

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

SOUTH DAKOTA,)
)
) Petitioner,)
)
) v.) No. 17-494
)
WAYFAIR, INC., ET AL.,)
)
) Respondents.)

Pages: 1 through 61

Place: Washington, D.C.

Date: April 17, 2018

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9 Washington, D.C.

10 Tuesday, April 17, 2018

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United

14 States at 10:16 a.m.

15

16 APPEARANCES:

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18 Pierre, South Dakota; on behalf of the

19 Petitioner.

20 MALCOLM L. STEWART, Deputy Solicitor General,

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22 behalf of the United States as amicus curiae,

23 in support of the Petitioner.

24 GEORGE S. ISAACSON, ESQ., Lewiston, Maine; on

25 behalf of the Respondents.

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-494, South Dakota versus Wayfair.

General Jackley.

ORAL ARGUMENT OF MARTY J. JACKLEY

ON BEHALF OF THE PETITIONER

MR. JACKLEY: Mr. Chief Justice, and may it please the Court:

There are two very significant consequences brought about by Quill: First, our states are losing massive sales tax revenues that we need for education, healthcare, and infrastructure.

Second, our small businesses on Main Street are being harmed because of the unlevel playing field created by Quill, where out-of-state remote sellers are given a price advantage.

JUSTICE SOTOMAYOR: I'm sorry. Isn't the problem not Quill but the fact that you don't have a mechanism to collect from consumers? It's not the merchants who are playing -- paying the sales tax; it's the

1 consumer. They're collecting it for you. So
2 find a way to collect from them.

3 MR. JACKLEY: Justice Sotomayor --
4 Sotomayor, we believe that we have a right,
5 because we have a statutory scheme in place
6 that is nondiscriminatory, there aren't
7 apportionment issues, it's a fair scheme, it
8 has safe harbors in place to allow our state to
9 --

10 JUSTICE SOTOMAYOR: Your scheme. But
11 I'm not concerned about your scheme as such.
12 I'm concerned about the many unanswered
13 questions that overturning precedents will
14 create a massive amount of lawsuits about.

15 I know you've told us that Quill has
16 created its own set of lawsuits, I guess every
17 law does, but here there are some significant
18 ones. You're not retroactive, but your
19 adversaries point out that there are many
20 states who have already made this collection
21 retroactive. So we have that question.

22 We have questions about what's the
23 contact that you have to do to impose this
24 obligation. Are we going to decide it under
25 Complete Auto? Are we going to decide it under

1 Pike balancing? How much contact is enough to
2 justify placing this obligation on an
3 out-of-town seller?

4 So there's going to be a host of
5 questions. What happens when the tax program
6 breaks down, as it already has for the states
7 who are using it, and merchants can't keep
8 track of who they've sold to? All of these are
9 questions that are wrought with difficulties.
10 So you're introducing now a whole new set of
11 difficulties to put be -- to put behind
12 something that's been in place for 30 years
13 now?

14 MR. JACKLEY: Justice Sotomayor, we
15 would encourage using the doctrines that are
16 already in place with Complete Auto when it
17 comes to a tax assessment to look for
18 discrimination, to look for apportionment
19 issues, to look at that substantial nexus.

20 JUSTICE SOTOMAYOR: How about
21 economic?

22 MR. JACKLEY: Certainly economics. It
23 can be addressed by Pike. Pike is a balancing
24 test that this Court uses for its dormant
25 Commerce Clause and Commerce Clause effect. It

1 is able to take a look at the actual --

2 JUSTICE SOTOMAYOR: So how many sales
3 does it take? You're at 200,000, I believe, or
4 200 sales, and I don't remember the monetary
5 amount. But what's the minimum?

6 MR. JACKLEY: In South Dakota, it's --
7 it's set at 200 --

8 JUSTICE SOTOMAYOR: I know what it was
9 set at. It still doesn't answer the question.
10 What's the minimum everywhere else?

11 MR. JACKLEY: The minimum would be one
12 sale because, if you look at Complete Auto,
13 that creates the nexus. And then, if you go --

14 JUSTICE SOTOMAYOR: So what are we
15 going to do with the costs that you're going to
16 put on small businesses?

17 MR. JACKLEY: The small businesses are
18 the ones that are affected most by Quill. If
19 you look at that small business on Main Street,
20 it is that business that is put at a price
21 disadvantage because of Quill.

22 If you look at what the --

23 JUSTICE SOTOMAYOR: Actually, they're
24 put at disadvantage not by Quill but by the
25 fact that there are massive discount sellers,

1 not just on the Internet, but even in stores
2 now. I -- I'm talking about the added cost of
3 doing business for the small businessman,
4 someone -- one of the briefs said it was a
5 \$250,000 cost to implement one of these sales
6 programs, one of these sales tax programs?

7 MR. JACKLEY: That brief left out that
8 it begins -- it's to scale, and it begins at
9 \$12 a month for 30 transactions. When you look
10 at the cost associated with collection, it --
11 it really depends --

12 JUSTICE SOTOMAYOR: That doesn't
13 include auditing. It doesn't include
14 integrating the program with the existing sales
15 program of the company. It doesn't account for
16 the maintenance of the program.

17 There's lots of costs that are
18 inherent in a process of this type.

19 MR. JACKLEY: One thing to look at is
20 the fact that all these sellers, at least in
21 the 45 states with a sales tax, already have a
22 collection and a remittance obligation and
23 already have in place the software that is able
24 to calculate --

25 JUSTICE SOTOMAYOR: I'm sorry.

1 There's five states that don't centralize the
2 state and local.

3 MR. JACKLEY: With those five states,
4 as -- as indicated from the briefing, it's to
5 scale. And it begins at \$12 a month for 30
6 transactions. And I think the important thing
7 to look at when it comes to burden is Quill, in
8 the physical presence, doesn't address that
9 issue. It doesn't address that issue because,
10 as shown in National Geographic, you may have a
11 situation where there's a warehouse, there's
12 goods that are warehoused in a particular
13 locality where it will still trigger the sales
14 tax obligation.

15 CHIEF JUSTICE ROBERTS: Well, but did
16 I understand you to acknowledge that there
17 would be a constitutional minimum with respect
18 to the burdens? In other words, that some
19 businesses would not -- you could not impose
20 the obligation on some small businesses?

21 MR. JACKLEY: Mr. Chief Justice,
22 certainly, that's what Pike is for, is to
23 determine in a balancing if there is a
24 constitutional concern, if there is a Commerce
25 Clause concern.

1 JUSTICE GINSBURG: It -- it sounds
2 like --

3 CHIEF JUSTICE ROBERTS: Well, in any
4 of the other areas you just mentioned, I don't
5 know that we've recognized a -- a lowest level
6 for things like a physical presence, right? I
7 mean, isn't it one person, one building? So
8 that -- that would be another special rule in
9 this context, wouldn't it?

10 MR. JACKLEY: You know, certainly,
11 that's one way to look at it, yes, that when
12 you look at the burdens and you look at really
13 physical presence, there are a lot of things
14 that can trigger it. It can be a building, a
15 warehouse. It can be a traveling salesperson
16 that comes to visit in South Dakota at Mount
17 Rushmore and there's a sale.

