16-567

No. 16-____

In the Supreme Court of the United States

AMERICAN BUSINESS USA CORP.,

Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the basic principle of territorial sovereignty, underlying this Court's Due Process Clause and dormant Commerce Clause precedents, that a State cannot impose a sales tax on a transfer of property that occurs outside its borders. Here, the State of Florida imposes a sales tax on flowers that are grown, stored, and delivered entirely within other States and Nations. The "nexus" that allegedly justifies this sales tax is the purchaser's placement of an order through an internet website operated by a corporation located within Florida. Florida's sales tax on flowers was held unconstitutional by the Florida Fourth District Court of Appeal, as a violation of the dormant Commerce Clause, and then reversed by the Florida Supreme Court.

The question presented is:

Can a State collect sales tax on out-of-state property ordered over the internet for out-of-state delivery, by relying on this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and the State's connection to the corporation that accepts the order and arranges the sale, or does such a tax violate both the Due Process Clause and dormant Commerce Clause of the United States Constitution by imposing a sales tax on the out-of-state transfer of tangible personal property?

PARTIES TO THE PROCEEDINGS

The petitioner is American Business USA Corp., who was the appellee and appellant in the proceedings below.

The respondent is the Florida Department of Revenue, who was the appellant and appellee in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner American Business USA Corp. states the following:

American Business USA Corp. is a privately-held corporation and it has no parent company or any publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

American Business USA Corp. ("American Business") respectfully petitions this Court for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 191 So. 3d 906 (App.1a–21a). The opinion of the District Court of Appeal of Florida, Fourth District ("Fourth District") is reported at 151 So. 3d 67 (App.22a–35a). The final order of the Department of Revenue of the State of Florida is unreported (App.36a–39a). The recommended order of the Division of Administrative Hearings of the State of Florida is also unreported (App.40a–55a).

JURISDICTION

The Florida Supreme Court issued its opinion on May 26, 2016. (App.1a). On August 15, 2016, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including October 23, 2016. *See* No. 16A162. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8, cl. 3.

The Florida statutory provision at issue—section 212.05(1)(*l*), Florida Statutes—is reproduced in its entirety in the appendix (App.56a), and provides that:

> Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered. Florists located in this state are not liable for sales tax on payments received from other florists for items delivered to customers in this state.

§ 212.05(1)(*l*), Fla. Stat. (2012).

The Florida regulatory provision, Fla. Admin. Code R. 12A-1.047, which specifically authorizes the sales tax at issue, is reproduced in its entirety in the appendix (App.67a), and provides, in relevant part, that:

> In cases where a Florida florist receives an order pursuant to which he gives telegraphic instructions to a second florist located outside Florida for delivery of flowers to a point outside Florida, tax will likewise be owing with respect to the total receipts of the sending florist from the customer who places the order.

Fla. Admin. Code R. 12A-1.047(2)(b).

INTRODUCTION

In a customary Due Process Clause or dormant Commerce Clause sales tax or use tax challenge under *Quill*, an out-of-state vendor challenges a State law that requires the vendor to collect sales or use tax for items delivered within the State, and the vendor's challenge is based on the vendor's lack of a physical presence within the State. *See e.g., Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). This case presents the inverse situation.[1] Here, a Florida corporation is accepting orders over the internet for the

[1] The pending petitions before this Court in *Direct Marketing Assn. v. Brohl*, Nos. 16-267 and 16-458, present circumstances similar to those presented in *Quill* and would offer the Court a companion case that complements the present case.

out-of-state delivery of out-of-state goods, and Florida is imposing a sales tax on the transactions.

By statute and administrative rule, the State of Florida requires Florida corporations that sell flowers to collect a sales tax when flowers are delivered from one out-of-state location to another out-of-state location, as long as the corporation that initially receives the order is located within Florida. § 212.05(1)(*i*), Fla. Stat. (2012) (App.56a); Fla. Admin. Code R. 12A-1.047(2)(b); (App.67a). This remains true even when, as in the present case, the Florida corporation has no inventory of flowers and uses a florist local to the out-of-state delivery location to fulfill the transaction.

This Court's review is necessary to confirm where the sale of tangible personal property occurs in the age of e-commerce.

A sales tax can be imposed by only one State. That State should have a connection to the tangible property being transferred. Allowing Florida's sales tax on flowers to stand would violate the fundamental territorial limits of State sovereignty under the Due Process Clause and dormant Commerce Clause. Just as a Florida court cannot issue a subpoena in California, a Florida agency may not tax a flower sale that is consummated in California. The decision below turns this inquiry on its head, relying on this Court's decision in *Quill* to support its holding that a Florida nexus exists for all business conducted with a Florida-based internet vendor. The Florida Supreme Court's decision thereby allows Florida to tax the sale of property that never actually enters Florida.

The Florida Supreme Court, relying on this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298

(1992), found that American Business's physical presence and receipt of payment within Florida rendered Florida's sales tax on flowers constitutionally permissible. That conclusion confuses this Court's decision in *Quill*.

