No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR AMICI CURIAE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INVESTMENT PROGRAM ASSOCIATION, NAREIT, NATIONAL ASSOCIATION OF REALTORS®, AND THE REAL ESTATE ROUNDTABLE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry, and represents over 70,000 shopping center owners, developers, managers, investors, retailers, brokers, academics, lawyers, and public officials. ICSC represents the interests of all 124 shopping centers in South Dakota, which employ over 43,870 people and generate approximately $137.5 million in state sales tax revenue.

The Investment Program Association is a non-profit organization that engages in advocacy and education relating to portfolio diversifying investment products, including Real Estate Investment Trusts.

Nareit is the global association of Real Estate Investment Trusts and publicly traded real estate companies with an interest in U.S. real estate and capital markets.

The National Association of REALTORS® is a trade association that represents 1.2 million members, including residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry.

The Real Estate Roundtable is a non-profit public policy organization that brings together business and

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief on October 20, 2017. Letters from the parties giving blanket consent to the filing of amicus briefs are on file with the Clerk.

trade association leaders to address policy issues relating to real estate and the overall economy.

Collectively, amici represent a variety of stakeholders in the real estate industry. Their interest in the case is twofold. First, because amici's members own, operate, and/or finance the physical space occupied by brick-and-mortar stores, they have a substantial interest in ensuring that those stores remain viable. To do so, brick-and-mortar stores must be able to compete on a level playing field with other retailers, including on issues like sales tax collection. Second, amici's members also supply retail and commercial real estate to online retailers looking to establish storefronts, offices, distribution centers, and warehouses. Accordingly, they have an interest in encouraging companies to expand their physical presence into new areas—an interest that *Quill* impedes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Brick-and-mortar retail stores across the country have long collected state and local sales taxes as a necessary cost of doing business. At the register, in-store customers pay not just the price of their merchandise, but also an amount ranging anywhere from 3 percent to 10 percent of the purchase price, depending on state and local tax rates.

As a result of this Court's decisions in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967), online and mail-order customers very often do not pay the same taxes. Out-of-state retailers, including online companies, cannot be required to collect sales taxes unless they have a "physical presence" in the State. While their customers still owe an equivalent "use" tax, they rarely pay it and instead mistakenly view the transaction as being tax-free. The direct harm this rule inflicts on brick-and-mortar retail stores is considerable. Local businesses struggle and increasingly fail to compete against online retailers that can offer customers identical goods for what is in effect up to a 10 percent discount.

Quill's distorting effects reach far beyond brick-and-mortar stores themselves and provide further reason for this Court to reevaluate *Quill*. *First*, the loss of brick-and-mortar stores, many of which are integral to the social fabric of their communities, increases unemployment and creates a sense of dislocation among community residents. *Second*, the decline in the retail sector reduces the value of retail real estate, discourages further development of retail properties, and impedes innovation in the retail sector. *Third*, the lost revenue from sales, property, and income taxes threatens the ability of state and local governments to provide much-needed public services, including those that benefit online retailers.

These cascading effects plainly call for revisiting *Quill*, a decision that relied primarily on *stare decisis*. As *Quill* all but acknowledged, developments in this Court's dormant commerce clause jurisprudence require a different conclusion today. The Court has now repeatedly held that the dormant commerce clause is meant to *level* the playing field so that businesses can compete fairly, not skew the playing field toward one subset of interstate actors and away from others. By mandating differential treatment of in-state and out-of-state interests, and by stifling interstate commerce rather than promoting it, *Quill* offends the clause's animating principles.

Stare decisis does not justify retaining *Quill*'s physical-presence rule. Many of the reasons this Court has recognized for departing from precedent apply with special force here. For one thing, the dramatic economic and technological changes over the past 25 years have substantially undermined *Quill*'s reasoning and made its unfairness to retailers, States, and others all the more apparent. And increasingly, *Quill* has been recognized as a doctrinal aberration, out of step with the Court's recent dormant commerce clause jurisprudence.

The petition should be granted and this Court should abrogate *Quill*'s anachronistic physical-presence requirement.

