No.

IN THE

Supreme Court of the United States

AMAZON.COM LLC AND AMAZON SERVICES LLC,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; ROBERT L. MEGNA, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; AND THE STATE OF NEW YORK,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Commerce Clause prohibits States from imposing sales and use tax collection burdens on out-of-state retailers that lack a physical presence in the taxing state. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 302, 313-15 & n.6 (1992); *accord Nat'l Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 754-55, 758 (1967). Against that "bright-line" physical-presence rule, *Quill*, 504 U.S. at 316, the Court of Appeals of New York in this case upheld New York Tax Law Section 1101(b)(8)(vi), which establishes an effectively irrebuttable evidentiary presumption that out-of-state Internet retailers that have no physical presence in the State—such as Petitioners—are in-state "vendors" and therefore must collect New York sales and use taxes on all of their sales to New Yorkers.

The questions presented are:

1. Whether Section 1101(b)(8)(vi) violates the Commerce Clause by imposing tax-collection obligations on out-of-state retailers that have no physical presence in New York.

2. Whether Section 1101(b)(8)(vi) violates the Due Process Clause by adopting an effectively irrebuttable evidentiary presumption that the prerequisites for taxation under the Commerce Clause have been satisfied.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, David A. Paterson, in his official capacity as the Governor of the State of New York, was a defendant in the Supreme Court of New York. Overstock.com, Inc. was the plaintiff in a constitutional challenge in the Supreme Court of New York that is similar to that brought by Petitioners in this proceeding, was an appellant before the Appellate Division of New York in this proceeding, was an appellant before the Court of Appeals of New York in this proceeding, and has filed with this Court a petition for a writ of certiorari seeking review of the court of appeals' decision in this case.

Pursuant to this Court's Rule 29.6, undersigned counsel state that the parent company of Petitioners Amazon.com LLC and Amazon Services LLC is Amazon Corporate LLC. Amazon.com LLC has the following subsidiaries: (a) AF Retail Services LLC and (b) AmazonFresh LLC. Amazon Services LLC has no subsidiaries. The ultimate parent of Amazon.com LLC and Amazon Services LLC is Amazon.com, Inc. Amazon.com, Inc. has no parent company, and no publicly held company owns 10% or more of Amazon.com, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Amazon.com LLC and Amazon Services LLC respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of New York.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 987 N.E.2d 621. The opinion of the Appellate Division of New York (App., *infra*, 18a-49a) is reported at 81 A.D.3d 183. The opinion of the Supreme Court of New York (App., *infra*, 51a-66a) is reported at 23 Misc. 3d 418.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2013. On June 14, 2013, Justice Ginsburg extended the time for filing the petition to and including August 23, 2013. *See* No. 12A1205. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the Appendix, *infra*, at 67a-68a.

STATEMENT

In this case, the Court of Appeals of New York upheld against constitutional challenge a state law that imposes tax-collection obligations on out-of-state retailers that merely advertise in the State. App., *infra*, 1a-12a. The Commerce Clause, however, prohibits States from imposing such burdens on out-of-state retailers that lack a "substantial nexus" with

the taxing jurisdiction. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 313-14 (1992). This Court has held that a substantial nexus exists only if the out-of-state retailer has a "physical presence" in the taxing state, such as a sales force engaging in active solicitation, a plant, or an office, *see id.* at 314-15; advertising in the taxing state, by contrast, does not create a "substantial nexus," *see id.* at 302, 313 & n.6; *accord Nat'l Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 754-55, 758 (1967). The New York statute cannot be reconciled with this settled caselaw.

The statute compounds this constitutional violation by adopting an effectively irrebuttable presumption that an out-of-state retailer has established a sufficient nexus with New York when third-party websites post passive advertisements that include Internet "links" to the retailer's website. But this Court has recognized that "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). New York cannot, consistent with due process, escape the limitations of its taxing authority simply by presuming that those limits have been satisfied. This Court's review is warranted.

1. Petitioners are Internet retailers. *See* Compl. ¶ 4. Petitioners have no physical presence in New York—they do not own property there, do not maintain any New York offices, and do not employ New York personnel. *Id.* ¶¶ 4, 20-21. Neither Petitioners nor anyone working on their behalf perform solicitation activities that are significantly associated with Petitioners' ability to generate sales to customers located in New York. *Id.* ¶¶ 4, 20-21, 26.

New York customers order products through Petitioners' website, www.Amazon.com, and place orders only through Petitioners. Compl. ¶¶ 20-22. The only contact customers have with Petitioners is through the Internet or by phone, mail, or e-mail. *Id.* ¶¶ 20-21. Products sold by Petitioners are shipped directly to customers from fulfillment centers located outside of New York. *Ibid.*

Like many Internet retailers, Petitioners use "Affiliate Marketing" as one method of advertising. Under Affiliate Marketing agreements, Internet retailers compensate some independent New York residents for posting passive advertisements on their websites that include "links" to the retailers' websites. Under Petitioners' version of Affiliate Marketing—called the "Associates Program"—Petitioners pay independent third parties located around the world to post advertisements for the Amazon.com website on the Internet that are not geographically targeted. Compl. ¶¶ 21-22, 25. Thousands of these third parties have New York addresses. *Id.* ¶ 25.

These third parties typically enroll in Petitioners' Associates Program by submitting an application electronically through Amazon's website. Compl. ¶ 21. If the application is accepted, Petitioners grant the third party a revocable license to place one or more different Amazon.com advertisements on that party's website. *Ibid.*; *see also* R.850, 857 (Operating Agreement).

These passive advertisements typically have links enabling visitors to click through to Petitioners' website. Compl. ¶¶ 21-22. These links function as advertisements either for Amazon.com itself or for specific products available on Amazon.com. *See ibid.* Once a visitor to a third party's website clicks

through to Amazon.com via the advertisement, any purchase made by that visitor takes place solely through Petitioners, all customer inquiries are handled only by Petitioners, and all products are shipped directly to the customer by Petitioners, their corporate affiliates, or other sellers, without any involvement of the third party or its website. *Ibid.*

Petitioners do not control the activities or content of such third-party websites. R.857 (Operating Agreement). For example, Petitioners do not require the owners of these websites to advertise only for Petitioners. R.715 (Comfort Affidavit ¶ 11). As a result, many of the third-party websites that advertise on behalf of Amazon.com also display other companies' advertisements. *Ibid.* (Comfort Affidavit ¶¶ 11-12). Petitioners simply require third parties who display Petitioners' advertisements on their websites not to "misrepresent or embellish" their relationship with Petitioners. R.857 (Operating Agreement).

As with other forms of advertising—such as that conducted in print, on television, and over radio—the third parties who display Petitioners' advertising links on their websites play no role in Petitioners' sales transactions. Compl. ¶¶ 21-22. They do not solicit sales on Petitioners' behalf, they do not consummate sales on Petitioners' behalf, and they are not authorized to act as Petitioners' agents. *Id.* ¶¶ 20-22. The advertisements posted on these third parties' websites are not geographically targeted, as the Internet is available worldwide.

Petitioners pay third parties on a "pay-per-purchase" basis—that is, when a visitor to the third party's website clicks on the Amazon advertisement (taking the visitor to Amazon.com) and then makes a purchase directly from Petitioners. Compl. ¶ 23.

Petitioners and other Internet retailers are unaware of the independent business activities undertaken by the third-party advertisers that participate in Affiliate Marketing. *See*, *e.g.*, R.714-15 (Comfort Affidavit ¶¶ 8-10). Internet retailers also lack the ability to monitor the activities of each third party's employees. *Ibid.* (Comfort Affidavit ¶¶ 8-10). These entities operate their own websites for a wide variety of purposes and display a vast array of different content. *Id.* at 715 (Comfort Affidavit ¶ 12). As a result, any two websites displaying advertisements will typically be operated in a substantially different way from one another. *See ibid.* (Comfort Affidavit ¶¶ 11-12).

2. Enacted in April 2008, New York Tax Law Section 1101(b)(8)(vi) provides that a seller of taxable goods "shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident . . . directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller." N.Y. Tax Law § 1101(b)(8)(vi). The statute purports to make that presumption rebuttable with "proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States [C]onstitution." *Ibid*. If a seller cannot rebut that presumption, however, then it is deemed a "vendor" under the statute and therefore must collect sales and use taxes on its New York sales. *See id.* §§ 1131(1), 1101(b)(8)(i)(C)(I).

a. Under Section 1101(b)(8)(vi), Petitioners and other out-of-state Internet retailers that employ Af-

filiate Marketing are presumed to have engaged in constitutionally sufficient (for Commerce Clause purposes) "solicitation" of New York customers and, thus, must collect New York sales and use taxes on all of their sales to New Yorkers. Failure to satisfy these tax-collection obligations would subject Petitioners and other similarly situated vendors to criminal and civil penalties. N.Y. Tax Law §§ 1145, 1817.

Shortly after enactment of Section 1101(b)(8)(vi), Petitioners filed suit in New York state court alleging that the statute is facially unconstitutional under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. *See* R.20 (Complaint); R.743-44 (Summons). Petitioners argued (Compl. ¶¶ 42-44) that Section 1101(b)(8)(vi) violates the Commerce Clause by imposing tax-collection obligations on out-of-state Internet retailers that—because they do not have a physical presence in New York—lack the requisite "substantial nexus" to that State. *Quill*, 504 U.S. at 313-14. Petitioners further contended that the statute attempts to camouflage this unconstitutional expansion of taxing power through an irrational and effectively irrebuttable evidentiary presumption that treats out-of-state Internet retailers who pay for Internet advertising in New York as having the equivalent of an on-the-ground, in-state sales force soliciting business from in-state residents for the retailers. Compl. ¶¶ 48-49. This presumption, Petitioners maintained, violates the Due Process Clause. *Ibid.*

After Petitioners filed suit, the New York State Department of Taxation and Finance issued two so-called "informational" memoranda addressing Section 1101(b)(8)(vi). The first memorandum, issued in May 2008, purports to clarify that advertising alone

will not trigger the statutory presumption. *See* R.824-29 (TSB-M-08(3)S ("First TSB-M")). That memorandum defines "advertisement" narrowly, however, to exclude Affiliate Marketing arrangements, under which retailers compensate third parties for posting passive Internet advertisements that contain links on a pay-per-purchase or commission basis. *See id.* at 825-28 (First TSB-M). The second memorandum, issued in June 2008, maintains that an out-of-state retailer can "rebut" the presumption if it can establish both that (a) a contract exists between the retailer and all of the third parties that post advertisements on the retailer's behalf, prohibiting various "solicitation" activities, and (b) the retailer has collected certifications from all of these third parties stating that they have not, in fact, engaged in solicitation. R.831-32 (TSB-M-08(3.1)S ("Second TSB-M")). The contractual prohibition requires retailers to include, in their Affiliate Marketing and similar contracts, language prohibiting the affiliate "from engaging in any solicitation activities in New York State that refer potential customers to the seller." *Id.* at 831 (Second TSB-M). The certification component requires each third party to submit an annual certification to the retailer stating that it has not engaged in any such solicitation activities that year. *Ibid.* (Second TSB-M).

b. The state trial court dismissed the case for failure to state a cause of action. *See* App., *infra*, 65a-66a. The Appellate Division affirmed the dismissal of Petitioners' facial challenges under the Commerce Clause and Due Process Clause. *See id.* at 47a-48a. In a divided decision, the Court of Appeals of New York affirmed. *See id.* at 1a-17a.

First, the majority concluded that Section 1101(b)(8)(vi) satisfied the "in-state physical presence" requirement under the Commerce Clause. App., *infra*, 8a-9a. Emphasizing the physical presence of the website owners paid under Affiliate Marketing and similar agreements, the majority concluded that, under such agreements, out-of-state retailers "pa[y] New York residents to actively solicit business in" New York. *Id.* at 9a. By agreeing to compensate website owners for posting their advertisements, the court of appeals concluded, retailers covered by Section 1101(b)(8)(vi) effectively create "in-state sales force[s]" that satisfy the physical-presence requirement under the Commerce Clause. *Ibid.* In reaching that conclusion, the court of appeals observed that "[t]he world has changed dramatically in the . . . two decades" since this Court decided *Quill*, and opined that "it may be that the physical presence test is outdated." *Id.* at 8a. "An entity may now," the court added, "have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet." *Ibid.*

Second, the court of appeals held that Section 1101(b)(8)(vi) satisfies due process. The court concluded that the presumption imposed by Section 1101(b)(8)(vi)—namely, that advertising alone establishes that an out-of-state retailer is actively engaging in constitutionally sufficient solicitation of New York customers—is not irrational. App., *infra*, 11a-12a. The court also concluded that the presumption, which on its face can be rebutted only if an out-of-state retailer establishes that no New York-based website owners with whom the retailer had an agreement solicited on the retailer's behalf, was not irrebuttable. *Ibid.* In reaching that conclusion, the court relied on the Second TSB-M, observing that

that memorandum "set[s] forth a method (contractual prohibition and annual certification) through which . . . retailers will be deemed to have rebutted the presumption." *Id.* at 12a.

Judge Smith dissented. In his view, the presumption imposed by Section 1101(b)(8)(vi) "does not make sense." App., *infra*, 14a (Smith, J., dissenting). The statute, he explained, "tries to turn advertising media into an in-state sales force through a presumption," even though "there is no basis for inferring that" owners of those advertising media (*i.e.*, websites) "are actively soliciting for . . . out-of-state retailers." *Ibid.* That presumption, he emphasized, effectively "nullif[ies]" the constitutional requirement "that advertising in in-state media is not the equivalent of physical presence." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

Review is warranted because the decision below raises issues of national importance and conflicts with the express direction of this Court. By upholding a statute that imposes tax-collection obligations on out-of-state retailers based on those retailers' mere display of passive Internet advertisements in the State, the New York Court of Appeals disregarded the "bright-line" physical-presence requirement established by this Court and contravened the settled rule that advertising alone is insufficient to give rise to the "substantial nexus" required under the Commerce Clause. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 313-16 & n.6 (1992); *accord Nat'l Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 754-55, 758 (1967). The court of appeals' decision also conflicts with this Court's due process caselaw by, among other things, upholding Section 1101(b)(8)(vi) even though it attempts an end-run around this

Court's Commerce Clause jurisprudence through an effectively irrebuttable (and hence unconstitutional) evidentiary presumption of in-state solicitation based on mere advertising. *See*, *e.g.*, *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *W. & Atl. R.R.* v. *Henderson*, 279 U.S. 639, 642 (1929).

This case raises issues of exceptional importance because the decision below leaves in place a state law that will significantly and unduly burden interstate commerce, provides a road map for other jurisdictions to inflict similar burdens on interstate commerce, and threatens to sow widespread confusion in an area that is—in the best of times—already "something of a quagmire." *Quill*, 504 U.S. at 315-16 (internal quotation marks omitted). The petition for a writ of certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE PRECEDENTS.

