No. 16-567

In the Supreme Court of the United States

AMERICAN BUSINESS USA CORP.,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Commerce Clause or the Due Process Clause of the Fourteenth Amendment prohibits Florida from collecting sales taxes from a florist maintaining its sole place of business in Florida, in connection with retail sales transactions resulting in the out-of-state delivery of flowers.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT OF THE CASE 3
REASONS FOR DENYING THE PETITION 8
I. THIS CASE DOES NOT IMPLICATE A DISAGREEMENT AMONG THE LOWER COURTS, AND THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS 8
A. The Decision Below Does Not Conflict With This Court's Precedents Addressing the Limits of State Territorial Jurisdiction. 9
B. The Florida Supreme Court Correctly Determined a Substantial Nexus Supported Florida's Taxation of Retail Sales Made by an In-State Florist. 11
C. The Florida Supreme Court Correctly Rejected Petitioner's Due Process Claim. 15
II. ABSENT A DISAGREEMENT AMONG THE LOWER COURTS OR A CONFLICT WITH THIS COURT'S PRECEDENTS, THE IMPORTANCE OF THE QUESTION PRESENTED DOES NOT INDEPENDENTLY WARRANT THIS COURT'S REVIEW. 18
III. THIS CASE DOES NOT SUPPLY AN APPROPRIATE VEHICLE FOR RECONSIDERING *QUILL*, AND A DECISION TO OVERRULE THAT CASE WOULD NOT HELP PETITIONER HERE. 23
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury,
490 U.S. 66 (1989) 15

Asarco Inc. v. Idaho State Tax Comm'n,
458 U.S. 307 (1982) 10

Barclays Bank PLC v. Franchise Tax Bd. of Cal.,
512 U.S. 298 (1994) 12

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 22

Complete Auto Transit v. Brady,
430 U.S. 274 (1977) 18, 19, 24

D.H. Holmes Co. Ltd. v. McNamara,
486 U.S. 24 (1988) 13

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 22

Direct Mktg. Ass'n v. Brohl,
135 S. Ct. 1124 (2015) 23, 26

Edgar v. Mite Corp.,
457 U.S. 624 (1982) 10

Fla. Hosp. v. Agency for Health Care Admin.,
823 So. 2d 844 (Fla. Dist. Ct. App. 2002) 6

Gen. Motors Corp. v. Tracy,
519 U.S. 278 (1997) 22

Goldberg v. Sweet,
488 U.S. 252 (1989) 12

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 16

Johnson v. Cook,
192 S.W.2d 975 (Ark. 1946) 1

McGoldrick v. Berwind-White Coal Mining Co.,
309 U.S. 33 (1940) 12

Miller Bros. v. Maryland,
347 U.S. 340 (1954) 10, 16

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 21

Mobil Oil Corp. v. Comm'r of Taxes of Vt.,
445 U.S. 425 (1980) 13, 14, 15

Moorman Mfg. Co. v. Bair,
437 U.S. 267 (1978) 16

Nat'l Bellas Hess, Inc. v. Dep't of Revenue, Ill.,
386 U.S. 753 (1967) 12, 13, 20, 24

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization,
430 U.S. 551 (1977) 13

Okla. Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) ..... passim

Powers v. Ohio,
499 U.S. 400 (1991) 17

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 15, 16, 20, 24

Roger Dean Enters., Inc. v. State, Dep't of Revenue,
387 So. 2d 358 (Fla. 1980) 13

TA Operating Corp. v. State, Dep't of Revenue,
767 So. 2d 1270 (Fla. Dist. Ct. App. 2000) 13

Treichler v. Wisconsin,
338 U.S. 251 (1949) 10

Trinova Corp. v. Mich. Dep't of Treasury,
498 U.S. 358 (1991) 15

Wardair Canada, Inc. v. Fla. Dep't of Revenue,
477 U.S. 1 (1986) 12

Wisconsin v. J.C. Penney Co.,
311 U.S. 435 (1940) 14

Statutes

Fla. Stat. § 212.05 ..... passim

Other Authorities

Minn. H. Rep., House Research Bill Summary,
H.F. 20 20

Regulations

103 Ky. Admin. Regs. 27:050 ..... 9, 20

61 Pa. Code § 31.24 ..... 9, 20

Ala. Admin. Code. r. 810-6-1-.67 ..... 9, 20

Fla. Admin. Code r. 12A-1.047 ..... 2, 5

Constitutional Provisions

U.S. Const., art. I, § 8 22

INTRODUCTION

A typical retail sales transaction involving the sale of flowers is simple. There is a buyer, there is a seller, and there is a tax. In some cases, however, the transaction can be more complicated. For example, if a customer in Connecticut contacts a florist in Florida to send a bouquet to a loved one in Louisiana, four parties might be involved: (i) the person placing the order, (ii) the Florida florist initially receiving and processing the order, (iii) the out-of-state florist ultimately preparing and delivering the bouquet, and (iv) the Louisiana recipient.