ARGUMENT

I. *QUILL*'S CONTINUED VIABILITY IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

Quill effectively discriminates against brick-and-mortar retail stores, which must collect sales taxes, in favor of online and mail-order companies, which need not. As explained below, tilting the playing field in this way imposes severe, concrete harms not just on brick-and-mortar retailers, but also on related industries, the communities that surround them, and the state and local governments that support them. Because all retailers should have to play by the same rules, it is exceptionally important for this Court to reconsider *Quill*.

A. *Quill* Directly Harms Brick-And-Mortar Retailers

As a direct result of *Quill*, customers do not pay sales taxes when making purchases from out-of-state mail-order and online companies. Although they technically owe *use* taxes at exactly the same rate, online and mail-order customers often (wrongly) perceive their purchases to be tax-free—and thus substantially cheaper than if they had bought the same items in person. This (ostensible) subsidy can add up quickly. For high-priced items like jewelry, electronics, and appliances, a 5 or 10 percent difference in the effective price can easily translate to hundreds of dollars.

Unsurprisingly, then, brick-and-mortar stores are losing sales as a result of this competitive disadvantage. *See Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (acknowledging that *Quill* unfairly harms "local retailers and their customers who do pay taxes at the register"). One study estimates that, in 2010, brick-and-mortar stores in California alone lost $4.1 billion in sales to online retailers—a number expected to reach $14.3 billion by 2020.[2] Several factors (including convenience) have contributed to the rise of online shopping. But tax avoidance has played an important role. The most commonly cited reason for online shopping is the perception that online retailers offer lower prices than their brick-and-mortar counterparts—a perception directly tied to *Quill*.[3]

Several studies confirm that customers, including online shoppers, are sensitive to changes in sales tax. As an obvious example, consumers who live near state

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[2] Parker, *Flawed System: Online Sales Tax Collection: Economic Impact upon California Businesses and Employers* 11 (Aug. 2010) [hereinafter *California Study*], *available at* https://media.gractions.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/1d71e284-6837-4452-a1f4-0a2f90faaf4c.pdf.

[3] PwC, *Total Retail 2015: Retailers and the Age of Disruption* 6 (Feb. 2015), *available at* https://www.pwc.com/sg/en/publications/assets/total-retail-2015.pdf.

lines often shop across the border to take advantage of lower sales-tax rates. Studies show that buyers in eBay's online marketplace engage in comparable behavior.[4] In response to an increase in a state's sales-tax rate, buyers decreased total purchases and increased purchases from out-of-state sellers, which do not collect sales taxes under *Quill*.[5] Amazon observed a similar phenomenon when it began collecting sales taxes in certain States. Households in those States reduced their Amazon purchases by 9.4 percent (or higher, for low-income families and for larger purchases).[6] The study concluded that at least some of those sales were likely diverted to online-only competitors that continued to enjoy a tax advantage.[7]

Consistent with those findings, one influential study estimated that approximately 24 percent of online buyers and 30 percent of online purchases would shift back to brick-and-mortar stores if online retailers were required to collect sales taxes.[8] In other words, in a fair, competitive environment, a substantial portion of online shoppers would return to shopping at local

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[4] Einav et al., *Sales Taxes and Internet Commerce*, Am. Econ. Review (2014), *available at* https://web.stanford.edu/~jdlevin/Papers/SalesTaxes.pdf.

[5] *Id.*

[6] Baugh et al., *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"* 4-5 (Apr. 2014, revised Sept. 2016), *available at* http://www.nber.org/papers/w20052.pdf.

[7] *Id.* at 21.

[8] Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce* 16 (Dec. 1998), *available at* http://www.nber.org/papers/w6863.pdf; *see also California Study* 9-10, *supra* note 2.

stores. That should not be surprising. Even as online commerce increases, the phenomenon of "showrooming"—in which prospective customers visit stores to ask questions and to see, feel, and try on merchandise—confirms that customers still value the in-person shopping experience.[9]

As long as customers can order the same items online at lower effective prices, however, local businesses will continue struggling to preserve their market share. If they slash prices to compete with online retailers, their already-thin margins will be reduced to almost nothing.[10] But if they cannot overcome the price disadvantage, their only option may well be to close. A growing number of major national retailers have in fact filed for bankruptcy, and stores, large and small, are shuttering at an alarming rate. In the first half of 2017 alone, an estimated 5,300 retail locations closed around the country,[11] putting the industry "on pace this year to eclipse the number of stores that closed in the depths of the Great Recession of 2008."[12] Because this upheaval

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[9] *Cf.* Rigby et al., Bain & Co., *Digical® Retail and Why Stores Matter*, Dec. 18, 2015, http://www.bain.com/publications/articles/retail-holiday-newsletter-2015-2016-4.aspx (noting that in-store conversion rates are 25% to 45%, while online conversion is only 2% to 5%).