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. This Court has long recognized that the Clause "is more than an affirmative grant of power": "[B]y its own force," the Clause "prohibits certain state actions that interfere with interstate commerce." *Quill*, 504 U.S. at 309 (internal quotation marks omitted). Indeed, "[t]he very purpose of the Commerce Clause was to ensure a national economy free from . . . unjustifiable local entanglements" that can result from burdensome state regulation. *Nat'l Bellas Hess*, 386 U.S. at 760.

A. The "negative sweep" of the Commerce Clause limits state authority to impose tax burdens

on interstate commerce. *See*, *e.g.*, *Quill*, 504 U.S. at 309-19; *Nat'l Bellas Hess*, 386 U.S. at 758-60.

1. Although a State may insist that "those engaged in interstate commerce" shoulder "their just share of state tax burden[s]," a state may impose tax burdens on out-of-state businesses only when "the tax is applied to an activity with a substantial nexus with the taxing state." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Under this Court's precedents, an out-of-state retailer has the constitutionally mandated "substantial nexus" with a state *only* if the retailer has a "physical presence" in the state, such as real estate, employees, or sales representatives engaged in "continuous local solicitation." *Quill*, 504 U.S. at 314; *see also*, *e.g.*, *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 210-11 (1960).

In *National Bellas Hess*, for example, this Court held that the Commerce Clause prohibited the State of Illinois from requiring an out-of-state mail-order firm to collect use taxes on items sold to Illinois residents. In reaching that conclusion, the Court emphasized that it "ha[d] never held that a State may impose" tax-collection obligations "upon a seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758. Before allowing a state to "deputize an out-of-state retailer as its collection agent for a use tax," the Court explained, the retailer must have a much stronger connection to the taxing state. *Id.* at 757.

In cases upholding "the power of a State to impose" tax-collection obligations on "an out-of-state seller," the seller had at least a physical presence in the taxing state—the seller's "sales were arranged by local agents in the taxing State," the seller "main-

tained local retail stores," or the seller had salesmen "conducting continuous local solicitation" in the taxing state. *Nat'l Bellas Hess*, 386 U.S. at 757-58 (discussing *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 (1939), *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941), and *Scripto*, 362 U.S. at 211) (internal quotation marks omitted). Those cases, the Court emphasized, reflect a "sharp" and "basic" distinction "between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 758. Refusing "to repudiate" that distinction, the Court held that a connection through common-carrier or U.S. mail was inadequate to authorize the State to impose tax-collection obligations on the out-of-state retailer. *Ibid.*

This Court reaffirmed *Bellas Hess*'s bright-line physical-presence rule 25 years later in *Quill*. In that case, the Court invalidated a state law that required out-of-state companies to pay use taxes on goods they sold for use in the State of North Dakota, even when the companies had neither outlets nor sales representatives in the state. 504 U.S. at 309-19. Because those companies lacked a physical presence in the taxing jurisdiction, the Court held, the Commerce Clause barred North Dakota from subjecting them to the tax. *See ibid.*

2. An out-of-state retailer may have a "physical presence" in a state if it has real estate there, employees in the state, or sales representatives engaged in "continuous local solicitation" in the state. *Quill*, 504 U.S. at 314; *Scripto*, 362 U.S. at 211. In addressing when physical presence can be established

through solicitation activities performed by third parties, the Court has made clear that solicitation alone does not automatically create a substantial nexus. Rather, solicitation by third parties creates a nexus only if it is "significantly associated" with the out-of-state retailer's ability to do business in the taxing state. *Tyler Pipe Indus., Inc.* v. *Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (internal quotation marks omitted).

Mere advertising in the taxing state, by contrast, does not amount to "solicitation" and therefore does not create a substantial nexus. *Quill*, 504 U.S. at 302, 304, 313 n.6; *see also Nat'l Bellas Hess*, 386 U.S. at 754-55, 758; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 347 (1954). Instead, solicitation requires direct, in-person local sales-support activities that include involvement in the actual sale. *See Tyler Pipe*, 483 U.S. at 249-51; *Scripto*, 362 U.S. at 210-11.

B. Section 1101(b)(8)(vi) directly violates the bright-line physical-presence rule established in *Bellas Hess* and *Quill*. The statute imposes tax-collection obligations on out-of-state retailers based only on their contractual relationships with independent, non-employee third parties that merely advertise the retailers' products or services. Like the statute invalidated in *Quill*, Section 1101(b)(8)(vi) impermissibly imposes those burdens without regard to whether retailers have any physical presence in New York, such as real estate, employees, or sales representatives engaged in continuous local solicitation. *Quill*, 504 U.S. at 314. And the Internet-only connection between retailer and buyer required under Section 1101(b)(8)(vi) is akin to the "connection . . . by common carrier or the United States mail" deemed insufficient in *Bellas Hess*. 386 U.S. at 758.

1. The court of appeals emphasized the physical presence not of Petitioners and other out-of-state Internet retailers, but instead of New York "resident website owner[s]," concluding that Section 1101(b)(8)(vi) appropriately "deem[s]" an out-of-state retailer "to have established an in-state sales force"—and one that "actively solicit[s] business" in New York—by entering Affiliate Marketing agreements with New York residents to advertise in New York. App., *infra*, 8a-9a. But this reasoning ignores the fact that the third-party website operators are not employed by Petitioners; instead, they are an independent means by which Petitioners advertise. By upholding tax-collection obligations based on out-of-state retailers' mere advertising in the State, the court of appeals thus contravened the rule that advertising alone is insufficient to give rise to the "substantial nexus" required under the Commerce Clause. *Quill*, 504 U.S. at 313-15 & n.6; *Nat'l Bellas Hess*, 386 U.S. at 754-55, 758.

Although the court of appeals stated that it was "bound" by this Court's decisions in *Bellas Hess* and *Quill*, its holding and reasoning depart from those decisions and accord instead with the court of appeals' own view that "[t]he world has changed dramatically in the last two decades" and that the "physical presence test" may now have become "outdated." App., *infra*, 8a. Even if the court were correct that *Bellas Hess* and *Quill* rest on "moth-eaten foundations," *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997), that would provide no basis for departing from them.

Even more significantly, purportedly dramatic changes in the world would not warrant replacing the physical-presence rule: Indeed, in *Quill*, this

Court squarely rejected a similar state-court effort to evade the physical-presence rule in light of purportedly dramatic changes in the world. *See Quill*, 504 U.S. at 301 (refusing to overrule the physical-presence rule and thus rejecting the North Dakota Supreme Court's decision not to follow *Bellas Hess* on the ground that "the tremendous social, economic, commercial, and legal innovations of the past quarter-century ha[d] rendered [*Bellas Hess*'s] holding obsolet[e]" (internal quotation marks omitted; last alteration in original)); *see also id.* at 314-19 (refusing to overrule *Bellas Hess*). The Court did so even though it recognized that the physical-presence rule was in some respects "artificial," and even though the Court did not deny that the world had changed in the decades since *Bellas Hess* was decided. Review is warranted so that this Court can make clear once more that the constitutionally grounded "clear rule" reaffirmed in *Quill* (*id.* at 315) continues to bind the States, even if "[t]he world has changed dramatically." App., *infra*, 8a.

2. Even if the activities of Petitioners and other out-of-state retailers could be deemed to have moved beyond mere advertising and into solicitation—and they cannot—Section 1101(b)(8)(vi) would still violate the Commerce Clause. There is simply no way to ensure, as the statute requires, that such solicitation is "significantly associated" with the retailer's ability to do business in the State. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). And, of course, the advertisements posted on third parties' websites are readily viewable worldwide and are not geographically targeted towards New York or any other specific state.

In *Tyler Pipe*, for example, in-state sales representatives "acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders," had "long-established and valuable relationships with Tyler Pipe's customers," and "[t]hrough sales contacts, the representatives maintaine[d] and improve[d] the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe." 483 U.S. at 249 (internal quotation marks omitted). The representatives provided Tyler Pipe with "virtually all" of its information regarding its Washington market—"including: product performance; competing products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington market." *Id.* at 250 (internal quotation marks omitted). In other words, Tyler Pipe could not have done business in Washington without its local representatives.

Similarly, this Court held in *Scripto* that a substantial nexus existed where an out-of-state company hired several "salesmen" who traveled throughout the State and were "actively engaged in [the State] as . . . representative[s] of [the company] for the purpose of attracting, soliciting and obtaining" in-state customers. 362 U.S. at 209, 211 (internal quotation marks omitted). The team of salesmen in *Scripto* engaged in "continuous local solicitation," and "[t]he only incidence of th[e] sales transaction that [was] nonlocal [was] the acceptance of the order." *Id.* at 211.[*]

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[*] *See also Gen. Trading Co.* v. *State Tax Comm'n*, 322 U.S. 335, 337 (1944) (substantial nexus created by seller's engagement of in-state sales agents for the purpose of establishing and maintaining a local market); *Felt & Tarrant Mfg. Co.*, 306 U.S.
[Footnote continued on next page]

By contrast, the activities of New York residents who post advertisements on their websites are not "significantly associated" with Petitioners' ability to do business in New York. The advertisements have no direct connection with New York except that they may have been posted by a third party with a New York address. In contrast to the local, in-person sales representatives in *Tyler Pipe* and *Scripto* who were targeting in-state customers, the websites operated by New York residents merely refer customers to Petitioners' website and have no involvement in actual sales transactions. *See* Compl. ¶¶ 21-22. Unlike the local sales force in *Tyler Pipe* and *Scripto*, moreover, an Internet advertisement posted on a New York resident's website has no effect on Petitioners' ability to maintain a New York market for its sales. The advertisement is posted on the Internet, is not geographically targeted, and can be viewed by anyone from anywhere in the world.

The decision below conflicts with this Court's Commerce Clause cases requiring that in-state solicitation activity be "significantly associated" with an out-of-state retailer's ability to do business in the State. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). This Court's review is warranted.

3. The decision whether to abandon the physical-presence rule is one that Congress "has the ultimate power to resolve" and one that Congress "may be better qualified to resolve" than are the courts. *Quill*,

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[Footnote continued from prior page]
at 64-68 (substantial nexus created by seller's engagement of in-state sales agents for the purpose of establishing and maintaining a local market).

504 U.S. at 318. This Court accordingly emphasized in *Quill* that its decision left Congress "free to decide whether, when, and to what extent the States" may impose tax-collection burdens on interstate retailers. *Ibid.* The court of appeals' decision below disregards the deference that this Court afforded Congress in *Quill*. Certiorari is warranted.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENTS.

The court of appeals' decision also warrants review because it conflicts with this Court's due process precedents.

A. Section 1101(b)(8)(vi) violates the due process principle that "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Speiser*, 357 U.S. at 526. As explained above, the statute violates the bright-line physical-presence rule established by this Court. *See supra* Part I. The State has attempted to circumvent that rule by camouflaging a blatant violation of the Commerce Clause with an evidentiary presumption. That presumption transforms mere advertising—which, under this Court's cases, does not give rise to a constitutionally adequate substantial nexus—into effectively dispositive proof that an out-of-state Internet retailer is actually engaged in constitutionally sufficient solicitation of New York customers, just as if it were going door-to-door and encouraging New Yorkers to purchase goods from Petitioners and other out-of-state retailers.

But "[t]he power to create presumptions is not a means of escape from constitutional restrictions." *Speiser*, 357 U.S. at 526 (internal quotation marks

omitted). This Court has emphasized that state laws "creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973). A statutory presumption violates due process when—even if it purports to be rebuttable—the statute "operates to deny a fair opportunity to repel it." *W. & Atl. R.R.*, 279 U.S. at 642.

Section 1101(b)(8)(vi) runs afoul of that principle. The statute requires out-of-state Internet retailers to prove an impossible negative: that all of the in-state residents posting the retailer's advertising links on their own websites are taking no other affirmative steps to "solicit" customers on the retailer's behalf. Unless the retailer is able to collect and adduce this proof, the statute forces the retailers to collect taxes on all of its New York sales, including sales to customers who were not referred to the retailer through a third-party advertising link. N.Y. Tax Law § 1101.

To see that the burden imposed by the statute is effectively insurmountable, consider how a retailer would attempt to rebut the statutory presumption. A retailer would first need to identify all third-party residents compensated to post links on their websites—a group comprising potentially thousands of persons and companies maintaining a physical address in New York, maintaining a place of business in New York, incorporated under New York law, or doing business in New York. 20 N.Y. Comp. Codes R. & Regs. tit. 20, § 526.15; R.825-26 (First TSB-M). If the retailer could actually identify all New York residents with whom it has advertising relationships, it would still have to locate and gather a wide variety of evidence regarding the day-to-day activities of

thousands of third parties, their websites, and all of their employees and members. If such evidence could somehow be collected, the retailer would *then* need to determine on whose behalf (if any) the website was communicating to the public. That itself is a practical impossibility because third-party affiliate websites exist for a wide variety of purposes—not just to advertise, and certainly not just to advertise on behalf of out-of-state retailers—and many of them have advertising relationships with many different in- and out-of-state retailers.

Even if a retailer could gather all of this evidence and make the requisite judgment calls, it *still* would not have enough evidence to actually *prove* the *lack* of solicitation by a preponderance of evidence in a judicial or administrative proceeding—as Section 1101(b)(8)(vi) requires in order to rebut the presumption. A retailer would have to prove that *none* of the third parties, their employees, or their members reached out to New Yorkers on behalf of the retailer through phone calls, e-mails, flyers, newsletters, in-person promotions, or other undefined activities (such as a post on Facebook, Twitter, or another social media outlet) that could constitute "solicitation" as New York interprets that term. R.831 (Second TSB-M).

This intractable web of burdens renders the statutory presumption effectively irrebuttable. The observation this Court made in *Speiser* v. *Randall* applies equally here: "How can a claimant . . . possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, . . . this procedural device must necessarily produce a result which the State could not command directly." 357 U.S. at 526.

B. The court of appeals disagreed that the presumption was irrebuttable because the Second TSB-M has "set forth a method (contractual prohibition and annual certification) through which . . . retailers will be deemed to have rebutted the presumption." App., *infra*, 12a. The contractual prohibition requires retailers to include, in their Affiliate Marketing and similar contracts, language prohibiting the affiliate "from engaging in any solicitation activities in New York State that refer potential customers to the seller." R.831 (Second TSB-M). The certification component requires each third party to submit an annual certification to the retailer stating that it has not engaged in any solicitation activities that year. *Ibid.* (Second TSB-M).