In *Direct Mktg. Ass'n v. Brohl*, Justice Kennedy issued a concurring opinion to note that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[2] 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). This case presents the Court with such an opportunity.

In *Quill*, this Court decided whether North Dakota had a sufficient nexus with the party upon which it imposed a use tax collection requirement. North Dakota's nexus to impose a use tax on the property itself, which was enjoyed within North Dakota, was never at issue. The present case, however, involves a question about the State's nexus with the transaction itself: the out-of-state delivery of out-of-state property. Because the incidence of Florida's sales tax falls upon consumers, Florida cannot base its nexus upon a connection to the internet vendor that merely acts as a middle-man in the transaction.

The present case is important because the Florida Supreme Court's newly announced power has no limiting principle. If a State may tax flower sales based only on the State's connection to the internet retailer who accepts the order, then nothing will

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2 *Natl. Bellas Hess, Inc. v. Dept. of Revenue of State of Ill.*, 386 U.S. 753 (1967) (ruling use tax unconstitutional based on vendor's lack of physical presence within State).

constrain the spread of this power to all e-commerce transactions. As a category, flowers are indistinguishable from other types of tangible personal property. The Florida Supreme Court's interpretation of *Quill* is, in fact, an invitation for State Legislatures to craft sales taxes on other out-of-state deliveries of out-of-state property.

The effects of this expanded authority would significantly alter the landscape of the States' power to collect sales tax. If a website is run by a corporation located within a State, that State would be able to collect sales tax on all the company's sales worldwide, without regard to the physical realities of the transactions. In their daily shopping, consumers would traverse a range of State jurisdictions, merely by crossing over to a website run by a company located within a particular State. The State of Washington could monopolize the collection of sales tax revenues by imposing a Washington sales tax on all items purchased from Amazon.com, regardless of where in the world the items are produced, stored, or delivered.

This Court's review is necessary to either overturn *Quill*, and thereby open the door for States to impose sales or use tax collection requirements on out-of-state vendors; or at least, to again announce that States may not impose sales tax on transfers of property that occur within other States or Nations, and thereby limit the disruptive power of the present tax from expanding into other areas of e-commerce.

STATEMENT OF THE CASE

The Florida Supreme Court has reached the unprecedented conclusion that a State is permitted to collect sales tax on the out-of-state transfer of tangible personal property. The Florida Supreme Court's decision is so broad that it allows Florida to tax out-of-state property ordered for out-of-state delivery by out-of-state consumers.

The following facts are drawn from the Recommended Order of the Department of Administrative Hearings (App.40a–55a), which was adopted by the Department of Revenue's Final Order (App.36a–39a). The following facts were presented to the Department below in the form of a Joint Stipulation of admitted facts between the parties, and were subsequently noted by the lower courts. (App.3a n.1; App.23a; App.41a); *Am. Bus. USA Corp. v. Dept. of Revenue*, 151 So. 3d 67, 69 (Fla. 4th Dist. App. 2014); *Florida Dept. of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 909 n.1 (Fla. 2016).

American Business is a Florida corporation that specializes in the sale of flowers, gift baskets, and other items of tangible personal property. (App.43a, ¶ 7). All of American Business's sales were initiated online. (App.43a, ¶ 8).

American Business "did not maintain any inventory of flowers, gift baskets and other items of tangible personal property." (App.43a, ¶ 13). When American Business "received an order over the [i]nternet for items of tangible personal property, [it]

relayed the order to a florist in the vicinity of the customer (the local florist). . . . [American Business] used a local florist to fill the order it had received for flowers, gift baskets, and other items of tangible personal property." (App.43a, ¶ 14). American Business "utilized the Internet or telephone to relay an order." (App.43a, ¶ 14).

American Business "charged its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered in Florida." (App.44a, ¶ 15). American Business "did not charge its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered outside of Florida." (App.44a, ¶ 16).

American Business "sold to customers throughout Latin America, in Spain, and in the United States (including Florida)." (App.43a, ¶ 9). However, there is nothing in the record to demonstrate the location from which American Business's customers accessed American Business's website.

In February 2012, the Florida Department of Revenue issued a proposed assessment to American Business for uncollected sales tax on out-of-state deliveries of flowers and other items of tangible personal property. (App.46a, ¶ 36).[3]

In February 2013, the Division of Administrative Hearings recommended a validation of the full Florida Department of Revenue assessment for uncollected sales tax. (App.40a–55a).

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[3] The Department also issued a proposed assessment for uncollected sales tax on sales of pre-paid calling cards, which are no longer at issue in this case.

