No.

In the Supreme Court of the United States

QUAD GRAPHICS, INC.,
PETITIONER,

v.

NORTH CAROLINA DEPARTMENT OF REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (1944), this Court held that a state may not tax sales that occur outside its borders, even when the purchased goods are ultimately delivered into the taxing state. In the decision below, the North Carolina Supreme declined to follow *Dilworth* on the ground that it has been "implicitly" overruled by this Court's more recent Commerce Clause cases. App. 15a.

The questions presented are:

(1) Whether the North Carolina Supreme Court was correct that state courts and taxing authorities no longer must follow *Dilworth* because this Court has implicitly overruled it; and

(2) Whether this Court should overrule or retain the holding of *Dilworth* that a state may not tax sales that occur outside its borders.

PARTIES TO THE PROCEEDINGS

Petitioner Quad Graphics, Inc. was petitioner in the North Carolina Office of Administrative Hearings, petitioner in the North Carolina Superior Court, and appellee in the North Carolina Supreme Court.

Respondent North Carolina Department of Revenue was respondent in the North Carolina Office of Administrative Hearings, respondent in the North Carolina Superior Court, and appellant in the North Carolina Supreme Court.

RULE 29.6 STATEMENT

Quad Graphics, Inc. is a publicly traded company, and no parent or publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Quad Graphics, Inc.* v. *North Carolina Department of Revenue*, No. 407A21 (N.C.), judgment entered on December 16, 2022; and
- *Quad Graphics, Inc.* v. *North Carolina Department of Revenue*, No. 20 CVS 7449 (N.C. Super. Ct.), judgment entered on June 23, 2021.

TABLE OF CONTENTS

Page

Opinions Below 1
Jurisdiction 1
Constitutional Provision Involved 1
Introduction 2
Statement 4
A. Legal Background 4
B. Proceedings Below 7
Reasons for Granting the Petition 11
I. The Decision Below Was Wrong 11
A. *Dilworth* Has Not Been Overruled 12
1. *Complete Auto* 12
2. *Wayfair* 14
B. *Dilworth* Was Rightly Decided 17
II. State Courts Are Divided About *Dilworth* 20
III. The Questions Presented Merit Review in This Case 27
A. This Court's Intervention Is Needed Now 27
B. This Case Is an Ideal Vehicle 30
Conclusion 32
APPENDIX A: North Carolina Supreme Court Decision (Dec. 16, 2022) 1a
APPENDIX B: North Carolina Business Court Opinion (June 23, 2021) 46a
APPENDIX C: North Carolina Office of Administrative Hearings Opinion (June 24, 2020) 81a

TABLE OF AUTHORITIES

Cases **Page(s)**

Agostini v. *Felton*,
521 U.S. 203 (1997) 11

Allied Signal, Inc. v. *Director, Div. of Taxation*,
504 U.S. 768 (1992) 6

Associated Indus. of Mo. v. *Lohman*,
511 U.S. 641 (1994) 13, 19

Baker & Taylor, Inc. v. *Kawafuchi*,
82 P.3d 804 (Haw. 2004) 23, 24

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— S. Ct. — (2023) 31

Bloomingdale Brothers, Division of Federated Department Stores, Inc. v. *Chu*,
513 N.E.2d 233 (N.Y. 1987) 21, 22, 26, 28

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505 N.Y.S.2d 258 (N.Y. App. Div. 1986) 21

Bosse v. *Oklahoma*,
580 U.S. 1 (2016) 12

Commonwealth Edison Co. v. *Montana*,
453 U.S. 609 (1981) 13

Complete Auto Transit, Inc. v. *Brady*,
430 U.S. 274 (1977) 6, 12, 13, 14, 21

Comptroller of Treasury of Maryland v. *Wynne*,
575 U.S. 542 (2015) 30

Cooper Indus., Inc. v. *Aviall Servs., Inc.*,
543 U.S. 157 (2004) 16

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490 U.S. 163 (1989) 13

Dep't of Revenue v. *Care Computer Sys.*,
4 P.3d 469 (Ariz. Ct. App. 2000) 26

General Trading Co. v. *State Tax Commission of Iowa*,
322 U.S. 335 (1944) 5, 6, 19, 29
Greenscapes Home & Garden Prods. v. *Testa*,
129 N.E.3d 1060 (Ohio App. 2019) 26
Healy v. *Beer Inst.*,
491 U.S. 324 (1989) 17
Hohn v. *United States*,
524 U.S. 236 (1998) 12
Hutto v. *Davis*,
454 U.S. 370 (1982) 27
Kimble v. *Marvel Ent., LLC*,
576 U.S. 446 (2015) 17
Mahnich v. *Southern S.S. Co.*,
321 U.S. 96 (1944) 27
McBoyle v. *United States*,
283 U.S. 25 (1931) 31
McKesson Corp. v. *Div. of Alcoholic Beverages & Tobacco*,
496 U.S. 18 (1990) 25
McLeod v. *J. E. Dilworth Co.*,
322 U.S. 327 (1944) 2, 4–5, 12–14, 17, 19, 21–26, 29
Media Graphics, Inc. v. *Director, Div. of Taxation*,
7 N.J. Tax 23 (1984) 25
National Bellas Hess, Inc. v. *Department of Revenue of Illinois*,
386 U.S. 753 (1967) 7, 15
Niz-Chavez v. *Garland*,
141 S. Ct. 1474 (2021) 28
Okla. Tax Comm'n v. *Chickasaw Nation*,
515 U.S. 450 (1995) 29
Okla. Tax Comm'n v. *Jefferson Lines, Inc.*,
514 U.S. 175 (1995) 12, 13, 17

