No. 10-1340

IN THE

Supreme Court of the United States

KFC CORPORATION,

Petitioner,

v.

IOWA DEPARTMENT OF REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF OF AMICUS CURIAE INTERNATIONAL FRANCHISE ASSOCIATION IN SUPPORT OF GRANTING THE PETITION

STEPHEN J. CALDEIRA
President and CEO
INTERNATIONAL FRANCHISE ASSOCIATION
1501 K St., N.W.
Suite 350
Washington, DC 20005

ARTHUR L. PRESSMAN
Counsel of Record
GREGG A. RUBENSTEIN
KENNETH H. SILVERBERG
SCOTT M. SUSKO
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
(617) 345-1000
apressman@
nixonpeabody.com

236366

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
BACKGROUND	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	8
A. The Petition Should be Granted to Protect the Settled Expectations of $2.1 Trillion of Domestic Economic Output	9
B. Allowing States to Collect Income Taxes From Out-Of-State Franchisors Imposes Undue Administrative and Economic Burdens	13
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

CASES

A&F Trademark, Inc. v. Tolson,
605 S.E.2d 187 (N.C. Ct. App. 2004) 2

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 9, 16

Geoffrey, Inc. v. South Carolina Tax Comm'n,
437 S.E.2d 13 (S.C. 1993) 2, 7

Goodyear Dunlop Tires Operations, S.A. v. Brown,
No. 10-76 (U.S.) 11

Kerl v. Rasmussen,
682 N.W.2d 328 (Wis. 2004) 3

KFC Corp. v. Iowa Dep't of Revenue,
792 N.W.2d 308 (2010) . . . . *passim*

Lanco, Inc. v. Director, Div. of Taxation,
908 A.2d 176 (N.J. 2006) 2, 13

National Bellas Hess, Inc. v. Department of Revenue of Ill.,
386 U.S. 753 (1967) . . . . *passim*

Praxair Tech., Inc. v. Director, Div. of Taxation,
988 A.2d 92 (N.J. 2009) 13

Page

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) . . . . *passim*

STATUTES AND LEGISLATIVE MATERIALS

The Business Activity Tax Simplification Act of 2011: Hearing on H.R. 1439 Before the H. Subcomm. on Courts, Commercial & Admin. Law (2011) (statement of Corey Schroeder, VP & CFO of Outdoor Living Brands, Inc.) 7-8

Cal. Code Regs. tit. 18, § 25137-3 (2011) 16

Uniform Division of Income for Tax Purposes Act, § 17 16

OTHER MATERIALS

Arizona Dep't of Revenue Hearing Officer Decision, No. 200700083-C (Mar. 27, 2008) 7

Bureau of Consumer Protection, Federal Trade Comm'n, *Buying a Franchise: A Consumer Guide* 11

Economic Impact of Franchised Businesses: Vol. 2 10

PricewaterhouseCoopers, *The Economic Impact of Franchised Businesses: Volume III, Results for 2007* 5

Page

The Profile of Franchising: 2006, Franchising World (Aug. 2006) 6

Bruce S. Schaeffer, *Tax Aspects of Franchising*, 559-2d T.M. (2005) 8

What is a Franchise? 3

INTEREST OF AMICUS CURIAE[1]

This brief is submitted on behalf of amicus curiae International Franchise Association ("IFA").

The IFA is the oldest and largest trade association in the world devoted to advocating the interests of franchising. The IFA is a membership organization of franchisors, franchisees and suppliers. Since its inception in 1960, the IFA has represented the interests of the franchise community and the American entrepreneurial spirit that franchising embodies.

The IFA currently represents more than 300 different industries and includes more than 11,000 franchisee, 1,100 franchisor and 575 supplier members nationwide. According to a recent study conducted by PwC, over 825,000 franchise businesses are responsible for creating nearly 18 million American jobs and generating over $2.1 trillion in economic output.

Since 1993, when it first invited franchisees to join, the IFA has attracted more than 11,000 franchisee members, one of whom currently serves as the IFA's Chairman. The IFA's mission is to enhance and safeguard the business environment for franchising worldwide. In addition to serving as a resource for current and prospective

---

1. The parties have consented to the filing of this brief and received timely notice of the IFA's intent to do so. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus has made a monetary contribution to the preparation or submission of this brief.

franchisors and franchisees, the IFA and its members work closely with public officials across the country to shape the laws and regulations that govern franchising, with the goals of promoting franchising's growth and achieving the interests of franchisors and franchisees. The IFA is the only trade association that acts as a voice for both franchisors and franchisees throughout the United States and the world.

