No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

A. PILAR MATA
Counsel of Record
W. PATRICK EVANS
ELI J. DICKER
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
(202) 464-8346
pmata@tei.org

Counsel for Amicus Curiae

April 4, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

REGULATIONS Page(s)

OTHER

IN THE
Supreme Court of the United States

No. 17-494

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTRODUCTION

Amicus curiae Tax Executives Institute, Inc. (TEI) respectfully files this brief in support of the respondents in *South Dakota v. Wayfair, Inc. et al.* (*Wayfair*).[1]

[1] All parties received at least 10 days' notice of TEI's intention to file this brief, and the brief is filed with the consent of all parties. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than TEI, its members, or its counsel made a monetary

In *Wayfair*, Petitioner South Dakota asks this Court to modify the "physical presence" rule established in *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967), and upheld in *Quill Corporation v. North Dakota*, 504 U.S. 28 (1992). TEI does not take a position on whether the physical presence rule should be upheld, modified, or overturned. Rather, TEI files this brief to bring this Court's attention to the injustice and subsequent litigation that would ensue if the ruling requested by South Dakota were to be applied retroactively.

STATEMENT OF INTEREST

TEI is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code. TEI is dedicated to the development of sound tax policy, the uniform and equitable enforcement of tax laws, the minimization of administrative and compliance costs for governments and taxpayers, and the vindication of taxpayers' constitutional rights.

TEI's members are employed by a broad cross-section of the business community. As in-house tax professionals, TEI's members must evaluate tax laws, advise their companies regarding the tax consequences of various transactions and business decisions, and make practical decisions regarding their tax compliance obligations, including determinations regarding which states they must register with for the collection and remittance of sales and use tax. TEI's

---

contribution intended to fund the preparation or submission of this brief.

members thus have a vital interest in ensuring they are provided with adequate notice of their registration, collection, and remittance responsibilities so they can structure their business activities and processes to meet these requirements.

SUMMARY OF THE ARGUMENT

South Dakota asks this Court to reconsider its decision in *Quill*, which bars states from requiring out-of-state retailers to collect and remit sales and use tax on sales made to in-state consumers unless the retailer maintains a "physical presence" in the state.

In response to retroactivity concerns this Court articulated in *Quill*, the South Dakota legislature crafted its economic presence law to take effect prospectively if this Court modifies *Quill* and finds South Dakota's law constitutional. However, retailers that relied upon *Quill* nonetheless remain at risk for potential retroactive application of this Court's decision in other states.

Such a decision could have the effect of retroactively validating or expanding state statutes, regulations, and administrative policies that other states have enacted. For example, eight states have enacted economic presence laws requiring out-of-state retailers to register for the collection and remittance of sales tax—even if they lack physical presence in the state—if such retailers exceed a specified dollar volume of sales or transactions with in-state consumers. Even though these laws contradict *Quill*, some of those states are attempting to enforce these laws now, prior to this Court's decision in *Wayfair*. A decision from this Court modifying *Quill* could effectively validate such assessments if this Court's decision is retroactive.

Twenty states have statutes, regulations, or policies requiring retailers to register for the collection and remittance of sales and use tax to the extent permitted by the Constitution or based on a standard that is broader than *Quill*'s physical presence standard. Unlike states that have enacted economic presence laws, these states are not currently seeking to assert their taxing jurisdiction beyond the bounds set by *Quill*. However, if this Court were to modify *Quill*'s physical presence rule, such statutes would automatically expand their states' jurisdiction over out-of-state retailers. If the Court's decision is retroactive, the scope of these statutes would expand on a retroactive basis.

State legislatures also could enact retroactive tax legislation to take advantage of a retroactive decision. Numerous state legislatures have taken the opportunity to enact retroactive tax legislation in other contexts following a court decision. Thus, the risk of retroactive assessments is not simply limited to states with existing statutes that will be automatically affected.

Allowing a decision modifying *Quill* to be retroactive is problematic for numerous reasons. Such a decision could lead to double taxation, as retailers do not have information regarding which of their consumers complied with their use tax obligations. Retroactive application also would effectively transfer the burden of the tax from consumers to retailers because retailers would have no efficient means of collecting tax from their consumers years after transactions.

