No. __-____

IN THE
Supreme Court of the United States

OVERSTOCK.COM, INC.,
Petitioner,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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August 22, 2013

QUESTION PRESENTED

In *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992), this Court held that the Commerce Clause prohibits States from exercising taxing authority over out-of-state businesses that "lack[] a physical presence in the taxing State." *Id.* at 312. The New York Court of Appeals in this case upheld a state statute requiring out-of-state Internet retailers that concededly have no agents, employees, or offices in New York to collect and remit sales tax. That judgment deepens a four-to-four division among state supreme courts on the following question presented:

Whether a business that has no employees or operations in a State is deemed to be physically present, and therefore subject to the State's taxing power, merely by entering into contractual relationships with residents of the State who are not its legal agents.

PARTIES TO THE PROCEEDINGS

Petitioner Overstock.com, Inc. was a plaintiff and appellant in the proceedings below.

Respondents New York State Department of Taxation and Finance; the State of New York; and Thomas H. Mattox, in his official capacity as Commissioner of the New York State Department of Taxation and Finance, were defendants and respondents in the proceedings below.

Amazon.com LLC and Amazon Services LLC (collectively, "Amazon") were plaintiffs and appellants in the proceedings below. We have been advised that Amazon also is filing a petition for a writ of certiorari seeking review of the same decision below; it therefore is a respondent before this Court in connection with this petition.

When this action was originally filed, the parties also included the Governor of the State of New York, who at the time was David A. Paterson. The Governor was dismissed pursuant to a stipulation among the parties dated October 13, 2011.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Overstock.com, Inc. states the following:

Overstock.com, Inc. does not have a corporate parent. Fairfax Financial Holdings Limited owns more than 10% of the corporation.

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Petitioner Overstock.com, Inc. ("Overstock") respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals in this case.

INTRODUCTION

More than two decades ago, in *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992), this Court held that the Commerce Clause prohibits States from requiring out-of-state businesses that "lack[] a physical presence in the taxing State" to collect State sales tax. *Id.* at 312. In doing so, it rejected the argument that mere economic contacts with a State are sufficient to create the "substantial nexus" necessary to bring an out-of-state seller within the State's taxing power. *Id.* Rather, *Quill* reaffirmed the principle, established 25 years earlier in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), that a bright-line physical-presence test furthers the Commerce Clause's purpose of preserving "a national economy free from . . . unjustifiable local entanglements." *Id.* at 760.

This case concerns New York's attempt to increase its tax revenues by circumventing *Quill*'s bright-line physical-presence test. The statute at issue imposes tax-collection duties on out-of-state retailers that, like Overstock, are not physically present in New York. Despite their lack of physical presence, the statute provides that such retailers are presumptively subject to New York's taxing jurisdiction if they engage in "affiliate marketing." Affiliate marketing is a form of advertising in which an online retailer such as Overstock enters into a contract with an affiliate who operates its own, independent website. The affiliate agrees to post on its own website a "click-through" advertising link that directs viewers to the retailer's website. If the viewer makes a purchase after having "clicked-through" that advertising link, the retailer pays the website owner a percentage of the resulting sales revenue.

A divided New York Court of Appeals held that the statute does not violate the Commerce Clause as interpreted by *Quill*. Although it acknowledged that the statute targets online retailers that "conduct their operations without maintaining a physical presence" in New York, the court nonetheless found the Commerce Clause satisfied by the "physical presence of [the] resident website owner[s]" whom those retailers pay for affiliate marketing. App. 8a. But the court did not find that the website owners' presence is attributable to the retailers in any legal sense. Indeed, such website owners are not agents of the retailers with whom they contract; they do not act on behalf of those retailers, nor can the retailers control their actions. Instead, the court simply "deemed" the physical presence of the website owners sufficient because the website owners might encourage people to "mak[e] purchases" from the retailers "through their [advertising] links." App. 8a-9a.

The decision below demands this Court's review for several reasons. First, it deepens an entrenched split among state courts of last resort regarding when a State may use the presence of a third party to justify exercising taxing authority over an out-of-state seller. Four state courts of last resort have held that the activities of an in-state third party render an out-of-state seller physically present in a State only if the third party is the seller's agent whose presence is thus legally attributable to the seller. Three other state supreme courts, however, have rejected such a requirement and adopted a looser and less precise test. The decision below puts New York in the latter camp and intensifies this well-developed split.

Second, as the dissent below observed, the decision below "nullif[ies]" *Quill*. App. 14a. Allowing a State to exercise taxing authority over out-of-state sellers based on the activities of third parties who are not their legal agents functionally abrogates the physical-presence requirement. Indeed, the decision below essentially adopted the very reasoning that *Quill* rejected – namely, that a State can exercise taxing authority over an out-of-state seller based on the economic effects of the seller's conduct.

Third, this case has "far-reaching ramifications" for the "expansion of cyberspace" and "commerce over the Internet." App. 19a. New York is a critical commercial market for online retailers, and its effort to impose tax obligations on out-of-state online retailers will interfere significantly with e-commerce nationwide. Thus, even the court below recognized that the policy considerations raised by this case implicate questions "for the United States Supreme Court to consider." App. 8a.

OPINIONS BELOW

The opinion of the New York Court of Appeals (App. 1a-17a) is reported at 987 N.E.2d 621. The opinion of the New York Supreme Court, Appellate Division, First Department (App. 18a-49a), is reported at 913 N.Y.S.2d 129. The opinion of the New York Supreme Court, New York County (App. 50a-53a), is not reported.

JURISDICTION

The New York Court of Appeals entered its judgment on March 28, 2013. On June 12, 2013, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including August 23, 2013. App. 94a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Relevant provisions of the New York Tax Law are reproduced at App. 72a-80a.

STATEMENT

1. Overstock is a Delaware corporation whose principal place of business is in Utah. C.A. App. 38 (¶ 2). Overstock possesses no property in New York and employs no New York residents. *Id.* at 41-42 (¶ 24). It sells merchandise over the Internet and ships purchases to customers nationwide solely via U.S. mail or common carriers. *Id.* at 41 (¶ 24).

Overstock's national marketing strategy includes an Affiliate Program, which allows third parties ("Affiliates") to advertise Overstock.com on their own websites. *Id.* at 42 (¶ 25). Affiliate advertisements consist of electronic links and banners that direct users who click on them to Overstock.com. *Id.* (¶¶ 26-27). Overstock pays many Affiliates based on the volume of purchases made by customers who access Overstock.com via the Affiliate's website. *Id.* (¶ 27). When a customer views an Affiliate's website, navigates to Overstock.com through the Affiliate's advertising link, and then makes a purchase, Overstock pays the Affiliate a percentage of its revenue from the sale.

