No. ______

In the Supreme Court of the United States

BARBARA J. BROHL, in her capacity as Executive Director of the Colorado Department of Revenue,
Cross-Petitioner,

v.

THE DIRECT MARKETING ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), this Court reaffirmed the "physical presence rule," which forbids a State from requiring a retail business to collect sales and use taxes unless the business has a physical presence in the State. Courts and commentators agree that the rule lacks doctrinal justification, given that States may impose other regulations on businesses that lack a physical presence within the regulating State's borders. And, with the explosion of e-commerce to a multi-trillion dollar industry, the physical presence rule has caused a "startling revenue shortfall in many States." *Direct Mktg. Ass'n v. Brohl* ("*Brohl II*"), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

The question presented in this Conditional Cross-Petition is as follows:

Should *Quill* be overturned?

PARTIES TO THE PROCEEDING

Cross-Petitioner is Barbara J. Brohl, the Executive Director of the Colorado Department of Revenue, in her official capacity (hereinafter, "the Department"). She was the appellant below and is the respondent in No. 16-267. Executive Director Brohl was substituted for the original named defendant, former Executive Director Roxy Huber, in her official capacity.

Cross-Respondent is the Direct Marketing Association ("DMA"). DMA was the plaintiff and appellee below and is Petitioner in No. 16-267.

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JURISDICTION

The court of appeals issued its judgment on February 22, 2016, and denied DMA's Petition for Rehearing on April 1, 2016. On June 14, 2016, Justice Sotomayor extended the time for DMA to file its Petition for Writ of Certiorari to and including August 29, 2016. DMA filed its Petition on August 29, 2016, and it was docketed on September 1, 2016 as No. 16-267. This Conditional Cross-Petition is timely pursuant to this Court's Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides that "Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST., art. I, § 8, cl. 3.

Section 39-21-112(3.5) of the Colorado Revised Statutes is reproduced in the appendix to DMA's Petition in No. 16-267 at E-1–E-4.

INTRODUCTION

In its Petition (No. 16-267), DMA evades a predicate legal issue it wishes the Court to avoid: whether the holding of *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), should be revisited and, if it can no longer be justified by *stare decisis*, overturned. DMA evades that issue because *Quill* exempts its members from collecting sales and use taxes, a burden that every in-state, and many interstate, businesses must bear. *Quill* confers a competitive advantage; DMA seeks to protect it.

Absent *Quill*, Colorado would not have been required to enact the reporting law challenged here. Consequently, a primary focus of briefing and argument, at every phase of this case, has been the reach and validity of *Quill*. But because lower courts are bound by *Quill*, the parties have not had the opportunity to directly challenge its holding. Justice Kennedy recognized the importance and urgency of this question when this case first came before the Court, stating that "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Below, Judge Gorsuch echoed that sentiment, explaining that *Quill* should "wash away with the tides of time." DMA Pet. App. A-47 (Gorsuch, J., concurring).

As currently framed, DMA's Petition should be denied, as its three questions present a request for error correction in a well-settled area of law.[1] But if the Court determines that review is appropriate in this

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[1] The Department will separately address in its Brief in Opposition the reasons for denying certiorari in No. 16-267.

case, it should reframe DMA's three questions, each of which concern the applicability of the dormant Commerce Clause's antidiscrimination doctrine, as a single question of national importance:

> "By enacting a law to enforce the existing and constitutional use tax within the limitations of *Quill*, does a State run afoul of the anti-discrimination principles of the dormant Commerce Clause?"

If the Court follows that approach, it should further grant the question presented in this Conditional Cross-Petition:

"Should *Quill* be overturned?"

STATEMENT

This Court is familiar with the factual and procedural history of this case, having previously resolved a threshold jurisdictional question in *Brohl II*, 135 S. Ct. at 1134. A few points, however, merit brief additional discussion.

1. Sales and Use Tax Background. Forty-six States and the District of Columbia rely on some form of consumption tax to fund their essential government functions.[2] Colorado, for example, has enacted a complementary sales and use tax framework, as have the vast majority of States. Under this framework, sales tax is owed on all purchases of tangible personal property at retail and is collected by the seller at the point of sale; use tax, on the other hand, is due on the

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[2] PricewaterhouseCoopers, *Retail Sales Tax Compliance Costs: A National Estimate*, Volume One: Main Report, at E-1 (2006), http://tinyurl.com/j32k2xt (last visited Sept. 21, 2016).

storage, use, or consumption of property within the State when sales tax was not paid to the seller. *See* COLO. REV. STAT. §§ 39-26-104(1)(a) & 202(1)(a) (2016). The purpose of this complementary sales and use tax framework is to make all tangible property used or consumed in the State subject to a uniform tax burden, regardless of whether it is acquired within or without the State. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963). These tax revenues are essential to the States' fiscal health. In Colorado, they account for one third of the state general fund. C.A. App. Vol. VII, p. 1930.

Like other States, Colorado requires retailers with a physical presence in the State to collect sales (and sometimes use) taxes from purchasers at the time of the transaction and to remit them to the Department. COLO. REV. STAT. § 39-26-105(1)(c) (2016). Collection at the point of sale is remarkably efficient, yielding a sales and use tax compliance rate of 98.3 percent. C.A. App. Vol. VII, p. 1761. Two decisions from this Court, however, exempt from sales and use tax collection duties any retailer that lacks a "physical presence" in the State: *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

2. *Bellas Hess* and *Quill*. In *Bellas Hess*, a Missouri mail-order house challenged on due process and dormant Commerce Clause grounds Illinois' attempt to require it to collect sales and use tax on sales it made to Illinois residents by mail or common carrier. 386 U.S. at 754–55. Although this Court acknowledged that it had upheld States' power to impose collection duties on out-of-state sellers "in a

variety of circumstances," it observed that it had never done so when the seller's "only connection with customers in the State is by common carrier or the United States mail." *Id.* at 757–58. To impose such a duty, the Court worried, could entangle the mail-order house in a "virtual welter" of tax collection obligations. *Id.* at 760.

