STATE OF SOUTH DAKOTA) :SS		IN CIRCUIT COURT
COUNTY OF HUGHES)		SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	32 Civ. 16-92
Plaintiff,	)	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
v.	)	
WAYFAIR INC OVERSTOCK.COM INC NEWEGG INC	)	
Defendants.	)	

INTRODUCTION

Plaintiff continues to assert that this matter should be remanded to state court. *See* Docs. 21-22.[1] Plaintiff agrees, however, that in the absence of remand, *this* Court will have to grant Defendants' request for summary judgment based solely on the outdated holding of *Quill*. The discussion below is accordingly restricted to the most critical respects in which Defendants misstate the law or facts in their defense of *Bellas Hess* and *Quill*. Properly understood, this case shows how far out of step *Quill* is with contemporary Commerce Clause doctrine. This Court can, however, help to clearly frame the question of *Quill*'s vitality for the United States Supreme Court—the only Court with the power to change it—by acknowledging the antiquated physical-presence test of *Quill*

[1] All references to "Doc." or "Docs." throughout this brief refer to documents filed in 16-cv-03019, before the Honorable Roberto A. Lange, United States District Court, District of South Dakota, Central Division.

should no longer shelter modern retailers who otherwise have a "substantial nexus" with the taxing state.

UNDISPUTED FACTS

The procedural background is summarized in the State's remand motion. *See* Doc. 22 at 1-2. For purposes of this Court's decision, the State agrees that there are no material disputed facts. Defendants' Brief in Support of Motion for Summary Judgment (Brief) at 8 and *see* "Plaintiff's Response to Defendants' Statement of Material Facts". As explained below, the State disagrees with Defendants' suggestion (Brief at 8 n.3) that the legislature's findings are "more in the nature of argument" and can, therefore, be argued away. To the contrary, the legislature's findings have gone unrefuted, are correct, and apply with particular force to sophisticated entities like Defendants.

ARGUMENT

I. Summary Judgment For Defendants Is Appropriate.

Twenty-five years ago, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Supreme Court reluctantly reaffirmed the now half-century-old holding of *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967). The *Quill* decision—reached two years before Amazon.com was born as a bookseller—resolved to keep, "at least for now," the rule that the dormant Commerce Clause requires a retailer to have a "physical presence" within a state before it can be asked to collect sales and/or use tax.[2] *See Quill*, 504 U.S. at 318-19. The point of Senate Bill 106, 91st Session, South Dakota Legislature,

[2] Sales and use taxes are typically complementary and interchangeable for purposes of *Quill*. Except as noted, the following discussion applies equally to both, but the State will frequently refer only to sales taxes for brevity.

2016, "An Act to provide for the collection of sales taxes from certain remote sellers" (Senate Bill 106), and this action, is to ask the United States Supreme Court to reconsider *Quill* in light of two-plus decades of critical experience, the harm *Quill* has caused to the States, *Quill*'s own acknowledgement that it was likely wrong on the day it was decided, *see id.* at 311, and Justice Kennedy's invitation for the legal system to bring such cases before the Court. *See Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J. concurring).

Defendants nonetheless argue that this Court "is required to follow *Quill*." Brief at 12-13. On that much, the State agrees: *This* Court is not an appropriate venue to litigate *Quill*'s continued wisdom, even though contemporary dormant Commerce Clause doctrine casts great doubt upon it, and it was "questionable even when decided." *DMA*, 135 S. Ct. at 1135 (Kennedy, J. concurring). If a "precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Accordingly, while there is voluminous evidence that *Bellas Hess*'s rule should no longer be retained—especially as to huge online retailers like Defendants—that argument must be directed to the Supreme Court.