18 The other important thing to look at
19 when it comes to burden is the state schemes
20 that are being put in place, such as in
21 Colorado with the notice and the reporting
22 requirement, those are burdens that are of
23 equal or perhaps even greater than a simple
24 collection and remittance of a tax.

25 JUSTICE ALITO: If you have -- if

1 there are two options, let's say option A is
2 eliminate Quill and states can do whatever they
3 want with respect to retroactive liability and
4 with respect to the minimum number of sales
5 that are required in the state in order for the
6 sales to be taxed, in order to require them to
7 collect the tax. That's option A.

8 Option B is a congressional scheme
9 that deals with all of these problems. If
10 those are the only two options, which is
11 preferable?

12 MR. JACKLEY: Option A. The reason
13 for Option A is this: Congress has had 26
14 years to address this issue. And it's not
15 Congress, but it's Quill, it's this Court's
16 decision, that is striking down our state
17 statutes.

18 JUSTICE KAGAN: But, General, usually,
19 when somebody says something like that, that
20 Congress has not addressed an issue for 25-plus
21 years, you know, it -- it gives us reason to
22 pause, because Congress could have addressed
23 the issue and Congress chose not to.

24 This is not the kind of issue where
25 you say: Well, probably didn't get on

1 Congress's radar screen or maybe Congress was
2 too busy doing other things. This is a very
3 prominent issue which Congress has been aware
4 of for a very long time and has chosen not to
5 do something about that. And that seems to
6 make the -- your bar higher to surmount, isn't
7 it?

8 MR. JACKLEY: This is a constitutional
9 interpretation. And one way to look at
10 Congress is what was just announced by the
11 Court today, the Microsoft decision.

12 Sometimes the activity of this Court
13 will spur Congress to act. It did in the
14 Microsoft situation. But, in this instance, it
15 hasn't. And I think --

16 JUSTICE GINSBURG: Now Microsoft was
17 just a statutory interpretation question where
18 we might expect Congress to come in.

19 But, here, I take it that your point
20 is Quill, right or wrong, was this Court's
21 decision. And if time has, and changing
22 conditions, have rendered it obsolete, why
23 should the Court which created the doctrine
24 say: Well, we'll -- we'll let Congress fix up
25 what turns out to be our obsolete precedent? I

1 think that's the --

2 MR. JACKLEY: It is, Justice Ginsburg.

3 JUSTICE BREYER: If that's your
4 answer, isn't it normal that we treat a dormant
5 Commerce Clause case the same way we treat
6 statutes?

7 I mean, I think the examples are
8 legion. Congress cannot overturn
9 constitutional decisions, but, in the dormant
10 Commerce Clause case, it's different, and of
11 course they can, and of course they do.

12 So I don't really see a difference
13 there. So what's the difference?

14 MR. JACKLEY: Justice Breyer, I would
15 still say there's a difference because this is
16 a constitutional interpretation.

17 JUSTICE BREYER: No, no, but the word
18 constitutional is not magic. The reason that
19 we say we are more willing to overturn a
20 constitutional case is because Congress can't
21 act.

22 But, here, they can act. And,
23 therefore, there is no reason for treating it
24 specially. What is the response to that?

25 MR. JACKLEY: I think the reason to

1 treat it special is because we have a situation
2 where Congress has had 26 years. They --

3 JUSTICE BREYER: Well, we have briefs
4 from three Senators and Congressman Goodlatte
5 that says Congress was about to act. And,
6 indeed, what stopped them from acting was our
7 decision to decide this case.

8 Now that's -- that's their view of it.
9 And between whether they know or whether I
10 know, I guess they have a better view. They're
11 members of Congress and they point to many
12 statutes. And you are 50 states. If you do
13 not have the power to get Congress to do
14 something, I don't know who would.

15 MR. JACKLEY: Congress doesn't have an
16 incentive in this instance to take action in
17 something that could be perceived as a tax when
18 yet they don't get the opportunity to use the
19 revenue.

20 JUSTICE ALITO: Well, as things stand
21 now, it seems that both the states and Internet
22 retailers have an incentive to ask for a
23 congressional solution to this problem.

24 So the Internet retailers will have to
25 deal with statutes like the Colorado reporting

1 statute and with aggressive moves by the states
2 to try to bring taxation within Quill in some
3 way.

4 And the states, obviously, have an
5 incentive to require retail -- Internet
6 retailers to collect the tax. So there are
7 incentives on both sides. But if Quill is
8 overruled, what incentives do the states have
9 to ask for any kind of congressional
10 legislation?

11 MR. JACKLEY: Well, certainly, if
12 Quill is overruled, the states will have their
13 constitutional responsibilities to follow
14 Complete Auto and to follow Pike.

15 I mean, what really has happened here
16 is, in Quill, this Court set the default. It
17 set the baseline. So where a state statute as
18 non-discriminatory as it may be and as
19 reasonable as it may be, such as South
20 Dakota's, it's automatically unconstitutional
21 and struck down.

22 JUSTICE BREYER: Can I ask you the
23 questions that I -- two or three brief
24 questions? You answer them when you wish and
25 if you wish.

1 And the reason I'm asking like this is
2 because I read through these briefs. When I
3 read your briefs, I thought absolutely right.
4 And then I read through the other briefs, and I
5 thought absolutely right. And you cannot both
6 be absolutely right.

7 (Laughter.)

8 JUSTICE BREYER: All right. So why is
9 it, one, you have wildly different estimates of
10 costs, revenues, and what states are losing or
11 not? How do I find -- and other -- and other
12 things.

13 Can you do this on the Internet --
14 they say there are 12 mistakes, even in South
15 Dakota, all right -- or not?

16 That's Question 1. How do I find out?
17 You have a list here of I would say -- they
18 do -- of six or eight really tough practical
19 decisions, retroactivity, all kinds of things
20 like that. How do we deal with that? Okay?

21 I would like to -- to -- to know the
22 answer to that. And you've already dealt with
23 one, which is, well, I'll put it specifically:
24 What's the standard? What's the standard?

25 The government says physical presence.

1 Huh? Any? What? Okay. So those were my
2 three questions. Anytime you want to deal with
3 them or if you want to deal with them, do so.

4 MR. JACKLEY: Use Respondents'
5 numbers. It's \$100 billion over the next 10
6 years. Use Respondents' activity. We know
7 they collect in -- Wayfair collects in 22
8 states. They do this.

9 In fact, Quill.com now collects in
10 every state. So those numbers show that they
11 do this, use the GAO to show that, of course,
12 you can do this. Companies do this every day.

13 Systemax, who was originally a
14 defendant in this case, no longer is a
15 defendant because overnight they simply
16 switched over.

17 When it comes to retroactivity, the
18 states don't want to address this
19 retroactively, which is why South Dakota,
20 illustrative of that, has indicated we're
21 prospective only.

22 In the briefing, 38 other states have
23 indicated their laws would prevent
24 retroactivity. And significantly --

25 JUSTICE GINSBURG: And that is

1 something that Congress could take care of if
2 we overturn Quill?