That method does not salvage the statute, however, because the statutory presumption remains effectively irrebuttable. Essentially no New York resident advertiser could comply with the contractual prohibition. Under Section 1101(b)(8)(vi), New York resident advertisers may not—without triggering tax-collection obligations for the out-of-state retailer—do anything that might "indirectly refe[r]" potential customers to the retailer's website through an Internet link "or otherwise." Thus, for example, a New York-based web company could *inadvertently* violate the contract prohibition as follows: (1) an employee of the company sends his sister (who lives in New York) an e-mail containing the company's website address; (2) the employee's sister reads the e-mail and goes on the Internet to learn about her brother's company; (3) while on the website, the employee's sister sees a book that interests her; (4) she clicks on the Amazon.com link and buys that book from Amazon; and (5) as a result, Amazon compensates the company with a percentage of the sale. In

that scenario, the company has "indirectly" referred a New York customer to Amazon, and in doing so has violated the contractual prohibition. Because there is no limit to the types of activities that could constitute an impermissible referral, no reasonable third-party website could be expected to submit the annual certification. And even if such certifications could be collected, they would afford retailers no relief because, if just a single advertiser engages in "solicitation" then the retailer is responsible for collecting taxes on *all* of its New York sales. *See* N.Y. Tax Law § 1101(b)(8)(vi).

The method relied upon by the court of appeals for concluding that the presumption is rebuttable is thus illusory. Because Section 1101(b)(8)(vi) "operates to deny a fair opportunity to repel" the presumption that it imposes, it cannot be reconciled with due process. *W. & Atl. R.R.*, 279 U.S. at 642. The court of appeals erred in concluding otherwise, and this Court's review is warranted.

III. THIS CASE RAISES CONCERNS OF NATIONAL IMPORTANCE.

The court of appeals' erroneous decision raises several important concerns that warrant this Court's review for at least three reasons.

A. The decision below leaves in place a statute that will significantly and unduly burden interstate commerce. The decision subjects Internet retailers to significant burdens on pain of serious civil and criminal penalties. Indeed, Section 1101(b)(8)(vi) leaves out-of-state retailers who (but for the improper application of that provision) lack a "substantial nexus" with three options: (1) collect taxes on New York sales even though that obligation exceeds the

State's authority under the Commerce Clause; (2) spend time and money to try to muster evidence needed to rebut the presumption, which would be impossible in practice; or (3) halt all advertising in the State that could possibly be deemed a "referral" that would risk triggering the presumption of vendor status. Each of those options is patently inconsistent with *Quill* and will inflict significant harm on interstate commerce—by imposing significant costs, by exacting intractable administrative burdens, or by halting large swaths of commerce altogether.

These issues are of national concern because they have interstate effect and because of the prominent position that New York holds in the national economy. New York is the third largest economy in the country. *See* Bureau of Economic Analysis, United States Department of Commerce, *Widespread Economic Growth in 2012*, *available at* http://www.bea.gov/newsreleases/regional/gdp_state/2013/pdf/gsp0613.pdf (Table 1). Any burdens that New York imposes on interstate commerce will necessarily have an outsized effect on the national economy. *Cf.* Pet. for Writ of Cert. 25-26, *Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, No. 98-2043, *cert. granted*, 527 U.S. 1068 (1999) ("California is the world's seventh largest economy—with corporate franchise tax revenues alone of more than $5.8 billion. Even if the impact of the decision below [upholding a law burdening out-of-state corporations] were limited to California, it would warrant this Court's review because of the enormous effect it will have on multistate taxpayers, the overwhelming majority of which do business in California." (footnotes omitted)). Online retail commerce is, moreover, a fast-growing part of the national economy and thus the importance of the issues presented here will only increase. *See* United

States Department of Commerce, U.S. Census Bureau News Release (Aug. 15, 2013), *available at* http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (estimating that adjusted U.S. retail e-commerce sales during the second quarter of 2013 (1) increased 18.4% from the same quarter in 2012, and (2) accounted for 5.8% of total quarterly retail sales).

The effect of the decision below on the national economy is reason enough to grant certiorari. As the United States has emphasized, "[b]arriers to interstate commerce harm the national economy, contrary to the Framers' intent to create a nationwide 'area of trade free from interference by the states.'" Br. for the United States as *Amicus Curiae* 9, *Am. Trucking Ass'ns, Inc.* v. *Mich. Pub. Serv. Comm'n*, Nos. 03-1230, 03-1234 & 03-1250, *cert. granted in part*, 543 U.S. 1096 (2005) (quoting *Am. Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 280 (1987)). This Court has accordingly "granted certiorari in numerous other cases" involving burdens on interstate commerce "even in the absence of an asserted conflict among appellate courts." *Ibid.* (citing, among other cases, *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59 (2003), *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), and *Scheiner*, 483 U.S. 266).

B. In addition, the decision below provides a road map for other state legislatures to enact similarly burdensome legislation. Several States have already enacted laws similar to the statute here. *See*, *e.g.*, Ark. Code Ann. § 26-52-117(d); Cal. Rev. & Tax. Code § 6203(c)(5)(A); Conn. Gen. Stat. § 12-407(a)(12)(L), (15)(A)(x); 35 Ill. Comp. Stat. 105/2(1.1); N.C. Gen. Stat. Ann. § 105-164.8(b)(3);

R.I. Gen. Laws § 44-18-15(a)(2). Many other States will jump at the opportunity to tax out-of-state Internet retailers. *See*, *e.g.*, David Streitfeld, *New York Court Upholds Sales Tax for Online Retailers*, N.Y. Times, Mar. 29, 2013, at B3 (noting that "[o]ther states" have been "debating measures like New York's"). Other States can simply copy Section 1101(b)(8)(vi) to defy the physical-presence requirement. And if other States are able to do so, they will escalate the commercial and constitutional harm inflicted by the court of appeals' decision here, creating a regime under which every Internet retailer could be subjected to tax-collection obligations "by the Nation's 6,000-plus taxing jurisdictions," *Quill*, 504 U.S. at 313 n.6—precisely the result that *Quill* sought to avoid.

C. Finally, the court of appeals' decision will sow widespread confusion. In *Quill*, this Court explained that the "clear" physical-presence rule "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes." 504 U.S. at 315. "Th[at] benefit is important," the Court emphasized, because the "law in this area is something of a quagmire and the application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the State in the exercise of their indispensable power of taxation." *Id.* at 315-16 (internal quotation marks omitted). By upholding the statute here, however, the court of appeals rejected a clear marker of "the boundaries of legitimate state authority" in favor of an approach that will sow precisely such "controversy and confusion." *Id.* at 315. *Quill* and the cases preceding it set forth "a bright-line rule" in part to "encourag[e] settled expectations" and thus to "foste[r] investment by

businesses and individuals." *Id.* at 316. The decision below undermines those goals.

Indeed, even if the court of appeals' decision were correct, which it is not, review would still be warranted so that this Court could provide legislators with authoritative guidance on the limits of state taxing authority. If, as Petitioners contend, laws in the mold of Section 1101(b)(8)(vi) "violate the Commerce Clause, the governing rules should be stated clearly so that states and localities may conform their taxes to constitutional requirements." Pet. for Writ of Cert. at *26, *Am. Trucking Ass'ns, Inc.* v. *Mich. Pub. Serv. Comm'n*, No. 03-1230, *available at* 2004 WL 389420, *cert. granted in part*, 543 U.S. 1096 (2005). And if such laws do not violate the Commerce Clause, "legislators should be so informed and permitted to exercise their taxing authority freely." *Ibid.* Either way, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

Court of Appeals of New York.

OVERSTOCK.COM, INC., Appellant,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE et al., Respondents.

Amazon.com, LLC, et al., Appellants,

v.

New York State Department of Taxation and Finance et al., Respondents.

March 28, 2013.

OPINION OF THE COURT

Chief Judge LIPPMAN.

Plaintiffs challenge Tax Law § 1101(b)(8)(vi) (the Internet tax), alleging that it is unconstitutional on its face because it violates the Commerce Clause by subjecting online retailers, without a physical presence in the state, to New York sales and compensating use taxes. They also maintain that the Internet tax violates the Due Process Clause by creating an irrational, irrebuttable presumption of solicitation of business within the state. We reject plaintiffs' facial challenges.

I.

Plaintiff Amazon.com, LLC is a limited liability company formed in Delaware; Amazon Services LLC is a limited liability company formed in Nevada (col-

lectively Amazon). Its principal corporate offices are located in the State of Washington. Amazon is strictly an online retailer—selling its merchandise solely through the Internet—and represents that it does not maintain any offices or property in New York.

Amazon offers an “Associates Program” through which third parties agree to place links on their own websites that, when clicked, direct users to Amazon's website. The Associates are compensated on a commission basis. They receive a percentage of the revenue from sales generated when a customer clicks on the Associate’s link and completes a purchase from the Amazon site. The operating agreement governing this arrangement states that the Associates are independent contractors and that there is no employment relationship between the parties. Thousands of entities enrolled in the Associates Program have provided a New York address in connection with their applications.

Plaintiff Overstock.com is a Delaware corporation with its principal place of business in Utah. Overstock likewise sells its merchandise solely through the Internet and does not maintain any office, employees or property in New York. Similar to Amazon, Overstock had an “Affiliates” program through which third parties would place links for Overstock.com on their own websites.[1] When a customer clicked on the link, he or she was immediately directed to Overstock.com, and if the customer completed a purchase, the Affiliate received a commission. According to the parties’ Master Agreement, the

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[1] Overstock suspended its Affiliates program (for those who provided a New York address) shortly after the enactment of the Internet tax at issue here.

Affiliates were independent contractors without the authority to obligate or bind Overstock.

In April 2008, the legislature amended the Tax Law to include the subparagraph at issue here. In connection with the statutory definition of "vendor," the Internet tax provides that

> "a person making sales of tangible personal property or services taxable under this article ("seller') shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods" (Tax Law § 1101[b][8][vi]).

The statutory presumption, however, can "be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question" (Tax Law § 1101[b][8][vi]).

Shortly after the legislation was enacted, the Department of Taxation and Finance (DTF) issued a memorandum to provide taxpayer guidance on the recent amendment. The document clarified that advertising alone would not invoke the statutory pre-

sumption, but further observed that, for purposes of this statute, the placement of a link to the seller's website where the resident was compensated on the basis of completed sales deriving from that link would not be considered mere advertising (*see* N.Y. St. Dept. of Taxation & Fin. Mem. No. TSB-M-08[3]S). The memorandum also explained that the statutory presumption could be rebutted through proof that the residents' only activity in New York on behalf of the seller was to provide a link to the seller's website and that the residents did not engage in any in-state solicitation directed toward potential New York customers (see N.Y. St. Dept. of Taxation & Fin. Mem. No. TSB-M-08[3]S).

The following month, DTF issued a second memorandum, further detailing how sellers could rebut the statutory presumption. The presumption would be deemed successfully rebutted if the seller satisfied two conditions: (1) if the parties' contract prohibited the resident representative from engaging in any solicitation activities in New York State on behalf of the seller, and (2) if each resident representative submitted an annual, signed certification stating that the resident had not engaged in any of the proscribed solicitation (*see* N.Y. St. Dept. of Taxation & Fin. Mem. No. TSB-M-08[3.1]S).

Amazon commenced this action on April 25, 2008, seeking a judgment declaring that the statute was unconstitutional both on its face and as applied. Overstock commenced its action on May 30, 2008, making essentially the same arguments and also seeking injunctive relief. Supreme Court, in separate decisions, granted DTF's motions to dismiss the complaints for failure to state a cause of action and denied plaintiffs' cross motions for summary judg-

ment as moot, rejecting all of plaintiffs' challenges to the constitutionality of the statute (*see Amazon.com LLC v. New York State Dept. of Taxation & Fin.*, 23 Misc.3d 418, 877 N.Y.S.2d 842 [Sup. Ct. N.Y. County 2009]).

The Appellate Division affirmed the portions of the orders that dismissed the facial challenges under the Commerce and Due Process Clauses and declared the statute constitutional on its face (81 A.D.3d 183, 913 N.Y.S.2d 129 [1st Dept. 2010]). However, the Court modified by reinstating the as-applied challenges, finding that further discovery was required before those claims could be determined. Plaintiffs then entered into stipulations of discontinuance withdrawing their as-applied constitutional challenges with prejudice, which were deemed the final judgments. They now appeal pursuant to CPLR 5601(b)(1) and (d), bringing up for review the prior nonfinal Appellate Division order.

II.

Having elected to forgo their as-applied challenges, plaintiffs now confront the substantial hurdle of demonstrating that the Internet tax is unconstitutional on its face. It is well settled that facial constitutional challenges are disfavored. "Legislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.' Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*LaValle v. Hayden*, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 773 N.E.2d 490 [2002] [citations omitted]).

There is some dispute as to the appropriate standard for evaluating a facial challenge under the Commerce Clause—whether we must determine that there is "no set of circumstances" under which the statute would be valid (*see Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 787 N.E.2d 624 [2003], quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 [1987]) or apply the stricter test of whether "the statute has a plainly legitimate sweep" (*see Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 [2008] [internal quotation marks and citation omitted]; *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202, 128 S. Ct. 1610, 170 L. Ed. 2d 574 [2008]). Under either standard, however, the Internet tax is constitutional on its face.

The dormant Commerce Clause has been interpreted to prohibit states from imposing an undue tax burden on interstate commerce (*see Matter of Orvis Co. v. Tax Appeals Trib. of State of N.Y.*, 86 N.Y.2d 165, 170-171, 630 N.Y.S.2d 680, 654 N.E.2d 954 [1995]). However, in the absence of an improper burden, entities participating in interstate commerce will not be excused from the obligation to pay their fair share of state taxes (*see Orvis*, 86 N.Y.2d at 171, 630 N.Y.S.2d 680, 654 N.E.2d 954). To that end, a state tax impacting the Commerce Clause will be upheld "'[1] when the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State'" (*moran towing*, 99 n.y.2d at 449, 757 N.y.s.2d 513, 787 N.E.2d 624, quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326

[1977]). The parties agree that the only prong at issue here is whether the statute satisfies the "substantial nexus" test.

In *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967), the United States Supreme Court held that a use tax could not be imposed on an out-of-state mailorder business that did not have offices, property or sales representatives in Illinois. The Court noted that it had never permitted such a tax where the seller's sole connection with its customers in the forum state was by mail or common carrier (*see Bellas Hess*, 386 U.S. at 758, 87 S. Ct. 1389). Rather, the Court observed that, if Illinois were permitted to impose that type of tax burden, every other taxing jurisdiction in the country could do the same, which would result in a morass of obligations to local governments (*see Bellas Hess*, 386 U.S. at 759-760, 87 S. Ct. 1389).

