**Team 13**

**No. 2016-01**

IN THE
# Supreme Court of the United States

STATE OF TIANTIC, by and through its Tax Commissioner, MAGGIE KARP,
*Petitioner*,

*v.*

ROCKET INC. and JESSICA ROCKET,
*Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TIANTIC

## BRIEF FOR RESPONDENTS

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## QUESTIONS PRESENTED

**I.** Whether Tiantic's Marketplace Equality Act violates the Commerce Clause by expressly imposing use tax collection obligations on out-of-state retailers that "[do] not have a physical presence" in Tiantic.

**II.** Whether, after an unauthorized private search of a business's unlocked computer files, the government violates the Fourth Amendment by conducting a subsequent warrantless search of different, password-protected computer files that had not been previously opened or viewed.

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## BRIEF FOR RESPONDENTS

### OPINIONS BELOW

The opinion and order of the Supreme Court of Tiantic is unreported and reproduced in the record. R. 13–22. The memorandum opinion and order of the Tiantic District Court is also unreported and reproduced in the record. R. 1–12.

### JURISDICTION

This Court has jurisdiction under Rule 3.2 of the National Moot Court Competition Rules.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Article I, § 8 of the United States Constitution, the Fourth Amendment to the United States Constitution, and the State of Tiantic's Marketplace Equality Act are reproduced in the Appendix to this brief.

## STATEMENT OF THE CASE

This case involves the State of Tiantic's attempt to impose use tax collection obligations on, and a civil income tax fraud penalty against, Rocket Inc. The court below ruled that the use tax collection obligations are unconstitutional under the Commerce Clause and that the evidence used to support the tax fraud claim was discovered through a warrantless search that violated the Fourth Amendment.

### A. Tiantic's "Marketplace Equality Act"

Like most States, Tiantic has a complementary sales-and-use tax scheme. R. ii, 15; *see generally* Walter Hellerstein & John A. Swain, *State Taxation* ¶ 12.02 (3d ed. 2016) [hereinafter *State Taxation*]. Tiantic imposes a sales tax on property purchased within the state as well as an equivalent use tax on property stored, used, or consumed within the State. R. ii. To eliminate the risk of multiple taxation, Tiantic will credit the use tax owed on an item by the amount of any sales or use taxes already paid on that item by the user of that item. R. ii. Tiantic requires retailers with a physical presence in Tiantic to collect the sales tax from consumers at the point of sale and remit the proceeds to the State. R. ii.

Recently, however, Tiantic enacted the Marketplace Equality Act ("MEA"), which extends this collect-and-remit obligation to certain retailers with no physical presence in Tiantic. MEA, § 1. Effective January 1, 2016, Tiantic requires sellers that have a "substantial economic presence" in Tiantic to "collect and remit the use tax owed" on "tangible personal property, electronically transferred products, or services" sold and delivered into Tiantic, even if the seller "does not have a physical presence in the State." *Id.* §§ 1, 5. A seller has a "substantial economic presence" in

Tiantic if, in the current or previous two calendar years, the seller either (1) had an annual "gross revenue from the sale of tangible personal property, electronically transferred products, or services delivered into Tiantic" that exceeds $200,000; or (2) sold "tangible personal property, electronically transferred products, or services delivered into Tiantic in five hundred or more separate transactions." *Id.* § 2. Tiantic abolished its state income tax in 1996, and the state legislature established this use tax collection scheme "quite obviously" as "a revenue grab." R. ii–iii, 2–3.

### B. Rocket Inc. and "Team Rocket"

Rocket Inc. sells "Pocket Monsters," wildly popular plush toys that are designed based on drawings from world-renowned artists. R. ii, iv. Each Pocket Monster comes with a "PK Orb," a hollow sphere that allows collectors to proudly display their Pocket Monsters collection. R. ii. Although Rocket is a Delaware corporation with offices and warehouses in only California, New York, and Illinois, it has generated a national presence by advertising online, in mobile applications, on television, and in national periodicals. R. ii. Rocket has no property or personnel in Tiantic, and like all of its customers, customers in Tiantic place their orders online and receive their Pocket Monsters via common carrier. R. ii, 3.

The success of these toys has been exceptional—in 2015, Rocket brought in $9.6 million in gross revenue from sales to Tiantic residents alone. R. ii. Leading Rocket to its meteoric rise is "Team Rocket": Jessica Rocket, the Chief Executive Officer and Chief Financial Officer; Giovanni Rocket, the Vice President; and James Rocket, the Technology Officer. R. ii, iv.

Rocket's success is partly attributable to its Pocket Monsters video game. R. iv. To keep up with the rapidly growing demand for this franchise, Rocket hired animal behaviorist Winston Willow in July 2013 to provide consulting services on how to make the creatures in the video game move and react more realistically. R. iv, vi–ii. While working as a consultant, Willow developed a suspicion that Rocket was genetically modifying live animals to look and act like Pocket Monsters. R. iv. After hearing a "rumor" that Rocket was selling live Pocket Monsters, Willow decided to take it upon himself to sneak into Jessica Rocket's office to collect evidence. R. vii.

### C. The Unauthorized Search of Rocket's Password-Protected Files

On June 21, 2015, Willow snuck into Jessica Rocket's office while she was on a smoke break. R. vii-viii. He sat at her computer and began searching for evidence to confirm the truth of the rumors. R. vii-viii. After searching for a while, Willow found what he believed to be evidence of Rocket's live animal research.[1]

During his search of Jessica Rocket's computer, Willow also found a folder labeled "FMEA." R. v. Although he was unsure what this nickname referred to, Willow opened the folder and discovered eight files: "original_1995," "new_1995," "original_2014," "new_2014," "original_2015," "new_2015," "original_2016," and "new_2016." R. v.

Willow attempted to open each of the files. R. v. This turned out to be a largely futile effort, as all of the files were password protected, with the exception of

[1] Jessica Rocket was tried on an animal cruelty charge in a proceeding unrelated to this case and was ultimately acquitted. R. viii, x.

"original_2014" and "new_2014" ("the 2014 files"). R. v. He reviewed the 2014 files and surmised, based on "rumors that [he] heard," that "those files might be [Rocket's] attempt to cook their books." R. viii. For the other password-protected files, however, he could only see their file names and thumbnail images; he could not read the text. R. ix. Thus, he was unsure—indeed, he later testified that he was not even 80% certain—about the contents of those files or whether they were even related to tax, revenue, or accounting. R. ix.

Despite being able to access only two of the eight files, Willow copied the entire FMEA folder onto a USB drive and gave it to Agent Rachel Rattata, an agent with the Tiantic Bureau of Investigations. R. v–vi. Upon receiving the USB drive from Willow, Agent Rattata opened the FMEA folder and correctly guessed the password to the password-protected files. R. vi. Agent Rattata neither requested nor received a search warrant before opening and reviewing the previously-unopened, password-protected files. R. vi. After opening and reviewing each of the files in the FMEA folder, Agent Rattata got a warrant to search the folder's contents. R. vi. Her warrant application requested access to passwords and encryptions; this request, however, was denied. R. vi.

### D. Proceedings Below

The State of Tiantic filed a complaint against Rocket in Tiantic Distict Court alleging two claims. R. x. First, Tiantic requested a declaratory judgment that, under the MEA, Rocket was obligated to collect and pay use taxes owed on the goods it sold to customers in Tiantic. Second, based on evidence that Agent Rattata obtained from opening the "original_1995" and "new_1995" password-protected files

("the 1995 files"), Tiantic sought to impose a civil tax fraud penalty against Rocket for evading state income taxes in 1995. R. x.