Such transactions are not uncommon in the floral sector, and they can present difficult issues for sales tax purposes. For example, who is the seller—the florist initially receiving, accepting, and processing the order, or the business preparing the flowers? Similarly, where does the sale occur—the location of the customer who placed the order with the initial florist, the location of the initial florist, the location of the second florist, or the location of the recipient (who may not be the purchaser) to whom the second florist delivers the flowers? Other questions abound.

In the absence of sale-sourcing laws like the one at issue here, florists seeking to partner with other florists or to accept orders from clients across state lines might have to consult a variety of factors to determine whether, when, and to whom they owe sales tax. *See, e.g.*, *Johnson v. Cook*, 192 S.W.2d 975, 976 (Ark. 1946) (considering agency law, situs of sale, and transfer of title in flower delivery case). To avoid such uncertainty

and confusion, Florida law specifies how sales tax applies to a transaction involving the sale of flowers. Fla. Stat. § 212.05(1)(*l*). In particular, Florida law imposes tax liability on Florida florists for sales they make to retail customers, regardless of where the items are delivered. However, florists located in Florida are not liable for sales tax on payments received from other florists for items delivered to recipients in this state. *See id.*; Fla. Admin. Code r. 12A-1.047.

Florida is not the only state to impose taxes on floral sales effectuated by an in-state company interacting with multiple parties in multiple locations; nor is it alone in seeking to use express statutory and administrative rules to clearly and equitably allocate tax liability for such transactions. As petitioner acknowledges, "[a]t least 36 other States and the District of Columbia have enacted sales taxes on flowers, which are of varying degrees of similarity to Florida's." Pet. 26. Notably, many of these statutes and administrative rules have existed for decades. Despite this longstanding and widespread practice, however, petitioner fails to identify any decision—state or federal, trial court or appellate court, published or unpublished—striking down a comparable sale-sourcing provision.

The petition for a writ of certiorari should be denied. Petitioner does not even attempt to argue that the decision below creates or implicates a disagreement among the lower courts. Further, the decision does not conflict with this Court's precedents, and any residual doubts concerning the correctness of the decision do not warrant this Court's review at this time. Finally, the Florida Supreme Court's decision affirming the legality

of a tax on in-state florists does not supply an appropriate vehicle for overruling prior precedent barring states from imposing certain taxes on out-of-state businesses. Indeed, any decision overruling such precedent would seem to hurt rather than help petitioner's cause, inasmuch as it would expand rather than contract the authority of states to tax economic transactions with out-of-state components.

STATEMENT OF THE CASE

Petitioner American Business USA Corporation (hereinafter "petitioner" or "American Business") is a for-profit business incorporated in Florida, operating in Florida, and having its sole physical location and principal address in Florida. Pet. App. 2a. It specializes in the sale of flowers, gift baskets, and other items of tangible personal property, and it "markets itself to the public as a company that sells flowers." *Id.* at 3a n.1, 4a.

Although petitioner maintains its sole physical presence in Florida, all of its sales are initiated online. *Id.* at 2a. Petitioner does "not maintain any inventory of flowers, gift baskets and other items of tangible personal property," so it uses "local florists to fill the orders it receive[s] for flowers, gift baskets and other items." *Id.* at 3a n.1. From April 1, 2008, through March 31, 2011—the audit period at issue here, *id.* at 2a, 42a—petitioner "charged its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered in Florida." *Id.* at 3a n.1. Petitioner "did not charge its customers sales tax on sales of flowers, gift baskets and other items on tangible personal property delivered outside of Florida." *Id.*

Following an audit, the Florida Department of Revenue (hereinafter "respondent" or "Department") issued a proposed assessment to petitioner which included unpaid sales tax and interest stemming from its sales resulting in out-of-state deliveries. Pet. App. 2a, 41a. The Department's assessment was based on the following statute:

> Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered. Florists located in this state are not liable for sales tax on payments received from other florists for items delivered to customers in this state.

Fla. Stat. § 212.05(1)(*l*) ("Florist Sales Tax").