[10] NYU Stern School of Business, *Margins by Sector (US)*, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html (last visited Nov. 2, 2017) (net margin for general retail store is 2.6%).

[11] Isidore, *Store Closings Have Tripled So Far This Year*, CNN Money, June 23, 2017, http://money.cnn.com/2017/06/23/news/companies/store-closings/index.html.

[12] Corkery, *Is American Retail at a Historic Tipping Point?*, N.Y. Times, Apr. 15, 2017, https://www.nytimes.com/2017/04/15/business/retail-industry.html.

results not just from shifting consumer preferences and evolving technology but also from *Quill*'s market-distorting rule, it demands this Court's attention.

B. *Quill* Severely Harms Local Communities

The harm *Quill* causes to the national economy spreads far beyond brick-and-mortar retailers. To start, the decline in the retail industry tangibly impacts the economic and social vitality of local communities in various ways. Some of these ways are obvious: Unemployment rises whenever stores shut down, particularly in the rural and small metropolitan areas where retail stores are replacing steel mills and factories as a key source of employment.[13] The shuttering of local stores also forces residents to travel greater and greater distances to purchase basic items—again, a challenge felt most acutely by rural communities.[14]

When a brick-and-mortar store closes its doors, however, the community loses more than a source of jobs and merchandise. As one architect stated, "the physical world of the marketplace—unlike the Internet—captures the vitality of civic life, which can yield a potentially unparalleled and needed experience for cus-

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[13] Abrams & Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017, https://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html?_r=0.

[14] *E.g.*, Wolff-Mann, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016, http://time.com/money/4192512/walmart-stores-closing-small-towns/ (noting that the departure of a Wal-Mart can leave a rural town with no grocery stores or pharmacies in a 50-mile radius).

tomers."[15] The physical space provided by retail stores—particularly Main Streets and shopping malls—helps foster and maintain a sense of community in an increasingly mobile and disconnected world. Shopping is often a social activity, and retail centers serve as important "third places" that bring people together outside the home and the workplace.[16] Retail centers also often draw other "third places"—like coffee shops, restaurants, and bars—to the area, further enhancing the community environment.[17]

In fact, studies have shown that home prices increase significantly in areas surrounding new brick-and-mortar retail developments.[18] People will naturally pay more to live in a vibrant, walkable area with easy access to stores, restaurants, and markets. New retail development is thus considered a "neighborhood amenity and an important aspect to community revitalization."[19]

Store vacancies, by contrast, have the opposite effect. As South Dakota has noted (Pet. 17), empty storefronts can signal a community in decline, increasing

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[15] International Council of Shopping Centers, *Shopping Centers: America's First and Foremost Marketplace* 11 (Oct. 2014) (quoting Eric Kuhne), *available at* https://www.icsc.org/uploads/research/general/America-Marketplace.pdf.

[16] *Id.*

[17] Jeffres et al., *The Impact of Third Places on Community Quality of Life* (2009), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1011&context=clcom_facpub.

[18] Wiley, *The Impact of Commercial Development on Surrounding Residential Property Values* 3-4, 15-16 (Apr. 2015), *available at* https://www.gamls.com/images/jonwiley.pdf.

[19] *Id.* at 3-4.

anxiety among community members and discouraging new residents from settling in the area. As the area becomes less attractive to new residents, home prices and property values will likely decline. New businesses, too, are less likely to move into a community where stores have already begun to close, as unemployment in the area is likely higher and disposable income lower.[20] The community thus loses important "third places," and vacant stores and strip malls instead become places to avoid—potentially even places of vandalism and criminal activity. The overall level of social interaction in the community decreases. Neighbors no longer run into each other at their local stores, and the social fabric frays.