The Supreme Court confronted a similar issue involving a mail-order business in *Quill Corp. v. North Dakota*, 504 U.S. 298, 314, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) and considered whether the emphasis in *Bellas Hess* on physical presence within the state had been rendered obsolete by the Court's shift toward "more flexible balancing analyses" under the Commerce Clause. While allowing that the result might have been different if the issue was being considered for the first time, the Court retained the bright-line presence requirement articulated in *Bellas Hess*, recognizing the benefits provided by a clear rule that established the limits of state taxing authority (*see Quill*, 504 U.S. at 311, 315, 112 S. Ct. 1904).

The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet. That question, however, would be for the United States Supreme Court to consider. We are bound, and adjudicate this controversy, under the binding precedents of that Court, the ultimate arbiter of the meaning of the Commerce Clause.

Subsequent to *Quill*, we further explained that, although an in-state physical presence is necessary, it "need not be substantial. Rather, it must be demonstrably more than a 'slightest presence'" (*Orvis*, 86 N.Y.2d at 178, 630 N.Y.S.2d 680, 654 N.E.2d 954, quoting *National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 556, 97 S. Ct. 1386, 51 L. Ed. 2d 631 [1977]). The presence requirement will be satisfied if economic activities are performed in New York by the seller's employees or on its behalf (*see Orvis*, 86 N.Y.2d at 178, 630 N.Y.S.2d 680, 654 N.E.2d 954).

There are clearly parallels between a mail-order business and an online retailer—both are able to conduct their operations without maintaining a physical presence in a particular state. Indeed, physical presence is not typically associated with the Internet in that many websites are designed to reach a national or even a global audience from a single server whose location is of minimal import. However, through this statute, the legislature has attached significance to the physical presence of a resident website owner. The decision to do so recognizes that, even in the Internet world, many websites are geared toward predominantly local audiences—including,

for instance, radio stations, religious institutions and schools—such that the physical presence of the website owner becomes relevant to Commerce Clause analysis. Indeed, the Appellate Division record in this case contains examples of such websites urging their local constituents to support them by making purchases through their Amazon links. Essentially, through these types of affiliation agreements, a vendor is deemed to have established an in-state sales force.

Viewed in this manner the statute plainly satisfies the substantial nexus requirement. Active, in-state solicitation that produces a significant amount of revenue qualifies as "demonstrably more than a 'slightest presence'" under *Orvis*. Although it is not a dispositive factor, it also merits notice that vendors are not required to pay these taxes out-of-pocket. Rather, they are collecting taxes that are unquestionably due, which are exceedingly difficult to collect from the individual purchasers themselves, and as to which there is no risk of multiple taxation.

Clearly, the statutory language allows for a range of possible types of compensation ("commission or other consideration"), which would include flat fee arrangements. However, no one disputes that a substantial nexus would be lacking if New York residents were merely engaged to post passive advertisements on their websites. The bottom line is that if a vendor is paying New York residents to actively solicit business in this state, there is no reason why that vendor should not shoulder the appropriate tax burden. We will not strain to invalidate this statute where plaintiffs have not met their burden of establishing that it is facially invalid.

III.

As explained in *Quill*, although Due Process and Commerce Clause challenges are "closely related," each provision "pose[s] distinct limits on the taxing powers of the States" (504 U.S. at 305, 112 S. Ct. 1904). Unlike the bright line presented by the Commerce Clause, physical presence is not required in order to satisfy due process. Instead, the focus is on whether a party has purposefully directed its activities toward the forum state and whether it is reasonable, based on the extent of a party's contacts with that state and the benefits derived from such access, to require it to collect taxes for that state (*see Quill*, 504 U.S. at 307-308, 112 S. Ct. 1904). Indeed, an entity "that is engaged in continuous and widespread solicitation of business within a State . . . clearly has fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign," even in the absence of physical presence (*Quill*, 504 U.S. at 308, 112 S. Ct. 1904 [internal quotation marks and citation omitted]). In this respect, we believe that a brigade of affiliated websites compensated by commission is the equivalent of "a deluge of catalogs" and "a phalanx of drummers" (*Quill*, 504 U.S. at 308, 112 S. Ct. 1904).

Plaintiffs argue that the Internet tax violates due process because the statutory presumption is irrational and essentially irrebuttable. In order for the presumption to be constitutionally valid, there must be "a rational connection between the facts proven and the fact presumed, and . . . a fair opportunity for the opposing party to make [a] defense" (*Matter of Casse v. New York State Racing & Wagering Bd.*, 70 N.Y.2d 589, 595, 523 N.Y.S.2d 423, 517 N.E.2d 1309 [1987]).

Here, the fact proved is that the resident is compensated for referrals that result in purchases. The fact presumed is that at least some of those residents will actively solicit other New Yorkers in order to increase their referrals and, consequently, their compensation.[2] It is plainly rational to presume that, given the direct correlation between referrals and compensation, it is likely that residents will seek to increase their referrals by soliciting customers. More specifically, it is not unreasonable to presume that affiliated website owners residing in New York State will reach out to their New York friends, relatives and other local individuals in order to accomplish this purpose. As noted above, the record contains examples of this type of solicitation by schools and certain other organizations.

The presumption would appear decidedly less rational if it were applied to those who receive some types of "other consideration"—i.e., those whose compensation is unrelated to actual sales. It is difficult to distinguish that arrangement from traditional advertising. Nonetheless, plaintiffs have chosen to limit our review to a facial challenge, and the fact that plaintiffs can posit a potential constitutional infirmity does not require the statute's invalidation on its face. This is particularly true where, as here, the agency charged with enforcing the statute has expressly acknowledged that mere advertising is beyond the scope of the provision.

Plaintiffs also claim that the presumption is irrebuttable because it will be extremely difficult, if

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[2] The presumption only applies in the first instance to a company that has sold at least $10,000 in products or services as the result of such referrals.

not impossible, to prove that none of their New York affiliates is soliciting customers on the retailers' behalf. However, as noted above, DTF has set forth a method (contractual prohibition and annual certification) through which the retailers will be deemed to have rebutted the presumption. Obtaining the necessary information may impose a burden on the retailers, but inconvenience does not render the presumption irrebuttable. In addition, while not determinative, it is notable that the presumption sensibly places the burden on the retailers to provide information about the activities of their own affiliates—information that DTF would have significant difficulty uncovering on its own (*see Lavine v. Milne*, 424 U.S. 577, 585, 96 S. Ct. 1010, 47 L. Ed. 2d 249 [1976]).

In sum, plaintiffs have failed to demonstrate that the statute is facially unconstitutional under either the Commerce or the Due Process Clause.

Accordingly, in both cases, the judgment appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs.

SMITH, J. (dissenting).

The rules that govern this case are laid down in a series of United States Supreme Court decisions and are not in dispute. Under the Commerce Clause, a state may require an out-of-state retailer to collect use tax from in-state purchasers only if the retailer has a physical presence within the state (*National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 [1967]; *Quill Corp. v. North Dakota*, 504 U.S. 298, 309-319, 112 S. Ct. 1904, 119 L. Ed. 2d 91 [1992]). The solicitation of customers for the retailer by in-state sales

representatives counts as a physical presence, even where the sales representatives are independent contractors (*Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 [1960]; *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 250-251, 107 S. Ct. 2810, 97 L. Ed. 2d 199 [1987]; *cf. Matter of Orvis Co. v. Tax Appeals Trib. of State of N.Y.*, 86 N.Y.2d 165, 180, 630 N.Y.S.2d 680, 654 N.E.2d 954 [1995]); but mere advertising by the out-of-state retailer in in-state media does not (*see Quill*, 504 U.S. at 302-303, 112 S. Ct. 1904 [North Dakota statute making tax obligation dependent on advertisements held invalid]). Thus, the majority correctly summarizes the law by saying that "if New York residents were merely engaged to post passive advertisements on their websites" no tax could be collected, but that a vendor who "is paying New York residents to actively solicit business in this state" may be required to remit tax (majority op. at [9a]).

Our task here is to decide whether certain New York-based websites—Overstock's "Affiliates" and Amazon's "Associates"—are the equivalent of sales agents, soliciting business for Overstock and Amazon, or are only media in which Overstock and Amazon advertise their products. I think they are the latter.

The Overstock and Amazon links that appear on websites owned by New York proprietors serve essentially the same function as advertising that a more traditional out-of-state retailer might place in local newspapers. The websites are not soliciting customers for Overstock and Amazon in the fashion of a local sales agent. Of course the website owners solicit business for themselves; they encourage people to visit their websites, just as a newspaper owner

would seek to boost circulation. But there is no basis for inferring that they are actively soliciting for the out-of-state retailers.

It does not make sense to envision a website owner trying to persuade members of the public, as a sales agent would, that Overstock and Amazon are high quality merchants that the public should want to do business with: persuasion of that sort does the website owner no good. A traditional sales agent—say, a vacuum cleaner salesman—would promote a particular brand of vacuum cleaner so that customers would order the product through him and he would get a commission. But no website owner promotes Overstock or Amazon for a similar reason, because everyone who wants to buy from either of those firms can go to the retailer's website directly. It is true, as the majority mentions (majority op. at [8a-9a]), that certain kinds of website owners—churches and schools, for example—may ask their supporters to show their loyalty by using the website when they buy from Amazon, but that is not the same as soliciting business that Amazon would not otherwise get. In any event, a rule applicable to websites generally cannot be justified on the basis of the special characteristics of volunteer-supported organizations.

The statute at issue here tries to turn advertising media into an in-state sales force through a presumption. The statute says that a seller "shall be presumed to be soliciting business through an independent contractor or other representative" if it enters an agreement under which a New York resident "for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise" (Tax Law § 1101[b][8][vi]). But of course a statutory presump-

tion cannot by itself permit a state to do what the United States Constitution forbids. To presume that every website that has an agreement under which it carries an Overstock or Amazon link is a sales agent for Overstock or Amazon would be to nullify the rule that advertising in in-state media is not the equivalent of physical presence.

Read literally, the statute would reach essentially all Internet advertising that links to a seller's website: it includes any agreement for referral of customers, by a link or otherwise, "for a commission or other consideration." Since this literal reading would unquestionably render the statute unconstitutional, the Department of Taxation and Finance has adopted a narrowing construction, largely ignoring the words "or other consideration," and applying the presumption only where the website receives a commission or similar compensation—i.e., where "the consideration for placing the link on the Web site is based on the volume of completed sales generated by the link" (N.Y. St. Dept of Taxation & Fin. Mem. No. TSB-M-08[3]S at 2). The narrowing construction, in my view, does not save the statute.

It was no doubt true before the Internet existed that advertising was usually sold for a flat fee, while sales agents usually worked on commission, but that has changed. When an advertisement takes the form of a link on a website, it is easy, as well as efficient, for the advertiser to compensate the website on the basis of results. But the link is still only an ad. It seems quite unlikely, and the record contains no evidence, that compensation "based on the volume of completed sales" is an unusual way of charging for web advertising, or that such compensation is pri-

marily associated with active solicitation on the seller's behalf by the website owner.

A number of tests have been stated for deciding the validity of a statutory presumption. In *People v. Leyva*, 38 N.Y.2d 160, 165-166, 379 N.Y.S.2d 30, 341 N.E.2d 546 (1975), we described certain United States Supreme Court cases as requiring "a rational connection between the facts which are proved and the one which is to be inferred with the aid of the presumption" (*see Tot v. United States*, 319 U.S. 463, 467-468, 63 S. Ct. 1241, 87 L. Ed. 1519 [1943]; *United States v. Romano*, 382 U.S. 136, 139-141, 86 S. Ct. 279, 15 L. Ed. 2d 210 [1965]), and others as requiring a "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend" (*Leary v. United States*, 395 U.S. 6, 36, 89 S. Ct. 1532, 23 L. Ed. 2d 57 [1969]). New York, according to the *Leyva* case, "has exacted an even higher standard of rational connection," one that "must assure 'a reasonably high degree of probability' that the presumed fact follows from those proved directly" (38 N.Y.2d at 166, 379 N.Y.S.2d 30, 341 N.E.2d 546, quoting *People v. McCaleb*, 25 N.Y.2d 394, 404, 306 N.Y.S.2d 889, 255 N.E.2d 136 [1969]).

I do not think it necessary to decide here what test should apply to a presumption enacted by a state for the purpose of expanding its own power over interstate transactions (though I would think it should be a relatively demanding one); whatever the test is, this statute fails. To infer, from an agreement to put a link on a website and to compensate the website owner in proportion to the resulting sales, that the website owner is actively soliciting business for the seller "is so strained as not to have a reasonable rela-

tion to the circumstances of life as we know them" (*Tot v. United States*, 319 U.S. at 468, 63 S. Ct. 1241).

I would therefore hold that the statute challenged in this litigation is invalid under the Commerce Clause.

Judges GRAFFEO, READ and PIGOTT concur with Chief Judge LIPPMAN.

Judge SMITH dissents in an opinion.

Judge RIVERA taking no part.

In each case: Judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs.

APPENDIX B

Supreme Court, Appellate Division,
First Department, New York.

AMAZON.COM, LLC, et al., Plaintiffs–Appellants,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, et al., Defendants–Respondents.

Performance Marketing Alliance,
Tax Foundation and American Legislative Exchange Council, Amici Curiae.

Overstock.com, Inc., Plaintiff–Appellant,

v.

New York State Department of Taxation and Finance, et al., Defendants–Respondents.

Nov. 4, 2010.

RICHARD T. ANDRIAS, J.P., JOHN W. SWEENY, EUGENE NARDELLI, JAMES M. CATTERSON, LELAND G. DeGRASSE, JJ.

NARDELLI, J.

In a case with far-reaching ramifications because of the exponential expansion of cyberspace in general, and commerce over the Internet in particular, the issue presented is the constitutionality of a recent amendment to the Tax Law § 1101(b)(8)(vi) intended to force on-line retailers to collect a sales tax on purchases made by New York residents. Since we find that there are issues of fact concerning some of

the as-applied challenges raised by plaintiffs to the statute, we conclude that the dismissal of the entire complaint was premature, and remand for further proceedings. We do, however, find that the facial challenges fail to state a cause of action, and declare in the State's favor to that extent.

In New York "every vendor of tangible personal property" is required to collect sales and use taxes on sales of tangible personal property (Tax Law § 1131[1]; see also §§ 1101[b][8], 1105, 1110, 1132[a]). A "vendor" is defined to include, inter alia, "[a] person who solicits business . . . by employees, independent contractors, agents or other representatives . . . and by reason thereof makes sales to persons within the state of tangible personal property or services" (Tax Law § 1101[b][8][i][C][I]). Vendors are required to register with the Department of Taxation and Finance (DTF), and are granted certificates of authority permitting them to collect sales taxes (Tax Law § 1134[a]).