3 MR. JACKLEY: Absolutely. In fact --

4 CHIEF JUSTICE ROBERTS: In terms of --
5 in terms of the economic impact, I mean, the
6 suggestion in some of the briefs is that this
7 is a problem that has peaked in the sense that
8 the -- the bigger e-commerce companies find
9 themselves with physical presence in -- in all
10 50 states. So they're already covered. And
11 the work-arounds that some of the states have
12 employed are also bringing more in.

13 And if it is, in fact, a problem that
14 is diminishing rather than expanding, why
15 doesn't that suggest that there are greater
16 significance to the arguments that we should
17 leave Quill in place?

18 MR. JACKLEY: Mr. Chief Justice,
19 because I think it's because of e-commerce.
20 E-commerce is now 9 percent of the market, and
21 it's rapidly growing.

22 If you look at the numbers, it's been
23 challenging for the states to collect on that
24 e-commerce. The collection rate is as low as
25 40 --

1 CHIEF JUSTICE ROBERTS: Sure,
2 e-commerce is expanding, and companies like
3 Amazon account for a large part of that. But
4 they're already collecting in all 50 states.

5 And that's the problem. It's not that
6 e-commerce is expanding. It -- it is -- it is
7 from your point of view, I think, the problem
8 you have to address is that the coverage in
9 terms of collecting the taxes is expanding as
10 well.

11 MR. JACKLEY: Mr. Chief Justice,
12 certainly it's expanding, but what remains is
13 that \$100 billion loss over the next 10 years.

14 Mr. Chief Justice, if I may please
15 reserve the remainder of my time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MR. JACKLEY: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Stewart.

20 ORAL ARGUMENT OF MALCOLM L. STEWART
21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
22 IN SUPPORT OF THE PETITIONER

23 MR. STEWART: Mr. Chief Justice, and
24 may it please the Court:

25 I'd like to start by making two brief

1 points about the stare decisis and the wisdom
2 of leaving this matter to Congress.

3 The first point I'd like to make is,
4 whatever this Court decides, whether it
5 overrules Bellas Hess and Quill, whether it
6 leaves those in place, whether it does
7 something in between, Congress can act.
8 Congress can impose whatever solution it
9 believes is appropriate.

10 And, indeed, if states are given
11 greater latitude to experiment in this area, to
12 devise different schemes that would balance the
13 interests of out-of-state retailers against the
14 interests of consumers within the states' brick
15 -- brick-and-mortar tailers, the states' own
16 interest in -- in acquiring funds, if states
17 can experiment, Congress will have a wider
18 variety of models to look at to decide what
19 aspects of each it would like to -- to choose.

20 The second thing I'd say about stare
21 --

22 JUSTICE SOTOMAYOR: That doesn't do
23 any -- that doesn't do anything for the interim
24 period and for the dislocation and lawsuits
25 that will -- it will engender until there is a

1 congressional settlement.

2 MR. STEWART: I mean, the second thing
3 I would say about Quill is that Quill has come
4 to be understood to stand for the proposition
5 that an out-of-state retailer cannot be made to
6 collect state sales tax unless it has employees
7 or a physical facility within the state. That
8 -- that's the meaning that's been attached to
9 the phrase "physical presence requirement" that
10 the Court used in Quill.

11 I think in context, it's very clear
12 that Quill was not issuing at least an
13 advertent holding about the role of the
14 Internet presence in determining a company's
15 obligation to collect state sales tax.

16 The Court was dealing with Bellas
17 Hess. It summarized the Bellas Hess rule as
18 being that, if the out-of-state retailer's only
19 contact with the taxing state was delivery of
20 goods and catalogs by mail or common carrier,
21 that was insufficient.

22 And then the Court used the term
23 "physical presence requirement," we believe, as
24 shorthand for that principle, but the Court was
25 not saying anything one way or the other about

1 the role of a pervasive Internet presence in
2 establishing sufficient contacts with the state
3 to allow for the collection duty.

4 And a rough analog might be that in
5 the past 15 years, the Court -- this Court has
6 sometimes acknowledged that its prior decisions
7 had used the word "jurisdictional" in a
8 less-than-precise manner, and the Court has
9 sometimes said statutes that we previously
10 characterized as jurisdictional are not really
11 that; they are something else.

12 And, to be sure, lower courts during
13 the interim were wary of rejecting this Court's
14 statement that a particular statute was
15 jurisdictional, even if it seemed to be
16 unthinking, but the Court, when it righted
17 itself, didn't feel obligated to go through the
18 steps of deciding whether the standards for
19 overruling a prior precedent had been
20 established. It simply said: We used the
21 wrong shorthand; we -- we're not wrong as to
22 the substance and we'll go from there.

23 And I think that --

24 CHIEF JUSTICE ROBERTS: Mr. Stewart,
25 do -- do you believe that there is a

1 constitutional minimum so that even a -- a
2 small business using the Internet may have
3 greater burdens than Amazon and, therefore,
4 they have a constitutional claim under your
5 position, or, under your position, can the
6 states impose the burdens on any -- any
7 micro-business, I guess is what the term has
8 been used?

9 MR. STEWART: I think our view as to
10 the -- the correct answer, the -- the answer
11 that is most consistent with this Court's --
12 the body of this Court's dormant Commerce
13 Clause jurisprudence is there's no
14 constitutional minimum, that if you have an
15 out-of-state retailer who is deliberately
16 selling a particular physical good within the
17 state, shipping the good into the state for
18 delivery to the customer and transfer of title,
19 that that is a sufficient basis for subjecting
20 that retailer to the tax collection obligation
21 in the same way that if that single good turned
22 out to be defective, the state could be subject
23 to the -- I'm sorry, the retailer could be
24 subject to regulatory burdens imposed by the
25 state, conceivably could be hauled into -- to

1 court to answer for the --

2 JUSTICE GINSBURG: Mr. -- Mr. Stewart,
3 isn't that the very kind of question that
4 Congress would be equipped to deal with,
5 establishing a minimum?

6 MR. STEWART: Certainly, the fact that
7 we don't think there's a constitutional minimum
8 doesn't mean it wouldn't be a good idea and it
9 wouldn't hinder Congress's ability to decide
10 that a minimum should be --

11 JUSTICE KAGAN: But isn't that
12 essentially a reason why we should leave this
13 to Congress? In other words, from this Court's
14 perspective, the choice is just binary. It's
15 -- it's you either have the Quill rule or you
16 don't.

17 But Congress is capable of crafting
18 compromises and trying to figure out how to
19 balance the wide range of interests involved
20 here.

21 Now the General said Congress hasn't
22 done that, but, again, you know, Congress can
23 decide when it wants to craft a compromise and
24 when it doesn't want to craft a compromise.
25 And then Congress, if it decides it wants to

1 craft a compromise, can craft a compromise in
2 ways that we cannot.

