and chairs online for a lower price and with "no sales tax." The store offered to match the online price, but the customer then asked for the store to throw in the sales tax. The store could not cover that additional cost and advised the customer that she owed the tax even if she purchased the furniture online. The customer was not convinced and said she would purchase the set online, "saving" $426 in sales tax.

These stories of sales lost due to consumers' sales-tax-driven choices reflect a common experience for all of *amici*'s members. Some of their online-only competitors go so far as to actively encourage customers to visit local stores for expertise and knowledge before making an online purchase to save the tax. *See* Bill Craig, *Letter to the Editor: Unfair Advantage*, RIDGEFIELD PRESS, Nov. 20, 2014, at A4. And any attempt to "nicely explain 'use' tax laws" to consumers, per a Texas retailer, "simply puts an immediate icy chill on the conversation."

The *Quill* court recognized that there were market consequences of the sales tax advantage that *Bellas Hess*, and adherence to that precedent in *Quill* itself, provided to certain out-of-state businesses. The Court remarked that "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." 504 U.S. at 316. What the *Quill* court could not have foreseen, however, was the way that the decision would interact with the growth of the internet, and mobile technology especially. *Quill* has played a critical role in transforming local, in-state retailers into showrooms and display outlets for online retailers in particular, to a much greater degree than ever occurred with the traditional "mail-order" industry. *See* Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. OF MKTG. RES. 229 (2010) (study concluding that online sales are significantly affected by whether a merchant collects sales tax, but catalog sales are not, likely due to the greater ease of online price searching).

In the e-commerce era, local stores are effectively required to expend resources—on rent for prime locations, equipment to demonstrate products, experienced and knowledgeable sales personnel, and product displays—to the benefit of out-of-state online retailers. And they incur such costs all while facing up to a 10% artificial pricing disadvantage in competing for the business of internet-savvy consumers that expect high levels of service (and will post negative online reviews when they don't receive it), but who will search prices, and ultimately purchase, online. That future is now here, and getting increasingly worse, for local in-state retailers.

II. There Is A Pressing Need For This Court's Intervention Because Showrooming Has Increasingly Negative Consequences For Local Retailers And Their Communities.

The steady stream of consumers coming in to look, touch, and learn—but not buy—imposes costs on stores. *Amici*'s members make significant investments in physical displays (imagine furniture or bathroom fixture showrooms, with their mock rooms designed and put together with care to evoke the feel of what an actual room might feel like), special equipment (like treadmills for evaluating a runner's gait before fitting her for shoes), and salespersons' knowledge and time. Retailers may spend "weeks sharing with [a] buyer different finish and fabric options" on furniture, for example—as one of *amici's* members reports happened regularly in his store—only to have the buyer purchase online to save 8% or 10%. Or, in the jewelry business, it is common for a sales person to spend an hour educating a customer about specific diamonds, with the customer taking extensive notes, only to have the customer then purchase online to save the sales tax—which is frequently a considerable sum (hundreds of dollars) for such a high-value purchase. These stories are legion from all industries.

Amici's members cannot defeat the advantage *Quill* bestows on out-of-state retailers through market competition alone. Price matching is not enough. Thus, Best Buy loudly proclaimed "the end of 'showrooming'" when it announced a price match guarantee, but commentators quickly noticed that the price match could not overcome the no-sales-tax differential. Brad Tuttle, *Best Buy Swears Shoppers Don't Have to Bother Showrooming Anymore*, TIME (Feb. 20, 2013).[5] *Amici*'s members report the same experience. A second-generation, family-owned furniture store in Phoenix, Arizona, for example, tried price matching, but found that it "can't survive discounting to match what online sites charge without sales tax." Even when people would prefer to buy from a local company, "they can't justify it" when the "price difference is 8% plus."

Or, as a jeweler in Mount Joy, Pennsylvania reports, when a local seller offers to price match, customers often either still make the purchase online or request that retailers "'cover' the tax for them." Even worse, retailers do not have the option of simply curtailing their level of service for showrooming consumers—if they did, in this online world, they'd simply "get a bad review on Yelp!"