Rocket moved to dismiss the complaint in its entirety during the civil trial, arguing that the MEA is unconstitutional under the Commerce Clause and that Agent Rattata's warrantless search of the 1995 files violated the Fourth Amendment.[2] R. x. The trial court dismissed the declaratory judgment claim, agreeing with Rocket that under *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the MEA is "patently unconstitutional." R. x, 3. The trial court did not agree that the search violated the Fourth Amendment, finding that "the State's actions subsequent to the [Willow's] search did not further intrude on [Rocket's] constitutionally protected expectation of privacy." R. x, 11.

The parties cross-appealed to the Tiantic Supreme Court, which affirmed the trial court's dismissal of the MEA claim. R. x. The Tiantic Supreme Court reversed, however, on the Fourth Amendment issue. R. x. Relying on *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Riley v. California*, 134 S. Ct. 2473 (2014), the court held that "Agent Rattata's search exceeded the scope of Willow's private search and violated [Rocket's] Fourth Amendment right." R. 22. This Court granted Tiantic's petition for certiorari on both issues on April 5, 2016. R. x, 23.

[2] The exclusionary rule applies in civil proceedings in Tiantic state courts. *See* R. x n.4.

## SUMMARY OF ARGUMENT

This case begins and ends with two settled constitutional limits on the States: The Commerce Clause forbids States from imposing tax collection burdens on out-of-state retailers with no physical presence in the State, and the Fourth Amendment forbids States from rummaging through a business's password-protected financial records without a warrant. The court below applied these limits correctly, and its judgment should be affirmed.

**I.** The Marketplace Equality Act violates the Commerce Clause. The Commerce Clause forbids States from exacting tax collection burdens on retailers that lack a "substantial nexus" to the taxing State. For out-of-state retailers, this Court has held time and again that the necessary "substantial nexus" requires a "physical presence in the taxing State." *Quill*, 504 U.S. at 312–13. In direct conflict with this well-established physical presence rule, Tiantic has enacted a tax scheme that saddles out-of-state retailers with use tax collection burdens based on their economic—rather than physical—presence in Tiantic. This scheme can only stand if this Court completely abandons the physical presence rule.

It should not do so for several reasons. *First*, the rule's clear guidance regarding the boundaries of legitimate state taxing authority is grounded in the Commerce Clause's basic proscription against burdening interstate commerce. *Second*, this Court has repeatedly reaffirmed the physical presence rule, which has become entrenched in our national economy and engendered substantial reliance by state and local governments as well as businesses and individuals. *Third*, the physical presence rule derives from the Commerce Clause; thus, any changes to its

contours—or, as Tiantic would need, a complete abandonment of the rule—would require finely-tuned legislation that Congress is "better qualified to resolve." *Quill*, 504 U.S. at 318.

**II.** Agent Rattata's search of Rocket's password-protected 1995 computer files violated the Fourth Amendment. The Fourth Amendment forbids unreasonable searches by the government; private searches by non-government individuals do not fall within the ambit of the Fourth Amendment's protections. Under the "private search doctrine," once an individual's expectation of privacy has been frustrated by a private search, the government can conduct a subsequent search without a warrant, but it must remain within the scope of the initial private search such that it is virtually certain of what will be found. *United States v. Jacobsen*, 466 U.S. 109, 113, 117 (1984).

That did not happen here. Rocket maintained a reasonable expectation of privacy in the contents of the password-protected 1995 files. This expectation of privacy endured beyond Willow's unauthorized private search of Jessica Rocket's computer, because Willow only opened the 2014 files—the 1995 files remained locked and unopened until they reached Agent Rattata. Thus, when Agent Rattata opened the 1995 files, she neither remained within the scope of Willow's prior search nor had any certainty of what she would find. And because she failed to obtain a warrant before opening the 1995 files, her search of the files was therefore unconstitutional.

## ARGUMENT

### I. TIANTIC'S MARKETPLACE EQUALITY ACT VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. In addition to its "positive grant of power to Congress," the Clause also "contain[s] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval," the dormant Commerce Clause "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Id.* Although "the Court's understanding of the dormant Commerce Clause has taken some turns," *Jefferson Lines*, 514 U.S. at 180, one rule has persisted for nearly half a century—the Clause prohibits States from imposing tax collection obligations on out-of-state retailers that lack a physical presence in the taxing State. *Quill*, 504 U.S. at 314–15; *Bellas Hess*, 386 U.S. at 758.

Tiantic's Marketplace Equality Act flouts this rule. By imposing tax collection burdens on out-of-state retailers based on economic rather than physical presence, the MEA imposes burdens virtually identical to those held unconstitutional in *Quill*. Tiantic's only way out of this all-but-foreclosed result

would be to have this Court jettison the physical presence rule, a rule grounded in fundamental Commerce Clause principles that has become even more relevant and necessary in the current national economy. Entire industries have relied on this rule in structuring their dealings, and Congress has consistently considered (and rejected) with various proposals to change it. Each of these considerations favors hewing to the physical presence rule and leaving any changes to Congress, just as this Court did in *Quill* nearly twenty-five years ago.

### A. The Commerce Clause forbids States from imposing tax burdens on out-of-state retailers that lack a physical presence in the taxing State.

A state may impose tax burdens on out-of-state retailers only "when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The first prong—"substantial nexus"—is designed to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313. Thus, for an out-of-state retailer to have the constitutionally-mandated "substantial nexus" with a taxing State, the retailer must have a "physical presence" in the taxing State. *Id.* at 314; *see Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1127 (2015) ("[U]nder our negative Commerce Clause precedents, [a State] may not require retailers who lack a physical presence in the State to collect [use] taxes on behalf of the [State].").

This physical presence rule has endured for generations. In *Bellas Hess*, for example, this Court rejected the State of Illinois's attempt to impose use tax

collection obligations on an out-of-state mail-order company that sold items to customers in Illinois via common carrier. 386 U.S. at 758–60. In reaching that conclusion, the Court emphasized that it "ha[d] never held that a State may impose" tax collection obligations "upon a seller whose only connection with customers in the State is by common carrier or the United States mail." *Id.* at 758; *see Miller Bros. Co. v. Maryland*, 347 U.S. 340, 346–47 (1954) (holding unconstitutional a state tax collection obligation on an out-of-state company that merely advertised its products in the taxing State). Rather, cases that had upheld State-imposed tax collection obligations on out-of-state retailers reflected a "basic distinction" between retailers "with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Bellas Hess*, 386 U.S. at 757–58; *see, e.g.*, *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) (sales representatives); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 362–64 (1941) (retail stores); *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62, 64–66 (1939) (sales agents).

Obliterating this distinction, the Court explained, would expose out-of-state retailers to "a virtual welter of complicated obligations to local jurisdictions" and contravene "the very purpose of the Commerce Clause"—ensuring "a national economy free from such unjustifiable local entanglements." *Bellas Hess*, 386 U.S. at 758–60. Thus, the Court refused to "repudiate totally" this "sharp distinction" and held that a connection through mail or common carrier was insufficient to impose tax collection obligations on an out-of-state retailer. *Id.* at 758.