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) 6, 7, 15, 18, 29, 30
Rodriguez de Quijas v. *Shearson/Am. Express, Inc.*,
490 U.S. 477 (1989) 12
Sears, Roebuck & Co. v. *Lindley*,
436 N.E.2d 1029 (Ohio 1982) 20, 21
Shalala v. *Illinois Council on Long Term Care, Inc.*,
529 U.S. 1 (2000) 16
South Dakota v. *Wayfair*,
138 S. Ct. 2080 (2018) 7, 12, 14, 15, 16, 18, 19, 20, 29
South Tex. Chlorine, Inc. v. *Bullock*,
792 S.W.2d 275 (Tex. App. 1990) 25
Spector Motor Service v. *O'Connor*,
340 U.S. 602 (1951) 6
State v. *Dorhout*,
513 N.W.2d 390 (S.D. 1994) 22, 23
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767 So.2d 1270 (Fla. App. 2000) 25
United States v. *New Mexico*,
455 U.S. 720 (1982) 29
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466 U.S. 388 (1984) 13
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590 N.W.2d 293 (Mich. 1999) 22

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Georgia Tax Tribunal, No. TAX-IIT-1340253
(Feb. 11, 2015) 25
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OPINIONS BELOW

The opinion of the North Carolina Office of Administrative Hearings (App. 81a–94a) is unreported. The opinion of the North Carolina Business Court (App. 46a–80a) is reported at 2021 WL 2584282. The opinion of the North Carolina Supreme Court (App. 1a–45a) is reported at 881 S.E.2d 810.

JURISDICTION

The North Carolina Supreme Court entered judgment on December 16, 2022. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3.

INTRODUCTION

In *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (1944), this Court held that a state may not tax sales that occur beyond its borders, even when the goods are purchased for delivery into the taxing state. As the Court explained, when title and possession are transferred to the purchaser outside the taxing state, the taxable event—the sale—also occurs outside the taxing state. In that situation, only one state may tax the sale: the state in which the sale occurs.

In its decision below, a majority of the North Carolina Supreme Court declined to follow *Dilworth*, instead embracing the State's power to tax sales by Petitioner Quad Graphics that occurred outside the State, on the ground that the goods were purchased for delivery to North Carolina. The majority did not dispute that *Dilworth* would control if it remained good law and also acknowledged that this Court has never expressly overruled it. Indeed, this Court has continued to cite *Dilworth* favorably in the decades since it was decided, and the overwhelming consensus of courts and commentators alike is that *Dilworth* remains a binding precedent. Yet over a strenuous dissent, the majority effectively overruled *Dilworth* from below based only on impressionistic inferences from and overbroad readings of this Court's more recent Commerce Clause jurisprudence.

That error demands this Court's immediate review. At minimum, it should summarily reverse the decision below, which directly challenges this Court's exclusive prerogative to overrule its own decisions. Our federal system does not countenance a state court deciding that the Supreme Court has "implicitly overrule[d]" its own precedents, App. 15a—especially when those precedents limit the state's own powers. Left unchecked, the ruling below will embolden other states to take matters into their own hands, creating uncertainty and endless litigation for

individuals and businesses. Taxpayers should not have to risk million-dollar tax liabilities and penalties—like the ones that North Carolina imposed on Quad Graphics here—for following U.S. Supreme Court precedent.

In the alternative, this case presents an ideal vehicle to lay to rest any doubts about the *Dilworth* rule. The North Carolina Supreme Court deepened a split as to whether the rule is compatible with this Court's modern Commerce Clause jurisprudence, with state courts of last resort divided 4 to 2 in favor of *Dilworth*'s continued vitality. But that ratio dramatically understates the confusion: Lower courts and state taxing authorities have expressed doubts, even where their own state supreme courts have continued to rely on *Dilworth*; indeed, different branches of the *same* state government have sometimes taken opposing positions on this issue.

On the merits, the question whether the *Dilworth* rule should be retained has a clear answer: yes. Even beyond the high bar for overruling precedent—especially where, as here, Congress could intervene if it wanted to—*Dilworth* was correct. States should not be able to levy sales taxes on transactions that are consummated entirely outside their borders; but they are free to tax the in-state *use* of goods purchased out-of-state. That sensible and easily administrable rule stands as an important obstacle to state attempts at extraterritorial regulation, and it suffers from none of the defects that have led this Court to overturn other Commerce Clause decisions. By upholding *Dilworth* on the merits, this Court would resolve a pressing legal question that even North Carolina itself concedes "really is quite important." Oral Arg. at 12:44–46, *Quad Graphics, Inc.* v. *N.C. Department of Revenue*, 881 S.E.2d 810 (N.C. 2022) (No. 407A21).

Whether the Court decides to summarily reverse the decision below or to grant plenary review, this Court's intervention is urgently needed.