Overstock neither authorizes nor instructs Affiliates to solicit business on its behalf. *Id.* (¶ 28). Its

Master Agreement with Affiliates prohibits Affiliates from "mak[ing] any representations, warranties or other statements concerning [Overstock] . . . except as expressly authorized." *Id.* at 183 (§ 2.2). The parties have "no authority to obligate or bind the other in any respect." *Id.* at 188 (§ 10.1). And sales generated through Affiliate advertising links are "exclusively between" Overstock and its customers; Overstock retains the "sole right and responsibility for processing all orders." *Id.* at 186 (§ 3.3).

2. New York requires "vendor[s]" to collect and remit sales tax on sales of taxable goods to New York residents. N.Y. Tax Law §§ 1131(1), 1132(a)(1). The term "vendor" has long encompassed persons who "regularly or systematically solicit[] business" in New York by "any . . . means" that "satisfies the nexus requirement of the United States constitution." *Id.* § 1101(b)(8)(i)(E). Relevant here, a "vendor" also has long included sellers that "solicit[] business" in New York either "by employees, independent contractors, agents or other representatives," *id.* § 1101(b)(8)(i)(C)(I), or "by distribution of . . . advertising matter" if the seller "has some additional connection with the state which satisfies the nexus requirement of the United States constitution," *id.* § 1101(b)(8)(i)(C)(II).[1] Those provisions appear designed to exercise the State's taxing authority to the constitutional limit under the Commerce Clause.

In April 2008, the New York legislature expanded the definition of "vendor." *See* 2008 N.Y. Laws ch.

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[1] A seller also can become a vendor by, among other things, "maintaining a place of business in the state," N.Y. Tax Law § 1101(b)(8)(i)(B); or "deliver[ing] . . . property or services in this state by means other than the United States mail or common carrier," *id.* § 1101(b)(8)(i)(D).

57, pt. OO-1, § 1. The amendment (the "Tax") sought to extend New York tax-collection duties to out-of-state online retailers. C.A. App. 146-47, 159. The Tax provides that a seller using affiliate marketing "shall be presumed to be soliciting business" in New York and thus qualify as a "vendor" under § 1101(b)(8)(i)(C)(I). N.Y. Tax Law § 1101(b)(8)(vi).

Three requirements trigger the presumption. First, a seller must "enter[] into an agreement" with a New York resident under which the resident "directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller." *Id.* Second, the agreement must provide the resident "a commission or other consideration" for the referrals. *Id.* Third, the seller's gross receipts over the previous four quarters from sales to New York customers "who are referred to the seller" must exceed "ten thousand dollars." *Id.* Once the presumption is triggered, the out-of-state seller can rebut it only by submitting "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 satisfies the Commerce Clause's "nexus requirement." *Id.*

Shortly after the Tax's enactment, the New York State Department of Taxation and Finance ("DTF") issued a bulletin stating that an agreement with a New York resident merely to "place an advertisement" does not trigger the Tax's presumption. *See* Technical Services Bureau Memorandum ("TSB-M") 08(3)S (May 8, 2008) (App. 84a). DTF included within that safe harbor agreements that pay website owners "based only on the number of clicks" on their advertising links. *Id.* (App. 87a). Thus, if a retailer pays a website owner for every customer who clicks on the posted link – regardless of whether the customer then buys something from the retailer – the retailer is exempt from the presumption. But a retailer that pays website owners "based on the volume of completed sales generated" through the link falls outside the safe harbor and is subject to the presumption. *Id.* (App. 84a).[2]

3. After New York enacted the Tax, Overstock suspended its relationship with its New York affiliates. C.A. App. 194 (¶ 29). It then filed this action in the Supreme Court of the State of New York, alleging facial and as-applied violations of the Commerce and Due Process Clauses of the United States Constitution. *Id.* at 37-52. The trial court dismissed Overstock's claims in their entirety. App. 50a-53a.[3]

The Appellate Division affirmed the dismissal of Overstock's facial challenges but reversed the dismissal of Overstock's as-applied challenges to permit additional evidence regarding whether Overstock's Affiliates were "soliciting business or merely advertising on [its] behalf." App. 42a. Overstock

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[2] DTF subsequently issued another bulletin stating that an online retailer can rebut the Tax's presumption by including language in its affiliate-marketing contracts "prohibit[ing]" website owners "from engaging in any solicitation activities in New York State that refer potential customers" to the retailer, and by collecting annual "signed certification[s]" attesting that the website owners have engaged in no such solicitation. TSB-M-08(3.1)S (June 30, 2008) (App. 91a). But if DTF subsequently determines upon audit that, notwithstanding the contractual prohibition and certification, website owners "are actually engaging in solicitation activities," the seller must collect sales tax. *Id.* (App. 93a).

[3] The trial court dismissed Overstock's complaint "[f]or the reasons stated" in a separate opinion dismissing allegations by Amazon.com LLC ("Amazon"). App. 52a; *see* App. 54a-69a. The Appellate Division and the Court of Appeals heard Overstock's appeal jointly with Amazon's.

subsequently discontinued its as-applied challenges, thereby permitting an appeal to the New York Court of Appeals. C.A. App. x.

4. The Court of Appeals affirmed in a divided opinion. The majority acknowledged that the Commerce Clause imposes a "physical presence test." App. 7a-8a. It further observed that the online retailers subject to the Tax, similar to the mail-order businesses at issue in *Quill*, "conduct their operations without maintaining a physical presence in a particular state." App. 8a.

Nevertheless, the majority found the Tax facially valid under the Commerce Clause based on the "physical presence of [the] resident website owner[s]" with whom the retailers enter affiliate marketing arrangements. *Id.*[4] The majority acknowledged that the physical presence of the resident website owners would be insufficient if the seller paid them merely "to post passive advertisements on their websites." App. 9a. It concluded, however, that compensating

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[4] The court below acknowledged the existence of "some dispute as to the appropriate standard for evaluating a facial challenge." App. 6a (discussing the "no set of circumstances" test and the "plainly legitimate sweep" test). The majority declined to resolve that dispute, however, because it held that the Tax is valid under either test. *Id.* This Court likewise would not need to resolve the issue here, because the Tax facially violates *Quill* under either standard. Prior to the enactment of the Tax, New York law already imposed sales-tax-collection duties on sellers who themselves engage in solicitation in the State. *See* N.Y. Tax Law § 1101(b)(8)(i)(C), (E). The only effect of the Tax is therefore to extend New York's sales-tax jurisdiction to out-of-state sellers whose sole nexus with the State arises from affiliate marketing arrangements with New York website owners. *See supra* pp. 5-6. Because such marketing arrangements do not make sellers physically present under *Quill*, the Tax is facially invalid under any standard.