Counsel for amicus curiae has read KFC Corporation's petition for certiorari. Having read the petition, counsel believes that the IFA's analysis and the considerations it raises in this brief will help inform the Court that granting the petition is important and necessary to protect the settled interests of thousands of franchisors and franchisees, millions of individuals employed by them and trillions of dollars of economic impact that franchising provides to the United States economy. In short, the IFA believes that franchising and the economic output it generates will suffer significant negative impact if the Supreme Court of Iowa's decision is not overturned.

BACKGROUND

Unlike the previous tax nexus cases for which the Court has denied review, *see e.g.*, *Lanco, Inc. v. Director, Div. of Taxation*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007); *A&F Trademark, Inc. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005); *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993), this case does not involve state tax planning structures where intangible holding corporations ("IHCs") were created and utilized by intellectual property owners to

minimize state tax obligations.[2] Instead, this case involves the legitimate and well-recognized business method of franchising, an arm's-length contractual relationship in which a franchisee is the direct licensee and beneficiary of a franchisor's intellectual property in the franchisee's local community.

At its most basic, franchising is a contractual agreement between two unrelated and independent parties that: (1) permits the franchisee to use the franchisor's trademark or service mark for the franchisee's benefit; (2) permits the franchisee to market a product or service using the franchisor's methodology for doing so; (3) requires the franchisee to pay for use of the franchisor's trademark and methodology; and (4) requires the franchisor to support the franchisee's business through providing advice and continuously developing and refining the licensed product or service. *See generally What is a Franchise*, available at http://franchise.org/franchiseesecondary.aspx?id=52625; *Kerl v. Rasmussen*, 682 N.W.2d 328, 331 (Wis. 2004).

Often, a franchisor does not operate outlets itself and instead concentrates its efforts on the development and improvement of its trademarks and business systems so its franchisees can compete effectively in their local communities and respond to changing market demands. In the franchising relationship, franchisors gain no direct benefit from the services or market conditions in a state because franchisors do not sell their products or services associated with their marks to customers. Instead, it is the franchisee that actually sells the product or service in

2. The IFA takes no position on whether these cases were correctly decided.

a particular state and thereby benefits from the market conditions and infrastructure each state offers.

Businesses decide to franchise for a variety of reasons. For example, franchising is an excellent way to expand distribution of a product or service by leveraging third parties' capital. While this allows growth without taking on large amounts of debt, it too comes at a price. In franchising that "price" is allowing the capital-providing franchisee to grow its capital investment by receiving the true profit from the business. Unlike a loan provider that receives only the agreed upon interest, regardless of how successfully the capital is deployed, franchisees' capital contributions can be both repaid and grow.

In the typical franchise relationship, a franchisee contributes capital by incurring the costs necessary to develop and open its licensed business. As start-up costs are often significant, franchise relationships typically extend for ten or twenty years with an opportunity to renew. This long-term relationship is essential to franchising because franchisees require significant time to recoup their initial capital investments.

Franchisees also typically pay a continuing royalty fee for use of the franchisor's trademarks, business methodology and support. This royalty is usually a franchisor's primary revenue source and is its compensation for development of trademarks and business systems in the first instance and the on-going research and support that help keep a franchisee's business competitive throughout the franchise term. As with other businesses, franchisors set their royalty rate, i.e., price, based on the revenues they determine are necessary to support their

operations and generate a profit. Unlike other businesses, however, franchisors cannot simply change their pricing to adapt to market changes because the amount a franchisee is obligated to pay is governed by a long-term franchise contract.

For more than forty years, franchising has been a successful way to grow businesses. In 2011, PricewaterhouseCoopers released *The Economic Impact of Franchised Businesses: Volume III, Results for 2007* ("Study"). *See* http://www.buildingopportunity.com/download/Part1.pdf. According to the Study, in 2007 franchised businesses *directly* produced goods and services worth $802.2 billion or 3.4% of private nonfarm output in the United States, contributed $468.5 billion or 3.9% of all private nonfarm United States GDP and provided 9,125,700 or 6.2% of private nonfarm jobs. Not surprisingly, franchising's indirect impact on the domestic economy is even greater. In 2007, franchised businesses supported 17,430,700 or 11.8% of private nonfarm jobs, $2.1 trillion or 9.0% of all private nonfarm output and $1.2 trillion or 9.7% of all nonfarm United States GDP.