Relatedly, the loss of a locally owned store means the loss of a crucial community resource. Retail stores provide daily opportunities for local business owners to build relationships with their neighbors and benefit from their patronage. These interactions build a sense of loyalty and accountability to the community, and make locally owned stores substantially more likely than faceless online retailers to invest in their neighborhoods. Their activities run the gamut from granting scholarships to local students; donating to local charities, schools, civic groups, and little leagues; and hosting workshops, fundraisers, and other philanthropic events. By actively participating in civic life, businesses give back to the communities that support them while also "generating goodwill and enhancing [their]

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[20] Velasco, *America's Stores Are Closing. Why Isn't That Raising a Jobs Alarm?*, Christian Science Monitor, Aug. 4, 2017, https://www.csmonitor.com/Business/2017/0804/America-s-stores-are-closing.-Why-isn-t-that-raising-a-jobs-alarm.

image."[21] Online retailers with no physical presence in the area—the very companies benefited by *Quill*—are substantially less likely to serve this role.

C. *Quill* Also Severely Burdens The Retail Real Estate Industry

The decline in brick-and-mortar retail stores also predictably impacts the retail real estate industry that provides the space these stores use. By 2015, the growth in online commerce had reduced the demand for retail space by 133 million square feet.[22] As stores close down, retail operators expect to see lower occupancy rates and lower rents.[23] These trends drive down property values.[24] One study estimated that retail real estate values in Ohio had already decreased by

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[21] Lund et al., *Brick vs. Click: A Resource Based View of Community Engagement*, *in* Society for Marketing Advances, Advances in Marketing 379 (VanMeter & Weiser eds., 2015), *available at* http://c.ymcdn.com/sites/www.marketingadvances.org/resource/resmgr/2015_Forms/2015_SMAProceedings-V2.pdf#page=379.

[22] American Booksellers Association et al., *Amazon and Empty Storefronts, 2015 Update: The Fiscal and Land Use Impacts of Online Retail* 3 (Sept. 2016) [hereinafter *Empty Storefronts*], *available at* http://www.civiceconomics.com/empty-storefronts.html.

[23] Bodamer, *Retail Real Estate Trends 2017, Part 3: Sliding Fundamentals*, National Real Estate Investor (Aug. 18, 2017), http://www.nreionline.com/retail-cre-market-study/retail-real-estate-trends-2017-part-3-sliding-fundamentals.

[24] Baen, *The Effects of Technology on Retail Sales, Commercial Property Values, and Percentage Rents* 98-101 (2000), *available at* http://jrdelisle.com/JSCR/IndArticles/Baen_N100.pdf.

$184 million in 2012,[25] and another estimated that retail real estate values in California will decrease by $3.4 billion in 2020.[26]

Shopping centers in less desirable areas have been hit particularly hard, as the markets already reflect substantially lower property values.[27] Shopping centers in higher-income areas have been more able to adapt to the changing market—but only at considerable cost. These malls are undergoing fundamental transformations as they move toward "experiential" retail—*i.e.*, mixed-use centers that focus on providing unique and innovative experiences for their customers. High-end restaurants are increasingly important tenants, yet require significant capital expenditures before they can open.[28] Markets, fitness centers, grocery stores, and other non-traditional tenants are replacing department stores as anchors, but these, too, require substantial investments and come with additional risk. It is unclear, for example, whether people are as likely to continue shopping after leaving the gym or buying groceries as they were after shopping at a department store; if not, total foot traffic at the mall will decline and other stores will suffer. Thus, even in these shopping malls, *Quill*'s impact can readily be felt.

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[25] Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* 10 (Oct. 2011), *available at* http://www.efairness.org/pdf/economicscenter-study.pdf.

[26] *California Study* 13-14, *supra* note 2.

[27] Shulman, *In the E-Commerce Revolution, Brick-and-Mortar Defenses Are Limited and Costly* (Oct. 2017), http://www.anderson.ucla.edu/Documents/areas/ctr/ziman/UCLA_Economic_Letter_Shulman_10.10.17.pdf.

[28] *Id.*

That impact reverberates to real estate investors, including investors in Real Estate Investment Trusts ("REITs"). REITs are companies that own and operate income-producing real estate and often trade on public markets. Retail REITs tend to own properties in more desirable, higher-income areas, and should be well-positioned to adapt to the changing market.[29] Yet even they have struggled in recent months—retail REIT investors earned approximately 10 percent less in dividends in early 2017 than in the same period the previous year.[30] Other real estate investors, including individuals and pension funds, are likely experiencing similarly disappointing returns. The experience of the real estate industry and its investors over the past several years thus illustrates how far downstream *Quill*'s effects can be felt.

