SUPREME COURT OF THE UNITED STATES

No. 17–494

SOUTH DAKOTA, PETITIONER *v.* WAYFAIR, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

[June 21, 2018]

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), this Court held that, under the dormant Commerce Clause, a State could not require retailers without a physical presence in that State to collect taxes on the sale of goods to its residents. A quarter century later, in *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992), this Court was invited to overrule *Bellas Hess* but declined to do so. Another quarter century has passed, and another State now asks us to abandon the physical-presence rule. I would decline that invitation as well.

I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the "Internet's prevalence and power have changed the dynamics of the national economy." *Ante,* at 18. But that is the very reason I oppose discarding the physical-presence rule. E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to

expiate a mistake it made over 50 years ago.

I

This Court "does not overturn its precedents lightly." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 15). Departing from the doctrine of *stare decisis* is an "exceptional action" demanding "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). The bar is even higher in fields in which Congress "exercises primary authority" and can, if it wishes, override this Court's decisions with contrary legislation. *Bay Mills*, 572 U. S., at ___ (slip op., at 16) (tribal sovereign immunity); see, *e.g., Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 8) (statutory interpretation); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. ___, ___ (2014) (slip op., at 12) (judicially created doctrine implementing a judicially created cause of action). In such cases, we have said that "the burden borne by the party advocating the abandonment of an established precedent" is "greater" than usual. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989). That is so "even where the error is a matter of serious concern, provided correction can be had by legislation." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)).

We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context. Under our dormant Commerce Clause precedents, when Congress has not yet legislated on a matter of interstate commerce, it is the province of "the courts to formulate the rules." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 770 (1945). But because Congress "has plenary power to regulate commerce among the States," *Quill*, 504 U. S., at 305, it may at any time replace such judicial rules with legislation of its own, see *Prudential Ins. Co.* v. *Ben-*

jamin, 328 U. S. 408, 424–425 (1946).

In *Quill*, this Court emphasized that the decision to hew to the physical-presence rule on *stare decisis* grounds was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." 504 U. S., at 318 (footnote omitted). Even assuming we had gone astray in *Bellas Hess*, the "very fact" of Congress's superior authority in this realm "g[a]ve us pause and counsel[ed] withholding our hand." *Quill*, 504 U. S., at 318 (alterations omitted). We postulated that "the better part of both wisdom and valor [may be] to respect the judgment of the other branches of the Government." *Id.,* at 319; see *id.,* at 320 (Scalia, J., concurring in part and concurring in judgment) (recognizing that *stare decisis* has "special force" in the dormant Commerce Clause context due to Congress's "final say over regulation of interstate commerce"). The Court thus left it to Congress "to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.,* at 318 (majority opinion).

II

This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage "third time's a charm" has in daily life, it is a poor guide to Supreme Court decisionmaking. If *stare decisis* applied with special force in *Quill*, it should be an even greater impediment to overruling precedent now, particularly since this Court in *Quill* "tossed [the ball] into Congress's court, for acceptance or not as that branch elects." *Kimble*, 576 U. S., at ___ (slip op., at 8); see *Quill*, 504 U. S., at 318 ("Congress is now free to decide" the circumstances in which "the States may burden interstate

. . . concerns with a duty to collect use taxes").

Congress has in fact been considering whether to alter the rule established in *Bellas Hess* for some time. See Addendum to Brief for Four United States Senators as *Amici Curiae* 1–4 (compiling efforts by Congress between 2001 and 2017 to pass legislation respecting interstate sales tax collection); Brief for Rep. Bob Goodlatte et al. as *Amici Curiae* 20–23 (Goodlatte Brief) (same). Three bills addressing the issue are currently pending. See Marketplace Fairness Act of 2017, S. 976, 115th Cong., 1st Sess. (2017); Remote Transactions Parity Act of 2017, H. R. 2193, 115th Cong., 1st Sess. (2017); No Regulation Without Representation Act, H. R. 2887, 115th Cong., 1st Sess. (2017). Nothing in today's decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue. Armed with today's decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers. See, *e.g.,* Brief for Sen. Ted Cruz et al. as *Amici Curiae* 10–11 ("Overturning *Quill* would undo much of Congress' work to find a workable national compromise under the Commerce Clause.").