3 MR. STEWART: I -- I would certainly
4 agree that Congress has a broader range of
5 options available to it than does the Court and
6 an ability to devise more nuanced solutions. I
7 don't think, with respect, that it's accurate
8 to characterize the choice before the Court as
9 binary; that is, although it would not be our
10 preferred constitutional rule, it would be open
11 to the Court to say physical presence in the
12 form of employees or physical facilities within
13 the state is not an ironclad requirement and
14 yet not go as far as -- as we've advocated;
15 namely, that anything --

16 JUSTICE BREYER: All right. When you
17 say the one --

18 MR. STEWART: -- within the state is
19 -- is sufficient. And one thing that the Court
20 could do is, as it often does, say: We'll look
21 at the statute before us. We will decide
22 whether the nexus that South Dakota has
23 required in the form of economic contacts
24 within the state as a prerequisite to the tax
25 collection duty -- that at any rate is

1 constitutionally sufficient. And the Court
2 could leave for another day and for Congress
3 the question should a lesser link be sufficient
4 as well.

5 JUSTICE BREYER: All right. But,
6 look, the -- the part that's bringing me there,
7 which I really think we can't do after reading
8 these briefs, is what they -- their side puts
9 up a certain specter which I'm sensitive to,
10 which is that we have four or maybe five giant
11 potential retailers in the country; I mean,
12 there could be a very small number selling
13 virtually anything. And they sell over the
14 Internet. And the hope of preventing
15 oligopoly, et cetera, is small business, which
16 finds it easy to enter.

17 Now you raise with this entry
18 barriers, and they say a lot and you say a
19 little. And I don't know if it's a little or
20 if it's a lot. And if it is a lot, there might
21 be ways of putting minimums in that would, in
22 fact, preserve the possibility of competition
23 and the possibility of new entry, stopping the
24 entry barriers from raising too high.

25 Now that's something the Antitrust

1 Division could testify about, but they're not
2 going to testify here. And so that's the kind
3 of problem that worries me.

4 MR. STEWART: Well, let me say two or
5 three things about that. The first is that the
6 GAO report said that something like 80 or 90 of
7 the 100 biggest Internet retailers are paying
8 their state sales taxes. So it's -- it's big
9 companies, but it's not just the -- the four or
10 five biggest giants.

11 And so the question is kind of how far
12 down the line do you go? How small does a
13 company have to become in order for the -- the
14 burden of collecting state sales taxes to -- to
15 be substantial as -- as a practical matter?

16 And, you know, a front-line answer is
17 the dormant Commerce Clause doesn't entitle a
18 fledgling business to the ability to make a
19 profit if the obligation to collect sales taxes
20 in various states pushes it from making a
21 profit to -- to sustaining a loss. That's not
22 a constitutional defect.

23 But the other thing we would say is
24 nobody on the other side is really seriously
25 contending that the South Dakota law in and of

1 itself places exorbitant burdens. And, indeed,
2 nobody on the other side is even contending
3 that if every state did exactly what South
4 Dakota has done, that the burdens would be
5 exorbitant.

6 JUSTICE ALITO: But South Dakota law
7 is obviously a test case. You know, it was --
8 it was devised to present the most reasonable
9 incarnation of this scheme. But do you have
10 any doubt that states that are tottering on the
11 edge of insolvency and municipalities which may
12 be in even worse position have a strong
13 incentive to grab everything they possibly can?

14 MR. STEWART: And, certainly, if the
15 Court issued a decision that said physical
16 presence is no -- that adopted our -- kind of
17 our view of the correct answer that said you
18 sell -- you make one sale into the state, you
19 are obligated to collect the sales tax. I have
20 no doubt that if the Court issued that ruling,
21 many states would adopt regimes that are less
22 hospitable to retailers, unless they were
23 stopped from doing that by Congress.

24 My -- my point, though, is that there
25 are various contexts in the -- the dormant

1 Commerce Clause, particularly in determining
2 whether a state's tax is likely to cause
3 duplicative taxation in which the Court says:
4 What if every state were to do this? Wouldn't
5 the burdens on interstate commerce be
6 exorbitant?

7 I have my doubts that that mode of
8 analysis applies here, but even if it -- if it
9 did, what the retailers are asking for is
10 something more -- much more than that. They
11 are asking for the Court to say that because if
12 every other state adopted a regime that was a
13 much more onerous variant of what South
14 Dakota's statute does, South Dakota's statute
15 must be invalid.

16 There's no basis in the Court's
17 dormant Commerce Clause jurisprudence for
18 holding that.

19 CHIEF JUSTICE ROBERTS: Well, on --

20 JUSTICE ALITO: So even on the issue
21 of duplicative --

22 CHIEF JUSTICE ROBERTS: Go ahead.

23 JUSTICE ALITO: -- duplicative
24 taxation, does the government have a position
25 on the question whether retroactive application

1 of -- of this would be constitutional?

2 MR. STEWART: In our view, it would be
3 constitutional, in part because, as I was
4 saying earlier, we don't understand Quill to
5 have issued an inadvertent holding with respect
6 to Internet presence. The Court, in our view,
7 can simply clarify Quill rather than overrule
8 it.

9 But even if the Court felt that
10 retroactive application of the decision, the
11 collection of back taxes, raised more
12 substantial constitutional problems, it could
13 simply leave open the possibility of additional
14 Pike-type challenges to back taxes even as
15 prospective application of the law was
16 sustained.

17 JUSTICE GINSBURG: Mr. Stewart, may I
18 just ask before you finish, what is the
19 government's position on the prospect of
20 prospective overruling of Quill? Then we would
21 have no retroactivity problem.

22 MR. STEWART: I -- I think the Court
23 has eschewed prospective announcement of
24 constitutional rules in the following sense:
25 That is, the Court has determined sort of

1 correctly, I -- I believe, that the Court's
2 role is to interpret the Constitution, not to
3 amend it.

4 If the Court says in June of this year
5 that the dormant Commerce Clause means X, it
6 can't say that up until now the dormant
7 Commerce Clause meant something else. And in
8 that sense, prospective decision-making is
9 inconsistent with the judicial role.

10 However, there are circumstances --
11 and qualified immunity is one of them -- where
12 even though the newly announced constitutional
13 rule as a rule applies retroactively, the
14 ability of -- the availability of particular
15 types of relief may depend on whether people
16 were justifiably uncertain at the time.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Isaacson.

20 ORAL ARGUMENT OF GEORGE S. ISAACSON

21 ON BEHALF OF THE RESPONDENTS

22 MR. ISAACSON: Mr. Chief Justice, and
23 if it please the Court:

24 I'd like to direct my initial
25 responses to some of the questions that Justice

1 Breyer was asking counsel. He pointed out the
2 fact that there were conflicting numbers before
3 the Court regarding what is the amount of lost
4 revenue that the states are experiencing, and
5 he said, what should we rely upon?

6 The most authoritative, independent,
7 and extensive study was the one that was done
8 by the General Accountability Office. And the
9 General Accountability Office determined that
10 the private study that was done by two
11 professors at the University of Tennessee,
12 which was issued in 2009 based on 2006 figures,
13 and then updated in 2012 based upon 2009
14 figures, the GAO indicated that the figures
15 were only one-quarter to one-third of the
16 amount of lost revenues.

17 JUSTICE BREYER: That -- that wasn't
18 the problem really. The problem really is your
19 brief is filled with stuff. I mean, for
20 example, go to the website, which I went to,
21 that they recommend, and it seems easy to
22 determine what the sales tax was. And you say:
23 But, my God, even 12 mistakes in South Dakota.