What is more, *Quill* actively impedes the industry's efforts to adapt to the changing retail market. Retailers and real estate companies are experimenting with innovative ways to attract new tenants and customers notwithstanding the growth of online retail. One promising strategy is to cater to online-only retailers seeking to develop or expand their brick-and-mortar presence, either permanently or through "pop-up" shops.[31]

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[29] Lerner, *Retail REITs in Adaptation Mode*, REIT, July 27, 2017, *available at* https://www.reit.com/news/reit-magazine/july-august-2017/retail-reits-adaptation-mode.

[30] *Id.*; *see also* Alster, *Investing in Malls, Despite Store Closings*, N.Y. Times, July 14, 2017 (noting 17 percent average negative return among retail REITs since last June), https://www.nytimes.com/2017/07/14/business/mutfund/real-estate-investment-malls.html?_r=0.

[31] *See, e.g.*, Hughes, *Pop Up Goes the Retail Scene as Store Vacancies Rise*, N.Y. Times, May 30, 2017,

These arrangements, however, would undoubtedly be much more robust if not for *Quill*, which *expressly* penalizes physical presence. Indeed, one study found that a 1 percent increase in a state's sales tax rate decreased the probability that an online-only retailer would open a store in that state by approximately 4 percent.[32] And an online-only retailer seeking to open a temporary pop-up store in a new state might be even more hesitant to do so, given considerable uncertainty about how the physical-presence rule could affect its long-term operations (*e.g.*, whether a temporary pop-up store would be enough to trigger the tax-collection obligation and whether that obligation would continue even after the pop-up store had run its course).

Quill's physical-presence rule thus hampers the very innovation that retailers and real estate companies are undertaking in response to the rise of online retail (which *Quill* itself has helped fuel). What is innovative about these new arrangements is the seamless integration of online and in-store shopping experiences. The clothing company Bonobos, for example, now has over a dozen "guideshops" where customers can try on clothing in every size, color, fit, and fabric that the company offers, order their desired merchandise, and receive those items in the mail a few days later.[33] Simi-

https://www.nytimes.com/2017/05/30/realestate/commercial/pop-up-stores-retail-vacancies.html.

[32] *See* Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 238 (Apr. 2010).

[33] Green, *Bonobos Is Opening Retail Stores—But You Can't Actually Take Any of the Clothes Home*, Business Insider, July 16, 2015, http://www.businessinsider.com/bonobos-opened-a-store-where-you-cant-physically-buy-anything-2015-7.

larly, Warby Parker's brick-and-mortar stores allow shoppers to try on dozens of pairs of glasses, assisted by employees with easy access to their online accounts. And at Rent the Runway's flagship store, employees can immediately see the options customers have been eyeing online and offer on-the-spot personal styling.[34]

All these companies have combined the most valuable features of online shopping—convenience and selection—with the attentive, one-on-one customer experience that online companies cannot provide. These experiences also help recapture the sense of place and community that many retail centers are in danger of losing as traditional retailers close down. The results have been positive for the retail industry; companies that have both an online and a physical presence have proven more profitable than companies that rely on either channel alone.[35] The retail real estate companies that amici represent also benefit significantly from this kind of innovation, as the unique experiences offered by online companies draw new customers and help revitalize their shopping centers.

The law should foster this kind of innovation. *Quill*, however, stifles it, by raising the costs and creating uncertainty for online companies experimenting

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[34] Howland, *Rent the Runway Boosting Physical Store Strategy with New Flagship*, Retail Dive, Dec. 6, 2016, http://www.retaildive.com/news/rent-the-runway-boosting-physical-store-strategy-with-new-flagship/431747/; Gustafson, *As Online Sales Reach New Highs, Rent the Runway Goes Analog*, CNBC, Dec. 5, 2016, https://www.cnbc.com/2016/12/05/as-online-sales-reach-new-highs-rent-the-runway-goes-analog.html.