Florida's Administrative Code further details the tax liability of Florida florists:

> (1) Florists are engaged in the business of selling tangible personal property at retail and their sales of flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable.
>
> (2) Where florists conduct transactions through a florists' telegraphic delivery association, the following rules will apply in the computation of the tax, which will be on the entire amount paid by the customer without any deductions whatsoever:

> (a) On all orders taken by a Florida florist and telegraphed to a second florist in Florida for delivery in the state, the sending florist is held liable for the tax.
>
> (b) In cases where a Florida florist receives an order pursuant to which he gives telegraphic instructions to a second florist located outside Florida for delivery of flowers to a point outside Florida, tax will likewise be owing with respect to the total receipts of the sending florist from the customer who places the order.
>
> (c) In cases where Florida florists receive telegraphic instructions from other florists located either within or outside of Florida for delivery of flowers, the receiving florist will not be held liable for tax with respect to any receipts which he may realize from the transaction. In this instance, if the order originated in Florida, the tax will be due from and payable by the Florida florist who first received the order and gave telegraphic instructions to the second florist.
>
> (3) All retail sales of cut flowers and potted plants by florists are taxable.

Fla. Admin. Code r. 12A-1.047.

Petitioner protested the assessment, and the Department referred the matter to the Florida Division of Administrative Hearings. Pet. App. 41a. The administrative law judge entered a recommended order upholding the Department's assessment, finding that

"[t]he [petitioner]'s sale of flowers, wreaths, bouquets, potted plants, and other such items of tangible personal property were subject to sales tax pursuant to section 212.05(1)(*l*) and rule 12A-1.047(1)." Pet. App. 52a-53a. The Department entered a final order accepting the recommendation, *id.* at 36a-39a, and petitioner appealed to the District Court of Appeal of Florida, Fourth District, *id.* at 25a.

On appeal, petitioner raised both Due Process and dormant Commerce Clause challenges to the assessment of taxes on its sales of flowers, gift baskets, and other items delivered outside Florida.[1] Pet. App. 26a. The Fourth District rejected petitioner's due process claim, concluding that "traditional notions of fair play and substantial justice were not offended because the [petitioner] was registered in Florida and had a mailing address in Florida." *Id.* at 33a. However, the Fourth District reversed the portion of the tax assessment relating to sales for out-of-state flower deliveries. *Id.* at 26a, 34a-35a. The Fourth District held that the so-called dormant Commerce Clause precluded the tax, finding it "unconstitutional as applied to the [petitioner]'s sales to out-of-state customers for out-of-state delivery." *Id.* at 26a. "Because the flowers . . . were

[1] Under Florida law, because administrative agencies and administrative law judges lack jurisdiction to decide constitutional claims, the constitutionality of a law may be raised for the first time on appeal from an administrative proceeding. *See* Pet. App. 25a ("Since this case involves an administrative agency, issues of the constitutionality of the tax statute may be raised for the first time on appeal.").

never stored in or brought into Florida," the court reasoned, "the imposition of taxes did not meet the 'substantial nexus' test." *Id.* at 22a.

The Department appealed to the Florida Supreme Court, which unanimously reversed the Fourth District's ruling that the Florist Sales Tax—as applied to petitioner's sales involving out-of-state deliveries—violated the Commerce Clause, Pet. App. 7a. As a matter of state law, the Florida Supreme Court concluded that "the administrative law judge and the Department are correct that the statute does not place a tax on the items sold, but on the sales transaction itself." Pet. App. 8a-9a. Of particular relevance, the Florida Supreme Court determined that the "substantial nexus" prong of *Complete Auto* was satisfied because petitioner "is headquartered in Wellington, Florida and has been doing business in Florida since 2001." Pet. App. 14a. Moreover, petitioner's "economic activities and transactions transpired from" its in-state headquarters. *Id.* at 12a. Based on these facts, the court held that there was a "substantial nexus" between the challenged tax and petitioner's retail sales transactions. *Id.* at 14a. The Florida Supreme Court went on to find that the tax satisfied the remaining three *Complete Auto* prongs. Pet. App. 14a-20a.

Finally, the Florida Supreme Court agreed with the Fourth District in rejecting petitioner's due process claim. "Due process," the court explained, "requires only that there be some minimal connection between the State and the transaction it seeks to tax." Pet. App. 20a-21a. "In the present case," the court emphasized, "American Business has a physical presence and does business within the state." *Id.* at 21a. "Thus," the court

held, "the minimum connection necessary to satisfy due process is also met." *Id.*

REASONS FOR DENYING THE PETITION

None of the factors traditionally supporting certiorari is present here. Notwithstanding the concededly common nature of Florida's floral tax regime, petitioner does not point to any other case invalidating such a tax. Nor does the decision below conflict with this Court's precedents. As the Florida Supreme Court recognized, Florida's unremarkable imposition of sales tax liability on a business incorporated in Florida, residing in Florida, headquartered in Florida, and conducting sales operations in Florida fits well within the scope of state taxing authority, regardless whether the goods in question originate in or are delivered out of state. Finally, this case does not supply an appropriate vehicle for revisiting prior precedent disallowing certain state taxes on out-of-state companies. Such precedent does not apply here, since this case addresses whether states may tax in-state companies. At any rate, a decision to overrule such precedent would not help petitioner's cause, since it would have the effect of expanding rather than contracting the sphere of state authority to tax transactions with out-of-state components.