Therefore, in a 6–3 decision, the Court agreed with the mail-order house that Illinois' collection obligation was unenforceable both as a matter of due process and under the dormant Commerce Clause. *Id.* at 756. The Court reasoned that it should not abandon its "sharp distinction" between "sellers with retail outlets, solicitors, or property within a State" and those that sell into the State remotely. *Id.* at 758. The Court thus ratified what has become known as the physical presence test, holding that States may not impose tax collection duties on sellers "who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.*

Justice Fortas dissented, joined by Justices Black and Douglas. In their view, the majority's concern regarding the burdens of collecting the tax "vastly underestimates the skill of contemporary man and his machines." *Id.* at 766 (Fortas, J., dissenting). They also noted that it would be perfectly fair to require interstate retailers like the petitioner to collect sales and use taxes, just as in-state businesses and out-of-state businesses with a physical presence in Illinois were required to do. The mail-order company "enjoy[ed] the benefits of, and profit[ed] from the facilities nurtured by, the State of Illinois as fully as if it were a

retail store or maintained salesmen therein." *Id*. at 762. "To excuse *Bellas Hess* from this obligation [to collect tax] is to burden and penalize retailers located in Illinois who must collect the sales tax from their customers." *Id*. at 763.

Twenty-five years later, in *Quill*, the Court reaffirmed *Bellas Hess* but on narrower grounds. 504 U.S. 298 (1992). The Court jettisoned the due process rationale for the physical presence rule, noting that the petitioner, a mail-order office supply company, "purposefully directed its activities at North Dakota residents" and could be subject to state regulation under due process principles. *Id.* at 308. The Court nonetheless retained *Bellas Hess*'s "artificial" physical presence rule based on *stare decisis*; it noted the benefits of bright-line tests, the virtue of protecting settled expectations, and the purported likelihood of reduced litigation. *See id*. at 315–18. The Court also expressed retroactivity concerns: "[a]n overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of [use] taxes and might trigger substantial unanticipated liability for mail order houses." *Id*. at 318 n.10. The Court acknowledged, however, that contemporary Commerce Clause jurisprudence "might not dictate the same result were the issue to arise for the first time today." *Id.* at 311.

Justice White dissented. He criticized as "without precedent or explanation" the majority's decision to craft a Commerce Clause test in conflict with the standard due process analysis that governs all other jurisdictional boundaries for state regulation. *Id.* at 327 (White, J., concurring in part and dissenting in part).

He also emphasized the compounded inequity visited upon the States and in-state retailers by the majority's "protectionist" rule. *Id.* at 329. What had been a $2.4 billion mail-order industry at the time of *Bellas Hess* had ballooned into a $180 billion industry at the time of *Quill*. *Id.*; *see also Bellas Hess*, 386 U.S. at 763. In Justice White's view, the majority's "protectionist rule[ ] favoring a $180-billion-a-year industry" raised "structural concerns" because of "the unfairness of [the] rule on retailers other than direct marketers." *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part). "If the Commerce Clause was intended to put businesses on an even playing field, the majority's rule is hardly a way to achieve that goal." *Id.* Justice White thus pointed out an irony that others have since highlighted: *Quill*'s retention of the physical presence rule frustrates the core of the Commerce Clause's anti-discrimination principle. It creates an "interstate tax shelter for one form of business—mail-order sellers—but no countervailing advantage for its competitors." *Id.*; *see also* DMA Pet. App. A-45 (Gorsuch, J., concurring) (quoting Justice White's dissent and stating *Quill* creates "a sort of judicially sponsored arbitrage opportunity or 'tax shelter'").

3. Colorado's Response to *Quill* and DMA's Lawsuit. In the wake of *Quill*, as the Internet's popularity grew and remote online sales began to skyrocket in the 2000s—climbing past $3 *trillion* in 2008—the States began to suffer tremendous tax losses. C.A. App. Vol. VII, p. 1760. The States' tax collections failed to keep pace because their primary method of collection (point of sale collection and remittance by the retailer) was off limits for remote online retailers. And despite remaining liable for the

tax, the vast majority of purchasers fail to pay it if the tax is not collected at the time of sale. *Id.*; *see Brohl II*, 135 S. Ct. at 1127.

Colorado responded to this growing problem in 2010 by enacting an information reporting law akin to the I.R.S.'s W-2 information return for employee income. *See* DMA Pet. App. E-1–E-17 (containing COLO. REV. STAT. § 39-21-112(3.5) (2016), and 1 COLO. CODE REGS. § 201-1:39-21-112.3.5). The three main components of Colorado's reporting law are described in detail in *Brohl II*, 135 S. Ct. at 1128, and in DMA's Petition. DMA Pet., pp. 6–7. By using the features of third-party reporting, Colorado's law is estimated to eventually close the growing sales and use tax gap attributable to remote sales significantly, but not entirely. C.A. App. Vol. IX, p. 2117.

DMA immediately brought a facial challenge against Colorado's law before its provisions could take effect. In federal district court, DMA argued that "*Quill* is the subtext that underlies this entire case." C.A. App. Vol. III, p. 663. After first issuing a preliminary injunction, the district court granted DMA summary judgment and permanently enjoined the Department from enforcing the reporting law. DMA Pet. App. B-1–B-25, C-1–C-17.

On appeal, the Tenth Circuit initially held that the district court lacked jurisdiction to hear DMA's challenge under the Tax Injunction Act, 28 U.S.C. § 1341. *Direct Mktg. Ass'n v. Brohl* ("*Brohl I*"), 735 F.3d 904 (10th Cir. 2013). This Court granted certiorari, reversed the Tenth Circuit, and remanded, holding that the Tax Injunction Act did not apply. *Brohl II*, 135 S. Ct. at 1134.