When Iowa seeks to tax KFC on the royalties paid by its Iowa franchisees, it does so acknowledging that KFC itself has no physical connection to or presence in Iowa. Petition for Writ of Certiorari, *KFC Corp.* (No. 10-1340) at 8. Instead, Iowa argues that because it has provided an infrastructure that allowed KFC's intellectual property to flourish, that is a sufficient economic nexus to justify a tax on the royalty KFC's Iowa franchisees pay. *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 327-28 (2010). What Iowa chooses to ignore is that its infrastructure is paid for by the Iowa franchisees who operate within its

borders, the sales taxes its citizens pay and the income, property and school taxes that the franchisees and their employees pay. The people whose tax dollars pay for Iowa's infrastructure use it just as KFC and its employees pay for the infrastructure they use in their home state.

The ramifications of Iowa's decision extend far beyond its impact on KFC which has over 3,000 franchisees in 50 states. While the administrative burden and expense of potentially 50 or more income tax filings are certainly not welcomed by KFC, it may have enough resources to carry that burden and expense and still support its franchisees. The same cannot be said for the remaining approximately 1,500 other franchisors who do business in the United States and represent a significant percentage of franchising's economic impact. More than 60% of them have fewer than 100 franchisees and more than 25 % have fewer than 10 franchisees. *The Profile of Franchising: 2006*, Franchising World 56 (Aug. 2006). For them, a dramatic increase in the number of income-based tax filings and the associated costs of those filings, especially when coupled with the likelihood of paying tax more than once on the same royalty dollar, is simply too heavy a burden to carry. As the burdens increase on franchise systems, system failures and/or decreased economic activity will no doubt follow.

SUMMARY OF THE ARGUMENT

The IFA strongly urges the Court to grant the petition for certiorari to protect franchised businesses' forty years of settled economic expectations and avoid the almost certain decline in economic activity and job growth that will result absent review and reversal. The

current state of the law, with states split on the right to impose income taxes on out-of-state franchisors, creates tremendous uncertainty about franchisors' past and future tax obligations.[3] This uncertainty is especially problematic for multi-state franchise systems with long-term contracts that cannot be modified to respond to fundamental changes in tax obligations. Franchisors have established their businesses and empowered independent owners to create millions of jobs and trillions of dollars of economic activity based on a fundamental economic premise that is now under attack. That attack will undoubtedly impose undue burdens on interstate commerce, including potential retroactive tax obligations, that will result in real economic slowdown and job loss among businesses that utilize franchising.[4]

---

3. Again, although previous cases have addressed states' efforts to thwart creative tax-driven structures, this is the first case to directly address the legitimate business method of franchising. Despite this clear difference, the Iowa Supreme Court incorrectly claimed that the first IHC case, *Geoffrey, Inc. v. S.C. Tax Comm'n*, involved "franchisors who earned income based on franchise activities within the state." *KFC Corp.*, 792 N.W.2d at 320-21 (citing 437 S.E.2d 13, 15 (S.C. 1993)). In fact, *Geoffrey* did not address a franchise situation, but rather a license between an IHC and an affiliated operating corporation where the affiliate had retail stores located within South Carolina. *Geoffrey*, 437 S.E.2d at 15.

4. Arizona, California, New Mexico, New York, North Carolina, South Carolina, Washington and perhaps other states are now claiming the right to collect income taxes from out-of-state franchisors. *See e.g.*, Arizona Dep't of Revenue Hearing Officer Decision, No. 200700083-C (Mar. 27, 2008) available at http://www.azdor.gov/LinkClick.aspx?fileticket=9ZY8i7xZVNE%3d&tabid=105&mid=474; *The Business Activity Tax Simplification Act of 2011: Hearing on H.R. 1439 Before the H. Subcomm. on*

KFC Corp. is an appropriate candidate for this Court to resolve the mixed answers and at-odds approaches offered by the sixteen states that have addressed the physical presence/economic nexus issue outside of the franchise context. Granting the petition also provides an opportunity to reaffirm the Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and protect the long-settled expectations of the thousands of franchisors and franchisees who have carefully arranged their economic lives in reliance on it.