I. THIS CASE DOES NOT IMPLICATE A DISAGREEMENT AMONG THE LOWER COURTS, AND THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

Petitioner makes no attempt to argue that the Florida Supreme Court's decision implicates a disagreement among the lower courts. *See* Pet. 12-15. And

for good reason: Petitioner does not cite, and respondent has not found, any case holding that a state may not tax sales of the kind at issue here. The absence of any such split is particularly noteworthy in light of the large number of states imposing similar taxes on floral sales. As petitioner acknowledges, "[a]t least 36 other States and the District of Columbia have enacted sales taxes on flowers, which are of varying degrees of similarity to Florida's." Pet. 26. Many of those laws have been on the books for a long time. *See, e.g.*, Ala. Admin. Code. r. 810-6-1-.67 (adopted 1965); 103 Ky. Admin. Regs. 27:050 (adopted 1974); 61 Pa. Code § 31.24 (adopted 1972).

Unable to point to a division between the lower courts, petitioner argues that "[t]he Florida Supreme Court's decision conflicts with this Court's precedents on state sales tax nexus under the due process clause and the dormant commerce clause." Pet. 15 (heading of petitioner's primary argument; alterations omitted). As explained below, that contention misapprehends this Court's precedents.

A. The Decision Below Does Not Conflict With This Court's Precedents Addressing the Limits of State Territorial Jurisdiction.

First, the challenged tax does not "violate[] the fundamental limits of state territorial jurisdiction and sovereignty," Pet. 15 (alterations omitted), as explicated by this Court's precedents. None of the cases petitioner cites (Pet. 15-17) holds that a state *exceeds* the "limits of state territorial jurisdiction and sovereignty" (Pet. 15) by imposing a sales tax on

transactions effectuated by a business located and operating *within* that state's territorial jurisdiction. Some of the cases petitioner cites involve taxes imposed on out-of-state companies. *See Miller Bros. v. Maryland*, 347 U.S. 340, 341 (1954) (addressing whether Maryland could impose a use tax on "a Delaware merchandising corporation which only [sold] directly to customers at its store in Wilmington, Delaware," even though the corporation did "not take orders by mail or telephone"); *Asarco Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 308-09 (1982) (considering "whether the State of Idaho constitutionally may include within the taxable income of a nondomiciliary parent corporation doing some business in Idaho a portion of intangible income . . . that the parent receives from subsidiary corporations having no other connection with the State").

Other cases cited by petitioner do not address sales taxes, like the one here at issue, where an in-state company's role in effectuating the sale in question supplies a readily identifiable nexus to the taxing state. *See Treichler v. Wisconsin*, 338 U.S. 251, 257 (1949) ("hold[ing] that Wisconsin's emergency inheritance tax is invalid insofar as it is measured by tangible property outside Wisconsin"); *Asarco Inc.*, 458 U.S. at 309 ("case involv[ing] corporate income tax" imposed by Idaho on "a nondomiciliary parent corporation"). And some cases on which petitioner relies are still farther afield. *See, e.g.*, *Edgar v. Mite Corp.*, 457 U.S. 624, 626-27 (1982) (addressing provision of the "Illinois Business Take-Over Act" imposing certain notification and registration requirements in connection with takeover offers).

Petitioner's reliance on *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, is particularly misplaced,

since the rationale enunciated in support of that decision affirmatively supports the constitutionality of the challenged tax. There, this Court held that Oklahoma could tax the sale of a bus ticket sold within the state, even when the trip terminated out of state, and even when the majority of the trip was out of state. 514 U.S. 175, 184-200 (1995). Regardless of where the purchased "travel" was delivered, the "sale" took place in Oklahoma, because that is where the company sold the ticket. Even when it leads to future interstate activity, "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale." *Id.* at 186. In this case, the discrete event occurs when petitioner accepts the order, and that happens in Florida.

In short, none of the cases petitioner cites is inconsistent with the Florida Supreme Court's ruling, and some of those cases affirmatively support respondent's position here.