Justice Kennedy authored a concurring opinion in *Brohl II*, writing to point out the severe negative consequences of *Quill*. He explained that customers have near instant access to most retailers "via cell phones, tablets, and laptops," permitting those retailers to do business in most States in a "meaningful way" without being physically present. *Id.* at 1135 (Kennedy, J., concurring). But the States have suffered, Justice Kennedy explained, because *Quill* and *Bellas Hess* prevent them from requiring online retailers to collect and remit the owed tax. *Id.* Justice Kennedy said Colorado "exemplif[ies] th[is] trend," having forgone $170 million in 2012 in tax revenue due on e-commerce sales. *Id*

On remand, the Tenth Circuit reached the merits and upheld Colorado's reporting law, holding that the law does not unlawfully discriminate against interstate commerce or run afoul of *Quill*'s protection from unduly burdensome collection duties. DMA Pet. App. A-1–A-47 ("*Brohl III*"). The court of appeals therefore reversed the district court's summary judgment in favor of DMA.[3]

Judge Gorsuch wrote separately in *Brohl III* to explain his views regarding the continuing viability of *Quill*. DMA Pet. App. A-39–A-47. As Judge Gorsuch observed, *Quill* "is among the most contentious of all dormant commerce clause cases," but because it

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[3] DMA filed a Colorado state court action between *Brohl I* and *Brohl II* in an effort to re-establish an injunction against Colorado's law. DMA Pet., p. 11. The state district court granted DMA a preliminary injunction in February 2014, but subsequently stayed the case once this Court granted certiorari in *Brohl II*. The state case remains stayed pending resolution of this federal case.

"remains on the books," lower courts "are duty-bound to follow it." *Id*. at A-40. He explained that *Quill* maintained *Bellas Hess*'s physical presence rule not because it makes any legal or practical sense but only because of "the doctrine of *stare decisis*." *Id.* at A-42. Indeed, the physical presence rule results in "an analytical oddity": it "guarantees a competitive benefit to certain firms simply because of the organizational form they choose to assume." *Id*. A-45. And, Judge Gorsuch pointed out, *Quill* expressly acknowledged that States *can* constitutionally impose on out-of-state retailers a wide range of regulatory burdens that are "more or less comparable" to the sales and use tax collection duty that other retailers must bear. *Id.* at A-43. Judge Gorsuch concluded that although lower courts must respect the *Bellas Hess* rule, *Quill*'s very reasoning "seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Id.* at A-47.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In No. 16-267, DMA asks this Court to overturn the Tenth Circuit's holding that Colorado's reporting law does not unlawfully discriminate against interstate commerce. Because the Tenth Circuit's decision is correct and DMA's Petition, as framed, asks for error correction in a well-settled area of law, this Court should deny certiorari in No. 16-267.

But if the Court believes it should grant review in this case, it should reframe DMA's three questions presented to address a critical issue presented in this case, and grant this Conditional Cross-Petition to reexamine *Quill*.

I. If review is granted, the Court should reframe the questions presented in DMA's Petition.

As drafted, the three questions presented in DMA's Petition are not worthy of certiorari review. DMA's Petition seeks error correction by arguing that the Tenth Circuit misapplied existing and well-settled precedent from this Court. *See* DMA Pet., p. 14 ("Discrimination doctrine under the dormant Commerce Clause has been settled law for decades."); *id.* at 17 ("The Tenth Circuit's analysis thus departs from existing dormant Commerce Clause precedent …."). Contrary to DMA's assertion, the Tenth Circuit's dormant Commerce Clause analysis is correct. But were this Court to grant the Petition, DMA's three questions presented should be reframed into the single question suggested in this Conditional Cross-Petition. *See Jones v. United States*, 527 U.S. 373, 396 (1999)

(noting the Court "granted certiorari on the Government's rephrasing of petitioner's questions").

The rephrased question—whether a state law that seeks to enforce the existing and constitutional use tax within the limitations of *Quill* runs afoul of the anti-discrimination principles of the dormant Commerce Clause—is of significant national importance. The artificial physical presence test and the resulting loss of tax revenue have forced States like Colorado to craft special regulations to address the problem. The result is that, despite the dormant Commerce Clause's purpose of preventing state economic protectionism, the States are forced to treat differently those local and national retailers that maintain a brick-and-mortar presence within their boundaries. Colorado's reporting law, for instance, applies only to the subset of retailers that "do[ ] not collect Colorado sales tax." DMA Pet. App. E-2 (quoting COLO. REV. STAT. § 39-21-112(3.5)). In other words, it applies only to retailers who lack physical presence in Colorado and are thus able to take advantage of *Quill*'s artificial protection.

But Colorado's law represents only one of a myriad of half-solutions the States have devised to attempt to stop the bleeding caused by *Quill*.[4] Other state approaches abound:

- **"Click-through nexus" statutes**: Some States have enacted laws that impose collection and

[4] Other States have also enacted some form of Colorado's notice and reporting law. *See* KY. REV. STAT. ANN. § 139.450 (LexisNexis 2016); OKLA. STAT. ANN. tit. 68, § 1406.1 (2016); S.C. CODE ANN. §§ 12-36-2692 & 2691(E) (2016); S.D. CODIFIED LAWS § 10-63-1, *et seq.* (2016); TENN. CODE ANN. § 67-6-515(f) (repealed Jan. 1, 2014); VT. STAT. ANN. tit. 32, § 9783 (2016).

reporting duties on remote retailers who market their products using in-state affiliates, including through websites that link to the seller's website.[5] State supreme courts, however, are split over the legality of these statutes. *Compare Performance Mktg. Ass'n v. Hamer*, 998 N.E.2d 54 (Ill. 2013) (striking down Illinois' click-through nexus law under the Internet Tax Freedom Act), *with Overstock.com, Inc. v. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013) (upholding New York's click-through nexus law against Due Process and Commerce Clause challenges). And online retailers have undercut the effectiveness of these statutes by severing ties with their affiliates in States with click-through laws.[6]

- **Streamlined Sales and Use Tax Agreement ("SSUTA")**: Twenty-four States participate as members in SSUTA, which attempts "to find solutions for the complexity in state sales tax systems that resulted in the U.S. Supreme Court

[5] *See, e.g.*, CAL. REV. & TAX CODE § 6203(c)(5)(A) (Deering 2016); CONN. GEN. STAT. § 12-407(a)(15)(A) (2016); GA. CODE ANN. § 48-8-2(8)(M)(i) (2016); KAN. STAT. ANN. § 79-3702(h)(2)(C) (2016); ME. REV. STAT. tit. 36, § 1754-B(1-A)(C) (2016); MINN. STAT. § 297A.66.Subd.4a.(b) (2016); MO. REV. STAT. § 144.605(2)(e) (2016); N.Y. TAX LAW §§ 1101(b)(8)(vi) (2016); N.C. GEN. STAT. § 105-164.8(b)(3) (2016); R.I. GEN. LAWS § 44-18-15(a)(2) (2016).