the website owners based on the amount of sales referred through their websites creates an incentive for the website owners to "urg[e] their local constituents to support them by making purchases through their [advertising] links." *Id.* The court thus concluded that the physical presence of the resident website owners should be "deemed" equivalent to the physical presence of the seller, because it could discern "no reason why" a seller that "pay[s] New York residents" on a per-sale basis for advertising "should not shoulder the appropriate tax burden." *Id.*[5]

Judge Smith dissented. He observed that paying a resident website owner on a per-sale basis does not transform him into a "local sales agent" of the seller. App. 13a. The resident website owners operate independent of and wholly outside the control of the seller: they might "solicit business for themselves; they encourage people to visit their websites, just as a newspaper owner would seek to boost circulation." *Id.* But "there is no basis for inferring that they are actively soliciting *for the out-of-state retailers*." *Id.* (emphasis added). Thus, the Tax's presumption – that paying website owners to post advertising links transforms them into "sales agent[s]" – would "nullify the rule that advertising . . . is not the equivalent of physical presence." App. 14a. And because a "statutory presumption cannot . . . permit a state to do what the United States Constitution forbids," *id.*, Judge Smith concluded that the Tax "is invalid under the Commerce Clause," App. 16a.

[5] The Court of Appeals affirmed the dismissal of Overstock's Due Process Clause claim for similar reasons. App. 10a-12a.

REASONS FOR GRANTING THE PETITION

Under the Commerce Clause, a State may not require sellers that maintain no "physical presence in the taxing State" to collect sales tax. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 312 (1992). The decision below eviscerates that principle by allowing States to exercise taxing authority over out-of-state sellers based solely on the physical presence of third parties who are not agents of the sellers. Certiorari is warranted because that decision deepens a mature conflict among state high courts, disregards this Court's precedents, and raises questions of critical importance to the national economy.

I. THE DECISION BELOW DEEPENS A CONFLICT REGARDING WHETHER STATES MAY EXERCISE TAXING AUTHORITY OVER OUT-OF-STATE RETAILERS BASED ON THE PRESENCE OF IN-STATE THIRD PARTIES WHO ARE NOT THE RETAILERS' AGENTS

A. State Courts Of Last Resort Are Divided Over Whether The In-State Activities Of Non-Agents Can Satisfy *Quill*'s Physical-Presence Requirement

State courts have provided inconsistent answers to the "difficult question of when the physical presence of third parties should be attributed to an out-of-state party" under *Quill*. *KFC Corp. v. Iowa Dep't of Rev.*, 792 N.W.2d 308, 327 (Iowa 2010) (noting that the "cases are hardly uniform" on the question), *cert. denied*, 132 S. Ct. 97 (2011). On one hand, several courts have held that the in-state activities of third parties who are not agents of the seller do not satisfy *Quill*'s physical-presence requirement, because the presence of a non-agent is not legally attributable to the seller. Under these cases, a corporation is physically present in a State only if its agents are present in the State.

By contrast, a number of other state supreme courts have rejected the requirement of an agency relationship. Those courts have adopted a far more permissive test, holding that a State can exercise taxing authority over an out-of-state seller based on its mere economic affiliation with an independent third party in the State. The decision below embraced that position here by upholding New York's imposition of tax-collection duties on retailers that merely enter into contracts with resident website owners who indisputably are not their agents.

1. The highest courts of four States have held that the Commerce Clause precludes States from exercising taxing authority over out-of-state businesses based on the in-state activities of non-agents

Courts of last resort in Mississippi, Arkansas, Maryland, and Ohio have held that, in the absence of an agency relationship, the in-state activities of third parties cannot render an out-of-state seller physically present under *Quill*. Those holdings span a range of circumstances closely analogous to the affiliate relationships that the court below found sufficient to impute to Overstock a "physical presence" in New York.

In *Mississippi State Tax Commission v. Bates*, 567 So. 2d 190 (Miss. 1990), the Mississippi Supreme Court invalidated a sales-tax assessment against an Alabama carpet seller because the seller had no "agents or employees" who "conducted business in the State." *Id.* at 193. The court found that the State lacked authority to assess sales tax against the carpet retailer despite the fact that it routinely sold carpets to Mississippi residents and "recommend[ed]" local Mississippi businesses to install its customers' carpets. *Id.* at 191. The seller often charged the installers' fees directly to the customer; it would collect and hold those fees "for the installers to pick up." *Id.* The court held that the seller's relationship with the local installers created "an insufficient nexus" for Commerce Clause purposes because the installers were not the seller's agents: "the installers . . . were not subject to the control of [the seller] in the details or final results of their work" and thus were "not agents or employees" of the seller. *Id.* at 192-94.

Similarly, the Arkansas Supreme Court refused to find taxing authority over a New Jersey bookseller that relied on Arkansas school teachers to facilitate sales to Arkansas students. *See Pledger v. Troll Book Clubs, Inc.*, 871 S.W.2d 389 (Ark. 1994). The teachers' involvement in the sales process was substantial: they "collect[ed] student orders," "distribute[d] the books" to the students, and "receiv[ed] cash or merchandise 'bonuses'" pegged to the "size of the order." *Id.* at 390. Nevertheless, the court held that the "use of teachers to solicit book orders" did not create a sufficient nexus under *Quill*, because the seller did not "authorize[] the teachers to bind it" and had no ability to "control the teachers' actions." *Id.* at 391-92. Without "authorization and control," there was no "agency relationship" between the teachers and the seller, and thus no basis to impute the teachers' physical presence to the seller. *Id.* at 392-93.[6]

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[6] The court noted that it "d[id] not reach" the suggestion made at oral argument that "'substantial nexus' might be found with proof of something less than agency." *Troll*, 871 S.W.2d at 392. But the court's holding functionally repudiated that

The Maryland Court of Appeals likewise found no Commerce Clause nexus with respect to sales by an out-of-state telecommunications provider, even though the seller had a contractual relationship with AT&T Communications of Maryland, Inc. ("AT&T Maryland"), an in-state corporation, to provide billing and other services. *See AT&T Communications of Maryland, Inc. v. Comptroller of Treasury*, 950 A.2d 86 (Md. 2008). The court held that AT&T Maryland's presence could be attributed to the seller – thus making the seller physically present in the State – only if AT&T was a "co-vendor with, or agent for, the information providers." *Id.* at 96 n.7. The court found that AT&T Maryland was not such an agent: although vendors paid AT&T for "transport, dispute resolution, and billing/collection services," AT&T lacked the "vested interest in the success of the contracting information vendors' ventures" necessary to create an agency relationship. *Id.* at 97-98. Accordingly, the court ruled that the tax contravened