B. The Florida Supreme Court Correctly Determined a Substantial Nexus Supported Florida's Taxation of Retail Sales Made by an In-State Florist.

The dispute in this case concerns the first prong of the *Complete Auto* test—specifically, whether Florida has a substantial nexus with the retail transactions it seeks to tax. Here, petitioner's sole physical presence is in Florida and all of its sales activities took place in Florida. Indeed, everything petitioner did, it did in Florida. Florida's decision to tax an in-state company in such circumstances does not raise concerns under

the dormant Commerce Clause. As this Court has explained, "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989); *see also Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) ("The nexus requirement is met by the business all three taxpayers [] did in California during the years in question.").

Although this Court's dormant Commerce Clause jurisprudence has evolved over time, "[i]t has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Jefferson Lines*, 514 U.S. at 184 (citing *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940)). Accordingly, this Court has upheld a state tax on interstate telephone calls when a resident of that state pays for the call, *Goldberg*, 488 U.S. at 252, a state tax on tickets for interstate bus travel purchased within the taxing state, *Jefferson Lines*, 514 U.S. at 184, and a tax on fuel sold to airlines within the state, even when consumed primarily out of state, *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 4 (1986). In each of these instances, the Court upheld taxes on local sales, notwithstanding the substantial interstate aspects of the transaction more broadly viewed.

Quite unlike the petitioner here, the entity subject to taxation in *National Bellas Hess, Inc. v. Dep't of Revenue, Ill.*, maintained no physical presence in the taxing state—no office or property, no agents or sales solicitors, and no telephone listing. 386 U.S. 753, 753-55 (1967). There is, of course, a "'sharp distinction . . .

between mail order sellers with retail outlets, solicitors, or property within (the taxing) State, and those (like Bellas Hess) who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.'" *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 559 (1977) (quoting *Bellas Hess*, 386 U.S. at 758). Therefore, in *National Geographic Society*, the Court had no trouble concluding that the taxpayer's "continuous presence in California in offices that solicit advertising for its magazine provides a sufficient nexus to justify that State's imposition" of the tax. *Id.* at 562. Although the Court declined to hold that the nexus requirement was satisfied by *any* presence, no matter how small, it found that the taxpayer's maintenance of offices and activities there was sufficient. *Id.* at 556. Here, petitioner's entire operation was within Florida. *See supra* at 3*; see also Roger Dean Enters., Inc. v. State, Dep't of Revenue*, 387 So. 2d 358, 362 (Fla. 1980) (""The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State.'" (quoting *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 437 (1980))); *TA Operating Corp. v. State, Dep't of Revenue*, 767 So. 2d 1270, 1274 (Fla. Dist. Ct. App. 2000) (noting that in *Quill* and *Bellas Hess*, "[t]he nexus necessary to tax the state's own residents' use was never in doubt").

Thus, whatever limit *Quill* and *Bellas Hess* may place on Florida's ability to tax an out-of-state entity with no Florida presence that directs mail-order sales to Florida, they are no obstacle to Florida's taxing a Florida resident. *See D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 33 (1988) ("This argument ignores . . . Holmes' significant economic presence in

Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business. We thus see little similarity between the mail-order shipments in *National Bellas Hess* and Holmes' activities in this case.").

Even putting aside the petitioner's residence in Florida, the fact that it consummates flower sales in Florida independently provides the necessary nexus. "[E]very person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state." Fla. Stat § 212.05. "For the exercise of such privilege, a tax is levied on each taxable transaction or incident . . . ." *Id.* § 212.05(1). Petitioner's sales are Florida sales. Under Florida law, the retail sale is the initial receipt of an order from a customer by a florist. *See supra*. That the sale leads to a chain of events resulting in delivery elsewhere does not change this. *See Mobil Oil Corp.*, 445 U.S. at 437 (""The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."" (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45 (1940))).

In *Jefferson Lines*, this Court held that Oklahoma could tax the sale of a bus ticket sold within the state, even when the trip terminated out of state, and even when the majority of the trip was out of state. 514 U.S. at 184-200. Regardless of where the purchased "travel" was delivered, the "sale" took place in Oklahoma, because that is where the company sold the ticket. Even when it leads to future interstate activity, "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale."

Id. at 186. In this case, the discrete event occurs when the petitioner accepts the order, and that happens in Florida.

In sum, there is nexus aplenty here, and the Florida Supreme Court's decision does not warrant review.

C. The Florida Supreme Court Correctly Rejected Petitioner's Due Process Claim.

As this Court has explained, the Commerce Clause inquiry encompasses due process concerns:

> The *Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well the due process requirement that there be "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise."

Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 373 (1991) (quoting *Mobil Oil Corp.*, 445 U.S. at 436-37, and citing *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*, 490 U.S. 66, 80 (1989) (Scalia, J., concurring)).

Here, because the Florida Supreme Court correctly determined that the challenged assessment satisfied all four prongs of the *Complete Auto* test, the assessment necessarily satisfied due process. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.7 (1992) (explaining that the *Complete Auto* test analysis encompasses due process requirements, which "suggest[s] that every tax that passes contemporary

Commerce Clause analysis is also valid under the Due Process Clause.").

With regard to state taxation, the Due Process Clause only "'requires 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 must be rationally related to 'values connected with the taxing State.'" *Id.* at 306 (citations omitted) (quoting *Miller Bros. Co.*, 347 U.S. at 344-45; *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)). This "minimum connection" inquiry is "flexible" and focuses on the taxpayer's contacts with the taxing State. *Id.* at 307 (discussing the *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), standard of whether maintenance of a suit would offend "traditional notions of fair play and substantial justice").

As the Florida Supreme Court (and Fourth District Court of Appeal) determined, the petitioner's business activities and physical presence provide a more-than-minimum contact with the State. Pet. App. 20a-21a. The entirety of its retail sales activities occurred in Florida.

It is irrelevant that the flowers, gift baskets, and other tangible personal property in this case were delivered outside of the state, because Florida's sales tax is imposed on retail sales transactions, not the tangible personal property which is the subject of those transactions. *See generally* Fla. Stat. § 212.05 ("[E]very person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . . For the exercise of such privilege,

a tax is levied on each taxable transaction or incident . . . ." (emphasis added)); *see also* Pet. App. 8a-9a ("[T]he administrative law judge and the Department are correct that the statute does not place a tax on the items sold, but on the sales transaction itself.")

It is also irrelevant that those receiving the flowers resided out of state. Petitioner argues that the tax violates due process because its out-of-state customers lack any minimum contacts with Florida. Pet. 25. First, without satisfying third-party standing requirements, petitioner cannot seek relief based on the legal rights or interests of third-parties.[2] Second, just because flowers are delivered out of state does not necessarily mean the purchasers reside out of state. Flower deliveries, of course, are frequently made to those other than the purchaser. Third, Florida law imposes sales tax liability on Florida florists for sales to retail customers. *See* Fla. Stat. § 212.05(1)(*l*) ("*Florists* located in this state are liable for sales tax on sales . . . ." (emphasis added)).

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[2] "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Only limited exceptions exist. To establish third-party standing, a litigant "must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, the litigant must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* (citations omitted). Petitioner has not identified any close relationship with its customers or any reason why the customers are incapable of protecting their own interests.

There is more than just a minimum connection between Florida and petitioner's sales activities. Florida's Florist Sales Tax satisfies due process.

II. ABSENT A DISAGREEMENT AMONG THE LOWER COURTS OR A CONFLICT WITH THIS COURT'S PRECEDENTS, THE IMPORTANCE OF THE QUESTION PRESENTED DOES NOT INDEPENDENTLY WARRANT THIS COURT'S REVIEW.

Petitioner claims that this case has broad significance for electronic commerce insofar as the decision below allows a state to collect taxes on the sale of tangible personal property when such property does not enter the taxing state. Pet. 26-31. That argument does not provide a persuasive basis for granting certiorari in this case.

Even if petitioner's claim had merit, it is far from clear that the alleged error of which petitioner complains is sufficiently important to warrant this Court's review. At bottom, petitioner's claim is based on its characterization of the challenged assessment as a tax on the sale of tangible personal property. *See, e.g.*, Pet. 12 ("This Court should grant certiorari to confirm the important principle that a State cannot collect sales tax on transfers of tangible personal property that occur wholly within another State or Nation."). This Court's dormant commerce clause analysis looks beyond the "formal language of the tax statute" to its "practical effect," and when that practical effect is upon an "activity with a substantial nexus in the taxing state," the nexus requirement is satisfied. *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). The reason for this

practical analysis is to avoid having the jurisprudence serve just as a "trap for the unwary draftsman." *See id.*

That is all a decision for petitioner here would be, and its effect would be fleeting. Under this Court's cases, a State is free to tax, as a tax on gross receipts on services, "sales with at least partial performance within the taxing State," with the tax assessed on the transaction's "entire gross receipts." *Jefferson Lines*, 514 U.S. at 189. Petitioner has never disputed that the service it performs in fielding orders and arranging for delivery by local florists is conducted from its location in Wellington, Florida. Pet. App. 2a; *see also* Pet. 31 (acknowledging that, even if this Court were to accept petitioner's asserted limit on the authority of a state to impose sales taxes, states would "maintain their authority to collect other taxes on a domestic corporation like American Business, such as income taxes, without such a stringent analysis on the location of the corporation's sales"). Thus, even if the challenged tax is struck down, Florida could likely remedy any such formal defect by restyling the tax as one upon the gross receipts of the services petitioner provides from Florida. So, too, could any other State that imposes sales tax under similar circumstances.