According to the Recommended Order's Conclusions of Law:

- The Division of Administrative Hearings "ha[d] jurisdiction over the subject matter of and the parties to this proceeding[.]" (App.48a, ¶ 45);
- "The Florida sales tax is an excise tax on the privilege of engaging in business in the state." (App.49a, ¶ 51);
- "It is the legislative intent that every person is exercising a taxable privilege who engages in the business of selling items of tangible personal property at retail in this state." (App.49a, ¶ 52);
- American Business's "sale of flowers, wreaths, bouquets, potted plants, and other such items of tangible personal property were subject to sales tax pursuant to section 212.05 (1)(*l*) and rule 12A-1.047(1) [of the Florida Administrative Code.]" (App.52a–53a, ¶ 59).

In March 2013, the Florida Department of Revenue issued a final order adopting the recommendation of the Division of Administrative Hearings, in whole. (App.36a–39a).

American Business appealed to the Florida Fourth District Court of Appeal, arguing that Florida's sales tax violated this Court's Due Process Clause and dormant Commerce Clause precedents.[4]

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[4] Pursuant to Rule 14.1(g)(i), American Business first raised its Due Process and dormant Commerce Clause arguments in its Initial Brief to the Fourth District Court of Appeal. *See* Case No. 4D13-1472, Appellant's Initial Brief at 1 ("The Florida Department of Revenue ('DOR') lacks jurisdiction to collect

On November 12, 2014, the Fourth District reversed the sales tax assessment as a violation of the dormant Commerce Clause: "Florida impermissibly burdened interstate commerce when it taxed out-of-state customers for out-of-state deliveries of out-of-state tangible goods." *Am. Bus. USA Corp. v. Dept. of Revenue*, 151 So. 3d 67, 68 (Fla. 4th Dist. App. 2014), *decision quashed sub nom. Florida Dept. of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906 (Fla. 2016). Under the Due Process Clause, the Fourth District held that Florida's sales tax was permissible, based on *Quill*. *Id.* at 73-74.

The Fourth District recognized that "[b]ecause the flowers sold by the Florida-registered internet business were never stored in or brought into Florida, the imposition of taxes did not meet the 'substantial nexus' test and thus violated the dormant commerce clause." *Id.* at 68. The Fourth District explained that "[m]erely registering in a state does not give the taxing state the right to assess sales taxes on transactions without any other facts to constitute 'substantial nexus.'" *Id.* at 73. Importantly, the Fourth District noted that the flowers being taxed "were not grown in, stored in, or delivered from Florida, and do not have any type of connection to Florida." *Id.*

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sales tax on out-of-state sales, under both the Due Process Clause and the Dormant Commerce Clause of the United States Constitution."). Because the Fourth District reversed, the Florida Department of Revenue raised the constitutionality of Florida's tax on appeal to the Florida Supreme Court. *See* Florida Supreme Court, Case No. SC14-2404, Appellant's Initial Brief at 1-29.

The Department of Revenue appealed to the Florida Supreme Court.

The Florida Supreme Court agreed with the facts as stated by the Fourth District: all of American Business's "sales of flowers, gift baskets, and other items of tangible personal property were initiated online" and American Business "did not maintain any inventory of these items but would use florists that were local to the location of the delivery to fill the order." *Florida Dept. of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 908 (Fla. 2016); *see also id.* at 909 n.1. The Florida Supreme Court determined that the sales tax assessment was constitutional because American Business had a physical presence in Florida and did business in Florida. *Id.* at 914, 917. The Florida Supreme Court also ruled that the tax assessment was not a due process violation, and that the tax met the remaining elements of the four-part dormant Commerce Clause test set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Id.* at 913-17.

In reliance on its understanding of *Quill*, the Florida Supreme Court held that American Business's "presence" in Florida was the "substantial nexus" that authorized Florida to impose a sales tax on tangible personal property delivered in other States and Nations. *Id.* at 913-14, 917.

While noting the standard this Court has set for a State to impose a sales tax—that "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction"—the Florida Supreme Court did not analyze the standard correctly. *Id.* at 912-14, 917 (quoting

Oklahoma Tax Commn. v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995)).

American Business had argued that Florida was impermissibly imposing a sales tax on out-of-state transfers of tangible personal property. *Id.* at 915. The Florida Supreme Court defined the transaction and tax differently, and explained that "the transaction occurs in Florida where the business facilitated every stage of the transaction from advertising for customers, accepting their orders, receiving payment, and locating and transmitting the orders to third-party florists." *Id.* at 915. Believing it was bound to do so by *Quill*, the Florida Supreme Court concluded that the statute was lawful because it "taxes the transaction that occurs in Florida by the business engaging in business here, and not on the items sold or the activities occurring out of state[.]" *Id.* at 915-16.

In conclusion, the Florida Supreme Court reversed the Fourth District "to the extent that it holds that the assessment of sales tax on sales of flowers, gift baskets, and other items of tangible personal property ordered by out-of-state customers for out-of-state delivery violates the dormant Commerce Clause of the United States Constitution." *Id.* at 917.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to confirm the important principle that a State cannot collect sales tax on transfers of tangible personal property that occur wholly within another State or Nation. This

Court's precedents are clear, and they hold that allowing such taxes to be imposed would violate the territorial limits of State sovereignty under the Due Process Clause and the dormant Commerce Clause. There is nothing in the Florida Supreme Court's decision that should convince this Court to alter this well-reasoned and long-standing jurisprudence.