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suggestion. It declined to follow a California decision upholding "almost an identical" tax in large part because that decision predated *Quill* and conflicted with its "bright-line physical presence test." *Id.* If the non-agency relationship present in both cases could have complied with *Quill*, that distinction would have made no difference. Thus, courts have recognized that *Troll* held that a seller's non-agency relationship with in-state third parties does not satisfy *Quill*. *See In re Scholastic Book Clubs, Inc.*, 920 P.2d 947, 958 (Kan. 1996) ("*Scholastic I*") (*Troll* "observed that unless the State could prove a formal agency relationship . . . Troll lacked the 'substantial nexus' required by the federal Constitution"); *Scholastic Book Clubs, Inc. v. Michigan Dep't of Treasury*, 567 N.W.2d 692, 695-96 (Mich. Ct. App. 1997) ("*Scholastic II*") ("agree[ing]" with *Troll* that seller's "contacts with Michigan teachers do not give rise to an agency relationship" and thus fail "the requirement of *Quill*").

Quill and *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). 950 A.2d at 99.

Finally, in *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995), the Ohio Supreme Court held that the presence of an affiliated corporation in the State cannot satisfy *Quill* because the presence of such an affiliate, unlike that of an agent, is not legally attributable to the seller. The State argued that Folio, a mail-order clothing seller, was physically present by virtue of its corporate "affiliation" with in-state retail stores that "accept[ed] Folio's returns and distribut[ed] Folio's catalogs." *Id.* at 697. The court rejected that argument because Folio and its retail affiliate were "separate and distinct legal entities." *Id*. at 696. Although the affiliate accepted returns of merchandise purchased directly from Folio, it did so "according to its policy, not Folio's," and it did not "own or operate an in-state place of business for Folio." *Id.* at 697.[7]

In addition to these four state courts of last resort, several lower state and federal courts have refused to find nexus based on the activities of in-state third

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[7] The Connecticut Supreme Court reached the same conclusion on comparable facts, holding that Folio's affiliation with a "separate and independently functioning corporation" did not create Commerce Clause nexus. *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 674 (Conn. 1991). Because there was no agency relationship between Folio and its affiliate, the court held that the two could not be "treated as one enterprise for the purposes of establishing a nexus for taxation." *Id.* at 672; *see id.* at 673 n.10 (noting that corporate formalities can be "ignored" where "subsidiary is mere agent or instrumentality of parent"). And, after discounting the physical presence of Folio's affiliate, Folio's only "contacts" with Connecticut were "through the United States mail and common carriers" and thus insufficient to establish nexus. *Id.* at 676.

parties not legally attributable to the out-of-state seller. *See St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575, 580-81 (E.D. La. 2007) (no "attributional nexus" between online seller and affiliate retailer where both were "separate corporate entities"); *Scholastic II*, 567 N.W.2d at 695-96 (no "physical presence" because seller's "contacts with Michigan teachers do not give rise to an agency relationship"); *Current, Inc. v. State Bd. of Equalization*, 24 Cal. App. 4th 382, 390 (1994) (invalidating tax and citing multiple cases that "found [an] agency relationship critical to the nexus analysis"); *Bloomingdale's By Mail, Ltd. v. Commonwealth*, 567 A.2d 773, 778 (Pa. Cmwlth. Ct. 1989) (mail-order seller's affiliation with retail chain did not create nexus in absence of a "true agency relationship"), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam). Thus, all told, a substantial number of courts have recognized the principle that a seller's mere affiliation with a non-agent third party in a State does not make that seller physically present.[8]

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[8] These cases also are consistent with the decisions of several state courts of last resort that have relied on the presence of an agency relationship in upholding taxes against Commerce Clause challenge. *See Scholastic I*, 920 P.2d at 958 (attributing presence of school teachers to textbook seller because "agency relationship" existed); *Illinois Commercial Men's Ass'n v. State Bd. of Equalization*, 671 P.2d 349, 355 (Cal. 1983) (finding nexus because seller's local representatives "undeniabl[y] . . . were acting as agents"); *Topps Garment Mfg. Corp. v. State*, 128 A.2d 595, 598 (Md. 1957) (finding nexus because in-state parties "were agents of [seller] for the purpose of . . . taking of orders").

2. Three state supreme courts have held that an agency relationship is not necessary to attribute an in-state third party's presence to an out-of-state seller

In direct conflict with those four States, three state supreme courts have held that an agency relationship is not necessary to find an out-of-state seller present in a State. In these States, an out-of-state seller's mere economic affiliation with an in-state third party who is not the seller's agent can establish a substantial nexus under the Commerce Clause.

In *New Mexico Taxation & Revenue Department v. Barnesandnoble.com LLC*, 303 P.3d 824 (N.M. 2013), the New Mexico Supreme Court held that the online bookseller Barnesandnoble.com was subject to the State's taxing jurisdiction because its affiliation with local retail Barnes & Noble stores "gave [it] an advantage over its competitors." *Id.* at 829. It rejected Barnesandnoble.com's argument that the retail stores did not "act as [its] sales agents," and instead held that the Commerce Clause "does not require the in-state actor to have any particular relationship to the out-of-state taxpayer." *Id.* at 828, 829. The court acknowledged that "courts in several states have reached a different conclusion" on similar facts. *Id.* at 829 (citing *Tracy*, *Bannon*, and *Bloomingdale's*). It also acknowledged that a "federal district court considered a case almost identical to this one and found no substantial nexus." *Id.* (citing *St. Tammany*).[9]

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[9] *See also Proficient Food Co. v. New Mexico Taxation & Rev. Dep't*, 758 P.2d 806, 808 (N.M. Ct. App. 1988) (holding that the "fact that PFC did not have a resident agent or representative within New Mexico does not negate . . . substantial nexus").