To the extent that this case implicates an important and unresolved issue of law, further percolation is warranted. As petitioner recognizes, "[a]t least 36 other States and the District of Columbia have enacted sales taxes on flowers, which are of varying degrees of similarity to Florida's." Pet. 26. In light of the abundance of similar state statutes, this Court will have ample opportunity to consider any arguable infirmity in sourcing laws of the kind at issue here. Further

percolation might be of particular use in focusing issues relevant to the dormant Commerce Clause issue, potentially enriching the analysis on all four of the *Complete Auto* factors, not just the nexus issue that petitioner presents here.

The absence of authority from any other jurisdiction also demonstrates that there is no urgent need for the Court to intervene in this area. In all the jurisdictions, over all the years that these laws have been in place, petitioner has identified no other florist or floral customer that has seen fit to challenge similar floral tax regimes under the dormant Commerce Clause. The lack of such litigation is instructive, as states have treated floral sales in this manner for decades. *See, e.g.*, Ala. Admin. Code. r. 810-6-1-.67 (adopted 1965); 103 Ky. Admin. Regs. 27:050 (adopted 1974); 61 Pa. Code § 31.24 (adopted 1972).

This lack of controversy over floral sales taxation practices may well stem from the fact that, by and large, taxing based on the location of the retailer is "preferred by the industry." Minn. H. Rep., House Research Bill Summary, H.F. 20, at 10 (July 19, 2011), *available at* http://www.house.leg.state.mn.us/hrd/bs/87/2011-1/hf0020.pdf. Allowing a seller to collect tax based on its own jurisdiction's rates greatly simplifies reporting and collection obligations. As the Court has previously acknowledged, the opposite practice of requiring multistate sellers to collect and remit tax in multiple states risks "entangl[ing sellers] in a virtual welter of complicated obligations." *Quill Corp.*, 504 U.S. at 313 n.6 (quoting *Bellas Hess*, 386 U.S. at 796-60).

Taxing floral sales like Florida and other jurisdictions have chosen to do tends to reduce these regulatory burdens on interstate commerce, not exacerbate them. The emerging consensus that floral sales should be remitted by the seller to the seller's jurisdiction, not the jurisdiction of the buyer or the recipient, tends to ensure uniform, uncomplicated treatment consistent with dormant Commerce Clause values. In other words, this Court should not disrupt established state taxing practice absent some demonstrated problem or injustice of a kind requiring judicial intervention. So, far from burdening interstate commerce, the prevailing approach promotes it by eliminating the uncertainty surrounding taxation of flower delivery transactions.

Lacking any present controversy over floral sales taxation, petitioner posits hypothetical future tax statutes concerning sales taxation of products other than flowers. If the decision below stands, petitioner suggests, the State of Washington might tax all of Amazon.com's online sales, or the domiciles of online food delivery services might tax all sales through those websites, regardless where the restaurants preparing the food are located. Such hypotheticals do not supply a need for this Court's review. There are obvious practical and political reasons that State legislatures might refrain from heaping tax obligations upon businesses located within their borders, even as to sales to out-of-state customers. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (recognizing that "[t]he existence of major in-state interests . . . is a powerful safeguard against legislative abuse"). States have enforced floral sourcing laws like the one at issue here

for decades, *see supra* at 9, and petitioner does not allege that such states have ever adopted the hypothetical taxes petitioner fears. There is no reason to believe that the decision below will prompt the widespread imposition of such taxes.

Prematurely addressing this issue would also impinge on Congress and the states' roles in determining appropriate taxation of interstate commerce. While this Court's dormant Commerce Clause jurisprudence is alert to the risk of economic Balkanization, it also "respect[s]" the "cross-purpose" of "federalism favoring a degree of local autonomy." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). Should states' exercise of autonomy generate burdens that are "intolerable or even undesirable," "Congress has the power to protect interstate commerce." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637 (1981) (White, J., concurring). Indeed, it is Congress, not the courts, to which the Constitution assigns the primary role to "regulate commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. As the Court has previously recognized, Congress has "the capacity to investigate and analyze facts beyond anything the Judiciary could match, joined with the authority of the commerce power to run economic risks that the Judiciary should confront only when the constitutional or statutory mandate for judicial choice is clear." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 309 (1997). In light of the rapidly evolving nature of electronic commerce, Congress is particularly well-positioned to assess the costs and benefits of state sourcing rules.