[6] *See* Laura Mahoney, et al., *States See Little Revenue From Online Sales Tax Laws, Keep Pressure on Congress*, Bloomberg BNA (Jan. 8, 2014), http://tinyurl.com/zvaarcv (last visited Sept. 19, 2016).

holding[s]" in *Bellas Hess* and *Quill*.[7] Its main features are the availability of a state-level administrator for sales and use tax collection and a uniform tax rate statewide. Joining SSUTA is prohibited in some states, however, because of home rule provisions in their constitutions that grant localities the right to administer their own sales and use taxes.[8] *See, e.g.,* COLO. CONST. art. XX, § 6; IDAHO CONST. art VII, § 6; LA. CONST. art. VI, § 29. Questions also linger over SSUTA's effectiveness; in over seven years a mere $1.3 billion was collected by retailers registered with SSUTA—a disappointingly low amount compared to the overall $66 billion-plus owed on e-commerce sales in the participating States.[9]

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[7] *About Us: The Streamlined Sales Tax Governing Board*, Streamlined Sales Tax Governing Board, Inc., http://tinyurl.com/gtqcdoj (last visited Sept. 18, 2016).

[8] *See* Dale A. Sevin, *Capturing Tax Revenue on Internet Sales: Abandoning the Streamlined Agreement for Origin Sourcing*, 56 ARIZ. L. REV. 249, 269 & n.196 (2014) (citing Congressional testimony of George S. Isaacson, Tax Counsel, Direct Marketing Association) ("Many states hesitate to join the SSUTA, which requires changing their tax regimes to comply with the SSUTA provisions and surrendering their sovereign right to select the best tax policy for their jurisdiction to the discretion of the Governing Board.").

[9] *See* Laura Mahoney, et al., *States See Little Revenue From Online Sales Tax Laws, Keep Pressure on Congress*, Bloomberg BNA (Jan. 8, 2014), http://tinyurl.com/zvaarcv (last visited Sept. 19, 2016); Donald Bruce, et al., *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537, 543 (2009) (Table 3).

- **"Look up" Table:** Nine states permit taxpayers to report their use tax by using a percentage of their income found in a "look up" table.[10] But compliance rates in States employing this approach are uneven at best. *See* Lila Disque & Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1179–80 (June 2016).
- **Use Tax Line on the Income Tax Return:** Approximately twenty-five States encourage taxpayers to report their use tax liability by including a use tax line on their state income tax return form.[11] Taxpayers' voluntary participation in this approach, however, is paltry, averaging just 3.1 percent.[12]

These varied approaches are just a sampling of how States have been forced to respond to *Quill*. They will continue to proliferate as e-commerce expands. States and interstate businesses need to know whether these types of laws, designed not to discriminate but to avoid the unfair consequences of *Quill*, comport with the dormant Commerce Clause's anti-discrimination doctrine. Accordingly, if the Court grants the Petition in No. 16-267, it should reframe the three questions

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[10] Nina Manzi, *Policy Brief: Use Tax Collection on Income Tax Returns in Other States*, p. 8, Minn. House of Representatives Research Dep't (Apr. 2012), http://tinyurl.com/z5fb9sl (last visited Sept. 18, 2016).

[11] Manzi, *supra* note 10, at 2.

[12] Manzi, *supra* note 10, at 8.

presented into a single question and grant this Conditional Cross-Petition.

II. If review is granted, the Court should take this opportunity to revisit *Bellas Hess* and *Quill*.

Certiorari review should be denied in both No. 16-267 and this case. However, if the Court grants certiorari in No. 16-267, the additional question presented in this Cross-Petition—whether *Quill* should be overturned—merits review for three reasons.[13]

First, whether the physical presence rule continues to have merit in today's e-commerce economy is a question of immense national importance, both as a practical matter and as a doctrinal one.

As a practical matter, members of this Court and lower courts have recognized that the physical presence rule imposes continuing injustice on the States and grants an unwarranted competitive advantage to a large and growing sector of the economy. The harm to the States' fiscal health and to market competition is

[13] The issue of *Quill*'s viability is preserved. The Department argued below that *Quill* "is outdated" and that it "makes no sense to expand that rule," while also acknowledging that "the continuing viability of the physical presence test is for the U.S. Supreme Court to decide." Dep't C.A. Supp. Op. Br., pp. 39–40. Given that the Tenth Circuit was not free to overturn *Quill*, *see* DMA Pet. App. A-40 (Gorsuch, J., concurring), those arguments were more than sufficient to preserve the issue for this Court's review. *See United States v. Williams*, 504 U.S. 36, 44 (1992) ("The dissent would apparently impose, as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent …. That seems to us unreasonable.").

no longer outweighed by the *stare decisis* benefits purportedly achieved by *Quill*'s bright-line rule. To the contrary, the data-driven technology that allows online retailers to entice customers to make targeted online purchases also permits them to facilitate, without substantial difficulty, the collection of the owed tax.

As a doctrinal matter, the constitutional underpinnings of the physical presence rule have stood on weak footing since the rule was first announced in *Bellas Hess*. It inexplicably exempts from any tax collection obligation a discrete subset of interstate businesses—remote retailers—despite their exploitation of the putative taxing State's marketplace. The *Quill* majority compounded that unprincipled approach by bifurcating the concept of nexus into separate meanings for purposes of the Due Process Clause and the Commerce Clause, all without supporting precedent for doing so. This Court should correct these doctrinal missteps by overturning *Quill* and making clear that due process and Commerce Clause challenges to tax collection duties, like other tax challenges, are governed by this Court's seminal four-part test in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Second, *Quill*'s "artificial" rule continues to spawn confusion and interjurisdictional conflicts. States have been required to adopt a range of divergent regulatory approaches to stem their tax losses. But the States' disparate answers to *Quill* are only partial solutions; as experience shows, none are adequate substitutes for requiring the retailer to collect the tax directly from the customer and remit it to the State. Worse, the confusion caused by *Quill* and the States' regulatory

approaches have triggered constant litigation and have led to conflicting lower court decisions regarding the proper scope of the physical presence rule. A uniform national standard would enable the States and taxpayers to more reliably anticipate their revenues and tax responsibilities.