In *Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services*, 38 A.3d 1183 (Conn.) ("*Scholastic IV*"), *cert. denied*, 133 S. Ct. 425 (2012), the Connecticut Supreme Court likewise "reject[ed]" the argument that "a legal or agency relationship" is necessary to attribute to an out-of-state seller the presence of its in-state affiliates. *Id.* at 1191. In addressing facts virtually identical to those confronted by the Arkansas Supreme Court in *Troll* and the Michigan Court of Appeals in *Scholastic II*, the Connecticut Supreme Court explicitly "reject[ed] the reasoning" of those decisions and "disagree[d]" that an "agency relationship" was "required to establish a substantial nexus under the commerce clause." *Id.* at 1198; *see also id.* at 1199 (calling the lack of any agreement "compelling the teachers to serve as agents" of the seller "not dispositive").[10]

The Alabama Supreme Court reached a similar conclusion in upholding the assessment of sales tax against an out-of-state advertising-specialty seller. *See Ex parte Newbern*, 239 So. 2d 792 (Ala. 1970). The court held that the Commerce Clause's "substantial nexus" test does not require "the presence of an agency relationship." *Id.* at 798. The court instead concluded that a seller that pays third parties to engage in a "local function of solicitation" that

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[10] The *Scholastic IV* court did not acknowledge, much less address, its earlier decision in *Bannon*, which refused to impute to a seller the presence of a "separate and independently functioning corporation." 585 A.2d at 674; *see supra* p. 14 n.7. The Connecticut Supreme Court's failure to address the conflict between its own decisions only heightens the need for this Court's review. *Cf. Scarborough v. United States*, 431 U.S. 563, 567 & n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as "ha[ving] an intra-Circuit conflict").

"secur[es] a substantial flow of goods" into the State is subject to the State's sales-tax authority. *Id.* (internal quotations omitted).[11]

In addition to these three state supreme courts, lower courts in two other States have held that an agency relationship is not required to attribute the presence of an in-state affiliate to an out-of-state seller. *See Scholastic Book Clubs, Inc. v. Farr*, 373 S.W.3d 558, 564 (Tenn. Ct. App.) (concluding that nexus does not turn on "whether Tennessee teachers may be considered agents of [the seller]" but noting that "our sister jurisdictions . . . are split on this matter"), *cert. denied*, 133 S. Ct. 663 (2012); *State v. Dell Int'l, Inc.*, 922 So. 2d 1257, 1264 (La. Ct. App. 2006) (calling question of whether affiliate was seller's "'agent'" mere "semantics . . . without constitutional significance").

In sum, state courts of last resort are divided over whether the activities of an in-state entity can be attributed to an out-of-state seller in the absence of an agency relationship. Other lower state and federal courts have only added to the disarray. That mature conflict warrants this Court's review.

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[11] Although *Newbern* predated *Quill*, it remains the Alabama Supreme Court's authoritative pronouncement on attributional nexus and has been relied on by state taxing authorities since *Quill*. *See* Ala. Dep't of Revenue, Revenue Ruling 05-001, at 10-12 (Apr. 7, 2005) (relying on *Newbern* and stating that "an agency relationship is not necessary under . . . federal law[] or Alabama case law to establish nexus"), *available at* http://www.revenue.alabama.gov/rules/05-001.pdf; *see also Commissioner of Rev. v. Jafra Cosmetics, Inc.*, 742 N.E.2d 54, 59 (Mass. 2001) (citing *Newbern* for proposition that "existence or absence of legal relationship between seller and solicitor [is] immaterial") (internal quotations omitted).

B. The Decision Below Exacerbates The Conflict By Finding Out-Of-State Retailers Physically Present In New York Based On The Activities Of Non-Agent Affiliates

The decision below deepens the existing conflict by holding that the Commerce Clause permits out-of-state retailers to be deemed physically present in New York based solely on their contractual affiliation with in-state website owners who are not their agents. The majority below recognized that the online retailers to whom the Tax applies do not themselves "maintain[] [any] physical presence" in New York. App. 8a. Nevertheless, it upheld New York's sales-tax authority over those retailers based entirely on the "physical presence of [the] resident website owner[s]." App. 8a-9a.

It is undisputed, however, that those website owners are not the sellers' agents. As this Court recently recognized, "'[a]n essential element of agency is the principal's right to control the agent's actions.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f(1) (2006) ("Restatement")). Moreover, agency arises only where the principal authorizes the agent to "act[] on [its] behalf." Restatement § 1.01 cmt. c.

The affiliate marketing arrangements that trigger the Tax establish neither of those core preconditions of agency. Paying a website owner on a per-sale basis does not give a retailer control over the website owner's solicitation activities, nor does it authorize the website owner to represent the retailer's legal interests. Without control and authorized representation, a party's "[p]erform[ance] [of] a duty created by contract" – even one that "benefit[s] the other party" to the contract – does not create an agency relationship. *Id.* cmt. g; *accord Hollingsworth*, 133 S. Ct. at 2666 (explaining that "[a]gency" "requires more than mere authorization to assert a particular interest").

The court below reasoned that a retailer's contract with a New York website owner is sufficient to establish physical presence under *Quill* when the retailer "pay[s]" the website owner in a way that incentivizes him "to actively solicit business in this State." App. 9a. But creating an incentive for website owners "to increase their referrals by soliciting customers" does not make those affiliates agents of the retailer. App. 11a. The website owners remain free to "decide for themselves, with no review, what [solicitations] to make and how to make them." *Hollingsworth*, 133 S. Ct. at 2666. In such circumstances, "the most basic features of an agency relationship are missing." *Id.*

In holding that the presence of such non-agent website owners satisfies the Commerce Clause's "substantial nexus" requirement, the decision below departed from the majority of state-court decisions that have required an agency relationship to impute an in-state actor's physical presence to an out-of-state retailer. Instead, the court below placed New York squarely in the minority camp of decisions holding that an out-of-state seller can be deemed physically present based on the in-state activities of affiliates who are *not* the seller's agents. The decision below thus deepens the already mature split on this important question.

II. THE DECISION BELOW CONFLICTS WITH *QUILL* AND THIS COURT'S OTHER COMMERCE CLAUSE PRECEDENTS

In holding that a State can require an out-of-state seller to collect sales tax based on the presence of individuals whose activities are not legally attributable to it, the court below circumvented *Quill*'s requirement that the seller itself be physically present in the taxing state. Certiorari is warranted because New York's effort to expand its own sales-tax jurisdiction undermines not only this Court's decisions, but also the important benefits that *Quill*'s bright-line rule creates for the national economy.

A. Attributing Nexus To A Seller In The Absence Of An Agency Relationship Conflicts With *Quill*'s Physical-Presence Rule

1. The decision below contravenes *Quill*'s central holding that the Commerce Clause's "substantial nexus" requirement forbids States from imposing sales-tax-collection duties on out-of-state sellers that maintain no physical presence in the State. *Quill* involved a seller engaged in "continuous and widespread solicitation of business within" North Dakota. 504 U.S. at 308; *see id.* at 302 (Quill "solicit[ed] business through catalogs and flyers, advertisements in national periodicals, and telephone calls"). The North Dakota Supreme Court had employed a functional "'economic presence'" test and found that solicitation sufficient to create nexus with North Dakota. *Id.* at 304 (quoting *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 219 (N.D. 1991)).