The issue presented is pressing. With the continuing expansion of e-commerce, and with trillions of dollars spent annually over the internet, States are understandably searching for ways to collect tax revenues from the internet-based sale of goods. The Florida Supreme Court has held that Florida can collect sales tax, permissibly under the Due Process Clause and dormant Commerce Clause, when out-of-state customers purchase out-of-state property for out-of-state delivery, as long as the internet-based company from which the order is initially placed is located within Florida.

Since a sales tax is imposed without apportionment on the entire value of a sale, only one State can be considered the location of the consummated sale. That State alone may collect sales tax on the transaction. American Business respectfully submits that a sale of tangible personal property cannot be consummated in a State where the property never enters, and Florida's attempt to collect sales tax for extraterritorial sales is constitutionally impermissible.

The Florida Supreme Court relied on this Court's decision in *Quill* to support its holding that a Florida company can be required to collect sales tax for sales made anywhere in the world. The Florida Supreme Court expressly relied on *Quill*'s "pre-

sence" requirement to justify its "substantial nexus" determination, despite the fact that *Quill* involved a North Dakota use tax for the enjoyment of property within North Dakota. The present case is different.

Justice Kennedy has called for the legal system to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring). American Business respectfully submits that this case offers such an opportunity.

By issuing a writ of certiorari, this Court can clarify the application of and reexamine its decisions in *Quill* and *Bellas Hess*, and clarify the law surrounding the taxation of e-commerce.

The present case is important because the power announced by the Florida Supreme Court—the power to impose sales tax on the transfer of out-of-state goods—has no limiting principle. If allowed to stand, there is no basis to constrain the spread of this power to all e-commerce transactions. It reflects an invitation for State Legislatures to craft sales taxes, outside the context of flowers, on other out-of-state transfers of tangible personal property.

This expanded authority would significantly alter the landscape of States' power to collect sales tax. The likely outcome would be chaos for consumers, as they face potential double taxation: a sales tax in the State where the sale is consummated, and a sales tax in the State where the company who received the initial order was incorporated. Because only one State may impose a sales tax, this Court's review is necessary to confirm that only the State where property is transferred may collect a sales tax. Otherwise, the system

of interstate sales tax collection will be left structurally unsound.

I. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS ON STATE SALES TAX NEXUS UNDER THE DUE PROCESS CLAUSE AND DORMANT COMMERCE CLAUSE

A. Florida's Sales Tax Violates The Fundamental Limits Of State Territorial Jurisdiction And Sovereignty

"'No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.'" *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954) (quoting *New York, L E & W R Co v. Com. of Pennsylvania*, 153 U.S. 628, 646 (1894)). "If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954) (quoting *City of St. Louis v. Wiggins Ferry Co.*, 78 U.S. 423, 430 (1870)). "'Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void.'" *Id.*

In the present case, the sales tax is imposed on the consumer, rather than American Business—§ 212.05 (1)(*l*), Fla. Stat. (2012); § 212.07(1)(a), Fla. Stat. (2016) (App.56a, 57a, 67a)—and the property being transferred

never enters Florida. Florida's statute and administrative rule expand Florida's power beyond its borders, and Florida lacks any basis to tax consumers for out-of-state transfers of tangible personal property.

"[W]hen a state re[a]ches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction . . . And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce." *Treichler v. State of Wis.*, 338 U.S. 251, 256-57 (1949) (citations omitted). "As a general principle, a State may not tax value earned outside its borders." *ASARCO Inc. v. Idaho State Tax Com'n*, 458 U.S. 307, 315 (1982) (citations omitted). "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion). "[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977).

While visible territorial boundaries do not always limit a state's jurisdiction, the State must have "some jurisdictional fact or event to serve as a conductor[.]" *Miller*, 347 U.S. at 343. In the context of a sales tax on goods, "a necessary condition for imposing the tax [is] the occurrence of 'a local activity, delivery of goods within the State upon their purchase for consumption.'" *Jefferson Lines*, 514 U.S. at 187 (quoting *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940)).

While "modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, [courts] have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax[.]" *Allied-Signal, Inc. v. Dir., Div. of Taxn.*, 504 U.S. 768, 778 (1992) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-08 (1992)).

As this Court has noted, "the granting by a state 'of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege' of doing business elsewhere." *Am. Oil Co. v. Neill*, 380 U.S. 451, 459 (1965) (citation omitted); *compare with* (App.49a, ¶ 52) ("It is the legislative intent that every person is exercising a taxable privilege who engages in the business of selling items of tangible personal property at retail in this state."); *see also Florida Dept. of Revenue*, 191 So. 3d at 909, 911-12 (discussing Florida's sales tax on flowers as "privilege" of doing business).