Third, this case presents an appropriate vehicle to reexamine *Quill*. Unlike other tax cases in which a new pronouncement by the Court can raise "thorny" retroactivity and fairness concerns, *Quill*, 504 U.S. at 318 n.10, DMA's facial challenge here involves no tax liability. The Court, should it affirm the Tenth Circuit by overruling *Quill*, will thus be unrestricted in using its equitable and remedial powers to avoid retroactivity or fairness problems. Moreover, the Court's familiarity with this case from *Brohl II* and the case's well-developed record both support granting certiorari. Given that *Quill* is binding across the county, lower courts will have little reason to develop extensive records in tax collection cases that directly challenge *Quill*. It is therefore unlikely that those cases will generate a record as complete as the one here. And, finally, overruling *Quill* will be dispositive of all issues addressed by the Tenth Circuit. This case therefore presents a clean opportunity to reconsider the physical presence rule.

A. The continuing validity of *Quill* is a question of immense national importance.

The States' heavy reliance on sales and use taxes renders the ongoing validity of *Quill* a question of critical national importance. Given the meteoric rise of online retail sales and the ready availability of technology to ease tax collection burdens, there is

simply no practical reason to maintain the artificial physical presence rule.

But that rule is not only immensely problematic in the real word; it is also without doctrinal justification. States may engage in all manner of regulation without relying on the physical presence of regulated entities. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). It makes no sense, as a legal matter, for sales and use tax collection requirements to be subject to a uniquely narrow restriction.

1. In light of the explosion of e-commerce and availability of technological solutions to ease tax collection burdens, the holding of *Quill* is no longer warranted or wise.

In *Brohl II*, Justice Kennedy observed that the physical presence rule results in "continuing injustice faced by Colorado and many other States." *Brohl II*, 135 S. Ct. at 1134 (Kennedy, J., concurring). He noted that the Internet has caused "far-reaching systemic and structural changes" to the economy; a shopper's favorite retail store is just a "click away—regardless of how close or far the nearest storefront." *Id*. at 1135. This has caused exponential growth in e-commerce sales. While mail-order sales at the time of *Quill* totaled just $180 billon, by 2008 e-commerce sales amounted to a staggering $3.16 *trillion* per year in the United States. *Id.* In the face of this rapid economic expansion, the States have been "unable to collect many of the taxes due on these purchases," resulting in a "startling revenue shortfall in many States." *Id.*

Justice Kennedy is not alone in these observations. Courts across the country have remarked on the significance of the e-commerce explosion and the increasing unfairness of insulating remote transactions from sales and use taxes. *See Overstock.com, Inc. v. N.Y. Dep't of Taxation & Fin.*, 987 N.E.2d 621, 625 (N.Y. 2013) ("The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated."); *Capital One Bank v. Comm'r of Revenue*, 899 N.E.2d 76, 86 (Mass. 2009) (stating "electronic commerce now makes it possible for an entity to have a significant economic presence in a state absent any physical presence there" (internal quotations omitted)); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 234 (W. Va. 2006) ("[W]e believe that the *Bellas Hess* physical-presence test, articulated in 1967, makes little sense in today's world.").

The record in this case illustrates these concerns. When not collected at the point of sale, voluntary taxpayer compliance with the use tax is dismal, hovering between zero and five percent.[14] This bleak compliance rate yielded a tax loss in Colorado on e-commerce sales of more than $170 million in 2012 alone. C.A. App. Vol. VII, p. 1760. "States' education systems, healthcare services, and infrastructure are weakened as a result." *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

Modern conditions have also undercut the argument that the administrative burden of collecting sales and use taxes counsels in favor of a physical presence rule.

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[14] Brief of the National Governors Association et al. as Amici Curiae in Support of Respondent, p. 9, *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015) (No. 13-1032).

See Bellas Hess, 386 U.S. at 759–60 (raising the concern that "[t]he many variations in rates of tax, in allowable exemptions, and in administrative record-keeping requirements could entangle … interstate business"). As Justice Fortas recognized decades ago in his dissent, while there is "no doubt" that collecting taxes is a burden, retailers' complaints regarding burdensome administrative and record keeping requirements "vastly underestimates the skill of contemporary man and his machines." *Id.* at 766 (Fortas, J., dissenting); *see also Quill*, 504 U.S. at 332 (White, J., dissenting in part and concurring in part) ("[T]he costs of compliance with the rule, in light of today's modern computer and software technology, appear to be nominal").

This observation, while perhaps debatable in the 1960s and 1990s, is undeniable today. The advent of electronic Internet-based transactions and vendor software largely automates the tax collection and reporting process, making the burdens of that process marginal at most. C.A. App. Vol. II, pp. 279, 284–85. As the record here bears out, remote retailers' cost of complying with Colorado's reporting obligations—which are "comparable"[15] to many obligations associated with tax collection—are "nominal" and "inconsequential," amounting to no more than 0.017% of gross annual sales. C.A. App. Vol. II, p. 279. Retailers are able to satisfy their reporting obligations as part of their ongoing automation system enhancements and regular tax compliance efforts; even small retailers are able to mitigate what nominal compliance costs there are by relying on third-party

[15] DMA Pet. App. A-46 (Gorsuch, J., concurring).

packaged e-commerce solution providers and incorporating compliance efforts into regular process improvements. C.A. App. Vol. II, pp. 279–80. What negligible collection costs remain are offset by the vendor fee that many States permit retailers to retain as compensation for collecting and remitting the tax. *See, e.g.*, COLO. REV. STAT. § 39-26-105(1)(c) (2016) (permitting retailer to retain "three and one-third percent" of all taxes reported).[16]

Thus, the very technology that allows online retailers to fully tap the online marketplace also permits them to facilitate with ease the reporting and collection of the owed tax.[17] It was against this backdrop—the explosion of e-commerce and the ready availability of technology to ease tax collection

[16] The ability of online retailers to exploit technology to maximize their efficiencies and profits should come as no surprise. Online retailers collect demographic information ranging from "your age, whether you are married and have kids, which part of town you live in, how long it takes you to drive to the store, your estimated salary, whether you've moved recently, what credit cards you carry in your wallet and what Web sites you visit." Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. Times Magazine (Feb. 16, 2012), http://tinyurl.com/83h7t2q (last visited Sept. 16, 2016).