STATEMENT

A. Legal Background

1. Sales transactions generally result in two types of state taxes: sales taxes and use taxes. See Charles A. Trost, *Federal Limitations on State and Local Tax* § 11:1 (2d ed. 2022 update). Though the taxes function in similar ways, and both types are typically collected and remitted by sellers, they are different in conception and effect. Sales taxes apply directly to the sales transaction itself, while use taxes apply to the post-sale use (or consumption) of the goods within the taxing state. See *ibid.*

States do not impose both sales and use taxes for the same transactions. See Jerome Hellerstein & Walter Hellerstein, *State Taxation*, § 16.01 (3d ed. 2022). Instead, states often maintain a complementary tax regime: They apply a sales tax to transactions that occur within the state's jurisdiction; and they apply a use tax when goods sold outside the state are brought within the state's borders to be used or consumed there. See Trost, *supra*, § 11:1. States typically set sales and use taxes at the same rate, making them economically equivalent. See Hellerstein & Hellerstein, *supra*, § 16.01.

2. Though sales and use taxes serve complementary functions, this Court has identified crucial distinctions between them. In *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327 (1944), the Court held that the Commerce Clause precludes a state from taxing a sale of goods that occurs outside its borders, even if the goods are purchased for delivery into the taxing state.

The facts of *Dilworth* were straightforward. Two Tennessee corporations sold and shipped goods from Tennessee to customers in Arkansas. The corporations' sales were "accept[ed] by the Memphis office," and title to the goods "passe[d] upon delivery to the carrier in Memphis." *Id.* at 328. The Court was thus confronted "with sales

made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." *Ibid.*

The question for this Court was whether Arkansas had the "power to exact a sales tax" on those transactions. *Ibid.* The Court said no. Because "the sale—the transfer of ownership—was made in Tennessee," the Court explained, any attempt by Arkansas to tax the transaction would be to "project its powers beyond its boundaries." *Id.* at 330.

In so ruling, the Court acknowledged the possibility that "Arkansas could have levied a tax of the same amount on the *use* of these goods in Arkansas by the Arkansas buyers." *Ibid.* (emphasis added). But the Court's "not too short answer" was that "Arkansas has chosen not to impose such a use tax," and the State must be held to its choice. *Ibid.* Sales and use taxes, the Court explained:

> are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase …. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end.

Ibid.

On the same day it decided *Dilworth*, this Court held in *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U.S. 335 (1944), that the Commerce Clause does *not*

preclude a state from imposing use taxes on goods acquired outside the state. Iowa sought to tax the use of property "bought from [a Minnesota corporation] and sent by it from Minnesota to purchasers in Iowa for use and enjoyment there." *Id.* at 336. In contrast to the sales tax at issue in *Dilworth*, the Court explained, Iowa's use tax was appropriately levied on "the opportunity … to enjoy property" within the State, "no matter whence acquired." *Id.* at 338; see *ibid.* ("property consumed in Iowa").

3. In the decades after *Dilworth* and *General Trading*, this Court went a significant step further, holding that states could not constitutionally tax *any* interstate transactions. See, *e.g.*, *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951) (invalidating application of state franchise tax to interstate trucking businesses). In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), however, this Court repudiated that rule in favor of a multi-factor test. Under the *Complete Auto* test, the Commerce Clause permits a state to tax interstate transactions if 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." *Id.* at 279.

Subsequent decisions have clarified that *Complete Auto*'s "substantial nexus" prong has two distinct requirements. First, a tax must have a sufficient connection to the *transaction* being taxed, or what is often described as a "transactional nexus." See, *e.g.*, *Allied Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 778 (1992). Second, the taxing jurisdiction must also have a sufficient connection to the *entity* being taxed, or what is often called a "personal nexus." See, *e.g.*, *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 311 (1992).

Recently, this Court has revisited some of its earlier caselaw on the personal nexus requirement. In *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill*, the Court had previously established a "physical-presence rule," under which a taxpayer lacks a personal nexus with the taxing state unless the taxpayer has a physical presence there. See *Quill*, 504 U.S. at 301, 317–18. But in *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018), this Court repudiated the physical-presence rule and overruled both *Bellas Hess* and *Quill*. The Court held that an "out-of-state" business's lack of physical presence within South Dakota did not prevent the State from requiring the business to "collect and remit" sales taxes to the State. *Id.* at 2087.

B. Proceedings Below

Quad Graphics is an integrated marketing company headquartered in Wisconsin that helps brands connect with consumers. Among other services, Quad Graphics prints magazines, catalogs, books, and direct-mail items for customers throughout the United States. App. 3a.

1. In 2018, the North Carolina Department of Revenue levied a $3.24 million sales tax assessment against Quad Graphics—including $970,896 in penalties—for sales of printed materials that Quad Graphics had made between 2009 and 2011. See ROA R_000027. Each of the taxed sales occurred entirely outside of North Carolina: Quad Graphics had received each order outside the State; printed each order outside the State; and delivered each order to a common carrier outside the State. App. 3a–4a. Although the carrier then shipped the orders to recipients in North Carolina, it was undisputed that title to the merchandise (and risk of loss) had already passed from Quad Graphics to its customers when the orders arrived at Quad Graphics' shipping dock outside of North Carolina. App. 4a.

Quad Graphics challenged the Department of Revenue's tax assessment by petitioning the North Carolina Office of Administrative Hearings. App. 84a. An administrative law judge granted North Carolina's motion for summary judgment and upheld the assessment. App. 93a. In her ruling, the administrative law judge acknowledged that she was "barred" from ruling on Quad Graphics' constitutional challenge to the assessment. App. 89a.