24 And, moreover, there are 10,000
25 different ones, and you try to do that and you

1 get it wrong, and either the state assesses
2 \$500 penalty for every mistake, which is
3 billions or, you know, a lot, and -- or the
4 class action lawyers sue you for having paid
5 too much. All right? Your brief is filled
6 with that kind of thing.

7 Their brief says: You know, even if
8 we don't have perfect software, we can develop
9 it. It's not so hard. And when there's a
10 demand for it, we'll do it, and it'll be easy.

11 And you say: It's going to cost
12 thousands and thousands of dollars for a small
13 business, maybe all their profits eaten up in
14 hiring accountants. They say: That won't be
15 necessary. We'll do it on software.

16 And, hey, they're not going to -- and
17 do it -- overrule prospectively. Okay? Both
18 are logical. How do I decide who's right?

19 MR. ISAACSON: Well, part of that
20 problem, Justice Breyer, is the fact that
21 there's no record in this case. And so, in
22 trying to determine even as a matter of stare
23 decisis where there is a special justification
24 for overruling Quill, I think the problem that
25 you've identified is that no record has been

1 presented to the Court that would support that
2 substantial justification.

3 JUSTICE GINSBURG: But how about going
4 back to the very basic issue? The assertion is
5 that asking an out-of-state seller to collect
6 tax on goods shipped in-state discriminates
7 against interstate commerce.

8 But, as I see it, why isn't it, far
9 from discriminating, equalizing sellers; that
10 is, anyone who wants to sell in-state, whether
11 an in-state shop, an out-of-state shop,
12 everybody is treated to the same tax collection
13 obligation. All who exploit an in-state market
14 are subject to the in-state tax.

15 Why isn't that equalizing rather than
16 discriminating?

17 MR. ISAACSON: Well, the -- the
18 dormant Commerce Clause takes as its principal
19 objective the maintenance of a single national
20 marketplace that is free and accessible to all
21 participants.

22 And the Court found back in the Bellas
23 Hess decision in '67 that the existence of 2300
24 different sales and use tax jurisdictions with
25 varying rates, varying exemptions, varying

1 taxability items, varying filing requirements
2 and audit obligations, was a burden on in-state
3 commerce.

4 In 1992, when Quill was decided, that
5 figure went from 2300 to 6,000. That figure
6 today is over 12,000 different jurisdictions.

7 So the concern that the Bellas Hess
8 and Quill courts had was the notion that a free
9 and open market would be encumbered by that
10 degree of complexity. And that complexity has
11 only worsened over time.

12 JUSTICE GORSUCH: I -- I -- I don't
13 think you've quite addressed Justice Ginsburg's
14 question, though, which is brick-and-mortar
15 retailers, if they choose to operate in any
16 given jurisdiction, have to comply with that
17 jurisdiction. There are a lot of retailers
18 that have to comply with lots of different
19 jurisdictions' rules.

20 Why should we favor, this Court favor,
21 a particular business model that relies not on
22 brick and mortar but on mail order?

23 I understand in Bellas Hess the court
24 was concerned about a nascent, small mail order
25 industry. Those concerns seem a little

1 antiquated today.

2 So maybe if you could address, Justice
3 Ginsburg's question is the same one I have, so
4 anything you might say on that would be
5 helpful.

6 MR. ISAACSON: Thank you, Justice
7 Gorsuch.

8 Borders count. States exercise their
9 sovereignty based upon borders, territorial
10 limits. It's a key part of horizontal
11 federalism in this country.

12 So, if there's going to be some
13 standard that determines when is a company
14 subject to the tax jurisdiction of a state,
15 using the -- the territorial limits of that
16 state make sense.

17 What I think is most significant in
18 looking at this -- this issue is that most of
19 the large retailers -- 19 of the 20 largest
20 Internet retailers already do collect tax
21 because the nature of the market has required
22 them to establish a local presence. Among the
23 100 top Internet retailers, the collection rate
24 is between 86 and 97 percent.

25 JUSTICE GORSUCH: I accept that. But

1 it's still not responsive, counsel.

2 You're -- you're -- you're just merely
3 pointing out that more Internet retailers are
4 moving toward brick and mortar. Fine. But,
5 again, why should this Court favor those who
6 don't over those who do? That's the question.

7 MR. ISAACSON: So the United States
8 has suggested that even one sale into the state
9 would require collection. Now a point of sale
10 retailer only has to comply with one
11 jurisdiction where their store is located.

12 JUSTICE GORSUCH: Not necessarily.

13 JUSTICE BREYER: You may know the
14 answer -- you may know the answer, but, I mean,
15 with all these numbers, I mean, one part of the
16 answer to that in my mind or, not an answer,
17 but help resolve it, is what does it cost for a
18 mandolin seller who sells mandolins on the
19 Internet to sell them in 50 states? How much
20 does it cost him to enter that market?

21 How much did it cost Sears, Roebuck?
22 You know, that's an ancient name, but they did
23 all right.

24 (Laughter.)

25 JUSTICE BREYER: And, by the way, how

1 much does it cost Amazon voluntarily to comply?

2 And I -- I mean, see, there are
3 empirical questions that I think are -- would
4 help me reach an answer. And if you know them,
5 tell me. No one asked Amazon. What does it
6 cost Amazon? What does it cost the mandolin
7 saler -- seller? What are the -- are there
8 differences? I don't know.

9 MR. ISAACSON: So one of the reports
10 --

11 JUSTICE BREYER: Do you know? Do you
12 know what it costs Amazon?

13 MR. ISAACSON: I do not know what it
14 costs Amazon, but I do know that in the
15 Kavanaugh report, which we cite in our -- in
16 our briefs to the Court, indicated that the
17 cost of just implementation and integration of
18 a software system, before you're dealing with
19 any of the other issues, costs up to \$250,000.

20 That the maintenance of a system --

21 JUSTICE GORSUCH: Well, but it starts
22 at \$12. We know that too. Right? So that
23 figure seems a little misleading.

24 I guess the real question that I think
25 Justice Breyer may be getting at, and I'd love

1 your help on this too, is the comparative
2 difference. Right?

3 After Quill, now states may force
4 Internet providers to provide information, like
5 Colorado does, that enable them to collect tax
6 from the taxpayer. So the real delta here
7 isn't no duty at all on the Internet supplier
8 versus collecting sales taxes. It's something
9 like Colorado's regime versus collecting sales
10 tax.

11 Do you have any information at all as
12 to which is the lesser burden? I've wondered
13 whether the Colorado regime might be more
14 burdensome to clients like yours who do sales
15 over the Internet than just simply collecting
16 the sales tax itself.

17 MR. ISAACSON: The Colorado regime is
18 much less burdensome.

19 JUSTICE GORSUCH: Do you have any data
20 on that? Is there anything at all that tells
21 us that?

22 MR. ISAACSON: Well, that law has only
23 gone into effect this year. The annual
24 reporting requirement hasn't -- hasn't arrived
25 yet. It doesn't arrive until -- until next

1 year. And so there's -- there's no empirical
2 evidence in that regard.

3 But the reporting requirement for the
4 Colorado law simply requires a single annual
5 spreadsheet reporting of all the purchases that
6 were made by Colorado residents.