[17] Waltreese Carroll, *Can Technology Lessen the Tax Burdens on Interstate Commerce*, 2012 ST. TAX. TODAY 143-2 (2012) (quoting Charles Collins, Vice President of Governmental Affairs at Automatic Data Processing, Inc.—one of six certified service providers under the SSUTA—as stating that "technology has moved in a direction that has alleviated the burdens at issue in *Quill*"); Disque and Hecht, 65 AM. U. L. REV. at 1185 ("Given the technology Internet sellers have developed to enable them to successfully grow and compete, it is not unreasonable to expect that these sellers could also report amounts of sales made to customers").

burdens—that Justice Kennedy emphasized, "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring). *Quill* "now harms States to a degree far greater than could have been anticipated earlier." *Id*. (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (noting that *stare decisis* is weakened where "experience has pointed up the precedent's shortcomings")). And there is no longer any compelling argument that the burdens of compliance compel the protectionist physical presence rule. It should be left in place, Justice Kennedy suggested, only if a "powerful showing" can be made that its rationale is still correct. *Id*.

2. The doctrinal underpinnings of *Quill* have always been, and continue to be, dubious.

Much of Justice Kennedy's strongly worded concurrence in *Brohl II* was grounded in the earlier warnings by members of the Court that *Quill* and *Bellas Hess* were wrongly decided. Those Justices explained why the physical presence rule is doctrinally unsound.

The dissent in *Bellas Hess* perceived no compelling constitutional difference between in-state retailers who sell locally and remote retailers who exploit the State's market from a distance. No constitutional principle merited placing the latter into a most "favored position" in the interstate market. *Id.* at 764 (Fortas, J., dissenting). Justice Fortas cautioned that exempting remote retailers from any obligation to collect use tax would produce a "competitive disadvantage" against local in-state retailers who must collect the tax. *Id.* at

763. This would occur, Justice Fortas accurately predicted, even though large, sophisticated remote retailers "regularly and continuously engage[ ] in exploitation of the consumer market" in the putative taxing State and "enjoy[ ] the benefits of, and profits from the facilities nurtured" by, such States. *Id.* at 762 (internal quotations omitted). It thus made no sense, as a constitutional matter, to exempt these businesses from regulatory burdens other businesses faced. "[I]t seems to me entirely clear that a mail order house engaged in the business of regularly, systematically, and on a large scale offering merchandise for sale in a State … is not excused from compliance with the State's use tax obligations by the Commerce Clause or the Due Process Clause of the Constitution." *Id*. at 765–66.

Twenty-five years later, the *Quill* majority was forced to acknowledge that *Bellas Hess* stood on a questionable legal foundation. The majority abandoned *Bellas Hess*'s "formalistic" due process rationale, adhering instead to "a more flexible inquiry" into whether the retailer's contacts with the forum make it reasonable to require it to defend a suit in that State. *Quill*, 504 U.S. at 307. The majority emphasized today's now-familiar due process rule that jurisdiction "'may not be avoided merely because the defendant did not *physically* enter the forum State.'" *Id*. at 307–08 (quoting *Burger King Corp.*, 471 U.S. at 476 (emphasis in original)). As such, the *Quill* majority recognized that due process allows States to engage in all manner of regulation so long as the foreign retailer purposefully avails itself of the benefits of the economic market in the forum State. *Quill*, 504 U.S. at 307. As Justice Scalia's concurrence explained, "[i]t is difficult to

discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax." *Quill*, 504 U.S. at 319 (Scalia, J., concurring in part and concurring in the judgment).

But the *Quill* majority nonetheless retained the physical presence rule based on a combination of *stare decisis* principles and the majority's view that *Bellas Hess* "is not inconsistent" with the Court's recent Commerce Clause cases. 504 U.S. at 311. This tepid reaffirmance of *Bellas Hess* was the best the majority could muster because it recognized that "contemporary Commerce Clause jurisprudence might not dictate the same result" in 1992 that *Bellas Hess* reached in 1967. *Quill*, 504 U.S. at 311. This much the majority was forced to acknowledge because it realized that the Court's seminal four-part test from *Complete Auto* governs anytime a tax is attacked under either the Due Process Clause or the dormant Commerce Clause. *See id.* (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 279 (holding that the Court will sustain a tax so long as it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State")); *see also Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("The *Complete Auto* test, while responsive to Commerce Clause dictates, encompasses … due process requirement[s] ….").

That the *Quill* majority retained the physical presence rule in the face of compelling doctrinal reasons to abandon it has been criticized as a mistake, particularly its unprincipled bifurcation of due process

and Commerce Clause analyses. *See* Richard D. Pomp, *Revisiting Miller Brothers, Bellas Hess, and Quill*, 65 AM. U. L. REV. 1115, 1144–46 (June 2016) (observing that *Quill* came with "high jurisprudential costs" because the Court "cited no other cases to support its [bifurcation] approach"). Justice White would have given *Bellas Hess* the "complete burial it justly deserves." 504 U.S. at 322 (White, J., concurring in part and dissenting part). He explained the "palpable" illogic and unfairness of *Bellas Hess*'s physical presence rule, stating that it "has very little to do with a transaction a State might seek to tax." *Id*. at 328. After all, even at the time of *Quill*, purchasers placed orders "by fax, phone, and computer linkup; [and] sellers ship[ped] goods by air, road, and sea . . . without leaving their place of business." *Id*. And remote sellers derive benefits, Justice White said, from the putative taxing State that include banking institutions to support credit transactions, courts to ensure collections, means of waste disposal for garbage generated by mail solicitations, and the creation of consumer confidence through enforcement of consumer protection laws. *Id.* To Justice White, the unfairness created by perpetuating an interstate tax shelter for one form of business, with no countervailing advantage for their competitors, worsened what was already an uneven playing field. *See id.* at 329.

Lower courts, although bound to follow it, have also routinely questioned the continuing doctrinal validity of *Quill*. Judge Gorsuch's concurrence below is one such example. DMA Pet. App. A-39–47. In addition to agreeing that *Quill* need not be expanded, he recognized that the decision is one of the "most contentious" of all dormant Commerce Clause cases, *id.*

at A-40, an "analytical oddity," *id.* at A-45, and the "target of criticism," *id.* at A-40. And because *Quill*'s protection is admittedly formalistic and artificial, Judge Gorsuch observed that the decision bears "a sort of expiration date." *Id.* at A-46.