Twenty-five years later, this Court reaffirmed the physical presence rule in *Quill*, invalidating a North Dakota law that imposed use tax collection obligations based on a retailer's catalog distributions in North Dakota, regardless of whether the retailer had a physical presence in North Dakota. 504 U.S. at 314–16. The out-of-state retailer in *Quill*—the sixth largest vendor of office supplies in North Dakota—"solicit[ed] business through catalogs and flyers, advertisements in national periodicals, and telephone calls," and was therefore subject to North Dakota's use tax collection obligation. *Id.* at 302–03. Initially, the tax burden was upheld by the North Dakota Supreme Court, which determined that "'wholesale changes' in both the economy and the law made it inappropriate to follow *Bellas Hess*." *Id.* at 303. In its place, the court employed an "economic presence" test "that depended on services and benefits provided by [North Dakota]." *Id.* at 304.

This Court squarely rejected North Dakota's "economic presence" approach, holding that an out-of-state retailer "that lacks a *physical* presence in the taxing State" also lacks the "substantial nexus" required by the Commerce Clause. *Id.* at 312 (emphasis added). By creating a "safe harbor" for out-of-state retailers, the physical presence rule "firmly establishes the boundaries of legitimate state [taxation] authority," it "reduces litigation," it "encourages settled expectations," and it "fosters investment by businesses and individuals." *Id.* at 315–16. The "benefits of a clear rule," the Court emphasized, ultimately "furthe[r] the ends of the dormant Commerce Clause." *Id.* at 314–15.

Indeed, in every decision upholding State-imposed tax collection obligations on an out-of-state retailer, the retailer has always had at least a physical presence in the taxing State, such as real estate, employees, or sales agents. *See, e.g.*, *Tyler Pipe Indus. Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250–51 (1987) (employees and sales representatives in the taxing State); *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 32–33 (1988) (retail stores and offices in the taxing State); *Nat'l Geographic Soc. v. Cal. Bd. of Equalization*, 430 U.S. 551, 561 (1977) (offices in the taxing State); *Standard Pressed Steel Co. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562 (1975) (employee in the taxing State).

It is therefore beyond dispute that a State may not, consistent with the Commerce Clause, "deputize an out-of-state retailer as its collection agent for a use tax" absent a physical presence in the State. *Bellas Hess*, 386 U.S. at 757.

### B. The MEA flouts the physical presence rule by imposing tax collection burdens on out-of-state retailers that have no physical presence in Tiantic.

Against the half century of precedent requiring physical presence for taxation authority, Tiantic now seeks to impose tax collection burdens on out-of-state retailers based on "substantial *economic* presence," regardless of physical presence. MEA, § 2 (emphasis added). This law is virtually indistinguishable from the tax schemes invalidated in *Bellas Hess* and *Quill*, both of which attempted to impose tax collection obligations on out-of-state retailers based on economic, rather than physical, presence in the taxing State. *See Quill*, 504 U.S. at 314; *Bellas Hess*, 386 U.S. at 758. There is no principled way to distinguish those laws from the MEA—it is unconstitutional.

By its express terms, the MEA imposes a use tax collection obligation on out-of-state retailers that "do not have a physical presence in the State." MEA, § 1. Rather than physical presence, the MEA only considers whether the seller has a "substantial economic presence" in Tiantic, a threshold that can be satisfied by (i) $200,000 in annual gross revenue attributable to sales into Tiantic, or (ii) 500 transactions with customers in Tiantic. *Id.* § 2.

Rocket exceeded the gross annual revenue threshold in 2015, but it has no physical presence in Tiantic. Rocket is a Delaware corporation with offices and warehouses in California, New York, and Illinois. It has no real estate in Tiantic. It has no employees in Tiantic. And it has no agents or representatives in Tiantic. Rocket merely sells its products to "customers in [Tiantic] by mail or common carrier as part of a general interstate business" and therefore "lacks the 'substantial nexus' required by the Commerce Clause." *Quill*, 504 U.S. at 307, 311 (quoting *Bellas Hess*, 386 U.S. at 758).

### C. The physical presence rule reflects fundamental principles of regulating interstate commerce and should be reaffirmed.

As the court below correctly noted (R. 17), the physical presence rule from *Bellas Hess* and *Quill* is "fully dispositive of this issue." Tiantic must therefore ask this Court to jettison the rule to better suit its desired tax policy—namely, its desire to arrogate the resources of out-of-state retailers like Rocket to collect its use taxes.

This Court should decline Tiantic's invitation for several reasons. To start, the physical presence rule is a clear rule that "firmly establishes the boundaries of legitimate state authority" and militates against the structural deficiencies

proscribed by the Commerce Clause. *Id.* at 315. Additionally, *stare decisis* counsels strongly against abandoning the physical presence rule given the rule's pervasive influence on the development of our national economy, "encourag[ing] settled expectations" of governments, businesses, and individuals. *Id.* at 316. Finally, any departure from the physical presence rule is best left to Congress—the branch that is "better qualified to resolve" matters of interstate commerce. *Id.* at 318.

### 1. The physical presence rule is grounded in the Commerce Clause's structural safeguards against state regulation of the national economy.

"[T]he dormant Commerce Clause is driven by concern about 'economic protectionism'—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). The Framers adopted the U.S. Constitution—and the Commerce Clause in particular—precisely to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Wynne*, 135 S. Ct. at 1794 (citation omitted); *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring) (explaining that pre-constitutional state taxation of interstate commerce fostered "conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad").

The Commerce Clause addresses these "structural concerns about the effects of state regulation on the national economy" in part by mandating that States have a "substantial nexus" with those it taxes. *Quill*, 504 U.S. at 312–13. Defining "substantial nexus" in terms of *physical* presence "firmly establishes the boundaries

of legitimate state authority to impose" tax collection obligations and ultimately "furthers the ends of the dormant Commerce Clause." *Id.* at 314–15. Tiantic's proposed "substantial *economic* presence" test, on the other hand, would untether the "substantial nexus" requirement from its Commerce Clause roots in at least three respects.

*First*, it would allow state and local legislators to usurp Congress's role in regulating the national marketplace. The physical presence rule is grounded in the "substantial nexus" requirement, a requirement squarely aimed at "limit[ing] the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Id.* at 313. This limitation on States, however, would be illusory if the *States* themselves could individually determine the reach of their taxing authority by setting arbitrary gross revenue or transaction thresholds. For example, Tiantic's state legislature, in passing the MEA, has determined that it can exercise taxing authority over out-of-state retailers that sell into Tiantic if the annual sales generate over $200,000 in gross revenue or 500 transactions. *See* MEA, § 2. South Dakota's state legislature, on the other hand, has recently passed similar legislation but chose to cast a wider net, setting its thresholds at $100,000 in gross revenue and 200 transactions. S.D. Codified Laws § 10-64-2 (2016). Having each State determine the reach of its taxing power on an *ad hoc* basis imposes no real limits at all.

Remarkably, the court below asserts (R. 17.) that, "with the presence of the Court's decision in *Quill*, Tiantic is not allowed to collect the use tax" on products

shipped to consumers residing in Tiantic. This assertion conflates a State's ability to collect use *taxes* and its ability to impose use tax *collection obligations*. "[U]se taxes are imposed on the user or consumer of the property, not the seller." Arthur R. Rosen et al., *State Business Tax*es § 4.06[1] (2015); *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581–82 (1983) (observing that the burden of a use tax falls on the "*resident* who shops out-of-state" (emphasis added)); Charles A. Trost, *Federal Limitations on State and Local Tax* § 11:1 (2d ed. 2015) ("The legal incidence of the use tax is upon the user or consumer."). Thus, Tiantic is free to collect use taxes on products shipped to its residents; it may not commandeer the resources of out-of-state retailers like Rocket to do so.