Here, Florida has used a connection to one of its internet-based corporations as the bridge to collect sales tax from consumers worldwide for transfers of property that occur anywhere in the world.

The State of Florida lacks a sufficient connection to the flowers being transferred to impose a sales tax. As such, other States or Nations are the proper parties to collect sales tax on these transactions. American Business seeks a writ of certiorari to clarify the law on this issue of national importance.

B. A State May Collect Sales Tax Only On The Sale Of Tangible Personal Property Consummated Within That State

This Court has previously held that the Commerce Clause has a negative sweep—the so-called "dormant Commerce Clause"—that prohibits States from regulating interstate commerce even when Congress has failed to legislate on the subject. *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (collecting cases). Similar to this Court's Due Process Clause precedent, the first element of this Court's dormant Commerce Clause precedent requires a State to demonstrate a nexus with the sale or activity it seeks to tax. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Quill*, 504 U.S. at 311.[5] While the nexus inquiries under the Due Process Clause and dormant Commerce Clause are ultimately distinct, the lack of nexus in the present case is sufficient to fail both tests.

Here, as the Florida Supreme Court noted, American Business "did not maintain any inventory of these items but would use florists that were local to the location of the delivery to fill the order." *Florida Dept. of Revenue*, 191 So. 3d at 908. Consequently, in the words of the Fourth District, the sales tax was imposed on "out-of-state deliveries of out-of-state tangible goods." *Am. Bus. USA Corp.*, 151 So. 3d at 68.

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[5] Because American Business "sold to customers throughout Latin America, in Spain, and in the United States (including Florida)" (App.43a, ¶ 9), this case technically involves the dormant Foreign Commerce Clause, as well. *See Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 8 (1986).

The Florida Supreme Court held that such an extraterritorial sales transaction was nonetheless subject to a Florida sales tax because American Business engages in business within Florida (advertising, accepting orders, receiving payment, and transmitting orders to third-party florists), and thus the sales transaction "occurs in Florida[.]" *Id.* at 915.

That holding is contrary to the decisions of this Court.

The requisite "local activity" in this Court's precedents for sales taxes on goods has never been the mere placement of an order for property. It has been the actual transfer of the property being sold. This "transfer" requirement derives from "the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place[.]" *Jefferson Lines*, 514 U.S. at 187. "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Jefferson Lines*, 514 U.S. at 184; *see* Black's Law Dictionary (9th ed. 2009) (defining "consummate" as "[t]o achieve; to fulfill").

The precedents for this "transfer" requirement are numerous. In *Jefferson Lines*, the bus ticket on which a sales tax was imposed was purchased in Oklahoma, and that was the location from which the bus service originated. *Jefferson Lines*, 514 U.S. at 184. In *McGoldrick*, the coal on which a sales tax was imposed was delivered in New York City, where title and possession passed from seller to buyer. *McGoldrick*, 309 U.S. at 44, 49. The present case, in contrast,

involves a tax on the transfer of flowers that are grown outside of Florida and are delivered to locations outside of Florida.

Similarly, in *State Tax Commn. of Utah v. P. State Cast Iron Pipe Co.*, 372 U.S. 605 (1963), the State of Utah imposed a sales tax deficiency upon a Nevada corporation, for the sale of goods that were delivered in Utah, where title to the property passed from seller to buyer. *Id.* at 605-06. The Supreme Court of Utah reversed the tax assessment. *Id.* at 606. This Court, in turn, reversed the Supreme Court of Utah and determined that the State of Utah could "levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State." *Id.* at 606 (citing *Intl. Harvester Co. v. Dept. of Treas. of State of Ind.*, 322 U.S. 340, 345 (1944)).

To the same effect, in *Intl. Harvester Co. v. Dept. of Treas. of State of Ind.*, 322 U.S. 340 (1944), the State of Indiana imposed a gross income tax on corporations authorized to do business in Indiana, but that were incorporated in other States. *Id.* at 341. In upholding the tax assessment on certain types of sales, this Court explained that

> [D]elivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just

> starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions.

Id. at 345.

Further, in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944), this Court resolved a case involving "sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." *Id.* at 328. The Court noted that the items were shipped from Tennessee and that title passed upon delivery to a carrier in Tennessee. *Id.* In affirming the Arkansas Supreme Court's decision that the Commerce Clause precluded liability for the sales tax at issue, this Court explained that it "would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction." *Id.* at 330; *see also J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 313 (1938) (noting that a sales tax cannot be measured "by sales consummated in another state").

While aspects of this Court's Due Process Clause and dormant Commerce Clause precedents have evolved in the intervening decades, the underlying rule enunciated in these cases has not.

The Florida Supreme Court's decision conflicts with this Court's precedents and a writ of certiorari is necessary to correct and clarify the law in this important area.