7 JUSTICE GINSBURG: And then the state
8 has the burden of going after consumers, I
9 mean, just in the real world, it's much more
10 efficient, much more likely, to yield funds if
11 you go after the seller than if you go after
12 the individual consumer.

13 MR. ISAACSON: And I think that
14 speaks, Justice Ginsburg, to the value of a
15 congressional solution. So, for example, what
16 Congress can require is one rate per state for
17 all remote sales.

18 It can require a clearinghouse that
19 can be used for the processing of payments. It
20 can require standard uniform definitions of
21 products so that food and sportswear and
22 clothing doesn't mean one thing in one
23 jurisdiction and another elsewhere.

24 I think an important part of the
25 history of this issue and correcting what I

1 think is the misimpression that's been
2 presented by the United States and the State of
3 South Dakota is that Congress has been active
4 on this issue going back to shortly after the
5 Quill decision.

6 Congress passed the Internet Tax
7 Freedom Act in 1998, which established an
8 Advisory Commission on Electronic Commerce,
9 which issued a comprehensive report in 2000
10 detailing the items that the states should
11 address to simplify their tax systems in order
12 to warrant federal legislation.

13 And it called upon the states to
14 develop that system within five years. The
15 minority report called upon the states to issue
16 -- to develop that system within two years.

17 The states did not develop that --
18 that system. A number of states initiated a
19 project called the Streamlined Sales Tax
20 Project to come up with such a uniform system
21 of taxation. And over two-thirds of the states
22 with populations having -- over -- states with
23 a population of more than two-thirds of the
24 national population refused to join, and that
25 included all the larger states, like New York,

1 Pennsylvania, Illinois, Texas, Florida,
2 California.

3 So that Congress has given clear
4 direction to the states, the kind of steps that
5 should be taken if they were going to be
6 obtaining from Congress broader tax
7 jurisdiction. The --

8 JUSTICE SOTOMAYOR: Can you imagine us
9 saying anything -- assuming we were -- and it's
10 hypothetical to accept your position. Is there
11 anything we can do to give Congress a signal
12 that it should act more affirmatively in this
13 area?

14 MR. ISAACSON: I would welcome a
15 decision from this Court that would indicate
16 that Congress should move forward with
17 consideration and action upon legislation. But
18 I think the wheels --

19 JUSTICE SOTOMAYOR: Well --

20 CHIEF JUSTICE ROBERTS: I'm sorry.
21 Maybe they already -- maybe they already have
22 and they've made a decision or at least
23 majorities have made a decision that this is
24 something they're going to leave the way it has
25 been for, whatever it is, 25 years. I think it

1 would be very strange for us to tell Congress
2 it ought to do something in any particular
3 area. Just a thought.

4 MR. ISAACSON: I certainly -- I
5 certainly wouldn't advise this Court on -- on
6 how it should relay to Congress. But I would
7 point out, Mr. Chief Justice, that all of the
8 players that are involved in this issue are in
9 favor of federal legislation. For the direct
10 marketing industry, as I've pointed out to you,
11 the largest players are collecting tax. They
12 would welcome simplification.

13 JUSTICE KENNEDY: But you say that --
14 that congressional action should be taken
15 against the background in which this Court has
16 made a statement of constitutional law that is
17 -- has now, especially in light of the cyber
18 age, proven incorrect. So you want Congress to
19 act against the background in which this Court
20 has made an incorrect resolution of the law.
21 That's -- that's the assumption you're making.

22 Of course, I know your backup argument
23 is that Quill is correct. I understand that.

24 MR. ISAACSON: I'm certainly not
25 suggesting that Congress should be acting to

1 correct this Court's Quill decision. Rather,
2 this Court recognized in its Quill decision
3 that Congress had the power and was better
4 suited to be addressing the issue.

5 JUSTICE KENNEDY: But -- but the
6 assumption of many of these questions is that
7 Quill is incorrect but that that doesn't make
8 any difference. And I'm suggesting that it
9 does make a difference when -- when Congress
10 acts for it to determine what the
11 constitutional rule is as correctly stated by
12 this Court.

13 Now I understand you think Quill is
14 correct, but most of these questions have just
15 assumed that Quill is incorrect. But what
16 difference does it make?

17 MR. ISAACSON: I think that then
18 introduces the issue of stare decisis because
19 the standard of stare decisis is that, even
20 where the Court has ruled incorrectly, there's
21 a value in settled expectations and standing by
22 the decision previously.

23 And that is most powerful when
24 Congress has the ability to correct an error if
25 that error existed. And both the state and the

1 United States deal very lightly with the issue
2 of stare decisis.

3 JUSTICE GINSBURG: But if the court is
4 responsible for *Bellas Hess*, and there was from
5 the very beginning strong dissenting opinions,
6 and there was a suggestion that there be a test
7 -- a test case, why shouldn't the Court take
8 responsibility to keep our case law in tune
9 with the current commercial arrangements? It's
10 been said that that has been done in the
11 antitrust area. Why are we -- Congress -- ask
12 Congress to overturn our obsolete precedent?

13 MR. ISAACSON: Well, first, the *Quill*
14 Court did not invite test case litigation on
15 the issue. Justice Kennedy raised that issue
16 in his concurring opinion in -- in the *Brohl*
17 decision.

18 JUSTICE GINSBURG: Yes.

19 MR. ISAACSON: But I think the main
20 reason, Justice Ginsburg, is because of the
21 power of stare decisis, especially on the issue
22 of reliance.

23 If this Court decided to overturn
24 *Quill* -- and I think Justice Alito giving the
25 -- the two alternatives, either a -- an

1 immediate overturning of Quill or -- or turning
2 to a congressional solution -- the result would
3 be chaotic.

4 It's interesting, if you take the
5 statement of Colorado's only member of the
6 House of Representatives, Katie Noem, said, "If
7 the Supreme Court rules in South Dakota's
8 favor, it could become a marketplace
9 free-for-all. A South Dakota small business,
10 for instance, could be forced to comply with
11 1,000 different tax structures nationwide
12 without the tools necessary to do so."

13 That's from a high official
14 representing the State of South Dakota.

15 JUSTICE GINSBURG: Under Brohl, don't
16 you think there's enough incentive in the
17 system that if we did overrule Quill, that
18 entrepreneurs would produce software that would
19 meet the market need?

20 MR. ISAACSON: The notion of software
21 being a silver bullet, I -- I think, is -- is
22 a -- is a real misapprehension. The actual
23 looking up of the rate for the 12,000 different
24 tax jurisdictions hardly scratches the surface.

25 Retailers need to map their products

1 against that software, which is rife with
2 errors because common products are defined
3 differently in different states. And it's not
4 merely the 45 states plus the District of
5 Columbia that have sales tax, but there are
6 over 500 home rule jurisdictions that have
7 their own tax bases and definitions.

8 The record retention that's necessary
9 for exempt buyers, exempt transactions, exempt
10 uses, is a physical process that needs to be
11 done by the -- by the retailer. The filing of
12 the -- of the reports are different for the
13 various states.