Other lower courts (though not all, *see* § II.B.2, *infra*) similarly strive to limit *Quill*'s reach due to the physical presence rule's questionable rationale. *See, e.g., Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788, 794 (Wash. 2011); *Geoffrey, Inc. v. S.C. Tax Comm'n*, 437 S.E.2d 13, 18 & n.4 (S.C. 1993); s*ee also KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 324 (Iowa 2010) (noting that the "lynchpin [of *Quill*] was not logic, or developing Commerce Clause jurisprudence, but *stare decisis"* and that the *Quill* Court "recognized the tides of due process and Commerce Clause jurisprudence tugged strongly in the opposite direction"); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 232 (W. Va. 2006) (stating that the *Quill* Court's reaffirmation of *Bellas Hess*'s physical presence rule was grounded primarily on *stare decisis*); *A&F Trademark, Inc. v. Tolson*, 605 S.E.2d 187, 194 (N.C. Ct. App. 2004) (noting the "shifting analyses" summarized in *Quill* and that the Court's opinion "hardly indicates a sweeping endorsement of the bright-line test it preserved").

In short, members of this Court (including those in the *Quill* majority) and lower courts have been troubled by the correctness of the physical presence rule since it was first announced in 1967. If review is granted in No. 16-267, this Court should grant certiorari on this Conditional Cross-Petition to correct *Quill*, a case that "was wrong when the case was decided" and that has

grown even more destructive with the passage of time. *Brohl II*, 135 S. Ct. at 1134 (Kennedy, J., concurring).

B. *Quill*'s aftermath has led to divergent regulatory approaches and conflicting court decisions.

In addition to the issue's immense national importance, this Court's reexamination of *Quill* would facilitate greater national uniformity in state tax law. Because *Quill* is binding throughout the country, there is no direct jurisdictional split in authority regarding its validity. But the absence of a uniform standard for collecting the tax owed on remote online transactions has led to an equally problematic state of affairs: an unnecessary proliferation in disparate state regulatory approaches. Likewise, *Quill*'s retention of the unworkable physical presence rule has prompted conflicting lower court decisions over the rule's proper scope, just as Justice White predicted. *See* 504 U.S. at 331 (White, J., dissenting in part and concurring in part) (stating that "it is a sure bet that the vagaries of 'physical presence' will be tested to their fullest extent in our courts").

1. The patchwork of state regulatory approaches triggered by *Quill* counsels in favor of granting certiorari.

Colorado's reporting law is only one of several approaches that the States have devised to mitigate the tax losses caused by *Quill*. As explained above, however, the States' varied approaches are only half-solutions. None has proven an adequate substitute for requiring the retailer to collect the owed tax at the time of sale. *See* § I, *supra*.

Of greater concern is that the States' disparate answers to *Quill* are, in many cases, incompatible with one another, frustrating the development of a more evenhanded national solution. While click-through nexus statutes and SSUTA jurisdictions premise their success on the States collecting the owed tax from the *retailer*, other state approaches use a very different model: voluntary *consumer* remittance. Colorado's reporting law, "look up" table jurisdictions, and States that include a use tax line on their income tax return all fall into the latter category. The result is a patchwork of conflicting and largely ineffective half-measures that have proven incapable of curing the growing tax gap caused by e-commerce sales or leveling the competitive playing field in the national retail market.

2. *Quill* has provoked continuous litigation and conflicting lower court decisions.

The central purported virtue of maintaining *Bellas Hess*'s bright line rule—reduction of litigation—has not been realized. *See Quill*, 504 U.S. at 315. To the contrary, the physical presence rule has *engendered* litigation over the States' differing regulatory approaches. *See* DMA Pet. App. A-43 (Gorsuch, J., concurring) (collecting cases); *Quill*, 504 U.S. at 329–30 (White, J., concurring in part and dissenting in part) (predicting that it is "very doubtful" that the majority's goal of reducing litigation through its bright line approach will be accomplished).

These foreseeable but unnecessary court battles have left a trail of conflicting court decisions over the proper scope of the physical presence rule. *See Lanco,*

Inc. v. Director, Div. of Taxation, 908 A.2d 176, 177 (N.J. 2006) (noting the split). Many courts, like the Tenth Circuit, decline to extend *Quill* beyond the sales and use tax context presented in that decision. *See, e.g.*, *In re Various Applicants for Exemption from Prop. Taxation*, 313 P.3d 789, 797 (Kan. 2013); *Scholastic Book Clubs, Inc. v. Comm'r of Revenue Servs*., 38 A.3d 1183, 1199–1200 (Conn. 2012); *Geoffrey, Inc. v. Comm'r of Revenue*, 899 N.E.2d 87, 94–95 (Mass. 2009); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 232 (W. Va. 2006). Others courts, however, have expanded *Quill* to reach not only sales and use taxes due on remote retail transactions but other types of taxes as well. *See, e.g., Scioto Ins. Co. v. Okla. Tax Comm'n*, 279 P.3d 782, 784 (Okla. 2012) (citing *Quill* to invalidate corporate income tax imposed on an out-of-state corporation that received payments for its intellectual property used at in-state Wendy's restaurants); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 299–300 (Tex. Ct. App. 2000) (relying on *Quill* to invalidate franchise tax imposed on a company holding a certificate of authority to transact business in the State); *J.C. Penny Nat'l Bank v. Johnson*, 19 S.W.3d 831, 841–42 (Tenn. Ct. App. 1999) (relying on *Quill* to invalidate franchise and excise taxes imposed on a bank's income generated by its credit card activities in the State).

These splintered court decisions serve to highlight the confusion and unfairness surrounding *Quill*'s unworkable rule. Retailers, individual taxpayers, and the States all suffer as a result—their ability to predictably anticipate their tax obligations and revenues depends entirely on the jurisdiction they happen to occupy rather than the consistent

application of a legal standard that treats all similarly-situated taxpayers alike. *Cf. Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152, 156 (1996) (explaining certiorari was granted "[b]ecause of the importance of [a] uniform nationwide application" of a federal regulatory scheme).