Even in industries where local stores have invested time and money to compete aggressively in the online space, retailers are still harmed by showrooming. For example, Pueblo Community College Bookstore in Pueblo, Colorado has implemented price comparison tools in its own online site, providing transparency to students on textbook purchases and making it easy for them to buy from the

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[5] *Available at* http://business.time.com/2013/02/20/best-buy-swears-shoppers-dont-have-to-bother-showrooming-anymore/.

lowest priced source, whether that is the Pueblo Community College Bookstore or elsewhere. More than 1,200 college stores do the same thing, and several thousand additional stores price match. Yet the bookstore (and others like it) still face a drain from showrooming, because an estimated 1 in 4 students use the sales personnel to research and gather all of the books that they need, with no intention of purchasing them at the store, harming customer service for those students who do plan to make their purchase in-store. Because the store price matches and offers an online engine permitting students to purchase from the lowest-priced source, the sales-tax differential is plainly driving this conduct. Effectively, the *Quill* advantage for out-of-state sellers means the Pueblo Community College Bookstore and its similarly-situated in-state peers must pay the overhead for tax-advantaged out-of-state sellers, despite offering identical prices.

No industry is immune. Take veterinary medicine, for example. The veterinarian-client-patient relationship, of course, cannot be supplanted by online sales. But veterinarians still face showrooming with respect to their sales of pet products such as pet food, prescriptions and over-the-counter medicines, and flea and tick products in a more than $66.75 billion annual market for veterinary care and pet-related supplies.[6] Consumers will avail

[6] Data provided by *amicus* American Veterinary Medical Association, drawn from American Pet Products Association, *2017-2018 National Pet Owner Survey Statistics: Pet*

themselves of the extensive training and education that make veterinarians and veterinary technicians extremely knowledgeable about these products, only to then make purchases through an online retailer that offers sales-tax savings.

Investments in knowledgeable and highly trained staff are common across many market sectors, and those investments only make local retailers even more subject to showrooming. For example, specialty running stores often put tremendous effort into understanding a customer's fitness level, goals, injuries, and foot and bone structure so that they can provide the perfect running shoe that will decrease the risk of injuries. *See* Dave Miller, *Working to Get It Right: Efairness for Small Businesses*, 21st Century Retail Blog (Aug. 17, 2015).[7] Yet—after half an hour or more spent finding the perfect shoe based on the narrowness of a person's heel, the flex of their arches, and any rotation when they run—the customer often leaves "with the intent of buying online to avoid paying sales tax." *Id.* Because manufacturers' prices are usually identical, the only difference in price between a local running store and its out-of-state, online competitor is the sales tax. Lance Muzslay, *It's More About Protecting a False Competitive Advantage Than Difficulty in Collecting Sales Tax*, 21st Century Retail

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Ownership & Expenses, http://www.americanpetproducts.org/pubs_survey.asp.

[7] *Available at* http://www.efairness.org/blog/2015/08/working-to-get-it-right-efairness-for-small-businesses/.

Blog (June 24, 2015).[8] As a store owner in Tempe, Arizona—where local sales tax averages over 8%—put it, "If this were a 100 meter running race, it would be equivalent to allowing some runners to start eight meters ahead of their competitors." *Id.* Whether the product is running shoes, plumbing fixtures, skis, or bicycles—or anything else you can imagine—it is not a fair race.[9]

Payments for elaborate and informative displays, compensation of highly-trained sales personnel, and investments in special equipment all become futile and expensive overhead costs with no return when sales go to another store—even if you offer the exact same price. That is hardly a sustainable business model. As mentioned above, one estimate puts the

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[8] *Available at* http://www.efairness.org/blog/2015/06/its-more-about-protecting-a-false-competitive-advantage-than-difficulty-in-collecting-sales-tax/.

[9] *See, e.g.*, Big Poppi Bicycle Co., *It's Been a Long Ride for EFairness*, 21st Century Retail Blog (Jan. 22, 2015), http://www.efairness.org/blog/2015/01/its-been-a-long-ride-for-efairness/ (bicycle retailer in Manhattan, Kansas); Mark Williams, *Online Sales Tax Loophole Presents Unique Challenges for Longtime Family Businesses*, 21st Century Retail Blog (June 14, 2015), http://www.efairness.org/blog/2015/06/online-sales-tax-loophole-presents-unique-challenges-for-longtime-family-businesses/ (patio furniture and ski shop in Chicago area); Reed White, *Vote Yes on E-Fairness Legislation*, CASPER STAR-TRIB. (May 29, 2015), http://trib.com/opinion/columns/white-vote-yes-on-e-fairness-legislation/article_ccf1f1ba-8f66-5634-af75-dfecac6feaef.html (plumbing and heating supply store in Wyoming).

losses from showrooming at $217 billion. Rapp, *supra*, at 359.