C. The Florida Courts Misapplied *Quill*, Which Applies To Tax Imposed In The Customer's Home State Where Physical Delivery Or Enjoyment Of The Property Occurs

The Florida Supreme Court relied on this Court's decision in *Quill* to support its ruling that Florida maintains a sufficient nexus to collect sales tax on the out-of-state transfer of tangible personal property. The Florida Supreme Court held that, since American Business is physically located in Florida and operates its business from that location, the sale of out-of-state flowers could permissibly be taxed by Florida under the Due Process Clause and the dormant Commerce Clause. *Florida Dept. of Revenue*, 191 So. 3d at 914-17.

As noted above, however, the circumstances in *Quill* actually present the inverse of the circumstances presented in this case. In a *Quill*-based Due Process Clause or dormant Commerce Clause challenge, an out-of-state vendor challenges the authority of a State to impose a sales or use tax for items delivered within the State, based on the vendor's lack of a physical presence. *See e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992). Here, however, a Florida corporation is accepting orders for the out-of-state delivery of out-of-state goods. The Florida Supreme Court's reliance on *Quill* has no application.

In *Quill*, the State's nexus with the transaction itself was never in question. The issue in *Quill* was the State's nexus with the party, an out-of-state mail-order house, whom the State required to collect a use tax. *Quill*, 504 U.S. at 301. North Dakota's nexus with the transaction itself—the enjoyment of

property within North Dakota—was never at issue. *Id.* In the instant case, the physical presence of American Business within Florida has no bearing on Florida's nexus over the transaction. It is undisputed that Florida has a nexus with American Business. The sole issue of contention is whether Florida has a nexus with the transfers of property being taxed.

When determining the incidence of a tax, this Court examines the tax's practical operation. *Am. Oil Co. v. Neill*, 380 U.S. 451, 455-59 (1965). In this case, the Florida Supreme Court made no express determination on the incidence of Florida's sales tax on flowers, but held that "the statute taxes the transaction that occurs in Florida by the business engaging in business here, and not on the items sold or the activities occurring out of state[.]" *Florida Dept. of Revenue*, 191 So. 3d at 915-16; *see contra* § 212.05, Fla. Stat. (2012) (titled "Sales, storage, use tax"); § 212.05(2), Fla. Stat. (2012) ("The tax shall be collected by the dealer, as defined herein, and remitted by the dealer to the state at the time and in the manner as hereinafter provided" (emphasis added)).

Here, the only reasonable interpretation of Florida's statutory scheme is that consumers suffer the incidence of the tax. *See* § 212.07(1)(a), Fla. Stat. (2016) ("[t]he privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer" (emphasis added)); *see also* § 212.05, Fla. Stat. (2012) (declaring legislative intent that "every person is exercising a taxable privilege who engages in the business of selling tangible

personal property at retail in this state" (emphasis added)).

In fact, it would be a crime for American Business to hold out to the public that American Business will pay the consumer's sales tax, or to refund the sales tax. § 212.07(4), Fla. Stat. (2016) ("A dealer engaged in any business taxable under this chapter may not advertise or hold out to the public, in any manner, directly or indirectly, that he or she will absorb all or any part of the tax, or that he or she will relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property or services sold or released or, when added, that it or any part thereof will be refunded either directly or indirectly by any method whatsoever. A person who violates this provision with respect to advertising or refund is guilty of a misdemeanor[.]").

Nonetheless, as previously recognized by this Court, "'[t]he state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the federal Constitution[.]'" *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 331 (1944) (quoting *Wagner v. City of Covington*, 251 U.S. 95, 102 (1919)).

The focus on American Business's connection to Florida, for purposes of the State's nexus inquiry, misses the point. American Business simply collects and remits the tax. It is not the entity called upon to pay the tax, so American Business's connection to Florida is not relevant. Only if American Business fails to collect the tax and remit it to the State, must American Business pay the tax with its own funds. Otherwise, consumers pay the tax.

If Florida cannot demonstrate a nexus with the sales it is taxing, then American Business cannot be forced to collect the tax or pay the tax when uncollected. American Business has no obligation to collect a tax from those who have no obligation to pay it.

For the large, though admittedly undetermined, number of purchasers in the present case who accessed American Business's website from a location outside of Florida, Florida's exercise of jurisdiction also violates this Court's minimum contacts jurisprudence, reflected in the foreseeability and purposeful availment requirements of the Due Process Clause. *See International Shoe Co. v. Washington*, 326 U.S. 310, 317-21 (1945) (setting forth "minimum contacts" standard); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-99 (1980) (explaining "minimum contacts" and "foreseeability" for purposes of state's jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985) (holding that contract alone cannot automatically establish minimum contacts for out-of-state party under Due Process Clause); *see also Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1352-53 (Fla. 3d Dist. App. 1994) (applying due process "minimum contacts" standard to online computer services).

For purchasers who accessed American Business's website from within a location in Florida, the transaction is nonetheless consummated out-of-state. The location where a contract is formed does not govern the consummation of a sale. *Intl. Harvester Co.*, 322 U.S. at 345 (explaining that Indiana purchaser and seller made contract out-of-state, and that Indiana could nonetheless unquestionably impose a sales tax).