2. After paying the full amount of the assessment up front, as required by statute, Quad Graphics petitioned for review in the North Carolina Business Court, arguing that the assessment was unconstitutional under the Commerce Clause. App. 53a–54a; see ROA R_000230. Citing *Dilworth*, Quad Graphics argued that, because the sales had indisputably occurred outside North Carolina, the State had no power to tax them. App. 62a. The court agreed, holding that "[t]he Sales at Issue lacked a sufficient transactional nexus to North Carolina under the Commerce Clause of the United States Constitution since it is undisputed that title to the Sales at Issue passed to the purchasers and third-party recipients outside of North Carolina." App. 80a.

3. In a divided decision, the North Carolina Supreme Court reversed. App. 3a.

a. "The sole question" on appeal, the majority explained, was "whether the holding of the Supreme Court of the United States in *Dilworth* controls the outcome of th[is] case." App. 9a. The majority concluded that *Dilworth* was no longer good law, having been "implicitly overrule[d]" by *Complete Auto* and *Wayfair*. App. 15a.

The majority began by suggesting that *Complete Auto* had undermined *Dilworth*'s reasoning. "Nearly thirty years" after that decision, the majority explained, "the Supreme Court began to disassociate its approach [to taxes on interstate commerce] from the strict formalism that had characterized *Dilworth* and the *Dilworth*

progeny." App. 12a. In particular, the four-part test set forth in *Complete Auto* "required the rejection of outdated precedent that 'proscribed all taxation formally levied upon interstate commerce' or encouraged legal gamesmanship by drawing artificial boundaries around taxes that differed in form but not substance." App. 14a. According to the majority, the differential treatment of sales and use taxes recognized in *Dilworth* "was exactly such a formalistic distinction that turned upon legal draftsmanship." *Ibid.* Indeed, to the majority, it "appear[ed]" that this Court "has wholly abandoned the free trade theory which had provided for the distinction's unsteady foundation." App. 14a–15a.

Though declaring that *Dilworth* was no longer good law, the majority stopped short of deciding whether *Complete Auto* itself "compelled [the court] to engage in an anticipatory overruling." App. 15a. Instead, the majority insisted that it was "in the fortuitous position" of not having to decide that question in light of this Court's subsequent decision in *Wayfair*. *Ibid.* In overturning the physical-presence rule, the majority argued, "the *Wayfair* Court explicitly repudiated the formalistic Commerce Clause jurisprudence of eras past as incompatible with modern legal precedents and economic realities." App. 21a.

The majority acknowledged that *Wayfair* overturned the physical-presence rule "without ever addressing *Dilworth*." *Ibid.* But the majority nonetheless deemed that silence fatal to *Dilworth*:

> Even though the *Wayfair* Court clearly understood that South Dakota's statute at issue involved the imposition of sales tax and not use tax, nonetheless the highest tribunal did not draw any legal distinction between the two. The Court did not discuss *Dilworth* or "transactional nexus" as

> a concept separate and apart from "substantial nexus" at all.

App. 22a (citations omitted). For the majority, *Wayfair*'s failure to address *Dilworth* was enough to conclude that the precedent had been "supersede[d]." App. 16a.

b. Justice Berger dissented. He agreed with the majority that "[t]he transaction at issue in the present case is strikingly similar to the one addressed in *Dilworth*." App. 40a. But that led Justice Berger to the opposite conclusion—that "*Dilworth* applies in this case," App. 44a—and he chastised the majority for its "disregard" of this Court's "interpretation of the Commerce Clause and the federal Constitution." App. 40a.

Neither *Complete Auto* or *Wayfair* overruled *Dilworth*, Justice Berger explained. *Complete Auto*'s substantial nexus prong incorporates two separate inquiries: (1) "whether the tax is applied to *an activity* with a substantial nexus with the taxing state" ("transactional nexus"); and (2) whether there is a "link between the taxpayer and the state" ("personal nexus"). App. 42a (citation omitted). "Notably," Justice Berger explained, "the Supreme Court in *Wayfair* only addressed personal nexus. The Court did not address the transactional nexus—leaving that aspect of *Dilworth* undisturbed." App. 42a–43a.

Justice Berger emphasized that, although North Carolina "could not levy a *sales* tax on the transaction at issue," the State "could have applied a use tax without running afoul of the Commerce Clause." App. 43a. Thus, "any loss of revenue … [was] a direct result of [North Carolina's] decision to levy a sales tax" rather than a use tax. App. 44a. Justice Berger continued:

> While a taxpayer certainly has an obligation to pay taxes owed, it is not a charity, and the government is required to assess the appropriate

> tax. While some may deem this a 'formalistic' requirement, such a requirement touches on fundamental fairness for taxpayers.

Ibid. The "constitutional quandary," in other words, was created by North Carolina's "choice of a tax, and not Quad Graphics' effort to avoid taxes." *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision below contravened the most foundational rule of vertical *stare decisis* when the North Carolina Supreme Court declared this Court's decision in *Dilworth* a dead letter, effectively overruling it from below. The North Carolina Supreme Court's decision also widens a growing split among state courts of last resort and state taxing authorities over the constitutionality of taxing out-of-state sales. The predictable consequence will be interstate confusion in an area of law where stability and predictability are crucial. Only this Court's intervention can restore both the integrity of its precedents and the certainty that tax collectors and taxpayers need.