On April 23, 2008, the Tax Law was amended to reflect the reality that many sales of goods to New York residents are effected through the Internet, and to place upon certain sellers who use the Internet the same responsibilities that are imposed upon other out-of-state sellers. The statute, as amended, created a presumption that an out-of-state seller was

> "soliciting business [in New York] through an in-dependent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a com-mission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cu-

> mulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November" (Tax Law § 1101[b][8][vi]).

The effect of this amendment was that the responsibility to collect sales or use taxes was now imposed on an out-of-state seller which used an in-state resident to solicit business from New York residents, through an Internet Web site.

The law further provided, however, that the presumption that the vendor was doing business in New York could be rebutted by proof that the resident with whom the seller had an agreement "did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States Constitution during the four quarterly periods in question" (*id.*).

Shortly after the statute became effective, and Amazon instituted its lawsuit, DTF issued two memoranda, known as Technical Services Bureau Memoranda. In the first memorandum (TSB-M-08(3)S, dated May 8, 2008), DTF advised that the statute applied to sellers, including e-commerce retailers, which "solicit business within the state through employees, independent contractors, agents or other representatives and, by reason thereof, make sales" to New York residents of taxable property or services. This memorandum also offered six examples of how certain transactions would be affected by the statute. Example 4 made clear that the statutory presumption would only be triggered by commission-

based referral agreements, as opposed to flat-fee agreements. The memorandum further explained that the presumption that solicitation had occurred could be rebutted if the seller established that "the only activity" of its in-state representatives consisted of the placement of Internet links connecting their Web sites to the out-of-state seller's Web site, i.e., advertisers only, and that "none of the resident representatives engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller." Thus, more than a mere pass-through "click" on the Internet was required to impose tax collection responsibilities on the out-of-state sellers. The in-state contractor actually has to engage affirmatively in customer solicitation before the out-of-state vendor becomes subject to the statute.

The DTF then issued a second memorandum (TSB-M-08(3.1)S, dated June 30, 2008) which set forth a "safe harbor" procedure whereby sellers could rebut the presumption by including in their business-referral agreements a provision prohibiting their in-state representatives from "engaging in any solicitation activities in New York State that refer potential customers to the seller," and requiring each in-state representative to submit a signed certification every year, stating that it has not engaged in any such solicitation during the prior year.

Plaintiff Amazon.com, LLC is a limited liability company incorporated in Delaware, and Amazon Services, LLC is a limited liability company incorporated in Nevada. Neither has offices, employees or property in New York. New York residents order products from Amazon solely through its Web site. Amazon does not have any in-state representatives

in New York to assist customers in placing orders, and all technical support telephone calls or e-mails are handled by Amazon's representatives located outside of New York. Products sold by Amazon are shipped directly to customers from fulfillment centers located outside New York.

Amazon, however, has developed a program using entities known as Associates which it allows hundreds of thousands of independent third parties located around the world, many of which have provided Amazon with New York addresses, to advertise the Web site "Amazon.com" on their own Web sites. Visitors to the Affiliates' Web sites can click on the link and immediately be redirected to Amazon.com. If the visitor ends up making a purchase from Amazon on the Amazon.com Web site—and only in that event—the Associate is paid a commission. Any purchase made by the visitor takes place solely with Amazon, and all customer inquiries are handled only by Amazon, its corporate affiliates, or other sellers without any involvement of the Associate.

In the standard operating agreement which governs the relationship between Amazon and its Associates, Amazon expressly disavows any control over their activities or Web site content, except to state that Associates are prohibited from "misrepresent[ing] or embellish[ing]" the relationship between themselves and Amazon.

Co-plaintiff Overstock.com is a Delaware corporation with its principal and only place of business in Utah. As Amazon does, it offers various products over the Internet at discounted prices. Overstock does not have any retail stores or outlets. All goods purchased through Overstock.com are shipped to customers directly via the mail or by common carri-

er. None of Overstock's employees or representatives live in New York. Like Amazon, Overstock allows owners of other Web sites located around the world to advertise Overstock.com on their own Web sites. Advertisements on the Web sites of these owners, known as Affiliates, consist of electronic links and banners. When a visitor to the Affiliate's Web site clicks on the link or banner, the visitor's browser navigates to the Overstock.com Web site.

The Master Agreement between Overstock and the Affiliate permits the Affiliate to provide advertising for Overstock in the form of links or banners. Affiliates are paid a commission only when a customer clicks on the link or banner and arrives at Overstock's Web site, and then purchases goods from Overstock. Furthermore, the Master Agreement provides that an Affiliate is only paid a commission if the Affiliate's Web site is the last site visited before Overstock's Web site, and the customer makes a purchase within a specified period of time. After the statute was enacted on April 23, 2008, Overstock suspended its relationships with all of its Affiliates in New York.

On April 25, 2008, two days after the bill was signed by the Governor, Amazon filed a complaint seeking declaratory and injunctive relief on the ground that the statute was unconstitutional. Amazon asserted claims for violation of the Commerce, Due Process and Equal Protection Clauses of the United States Constitution, as well as the Due Process and Equal Protection Clauses of the New York State Constitution. Other than by passing reference, however, the challenges under the New York State Constitution are not pursued on this appeal.

Overstock's complaint was filed on May 30, 2008. It also sought injunctive and declaratory relief, but only asserted claims for violation of the Commerce and Due Process Clauses of the United States Constitution, and the Due Process Clause of the New York State Constitution. Its claims under the State Constitution are likewise not pursued on this appeal.[1]

The State moved by order to show cause to dismiss the complaints pursuant to CPLR 3211(a)(2) and (7) on July 17, 2008. Subsequently, on August 11, 2008, Amazon cross-moved for summary judgment on its first and second causes of action, which en-compassed its Commerce and Due Process Clauses causes of action.[2] Overstock moved on August 12, 2008 for similar relief.

In response to the cross motions, the State submitted evidence purporting to demonstrate that Amazon's and Overstock's Affiliates in fact engaged in activities that arguably amounted to solicitation of New York business, and argued generally that the claims that the statute was unconstitutional as applied could not be determined as a matter of law without discovery into Amazon's and Overstock's business practices. The materials proffered by the State included documents relating to Amazon's "SchoolRewards" affiliates program and other similar

1 Also submitting amicus curiae briefs on this appeal, all contending that the statute is unconstitutional under the Commerce Clause, are the Tax Foundation, American Legislative Exchange Council, and Performance Marketing Alliance.

2 Although Amazon did not move for relief on its equal protection claims, their viability is addressed on appeal because the State obtained dismissal of the complaint in its entirety.

programs, by which local (including New York-based) nonprofit organizations are given a commission when they lead visitors to their Web sites to purchase goods on Amazon.com. The State argued that, due to the local nature of these nonprofit organizations, the visitors to their Web sites were most likely to be based locally as well, and, thus, it was a reasonable assumption that these organizations were actively targeting and soliciting other New York residents in their communities to purchase goods from Amazon so as to benefit the organization.

In an order entered January 13, 2009, the court granted the State's motion to dismiss Amazon's complaint in its entirety and denied Amazon's cross motion for summary judgment as moot. The court found the Commerce Clause challenge unavailing because the statute was targeted at requiring tax calculation from out-of-state sellers which avail themselves of in-state contractors, and was "carefully crafted to ensure that there is a sufficient basis for requiring collection of New York taxes and, if such a basis does not exist, it gives the seller an out" through the ability to rebut the statutory presumption that it qualifies as a vendor. The court also rejected the as-applied Commerce Clause challenge because it found that Amazon did not allege in its complaint that "its New York Associates do not solicit business for it from New York customers."

With regard to Amazon's due process challenges, the court reasoned that "[t]here is a 'reasonably high degree of probability' that New York business people and entities desirous of raising money that are compensated for referring customers who ultimately make purchases will solicit business from those with whom they are familiar and encourage sales," and

that "[i]t is also highly probable that New York residents will more likely than not have ties to other New York residents and it is [therefore] not irrational to presume that at least some of them will actively solicit business for the remote seller from within the State from others within the State." In addition, the court stated, the "statutory presumption is by its terms and effect rebuttable." The court also rejected the vagueness challenge because "the [Statute's] applicability upon entry into an agreement with an in-state resident for a commission 'or other consideration' based on direct referral of New York customers or 'indirect' referrals is not so vague and standardless as to leave the public uncertain about its reach." Finally, the court held that Amazon's "class-of-one" equal protection challenge failed to state a cause of action because Amazon's complaint failed to assert that the State had treated it differently from others similarly situated.

In a separate order entered January 15, 2009, the court similarly granted the State's motion to dismiss Overstock's complaint and denied Overstock's cross motion to dismiss as moot "[f]or the reasons stated" in the Amazon decision.

Amazon and Overstock appealed directly to the Court of Appeals, pursuant to CPLR 5601(b)(2). By separate orders dated May 5, 2009, the Court of Appeals transferred the appeals to this Court, on the ground that "a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (12 N.Y.3d 827, 827, 881 N.Y.S.2d 6, 908 N.E.2d 912 [2009], 12 N.Y.3d 830, 831, 881 N.Y.S.2d 9, 908 N.E.2d 916 [2009])."

On this appeal Amazon raises three challenges to the statute. It does not pursue its facial claims with

the Commerce Clause, but argues that, as applied to it, the statute is unconstitutional because it lacks a "substantial nexus" within the State. Amazon also argues that the statute violates the Due Process Clause because, facially and as applied, it enacts an irrational and irrebuttable presumption, and is also vague. It lastly argues that the statute violates the Equal Protection Clause because it targets Amazon, one of the world's largest Internet retailers, in bad faith.

Overstock argues that the statute violates the Commerce Clause, both on its face, and as applied to Overstock. It likewise argues that the statute is unconstitutional on its face because it runs afoul of the Due Process Clause because of its vagueness.

FACIAL CHALLENGES

We address first the facial challenges. Initially, as was recently reiterated by the Supreme Court in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 [2008], facial challenges to a statute's constitutionality are disfavored. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid', *i.e.*, that the law is unconstitutional in all of its applications" (*id.* at 449, quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 [1987]; *see also Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 787 N.E.2d 624 [2003]; *Cohen v. State of New York*, 94 N.Y.2d 1, 8, 698 N.Y.S.2d 574,

720 N.E.2d 850 [1999]).[3] Since "[l]egislative enactments enjoy a strong presumption of constitutionality . . . parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'" (*LaValle v. Hayden*, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 773 N.E.2d 490 [2002] [internal citations omitted]). "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*id.*).

COMMERCE CLAUSE FACIAL CHALLENGE

Article I (§ 8[3]) of the U.S. Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." While the Constitution "says nothing about the protection of interstate commerce in the absence of any action by Congress . . . the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well" (*Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 112 S. Ct. 1904, 119 L. Ed. 2d 91 [1992]). "'[B]y its own force', [it] prohibits certain state actions that interfere with interstate commerce" (*id.* quoting *South Carolina State Highway Dept. v.*

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[3] We note that Overstock, relying on language in a footnote in City of *Chicago v. Morales*, 527 U.S. 41, 55 [n. 22], 119 S. Ct. 1849, 144 L. Ed. 2d 67 [1999] contends that the "no set of circumstances" standard is not the appropriate test, and claims that the test has been rejected by the Supreme Court. Yet, the *Washington Grange* case was issued nine years after *Morales*, and, Justice Stevens, the author of the plurality decision in *Morales*, joined the majority decision in *Washington Grange*. Thus, in the absence of any unequivocal holding to the contrary, we conclude that continued reliance on the "no set of circumstances" standard is warranted.

Barnwell Bros., Inc., 303 U.S. 177, 185, 58 S. Ct. 510, 82 L. Ed. 734 [1938]).

In *Moran Towing Corp.*, the Court of Appeals outlined the four-prong test for determining whether a state tax violates the Commerce Clause. The court stated that the tax will be upheld "'[1] when the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State'" (99 N.Y.2d at 449, 757 N.Y.S.2d 513, 787 N.E.2d 624, quoting *Complete Auto Tr., Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 [1977]). As was the situation in *Moran*, the challenge to the tax in this case only implicates the first prong, i.e., whether the activity involved has a substantial nexus with the taxing State.

The sine qua non for the finding that a party has a substantial nexus with New York, and is thus required to collect sales or use taxes, is that it have a physical presence within the state (*id.* at 449, 757 N.Y.S.2d 513, 787 N.E.2d 624, citing *Matter of Orvis Co. v. Tax Appeals Trib. of State of N.Y.*, 86 N.Y.2d 165, 630 N.Y.S.2d 680, 654 N.E.2d 954 [1995], *cert. denied* 516 U.S. 989, 116 S. Ct. 518, 133 L. Ed. 2d 426 [1995]; *see also National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 [1967]). Nevertheless, "[w]hile a physical presence of the vendor is required, it need not be substantial" (*Orvis Co.* at 178, 630 N.Y.S.2d 680, 654 N.E.2d 954). While it must constitute more than a "'slightest presence'" (*id.* quoting *National Geographic v. California Equalization Bd.*, 430 U.S. 551, 556, 97 S. Ct. 1386, 51 L. Ed. 2d 631 [1977]), "it may be manifested by the presence in the

taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf" (*Orvis Co.* at 178, 630 N.Y.S.2d 680, 654 N.E.2d 954).

National Bellas Hess, discussed at length in *Orvis*, involved an out-of-state mail-order vendor whose only connection with customers in the state of Illinois was by common carrier or the United States mail. The Supreme Court observed that in order to uphold the imposition of a sales tax by Illinois on the vendor's transactions, it "would have to repudiate totally the sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business" (386 U.S. at 758, 87 S. Ct. 1389). The Court went on to state, "[T]his basic distinction which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it" (*id.*).[4]

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[4] The Supreme Court adhered to the "bright line" requirement that in order to impose a duty on the out-of-state seller to collect sales taxes it must have a demonstrable, albeit minimal, presence in the taxing state, in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 [1992]. In pertinent part, the Court stated, "[s]uch a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes" (*id.* at 315, 112 S. Ct. 1904). In language that is at once ironic and prescient, it also observed, "[t]his benefit is important, for as we have so frequently noted, our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of tax-

[Footnote continued on next page]

On the other hand, where a Pennsylvania company which manufactured aerospace fasteners such as nuts and bolts, and whose only presence in the State of Washington was an engineer who operated from his home, and whose responsibilities were essentially encompassed in communicating with the Boeing Company as to its needs and requirements, but did not include taking orders, the substantial nexus requirement was found to have been met (*see Standard Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 [1975]). In upholding the tax, the court framed the threshold inquiry as "'whether the state has given anything for which it can ask return'" (*id.* at 562, 95 S. Ct. 706, quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267 [1940]), and answered by stating that the company's employee "made possible the realization and continuance of valuable contractual relations between [the company] and Boeing" (*Standard Pressed Steel* at 562, 95 S. Ct. 706).