There is an argument that even *Quill* does not require extending the physical-presence test to create a tax shelter for large-scale Internet retailers, based on both their pervasive presence in consumers' homes and everyday lives, and the absence of mean-

ingful reliance by such parties on a case about *catalog mailers* that flagged its own tenuous nature 25 years ago. *See, e.g.*, *Direct Marketing Association v. Brohl,* 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J. concurring) (noting absence of reliance interests because "*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would … wash away with the tides of time."). Justice Kennedy himself seemed to endorse such a distinction. *DMA*, 135 S. Ct. at 1135 (Kennedy, J. concurring) ("Although online businesses may not have a physical presence in some states, the Web has, in many ways, brought the average American closer to most major retailers," and "as a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."). Nonetheless, *Quill* appears to require a more traditional form of "presence," which is presumably why Justice Kennedy called for "reconsidering [*Quill*'s] doubtful authority," rather than asking lower courts to distinguish it away. The State accordingly believes that the decision to limit or distinguish *Quill* along the lines Justice Kennedy has suggested must await a decision from the Supreme Court itself, and that this Court must therefore grant summary judgment to the Defendants.

II. Defendants Present No Serious Argument That Contemporary Doctrine Supports Their Position, Or That They Can Satisfy Any Constitutional Metric Apart From *Quill*.

That said, this Court should reject Defendants' suggestion (Brief at, *e.g.*, 11-12, n.4 and 19) that the Supreme Court has reaffirmed *Quill*'s "questionable" holding within the last 25 years, or that *Quill*'s holding tracks contemporary Commerce Clause doctrine. Neither point has any merit.

Defendants begin (Brief at 9) by conceding that "[u]nder contemporary dormant Commerce Clause analysis," a state tax can constitutionally be applied to interstate commerce if it satisfies the four requirements of *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977): It must be (1) "applied to an activity with a substantial nexus with the taxing State," (2) "fairly apportioned," (3) "not discriminat[ory] against interstate commerce," and (4) "fairly related to the services provided by the State." Defendants then admit (Brief at 9) that only the first prong is at issue here, rendering the question presented into whether companies doing at least $100,000 of business (or averaging 4 transactions/week) in South Dakota's relatively small economy have "a substantial nexus" with the State. It would seem the answer is: "Yes."

Defendants make no effort to establish that the contemporary authority they cite validates their arguments. This is not surprising considering that when decided, *Quill* itself acknowledged that "contemporary Commerce Clause jurisprudence might not dictate the same result [the Court adopted in *Bellas Hess*] were the issue to arise for the first time today." 504 U.S. at 311. Years of experience have revealed that this was a generous understatement as *Bellas Hess*'s bright-line, physical-presence rule is now essentially cabined to taxes called "sales tax." It is not applied to similar taxes and regulations imposing essentially identical burdens on interstate commerce, even though the entire trend of Commerce Clause jurisprudence has been to reject formalistic distinctions in favor of an analysis more grounded in economic realities. *See Quill*, 504 U.S. at 314 (noting, even then, that the Court had not followed *Bellas Hess* in its "review of other types of taxes"); *Complete Auto*, 430 U.S. at 279 (rejecting formalistic Commerce Clause analysis that

makes it a "trap for the unwary draftsman").

Since *Quill*, state and federal courts have upheld one tax after another requiring companies or individuals to remit their fair share of various non-sales taxes whether they have a physical presence in the taxing state or not.[3] The Supreme Court, in turn, has denied certiorari in case after case where petitioners have asked it to expand *Quill* by acknowledging its application to these other kinds of taxes.[4] One particularly relevant example is the Tenth Circuit Court of Appeal's recent decision regarding a use-tax reporting requirement. *See DMA*, 814 F.3d at 1129. As Defendants admit, the purpose of the substantial nexus requirement is to "restrict[] the authority of a state to impose undue burdens on interstate commerce," Brief at 9. And yet, the Tenth Circuit affirmed that as long as the burdens imposed do not require actual sales tax collection, states may require out-of-state sellers to *track and report* substantial sales to in-state residents—thereby imposing a "burden" that can hardly be that different from collecting and remitting the tax itself. *See DMA*, 814 F.3d at 1146-47; *id.* at 1149 (Gorsuch, J., concurring) (noting that Court would not and should not apply *Quill*, even though Colorado statute imposed "burdens comparable in their severity to those associated with collecting the underlying taxes