I. THE DECISION BELOW WAS WRONG

This Court has warned lower courts against presuming that "more recent [Supreme Court] cases have, by implication, overruled an earlier precedent." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). Yet the North Carolina Supreme Court did just that, declaring that *Dilworth* had been "implicitly overrule[d]" by subsequent Commerce Clause caselaw. App. 15a. This Court should reaffirm that when lower courts are deciding whether to follow an on-point Supreme Court decision, "implicitly overruled" is a contradiction in terms. But even apart from the need to respect precedent, the *Dilworth* rule should be retained because it reflects an accurate understanding of the Commerce Clause: States may not tax (or otherwise regulate) transactions that occur wholly outside their own borders.

A. Dilworth *Has Not Been Overruled*

"It is this Court's prerogative alone to overrule one of its precedents." *Bosse* v. *Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam) (brackets and citation omitted). Even where a past decision "appears to rest on reasons rejected in some other line of decisions," lower courts must "follow the case which directly controls" unless and until this Court overrules it. *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

The majority below nevertheless held that it was not bound by *Dilworth* in light of two subsequent decisions: *Complete Auto Transit Inc.* v. *Brady*, 430 U.S. 274 (1977), and *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018). Even if these cases had "raised doubts about [*Dilworth*'s] continuing vitality," as the majority claimed, that would not justify disregarding a "binding precedent" of this Court. *Hohn* v. *United States*, 524 U.S. 236, 253 (1998). But in any event, neither *Complete Auto* nor *Wayfair* undermined—much less overruled—*Dilworth*.

1. Complete Auto

Dilworth fits comfortably within the four-part *Complete Auto* test. As relevant here, the test's first prong requires a tax to have a "substantial nexus" to: (1) the entity being taxed (sometimes called "personal nexus"), and (2) the transaction being taxed ("transactional nexus"). *Complete Auto*, 430 U.S. at 279. *Dilworth* was a case about transactional nexus: The *Dilworth* rule bars states from taxing out-of-state sales because those sales have an insufficiently close "relation [to] the taxing state." 322 U.S. at 330.

That is how this Court has understood the *Dilworth* rule. In *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175 (1995), the question was whether Oklahoma could impose a sales tax on the full price of interstate bus tickets sold in the State. The Court held that *Complete*

Auto's "substantial nexus" prong was easily met because, consistent with *Dilworth*, "[i]t has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Id.* at 184 (citation omitted); see *ibid.* ("So, too," for "services."). The Court thus affirmed *Dilworth*'s core proposition—that a "sale of goods" is a "discrete event," completed when the seller is "'through selling'"—and it upheld Oklahoma's authority to impose a tax "operating on the transfer of ownership and possession at a particular time and place" (*i.e.*, a tax on sales made within the State). *Id.* at 186–87 (quoting *Dilworth*, 322 U.S. at 330).

In the decision below, the majority nevertheless opined that *Complete Auto* had undermined *Dilworth* by "wholly abandon[ing] the free trade theory" that had provided the "unsteady foundation" for *Dilworth*'s distinction between taxing out-of-state sales and in-state uses. App. 14a–15a. That is incorrect. *Complete Auto* rejected the very different notion "that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." 430 U.S. at 278. *Complete Auto* makes clear that "interstate business" is *not* "immune from state taxation." *Id.* at 287 (citation omitted). But this Court has never overturned the *Dilworth* rule that a state may not tax transactions occurring wholly outside its borders. And indeed, this Court has continued to invoke *Dilworth* for the proposition that "the Commerce Clause's central objective [is] securing a national 'area of free trade among the several States.'" *Associated Indus. of Mo.* v. *Lohman*, 511 U.S. 641, 650 (1994) (quoting *Dilworth*, 322 U.S. at 330) (citation omitted); see, *e.g.*, *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) (citing *Dilworth*); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 402 (1984) (quoting *Dilworth*); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 618 (1981) (quoting *Dilworth*).

The majority below also declared *Dilworth* incompatible with *Complete Auto*'s rejection of "formalism over substance," 430 U.S. at 281, since the sales taxes that *Dilworth* forbids could readily be replaced by economically equivalent use taxes. Yet the distinction between sales and use taxes does not reflect mere "draftsmanship and phraseology." *Ibid.* Rather, as *Dilworth* explains, the distinction is based on "the differences in the basis of these two taxes and the differences in the relation of the taxing state to them." 322 U.S. at 330. Sales and use taxes are thus "different in conception" and "differen[t] in substance," not merely in "nomenclature." *Id.* at 330–31.

Unsurprisingly, the overwhelming majority of state courts have continued to apply *Dilworth* in the decades since *Complete Auto*. See Part II, *infra*. Commentators likewise have recognized that *Dilworth* fits comfortably within *Complete Auto*'s "substantial nexus" prong. See Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 Md. L. Rev. 1, 13 (2019) ("The best place to start when uncovering the transactional nexus requirement is with the 1944 companion cases of" *Dilworth* and *General Trading*); see also, *e.g.*, Trost, *supra*, § 11.4; Breen M. Schiller and Daniel L. Staley, *The Reemergence of Transactional Nexus*, 40 J. St. Tax'n 9, 10 (2021).