[35] L2, *Intelligence Report: Death of Pureplay Retail* 39 (Jan. 12, 2016), *available at* https://www.l2inc.com/research/death-of-pureplay-retail.

with physical presence as a way to reach new markets. That provides yet another reason for this Court to grant the petition and abrogate *Quill*.

D. *Quill* Deprives State And Local Governments Of Much-Needed Revenue

All the consequences of *Quill* described above—on brick-and-mortar retail, on unemployment, on property values, and so on—have a concrete impact on public coffers. State and local governments derive an overwhelming percentage of their budgets from three key sources of tax revenue: sales, property, and income taxes. *Quill* reduces all three revenue streams, with severe consequences for public services.

First, *Quill* directly and indirectly reduces sales-tax revenue in the 45 States that collect it by permitting—and even encouraging—widespread tax evasion. Sales tax is most easily collected at the point of sale, but *Quill* prevents States from requiring online and mail-order retailers to take on the responsibility of collecting it. While *Quill* does not absolve consumers of paying taxes on their purchases (an online customer still owes the State a *use* tax set at exactly the same rate), few taxpayers are even aware of this obligation, and only 1.6 percent nationwide comply.[36]

As South Dakota has explained (Pet. 13), state and local governments would have collected an additional $23 billion in sales-tax revenue in 2012 if not for *Quill*'s loophole. That number is projected to rise to $33.9 bil-

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[36] Joffe-Walt, *Most People Are Supposed To Pay This Tax. Almost Nobody Actually Pays It*, NPR, Apr. 16, 2013, http://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax.

lion in 2018 and $51.9 billion in 2022.[37] And the loss of brick-and-mortar stores drives that number up even higher by further eroding the tax base. Once shuttered, these businesses can neither make additional sales themselves nor purchase goods from their own suppliers in other sectors. Although difficult to quantify, *Quill*'s total effect on sales tax revenues is undeniably significant.

Second, *Quill*'s impact on the real estate industry reduces state and local property tax revenues. Shopping centers, for example, currently pay $27.8 billion in local property taxes nationwide.[38] But that figure stands to decrease as more and more retail real estate remains vacant and property values decline. A nationwide study estimated that, by lowering the value of retail real estate, the decline in demand for such real estate has resulted in uncollected property taxes of $528 million dollars.[39] A California-specific study estimated that retail real estate value in that State alone will decrease by $3.4 billion by 2020, resulting in lost property taxes of approximately $34 million.[40] And, as explained above (at 9-10), the decline in retail also reduces residential property values in surrounding neighborhoods.

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[37] Marketplace Fairness Coalition, *Case for Fairness*, http://www.efairness.org/files/united-states.pdf (last visited Nov. 2, 2017).

[38] International Council of Shopping Centers, *How Do Shopping Centers Impact the U.S. Economy?*, https://www.icsc.org/uploads/t07-subpage/US-Economic-Impact-2017.pdf (last visited Nov. 2, 2017).

[39] *Empty Storefronts* 3, *supra* note 22.

[40] *California Study* 13-14, *supra* note 2.

That, too, will ultimately reduce the property taxes that state and local governments can collect.

Third, *Quill* further strains state and local coffers by contributing to rising unemployment in the retail industry. An estimated 89,000 employees in general merchandise stores lost their jobs between October 2016 and April 2017—a number that exceeds the entire workforce of the U.S. coal industry.[41] Again, studies have demonstrated that *Quill* is responsible for at least some of this job loss. In California, for example, the ability of online retailers to avoid sales taxes will cause the loss of approximately 38,900 jobs in the retail sector (and 63,400 jobs total) by 2020.[42] The increase in unemployment decreases state income tax revenues and burdens state unemployment programs.

These budget shortfalls strain state and local governments' ability to provide much-needed public services. Notably, many of those services *directly benefit* online retailers. For example, approximately 8 percent of state spending and 4 percent of local spending goes toward building and maintaining highways and roads[43]—*i.e.*, the very infrastructure that online retailers use to deliver their goods from distant States. *Cf. Quill*, 504 U.S. at 328-329 (White, J., dissenting in part) (noting that "out-of-state seller" may "creat[e] the

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[41] Corkery, *Is American Retail at a Historic Tipping Point?*, *supra* note 12.

[42] *California Study* 15, *supra* note 2.