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[3] *See, e.g., Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (2000); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W. 2d 308, 323 (Iowa 2010), *cert. denied*, 132 S. Ct. 97 (2011); *Capital One Bank v. Comm'r of Revenue*, 899 N.E.2d 76 (Mass. 2009), *cert. denied*, 557 U.S. 919 (2009); Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226, 232-34 (W. Va. 2006), *cert. denied sub nom FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007); *Couchot v. State Lottery Comm'n*, 659 N.E.2d 1225 (Ohio 1996), *cert. denied*, 519 U.S. 810 (1996); *Geoffrey, Inc. v. S.C. Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993).

[4] *See supra* n.3; Petition for Writ of Certiorari at i, *Couchot*, U.S. S. Ct. No. 95-1802 (Question Presented: "Does the 'physical presence' test for 'substantial nexus' … articulated in *Quill* … apply to state income taxes?"), *cert. denied* 519 U.S. 810 (1996).

themselves").

Put otherwise, ever since *Quill*, the courts have consistently held that so long as States comply with the literal limit of *Quill*'s holding, laws imposing identical burdens on interstate sellers in fact *satisfy* contemporary Commerce Clause analysis, not the other way around. It is thus perhaps unsurprising that, in a section entitled "The Physical Presence Standard of Substantial Nexus Is Grounded In Core Principles Of The Commerce Clause," *see* Brief at 13-15, Defendants cite no cases other than *Bellas Hess* and *Quill* themselves.[5] But for *Quill*, asking Defendants to collect their fair share of sales tax would clearly comply with *Complete Auto* and the dormant Commerce Clause.

III. Defendants Have Failed To Establish Any Meaningful Burden On Their Participation In Interstate Commerce.

By limiting their arguments to issues of "substantial nexus," Defendants admit that South Dakota's approach in no way discriminates against interstate commerce or apportions it an unfair share of tax under the other prongs of the *Complete Auto* test. Instead, they suggest that it is simply too burdensome for out-of-state sellers to comply with different tax rates in different jurisdictions, and that removing *Quill*'s bright-line, physical-presence requirement will somehow immediately "remove all limitations" on a State's authority to impose tax collection obligations on such sellers. Defendants' arguments

[5] Defendants cite only two cases in which they purport to find some support for *Quill*. *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015); *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010). But these decisions cite *Quill* only for uncontroversial propositions not relevant here. Neither is about the physical-presence rule, or even the substantial-nexus prong of *Complete Auto*; indeed, *Hemi Group* isn't even about the Commerce Clause or Constitution at all. The absence of contemporary support for *Quill* in defendants' own best cases demonstrates how far *Quill*'s already "doubtful authority" has now sunk in the rising tide of the case law. *See DMA*, 814 F.3d at 1151 (Gorsuch, J. concurring).

lack any support, misunderstand the consequences of this litigation, and ironically fail to show that *Quill* itself prevents the problems over which they fret.

A. Defendants have failed to establish any burden in fact.

As an initial matter, Defendants attempt to establish a burden on interstate commerce from the mere fact that there are now supposedly 10,000 taxing jurisdictions in the United States—up from about 6,000 at the time of *Quill*. This argument fails in multiple respects.

First, it is obvious that large and sophisticated sellers like Defendants can easily comply with their tax obligations in multiple jurisdictions. First, Defendants admit that other national brick-and-mortar retailers already do, as do other large players in Internet retail. Brief at 21-25. In fact, when the State sued Systemax in this action, Systemax was able to comply *instantaneously*. *State of South Dakota v. Wayfair Inc. et al.*, Circuit Court, Hughes County, 32 Civ. 16-92, "Plaintiff's Notice of Voluntary Dismissal without Prejudice RE: Systemax Inc." Defendant Wayfair already collects tax in Texas, which according to Defendants' chosen metric, alone has well over 1,000 taxing "jurisdictions." *See* Wayfair's Shipping Information under "Free Shipping?" lists the state "or any Canadian province, we are required to charge sales tax" at https://www.wayfair.com/customerservice/shipping_info.php#ordership and Texas Comptroller of Public Accounts, Overview of Texas Taxes at http://comptroller.texas.gov/taxes/. Simply put, all experience demonstrates that contemporary retailers of any reasonable scale have no difficultly complying with the logistically simple task of calculating applicable sales taxes based on shipping addresses.