Because the Florida Supreme Court expressly relied upon *Quill*, this case presents the Court with an opportunity to clarify the proper scope and continued viability of its decisions in *Quill* and *Bellas Hess*. *See Brohl*, 135 S. Ct. at 1135 (2015) (Kennedy, J., concurring). A writ of certiorari would provide clarity in this area of rapidly increasing importance.

II. THIS CASE HAS BROAD SIGNIFICANCE FOR THE TAXATION OF E-COMMERCE BECAUSE IT ALLOWS A STATE TO COLLECT SALES TAX BASED ON A STATE'S CONNECTION TO A COMPANY THAT OPERATES AN INTERNET WEBSITE, RATHER THAN ANY CONNECTION TO THE PHYSICAL GOODS BEING TRANSFERRED

A. This Case Has Broad Significance, Based On The Number Of States That Have Enacted Taxes Of Varying Degrees Of Similarity To Florida's Sales Tax On Flowers

At least 36 other States and the District of Columbia have enacted sales taxes on flowers, which are of varying degrees of similarity to Florida's. *See* Ala. Admin. Code r. 810-6-1-.67 (a) (2014); Ariz. Admin. Code. R. 15-5-172; Ark. Code Ann. § 26-52-52-507 (2014); Cal. Code Regs. tit. xviii, § 1571(b)(1)-(2) (2007); Conn. Agencies Regs. § 12-426-4 (2014); D.C. Mun. Regs. tit. ix, § 441 (2014); Ga. Comp. R. & Regs. 560-12-2-.42(3) (2014); Idaho Admin. Code r. 35.01.02.059 (2014); 35 Ill. Comp. Stat. 120/1 (2014); Ill. Admin. Code tit. 86, § 130.1965 (2014); Ind. Code Ann. § 6-2.5-13-1(h) (2014); Kan. Admin. Regs. § 92-19-13a (2014); 103 Ky. Admin. Regs. 27:050 (2014); Me. Bureau of Taxation, Sales & Use Tax Instruction

Bulletin No. 21, 1989 WL 592717, at *1-2 (1989); Md. Code Regs. 03.06.01.18 (2014); Mich. Admin. Code R. 205.80 (2014); Minn. Stat. Ann. § 297A.668, Subd. 9 (2014); Minn. R. 8130.8900 (2014); 35-IV Miss. Code R. § 8.01 (2014); Mo. Code Regs. Ann. tit. 12, § 10-103.620 (2014); 316 Neb. Admin. Code § 1-052 (2014); Nev. Admin. Code § 372.230 (2014); N.J. Div. of Taxation, Out-of-State Sales & New Jersey Sales Tax, Publication ANJ-10 (rev. Mar. 2009); N.M. Stat. Ann. § 7-9-3.5A(2)(e) (West 2014); N.M. Code R. 3.2.1.15(H) (2014); N.Y. Comp. Codes R. & Regs. tit. 20, 526.7(e)(3) (2014); N.C. Gen. Stat. Ann. § 105-164.4B(d)(3) (West 2014); N.D. Admin. Code 81-04.1-04-21 (2014); Ohio Admin. Code 5703-9-31 (2014); Okla. Stat. Ann. tit. 68, § 1354(A)19. (West 2014); Okla. Admin. Code § 710:65-19-108 (2014); 61 Pa. Code § 31.24 (2014); 60-1. R.I. Code R. § 206:1 SU 07-49 (West 2014); S.C. Code Ann. Regs. 117-309.1 (2014); S.D. Admin. R. 64:06:02:32 (2014); Tenn. Code Ann. § 67-6-907 (West 2014); 34 Tex. Admin. Code § 3.307(c) (2014); Utah Admin. Code r. 865-19S-50 (2014); 23 Va. Admin. Code § 10-210-610 (2014); Wash. Admin. Code § 458-20-158 (2014); Wis. Admin. Code Dep't of Revenue § 11.945 (2014).

However, just like Florida, a number of these States otherwise impose sales tax based on the physical transfer of non-floral tangible goods. That conflict, underscored by this case, demonstrates the varying justifications for States' assertion of sales tax jurisdiction. As such, the issue presented here is of broad significance, even without examining the potential for the States' power in this regard to expand into other areas.

B. If Upheld, The Collection Of Sales Tax On Internet Sales, Relying On The Location Of The Corporation That Operates A Website, Is Likely To Proliferate In Other States And Other Contexts Outside Of Flower Sales

The rise of e-commerce has presented significant difficulties for States in their collection of sales tax revenue. Under this Court's decision in *Quill*, a State cannot exercise jurisdiction over an out-of-state vendor without a physical presence in the State. As such, a State cannot require these vendors to collect sales or use tax for sales within the State.