[43] Urban Institute, *State and Local Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-expenditures (last visited Nov. 2, 2017).

greatest infrastructure burdens"). These improvements are often funded by sales-tax revenue. Indeed, Virginia's legislature hoped to fund its 2013 transportation bill with revenue from online sales taxes, but after Congress failed to pass the necessary legislation the State had to increase the state gas tax instead.[44]

Other state and local services that may suffer as a result of *Quill* include health care, fire protection, law enforcement, and, perhaps most importantly, education. In South Dakota, for example, the lost sales-tax revenue directly impacted the State's ability to pay teachers' salaries and forced the State to increase the sales-tax rate to make up the difference. Pet. 13-14. *Quill* thus severely burdens state and local governments' ability to provide needed services and accurately plan for their futures.

* * *

The unanticipated growth in online retail at the expense of brick-and-mortar stores is reason enough to reevaluate whether the dormant commerce clause requires *Quill*'s market-distorting rule. But the need to revisit the decision is all the more pressing in light of *Quill*'s substantial spillover effects on state and local coffers, on the real estate industry, and on local communities around the country.

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[44] Portnoy, *Va. Gas Tax Set to Increase After Congress Fails to Pass Online Sales Tax Bill*, Wash. Post, Nov. 27, 2014, https://www.washingtonpost.com/local/virginia-politics/va-gas-tax-set-to-increase-after-congress-fails-to-pass-online-sales-tax-bill/2014/11/27/609952ea-74fa-11e4-9d9b-86d397daad27_story.html?utm_term=.46d4e18314c4.

II. THIS COURT SHOULD ABROGATE *QUILL'S* PHYSICAL-PRESENCE REQUIREMENT

As *Quill* acknowledged, the dormant commerce clause is meant to safeguard the national economy against the "structural ills" that afflicted it under the Articles of Confederation. *Quill*, 504 U.S. at 312. Those problems stemmed from "state taxes and duties [that] *hindered and suppressed* interstate commerce." *Id.* (emphasis added). To promote a unified economy instead, the Court has repeatedly struck down state regulations and taxes that "discriminat[e] against" or "unduly burden" interstate commerce. *Id.*; *see also Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Under that framework, South Dakota's law is perfectly constitutional. Requiring out-of-state online retailers to collect the same sales tax as in-state retailers neither discriminates against nor burdens interstate commerce. *Exempting* out-of-state retailers from that obligation does both.

1. A state requirement that out-of-state retailers collect and remit state and local sales taxes plainly does not discriminate against interstate commerce at all. A critical element of "discrimination" in this context is "'*differential treatment* of in-state and out-of-state economic interests.'" *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (emphasis added). But quite to the contrary, a law like South Dakota's merely levels the playing field between in-state and out-of-state retailers. *See, e.g.*, *id.* at 345 (no dormant commerce clause violation where local ordinances "treat[ed] in-state private business interests exactly the same as out-of-state ones"); *see also Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring), *cert. denied*, 137 S. Ct. 591 (2016).

Nor does such a requirement unduly burden interstate commerce. As *Quill* acknowledged, the *Complete Auto* standard includes two prongs that deliberately protect against overly burdensome state taxation. *See Quill*, 504 U.S. at 313. First, a state tax must be "fairly related" to services provided by the State. That would plainly be satisfied here, *see supra* pp. 18-19; indeed, no one has suggested it is not, *see* Pet. 21. Second, under *Complete Auto*, there must be a "substantial nexus" between the taxing State and the activities subject to the tax. 430 U.S. at 279. If not for *Quill*, this element, too, would be easily satisfied: The tax applies to online purchases made by and delivered to residents *in the State*. *See, e.g.*, *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) ("a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State"). Thus, South Dakota's law and others like it do not unduly burden interstate commerce under the *Complete Auto* standard applicable to state taxation.

2. Although state taxation of online retailers does not discriminate against or unduly burden interstate commerce, the *Quill* rule does. *Quill* undisputedly mandates differential treatment of in-state and out-of-state retailers. By its own terms, the decision "create[d] a safe harbor" for out-of-state online and mail-order retailers, retaining the "'sharp distinction'" between them and their in-state, brick-and-mortar counterparts. *Quill*, 504 U.S. at 307, 315.