2. Wayfair

The majority below declared itself uncertain whether *Complete Auto* "compelled [it] to engage in an anticipatory overruling" of *Dilworth*. App. 15a. But the majority decided it could "confidently" proclaim *Dilworth*'s demise anyway, in light of this Court's recent decision in *Wayfair*. *Ibid.* Yet *Wayfair* had nothing to do with the *Dilworth* rule—and certainly gave lower courts no license to ignore it.

The question in *Wayfair* was whether the Court should overrule the "physical presence requirement" announced in *Bellas Hess* and *Quill*, which made an out-of-

state seller's obligation "to collect and remit" taxes "depende[nt] on whether the seller had a physical presence in that State." 138 S. Ct. at 2087. The Court concluded that the physical-presence rule was premised on "unfounded" assumptions and riddled with "internal inconsistencies"; it created an "online sales tax loophole" that gave out-of-state businesses an unfair "advantage"; and it had become "removed from economic reality." *Id.* at 2092 (quotation marks omitted). The *Wayfair* Court accordingly declared the rule "unsound and incorrect," and it overruled *Quill* and *Bellas Hess*. *Id.* at 2099.

Nothing in *Wayfair* calls *Dilworth* into question, much less overrules it. The physical-presence rule examined in *Wayfair* spoke only to whether *the taxpayer* had a sufficient connection to the taxing state (personal nexus), not to whether *the transaction* did (transactional nexus). See *id.* at 2099 (discussing "the economic and virtual contacts respondents have with the State"). Indeed, the physical-presence rule operated irrespective of the type of transaction being taxed: *Wayfair* concerned sales taxes, but *Bellas Hess* and *Quill* both involved use taxes. See *Bellas Hess*, 386 U.S. at 754; *Quill*, 504 U.S. at 301. The *Dilworth* rule, by contrast, depends *entirely* on whether the transaction being taxed is an out-of-state sale (not allowed) or in-state use (allowed).

The *Wayfair* Court could not have re-evaluated the *Dilworth* rule even if it wanted, moreover, because the parties had stipulated away the transactional-nexus issue for purposes of the appeal. As the Court noted, "[a]ll" parties there "agree[d] that South Dakota ha[d] the authority to tax these transactions," per the parties' stipulation that the sales were "consummated" there. *Id.* at 2092 (quotation marks omitted). The Court accordingly had no occasion to venture beyond the narrow question before it: Since "the *Quill* physical presence rule was an obvious barrier to the [South Dakota] Act's validity," other issues

had "not yet been litigated or briefed," and the Court declined to resolve them. *Id.* at 2099; see *ibid.* (leaving open the possibility that "some other principle in the Court's Commerce Clause doctrine might invalidate the Act").

For these reasons, it should be unsurprising that *Dilworth* went unmentioned throughout *Wayfair*: The parties never cited it in their briefing; it was not discussed at oral argument; and neither the majority, the dissent, nor the two concurrences referenced it. Of course, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (citation omitted). And that rule applies with uncommon strength when the question is whether this Court has overruled one of its own decisions, since "[t]his Court does not normally overturn … earlier authority *sub silentio*." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

Equally unsurprising, the North Carolina Supreme Court's strained interpretation of *Wayfair* has found little favor elsewhere. The consensus among scholars and commentators is that *Wayfair* "is properly viewed solely as a personal nexus case, leaving intact the transactional nexus jurisprudence and the *Dilworth*/*General Trading Co.* dichotomy." Holderness, *supra*, at 24; see, *e.g.*, Adam Thimmesch, Darien Shanske, and David Gamage, Wayfair*: Sales Tax Formalism and Income Tax Nexus*, 89 St. Tax Notes 975, 976 (2018) (doubting that "the Court meant to overrule *Dilworth* by implication"); see also Trost, *supra*, § 11.4 (*Dilworth* remains good law under *Complete Auto* and its progeny); Richard D. Pomp, Wayfair*: Its Implications and Missed Opportunities*, 58 Wash. U. J. L. & Pol'y 1, 56 n.226 (2019) ("I cannot believe that the Court was even aware of *Dilworth*, let alone was implicitly overruling it.").

B. Dilworth *Was Rightly Decided*

Even if the North Carolina Supreme Court had authority to overturn this Court's decisions, the *Dilworth* rule should be retained. *Stare decisis* "carries enhanced force" where, as here, "Congress can correct any mistake" through legislation. *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015). But more than that, *Dilworth* was right when it was decided and remains right today: A state that taxes transactions "consummated" beyond its borders is not taxing *inter*-state commerce, but rather *extra*-state commerce—something our federal system does not allow. *Dilworth*, 322 U.S. at 330.

1. Most fundamentally, *Dilworth* recognizes the inherent limits of a state's authority to regulate conduct beyond its borders. The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (citation omitted). If a Georgia resident buys a wooden decoy from a Georgian sporting goods store and goes hunting with it in Georgia, no one thinks that the State of North Carolina can tax that purchase. The majority below took the position that the constitutional analysis differs when the goods are purchased for delivery into a state after the sale. But that view clashes with this Court's "settled treatment" of the question, which accepts "the taxable event of the consummated sale of goods … as unique" to the "particular time and place" where the "transfer of ownership and possession" occurred. *Jefferson Lines*, 514 U.S. at 187–88. That rule applies "even when the parties to a sales contract specifically contemplated interstate movement of the goods either immediately before, *or after*, the transfer of ownership." *Id.* at 187 (emphasis added).