The Court proceeds with an inexplicable sense of urgency. It asserts that the passage of time is only increasing the need to take the extraordinary step of overruling *Bellas Hess* and *Quill*: "Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States." *Ante*, at 10. The factual predicates for that assertion include a Government Accountability Office (GAO) estimate that, under the physical-presence rule, States lose billions of dollars annually in sales tax revenue. See *ante*, at 2, 19 (citing GAO, Report to Congressional Requesters: Sales Taxes, States Could Gain Revenue from Expanded Au-

thority, but Businesses Are Likely to Experience Compliance Costs 5 (GAO–18–114, Nov. 2017) (Sales Taxes Report)). But evidence in the same GAO report indicates that the pendulum is swinging in the opposite direction, and has been for some time. States and local governments are already able to collect approximately 80 percent of the tax revenue that would be available if there were no physical-presence rule. See Sales Taxes Report 8. Among the top 100 Internet retailers that rate is between 87 and 96 percent. See *id.,* at 41. Some companies, including the online behemoth Amazon,* now voluntarily collect and remit sales tax in every State that assesses one—even those in which they have no physical presence. See *id.,* at 10. To the extent the physical-presence rule is harming States, the harm is apparently receding with time.

The Court rests its decision to overrule *Bellas Hess* on the "present realities of the interstate marketplace." *Ante,* at 18. As the Court puts it, allowing remote sellers to escape remitting a lawful tax is "unfair and unjust." *Ante,* at 16. "[U]nfair and unjust to . . . competitors . . . who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax." *Ante,* at 16. But "the present realities of the interstate marketplace" include the possibility that the marketplace itself could be affected by abandoning the physical-presence rule. The Court's focus on unfairness and injustice does not appear to embrace consideration of that current public policy concern.

The Court, for example, breezily disregards the costs that its decision will impose on retailers. Correctly calculating and remitting sales taxes on all e-commerce sales

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*C. Isidore, Amazon To Start Collecting State Sales Taxes Everywhere (Mar. 29, 2017), CNN Tech, http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html (all Internet materials as last visited June 19, 2018).

will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence" in the jurisdiction. Sales Taxes Report 3. A few examples: New Jersey knitters pay sales tax on yarn purchased for art projects, but not on yarn earmarked for sweaters. See Brief for eBay, Inc., et al. as *Amici Curiae* 8, n. 3 (eBay Brief). Texas taxes sales of plain deodorant at 6.25 percent but imposes no tax on deodorant with antiperspirant. See *id.*, at 7. Illinois categorizes Twix and Snickers bars—chocolate-and-caramel confections usually displayed side-by-side in the candy aisle—as food and candy, respectively (Twix have flour; Snickers don't), and taxes them differently. See *id.,* at 8; Brief for Etsy, Inc., as *Amicus Curiae* 14–17 (Etsy Brief) (providing additional illustrations).

The burden will fall disproportionately on small businesses. One vitalizing effect of the Internet has been connecting small, even "micro" businesses to potential buyers across the Nation. People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale. See Sales Taxes Report 22 (indicating that "costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions"). And the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate. See Etsy Brief 17–19 (describing the inadequacies of such software); eBay Brief 8–12 (same); Sales Taxes Report 16–20 (concluding that businesses will incur "high" compliance costs). The Court's decision today will surely have the effect of dampening opportunities for commerce

in a broad range of new markets.

A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways. As we have said in other dormant Commerce Clause cases, Congress "has the capacity to investigate and analyze facts beyond anything the Judiciary could match." *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 309 (1997); see *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 356 (2008).

Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. See Goodlatte Brief 12–14 (providing varied examples of how Congress could address sales tax collection). In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect.

An erroneous decision from this Court may well have been an unintended factor contributing to the growth of e-commerce. See, *e.g.,* W. Taylor, Who's Writing the Book on Web Business? Fast Company (Oct. 31, 1996), https://www.fastcompany.com/27309/whos-writing-book-web-business. The Court is of course correct that the Nation's economy has changed dramatically since the time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix

it in a totally different era. The Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, §8. I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century.

I respectfully dissent.