*Second*, Tiantic's economic presence test would obliterate the distinction between Commerce Clause nexus and Due Process nexus. This Court has repeatedly observed that "the nexus requirements of the Due Process and Commerce Clauses are not identical." *Quill*, 504 U.S. at 312; *see Wynne*, 135 S. Ct. at 1799 ("[T]he fact that a State has the jurisdictional power to impose a tax says nothing about whether that tax violates the Commerce Clause."); *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) ("The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities."). That is so because "[t]he two standards are animated by different constitutional concerns and policies." *Quill*, 504 U.S. at 312.

Unlike the Due Process Clause, the Commerce Clause does not primarily address "concerns about fairness"; it protects the "structural concerns about the

effects of state regulation on the national economy." *Id.* at 312. In turn, "the 'substantial nexus' requirement is not, like due process'[s] 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Id.* at 313. If, however, commercial activity directed at a State's residents were a sufficient nexus for the Commerce Clause, the Commerce Clause's "substantial nexus" requirement would be collapsed into the "minimum contacts" nexus required by the Due Process Clause. *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (holding that an out-of-state business's commercial activity with in-state residents is sufficient to satisfy due process nexus).

*Third*, allowing Tiantic to exercise taxing authority over out-of-state retailers based on economic—rather than physical—presence would only revive the "quagmire" of "controversy and confusion" that the physical presence rule laid to rest. *Quill*, 504 U.S. at 315. In *Quill*, this Court expressed concern that the North Dakota tax collection requirement would impose the varied compliance burdens of 6,000-plus taxing jurisdictions on every business in the nation who merely advertised and sold into the state by common carrier. *Id.* at 313 n.6. Things have only gotten worse.

The total number of sales tax jurisdictions in the United States is nearly 10,000,[3] and "the lack of consistent and uniform definitions of taxable goods and

[3] *See* Richard Borean & Joseph Henchman, *State Sales Tax Jurisdictions Approach 10,000*, Tax Foundation (June 9, 2015), http://www.taxfoundation.org/blog/state-sales-tax-jurisdictions-approach-10000.

services that comprise the tax base places a significant burden on interstate commerce." Brian S. Masterson, *Collecting Sales and Use Tax on Electronic Commerce: E-Confusion or E-Collection*, 79 N.C. L. Rev. 203, 222 (2000). For example, Tiantic—like New Mexico, Ohio, and Texas—applies its use tax to "services." MEA, § 2; *see State Taxation*, *supra*, ¶ 16.01 n.12. Other States, such as California, do not. *State Taxation*, *supra*, ¶ 16.01 n.12. And still others, such as New York, apply their use tax to only some taxable services. *Id.* Similar nuances include exemptions for clothing sales and exemptions for sales to state and local governments. *See id.* ¶¶ 12.02, 12.04. And after weeding through these definitional nuances to determination the taxable products in a particular jurisdiction, an out-of-state retailer will then encounter the "nightmare" of a "patchwork of rules" governing state tax administration and compliance. *Id.* ¶ 19A.01. Such complexities include calculating the proper taxable "sales price," accounting for any additional exemptions or exclusions, following recordkeeping and reporting requirements, and responding to any state or local tax audits.[4]

In short, the "nuttiness of state tax policy" still has the potential to "to cause overwhelming complexity for multistate businesses." Charles E. McLure, Jr., *Understanding the Nuttiness of State Tax Policy: When States Have Both Too Much Sovereignty and Not Enough*, 58 Nat'l Tax J. 565, 567–68 (2005). By demarcating "a discrete realm of commercial activity that is free from interstate taxation," *Quill*

[4] In fact, these administrative concerns have resulted in efforts to simplify the complex and widely disparate sales and use tax system. *See, e.g.*, Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet Is Changing Tax Laws*, 34 Conn. L. Rev. 333, 387–88 (2002).

504 U.S. at 315, the physical presence rule ultimately continues to reflect "[t]he very purpose of the Commerce Clause"—avoiding "unjustifiable local entanglements" that can result from burdensome state regulation, *Bellas Hess*, 386 U.S. at 760.

### 2. *Stare decisis* principles counsel heavily in favor of reaffirming the physical presence rule given the national economy's substantial reliance on the rule.

Tiantic's request to jettison the physical presence rule also ignores the "'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis*." *Quill*, 504 U.S. at 317 (quoting *Runyon v. McCrary*, 427 U.S. 160, 190–91 (1976) (Stevens, J., concurring)).

*Stare decisis*, this Court has explained, is "a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (citation omitted). It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It also "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

Accordingly, this Court has always required "special justification" to overturn settled precedent, "over and above the belief 'that the precedent was wrongly decided.'" *Kimble*, 135 S. Ct. at 2409 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)). And *stare decisis* applies with "added

force" in this case, where legislators and individuals "have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991).

Even in 1992, the physical presence rule had "engendered substantial reliance and has become part of the basic framework of a sizeable industry." *Quill*, 504 U.S. at 317. With the arrival of the Internet, this industry has become only more sizeable, and the reliance more substantial.[5] The growth of retailers such as Rocket that reach customers through online commerce has been predicated in large part on the "safe harbor" from the "welter of complicated obligations" that could accompany unilateral state regulation of interstate commerce. *Id.* at 313 n.6, 315 (quoting *Bellas Hess*, 386 U.S. at 760). The MEA, and statutes like it, threaten that growth—remote retailers would still be severely burdened if multiple States were to assert that any one interstate e-commerce transaction triggers their respective sales tax collection obligations. *See, e.g.*, *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) ("Without the limitations imposed by the Commerce Clause, . . . inconsistent regulatory schemes could paralyze the development of the Internet altogether."); Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on*

[5] This reliance has not been doctrinally misplaced, as *Quill* and its reaffirmation of the physical presence rule continue to be cited favorably as authority for the Commerce Clause's limits on state taxation. *See, e.g.*, *Wynne*, 135 S. Ct. at 1799 (citing *Quill* for the proposition that a State's "jurisdictional power to impose a tax says nothing about whether that tax violates the Commerce Clause"); *Brohl*, 135 S. Ct. at 1127 (citing *Quill* for the proposition that "under [this Court's] negative Commerce Clause precedents, [a State] may not require retailers who lack a physical presence in the State to collect these taxes on behalf of the [State's] Department [of Revenue]").

*Interstate Commerce*, 115 Q. J. Econ. 561, 568 (2000) (estimating that applying sales taxes to existing Internet sales would reduce the number of online buyers by as much as 24 percent).

Although the court below accuses (R. 17) the physical presence rule of being out of step with the times, purportedly "rapid technological change" does not warrant replacing the physical presence rule. Indeed, similar arguments were raised and rejected in *Bellas Hess* and *Quill*. *See Quill*, 504 U.S. at 301–02 (refusing the North Dakota Supreme Court's suggestion to overrule *Bellas Hess* on the ground that "'the tremendous social, economic, commercial, and legal innovations' of the past quarter-century ha[d] rendered its holding 'obsole[te]'"); *Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting) (arguing that the majority "vastly underestimate[d] the skill of contemporary man and his machines"). These arguments remain as unconvincing today as they did twenty-five years ago, because they continue to ignore "the idea that parochial state interests cannot burden interstate commerce remains a timeless principle regardless of how sophisticated technology may be." Joseph Henchman, *Why the* Quill *Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction*, 46 State Tax Notes 387, 395 (2007); *see also* Neil V. Birkhoff, *Beyond Batsa: State Taxation Without State Boundaries?*, 67 Wash. & Lee L. Rev. 341, 349 (2010) ("[T]he concept that state interests cannot burden interstate commerce remains a constant, despite the sophisticated new economy and technology.").