Our analysis leads us to the conclusion that on its face the statute does not violate the Commerce Clause. It imposes a tax collection obligation on an out-of-state vendor only where the vendor enters into a business-referral agreement with a New York State resident, and only when that resident receives a commission based on a sale in New York. The statute does not target the out-of-state vendor's sales through agents who are not New York residents. Thus, the nexus requirement is satisfied.

[Footnote continued from previous page]
ation'" (*id.* at 315-316, 112 S. Ct. 1904, quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458, 79 S. Ct. 357, 3 L. Ed. 2d 421 [1959]).

Of equal importance to the requirement that the out-of-state vendor have an in-state presence is that there must be solicitation, not passive advertising. While Tax Law § 1101(3)(8)(vi) creates the presumption that the in-state agent will solicit, it provides the out-of-state vendor with a ready escape hatch or safe harbor. The vendor merely has to include in its contract with the in-state vendor a provision prohibiting the in-state representative from "engaging in any solicitation activities in New York State that refer potential customers to the seller"[5], and the in-state representative must provide an annual certification that it has not engaged in any prohibited solicitation activities as outlined in the memorandum. Thus, an in-state resident which merely acts as a conduit for linkage with the out-of-state vendor will be presumed to have not engaged in activity which would require the vendor to collect sales taxes. Presumably, there are vendors which will be able to execute the annual certification without fear of making a misrepresentation.

On the other hand, the State has a legitimate basis to conclude that many other in-state representatives will engage in direct solicitation, rather than

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[5] Advisory memo TSB-M-08(3)S, dated June 30, 2008 provides, not unreasonably, that solicitation activities can include "distributing flyers, coupons, newsletters and other printed promotional materials, or electronic equivalents; verbal solicitation (e.g., in-person referrals); initiating telephone calls; and sending e-mails." Additionally, in a recognition of the potential use of fundraisers conducted by organizations, the memo provides that in an agreement with a club or non-profit group, "the contract or agreement must provide that the organization will maintain on its Web site information alerting its members to the prohibition against each of the solicitation activities described above."

mere advertising. For instance, a document prepared by Amazon explaining the benefits of joining the Associates' program, states, in pertinent part, "Our compensation philosophy is simple: reward Associates for their contributions to our business in unit volume and growth. Amazon is a fast growing business and we want our Associates to grow with us." The overview document goes on to state, "The Performance structure allows you to earn higher fees when you generate a sufficient volume of referrals that result in sales at Amazon.com during a month. *The higher your referrals, the greater your earnings will be*."

Clearly, Amazon's program, reasonably, is not designed for the passive advertiser, but seeks growth by reliance upon representatives who will look to solicit business. The obligations imposed by the state to collect the tax only arise when the paradigm shifts from advertising to solicitation. Thus, until such time as the out-of-state vendor produces a certification from every one of its New York representatives that they have not engaged in solicitation, the facial challenge based upon the Commerce Clause must fail, since there is a set of circumstances under which the statute would be valid, i.e., when a New York representative uses some form of proactive solicitation which results in a sale by Amazon, and a commission to the representative; and the representative has an in-state presence sufficient to satisfy the substantial nexus test.

DUE PROCESS FACIAL CHALLENGES

Amazon and Overstock make two main due process arguments. First, they argue that the statute violates due process because it creates a presumption that is both irrational and irrebuttable. Second, they

argue that the statute is void for vagueness. Both arguments challenge the fairness of requiring them and other out-of-state retailers like them to collect sales tax from New York residents referred to them by their New York-based Affiliates.

In *Quill*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 [1992], *supra*, the Supreme Court made clear that the Due Process Clause implicates fundamentally different concerns from the Commerce Clause (*id.* at 306-18, 112 S. Ct. 1904). The Court stated:

> "[d]ue process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him . . . In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual . . . as by structural concerns about the effects of state regulation on the national economy."

(*id.* at 312, 112 S. Ct. 1904). Thus, the Commerce Clause operates to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce" (*id.* at 313, 112 S. Ct. 1904), while the Due Process Clause ensures that there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and that the income attributed to the State for tax purposes [is] rationally related to 'values connected with the taxing state" (*id.* at 306, 112 S. Ct. 1904 (internal quotation marks and citations omitted)).

CLAIMS OF IRREBUTTABLE PRESUMPTION

The Supreme Court has noted that irrebuttable presumptions are looked upon with disfavor as violative of due process (*see e.g. Vlandis v. Kline*, 412 U.S. 441, 446, 93 S. Ct. 2230, 37 L. Ed. 2d 63 [1973]). Nevertheless, rational presumptions, even in criminal cases, are commonly upheld (*see e.g. Tot v. United States*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 [1943]; *People v. Leyva*, 38 N.Y.2d 160, 379 N.Y.S.2d 30, 341 N.E.2d 546 [1975]).

The test for assessing the validity of a presumption is that there be a rational connection between the basic facts proven and the ultimate fact presumed (*County Court of Ulster County v. Allen*, 442 U.S. 140, 165, 99 S. Ct. 2213, 60 L. Ed. 2d 777 [1979]). Succinctly stated, the validity of the presumption turns on whether it is more likely than not that the fact presumed flows from the fact proven (*id.*). In New York the test is even higher, i.e., "the connection must assure a reasonably high degree of probability' that the presumed fact follows from those proved directly" (*People v. Leyva*, 38 N.Y.2d at 166, 379 N.Y.S.2d 30, 341 N.E.2d 546, quoting *People v. McCaleb*, 25 N.Y.2d 394, 404, 306 N.Y.S.2d 889, 255 N.E.2d 136 [1969]).

The statute at issue makes the presumption that in-state solicitation occurs when an in-state representative is paid a commission on a per sale basis, after a New York purchaser accesses its Web site and "clicks" through to make a purchase at the out-of-state vendor's Web site. This is not an irrational presumption. Both the out-of-state vendor and the in-state representative seek, quite frankly, to make money. It is not irrational to presume that the in-state representative will engage in various legal

methods to enhance earnings. Advertising would be one of those methods, but mere advertising does not implicate the statute. Solicitation, however, in varying forms, is another extremely plausible and likely avenue by which any competent businessperson would seek to improve revenues.

In the event, however, the in-state representative wishes to chance success merely on luck and good fortune, without expending initiative, the statute permits it to offer proof that it did not engage in solicitation. The implementing regulation provides that this proof can come in the form of a certification from the in-state representative that it did not engage in solicitation.

DUE PROCESS VAGUENESS CLAIM

The second prong of the due process challenge is the claim that the statute is unconstitutionally vague. Amazon takes issue with the words "or indirectly" (in discussing referrals), and "other consideration" (in discussing the manner of recompense to the in-state representative). Overstock likewise takes umbrage at the use of the words "or indirectly," but also complains that the failure to define "solicitation" is fatal. It claims that since the Internet has drastically changed the manner in which commerce is transacted, the medium requires a definition tailored to this new world of communication.

Initially, both Amazon and Overstock are correct in their assertions that, at least under certain circumstances, a statute may be challenged for unconstitutional vagueness both facially and as applied (*see People v. Stuart*, 100 N.Y.2d 412, 421, 765 N.Y.S.2d 1, 797 N.E.2d 28 [2003]). Yet, both the decision in *Stuart*, 100 N.Y.2d at 422, 765 N.Y.S.2d 1, 797 N.E.2d 28 n.8, *but see* 100 N.Y.2d at 429-433,

765 N.Y.S.2d 1, 797 N.E.2d 28, Kaye, Ch. J., concurring and the Supreme Court in *Chapman v. United States*, 500 U.S. 453, 467, 111 S. Ct. 1919, 114 L. Ed. 2d 524 [1991] indicate that a facial challenge is only implicated when First Amendment rights are at issue. This is not the case here.

For purposes of resolving plaintiffs' vagueness challenge, however, our inquiry will be directed first to the as-applied challenge, which we conclude is unavailing. The finding that the as-applied vagueness challenge is not substantiated, of necessity, leads to the conclusion that "the facial validity of the statute" is confirmed.

The words "or indirectly," criticized by both Amazon and Overstock, do not present any confusion. The in-state buyer can be referred by the in-state representative "directly" to the out-of-state vendor by a click on its Web site. We take the words "or indirectly" to mean by a manner other than a direct click, perhaps just by providing an e-mail address of the out-of-state vendor. In either case, the result is the same—a buyer has been routed to a seller by an intermediary.

Amazon's criticism of the words "or other consideration" is likewise perplexing. The statute simply provides that if there is some type of remuneration to the in-state representative other than a direct payment, the transaction will still be encompassed by the statute. Presumably, "other consideration" could include such items as a bonus program, or discounting of the vendor's goods if purchased by the representative, either in lieu of or in addition to the direct payment. The rationale for the language turns not on what form the consideration takes, but on the fact

that the in-state representative is being compensated for its efforts.

Finally, with regard to the vagueness challenge, Overstock complains that the word solicitation is so imprecise, in this Internet age, as to be unconstitutionally vague. Yet, while the Internet certainly represents a significant change in communication, the argument that it is a brave new world requiring its own definitions of terms that previously had a clear meaning is not persuasive. An advertisement in a newspaper is clearly not solicitation, as it is geared to the public at large. Likewise, the maintenance of a Web site which the visitor must reach on his or her own initiative is not, under the statute, or the advisory opinions, a solicitation.

On the other hand, the targeting of a potential customer by the transmission of an e-mail is no different from a direct telephone call or a mailing to a customer. Both constitute active initiatives by a party seeking to generate business by pursuing a sale.

RIPENESS OF ISSUES FOR JUDICIAL RESOLUTION

Preliminary to the arguments that the statute, as applied, is unconstitutional on Commerce, Due Process and Equal Protection Clause grounds, the State's claim that the issues are not ripe for judicial review must be addressed. The State argues that because an enforcement action has yet been commenced and thus the statute has not been applied to either Amazon or Overstock, any factual review is not ripe. The State also argues that plaintiffs are precluded from bringing this action because they have not exhausted their administrative remedies.

In support of its argument that the as-applied challenges are not ripe, the State relies upon the decision in *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 505 N.Y.S.2d 24, 496 N.E.2d 183 [1986], *cert. denied* 479 U.S. 985, 107 S. Ct. 574, 93 L. Ed. 2d 578 [1986]. In *Barwick* a church brought a declaratory judgment action contending that the Landmarks Law was unconstitutionally applied to it, and that the restrictions imposed prevented it from undertaking structural renovations, and, in turn, that failing to undertake these renovations would expose it to criminal sanctions. The Court noted that "a claim based upon an injury which might never occur should be dismissed" (*id.* at 518, 505 N.Y.S.2d 24, 496 N.E.2d 183). In order to determine ripeness, it reasoned, there must be a determination that the issues are appropriate for judicial resolution (i.e., the action being reviewed must be final, and the controversy may be determined as a "purely legal" question), and an assessment that the hardship to the parties involved if judicial action is denied, will be both significant and direct (*id.* at 519-520, 505 N.Y.S.2d 24, 496 N.E.2d 183, citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 [1967]; *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 87 S. Ct. 1520, 18 L. Ed. 2d 697 [1967]; *Gardner v. Toilet Goods Assn.*, 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704 [1967]). The Court found that since the effect on the plaintiff of being subject to the Landmarks Law could not yet be gauged because it had not yet sought the appropriate permission to undertake renovations, the issue was not ripe (*Barwick*, 67 N.Y.2d at 522-523, 505 N.Y.S.2d 24, 496 N.E.2d 183).

In *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 756 N.Y.S.2d 108, 786 N.E.2d 7 [2003], which also

presented a challenge to a tax law, the Court of Appeals rejected an argument by DTF, premised on *Barwick*, that the controversy was unripe because DTF had not commenced any enforcement action (*id.* at 321, 756 N.Y.S.2d 108, 786 N.E.2d 7 n. 3). The Court stated that DTF's reliance on *Barwick* was "misplaced" because, even though an enforcement action against the plaintiffs, a cigarette manufacturer and retailer, had not yet been initiated, DTF had "allegedly used threats to force retailers to stop participating in [the cigarette marketing promotions at issue], and this constitute[d] sufficiently 'direct and immediate' harm for jurisdictional purposes" (*id.* quoting *Barwick* at 520, 505 N.Y.S.2d 24, 496 N.E.2d 183).

In this case, DTF has made clear its position that the statute applies to the activities of the New York-based representatives taken on their behalf, and its intention to enforce the statute against them. Thus, the threat of harm to them is as equally "direct and immediate" as it was to the plaintiffs in *Lorillard* (*see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29, 127 S. Ct. 764, 166 L. Ed. 2d 604 [2007] ["where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction"]).

The State also argues that the as-applied claims should not be decided by the courts at this stage because Amazon and Overstock have not exhausted

their administrative remedies with respect to those claims. It contends that these claims should be addressed in the first instance to the applicable administrative agency, DTF, so that the necessary factual record can be established, either in an enforcement proceeding (if they choose to take their chances and not collect the tax), or a refund action (if they choose to collect it in an abundance of caution).

The New York courts have generally recognized an exception to the exhaustion requirement where a party is challenging the constitutionality or the basic applicability of a statute or regulation (*see e.g. Matter of First Natl. City Bank v. City of N.Y. Fin. Admin.*, 36 N.Y.2d 87, 92, 365 N.Y.S.2d 493, 324 N.E.2d 861 [1975] ["When a tax statute . . . is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive.'"]; *Martinez 2001 v. New York City Campaign Fin. Bd.*, 36 A.D.3d 544, 548, 829 N.Y.S.2d 55 [2007]).

The State argues, however, that this exception only applies where the issues are purely legal, and do not require the resolution of factual issues (*see Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 206, 11 N.E.2d 728 [1937]; *Matter of Between the Bread II v. Urbach*, 234 A.D.2d 724, 651 N.Y.S.2d 629 [1996]). Generally, however, these cases involve factual issues as to the amount of tax that is owed, for example, not whether the statute is constitutional as applied to the challenger in the first place (*see Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin.*, 185 A.D.2d 201, 586 N.Y.S.2d 597 [1992], *affd*. 81 N.Y.2d 1002, 599 N.Y.S.2d 536, 615 N.E.2d 1020 [1993], citing *Tully v. Griffin, Inc.*, 429

U.S. 68, 75, 97 S. Ct. 219, 50 L. Ed. 2d 227 [1976]). In this case, the circumstances are exigent enough to warrant review now. Plaintiffs are conducting an ongoing business, and require finality and clarity as to the extent of their present obligations.