As a result, States have suffered significant revenue shortfalls. *See Brohl*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring). Understandably, States have sought out other methods to collect tax on the internet-based sale of goods. Some States, for example, look through the affiliates an out-of-state vendor uses within the State, in order to establish a physical presence. *See, e.g., Overstock.com, Inc. v. New York State Dept. of Taxn. and Fin.*, 987 N.E.2d 621 (N.Y. 2013). Some States—like the State of Colorado in *Direct Marketing Ass'n. v. Brohl*—have imposed reporting requirements on out-of-state vendors to allow the collection of tax from in-state residents. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016); *see also* Nos. 16-267 and 16-458.

The decision by the Florida Supreme Court, however, offers States a startling and different method to collect sales tax, which is unmoored to any physical connection to the transfer of goods and more disruptive in its effects. Under the power announced by the Florida Supreme Court, Florida can collect

sales tax on any sale, made anywhere in the world, by any consumer, as long as that sale originates with an order placed on a website operated by a company located within Florida. In Florida and many other States, this power is limited by statute to the context of flower sales.

There is, however, no principled distinction to make between flowers and other items of tangible personal property. And there is no limitation on the ability of State Legislatures to enact similar statutes regarding non-floral items of tangible personal property. The Florida Supreme Court's decision is, in fact, an invitation for State Legislatures to enact such taxes. If a State may permissibly tax flowers that never enter its borders, there is no constraint on taxing the transfer of other items of tangible personal property—including cars, clothes, and food—that never enter a State.

In their daily shopping, consumers on the internet would navigate a range of States' jurisdictions, merely by crossing over to a website run by a corporation incorporated within a certain State.

In the end, this Court's review is necessary to either open the door for States to impose sales or use tax collection requirements on out-of-state vendors by overturning *Quill*, or at least to limit the potential disruptive power of the Florida Supreme Court's ruling.

C. The Florida Supreme Court's Reasoning Would Drastically Expand The Authority Of States To Tax And Regulate Activity And Property Wholly Within Other States

The reasoning of the Florida Supreme Court's ruling would radically expand state authority to tax and regulate activity and property wholly located within other States and, indeed, Nations. In Florida, as it currently stands, if a resident of Venezuela ordered flowers for delivery in Venezuela through American Business's website, and the flowers were grown, stored, and delivered entirely within Venezuela, American Business would still be responsible to collect and remit Florida sales tax on the transaction. Similarly, if a resident of California or Florida ordered California flowers for delivery in California, American Business would still be responsible to collect and remit Florida sales tax on the transaction.

If Florida can impose a sales tax on a transaction based solely on the identity of the corporation that receives the order, then

- The State of Washington could require Amazon.com to collect a Washington sales tax on every item sold over its website anywhere in the world.

- The State in which a company that operates a food delivery website is located (*e.g.*, Grubhub or Seamlessweb) could collect a sales tax on all out-of-state food ordered for delivery and consumption though the website.

Because a sales tax is a tax on a discrete event—the transfer of goods at a particular time and place—

only one State may impose it and that State alone may tax the total value of the transaction. *Jefferson Lines*, 514 U.S. at 186-88. If States source transactions based on the State where the middle-man is located, that raises questions concerning the power of a State to collect tax where an actual transfer of property occurs. For example,

- If the State of Washington collected sales tax on all of Amazon.com's sales, could the State of Florida permissibly tax a sale of goods that originates from a Florida warehouse and is delivered to a Florida consumer?
- In *Brohl*, could the State of Colorado impose a use tax on the enjoyment of property in Colorado, if Florida had previously taxed the sale based on the location of the company that received the order?

States maintain their authority to collect other taxes on a domestic corporation like American Business, such as income taxes, without such a stringent analysis on the location of the corporation's sales. The question in the present case is only whether States may collect a sales tax, from a consumer, based solely on that consumer's interaction with a domestic corporation over the internet.

As it stands, there is no principle to limit the Florida Supreme Court's decision from being applied in the circumstances outlined above. This case presents an opportunity for this Court to clarify its decisions in *Quill* and *Bellas Hess*, and to address the appropriate method of State sales tax collection in the age of e-commerce.

III. This Case Presents an Excellent Vehicle to Further Define the Contours of *Quill* and the Collection of Sales Tax in the Age of E-Commerce

The present case offers the Court an excellent opportunity to define the contours of state sales tax collection in the internet age. As noted above, the facts of this case came in the form of a Joint Stipulation of admitted facts between the parties. (App.3a n.1); *Florida Dept. of Revenue*, 191 So. 3d at 909 n.1; *Am. Bus. USA Corp.*, 151 So. 3d at 69. American Business agrees with the facts as set forth by the lower courts. As such, if this Court accepts review, this case would allow the Court to focus exclusively on the law as it applies to the facts presented.

Furthermore, because this case presents the inverse circumstances from those presented in *Quill*, this case offers an opportunity for the Court to define the contours of *Quill*'s application to domestic corporations. The pending petitions in *Brohl*—Nos. 16-267 and 16-458—would offer a complementary companion case to the present case, whereby the Court could further define the contours of these context-specific issues.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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