In sum, the asserted importance of the question presented does not warrant this Court's review. It is far

from clear that the ruling petitioner seeks would have much real-world impact; and, even if it would, further percolation is in order before this Court resolves any important and unresolved issues concerning the scope of state taxing authority in the age of electronic commerce. A cautious approach is particularly prudent here, since the prevailing state practice appears to advance rather than undermine the policies underlying this Court's dormant Commerce Clause jurisprudence. In any event, no constitutional or other impediment prevents Congress from addressing any arguable costs or problems with sourcing rules of the kind at issue here, and the national legislature is in a particularly good position to assess the economic justification for such rules.

III. THIS CASE DOES NOT SUPPLY AN APPROPRIATE VEHICLE FOR RECONSIDERING *QUILL*, AND A DECISION TO OVERRULE THAT CASE WOULD NOT HELP PETITIONER HERE.

Petitioner argues that this Court's review is warranted because this is an "'appropriate case . . . to reexamine *Quill* and *Bellas Hess*,'" Pet. 5, 14 (quoting *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)). That contention collapses under the slightest scrutiny.

In concluding that the Florist Sales Tax did not run afoul of the Commerce Clause, the Florida Supreme Court distinguished *Quill* and *Bellas Hess* from the present case, determining that Florida could tax the transactions at issue because they were sales made by an in-state retailer. Because this case does not involve a state's attempt to impose tax obligations upon

an out-of-state retailer, it is an inappropriate vehicle for revisiting *Quill* and *Bellas Hess*.

In *Complete Auto*, this Court established the test for evaluating a state tax's compatibility with the dormant Commerce Clause. A court will sustain a state tax if the tax "[1] 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." 430 U.S. at 279. The dispute in this case concerns the first prong and whether Florida has a substantial nexus with the retail transactions it seeks to tax.[3]

Quill addressed the *Complete Auto* nexus inquiry in the distinct context of whether a state could collect taxes from sellers who do *not* reside within the state. Specifically, this Court held that a state could not "require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." 504 U.S. at 301. In doing so, the Court reaffirmed its decision from twenty-five years earlier "that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Id.* at 311 (citing *Bellas Hess, Inc.*, 386 U.S. at 753).

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[3] Before the Florida Supreme Court, the petitioner did not dispute that the Florist Sales Tax satisfies the remaining three prongs of *Complete Auto*. Pet. App. 12a.

Although the Florida Supreme Court discussed the facts and general principles of both *Quill* and *Bellas Hess*, Pet. App. 12a-14a, it in no way "relied on this Court's decision in *Quill*," Pet. 13, to uphold Florida's Florist Sales Tax. Indeed, the decision below did the exact opposite in distinguishing those cases from the present case. Pet. App. 13a. Specifically, the Florida Supreme Court acknowledged that *Quill* "reaffirmed the *Bellas Hess* distinction . . . between businesses that have a physical presence in the state and those whose only contacts with the state are by mail or common carrier." *Id.* In light of that distinction, "without any physical presence in Florida," the State could not impose sales tax obligations on a retailer without violating the Commerce Clause. *Id.* at 14a. In this case, however, the petitioner "does have a physical presence in Florida—it is headquartered in Wellington, Florida, and has been doing business in Florida since 2001," *id.*, rendering *Quill* and *Bellas Hess* inapplicable.

Petitioner's argument concerning *Quill* does not just misapprehend the lower court's reasoning; it refutes itself. As petitioner repeatedly recognizes, "this case presents *the inverse circumstances* from those presented in *Quill*," Pet. 32 (emphasis added); *id.* at 22 ("[T]he circumstances in *Quill* actually present the inverse of the circumstances presented in this case."). A case presenting a materially different factual and legal scenario does not supply any occasion to revisit this Court's ruling in *Quill*; still less could a case presenting the concededly opposite set of circumstances be thought to present an "excellent vehicle," Pet. 32, for doing so.

In short, doubts concerning the continuing validity of *Quill* do not support petitioner's position here. Indeed, a decision to overrule *Quill* would expand rather than contract the authority of the states to tax economic transactions with out-of-state components. *See Brohl*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (suggesting that *Quill* be reexamined because it "now harms States to a degree far greater than could have been anticipated earlier"). As the court below recognized, no such expansion of the states' traditional taxing authority is needed to uphold Florida's unremarkable tax on an in-state business's in-state activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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