ARGUMENT

The petition is appropriately granted to avoid the substantial negative impact the decision below is having and will continue to have on the $2.1 trillion dollars of annual economic activity that franchising in the United States helps generate. Indeed, the amount of economic activity implicated by Iowa's decision in and of itself justifies review by the Court. When coupled with the actual reliance franchisors have placed in the Court's prior decisions and the undue burden Iowa's approach will impose on franchising specifically and interstate commerce generally, the need for full review is plain. Finally, review is necessary to preserve the Constitutional distinction between Commerce Clause requirements and Due Process requirements.

Courts, Commercial & Admin. Law, (2011) (statement of Corey Schroeder, VP & CFO of Outdoor Living Brands, Inc.) available at http://www.franchise.org/uploadedFiles/Franchise_Industry/Government_Relations/BATSA%20Testimony%20Corey%20Schroeder%20-%20IFA%204%2013.pdf; Bruce S. Schaeffer, *Tax Aspects of Franchising*, 559-2d T.M. (2005).

A. The Petition Should be Granted to Protect the Settled Expectations of $2.1 Trillion of Domestic Economic Output.

The success of franchising and its positive effect on the United States economy is due in no small measure to the predictable taxation scheme first adopted in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), amplified by application of the "substantial nexus" prong in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and affirmed in *Quill*. 504 U.S. at 298.[5] By limiting franchisors' tax filing obligations to only those states in which they have a physical presence, the Court allowed franchisors to grow their businesses through long-term contracts without fear of experiencing the additional costs of preparing and filing multiple tax returns in jurisdictions where they may have only the slightest economic activity or the potential for double taxation. Moreover, franchisors were able to offer their franchises at lower cost due to the limited state tax filing burden. The combination of long-term potential and lower cost inspired by reliance on the Court's precedents

5. Although *Bellas Hess* and *Quill* did not specifically address income taxes, the Iowa Supreme Court's focus on distinguishing *Quill* and the decisions of several state appellate courts equating "economic nexus" with "physical presence" demonstrate that *Quill*'s physical presence requirement is recognized as applying to income taxes. *See generally KFC Corp.*, 792 N.W.2d at 320-22 (collecting and discussing various appellate court decisions). This debate was, however, of no consequence to franchised businesses because it was limited to IHC state tax planning scenarios, rather than arm's-length transactions between unrelated third parties as in franchising. No previous case has sought to equate economic nexus to physical presence in the true franchise context.

has been successful for both franchising and the United States economy. According to studies, franchising has grown in the United States from producing $624.6 billion of economic output in 2001 to $802 billion in 2007. *See* Study; *Economic Impact of Franchised Businesses: Vol. 2* at 6 available at http://www.franchise.org/uploadedFiles/Franchisors/Other_Content/economic_impact_documents/EconImpact_Vol2_HiLights.pdf.

While no single factor can account for franchising's growth, franchisors' ability to limit and know in advance their state tax filing obligations undoubtedly played a significant role. Specifically, it permitted franchisors to lower franchise costs while maintaining sufficient returns on investment, thereby spurring economic activity and job growth. *See Quill*, 504 U.S. at 316 ("[I]t is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.").

As this Court explained in *Quill*, settled expectations, especially as to a state's authority to impose a tax, play an important role in deciding whether to overturn precedent.[6]

---

6. There can be no reasonable doubt that permitting Iowa and other states to collect income taxes from out-of-state franchisors without a physical presence within their borders effectively abrogates *Quill*. While the Iowa Supreme Court may sincerely believe that use of intellectual property within Iowa's borders constitutes a "physical presence" there, that conclusion does not comport with any common understanding (or this Court's prior view) of physical presence. Indeed, equating bona fide third parties' use of intellectual property within a state as a sufficient basis for imposing taxes will likely have no less negative impact on interstate commerce than allowing pure stream of commerce to