14 JUSTICE GINSBURG: Why is it --

15 JUSTICE KAGAN: I think what Justice
16 Ginsburg was perhaps suggesting was that all
17 these functions would be essentially taken over
18 by companies like Amazon and eBay and Etsy,
19 that they would do it for all the retailers on
20 their system.

21 Now there's something a little bit
22 ironic in saying the problem with Quill is that
23 it benefited all these companies, so now we're
24 going to overturn Quill so that we can benefit
25 the exact same companies.

1 But -- but I think that that's the
2 idea; that, in fact, this would not fall on
3 individual entrepreneurs, that it -- instead,
4 they would pay fees to companies like Amazon.

5 MR. ISAACSON: The -- the problem,
6 Justice Kagan, is that a number of the
7 functions that I described simply cannot be
8 performed by software. So, for example, if you
9 need to collect resale and other forms of
10 exemption certificates, states require that
11 those be physical papers that -- that you
12 collect. There's no software solution to that.

13 If -- if a state is coming in to audit
14 you, software doesn't solve that for you in --
15 in any respect. So software can do certain
16 functions, and those functions might improve by
17 entrepreneurial initiatives, but they're not
18 going to solve these other issues.

19 And what will happen, because of the
20 substantial expense that's associated with
21 this, is that small and mid-sized companies
22 will be deterred from entering that market.
23 They have a choice. They can either invest in
24 opening a store within the state and foregoing
25 a national market, or they can develop a

1 website and sell to a national market.

2 The Commerce Clause was the promise --

3 JUSTICE GINSBURG: But they say if
4 they open a store within the state, then
5 they're hit by these remote sellers, and so
6 their store in the state is suffering. It is
7 the small business person inside the state
8 that's suffering.

9 MR. ISAACSON: It's interesting,
10 Justice Ginsburg, that, currently, over
11 70 percent of all small businesses have a
12 website. And by the end of 2018, it's
13 estimated that 91 percent of small businesses
14 will have a website.

15 So the issue here is not between small
16 in-state retailers and out-of-state direct
17 marketers. The real competition is between the
18 large companies, who are Omni merchants, who
19 are multi-channel merchants, who are
20 increasingly dominating the Internet.

21 And one of the effects, if you
22 increase the cost of admission, if you have
23 barriers to entry, one of the inevitable
24 effects is going to be that those small and
25 medium-sized companies are going to be deterred

1 and there will be even greater concentration by
2 the largest retailers.

3 Again, I think that is antithetical to
4 what the objectives of the Commerce Clause
5 were.

6 The arguments that the United States
7 made, I think, raise some very disturbing
8 notions of what the future would -- would look
9 like.

10 The notion that Mr. Stewart presented
11 that there is no constitutional minimum, if the
12 Court overturns Quill, that any single sale
13 would obligate a company to then comply with
14 the particulars of that jurisdiction's tax,
15 would really mean that you'd have most smaller
16 merchants say that's not a -- a function that
17 we can assume at an economic basis.

18 JUSTICE GINSBURG: But that would be
19 really something that would appeal to Congress
20 to fix, because the whole picture, Congress
21 doesn't want to look like it's increasing
22 taxes, but fixing something like that would not
23 encounter the same hurdle.

24 MR. ISAACSON: The absence of any
25 incentive of the states to seek a congressional

1 resolution in the event that Quill was
2 overruled, I think, is a major impediment to
3 the notion that Congress would come in and fix
4 the problem.

5 And as Justice Sotomayor pointed out,
6 what happens in the interregnum, what happens
7 in the one- or two- or three-year period before
8 Congress acts and companies are confronted with
9 this dilemma of collection?

10 The notion of a chaotic period
11 preceding Congress coming in to address the
12 issue is as daunting as any in terms of what
13 the consequence of overruling Quill would be.

14 I do want to place special --

15 JUSTICE GINSBURG: We saw today, from
16 the announcement today, that Congress can
17 sometimes act with -- with rapidity.

18 MR. ISAACSON: Well, in -- in this
19 instance, leading state leaders, for example,
20 the Director of Tax Policy For the Conference
21 of State Legislatures has publicly stated that
22 if this Court were to overturn Quill, there's
23 no reason that the states would favor federal
24 legislation.

25 So that dynamic is one which I think

1 would likely stalemate Congress rather than
2 encourage Congress to act.

3 I do want to make special emphasis on
4 the issue of -- of stare decisis because, since
5 Quill has been in place, and there's been a
6 clear explanation of what the standard is for
7 tax jurisdiction, literally thousands of
8 companies have conformed their conduct to the
9 standard that was -- was established.

10 Justice Scalia's concurrence in the
11 Quill case said that, where that kind of
12 reliance is present and companies have ordered
13 their economic affairs in that reliance, that
14 the adoption of stare decisis is at its acme.
15 And he also pointed out that that is especially
16 so where Congress can address the issue.

17 If Congress were to address the issue,
18 I think there would be no doubt that it would
19 be purely prospective. In fact, I think that's
20 the only thing Congress could probably do, is
21 have a prospective law.

22 But this Court has indicated that a
23 purely prospective ruling is inconsistent with
24 its view of the law and made that very clear in
25 the -- in the Harper case.

1 CHIEF JUSTICE ROBERTS: What is the --

2 JUSTICE GORSUCH: When you say -- I'm
3 sorry.

4 CHIEF JUSTICE ROBERTS: What is the
5 reliance you're talking about, other than the
6 retroactivity question?

7 MR. ISAACSON: Companies have made
8 their investment decisions based upon a
9 business model understanding what the Quill
10 standard requires. So --

11 CHIEF JUSTICE ROBERTS: But the -- the
12 assumption, when you're talking about stare
13 decisis, is that the decision was wrong. So
14 you're saying they've made business decisions
15 on the basis of an erroneous decision, when the
16 decision is based on the fact that -- well,
17 that use taxes are not being paid.

18 MR. ISAACSON: Yeah, I think --

19 CHIEF JUSTICE ROBERTS: In other
20 words, the benefit comes from them not just
21 from the fact that they don't have to collect,
22 but from the fact that most people aren't
23 paying use taxes.

24 MR. ISAACSON: I think Justice Kagan's
25 decisions in Bay Mills and in Kimble make clear

1 that the application of stare decisis is not
2 dependent upon the correctness of the decision
3 which is being followed.

4 In fact, if a decision is correct,
5 stare decisis isn't necessary. The decision
6 would be standing on its -- on its own legs.

7 So, here, you have a situation quite
8 different than other cases where the Court has
9 been able to declare that there was no reliance
10 or no rightful reliance. Here, you have a
11 situation where you have a whole industry that
12 has understood what the rules are.

13 I think Justice Scalia's term in -- in
14 his concurrence in the Quill case was that
15 these companies had the right to take us at our
16 word, that that was the standard that was --
17 that was applicable.

18 JUSTICE SOTOMAYOR: Is there any brief
19 I can read or any source to determine what
20 constitutes a small business in America? I
21 don't even have the answer to that. Okay? The
22 figures we were given was based on a small
23 business.

24 But is 200 sales a year the minimum,
25 or is it something higher? That's the South

1 Dakota law. It has a minimum amount of sales.
2 I don't know. I don't know enough about the
3 Internet to make a judgment, as suggested by
4 the Solicitor General, to make a judgment that
5 these are actually the right numbers.