This Court, however, squarely rejected the "economic presence" test. Instead, it held that a seller without "a *physical* presence in the taxing State" – no matter how extensive its *economic* contacts with the State – lacks the substantial nexus that the Commerce Clause requires. *Id.* at 312 (emphasis added). *Quill* reaffirmed that bright-line physical-presence test out of a firm belief that a "clear rule" will "reduce[] litigation" and "foster[] investment." *Id.* at 315-16.

Quill's "bright-line, physical-presence requirement" is satisfied only if the *seller itself* is present in the taxing State. *Id.* at 317. Any other rule would undo *Quill*'s sharp distinction between physical and economic presence. Indeed, a corporation does not become *physically* present in a State merely by contracting with in-state entities.[12] Instead, a corporation can become physically (as opposed to economically) present in a State only if its agents are present in a State. *See Braswell v. United States*, 487 U.S. 99, 110 (1988) ("[a]rtificial entities" like corporations "may act only through their agents").

That conclusion accords with this Court's longstanding recognition that agency principles ordinarily delimit those individuals for whom a corporation bears legal responsibility. *See*, *e.g.*, *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 662 (1999) (Kennedy, J., dissenting) ("[a]gency principles" "usually mark the outer limits of an entity's liability for the actions" of third parties).[13] Even before *Quill*, this Court had held that a

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[12] *Cf.* Walter Hellerstein, *State Taxation* ¶ 19.02[2][a] (3d ed. 2008) ("The Court has never suggested that a contractual relationship with an unrelated third party in and of itself can provide the state with a basis for asserting jurisdiction over an out-of-state taxpayer.").

[13] *See also Maples v. Thomas*, 132 S. Ct. 912, 922-23 (2012) (attorney's "acts or omissions . . . cannot fairly be attributed to the client" once "principal-agent relationship" is "severed") (internal quotations and brackets omitted); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998) ("common law of agency" delimits vicarious liability under Title VII of the Civil Rights Act of 1964) (internal quotations omitted); *Commissioner v. Bollinger*, 485 U.S. 340, 349 (1988) ("law of agency" controls

corporation cannot be considered physically present in a State except through authorized agents: "when a corporation of one state goes into another, in order to be regarded as within the latter it must be there *by its agents* authorized to transact its business in that state." *International Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 583 (1914) (emphasis added); *see Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335, 337-38 (1925) (seller not "present in North Carolina" "for purposes of jurisdiction" because in-state marketing subsidiary did not solicit business "as [the seller's] agent").

The longstanding rule that a seller does not subject itself to a State's sales-tax jurisdiction merely by advertising in the State reinforces that conclusion. *See Quill*, 504 U.S. at 313 n.6 (nexus not created by "radio advertisements . . . heard in North Dakota"); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 347 (1954) ("general advertising" insufficient); App. 9a (majority agreeing that "no one disputes" that conclusion). The reason that mere advertising in a State does not confer taxing authority over an out-of-state seller is that advertisers generally do not act as sellers' agents. *See Miller Bros.*, 347 U.S. at 346-47 (distinguishing seller using "general advertising" from "merchant entering the taxing state through traveling sales agents"); App. 13a (Smith, J., dissenting) (advertisers do not "solicit[] customers for [retailers] in the fashion of a local sales agent").[14] Accordingly, when

when "the law attributes tax consequences of property held by a genuine agent to the principal").

[14] *See also*, *e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1023, 1035-36 (9th Cir. 2003) (rejecting argument that "agency relationship arose" from advertiser's agreement to "display[]" seller's "logo and other advertisements" "on [its] website and in its listserv").

an out-of-state seller places advertisements in an in-state newspaper or other media, the presence of the advertiser is not legally attributable to the seller and does not make the seller physically present in the State under *Quill*.[15]

2. The decision below obliterates *Quill*'s core distinction between physical presence and mere economic presence. The Court of Appeals found nexus as to online retailers based solely on the presumed solicitation of third-party website owners. Because those website owners are not agents of the retailers, however, their solicitation is not legally attributable to the retailers, and they cannot make the retailers physically present in the State.

In overlooking the absence of any agency relationship between the retailers and website owners, the Court of Appeals functionally adopted the economic-effects test that this Court expressly rejected in *Quill*. 504 U.S. at 316. Rather than analyze whether the presence of the in-state website owners could legally be attributed to the out-of-state sellers for Commerce Clause purposes, the majority reasoned that the website owners had an incentive to encourage their readers to make purchases through their advertising links, and thus could be "deemed" to be the functional equivalent of "an in-state sales force."

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[15] The decision below explained this principle by focusing on advertising's passivity; although an advertiser's "passive" display concededly fails to create nexus, the majority thought that "active[]" solicitation by an advertiser leads to the opposite conclusion. App. 9a. That explanation of the advertising rule, however, is flatly inconsistent with *Quill*'s holding that nexus does not turn on a seller's "economic presence." 504 U.S. at 304 (internal quotations omitted). Whether advertising is active or passive might affect a seller's *economic* contacts with the State, but it has no bearing on the seller's *physical* presence.

App. 8a-9a. That reasoning – focusing exclusively on the predicted economic effect of affiliate marketing – is flatly at odds with *Quill*'s command that physical presence, not mere economic contact, is the touchstone for state taxing authority under the Commerce Clause.

The Court of Appeals' reasoning also demonstrates the unpredictability of the economic-effects test, which is the core reason that *Quill* rejected it. The court's "bottom line" was that it could discern "no reason why" a retailer that "pay[s] New York residents to actively solicit business . . . should not shoulder the appropriate tax burden." App. 9a. Reasoning so arbitrary and subjective vitiates *Quill*'s "clear rule" and substantially complicates businesses' task of predicting their exposure to tax-collection obligations. Indeed, having every State exercise taxing jurisdiction based on its own *ad hoc* determination of whether such jurisdiction seems "appropriate" would not only contravene this Court's precedents but also result in the very sort of "controversy and confusion" that *Quill* sought to eliminate. 504 U.S. at 315 (internal quotations omitted).

B. The Decision Below Expands Sales-Tax Nexus Beyond The Outer Boundaries Of This Court's Pre-*Quill* Precedents

The decision below also expands state taxing jurisdiction beyond the furthest reaches of this Court's pre-*Quill* precedents. Neither before nor after *Quill* has this Court ever held that a seller becomes physically present in a State merely by entering into a contract with a third party in the State. To the contrary, this Court has only found that such contracts establish sales-tax nexus when the in-state third party is the seller's agent.