The retroactive application of a decision modifying *Quill* thus raises serious due process concerns. *Quill* holds that states cannot compel out-of-state retailers that lack physical presence with the state to register with the state, collect sales tax from their consumers, and remit the tax to the state. Allowing states to assess and collect tax from out-of-state retailers that relied on *Quill* and were not given advance notice of this potential liability—and thus the need to offset that liability by collecting tax at the time of the transaction—offends traditional notions of fair play and substantial justice, particularly since the tax liability is intended to be borne by consumers. It also cannot be reconciled with principles of sound judicial and tax policy.

Taxpayers should be able to rely upon the laws in effect at the time business transactions and other taxable events occur. This Court may change its standard to determine what activities give rise to substantial nexus under the Constitution but this change should not be retroactive if it has a significant financial effect on taxpayers. Doing so would unfairly penalize out-of-state retailers for relying on this Court's decision in *Quill* and undermine taxpayers' confidence in the judiciary.

This Court has previously held that where it does not reserve the question of whether a newly-announced rule of law should be prospective, the normal rule of retroactivity will apply. Thus, if this Court modifies *Quill*'s physical presence rule, it should affirmatively state that the change is prospective only.

THE ARGUMENT

I. RETROACTIVITY IS AN IMPORTANT ISSUE IN THIS CASE.

The question squarely before this Court is whether *Quill*'s physical presence rule should continue to limit South Dakota's ability to impose sales tax registration, collection, and remittance obligations on out-of-state retailers. Although this case is predicated upon whether South Dakota's economic presence law, S.B. 106, is constitutional, this Court's decision will directly impact the laws of every other state and locality imposing sales and use taxes.

South Dakota's law was carefully drafted to avoid the "thorny questions concerning the retroactive application" of taxes this Court raised in *Quill* when deciding whether to abrogate the physical presence rule established in *Bellas Hess*. *See*, *e.g.*, S.D. Senate Bill 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016), §§3, 6, 8; *Quill*, 504 U.S. at 318, n.10. Some states with economic nexus laws have followed South Dakota's example and similarly limited the reach of their laws: Tennessee and Vermont have provisions in their laws that would restrict their ability to apply their economic presence laws retroactively. Tenn. Code Ann. 2017 Pub. Acts, c. 452, § 2; Tenn. Comp. R. & Regs. 1320-05-01-.129; 32 Vt. Stat. Ann. tit. 32, § 9701; 2016 Vt. Laws No. § 41(5). By formulating their laws in this manner, these states ensured that remote sellers could make sales to consumers in these states without gambling on whether this Court would uphold or overturn *Quill*.

Not all states, however, have included similar safeguards. Thus, if this Court were to modify the physical presence rule without addressing whether its decision can be applied retroactively, the "thorny questions" this Court sought to avoid in *Quill* become unavoidable.

A. Eight States Enacted Economic Presence Laws Without Safeguards Against Retroactivity.

Alabama, Connecticut, Indiana, Maine, Massachusetts, Mississippi, Ohio, and Wyoming enacted economic nexus laws providing that an out-of-state retailer will have substantial nexus, and thus registration, collection, and remittance responsibilities, with their state if the retailer exceeds a certain dollar amount of sales or number of transactions with in-state consumers. *See*, *e.g.*, Ala. Admin. Code r. 810-6-2-.90.03 (effective Jan. 1, 2016); Conn. Gen. Stat. § 12-407(a)(15)(A)(v) (effective Oct. 1, 2017); Ind. Code § 6-2.5-2-1(c) (effective July 1, 2017); Me. Rev. Stat. Ann. tit. 36, § 1951-B(7) (effective Oct. 1, 2017) (providing for an injunction during litigation challenging provision but only barring retroactive assessments prior to effective date); 830 Mass. Regs. Code 64H.1.7 (effective Sept. 22, 2017); Miss. Admin. Code § 35.IV.3.09(100), (101) and (103) (effective Dec. 1, 2017); Ohio Rev. Code § 5741.01(I)(2)(h) & (i) (effective Jan. 1, 2018); Wyo. Stat. Ann. § 39-15-501 (effective July 1, 2017) (providing for an injunction during litigation challenging provision but not barring retroactive assessments for sellers not subject to the injunction).