Given the enormous dollar amounts at issue, litigation—and conflicting court decisions—will continue unless this Court addresses the *Quill* problem at a national level.

C. This is an appropriate vehicle for this Court to reexamine the physical presence rule.

If the Court grants certiorari in No. 16-267, it should also grant this Conditional Cross-Petition because the instant case provides an appropriate vehicle for reexamining *Quill* and *Bellas Hess*, for three reasons.

First, no tax liability is at stake, eliminating any concerns over the retroactive imposition of taxes or penalties. DMA brought its facial challenge in 2010 before the Colorado law or its penalty provisions went into effect. By contrast, the typical sales and use tax case involves an enforcement proceeding through which the State is attempting to recover back taxes and penalties it asserts are owed, as occurred in *Quill* itself did. *See Quill*, 504 U.S. at 303 (stating that North Dakota "filed this action to require Quill to pay taxes (as well as interest and penalties) on all such sales made after July 1, 1987"). Overruling prior precedent in that type of posture can raise "thorny questions" concerning the retroactive imposition of liability that

the litigating taxpayer may not have reasonably expected. *Quill*, 504 U.S. at 318 n.10.

The Court at the time of *Quill* was well aware of these thorny issues, having just issued its splintered decision concerning retroactive taxes in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). In *Beam*, the Court was confronted with the question whether its recent decision striking down a discriminatory Hawaii liquor law should be applied retroactively to authorize additional tax refunds. *Id.* at 533 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)). Justice Souter summarized the three basic approaches to the "choice-of-law problem" when a new rule of decision is announced: (1) fully retroactive, which is the "norm" but can "prompt difficulties of a practical sort"; (2) purely prospective, under which the new rule applies going forward but does not apply to the instant parties or to events occurring before the decision; and (3) modified prospectivity, in which the new rule applies in the case where it is pronounced but the old rule governs in all others arising on facts predating its announcement. *See id*. at 535–38 (opinion of Souter, J., joined by Stevens, J.). Although the *Beam* Court adhered to the normal rule and applied its prior decision retroactively, a different result may obtain, Justice Souter stated, if the Court's prior decision "reserve[d] the question whether its holding should be applied to the parties before it." *Id.* at 539.

Should this Court overrule *Quill*, the absence of tax liability in this case will permit the Court maximum flexibility in fashioning the implementation of its new rule. With no tax liability at issue, the fairness concerns that animated the *Beam* Court's decision fall

away. In particular, the absence of tax liability here will free the Court to "reserve" in its discretion the question whether its holding should be applied to the instant parties before it. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (citing *Beam*, 501 U.S. at 539 (opinion of Souter, J.)). Exercising that discretion will leave open to the Court all possible remedial options. The Court could elect, for instance, to adopt one of its three approaches to retroactivity; alternatively, the Court could leave it to the States to implement the new rule by crafting appropriate remedial measures that comply with the fair-notice requirements of due process. *Cf. Levin v. Commerce Energy, Inc*., 560 U.S. 413, 428 (2010). Either way, the posture of this case presents the Court with the full panoply of remedial and equitable options to avoid retroactivity concerns.

Second, because this case has been before the Court before, the Court is already familiar with its well-developed record and the parties' and *amici*'s respective positions on *Quill*. Indeed, through district court proceedings in both federal and state court, two rounds of briefing and oral argument at the court of appeals, and this Court's decision in *Brohl II*, the parties have had multiple opportunities to advance arguments and marshal facts on the virtues and drawbacks of *Quill*. The record contains information regarding *Quill*'s effects on state and local tax revenue, research by the I.R.S. regarding voluntary taxpayer compliance, and estimates regarding the costs of compliance with the States' alternative regulatory approaches, just to name

a few.[18] If there is any benefit to the length of this drawn-out litigation, it is that the Court will have a wealth of information to draw upon when reaching its decision. *See Adams v. Robertson*, 520 U.S. 83, 92 (1997) (noting "the value to this Court of a fully developed factual and legal record upon which to base decisions").

Third, this case cleanly presents the question of whether to maintain *Quill*'s artificial rule. For one, the jurisdictional issue under the Tax Injunction Act that prevented the Court from addressing the heart of the *Quill* issue in *Brohl II* is no longer an obstacle. For another, the validity of *Quill* is dispositive of all issues decided by the Tenth Circuit and raised in DMA's petition. If *Quill* is overturned, there is no *per se* undue burden problem.[19] Instead, future retailer-specific allegations that tax regulations create an undue burden will continue to be evaluated under the substantial nexus prong of *Complete Auto*, 430 U.S. 274. Similarly, DMA's allegations of discrimination will be mooted in the absence of *Quill*. *Quill* is the only reason that the States treat in-state and out-of-state retailers differently; without it, Colorado and other States will treat retailers alike, regardless of their in-state or out-of-state location. *See* COLO. REV. STAT. §§ 39-26-104(1)(a) & 202(1)(a) (2016) (imposing sales

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[18] *See, e.g.*, C.A. App. Vol. II, pp. 279–99, 306–441; Vol. VII, pp. 1760–63; Brief of the National Governors Association et al. as Amici Curiae in Support of Respondent, pp. 7-11, *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015) (No. 13-1032).

[19] Even if this Court were to reaffirm *Quill*, DMA in its Petition argues only that Colorado's law is discriminatory, not that it is unduly burdensome in violation of *Quill*.

and use tax on all retail sales, without regard to the retailer's location); *id.*, §§ 39-26-104(1) & 204(2) (imposing sales and use tax collection duty without regard to retailer's location). Indeed, the only retailers that would be compelled to report under Colorado's law will be those retailers, in-state or out-of-state, that flout their tax collection responsibilities. Without *Quill*, Colorado's law will no longer have an uneven geographic effect.

Accordingly, if DMA's Petition is granted, this Court should also grant certiorari on this Conditional Cross-Petition because this case is an appropriate vehicle for reexamining *Quill*.

CONCLUSION

Certiorari review in No. 16-267 and this case should be denied. But if this Court grants certiorari in No. 16-267, it should reframe DMA's questions presented and also grant this Conditional Cross-Petition.

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