Id. (discussing importance of settled expectations); *see also KFC Corp.*, 792 N.W.2d at 319-20 (recognizing important role that settled expectations and stare decisis played in *Quill*). Here, it is clear that franchisors both expected and relied upon the physical presence requirement as demonstrated by their entering into long-term contracts with franchisees with fixed royalty percentages. While the length of franchise contracts varies from system to system, they generally range from no less than five years to as long as twenty years, with renewal options, usually at a franchisee's election. Bureau of Consumer Protection, Federal Trade Comm'n, *Buying a Franchise: A Consumer Guide* 4 available at http://business.ftc.gov/documents/inv05-buying-franchise-Consumer-guide.pdf. As a result, franchisors have no ability to alter the amount of royalty they receive based on new tax filing obligations imposed upon them until five, ten or twenty years, if then, into the future. This actual reliance is precisely the type of settled expectation the *Quill* Court relied upon in rejecting challenges to *Bellas Hess* and which the Court should again recognize to grant the petition and reverse the Iowa Supreme Court. *Quill*, 504 U.S. at 317 ("[T]he *Bellas Hess* rule has engendered substantial reliance and become part of the basic framework of a sizeable industry.") Indeed, because this case involves applying the Commerce Clause to a state income tax that imposes a tax payment obligation on franchisors, as opposed to a use tax obligation of collecting taxes from customers, the settled expectations of franchised businesses are even

---

establish personal jurisdiction will have on international commerce and is therefore no less worthy of the Court' s review. See Brief for United States as Amicus Curiae Supporting Petitioners, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, No. 10-76 (U.S.).

more relevant than they were in *Quill*. *Id.* at 312 ("In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effect of state regulation on the national economy.") Absent review, the effect on franchised businesses is clear: those franchisors that are able to remain in business will impose higher royalty rates to offset the increased tax reporting and tax payment burdens, resulting in less economic activity and lower job growth.

Permitting states to impose income tax filing obligations would also upset franchisors' settled expectations by creating potentially significant retroactive unanticipated tax liabilities. Again, the *Quill* Court foresaw this exact concern and relied upon it in affirming the physical presence requirement. *Id.* at 318 n.10 ("An overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mailorder houses."). The concern here equals or exceeds that in *Quill*. As the facts here establish, when in 2001 Iowa first issued KFC an assessment for taxes, Iowa did so for 1997, 1998 and 1999. *KFC Corp.*, 792 N.W.2d at 310. Not content with simply imposing a new tax, Iowa also imposed penalties and interest based on KFC's failure to pay the tax Iowa had never before sought to collect. *Id.* Should Iowa's action escape the Court's review, there is good reason to believe that every other state and jurisdiction with an income tax will follow Iowa's example and thereby create precisely the type of retroactive tax obligation and unanticipated liabilities that the Court

refused to condone in *Quill*. Needless to say, this would likely have a devastating impact on small franchisors with franchisees in multiple states.[7]

B. Allowing States to Collect Income Taxes From Out-Of-State Franchisors Imposes Undue Administrative and Economic Burdens.

The decision of the Iowa Supreme Court must be reviewed and vacated because it violates the most basic Commerce Clause tenet: it imposes undue burdens on interstate commerce. *See Quill*, 504 U.S. at 312 ("[W]e have ruled that that Clause prohibits discrimination against interstate commerce [citation omitted] and bars state regulations that unduly burden interstate commerce [citation omitted]."). It does so by imposing an undue administrative burden on multi-state franchisors comparable to the burden imposed by the use taxes held excessive in *Bellas Hess* and *Quill*. *See e.g.*, *id.* at 313

7. Again, this is more than just speculation. As stated above, at least eight states (including Iowa) are currently seeking to require out-of-state franchisors to pay income taxes on royalties from in-state franchisees. Moreover, Iowa's attempt to collect tax, penalties and interest for at least three taxable years going back to the 1990s cannot be interpreted as anything but retroactive. Similarly, New Jersey has adopted an aggressive enforcement position post-*Lanco*, 908 A.2d at 176, that there is no temporal limit for past due income taxes. These enforcement policies demonstrate that describing the retroactive impact as "devastating" is not mere hyperbole. *See KFC Corp.*, 792 N.W.2d at 310; *Praxair Tech., Inc. v. Director, Div. of Taxation*, 988 A.2d 92 (N.J. 2009) (rejecting argument that past due income taxes were limited to date of regulation specifying their applicability based on new economic nexus theory).

n.6 (recognizing that complying with 6,000-plus taxing jurisdictions that may impose use taxes is excessive). This undue burden on franchised businesses and interstate commerce violates the Commerce Clause and strongly supports the petition and reversal.