Unlike South Dakota, however, those states did not include safeguards against retroactivity. At least three of those states—Alabama, Connecticut, and Massachusetts—have already issued assessments or notices of intent to assess out-of-state retailers under these laws, even though these economic nexus standards are directly contrary to *Quill*'s physical presence rule. *See*, *e.g.*, U.S. Government Accountability Office, GAO-18-114, *Sales Tax – States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs*, 23 (Nov. 2017); Brief for Respondents 64.

Regardless of whether states have begun issuing assessments, retroactivity is a concern in all economic presence states. In general, a state's ability to issue an assessment is confined by its statute of limitations.

The statute of limitations for the state to issue assessments does not begin to run until a retailer has filed a sales and use tax return in Alabama, Indiana, Massachusetts, Mississippi, and Wyoming, and is extended for ten years past the due date of a return in Ohio. *See* Ala. Code § 40-2A-7(b)(2); Ind. Code § 6-8.1-5-2(f); Me. Rev. Stat. Ann. tit. 36, § 141.2.C; Mass. Gen. Law ch. 62C, § 26(d); Miss. Code Ann. § 27-65-42; Wyo. Stat. Ann. §§ 39-15-107(a)(iv), 39-15-110(b); Ohio Rev. Code Ann. § 5703.58 (10 years). Connecticut does not expressly address whether its statute of limitations is open-ended or extended if a retailer has not filed a return. *See* Conn. Gen. Stat. § 12-415(f). Thus, if this Court were to modify *Quill* and make the decision retroactive, out-of-state retailers that did not file returns in those states would be exposed to potential tax liabilities dating back to the effective date of those states' economic presence laws.

B. Twenty States Have Existing Laws that Would Permit the Retroactive Application of a Decision Abandoning *Quill*'s Physical Presence Rule.

This problem is not confined to states that have enacted economic presence laws. At least twenty states have statutory or regulatory provisions extending the obligation for out-of-state retailers to register, collect, and remit tax to the extent permitted by the U.S. Constitution or using criteria that fall short of *Quill*'s physical presence standard. *See*, *e.g.*, Cal. Rev. & Tax. Code § 6203(c) (extending to retailers with substantial nexus for purposes of the Commerce Clause of the U.S. Constitution); Colo. Rev. Stat. § 39-26-102(3)(b) (extending to retailers soliciting sales by any communication media); Colo. Code Regs. § 39-26-102.3(1) (extending to retailers soliciting by any means whatsoever, including advertising by e-mail or the Internet); Fla. Stat. § 212.0596(2)(l) (extending to retailers whose activities have a sufficient connection with this state or its residents to create nexus); Ga. Code Ann. § 48-8-2(8)(I)(i)(III) (extending to retailers advertising or soliciting sales by computer, the Internet, or other communication systems); Idaho Code § 63-3611 (extending to retailers with sufficient contacts with the state under the U.S. Constitution); Kan. Stat. Ann. § 79-3702(h)(1)(F) (extending to retailers with any contact with the state that would allow the state to require the retailer to collect and remit tax under the U.S. Constitution); La. Rev. Stat. Ann. § 47:305(E) (extending to retailers promoting sales through the use of catalogs and other means for which federal legislation or jurisprudence will allow); Nev. Rev. Stat. § 372.724 (extending to retailers with sufficient nexus to satisfy the requirements of the U.S. Constitution); N.J. Stat. Ann. § 54:32B-2(i)(1)(C) (extending to retailers that solicit sales by distributing advertising matter); N.M. Stat. Ann. § 7-9-10(A) (extending to retailers that solicit sales through advertisements transmitted by cable systems); N.Y. Tax Law § 1101(b)(8)(E) (extending to retailers that regularly solicit business if such solicitation satisfies the nexus requirement of the U.S. Constitution); N.C. Gen. Stat. § 105-164.8(b)(5) (extending to retailers that have nexus by purposefully or systematically exploiting the market by any media); N.D. Cent. Code § 57-40.2-01(7) (extending to retailers soliciting sales and advertising via communication systems); Okla. Admin. Code 710:65-15-3(c) (extending to retailers soliciting sales by distributing advertising by newspaper, radio, television, mail or catalog); 72 Pa. Cons. Stat. § 7201(b)(3.3) (extending to retailers whose contacts would allow the Commonwealth to require the person to collect and remit tax under the U.S. Constitution); 44 R.I. Gen. Laws § 44-18-15(a)(6) (extending to retailers that solicit sales by means of a computer-assisted shopping network or any other electronic media); S.C. Code Ann. § 12-36-1340(4) (extending to retailers that distribute advertising matter); Tex. Tax Code Ann. § 151.107(a)(4)-(5) (extending to retailers that solicit sales by distributing advertising via communication systems or that solicit orders through media and are subject to the jurisdiction of the state under federal law); Tex. Tax Code Ann. § 151.307(a) (exempting sales the state is prohibited from taxing by federal law or the U.S. Constitution); Va. Code Ann. § 58.1-612(F) (extending to retailers to the extent permitted under federal law or an opinion of this Court); Wis. Stat. § 77.51(13g) (extending to retailers unless otherwise limited by federal law).