At bottom, overruling *Quill* "would defeat the reliance interest of those corporations that have structured their activities and paid their taxes based upon the well-established rules" that this Court has repeatedly reaffirmed. *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992); *see Quill*, 504 U.S. at 321 (Scalia, J., concurring in part and concurring in the judgment) ("Having affirmatively suggested that the 'physical presence' rule could be reconciled with our new jurisprudence, we ought not visit economic hardship upon those who took us at our word.").

**3. Congress has plenary power over interstate commerce and is better suited to calibrate any departure from the physical presence rule.**

In addition to the economy's substantial reliance on the physical presence rule, considerations of *stare decisis* also have "special force" here, because "Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so." *Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and concurring in the judgment). In the absence of congressional action, this Court's interpretations of the Commerce Clause are essentially "balls tossed into Congress's court, for acceptance or not as that branch elects," *Kimble*, 135 S. Ct. at 2409, because the contours of the Commerce Clause are issues that Congress is "better qualified" and "has the ultimate power to resolve," *Quill*, 504 U.S. at 318.

Indeed, Congress has repeatedly exercised its power under the Commerce Clause to respond to decisions by this Court. *See, e.g.*, *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), *superseded by statute*, Interstate Income Act of 1959, Pub. L. No. 86-272, 73 Stat. 555 (1959), *as recognized in Heublein, Inc. v.*

*S.C. Tax Comm'n*, 409 U.S. 275, 279–80 (1972); *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533 (1944), *superseded by statute*, McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945), *as recognized in W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653–54 (1981).

If anything, deference to congressional judgment has particular force here, for Congress has engaged extensively with the physical presence rule. Directly before and after *Quill*, Congress contemplated various changes to the physical presence rule.[6] *See Quill*, 504 U.S. at 318 & n.11. Congress's interest in this issue has not waned; changes to the physical presence rule continue to be the focus of sustained legislative attention. Four examples of recently proposed legislation are instructive.

***Marketplace Fairness Act.*** The Marketplace Fairness Act, which has been introduced in the Senate several times, would allow a State to impose use tax collection obligations on out-of-state retailers only if the State simplifies its sales and use tax regime. S. 698, 114th Cong. (2015); S. 743, 113th Cong. (2013); S. 1832, 112th Cong. (2011). The bill was first introduced in 2011 and proposed that States have the authority to impose tax collection obligations on out-of-state businesses that collect more than $500,000 from gross sales to the taxing State. S. 1832.

[6] For example, between 1985 and 1996, sixteen bills were introduced to overrule the physical presence rule. *See* H.R. 3039, 104th Cong. (1996); S. 545, 104th Cong. (1995); S. 1825, 103 Cong. (1994); H.R. 2230, 101st Cong. (1989); S. 480, 101st Cong. (1989); S. 2368, 100th Cong. (1988); H.R. 1891, 100th Cong. (1987); H.R. 1242, 100th Cong. (1987); S. 1099, 100th Cong. (1987); S. 639, 100th Cong. (1987); H.R. 3521, 100th Cong. (1987); H.R. 5021, 99th Cong. (1986); H.R. 4365, 99th Cong. (1986); S. 2913, 99th Cong. (1986); S. 1510, 99th Cong. (1985); H.R. 3549, 99th Cong. (1985).

When the bill was reintroduced in 2013, and again in 2015, the gross sales threshold was increased to $1,000,000. S. 698; S. 743.

***Remote Transactions Parity Act.*** As an alternative to the Marketplace Fairness Act, the House Representatives introduced the Remote Transaction Parity Act of 2015. H.R. 2775, 114th Cong. (2015). Like the Marketplace Fairness Act, this proposal would also allow States to impose use tax collection obligations on remote sellers. *Id.* There are, however, substantive differences. For example, rather than a static threshold amount, this proposal would be implemented through phased-in thresholds—$10 million in the first year following the respective date, $5 million in the second, and $1 million in the third. *Id.* Additionally, this bill limits a State's auditing abilities by requiring a "reasonable suspicion of intentional misrepresentation or fraud" to audit a remote seller with less than $5 million in annual gross receipts. *Id.*

***Online Sales Simplification Act.*** A discussion draft of a third approach, the Online Sales Simplification Act, has been circulated by House Representatives Bob Goodlatte and Anna Eshoo. *See* Brian Goldstein et al., *Discussion Draft of Origin-Based Online Sales Simplification Act Released*, PWC (Jan. 16, 2015), https://goo.gl/TXQriC. Unlike the Marketplace Fairness Act, the Online Sales Simplification Act proposes an "origin-based" collection system that would enable States to require out-of-state buyers to pay sales tax to the state in which the seller is located, rather than the seller remitting collected taxes to the purchaser's state. *Id.* Representative Goodlatte has recently released a draft of the 2016 version,

which implements various changes in response to concerns raised with the first draft. *See* Discussion Draft, Online Sales Simplification Act of 2016, 114th Cong. (2016), https://goo.gl/9ssNCJ.

***No Regulation Without Representation Act.*** Finally, the No Regulation Without Representation Act of 2016 was recently introduced in the House. H.R. 5893, 114th Cong. (2016). Unlike the first three proposals, this bill seeks to codify the physical presence rule by requiring that a State can only burden a retailer with tax collection obligations if the retailer maintains real estate, property, employees, or offices in the taxing State. *Id.*

This sampling of proposals illustrates that departing from the physical presence rule will require "finely tuned legislation." John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 Ga. L. Rev. 343, 364 (2003); *see also, e.g.*, Wireless Telecommunications Tax and Fee Collection Fairness Act, H.R. 1087, 114th Cong. (2015) (focusing on tax collection issues related to wireless telecommunication services); Digital Goods and Services Fairness Act, S. 851, 114th Cong. (2015) (same for the sales of digital goods and services).

Evaluating the wisdom of these competing proposals to reform interstate commerce taxation is quintessentially a task of Congress, which has "the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved." *Bay Mills*, 134 S. Ct. at 2037–38. And unlike this Court, Congress does not face the blunt question of whether to overrule *Quill*, and may

instead consider various intermediate approaches. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946) (observing that Congress's regulation of interstate commerce is not a path "of narrowly fixed dimensions," as it "may keep the way open, confine it broadly or closely, or close it entirely"). Given the complex and policy-driven issues involved, any claims that the current rule creates a "revenue shortfall in many States," or an "unfairness to local retailers," *Brohl*, 135 S. Ct. at 1135 (Kennedy, J., concurring), are claims that are "more appropriately addressed to Congress," *Halliburton*, 134 S. Ct. at 2413.