As the Court recognized in *Bellas Hess* and *Quill*, requiring national businesses to comply with sales tax obligations from 6,000 plus jurisdictions is *a fortiori* an undue burden on interstate commerce. 386 U.S. at 759-60; 504 U.S. at 313 n.6. The burden use taxes impose on businesses is at least comparable to that income taxes would impose on franchisors. Income-based taxes would require franchisors to make a multitude of determinations arguably more complex than those generally involved in calculating use or sales tax, including: (1) filing methodology, i.e., whether the franchisor must file a combined return with affiliates or a separate return; (2) tax base, i.e., the calculation of state taxable income, including the use of corporate attributes such as net operating loss deductions and tax credits; (3) division of income based on each state's particular formulary apportionment; (4) procedural rules such as estimated tax and final return due dates; and (5) tax rates to apply to the different amounts of taxable income allocated to each jurisdiction.[8] *See generally* Brief for Council on State Taxation et al. as Amici Curiae Supporting Petition for Certiorari, Capital One Bank, N.A. v. Comm'r of Revenue of Mass., (No. 08-1169) at 8-15. Further complicating the analysis is the fact that no state's rules are exactly the

8. To comply with sales and use taxes, a business is only required to determine whether a transaction is taxable, and if so, what is the applicable rate.

same as another state's rules. *Id.* As such, calculating the income tax owed is anything but straightforward.

If the "economic nexus" theory put forth by Iowa and the thirteen other states that have similar case law is allowed to continue, franchisors will likely be faced with state-by-state tax return compliance costs far out of proportion to the income received in each state. This is especially true for the overwhelming majority of smaller multi-state franchisors for whom the costs of compliance are not tied to the level of royalty income they receive. Instead, costs will be driven by the number of taxing jurisdictions in which franchises are located, rather than the amount of royalty paid to their franchisor. As a result, the Massachusetts franchisor with ten total franchisees spread through Massachusetts, Rhode Island, Connecticut and Maine will likely have compliance costs far out of proportion to the limited royalty income it receives from each state. Moreover, whether that small franchisor chooses to offer a franchise in another state is directly influenced by its weighing compliance costs against incremental net royalty income.

The measure for undue burden is not limited to the number of jurisdictions that could be implicated under the expansive "economic nexus" theory, but rather includes the true complexity that comes with calculating the amount of tax. This complexity will certainly manifest itself with the costs associated with complying with the various rules in each jurisdiction. While the problems presented by the sheer volume of sales and use tax return jurisdictions may be solved with technology, the calculation of income-based taxes involves more human resources to make the individual judgments necessary to

prepare an income-based tax return. This increased cost presents an undue burden on the industries that utilize the franchise business model.[9]

9. Franchisors may also be subject to an undue economic burden in the form of having to pay multiple income taxes on their royalty revenues. This would result, for example, where one state seeks to impose its income tax on royalties paid by franchisees located within the state, while the franchisor's home state also lays claim to taxing that same revenue based on the franchisor's operations in the home state that permit the royalty revenue to be generated. *Compare* Cal. Code Regs. tit. 18, § 25137-3 (2011) (providing that franchise fees or royalties for use of the franchisor's trademark are attributed to the state in which the franchisee's business is located, assuming the franchisor is taxable in that state) *with* Uniform Division of Income for Tax Purposes Act, § 17 (apportioning *all* revenues to state where activities occurred that permitted revenue to be generated). Although the case below does not specifically call into question the "fair apportionment" prong of *Complete Auto*, 430 U.S. at 279, the reality is that double taxation will occur in certain situations without a physical presence requirement, thereby imposing an economic burden on franchised businesses.

CONCLUSION

For the reasons stated above, the IFA asks the Court to grant KFC's petition for certiorari and again affirm *Quill*'s physical presence requirement for the imposition of a state tax.

Respectfully submitted,

Stephen J. Caldeira
President and CEO
International Franchise Association
1501 K St., N.W.
Suite 350
Washington, DC 20005

Arthur L. Pressman
Counsel of Record
Gregg A. Rubenstein
Kenneth H. Silverberg
Scott M. Susko
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110
(617) 345-1000
apressman@nixonpeabody.com

Attorneys for Amicus Curiae International Franchise Association