Laws that allow states to require out-of-state retailers to collect and remit tax to the extent permitted by the Constitution will automatically conform to whatever constitutional standard this Court sets in *Wayfair*. Similarly, laws that would allow states to assert jurisdiction over out-of-state retailers based on activities that do not meet *Quill*'s physical presence requirement (*e.g.*, advertising and solicitation), and which are not currently enforceable, could become enforceable depending upon how this Court decides this case.

In nine of those states, the statute of limitations does not begin to run until a retailer files a sales and use tax return. *See* Fla. Stat. § 95.091(3)(a)(5); Ga. Code Ann. § 48-2-49(c); N.J. Stat. Ann. § 54:49-6(b); N.Y. Tax Law § 1147(b); N.C. Gen. Stat. § 105-241.1(e); Okla. Stat. § 223.E; 72 Pa. Cons. Stat. § 7259; S.C. Code Ann. § 12-54-85(c); 34 Tex. Admin. Code § 3.339(a)(2)(B). This means that an out-of-state retailer's liability could be unlimited if that retailer, relying on this Court's decision in *Quill*, never filed a sales and use tax return with the state.

In six of those states, the statute of limitations is extended for six to ten years past the due date of the return if a retailer fails to file a return. *See* Cal. Rev. & Tax Code §6487(a) (eight years); Idaho Code § 63-3633 (seven years); Nev. Rev. Stat. § 360.355(2) (eight years); N.M. Stat. Ann. § 7-1-18(C) (seven years); N.D. Cent. Code § 57-39.2-15 (six years); Va. Code Ann. § 58.1-634 (six years). One of those states would apply the normal statute of limitations if a court decision reclassified a transaction from nontaxable to taxable. *See* La. Rev. Stat. Ann. § 47:1580. Four states do not expressly address whether their statutes of limitations are open-ended or extended if a retailer has not filed a return. *See* Colo. Rev. Stat. § 39-26-125; Kan. Stat. Ann. § 79-3609(b); 44 R.I. Gen. Laws § 44-19-13; Wis. Stat. § 77.59(3).

Retailers that relied on *Quill* when determining they did not need to file returns in those states could thus have even greater liabilities in these states than they would in states with more recently-enacted economic presence laws.

C. States Could Enact Retroactive Tax Legislation to Adopt the Court's Standard.

Further, if this Court's decision were to modify *Quill*'s physical presence rule and makes this Court's decision retroactive, states that do not have statutes testing the bounds of *Quill* could be incentivized to enact retroactive tax legislation adhering to the new standard. Over the past few decades, several state legislatures have engaged in a practice of enacting retroactive tax legislation in response to judicial decisions.

This Court has not granted certiorari in cases challenging retroactive tax legislation in other contexts. *See, e.g.*, *Dot Foods, Inc. v. State of Washington, Dep't of Revenue*, 372 P.3d 747 (Wash. 2016), *cert. denied,* 137 S. Ct. 2156 (2017); *Intl. Bus. Machs. Corp. v. Dep't of Treasury*, 878 N.W.2d 891 (Mich. App. 2016), *cert. denied*, 137 S. Ct. 2180 (2017); *Estate of Hambleton*, 335 P.3d 398 (Wash. 2014), *cert. denied*, 136 S. Ct. 318 (2015) *Gen. Motors Corp. v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. Ct. App. 2010), *cert. denied*, 132 S. Ct. 1143 (2012). The Court's decision not to review this practice of enacting retroactive tax statutes could thus embolden states without automatically expanding economic nexus laws to amend their laws retroactively.