Defendants' argument is entirely theoretical and lacks grounding in practical reality. For example, they recite a long list of difficult-sounding compliance tasks, Brief at 14, but make no effort to show that these obligations actually are difficult or expensive, or explain how real-world compliance is achieved. This failure likely arises because the biggest change by far since *Quill* is not the modest growth in the number of taxing jurisdictions, but the explosion of logistical and computing power unleashed by modern Internet functionality and network computing. In pursuing their business model, Defendants are now able to track individual purchasers' preferences with cookies associated with their IP addresses, target their advertising on a house-by-house basis, follow consumers around as they travel with their smartphones, and deliver products of every size and description to every corner of the country in a matter of days, if not hours. Defendants themselves identify a software provider (one of many) that tracks the requirements in different jurisdictions and provides the ability to accurately comply with tax requirements through integration into an Internet shopping cart. *See* Brief at 16. Meanwhile, South Dakota makes its database information for sales tax compliance by address readily available, and in its experience, companies interested in abiding by their legal duties have had no difficulty doing so. Defendants, who do *millions* of dollars of business in South Dakota and are masters of modern logistics, thus face no undue burden in being asked to collect and remit their fair share of sales tax.

In addition to ignoring the advent of modern computing and the scale thresholds in South Dakota's statute, Defendants do not once mention the Streamline Sales Tax system available in South Dakota and many other states. Among other things, Streamline regu-

larizes the compliance requirements in a host of States, and makes compliance software available to companies free of charge if they choose to voluntarily participate. For any company actually interested in sales-tax compliance, the burden in South Dakota is thus far more imagined than real. *See infra* Brief at 15-17; *Cf. DMA*, 841 F.3d at 1150-51 (Gorsuch, J. concurring) (questioning whether the effort to expand *Quill* is meant to avoid undue burdens on interstate commerce or to capture a tax advantage).

B. Defendants' misunderstand the effect of a judgment upholding Senate Bill 106.

Lacking concrete evidence that it would be burdensome for them (or anyone else) to comply with Senate Bill 106, Defendants fall back on the "structural" argument that, if *Quill* were abrogated in this case, it would "remove all limitations" on how far states' taxing authorities might reach, and allow states to adopt "arbitrary" thresholds that would unleash economic chaos. *See* Brief at 17-18, 25. This is not how constitutional litigation works. The sole consequence of a holding that Senate Bill 106 is constitutional under the dormant Commerce Clause would be the approval of that regime in the unique context of South Dakota. Approving one threshold would not require any court to approve others; the fact that that someone doing six-figure business or making 200 separate sales in the relatively small economy of South Dakota has a "substantial nexus" with the State would not require courts to approve a $500 threshold for the world's fifth largest economy in the State of California, nor would it mean the State could lower the threshold to $1,000 the next day without risk of invalidation.

While Defendants suggest that "there is nothing constitutionally significant about a particular number of transactions or one level of gross revenues as compared with another," *see* Brief at 25, the Supreme Court's settled test is called the "*substantial* nexus" test for a reason, and of course admits the possibility that doing huge business in a State creates a "substantial" nexus while fulfilling occasional orders does not. Our system of constitutional litigation works by testing these limitations one at a time; it does not require courts to assume that if one rule changes, there will never be rules again.[6]

C. *Quill* itself does not solve Defendants' purported problems.

The most ironic aspect of Defendants' argument is that it has little to do with *Quill* because the physical-presence requirement does not even prevent the burdens Defendants purport to identify. *See, e.g.*, *DMA*, 814 F.3d at 1149 (Gorsuch, J. concurring) (collecting cases that make it "a matter of precedent" that "*Quill* does nothing to forbid states from imposing regulatory and tax duties of comparable severity to sales and use tax collection duties"). Instead, all *Quill* does is create one very particular way that an out-of-state seller can obtain a privileged tax shelter when competing against other sellers who have even a minimal presence in a state. This shows with particularity how *Quill* lacks an anchor in the contemporary principles and purposes of Commerce Clause doctrine.