Quill also directly stifles interstate commerce by skewing the playing field toward some interstate actors and away from others. Online and mail-order companies' interstate operations thrive thanks to the effective tax subsidy that *Quill* provides. But other interstate companies suffer, including many of the retail real estate companies that amici represent. These companies often own properties in multiple States that could be leased to out-of-state companies looking to open retail stores, office space, local distribution centers, or warehouses. Yet *Quill* gives out-of-state companies a powerful incentive to maintain all physical infrastructure in as few States as possible. *See* Pet. 17-18.[45]

The incentive to minimize physical presence, in turn, stifles innovation in the retail industry. *See supra* pp. 13-16. As amici have found, the relationship between online and brick-and-mortar retail can and should be complementary. But *Quill*'s bright-line rule systematically discourages online companies from experimenting with physical stores by exposing them to new tax-collection obligations every time they expand into a new State. In this way, too, *Quill* burdens interstate commerce by hindering innovation that would ultimately benefit consumers, local communities, and online companies themselves.

3. Finally, *stare decisis* does not require adhering to *Quill*. Whether or not the physical-presence rule was reasonable when adopted, it no longer makes sense.

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[45] Notably, companies also have an incentive to settle in the *least* densely populated states in order to minimize the number of purchases on which they can be required to collect taxes. For example, Jeff Bezos referenced the *Quill* rule in explaining the original decision to locate Amazon's headquarters in Washington: "[I]t had to be in a small state. In the mail-order business, you have to charge sales tax to customers who live in any state where you have a business presence. It made no sense for us to be in California or New York." Taylor, *Who's Writing the Book on Web Business*, Fast Co. (Oct. 31, 1996), https://www.fastcompany.com/27309/ whos-writing-book-web-business.

This Court may depart from precedent where the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-855 (1992); *see also American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 302 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate ...."). *Quill* was decided in 1992, before the global Internet boom. In today's world, a brick-and-mortar presence is no longer necessary to ensure a sufficient "nexus" between the taxed activities and the taxing State. As Justice Kennedy has observed, "cell phones, tablets, and laptops" now allow businesses to "be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Direct Mktg. Ass'n*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

Advances in technology have also undermined another key aspect of the reasoning in *Bellas Hess* and *Quill*. Collecting sales taxes in multiple states is now a straightforward task, not a "'virtual welter of complicated obligations.'" *See, e.g.*, *Quill*, 504 U.S. at 313 n.6; *Bellas Hess*, 386 U.S. at 759-760. As one study explained: "Since *Quill*, we have witnessed a proliferation of more sophisticated technology through which sellers can affordably track sales tax collection rules, collect taxes owed, remit them to taxing jurisdictions, and comply with other requirements. The technology available today bears *no resemblance* to what existed in 1992."[46] Meanwhile, the rule's impact on brick-and-

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[46] Yetter & Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 571 (2017) (emphasis added).

mortar retailers, on the real estate industry, on local communities, and on state and local coffers make it patently unfair to continue affording online companies this unwarranted competitive advantage. *See supra* pp. 4-19.

Just as significantly, *Quill*'s vitality has been undermined by subsequent dormant commerce clause decisions. *Stare decisis* is meant to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986). Accordingly, this Court can and does revisit prior decisions when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 854-855.

The *Quill* rule is indeed an outdated relic. It is out of step with the Court's present-day focus on eradicating discriminatory and unduly burdensome restrictions on interstate commerce. *Supra* pp. 20-21. And it has not prevented States from "imposing regulatory and tax duties of comparable severity to sales and use tax collection duties." *Direct Mktg. Ass'n*, 814 F.3d at 1149 (Gorsuch, J., concurring). These efforts—many of which "consciously stop[] (just) short of doing what *Quill*'s holding forbids," *id.* at 1148—have almost uniformly been upheld by lower courts. *Quill* has thus increasingly become a doctrinal "island," *id.* at 1151—the kind of case this Court has freely reconsidered. Indeed, under these circumstances, revisiting *Quill* will serve precisely the values that *stare decisis* protects—namely, promoting a coherent and principled body of law.

For these reasons, as well as those set forth in South Dakota's petition (at 27-35), there is "special justification" for departing from *stare decisis* and abrogating the *Quill* rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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