Ultimately, Tiantic's Marketplace Equality Act violates the Commerce Clause and cannot stand. By imposing tax collection burdens on out-of-state retailers that "[do] not have a physical presence" in Tiantic, the MEA contravenes the physical presence rule solidified in *Bellas Hess* and reaffirmed in *Quill*. This importance of adhering to this entrenched rule is difficult to understate. It reflects fundamental principles of the Commerce Clause by relieving out-of-state retailers from the increasingly burdensome state and local tax schemes. It stabilizes the national economy by providing governments and industries with a clear guidance on the limits of state taxing authority. And it acknowledges that departing from the rule will require policy-driven, finely tuned legislation. This Court should decline Tiantic's invitation to disturb the physical presence rule—that is a matter that Congress is "better qualified to resolve." *Quill*, 504 U.S. at 318.

## II. AGENT RATTATA'S WARRANTLESS SEARCH OF ROCKET'S PASSWORD-PROTECTED FILES VIOLATED THE FOURTH AMENDMENT.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV.[7] This Amendment safeguards "the rights of a corporation," like Rocket, "against unlawful search and seizure . . . even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.).

A "search" for Fourth Amendment purposes—which is "presumptively unconstitutional" if done without a warrant—"occurs when the *government* violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 32–33 (2001) (emphasis added). Thus, a "search" under the Fourth Amendment does not include a search by a private individual who is not acting on behalf of the government. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Rather, when a private, non-government individual searches through another person's private information, that search "frustrates" the person's "original expectation of privacy" in the information. *Id.* at 117. And once that expectation of privacy has been frustrated, the government may search the same, "now-nonprivate information" without obtaining a warrant. *Id.*

This "private search doctrine," however, is circumscribed—police officers cannot "exceed the scope of the private search" by using "information with respect to

[7] The Fourth Amendment's right to privacy is enforceable against the States through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

which the expectation of privacy has *not* already been frustrated." *Id.* at 115, 117 (emphasis added). In such a case, the officers "have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant." *Id.* at 117–18.

Agent Rattata's roving warrantless search of Rocket's password-protected 1995 files undermines these fundamental principles. Rocket maintained a reasonable expectation of privacy in the 1995 files, which can most obviously be seen from the fact that the 1995 files were password protected. This expectation of privacy in the 1995 files remained intact after Willow's unauthorized private search, because that search was limited to the 2014 files. Indeed, this expectation of privacy remained intact until Agent Rattata opened them for the first time, exceeding the scope of the prior private search. And because her search was done without a warrant, it violated the Fourth Amendment.

### A. Rocket maintained a reasonable expectation of privacy in the password-protected 1995 files.

As an initial matter, Rocket's reasonable expectation of privacy in the 1995 files comes from a simple and axiomatic rule: "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, *wherever they may be*." *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (emphasis added). As any modern business does, Rocket "secured" its papers with password-protection. And these were not just any "papers"—they were the company's tax records. "Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the

massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance." *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 355 (1977).

The potentially "massive intrusion on privacy" that accompanies the search of a business's tax records is only amplified when the files are digital. Although this Court has not specifically addressed the nature of one's privacy interests in digital data, the idea that the Fourth Amendment "limit[s] only searches and seizures of tangible property" was rejected long ago. *Katz v. United States*, 389 U.S. 347, 352–53 (1967); *see Kyllo*, 533 U.S. at 33–34 ("It would be foolish . . . to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

The circuit courts that have addressed this issue agree, concluding that individuals maintain a reasonable expectation of privacy in files stored on their computers. *See, e.g.*, *United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009) ("[T]he hard drive of a computer . . . is the digital equivalent of its owner's home, capable of holding a universe of private information"); *United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001) (concluding that the defendant manifested an expectation of privacy in electronic images by storing the images on digital storage devices); *United States v. Carey*, 172 F.3d 1268, 1270–71, 1275–76 (10th Cir. 1999) (defendant retained a privacy interest in individual data files even though police copied files onto separate discs before searching the contents of files).

If anything, the expectation of privacy in this case is even more manifest because the relevant files were secured with a password. *See Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) ("[B]y using a password, Trulock affirmatively intended to exclude . . . others from his personal files."). No different than if the files had been kept in a locked filing cabinet, Rocket ultimately expected that the "records would not be taken except with [its] permission." *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968); *see United States v. Ross*, 456 U.S. 798, 812 (1982) (observing the "general principle that closed packages and containers may not be searched without a warrant").

Rocket's expectation of privacy in its computer files also accords with this Court's decision in *Riley*—"[w]ith all they contain and all they may reveal," computers, like smartphones, "hold for many Americans 'the privacies of life.'" 134 S. Ct. at 2494–95 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). The fact that Rocket's files are digital "does not make [them] any less worthy of the protection for which the Founders fought." *Id.* at 2495.

### B. Agent Rattata violated Rocket's expectation of privacy by exceeding the scope of Willow's initial search and opening the password-protected 1995 files.

By opening the 1995 files, Agent Rattata violated Rocket's expectation of privacy. Of course, Willow's unauthorized search of the unlocked 2014 files "frustrated" Rocket's expectation of privacy in those files. *See Jacobsen*, 466 U.S. at 117. Agent Rattata's search, however, was not limited to the 2014 files, and as this Court explained in *Jacobsen*, a "private search merely frustrate[s] that expectation in part. It [does] not simply strip the remaining unfrustrated portion of that

expectation of all Fourth Amendment protection." *Id.* at 116 n.11. Thus, any "additional invasions of . . . privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115. Tiantic cannot bootstrap its warrantless search of the password-protected 1995 files to Willow's "private search" of the unlocked 2014 files as a means of evading the Fourth Amendment's warrant requirement.

The private search in *Jacobsen* involved Federal Express employees that discovered a damaged package—a cardboard box wrapped in brown paper. *Id.* at 111. Pursuant to company policy, the employees opened the package and examined its contents. *Id.* Inside the package, the employees found contained a number of pieces of crumpled newspaper covering a tube made of tape, and inside the tube was a zip-lock bag containing white powder. *Id.* The employees contacted the Drug Enforcement Agency (DEA) and when the DEA agent arrived, he saw that the tube had been opened, removed it from the box, removed the zip-lock bag, and finally, removed a small amount of the white powder. *Id.* at 111–12. The agent then performed a field test and determined that the powder was cocaine. *Id.*

After first determining that the initial search by the employees did not implicate the Fourth Amendment because of its private character, the Court proceeded to determine "the degree to which [the government] exceeded the scope of the private search." *Id.* at 115. Neither the agent's removal of the tube from the box nor the chemical test of the powder, the Court explained, violated the defendants' Fourth Amendment rights. *Id.* at 118. The removal of the tube from

the box did not enable the agent to learn anything that had not been discovered in the prior private search. *Id.* at 120. Likewise, the chemical test was a *de minimis* infringement that could reveal nothing beyond whether the substance in question was cocaine, a fact in which the respondent did not have any legitimate privacy interest. *Id.* at 123. In essence, the government's follow up search was reasonable because it did not infringe any constitutionally protected interest that had not already been infringed by the prior private search. *See id.* at 126.

This Court has not revisited the private search doctrine since *Jacobsen* and has consequently not addressed its application to searches of digitally-stored computer files. Multiple circuit courts have done so, however, and concluded—like the court below—that the government exceeds the scope of a prior private search of some computer files by opening different computer files.