To take one example, the physical-presence rule decidedly fails to prevent Defendants' worry that different states and jurisdictions will burden interstate sellers by ad-

[6] It is worth noting that, while Defendants raise the specter of different thresholds in different jurisdictions, the States appear to be adopting similar standards for the scale of businesses that are required to comply. The thresholds of $100,000 in South Dakota, $250,000 in Alabama, and $500,000 in Tennessee translate to estimated national sales of approximately $40 million, $17 million, and $26 million, respectively, based on the relative size of each State's economy.

dressing different sales tax issues differently. A small business with stores in Minnesota, South Dakota, and North Dakota must comply with the different rules of each state and locality, even if it is shipping goods to Pierre, South Dakota from St. Paul, Minnesota and its only South Dakota store is in a different city (or tax jurisdiction) hours away. Companies with a national presence, from AutoZone to Best Buy, comply with all state and municipal sales taxes for every state in which they have a store, even when goods are purchased from their online channel and shipped from one side of the country to another. There is no sense in which *Quill* prevents the burdens of compliance with multiple tax regimes throughout the Nation; instead, it simply substitutes the arbitrary trigger of physically touching the state in some way for the much more sensible trigger of conducting hundreds of thousands of dollars of business therein.

Moreover, *Quill* in no way prevents different states from adopting different definitions *of physical presence itself*, a phenomenon that has become increasingly common in recent years. *See* MultiState Insider, Liz Malm, "Four State Have Enacted Sales Tax Nexus Legislation This Year, with Dozens of Other Bills Still Active", May 10, 2016, at https://www.multistate.com/insider/2016/05/three-states-have-enacted-sales-tax-nexus-legislation-this-year-with-dozens-of-other-bills-still-active/. Sellers are still faced with the problem of determining which rules apply to trigger tax obligations in different states. All *Quill* does is prevent different economic-nexus thresholds by allowing for different physical-presence thresholds—at best a pyrrhic victory from the standpoint of the relevant constitutional values.

Finally, and perhaps most fundamentally, Defendants are wrong to argue that *Quill* somehow prevents the states from "usurp[ing] congressional authority for regulating the national marketplace." *See* Brief at 15 n.8, 19-20. With or without *Quill*, Congress retains the authority to "*regulate* Commerce … among the several States," U.S. Const. art. I, sec. 8, cl. 3. Abrogating *Quill* and allowing states to impose economic nexus thresholds on the one tiny corner of state tax law still subject to a physical-presence test does not prevent Congress from later determining that such thresholds have harmed interstate commerce and should be replaced with something else. Defendants may be right that it would be better to have a nationwide system, and that Congress is the best suited entity to decide what that system should look like. *See, e.g.*, Brief at 19-21, 25 n.12. But that tells the courts nothing about what they should do when Congress has done nothing, and acknowledging the power of the States to act unless and until Congress says otherwise has literally no effect on what Congress can do in the future. U.S. Const. Amend. X.

Ultimately, Defendants have not shown that sales tax compliance imposes burdens on them (or anyone else) that differ from other ordinary costs of doing business which have never triggered dormant Commerce Clause concerns—especially given modern Internet and network computing functionality. Nor have they shown that *Quill* would actually help anyone avoid those burdens if they did exist. Their argument, instead, is that, having set up the faulty *Bellas Hess/Quill* rule, the courts ought to leave it in place indefinitely unless and until Congress cleans up the mess. *See, e.g.*, Brief at 20 ("Any *changes* in the *established* standards defining the limits of state taxing authority over interstate

commerce are legislative judgments to be made by Congress[.]") (emphasis added). That is the exact question the State is endeavoring to bring to the United States Supreme Court in this action, because that Court alone can determine, finally, that "the time has come" to fix the harm that *Bellas Hess* has done, *see* 504 U.S. at 318, while still leaving to Congress the prerogative to choose any different system it may prefer.