II. ALLOWING STATES TO RETROACTIVELY APPLY A DECISION MODIFYING *QUILL* WOULD RAISE DUE PROCESS CONCERNS AND SUBVERT PRINCIPLES OF SOUND JUDICIAL AND TAX POLICY.

Chief Justice Marshall famously declared that "[a]n unlimited power to tax involves, necessarily, a power to destroy. . . ." *M'Culloch v. Maryland*, 17 U.S. 316, 327 (1819). This now-axiomatic principle would be called into question if this Court were to modify its decision in *Quill* and permit states to retroactively enforce the Court's decision against out-of-state retailers.

A. Modifying *Quill* and Allowing States to Apply the Decision Retroactively Would Undermine the Intended Operation of Sales and Use Taxes.

Sales and use taxes are generally regarded as consumption taxes—taxes not imposed on retailers' activities, but on their consumers' use or consumption of products and services within a state.[2] While the economic incidence of the tax is imposed on consumers, retailers nevertheless play a critical role in administering such taxes: retailers collect the tax from consumers and remit the tax to the states. *See*, *e.g.*, Hellerstein, Hellerstein & Swain, *State Taxation* ¶12.01 (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through Dec. 2017) (online version accessed on Mar. 22, 2018). However, states cannot compel out-of-state retailers to undertake this obligation or hold them liable for failing to do so unless a retailer has substantial nexus with the state. *Bellas Hess* and *Quill* confirmed that this substantial nexus requirement is met only if out-of-state retailers are physically present in the taxing state.

[2] This is also true for states, such as South Dakota, that technically impose the tax upon the privilege of engaging in business as a retailer in the state, *see*, *e.g.*, S.D. Codified Laws § 10-45-2, because such states authorize retailers to add the tax to the price charged to consumers, *see*, *e.g.*, S.D. Codified Laws § 10-45-22. This Court has thus examined the nature of taxes and their operation in prior cases rather than relying upon formalistic classifications. *See*, *e.g.*, *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991) ("A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." (*citing* Jenkins, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242 (1960))).

If retailers lack substantial nexus with a state and do not collect the tax from consumers, consumers generally have an obligation to remit the corresponding use tax to the state. In practice, not all consumers remit their use tax obligations, and states lack an efficient mechanism to measure or track consumers' use tax liabilities – hence the genesis of this case.

Nonetheless, some consumers—in particular, business consumers—do regularly remit use tax to states. The United States Government Accountability Office estimates that compliance rates for business consumers range from approximately 70 to 90 percent. *See*, *e.g.*, U.S. Government Accountability Office, GAO-18-114, *Sales Tax – States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs*, 14 (Nov. 2017).

States cannot hold retailers responsible for sales and use tax liability if consumers remit use tax to the state and retailers can prove consumers paid the tax. Retailers, like states, however, lack an efficient mechanism to prove which of their consumers actually complied with their use tax obligations.

Further complicating matters, states such as California and New York allow their residents to estimate their use taxes based upon their federal or state adjusted gross income. *See*, *e.g.*, California 540 Form and Instructions: 2017 Personal Income Tax Booklet; New York State 2017 Instructions for Form IT-201 Full-Year Resident Income Tax Return at p. 26.[3] This practice, which is designed to make it easier for consumers to comply with their use tax obligations, makes it more difficult to reconcile whether a

---

[3] Available at: https://www.ftb.ca.gov/forms/2017/17_540bk.pdf; https://www.tax.ny.gov/pdf/current_forms/it/it201i.pdf.

consumer paid use tax on a particular transaction. For all of these reasons, states will likely collect tax twice on many sales if they can retroactively assess out-of-state retailers for sales and use taxes.