1. In *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), this Court confronted the "furthest extension of [the] power" to impute to a seller the "presence of sales personnel in the State." *Quill*, 504 U.S. at 306; *see Bellas Hess*, 386 U.S. at 757 (*Scripto* "represents the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent"). The decision below extends state taxing authority well past *Scripto*'s outer limits.

Scripto involved an out-of-state seller, Scripto, Inc. ("Scripto"), that solicited Florida orders for its writing instruments through in-state "advertising specialty brokers." 362 U.S. at 209. This Court noted, and the record made clear, that the sales brokers were acting as Scripto's agents. The brokers "actively engaged in Florida *as a representative of Scripto* for the purpose of attracting, soliciting and obtaining Florida customers." *Id.* (internal quotations omitted; emphasis added); *see also Scripto, Inc. v. Carson*, 105 So. 2d 775, 782 (Fla. 1958) (stating that the brokers operated "pursuant to a contract that authorized [them] to solicit orders and otherwise obtain business for Scripto"). Thus, both this Court and the Florida Supreme Court recognized that the solicitors acted as Scripto's agents. *Scripto*, 362 U.S. at 211 (noting that the brokers were "agent[s]," albeit agents that "worked for several principals") (internal quotations omitted); *Scripto*, 105 So. 2d at 782 (calling the solicitors "limited agents").

Scripto's contracts with its agents designated them as "'independent contractor[s],'" 362 U.S. at 209, and the Court rejected Scripto's suggestion that such "contractual tagging" defeated constitutional nexus, *id.* at 211. That conclusion comports fully with agency principles, as it is black-letter agency law that "how the parties . . . label" a relationship is not controlling. Restatement § 1.02 cmt. a. Accordingly, the Court looked to the legal characteristics of Scripto's relationship with its solicitors and determined that those solicitors – however labeled – were Scripto's legal agents. *See id.* § 1.01 cmt. c ("some termed independent contractors are agents"); John Harper & Jon Sedon, *Are First Appearances Deceiving? A Reexamination of* Scripto *and* Tyler Pipe, 49 State Tax Notes 457, 463-68 (Aug. 18, 2008) ("*Reexamination*") (surveying record). The decision below, by contrast, imputed to out-of-state retailers the presence of *non-agents*. That plainly exceeds *Scripto*'s outer boundary.

2. *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), followed *Scripto* and attributed nexus to a seller based on the presence of its in-state agents. Tyler Pipe solicited business for its plumbing products in Washington through "in-state sales representative[s]." *Id.* at 249. Those representatives "'acted daily *on behalf of Tyler Pipe* in calling on its customers and soliciting orders,'" *id.* at 249-50 (quoting *Tyler Pipe Indus., Inc. v. Washington Dep't of Rev.*, 715 P.2d 123, 127 (Wash. 1986) (emphasis added)), and were "essentially identical" to the "factory salesmen who represent[ed] Tyler" in other States, 715 P.2d at 125. This Court found Tyler Pipe present in Washington because "'[t]he activities *of [its] agents* in Washington have been substantial.'" 483 U.S. at 250 (quoting 715 P.2d at 127) (emphasis added).

Tyler Pipe reiterated *Scripto*'s conclusion that a seller cannot defeat nexus merely by insisting that its agent is more "properly characterized as an independent contractor instead of as an agent." *Id.*

Consistent with the black-letter agency principle that the parties' labels are not dispositive, *see supra* pp. 26-27, the Court rejected Tyler Pipe's attempt to avoid taxation by "characteriz[ing] [its] in-state agent as an independent contractor." 715 P.2d at 126; *see* 483 U.S. at 250 (citing Washington Supreme Court and "agree[ing] with this analysis"). But *Tyler Pipe* did not suggest that a seller can become present in a State through a third party that is not its legal agent. Rather, *Tyler Pipe*, like *Scripto*, "support[s] the conclusion that a finding of agency is a prerequisite for constitutional attributional nexus." Harper & Sedon, *Reexamination*, 49 State Tax Notes at 475. The decision below conflicts squarely with that core principle.

C. The Tax's Evidentiary Presumption Does Not Avoid The Constitutional Violation

The Tax's use of an evidentiary presumption does not ameliorate the conflict with *Quill*. As explained above, the Tax provides that retailers are presumed to be "vendors" subject to New York's sales-tax authority based solely on a discrete set of limited facts – the existence of an affiliate marketing agreement with a payment of commission for referrals – that fails to satisfy *Quill*'s bright-line test. And, once the presumption is triggered, the statute imposes the burden on the *seller* to prove that the resident website owner "did not engage in any solicitation in the state on behalf of the seller" that satisfies the Commerce Clause's "nexus requirement." N.Y. Tax Law § 1101(b)(8)(vi).

The Commerce Clause does not permit a State to interfere with interstate commerce through such a presumption. As this Court has held, "'[t]he power to create presumptions is not a means of escape from constitutional restrictions.'" *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (quoting *Bailey v. Alabama*, 219 U.S. 219, 239 (1911)). As such, *Quill*'s bright-line rule "'cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment.'" *Id.* (quoting *Bailey*, 219 U.S. at 239). That principle is especially important in the context of the Commerce Clause, which withdraws certain matters from state authority to ensure the free flow of interstate commerce. *See Quill*, 504 U.S. at 312-13; *cf. Bailey*, 219 U.S. at 239. Allowing a State to evade that structural constraint through the device of a presumption would undermine the Commerce Clause as a limit on States' ability to disrupt the national economy.

The Tax's presumption violates the Due Process Clause for similar reasons. Civil evidentiary presumptions accord with due process only if there is "'some rational connection between the fact proved and the ultimate fact presumed.'" *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K.C.R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)). Here, the proved fact (commission payments to website owners) has no rational connection to the presumed fact (in-state solicitation by the retailer making the payments). The majority disagreed because it found it "rational to presume that . . . [affiliates] will seek to increase their referrals by soliciting customers." App. 11a. But, to establish taxing authority over a seller, New York cannot merely show solicitation by *a website owner*; it must show that the website owner is acting as an agent of the seller and soliciting on its behalf. As explained above, however, affiliates of Overstock and similar retailers are not authorized to represent the retailer and are not under its control. Because the affiliates are not legal agents of the retailers, there is no rational basis upon which to presume that a retailer is present in a State merely because it pays commission to affiliates. *See supra* pp. 21-25.

III. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION

As the Appellate Division recognized below, this is a "case with far-reaching ramifications." App. 19a. The issue it presents – concerning when States may require online retailers to collect sales tax based on their marketing arrangements – is of vital importance to the national economy. This Court's intervention is required to safeguard Internet commerce from burdensome tax obligations and restore *Quill*'s promise of a "clear rule" that promotes "settled expectations" and "investment by businesses and individuals" alike. 504 U.S. at 315-16.