In *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015), the Sixth Circuit held that a police officer's warrantless search of a laptop's files for child pornography exceeded the scope of a prior private search that was limited to only some of the files on the laptop. *Id.* at 485–86. The defendant's girlfriend in that case called the police after hacking the defendant's laptop and finding images of child pornography. *Id.* at 479–80. When an officer arrived, she opened several folders and began clicking on random thumbnail images, although she was later unable to recall whether the images she showed the officer were the same as those she had viewed in her initial private search. *Id.* at 480–81. The police then obtained a warrant for the laptop and its contents. *Id.* at 480.

The court began by observing *Jacobsen*'s rule that "the government's ability to conduct a warrantless follow-up search of this kind is expressly limited by the scope of the initial private search." *Id.* at 482 (citing *Jacobsen*, 466 U.S. at 116). Because the girlfriend was unable to recall if she showed the officer the same images that she had previously viewed, and because the officer "may have asked [the girlfriend] to open files other than those she had previously opened," the court held that the officer exceeded the scope of the initial private search. *Id.* at 488. That was so, the court explained, because "there was a very real possibility" that the officer "could have discovered something else on [the defendant's] laptop that was private, legal, and unrelated to the allegations prompting the search—precisely the sort of discovery the *Jacobsen* Court sought to avoid in articulating its beyond-the-scope test." *Id.* at 488–89.

Likewise, in *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015),[8] the Eleventh Circuit concluded that, after a Walmart employee found an unlocked cell phone that contained images of child pornography, the police exceeded the scope of this initial search by opening images and videos on the phone that had not been previously opened. *Id.* at 1336. Heeding *Jacobsen*'s rule that a warrantless police search that follows a private search violates the Fourth Amendment "to the extent to which it is broader than the scope of the previously occurring private search," the court observed that the "private search of the cell phone might have removed

[8] This case comprised two consolidated cases and was cited as *United States v. Johnson* by both courts below; however, it is officially reported as *United States v. Sparks* in the Federal Reporter.

certain information from the Fourth Amendment's protections." *Id.* at 1334, 1336. The private search "did not," however, "expose every part of the information contained in the cell phone." *Id.*

Some courts, including the Tiantic District Court, have attempted to apply a "closed container" approach to searches of digitally-stored information, curiously ruling that a private search of only some files contained on a digital storage device (such as a disk or computer) allows the government to conduct a warrantless search of all of the files on that device. *See Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012); *Runyan*, 275 F.3d at 464. These courts contend that it is not "constitutionally problematic for the police to have examined more files than did the private searchers" because the officer is merely "examining [the device] more thoroughly than did the private parties," akin to a "closed container search." *Runyan*, 275 F.3d at 464.

This approach strains credulity on several fronts and should not be adopted by this Court—equating a computer to a closed container is like "saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together." *Riley*, 134 S. Ct. at 2488.[9]

As an initial matter, treating a digital storage device like a single container is dubious because it is not really a container at all. A "container" is "any object capable of holding another object," such as "luggage, boxes, bags, clothing, and the

[9] Notably, *Runyan* and *Rann* were both decided before this Court's decision in *Riley*.

like." *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981). The storage capacity for these objects is clearly limited in the physical sense to the parameters of the object itself.

The storage capacity on digital devices, on the other hand, is "immense"—"far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley*, 134 S. Ct. at 2488–89. That is so because digital storage devices, although "compact at a physical level," have the storage capacity "akin to a vast warehouse of information." Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 542 (2005). The smartphone in *Riley*, for example, had an "immense storage capacity" of 16 gigabytes. 134 S. Ct. at 2489. The current bestselling laptop on Amazon, on the other hand, holds 256 gigabytes of data.[10] Flash drives can hold similarly large quantities of data; the number-one selling flash drive on Amazon has a storage capacity of 128 gigabytes.[11]

These devices—with their hundreds of gigabytes of storage capacity—can easily hold millions of pages of text. *See* Kerr, *supra*, at 542 (observing that 80 gigabytes of storage roughly equates "forty million pages—about the amount of information contained in the books on one floor of a typical academic library"). "It would be quite odd if looking at one file on a server meant that the entire server had been searched." *Id.* at 556.

[10] *See Acer Aspire E15*, Amazon, https://goo.gl/L47i1f (last visited Oct. 14, 2016).

[11] *See SanDisk Ultra Fit*, Amazon, https://goo.gl/mc67s3 (last visited Oct. 14, 2016).

Not only would it be "quite odd," it would sharply conflict with the limitations on "scope" in other areas of this Court's Fourth Amendment jurisprudence. Time and again, and in several different contexts, this Court has emphasized that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 18 (1968). As such, the scope of a search "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 19 (citation omitted).

For example, warrantless searches conducted pursuant to exigent circumstances "must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (citation omitted). Thus, in *Arizona v. Hicks*, 480 U.S. 321 (1987), this Court held that an officer, after entering an apartment on valid exigent circumstances grounds, conducted a "separate" search by moving stereo equipment in the apartment to better see the equipment's serial numbers. *Id.* at 324–25. By "taking action, unrelated to the objectives of the authorized intrusion," the officer's movement of the equipment "produce[d] a new invasion of . . . privacy unjustified by the exigent circumstance that validated the entry." *Id.* at 325.

The same is true for consent searches—warrantless searches that are validated by consent are limited to "the scope of the suspect's consent." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). As such, this Court has observed that it would be "very likely unreasonable to think that a suspect, by consenting to the search of his

trunk, has agreed to the breaking open of a locked briefcase within the trunk." *Id.* at 251–52. Thus, even if a warrantless search is valid by consent, the government agent may not use that consent to "conduct a general search for incriminating materials." *Lewis v. United States*, 385 U.S. 206, 211 (1966). And if consent is obtained by a third party, the search is limited to items that the third party uses by virtue of "joint access or control," such that the third party has "the right to permit the inspection in his own right." *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974); *see Georgia v. Randolph*, 547 U.S. 103, 135 (2006) (Roberts, C.J., dissenting) (observing that a person can limit the scope of a consent search by placing items "in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed").

Likewise, the scope of a warrantless seizure under the "plain view" exception is limited to items that have an "incriminating character" that is "immediately apparent." *Horton v. California*, 496 U.S. 128, 136 (1990) (citation omitted). Thus, if police cannot determine that an "object in plain view is contraband without conducting some further search of the object," then "the plain-view doctrine cannot justify its seizure." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993); *see Horton*, 496 U.S. at 137 (explaining that if the "probative value" of an item "remain[s] uncertain until after the interiors [are] swept and examined microscopically," the item falls outside the scope of the "plain view" exception).

All of these cases follow the basic premise that "the scope of a warrantless search must be commensurate with the rationale that excepts the search from the

warrant requirement." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). In this case, the "rationale that excepts the search" of the 2014 files "from the warrant requirement"—the frustration of privacy by Willow's private search—simply does not apply to the 1995 files that were never opened or viewed by Willow.

At bottom, the government cannot use the "power of technology to shrink the realm of guaranteed privacy," *Kyllo*, 533 U.S. at 34; otherwise, the Fourth Amendment would be "as easy of application as it would be deficient in efficacy and power," *Weems v. United States*, 217 U.S. 349, 373 (1910). "Its general principles would have little value and be converted by precedent into impotent and lifeless formulas." *Id.* By opening the previously-unopened, password-protected 1995 files, Agent Rattata exceeded the scope of Willow's private search.

### C. Agent Rattata could not have been virtually certain as to the contents of the 1995 files before she opened them because they had not been previously opened or viewed by anyone else.