The end result of this no-win situation, where consumers expect service in person but purchase online, is closed stores and lost jobs. And, over time, online cost savings for individual consumers are more than offset when entire communities suffer from failed businesses and lost jobs. The former president of a family furniture business that was in operation for more than two decades in Austin, Texas reported that the store attempted price matching for a time, but the price match was "trumped by competing against no sales tax with either having to pay the sales tax ourselves or lose out on the sale in its entirety." In December 2016, after years of operation, the store had to close its doors.

The net effect is that "[i]n the middle of an economic recovery, hundreds of shops and malls are shuttering." Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, ATLANTIC, Apr. 10, 2017. And the store closures and bankruptcies are only accelerating in recent years. In just the last 18-24 months, the National Sporting Goods Association reports that four sporting goods retailers have closed permanently: The Sports Authority (a national chain), City Sports (predominantly in New England), MC Sports (Midwest), and Sports Chalet (West Coast). More than 600 stores were closed as part of those bankruptcies, resulting in more than 18,000 jobs lost. And such closures were only in the past two years, from just one of the *amici*'s membership.

Although closures have accelerated in recent years, the historical data since *Quill* suggest that the trend has been a steady one, indicating long-term negative effects of that decision on local retail stores. Looking just at sporting goods retailers, census data indicate there were 5,356 single-location sporting goods stores when *Quill* was decided in 1992. The most recent census data, from 2012, identifies 3,232 single-location sporting goods retailers. That means about 2,124, or almost 40% of "mom and pop" sporting goods stores have closed since *Quill*. The decline in multi-location firms is even starker in percentage terms, as that number declined from 507 to 207 over the same period.[10] Because each multi-unit firm could have a few locations or hundreds (as with the four recent multi-location closures described above), the decline of 300 multi-location firms represents an exponentially higher decrease in the number of brick-and-mortar local retail stores.

Online commerce generally, and the *Quill* sales-tax advantage specifically, are not the only reasons that retail stores are closing and jobs are being lost, but they are surely a big part of the story. *See* Thompson, *supra* (citing the increase in internet commerce, and mobile-device commerce, as the primary factor in the "demise of America's storefronts"). As the National Sporting Goods Association reports, all four of the sporting goods

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[10] Data provided by *amicus* National Sporting Goods Association, drawn from U.S. Census Bureau, 2012 Retail Trade, https://www.census.gov/data/tables/2012/econ/census/retail-trade.html.

retailers that recently closed cited changing shopping habits with respect to the internet, reinforced by the unfair tax advantage, as a significant factor in the store closures.

Although loss of jobs is bad enough, more than jobs are lost when local stores shut down. Such closures also cause the loss of other contributions to the community such as little league sponsorships, local events like bicycle races and fun runs hosted by retailers, and participation in other civic activities like the Rotary Club or local Chambers of Commerce. These negative consequences will only worsen when in-state, local retail stores increasingly function largely as showrooms for out-of-state online rivals that have an impossible-to-defeat pricing advantage. As long as *Quill* is the governing national rule, local retailers have little hope of changing this trend.

Amici and their members understand that competition from online retailers is here to stay. They are more than happy to compete in the modern marketplace and to have consumers evaluate the service and products they offer against those of any other seller. But there is no reason that the Commerce Clause, or its dormant cousin, should force them to compete using a deck stacked in favor of out-of-state sellers. This Court's ruling in *Quill* effectively turns the stores and sales personnel in which *amici* and their members have invested their lives and their livelihoods into mere showrooms and adjuncts for online out-of-state sellers who start with an artificial, unfair, and immutable advantage. This Court's intervention is needed now, before even more jobs are lost and local businesses bankrupted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
Deutsch Hunt PLLC

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