COMMERCE CLAUSE AS-APPLIED CLAIM

The first of the "as-applied" arguments to be addressed is the claim that the statute violates the Commerce Clause. Plaintiffs argue that since their representatives do nothing more than advertise on New York-based Web sites, the statute cannot be applied in a constitutional manner. Inasmuch as there has been limited, if non-existent, discovery on this issue we are unable to conclude as a matter of law that plaintiffs' in-state representatives are engaged in sufficiently meaningful activity so as to implicate the State's taxing powers, and thus find that they should be given the opportunity to develop a record which establishes, actually, rather than theoretically, whether their in-state representatives are soliciting business or merely advertising on their behalf. Although, as noted above, the advisory memoranda describe a process by which the representatives can certify that they do not solicit, the possibility remains that many of the in-state representatives could certify that they are not soliciting, and, yet, the DTF could find that the activities in which they are engaged do constitute solicitation. Additionally, it is within the realm of possibility that the DTF could find that purported out-of-state representatives are actually located in-state by virtue of misrepresenting their address. It would also afford plaintiffs the opportunity to establish the bona fides of their other claims, such as whether it is impossible to identify who their in-state representatives are (even though

plaintiffs presumably need an address to which to send, inter alia, any commission checks).

We are also unable to determine on this record whether the in-state representatives are engaged in activities which are "significantly associated" with the out-of-state retailer's ability to do business in the state, as addressed in *Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 250, 107 S. Ct. 2810, 97 L. Ed. 2d 199 [1987]. In an affidavit from its vice-president, Amazon represents that, in 2007, its sales to New York State residents referred by Associates which provided Amazon with New York addresses upon registration constituted less than 1.5% of its total sales to New York State residents. It argues that this revenue is not "significantly associated" with its ability to do business in New York.[6] Whether plaintiffs can meet their burden on this issue remains to be seen, but we cannot, on this record, make a determination.

DUE PROCESS AS-APPLIED CLAIM

Amazon and Overstock also raise an "as applied" due process challenge based on their contention that the statute is both irrational and irrebuttable as ap-

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[6] The affidavit did not supply the sales data upon which the calculation was based. An Internet search, however, found, and we take judicial notice, that on April 22, 2010 Amazon reported that its first quarter sales in Canada and the United States were $3,780,000,000 (which would translate on an annual basis into North American sales of over $15,000,000,000). What percentage of those sales were made in New York cannot be quantified from the data available. Nor can the actual percentage made as a result of New York residents accessing New York-based Associates be calculated. Even 1.5% of New York sales by New York Associates, however, would not appear to be an insignificant number.

plied to them specifically. Ultimately, the determining factor in this inquiry is whether it is irrational to conclude that the Amazon and Overstock agreements with New York-based Web sites, by which they compensate the New York-based Web sites in exchange for the New York-based Web sites' referral of customers to Amazon and Overstock through Web links, are by their nature sufficient to establish that the New York-based Web sites will engage in other activity that goes beyond mere advertising and actually amounts to solicitation—to such a level that would satisfy the Commerce Clause's substantial nexus requirement—of New York business on Amazon's and Overstock's behalf. The existence of Amazon's SchoolRewards and similar programs is strong evidence that the presumption is valid. Nevertheless, we remand for further discovery so that plaintiffs can make their record that all their in-state representatives do is advertise on New York-based Web sites.

Amazon's and Overstock's claim that they cannot "control and remain informed about whether their New York contractors solicit business from other New York residents" because they have relationships with "hundreds of thousands" of such entities and cannot possibly keep tabs on all of them in a manner sufficient to rebut the presumption is belied by the fact that they have contracts with all of their representatives, presumably including addresses. In any event, they can easily include the terms recommended in the TSBMs in their standard affiliate agreements to protect themselves. Nevertheless, we conclude that it would be premature to find that even as applied the due process challenges are unavailing, whether because they create an illegal and irrebuttable presumption, or because the language of the

statute is so vague that plaintiffs cannot ascertain which transactions give rise to their obligations to collect the sales tax.

EQUAL PROTECTION AS-APPLIED CLAIM

Lastly, Amazon contends that the statute, as applied to it, violates the Equal Protection Clause because it is being treated differently from two similarly situated entities: out-of-state retailers who advertise in New York but do not use a mechanism similar to its Associates program, and those out-of-state retailers who do advertise in New York, and who do utilize an Associates-like program, but who compensate their advertisers with a flat fee or on a "pay-per-click" model.

The Supreme Court has recognized that successful equal protection claims may be brought by a class of one, "where the plaintiff alleges that [it] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" (*Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 [2000], citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 [1923]). As the Supreme Court stated, "'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents'" (*Olech* at 564, 120 S. Ct. 1073, citing *Sioux City Bridge Co.*, 260 U.S. at 445, 43 S. Ct. 190, quoting *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352, 38 S. Ct. 495, 62 L. Ed. 1154 [1918]).

"Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes" (*Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547, 103 S. Ct. 1997, 76 L. Ed. 2d 129 [1983]). Consequently, the "'presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes'" (*id.*, quoting *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S. Ct. 406, 84 L. Ed. 590 [1940]).

Our review concludes that Amazon has failed to establish the existence of a viable equal protection claim. In the first instance, Amazon cannot claim that it is being exclusively targeted since it is being treated exactly the same as Overstock. Their programs are similar, in that they both use in-state representatives and reward them on a "sales-made" basis, rather than on a "per-click" basis. Secondly, Amazon also fails in its claims that it is treated differently from those out-of-state retailers which do not have an Affiliates program like its own. Those retailers are not similarly situated. The first example offered by Amazon involves businesses which do not directly solicit, but only advertise in media, and the second involves representatives who are paid for results that are much less beneficial to the out-of-state vendor—referrals rather than actual sales. When a representative can only receive compensation for an actual sale, it is much more likely that the representative will actually solicit, rather than passively maintain a Web site. Thus, there is no proof of impermissible motive—"proof of action with intent to injure—that is, proof that the applicant was singled out with an 'evil eye and an unequal hand, so as practically to make unjust and illegal discrimina-

tions between persons in similar circumstances'" (*Bower Assoc. v. Town of Pleasant Val.*, 2 N.Y.3d 617, 631, 781 N.Y.S.2d 240, 814 N.E.2d 410 [2004], quoting *Masi Mgt. v. Town of Ogden* [Appeal No. 3], 273 A.D.2d 837, 838, 709 N.Y.S.2d 734 [2000], quoting *Matter of 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693, 416 N.Y.S.2d 219, 389 N.E.2d 815 [1979], quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220 [1886]).

In summation, although we do not find that the facial challenges have merit, further discovery is necessary before a determination can be rendered as to the as-applied Commerce and Due Process Clauses claims.

Accordingly, the judgment of the Supreme Court, New York County (Eileen Bransten, J.), entered February 17, 2009, dismissing the complaint in this declaratory judgment action challenging the constitutionality of Tax Law § 1101(b)(8)(vi) on Commerce Clause and federal and state due process and equal protection grounds, should be modified, on the law and on the facts, to declare that the statute is constitutional on its face and does not violate the Equal Protection Clause either on its face or as applied and, to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses, and otherwise affirmed, with costs. The order of the same court and Justice, entered January 15, 2009, which, inter alia, directed entry of a judgment dismissing the complaint in the separate declaratory judgment action challenging the constitutionality of subparagraph vi on Commerce Clause and federal and state due process and equal protection grounds, should be modified, on the law and on the facts, to

declare that the statute is constitutional on its face, and does not violate the Equal Protection Clause either on its face or as applied, and to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses, and otherwise affirmed, with costs.

All concur except CATTERSON, J. who concurs in a separate Opinion.

CATTERSON, J. (concur).

While I believe that there may be a genuine issue of material fact sufficient to warrant a trial on the question of whether the tax in question violates the Commerce Clause as it is applied to the activities of the plaintiffs, I must nonetheless concur with the majority because on appeal, the plaintiffs have chosen to assert only a facial challenge to the statute's constitutionality under the Commerce Clause.

The majority maintains that, "[c]learly, Amazon's program, reasonably, is not designed for the passive advertiser, but seeks growth by reliance upon representatives who will look to solicit business." The majority concludes that, the statute in question would be valid "when a New York representative uses some form of proactive solicitation which results in a sale by Amazon, and a commission to the representative; and the representative has an in-state presence sufficient to satisfy the substantial nexus test." Unfortunately, the record is insufficient to rebut the premise as a matter of law.

Thus, I agree with the majority that in order to prevail on a facial challenge to the constitutionality of the tax at issue, plaintiffs must overcome the strong "presumption of constitutionality accorded to

legislative enactments by proof 'beyond a reasonable doubt.'" *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 516, 787 N.E.2d 624, 627 (2003), quoting *LaValle v. Hayden*, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 129, 773 N.E.2d 490, 494 (2002). Furthermore, that plaintiffs bear the "substantial burden of demonstrating 'that "in any degree and in every conceivable application" the law suffers wholesale constitutional impairment."'" *Moran Towing Corp.*, 99 N.Y.2d at 448, 757 N.Y.S.2d at 516, 787 N.E.2d 624, quoting *Cohen v. State of New York*, 94 N.Y.2d 1, 8, 698 N.Y.S.2d 574, 576, 720 N.E.2d 850, 852 (1999), quoting *McGowan v. Burstein*, 71 N.Y.2d 729, 733, 530 N.Y.S.2d 64, 65, 525 N.E.2d 710, 711 (1988). Had the challenge been based on the tax as applied to the plaintiffs' actual activities in New York, supported by a complete record of those activities as well as how the tax was apportioned, the plaintiffs may have had a valid challenge.

APPENDIX C

Court of Appeals of New York.

AMAZON.COM, LLC and Amazon Services, LLC, Appellants,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; et al., Respondents.

May 5, 2009.

Appeal transferred without costs, by the Court of Appeals, sua sponte, to the Appellate Division, First Department, upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (N.Y. Const, art VI, §§ 3[b][2], 5[b]; CPLR 5601[b][2]).

APPENDIX D

Supreme Court, New York County, New York.

AMAZON.COM LLC and Amazon Services, LLC, Plaintiffs,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, Robert Megna, in his Official Capacity as Commissioner of the New York State Department of Taxation and Finance; The State of New York; and David A. Paterson, in his Official Capacity as the Governor of the State of New York, Defendants.

Jan. 12, 2009.

EILEEN BRANSTEN, J.

Pursuant to CPLR 3211(a)(2) and (7), defendants New York State Department of Taxation and Finance, Robert Megna, in his Official Capacity as Commissioner of the New York State Department of Taxation and Finance, The State of New York, and David A. Paterson, in his Official Capacity as the Governor of the State of New York (collectively "the State") move to dismiss the complaint. Plaintiffs Amazon.com LLC and Amazon Services, LLC (collectively "Amazon") oppose dismissal and cross-move for summary judgment.

Background

Since 1995, Amazon has been operating a retail internet business (Mastro Aff., Ex. 1, at ¶ 4). Its

goods are sold online and shipped to buyers worldwide, including to New York (*id.* at ¶ 20). Amazon does not own property in New York or maintain any New York offices.[1] None of its employees work or reside in New York (Mastro Aff., Ex. 1, at ¶ 20).

Amazon's Associates Program

Amazon created an "Associates Program," which allows participants ("Associates") to maintain links to Amazon.com on their own websites and compensates them by paying "a percentage of the proceeds of the sale" (Mastro Aff., Ex. 1, at ¶ 23). Amazon also offers incentives to Associates that "directly refer" customers to its Amazon Prime program through website links, paying them a "$12 bounty" for each new enrollee (*id.*, Ex. 24, at ¶ 5).

Prospective Associates must apply to join the program (Mastro Aff., Ex. 1, at ¶ 21; Ex. 24). Assuming that Amazon accepts the application, the parties enter into an Operating Agreement, which makes clear that the "Relationship of [the] Parties" is that of "independent contractors" (*id.*, Ex. 24, at No. 14). Associates are granted "a revocable, non-exclusive, worldwide, royalty-free license . . . solely for purposes of facilitating referrals from [their sites] to the Amazon Site" (*id.*, Ex. 24, at # 2).

Amazon authorizes Associates to place different types of links from their websites to its own. For example, Associates can set up a "product link," generally allowing them to "select one or more Products [on Amazon's site] to list on [their own] site," a "search box link," which permits visitors to the Asso-

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[1] Facts taken from the Verified Complaint are deemed true solely for purposes of this motion to dismiss.

ciate's site to view Amazon merchandise related to their queries, or a "cart link," which "when clicked will allow visitors [of the Associate's site] to add products to their shopping cart and/or purchase products via [Amazon's] 1-Click feature" (Mastro Aff., Ex. 24, at # 2).

As a condition of participation, Associates acknowledge that Amazon "may receive information from or about visitors to [their sites]" and that Amazon "may from time to time send [them] email updates about the Program" (Mastro Aff., Ex. 24, at # 2).

The Operating Agreement further sets forth that Associates will be paid through a "referral fee" and can elect between the "Classic Fee Structure" (generally 4% of qualifying revenues from sales of products sold through special links) or the "Performance Fee Structure" (a percentage of qualifying revenues set forth in a table that varies with the number of total items shipped) (Mastro Aff., Ex. 24, at # 5).

Amazon has hundreds of thousands of Associates. Thousands "of them have provided Amazon with addresses in New York" (Mastro Aff., Ex. 1, at ¶ 25). Sales to New York customers originating from New York-based Associate referrals constitute less than 1.5% of Amazon's New York sales (Comfort Aff., at ¶ 6). Without disclosing the dollar amount of those sales, Amazon simply acknowledges that its "Associates Program generates more than $10,000 per year in sales to customers located in New York" (*id.* at ¶ 13).

2008 Amendment of New York's Tax Law

In New York, "every vendor of tangible personal property" is required to collect sales tax (*see* N.Y. Tax

Law §§ 1131[1], 1105). Included in the definition of "vendor" is:

> "A person who solicits business either:
>
> (I) by employees, independent contractors, agents or other representatives . . .
>
> and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article" (N.Y. Tax Law § 1101[b][8][i][C]).

On April 23, 2008, Governor Paterson signed into law N.Y. Tax Law § 1101(b)(8)(vi) ("Commission-Agreement Provision"), which provides that for purposes of the above-quoted section of the Tax Law:

> "a person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods . . . This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus

> requirement of the United States constitution during the four quarterly periods in question."

The Commission-Agreement Provision thus requires collection of New York taxes from New Yorkers by out-of-state sellers that contractually agree to pay commissions to New York residents for referring potential customers to them, provided that more than $10,000 was generated from such New York referrals during the preceding four quarterly periods.