Not only did Agent Rattata exceed the scope of Willow's search by opening the previously-unopened files, she did so despite a "virtual certainty that nothing else of significance" would be found. *Jacobsen*, 466 U.S. at 119. When a police officer searches privately-searched items without a warrant, the officer must be "virtually certain" that the object of the search "contain[s] nothing but contraband." *Id.* at 120 n.17; *see Lichtenberger*, 786 F.3d at 485–86 ("The critical measures of whether a governmental search exceeds the scope of the private search that preceded it are how much information the government stands to gain when it re-examines the evidence and, relatedly, how certain it is regarding what it will find."). The evidence in this case overwhelmingly shows that Agent Rattata could not have

been remotely sure, let alone virtually certain, of the contents of the password-protected 1995 files.

The only information Agent Rattata had about the contents of the files came from Willow, who admitted that he was not even 80% percent sure of the 1995 files' contents. This is unsurprising given that he was barred from accessing the files and was acting on "rumors" (R. viii.), merely "guess[ing] those files might be an attempt to cook their books." In fact, the only files that Willow *did* open—the 2014 files—had nothing to do with Tiantic's attempt to impose an income tax fraud penalty against Rocket because Tiantic repealed its income tax in 1996. The contents of the 2014 files were thus irrelevant to the only plausible object of Tiantic's search—Rocket's evasion of 1995 state income taxes. *Cf. United States v. Di Re*, 332 U.S. 581, 595 (1948) ("[A] search is not to be made legal by what it turns up.").

With respect to the 1995 files, the only bits of information that Willow and therefore Agent Rattata could see were the files' names and thumbnails. Of course, as Willow also admitted (R. ix.), the file names—"original_1995" and "new_1995"—did not even "suggest that they [were] tax or revenue, or even accounting related." *See also United States v. Hill*, 322 F. Supp 2d 1090, 1090–91 (C.D. Cal. 2004) (observing in a child pornography case that "there is no way to know what is in a file without examining its contents" because files "can be disguised—whether by renaming sexyteenyboppersxxx.jpg as sundayschoollesson.doc, or something more sophisticated"). The same is true for the thumbnails, which did not enable Willow or Agent Rattata to see the contents of the files. *Cf. United States v. Tosti*, 733 F.3d

816, 822 (9th Cir. 2013) (explaining that detectives did not exceed the scope of a prior private search of a computer because "they could tell from viewing the thumbnails that the images contained child pornography"). Indeed, Agent Rattata apparently realized that she would need access to the actual files to be sure of their contents when she applied for a search warrant. The warrant application—which she filed *after* her search—specifically requested access to passwords and encryptions, a request that was ultimately denied.

In short, the 1995 files remained unopened, and their contents unknown, when they reached Agent Rattata's desk. Rocket thus maintained "a reasonable expectation of privacy" in the 1995 files such that they could "not be searched, even on probable cause, without a warrant." *Jacobsen*, 466 U.S. at 120 n.17.

### D. Agent Rattata's warrantless search of the 1995 files does not fall into any of the exceptions to the warrant requirement and was thus *per se* unreasonable.

As this Court has repeatedly emphasized, "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness,'" and "reasonableness generally requires the obtaining of a judicial warrant." *Riley*, 134 S. Ct. at 2482 (citations omitted). Thus, warrantless searches by the government "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357).

None of the recognized exceptions to the warrant requirement apply in this case. This was not a case of exigent circumstances, as there was no reason for Agent Rattata to reasonably believe that the destruction of evidence, escape of a

suspect, or serious injury was likely to occur if she had taken the time to obtain a warrant prior to opening the files. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Nor is this a case of a consent search, which requires the voluntary consent of the subject of the search. *See Randolph*, 547 U.S. at 106. And the "good faith" exception does not apply when, as here, "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987).[12] The constitutional minimum for government searches of password-protected computer files "is accordingly simple—get a warrant." *Riley*, 134 S. Ct. at 2495.

Tiantic is not saved by the warrant that Agent Rattata obtained *after* she searched the files. Government agents may not conduct a search without a warrant regardless of the agent's "[b]elief, however well founded," that the evidence sought will be found; indeed, "such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U.S. 20, 33 (1925). "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo*, 533 U.S. at 35 n.2.[13]

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[12] In any event, none of the recognized exceptions to the warrant requirement was addressed below. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016) ("This Court generally does not decide issues unaddressed on first appeal—especially where, as here, the matter falls outside the question presented and has not been thoroughly briefed before us.").

[13] Even if the after-the-fact search warrant was applicable, the warrant specifically excluded (R. vi.) access to password-protected information. The 1995 files required a password; thus, a search of the 1995 files would still be "*per se* unreasonable" because it would have "extend[ed] beyond the place specified" in the warrant. *Ybarra v. Illinois*, 444 U.S. 85, 101 (1979).

In sum, Agent Rattata's search strikes at the "central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345. Rummaging through Rocket's previously-unopened, password-protected computer files without a warrant was an unconstitutional search under the Fourth Amendment.

## CONCLUSION

The judgment of the Tiantic Supreme Court should be affirmed.

Respectfully submitted,

TEAM NUMBER 13
*Counsel for Respondents*

OCTOBER 2016

# APPENDIX
## Pertinent Constitutional and Statutory Provisions

**U.S. Const. art. I, § 8, cl. 3**

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

**U.S. Const. amend. IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**State of Tiantic Marketplace Equality Act**
**Effective: January 1, 2016**

**Section 1. Use Tax Collection Obligations for Certain Sellers.**

Notwithstanding any other provision of law, any person or entity selling tangible personal property, electronically transferred products, or services for delivery into Tiantic, who does not have a physical presence in the State shall collect and remit the use tax owed on such goods if that seller has a substantial economic presence in Tiantic.

**Section 2. Substantial Economic Presence Definition.**

A seller has substantial economic presence in Tiantic if either of the following criteria is met:

(1) The seller's gross revenue from the sale of tangible personal property, electronically transferred products, or services delivered into Tiantic exceeds two hundred thousand dollars per year in any year of the testing period; or

(2) The seller sold tangible personal property, electronically transferred products, or services delivered into Tiantic in five hundred or more separate transactions in any year of the testing period.

The testing period for substantial economic presence includes the current calendar year and the two previous calendar years.

**Section 3. Special Procedures for Judicial Resolution.**

Notwithstanding any other provision of law or whether the state begins an audit or other tax collection procedure, the State may bring a declaratory judgment action in any State trial court against any person the State believes meets the criteria of Section 1 of this Act to establish that the obligation to collect and remit use tax is applicable and valid under State and federal law.

The State trial court shall act on this declaratory judgment action as expeditiously as possible and such action shall proceed with priority over any other action presenting the same question in any other venue.

The filing of this declaratory judgment action established by this Act shall operate as an injunction during the pendency of the action, prohibiting any State entity from enforcing the obligation in Section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the use tax on a voluntary basis. This injunction shall not apply in cases where there is a previous judgment from a court establishing the validity of the obligation in Section 1 of this Act with respect to the taxpayer in question.

All appeals from a decision resulting from the cause of action established by this Act may only be made to the Tiantic Supreme Court. The appeal shall be heard as expeditiously as possible.

**Section 4. Tax Retroactivity.**

No obligation to collect and remit the use tax required by this Act may be applied retroactively.

**Section 5. Effective Date.**

Whereas this Act is necessary for the support of the Tiantic government and its existing public institutions, this Act shall be in full force on January 1, 2016.