Abandoning *Dilworth* would also have serious implications beyond taxation. The Commerce Clause, as its

name suggests, applies to *all* interstate commerce. The *Dilworth* rule thus stands in the way of states not only taxing remote sales, but also *regulating* them. As Justice Scalia explained, "[i]t is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax." *Quill*, 504 U.S. at 319 (Scalia, J., concurring in part and in the judgment). If states like North Carolina can tax sales consummated entirely outside their borders, there is no reason they cannot also regulate such sales in other ways—for instance, imposing their health, labor, and environmental codes on them. That kind of cross-border projection of a state's values, morals, and policy choices is precisely what the Commerce Clause was designed to prevent. Cf. Br. for United States as *Amicus Curiae* Supporting Petitioners at 34, *Nat'l Pork Producers Council* v. *Ross* (No. 21-468) (a state's "philosophical objection to the public policy of other States" is "not a legitimate basis for regulation under our federal system"). By jettisoning *Dilworth*, the majority below has taken a significant step towards a new and far more hostile world of inter-state relations.

2. *Dilworth* also merits continued fealty because it does not implicate any of the factors that led the *Wayfair* Court to overrule the physical-presence rule.

First and foremost, *Wayfair* criticized the physical-presence rule for giving online, out-of-state retailers "artificial competitive advantages" over their in-state peers—advantages that distorted markets and had "come to serve as a judicially created tax shelter." 138 S. Ct. at 2094. At bottom, this was a concern about "economic discrimination": If out-of-state sellers did not have to pay taxes for online sales, and could not be required to collect use taxes on them, then *no one* would pay; the interstate sale would evade taxation altogether, thereby putting "local businesses … at a competitive disadvantage relative to remote sellers." *Ibid.*; see *id.* at 2095–96. Concerns about

discrimination loomed particularly large in *Wayfair* because a central aim of the Commerce Clause is to "prevent States from discriminating between in-state and out-of-state firms." *Id.* at 2100 (Gorsuch, J., concurring). And the functional tax immunity of online sales that had resulted from the physical-presence rule was also inhibiting states' "long-term prosperity"—estimated at up to $33 billion in lost tax revenue every year. *Id.* at 2096–97 (majority op.).

Dilworth raises no similar concerns. Under the *Dilworth* rule, out-of-state sellers can be required to collect and remit use taxes from in-state buyers, including in cases where *Dilworth* prohibits levying a direct sales tax. See *General Trading*, 322 U.S. at 338 (describing the duty to collect use taxes as "a familiar and sanctioned device"). Imposing "equivalent sales and use taxes" thus ensures "equality of treatment between local and interstate commerce." *Lohman*, 511 U.S. at 648 (quotation marks omitted). The upshot is that a state like North Carolina can generate equal revenue when goods are purchased in-state or out-of-state, so long as it applies the appropriate tax. *See* Hellerstein & Hellerstein, *supra*, § 16.01. Thus, "any loss of revenue here is a direct result of the Department's decision to levy a sales tax" rather than a use tax. App. 44a (Berger, J., dissenting).

Other concerns animating *Wayfair* are also irrelevant here. The Court there observed that physical presence is hard to determine, and can be a "poor proxy" for compliance costs and other issues that matter to interstate businesses. 138 S. Ct. at 2093. Not so for *Dilworth*, which articulates an easily administered rule under which sales can be taxed in only one location: where they are consummated. The *Dilworth* rule thus avoids subjecting businesses to conflicting tax regimes under which multiple states lay claim to the same sale, making it easier for businesses to structure their operations.

Finally, *Wayfair* explained that the physical-presence rule's flaws had become "all the more egregious and harmful" in an age of online commerce. *Id.* at 2097. In a world where much of modern business is conducted through "virtual presence," the Court explained, it makes little sense to insist on a merchant's physical presence as a precondition to tax liability. *Id.* at 2095. Indeed, even discerning what counted as a physical presence—*e.g.*, what about "cookies saved to the customers' hard drives"?—had become murky. *Ibid.* Once again, *Dilworth* does not implicate those concerns. Goods sold online must still be sent in the physical world; *Dilworth* merely prevents a state from taxing (and regulating) those sales when they are fully consummated outside its borders.

II. STATE COURTS ARE DIVIDED ABOUT *DILWORTH*

Including the decision below, there is a 4-2 split among state high courts about whether *Dilworth* remains good law. But that significantly understates the confusion: State lower courts have divided in similar ways—sometimes even questioning rulings from their own supreme courts.

1. Courts of last resort in Ohio, New York, Michigan, and South Dakota continue to apply *Dilworth*, including in the face of arguments that its rule has been supplanted by the *Complete Auto* test.