Finally, just as retailers have no efficient means to verify and prove the payment of use tax by consumers, they also have no efficient means to recover use tax from their consumers if their consumers did not pay it to states. Indeed, the expense of such efforts would make it cost-prohibitive for retailers to attempt to verify the payment of tax or collect tax the consumer did not remit after the transaction for most sales. Allowing states to assess out-of-state retailers for taxes that those retailers were not required to collect because of *Quill*'s physical presence rule would thus have the effect of shifting liability for these indirect consumption taxes from consumers to retailers and penalizing retailers that relied upon the bright line test afforded by *Quill*.

B. Modifying *Quill* and Allowing States to Apply the Decision Retroactively Would Raise Significant Due Process Concerns.

Shifting the economic incidence of sales and use taxes from consumers to out-of-state retailers for periods when *Quill*'s physical presence rule was in effect would raise significant due process concerns. The Due Process Clause of the U.S. Constitution provides that a state shall not "deprive any person of life, liberty or property, without due process of law." U.S. Const., amend XIV. This Court has held that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson Corp. v. Div.*

of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla., 496 U.S. 18, 36 (1990). Procedural due process "protect[s] persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

At its core, the Constitutional requirement of due process exists to prohibit states from exercising their authority in ways that "offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). Requiring out-of-state retailers to bear the financial burden of a tax never intended to be borne by retailers—years after making sales to their consumers—patently offends "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

A fundamental principle of due process—and perhaps a universal understanding of "fairness" and "notice"—is laws must exist before a person can be required to comply with them. This is particularly true in the present case because out-of-state retailers have the ability to mitigate their liability for sales and use taxes by collecting the tax from consumers. After all, the economic incidence of the tax is imposed on the person consuming goods and services, not the person selling them. Holding out-of-state retailers liable for taxes they previously were not required to collect, and could have recovered if they had notice of their need to do so, undoubtedly falls short of this Court's understanding of what satisfies the traditional notions of fair play and substantial justice.

C. Principles of Sound Judicial and Tax Policy Require This Court to Address the Retroactivity Issues Described Above if this Court Modifies *Quill*.

This Court has previously indicated that unless it has reserved the question of whether its holding should be applied prospectively, "it is properly understood to have followed the normal rule of retroactive application in civil cases." *See*, *e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539 (1991); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). Although retroactivity may not be a concern with respect to South Dakota's statute, if this Court modifies *Quill*, it should state that the change in jurisprudence is prospective only.

Principles of sound judicial and tax policy caution against allowing states to retroactively apply a decision from this Court should it modify *Quill*. In *Quill*, this Court articulated two relevant policy considerations coloring its decision to reaffirm *Bellas Hess*: the physical presence rule "reduces litigation concerning those taxes" and "encourages settled expectations." *Quill*, 504 U.S. at 303. Both of these policy goals would be subverted if this Court were to modify *Quill* and allow states to apply its decision retroactively—either explicitly through an affirmative statement or implicitly through silence.

Litigation seeking to resolve the due process concerns described above would unquestionably arise if this Court allowed retroactive application of a decision modifying *Quill*. Moreover, such retroactive application would eradicate any "settled expectations" that the physical presence rule provided and reduce taxpayers' confidence in the judicial system as a whole. Out-of-state retailers are entitled to rely upon the physical presence rule unless and until this Court (or Congress) modifies that standard. Requiring out-of-state retailers to bear the cost of defending against retroactive assessments would be unjust even if such retailers ultimately prevailed.

Fairness, certainty, and notice are essential attributes of a sound tax system, particularly a system that relies upon voluntary compliance. Taxpayers must be able to rely upon the rules in existence at the time business transactions occur. While governments have the right to change their laws and policies, fairness demands governments provide taxpayers notice of their obligations and responsibilities, especially when such notice will enable taxpayers to mitigate their tax and compliance burdens.

CONCLUSION

This case has national implications for sales and use taxes. If this Court modifies *Quill*, the Court should state that its decision is prospective only. Such action is necessary to avoid the injustice and consequent litigation that would ensue between states and taxpayers.

Respectfully submitted,

A. PILAR MATA
Counsel of Record
W. PATRICK EVANS
ELI J. DICKER
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
(202) 464-8346
pmata@tei.org

Counsel for Amicus Curiae

April 4, 2018