IV. Defendants Fail To Refute The Obvious Harm That *Quill* Does To State Treasuries, Constituents, And Public Services.

Citing a study from an affiliated lobbying association, *see* Brief at 22, Defendants spend the closing sections of their brief attempting to refute the widely acknowledged and obvious harm that *Quill* causes to the States that are unable to collect sales taxes on remote sales. As Defendants acknowledge, Professor Bill Fox's research regarding these losses and other associated harms has been widely cited, including by the Supreme Court, *see* Brief at 21-22 & n.11, and indicates that Defendants' analysis is incorrect. Unsurprisingly, in light of the exponential growth of online retail, the more widely regarded research concludes that the lost revenues associated with the *Quill* rule are large and still growing, and even more serious in states—like South Dakota—that have no income tax and rely heavily on their sales tax to fund state government.

In fact, with respect to South Dakota in particular, Defendants' efforts to show the absence of a serious harm in this area refutes itself. Through an extended calculation, Defendants purport to derive the amount of lost tax revenue in South Dakota from census data and financial news sources. *See* Brief at 22-23. Their key step is cutting the number nearly in half by assuming that "45% [of e-retail sales] … are made by Amazon.com,

which now collects sales tax on the great majority of its sales, and the large 'multi-channel' retailers that sell both in retail stores and online, and thus collect state and local tax." *See id.* at 22. Amazon.com *does not* remit sales tax in South Dakota. Therefore, subtracting Amazon's sales from a calculation of *South Dakota's* lost sales tax revenue is inaccurate.

Indeed, much of Defendants' argument about the lack of a burden on States from *Quill* boils down to a strange defense that, because states are more and more successfully legislating around *Quill* or retailers are agreeing to voluntarily comply, there is no case for *Quill* to be overturned. *See id.* at 23-24 (noting that Amazon is the largest player, and is increasingly collecting tax). This is a bit like a trucking company defending its right to avoid paying highway tolls because the bigger trucking companies are voluntarily paying, thereby alleviating the harm caused by the ones who dodge the gates. In truth, this is entirely backwards: The fact that taxes are being paid with no apparent problems by other retailers of similar size and description on other interstate shipments that might otherwise be exempt under *Quill* is a good reason to recognize that the Supreme Court *can safely get rid of Quill*, not a good reason for the law to overlook the continued and undeserved advantage it provides to a narrow set of specially organized firms.

The Court should also reject Defendants' effort to clothe themselves in the mantle of small business. Defendants acknowledge that South Dakota has only 0.267% of the national population, *see* Brief at 23, making Senate Bill 106's thresholds quite high in context. In any event, Defendants themselves are massive masters of nationwide logistics who do many millions of dollars of business in South Dakota annually. The question be-

fore the Court in this case is whether *they* can somehow avoid collecting their fair share of tax on the ground that they have an insubstantial nexus with the State, and are doing it no real harm by failing to comply. Apart from the outdated rule of *Quill*, Defendants have the requisite nexus with South Dakota to allow the imposition and collection of the State sales tax on purchases delivered to residents of South Dakota.

CONCLUSION

The State respectfully requests, as explained elsewhere, that this Court remand this matter to the State court for lack of jurisdiction. Failing that, it should grant summary judgment to the Defendants, for now, because, *notwithstanding* contemporary Commerce Clause doctrine and until the United States Supreme Court acts to harmonize this area of the law, *Quill* entitles certain out-of-state retailers to refuse to collect their fair share of sales tax. *See DMA*, 135 S. Ct. at 1135 (Kennedy J., concurring) (urging "the legal system [to] find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*").

Dated this 23rd day of February, 2017.

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CERTIFICATE OF SERVICE

On this 23rd day of February, 2017, the undersigned hereby certifies that a true and correct copy of the *Plaintiff's Response to Defendants' Motion for Summary Judgment* in the above-entitled matter was served electronically through the Odyssey File and Serve system, upon the following:

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