A. The Decision Below Has Substantial Economic Ramifications

The economic importance of online commerce cannot be overstated. Online commerce accounted for an estimated $4.1 trillion worth of retail and wholesale transactions in 2010, and those sales volumes are only expected to increase.[16] As online commerce has matured, "the nation has benefited greatly from industry-led, Internet-driven innovation and growth, with those benefits reflected throughout the entire economy." Department of Commerce Internet Policy Task Force, *Cybersecurity, Innovation and the Internet*

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[16] *See* Steven Maguire, *State Taxation of Internet Transactions*, Cong. Res. Serv. Rep. No. 7-5700 (May 7, 2013), *available at* http://www.fas.org/sgp/crs/misc/R41853.pdf.

Economy 33 (June 2011), *available at* http://www.nist.gov/itl/upload/Cybersecurity_Green-Paper_FinalVersion.pdf.

The decision below threatens that growth. This Court has recognized that sales and use taxes, when crafted too broadly, become an "undu[e] burden" on "interstate commerce." *Quill*, 504 U.S. at 313. The burden created by the Tax is particularly severe. It presents retailers with a Hobson's choice: either accept the substantial administrative and compliance costs of collecting sales tax in a remote jurisdiction where they lack political power, or forgo entirely a crucial form of online advertising.[17] The result has been an "exodus of merchants away from . . . New York affiliates," with those that remain forced to navigate numerous bureaucratic hurdles. Timothy P. Noonan & Joshua K. Lawrence, *Merchants and Affiliates Struggle to Navigate New York's 'Amazon Law*,' 52 State Tax Notes 73, 73 (Apr. 6, 2009). Not only does that harm retailers, but it wreaks havoc on the website owners who depend on the "stream of revenue created by affiliate marketing." *Id*. at 73-74.

The spread of similar taxes to other States likely will amplify the economic disruption. At least 12 States currently have followed New York's lead and adopted taxes similar to the one at issue here; four States enacted such taxes in the months immediately

[17] *See* Bruce C. Brown, *The Complete Guide to Affiliate Marketing on the Web* 17-20 (Atlantic Publ'g Group, Inc. 2009) (describing benefits of affiliate marketing); *see also* H. Beau Baez III, *Taxing Internet Sales: Trying to Make a Two-Thousand-Year-Old Jurisdiction Test Work in the Dot-Com Economy*, 64 Tax Law. 807, 810-11 (2011).

after the New York Court of Appeals' decision.[18] Put simply, States seeking to obtain additional tax revenue increasingly are looking to target Internet sales from remote sellers. The decision below, which emanates from an influential state court presiding over one of the Nation's largest and most important commercial markets, likely will accelerate that trend.

Left unreviewed, the judgment below will embolden still other States to promulgate similar taxes and "entangle" retailers "in a virtual welter of complicated obligations." *Quill*, 504 U.S. at 313 n.6 (internal quotations omitted). Just as was true of the "mail-order industry" addressed in *Quill*, the "dramatic growth" of online commerce has been predicated in part on a "bright-line exemption" from such burdens. *Id.* at 316; *see American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (noting that unilateral state regulation of online commerce risks "conflicting obligations" that "could paralyze the

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[18] *See* Ark. Code Ann. § 26-52-117; Cal. Rev. & Tax Code § 6203(c); Conn. Gen. Stat. Ann. § 12-407(a)(12)(L); Ga. Code Ann. § 48-8-2(8)(M); 35 Ill. Comp. Stat. Ann. 105/2 (¶ 1.2); Iowa Code Ann. § 423.1(48) (eff. July 1, 2013); 2013 Me. Laws ch. 200, § 4 (enacted June 5, 2013) (amending Me. Rev. Stat. Ann. tit. 36, § 1754-B(1)(A)), *available at* http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0251&item=7&snum=126; 2013 Minn. Laws ch. 143, art. 8, § 19 (enacted May 23, 2013) (amending Minn. Stat. Ann. § 297A.66 subd. 4a), *available at* https://www.revisor.mn.gov/laws/?id=143&doctype=Chapter&type=0&year=2013; S.B. 23 at p. 50, 97th Gen. Assem., 1st Reg. Sess. (Mo. 2013) (enacted July 5, 2013) (amending Mo. Rev. Stat. § 144.605), *available at* http://openstates.org/mo/bills/2013/SB23/documents/MOD00008583/; N.C. Gen. Stat. Ann. § 105-164.8(b)(3); Pa. Dep't of Rev., Sales and Use Tax Bull. 2011-01 (Dec. 1, 2011) (construing 72 Pa. Cons. Stat. § 7201(b)), *available at* http://www.revenue.state.pa.us/portal/server.pt/community/tax_bulletins/14830/sales_tax___use_tax/602540; R.I. Gen. Laws § 44-18-15(a)(2).

development of the Internet"). Given the increasingly central importance of online commerce to the Nation's economy, certiorari here is required even more urgently than it was in *Quill*.

B. Review By This Court Is Necessary To Address The Growing Uncertainty Plaguing Online Commerce

The economic uncertainty created by the division among state courts heightens the need for this Court's immediate review. *See* Maryann B. Gall & Laura A. Kulwicki, *A Lawmaker's Guide to Sales Tax Nexus* 2 (Univ. of Wisconsin-Milwaukee 2012) (surveying widespread "uncertainty as to the proper limits of state authority" to tax online commerce). This "uncertainty itself creates a burden on interstate commerce." *Id.* The disarray among the state courts, combined with the "mounting pressures on businesses regarding tax collection and payment," has created a substantial and urgent "need . . . for additional nexus guidance." Michele Borens & Scott Booth, *The Supreme Court Should Accept A Nexus Case – Part II*, 65 State Tax Notes 665, 669 (Sept. 3, 2012).

In the face of such uncertainty, this Court's intervention is necessary to vindicate *Quill*'s bright-line test and restore the important "benefits of a clear rule" that *Quill* envisioned. 504 U.S. at 315. *Quill*'s principal aim was to "firmly establish[] the boundaries of legitimate state authority" and eliminate "controversy and confusion" over state taxing jurisdiction. *Id.* (internal quotations omitted). In the two decades since *Quill*, States increasingly have transgressed those boundaries in pursuit of additional tax revenues at the expense of Internet commerce. This Court should grant certiorari to reverse the steady erosion of *Quill*'s bright-line rule and eliminate the extensive commercial uncertainty that those States have created.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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