An out-of-state seller that could establish its commissioned New York residents did not engage in any solicitation that would satisfy the United States Constitution's "nexus requirement," would be exempt from tax collection (*see* State's Memorandum of Law ["State Mem."], at 7). The State has clarified that an out-of-state seller that includes in its agreement a condition that in-state commissioned representatives are prohibited from engaging in solicitation activities in New York on its behalf and ensures compliance through a certification, may rebut the presumption that the seller is a vendor so long as the State does not subsequently determine that in-state solicitation actually took place (*see* State Mem., Ex. 3 [June 30, 2008 Tax Bureau Services Memorandum]).

Once the Commission-Agreement Provision was enacted, Amazon began collecting taxes from its New York customers under protest (Comfort Aff., at ¶¶ 14-15).

This Action

On April 25, 2008, Amazon commenced this action, alleging that the Commission-Agreement Provision "violates the Commerce Clause of the United States Constitution, both facially and as applied to

Amazon, because it imposes tax collection obligations on out-of-state entities who have no substantial nexus with New York" (Verified Complaint, at ¶ 3[b]). Amazon also contends that the provision violates the Federal and State constitutions' Due Process Clauses, both facially and as applied, because "it effectively creates an irrebuttable presumption of solicitation' and is overly broad and vague" (*id.* at ¶ 3 [b]). Amazon further maintains that the enactment violates the constitutions' Equal Protection Clauses because "it intentionally targets Amazon" (*id.* at ¶ 3[c]).

Analysis

Amazon's complaint must be dismissed in its entirety for failure to state a cause of action (CPLR 3211[a][7]). Even accepting all the facts alleged to be true, there is no basis upon which Amazon can prevail.

Commerce Clause

A State may require an entity engaged in interstate commerce to collect taxes on its behalf provided the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 [1977]).

To establish a "substantial nexus" with the taxing State, "physical presence of the vendor is required [however] it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence.' And it may be manifested by . . . economic activities in the taxing State performed by the vendor's personnel or on its behalf" (*Matter of Orvis Co. v. Tax*

Appeals Tribunal, 86 N.Y.2d 165, 178, 630 N.Y.S.2d 680, 654 N.E.2d 954 [1995] [citations omitted], *cert. denied sub nom. Vermont Information Processing v. Commissioner, N.Y. State Dept. of Taxation & Fin.*, 516 U.S. 989, 116 S. Ct. 518, 133 L. Ed. 2d 426). As Amazon acknowledges, physical presence "can be actual or imputed based on the in-state solicitation of sales by an employee, agent, or independent contractor of the retailer on its behalf" (Amazon's Memorandum of Law ["Amazon Mem."] at 14).

In *Scripto v. Carson*, 362 U.S. 207, 209, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960), for example, the United States Supreme Court held that a State could require tax collection by an out-of-state company that had contracts with 10 in-state residents—deemed "independent contractors"—who solicited orders for products on its behalf. The agreement with the contractors provided that they were to be paid by commission and salespeople sent orders out of state for fulfillment (*id.*; *see also Standard Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 561, 95 S. Ct. 706, 42 L. Ed. 2d 719 [1975] [sufficient nexus based on single employee who resided in-state and consulted with customer therein]); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 64, 59 S. Ct. 376, 83 L. Ed. 488 [1939] [collection mandated based on presence of two general agents contractually granted the right to solicit in-state orders who were to be paid by commission]; *Matter of Orvis Co.*, 86 N.Y.2d at 165, 630 N.Y.S.2d 680, 654 N.E.2d 954 [in-state activity sufficient based on employee visits to solicit business].

In contrast, if the *only* connection with the State is solicitation from out of State—through catalogs, flyers, advertisements in national periodicals or tele-

phone calls—and delivery of merchandise to customers by common carrier or use of mail, there is an insufficient nexus for taxation purposes (*see Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 [1992]; *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 [1967]).

So long as there is a "substantial nexus" with the taxing State, the taxes that must be collected need not derive from the seller's in-state activity (*National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 560, 97 S. Ct. 1386, 51 L. Ed. 2d 631 [1977] [nonprofit society required to collect taxes from California mail-order customers based on maintenance of two offices in California from which advertising was solicited for its monthly magazine]).

Facial Challenge

"A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that "in any degree and in every conceivable application" the law suffers wholesale constitutional impairment" (*Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 757 N.Y.S.2d 513, 787 N.E.2d 624 [2003] [citations omitted]). The statute's "challenger must establish that no set of circumstances exists under which the Act would be valid" (*id.* [citation omitted]).

Amazon argues that the statute is facially invalid because "it imposes tax collection obligations based on activities that are insufficient to create a substantial nexus under the dormant Commerce Clause" (Amazon Mem. at 15). Amazon is wrong.

The Commission-Agreement Provision is carefully crafted to ensure that there is a sufficient basis

for requiring collection of New York taxes and, if such a basis does not exist, it gives the seller an out. The statute first requires that a seller enter into a contract with a New York resident before any obligation will be imposed. Next, before tax-collection is required, it mandates that the New York resident refer potential customers to the seller. The measure further necessitates an arrangement whereby the seller pays the New York resident a commission or provides other consideration for the referral. Finally, New York's Tax Law requires that the seller receive in excess of $10,000 from New York customers referred to it through its business arrangement.

All of these requirements make clear that a tax-collection obligation will only be imposed based on an out-of-state seller's conscious decision to contract with in-state residents who collectively refer more than $10,000 of New York based business. The statute is targeted at requiring tax collection when an out-of-state seller avails itself of the benefit of in-state contractors compensated for referrals. As an added safeguard the Commission-Agreement Provision makes plain that a seller does not have to collect taxes so long as its New York actors "did not engage in any solicitation in the state [on its behalf] that would satisfy the nexus requirement of the United States Constitution." Thus, a seller is afforded the opportunity to prove that none of its contractors actively sought sales on its behalf in New York.

There is nothing infirm about the Commission-Agreement Provision, which contemplates a substantial nexus with New York. Significantly, New York residents, with whom out-of-state sellers entered into agreements, must refer more than $10,000 of business—and New York business no less—before there

is any collection obligation. The statute thus requires "demonstrably more than a 'slightest presence'" and obligates collection of taxes based on economic activities in New York performed by the vendor's personnel or on its behalf" (*Matter of Orvis Co.*, 86 N.Y.2d at 178, 630 N.Y.S.2d 680, 654 N.E.2d 954 [citations omitted]).

Amazon urges that the statute would bring within its ambit "simple advertising by in-state advertisers" (Amazon Mem. at 16). The Commission-Agreement Provision, however, does no such thing. It imposes a tax-collection obligation on sellers who contractually agree to compensate New York residents for business that they generate and not simply for publicity. Amazon has not come close to refuting the Tax Law's presumed constitutionality and the statute must be upheld.

As-Applied Challenge

Amazon maintains that it lacks a substantial nexus with New York and that its Associates' activities are insufficient to justify imposition of New York tax-collection obligations (Amazon Mem. at 15). It argues that it has no physical presence in New York and that its Associates have no role in its sales transactions, which are completed out-of-state (Amazon Mem. at 19). Amazon emphasizes that its Associates "are mere advertisers who do not solicit sales at Amazon's behest" and that they are not "traveling salesmen"—they do not necessarily personally solicit sales from New York residents (*id.* at 20, 21, 24-25; Amazon Reply Mem. at 5). It asserts that all its Operating Agreements provide for is placement of links on Associates' websites (Amazon Mem. at 21, 25).

Amazon further states that Associates' referrals to New York customers are not significantly associ-

ated with its ability to establish and maintain a market for sales in New York because they account for less than 1.5% of its New York sales (Amazon Mem. at 27). Amazon complains that "it is practically impossible" for it to determine with certainty which of its Associates are New York residents and then to disprove solicitation (Mastro Aff., Ex. 1, at ¶ 44).

None of these allegations, however, sufficiently state a claim for violation of the Commerce Clause.

Amazon contracts with thousands of Associates that provided it with a New York address. Certainly, if Amazon were to have a dispute with any of them, it could easily ascertain New York residency for purposes of a lawsuit. All of the information is publicly available. Indeed, there is no reason that the Associates application, which Amazon may accept or reject, cannot inquire about New York resident status.

It does not matter, moreover, that Associates do not solicit New York business at Amazon's direct behest or that Amazon contractually prohibits them from engaging in certain limited specified conduct such as offering its customers money back for Amazon purchases made through Associate links.[2] Amazon chooses to benefit from New York Associates that are free to target New Yorkers and encourage Amazon sales, all the while earning money for Amazon in return for which Amazon pays them commissions. Amazon does not discourage its Associates from reaching out to customers or contributors and pressing Amazon sales.

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[2] Amazon does not contractually prohibit in-state solicitation of business on its behalf.

Amazon has not contested that it contracts with thousands of New Yorkers and that as a result of New York referrals to New York residents it obtains the benefit of more than $10,000 annually. Amazon should not be permitted to escape tax collection indirectly, through use of an incentivized New York sales force to generate revenue, when it would not be able to achieve tax avoidance directly through use of New York employees engaged in the very same activities.

In its complaint, Amazon fails to allege that its New York Associates do not solicit business for it from New York customers. None of Amazon's claims, even if all true, would justify a conclusion that the Commission-Agreement Provision cannot legally be applied to Amazon. Amazon's first cause of action for declaratory relief based on violation of the Commerce Clause is therefore dismissed.

Due Process and Equal Protection Claims

Amazon maintains that the Commission-Agreement Provision "violates due process by attempting to camouflage its blatant violation of the Commerce Clause as a statutory presumption'" (Amazon Mem. at 30). It contends that there is no rational relationship between facts triggering the presumption—contracts with in-state residents who are paid by commission to make referrals and more than $10,000 of New York revenue from such arrangements—and the fact presumed—that motivated New York residents will solicit business for Amazon from other New York residents.

A legislative presumption will withstand Constitutional challenge provided that "there is some rational connection between the fact proved and the ultimate fact presumed, and . . . the inference of one fact from proof of another shall not be so unreasona-

ble as to be a purely arbitrary mandate" (*Mobile, Jackson, & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78 [1910]; *see also United States v. Romano*, 382 U.S. 136, 139, 86 S. Ct. 279, 15 L. Ed. 2d 210 [1965]). New York has applied a "higher standard of rational connection" to statutory presumptions in criminal cases, requiring "a reasonably high degree of probability' that the presumed fact follows from those proved directly" (*People v. Leyva*, 38 N.Y.2d 160, 165-166, 379 N.Y.S.2d 30, 341 N.E.2d 546 [1975]).

There is a "reasonably high degree of probability" that New York businesspeople and entities desirous of raising money that are compensated for referring customers who ultimately make purchases will solicit business from those with whom they are familiar and encourage sales. It is also highly probable that New York residents will more likely than not have ties to other New York residents and it is not irrational to presume that at least some of them will actively solicit business for the remote seller from within the State from others within the State.

In any event, the statutory presumption is by its terms and effect rebuttable. The Commission–Agreement Provision does not conclude that all commissioned residents definitively will solicit business for the seller in a manner that would justify tax collection. Sellers can establish that none of their contractors engage in New York solicitation for them. Out-of-state sellers know exactly with whom they are contracting and can reasonably control and remain informed about whether their New York contractors solicit business from other New York residents.

Out-of-state sellers can shield themselves from a tax-collection obligation by altogether prohibiting in-

state solicitation activities referring to them or encouraging sales on their behalf that would subject them to a tax-collection requirement and, as a condition of compensation, requiring that their New York contractors attest to compliance. To the extent that the exercise may be burdensome, it is a cost of doing business associated with the decision to contract with New York residents and offer them incentives for bringing them sales when such an arrangement is profitable to the vendor.

Additionally, Amazon's due-process vagueness challenge must be analyzed on an as-applied basis (*see United States v. Powell*, 423 U.S. 87, 92, 96 S. Ct. 316, 46 L. Ed. 2d 228 [1975] [vagueness challenges not involving First Amendment freedoms must be examined based on the facts at hand]; *see also People v. Stuart*, 100 N.Y.2d 412, 422 n. 8, 765 N.Y.S.2d 1, 797 N.E.2d 28 [2003]). There is no allegation that the provision is impermissibly vague as applied to Amazon here. Moreover, the statute's applicability upon entry into an agreement with an in-state resident for a commission "or other consideration" based on direct referral of New York customers or "indirect" referrals is not so vague and standardless as to leave the public uncertain about its reach.[3]

Finally, Amazon alleges that it has been denied equal protection because the statute "is targeted at Amazon" and the "Equal Protection Clause prohibits

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[3] Interestingly, in its Operating Agreement, Amazon prohibits its Associates from "directly or *indirectly* [offering] any person or entity any consideration or incentive" for using links set up to access Amazon's site, employing the same "vague" language about which it complains (Mastro Aff., Ex. 24, at ¶ 4 [emphasis added]).

government action intentionally directed at a class of one' and motivated by animus" (Mastro Aff., Ex. 1, at ¶ 55). To state a "class-of-one" claim, however, a plaintiff must allege that it was intentionally treated differently from similarly situated individuals (*see, e.g.*, *Seabrook v. City of New York*, 509 F. Supp. 2d 393, 400 [S.D.N.Y.2007]; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 [2000] [plaintiff must allege intentional different treatment from others similarly situated without any rational basis for the difference in treatment]; *see also Trump v. Chu*, 65 N.Y.2d 20, 25, 489 N.Y.S.2d 455, 478 N.E.2d 971 [1985]). Amazon's complaint is devoid of any assertion that the State has actually treated it any differently from others that are similarly situated. In fact, Amazon's complaint acknowledges that the statute "was intended to impose tax-collection obligations on out-of-state Internet retailers such as Amazon" and sets forth that the enactment would also apply to other retailers (Mastro Aff., Ex. 1, at ¶¶ 30, 31).

Thus, Amazon's second and third causes of action must be dismissed as well.

In the end, the Commission-Agreement Provision does not broadly tax any and all internet sales to New York consumers. It requires a substantial nexus between an out-of-state seller and New York through a contract to pay commissions for referrals with a New York resident along with realization of more than $10,000 of revenue from New York sales earned through the arrangement. The neutral statute simply obligates out-of-state sellers to shoulder their fair-share of the tax-collection burden when using New Yorkers to earn profit from other New Yorkers.

Accordingly, it is ORDERED that the State's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is GRANTED and Amazon's cross-motion for summary judgment is denied as moot.

The Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

APPENDIX E

U.S. Const. art. I, § 8 provides in relevant part:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. amend. XIV, § 1 provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

N.Y. Tax Law § 1101 provides in relevant part:

§ 1101. Definitions

* * *

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(8) Vendor.

* * *

(vi) For purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph, a person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent con-

tractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November. This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question. Nothing in this subparagraph shall be construed to narrow the scope of the terms independent contractor or other representative for purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph.

* * *