6 Is there something I could look at to
7 figure it out?

8 MR. ISAACSON: The Small Business
9 Administration defines small business in
10 various categories of business activity. So
11 that's certainly a source that you could look
12 at.

13 The figure of 200 transactions, I
14 think, needs to be put into -- into clear
15 perspective. The average Internet transaction
16 is \$84. So 200 transactions times \$84 is less
17 than \$17,000.

18 So it's not the \$100,000 a year
19 figure. And there are many Internet sellers,
20 for example, Etsy has 1.9 million participants
21 on Etsy, and many of them are selling products
22 that have only a \$10 sales value. So \$10 times
23 200 is \$2,000.

24 The compliance cost of -- of complying
25 with the South Dakota sales and use tax law on

1 \$2,000 worth of sales would far exceed whatever
2 the profit margin is. And it becomes a good
3 example of --

4 JUSTICE GORSUCH: Is the same true of
5 Colorado's reporting requirements?

6 MR. ISAACSON: Pardon me?

7 JUSTICE GORSUCH: If we're going to
8 compare barriers to entry, we have to compare
9 apples to apples. And -- and so we wouldn't
10 compare it necessarily against a baseline of
11 nothing. We'd have to compare it against the
12 reporting requirements of a state like
13 Colorado's. So do you know what the
14 difference, the delta there is?

15 MR. ISAACSON: I don't. I don't, Your
16 Honor. I don't have that -- that figure.

17 If there are no further questions, I
18 thank the Court.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 General Jackley, five minutes
22 remaining.

23 REBUTTAL ARGUMENT OF MARTY J. JACKLEY
24 ON BEHALF OF THE PETITIONER

25 MR. JACKLEY: Thank you, Mr. Chief

1 Justice.

2 Justice Breyer, I owe you an answer to
3 your third question, and that is what rule
4 would apply. And I would tell you the sky
5 isn't falling, that this Court's jurisprudence
6 already in place with respect to a tax
7 assessment is Complete Auto.

8 With respect to the collection side
9 and concerns with burden, the balancing that
10 Pike has in place provides those constitutional
11 protections.

12 When it comes to Congress, I know the
13 question is --

14 JUSTICE SOTOMAYOR: I'm sorry, you
15 said earlier one sale is enough for -- to
16 justify a state imposing the reporting
17 requirements. Are you backing off that?

18 MR. JACKLEY: No. I think --

19 JUSTICE SOTOMAYOR: What does Pike
20 give us if you're saying one sale is enough?

21 MR. JACKLEY: I think it gives you the
22 nexus. I think there could be a set of
23 circumstances, and that's precisely what Pike
24 is for, to address that in the balancing. But,
25 generally speaking, if there's a sale, there's

1 an activity in the state --

2 JUSTICE BREYER: But what Complete
3 Auto is, it's -- it's a nexus such that the
4 benefits of state revenue do not outweigh the
5 compliance costs associated with the tax
6 collection obligations that the state has
7 imposed.

8 Now that seems like a sensible test,
9 until I suddenly think of 10,000 cases being
10 brought by 20,000 lawyers on one side and
11 another 20,000 on the other to decide
12 jurisdiction by jurisdiction, case by case
13 about whether that test is met.

14 Now that's -- that's -- that's why --
15 that was my problem with Complete Auto.

16 MR. JACKLEY: Complete Auto addresses
17 every other tax situation --

18 JUSTICE BREYER: That's true.

19 MR. JACKLEY: -- other than sales tax.

20 JUSTICE BREYER: That's a very good
21 point.

22 MR. JACKLEY: And Pike addresses every
23 other state regulatory system under the
24 Commerce Clause. And I think it's, based upon
25 that, the sky isn't falling.

1 The question came up about what signal
2 needs to go to Congress. And I would submit I
3 don't believe this Court has to, but if -- if
4 they're looking for a signal, that signal is to
5 overrule Quill.

6 I mean, to reset the default, so that
7 the default, like here, isn't doing all the
8 work. It's a situation where it's this Court's
9 decision in Quill that's basically striking
10 down every state statute, including mine, no
11 matter how non-discriminatory, no matter how
12 low the burdens are.

13 I live in a state that is a
14 streamlined tax state, which means we pay all
15 those collection remittance costs. In fact, we
16 actually pay the businesses up to \$70 a month
17 to be a part of that. So there is no burden.
18 Certainly less of a burden than what is
19 happening in Colorado with a notice and a
20 reporting requirement.

21 The question came up about no record.
22 And the reason there is no record in any of
23 these cases is because Quill makes every fact
24 beyond physical presence irrelevant. That's
25 why Quill was summary judgment, DMA was summary

1 judgment, this case is summary judgment.

2 And I think if you truly want to
3 protect the small sellers, Quill doesn't do
4 that, because you have the National Geographic
5 situation where a -- a business has placed
6 something in a warehouse or a sales
7 representative goes into a state, and it
8 doesn't just trigger the state's taxing. It
9 triggers every local jurisdiction also. If
10 it's California, it triggers several hundred
11 different taxing consequences.

12 So Quill doesn't protect against that.
13 A statute such as South Dakota's does. It sets
14 a reasonable limit of \$100,000 and 200 specific
15 transactions.

16 I know there has been a lot of
17 conversation about retroactivity. And I would
18 again go back to the states are not looking to
19 apply this retroactively. Thirty-eight states'
20 laws, as set forth in Part B of our appendix,
21 can't.

22 Forty-five State Attorney Generals,
23 the chief litigants that will be addressing
24 this issue, are telling you there are
25 significant constitutional concerns.

1 JUSTICE SOTOMAYOR: So why is it that
2 the states are doing it? The other side
3 pointed us to a number of states that are
4 already making it retroactive.

5 MR. JACKLEY: I believe --

6 JUSTICE SOTOMAYOR: So, I mean --

7 MR. JACKLEY: Justice Sotomayor, I
8 believe that the other side pointed to one
9 state, Connecticut, whose low level
10 representative sent a letter asking it to apply
11 prospectively from here forward.

12 And I would point out that Attorney
13 General Jepsen, who signed the 45-state amicus
14 briefs, will actually be making that decision.
15 And the true problem with retroactivity is, is
16 what is at issue? What is at issue is not an
17 assessment. It's a collection.

18 So what should we be doing is telling
19 a remote seller you don't have to collect and
20 remit this, and then three years later you
21 would say: Oh, by the way, you do. And we've
22 now changed that collection responsibility to a
23 penalty and interest.

24 And that has significant
25 constitutional concerns, which is why the

1 states aren't doing it and aren't likely going
2 to do it.

3 I truly believe that if you go to look
4 at what is at issue here, it goes back to what
5 I originally said. Small businesses are not
6 being treated fairly. We're not asking remote
7 sellers to do anything that we're not already
8 asking our small businesses to do in our state.
9 And that is simply to collect and remit a tax.

10 I have no further information, Your
11 Honor.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 General.

14 The case is submitted.

15 (Whereupon, at 11:16 a.m., the case
16 was submitted.)

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