In *Sears, Roebuck & Co.* v. *Lindley*, 436 N.E.2d 1029 (Ohio 1982) (per curiam), Ohio sought to impose a sales tax on advertising supplements that were ordered, printed, and paid for out of state, and for which title passed out of state. *Id.* at 1031. Based on those facts, the Supreme Court of Ohio held that the State could not tax the sales because "no taxable event, *i.e.*, the transfer of title or the transfer of possession, occurred in Ohio and, if a tax was due, it certainly was not a sales tax." *Ibid.*

In so holding, the court "categorically reject[ed]" Ohio's argument that "the style of the assessment as a 'sales' rather than a 'use' tax is a technical defect in light of the complementary nature of the two taxes." *Id.* at 1032. Citing *Dilworth*, the court explained that "the style of the assessment as a sales tax rather than a use tax" was no mere "technicality." *Ibid.* "While the sales and use tax[es] … are complementary," the court noted, "they are not interchangeable." *Ibid.*

In *Bloomingdale Brothers, Division of Federated Department Stores, Inc.* v. *Chu*, 513 N.E.2d 233 (N.Y. 1987), New York attempted to impose a sales tax on "a non-New York resident's out-of-State purchase of a gift from a store," where "at the customer's request, the store arrange[d] to have the gift delivered by common carrier, to the ultimate intended recipient in New York." *Id.* at 233. The Court of Appeals held that New York could not tax such out-of-state transactions. Citing *Dilworth*, the court explained that the transactions, having "tak[en] place wholly within another State—from the time of contract to the delivery of the goods to a common carrier, at which time the sale was completed and the purchasers exercised control over the merchandise—are not subject to New York's sales tax." *Id.* at 234. The court thus rejected the argument that "the distinction between sales taxes and use taxes drawn by the majority of a divided Supreme Court in *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944) … is no longer significant for commerce clause purposes" because it "has since been specifically repudiated" by the *Complete Auto* test. *Bloomingdale Brothers, Division of Federated Department Stores, Inc.* v. *Chu*, 505 N.Y.S.2d 258, 262 (N.Y. App. Div. 1986) (Levine, J., dissenting).

In ruling that New York could not impose its *sales* tax, the Court of Appeals emphasized that such "out-of-State purchases resulting in New York use of tangible personal property are subject to the *use* tax," which

"complements the sales tax" by "tax[ing] uses which have not and will not be the subject of sales tax." *Bloomingdale Brothers*, 513 N.E.2d at 235 (emphasis added). But the State's use tax did not apply to the gifts at issue, the court explained, because New York law limits the rate of taxation for "use by donees of gifts." *Ibid.* The State Taxing Commission was thus attempting to "avoid the limitations of the use tax" by instead taxing the sales themselves. *Ibid.* The court rejected that gambit as "inconsistent with the Legislature's stated intent to tax use only by *purchasers* of out-of-State articles." *Ibid.*

In *World Book, Inc.* v. *Revenue Division*, 590 N.W.2d 293 (Mich. 1999), Michigan sought to impose a sales tax on World Book, a Delaware corporation that shipped encyclopedias "from [its] inventory in Illinois to the customer [in Michigan] by common carrier." *Id.* at 295. Michigan asserted that, because World Book had "engage[d] in 'sufficient local activity' in Michigan, its sales c[a]me within the purview of the [State's] General Sales Tax Act, regardless of where they occur[ed]." *Id.* at 296.

The Supreme Court of Michigan disagreed, "hold[ing] that the correct test for deciding whether a sales transaction is subject to a sales, not a use, tax is whether it was consummated within the state." *Id.* at 297. World Book's sales were not subject to tax in Michigan, the court explained, because they were "consummated" in Illinois: "the purchase applications were approved in Illinois," and "title to the encyclopedias was transferred to the Michigan purchasers in Illinois when [World Book] placed them on a common carrier for shipment." *Id.* at 298. Under those facts, World Book "was 'through selling' the encyclopedias when it approved the transactions in Illinois and loaded the encyclopedias onto a common carrier for shipment." *Ibid.* (quoting *Dilworth*).

In *State* v. *Dorhout*, 513 N.W.2d 390 (S.D. 1994), the South Dakota Supreme Court upheld the State's right to

tax sales made by an Iowa-based farm-implement dealership into South Dakota. *Id.* at 391. The dealership's owner contested the assessment, arguing that "if he was liable to [the] Department for any tax, it was a use tax, not a sales tax." *Ibid.* But the Supreme Court of South Dakota disagreed, explaining that "a sales tax and a use tax are 'assessments upon *different* transactions.'" *Id.* at 393 (quoting *Dilworth*, 322 U.S. at 330). Because the sale was "consummated" within South Dakota—since "title passe[d]" within the State—that transfer of ownership "constituted the taxable event which … triggered South Dakota sales tax." *Id.* at 393–94.

2. Besides the court below, one other state court of last resort has held that *Dilworth* is no longer precedential. In *Baker & Taylor, Inc.* v. *Kawafuchi*, 82 P.3d 804 (Haw. 2004), a Delaware corporation based in North Carolina (Baker & Taylor) disputed its tax liability for sales that it had made to Hawai'i customers in which "title to the property sold passed to [the purchaser] outside of Hawai'i." *Id.* at 806. Relying on *Dilworth*, Baker & Taylor argued that "imposition of the tax would violate the Commerce Clause of the United States Constitution." *Ibid.* The Supreme Court of Hawai'i disagreed. Since Baker & Taylor's "representatives [had] made frequent visits to Hawai'i," the court held, the corporation had "conducted sufficient activity within the state to subject it to [Hawai'i's] taxing jurisdiction," even though "title to the goods passed out-of-state." *Id.* at 813 (emphasis omitted).

The Hawai'i Supreme Court further ruled that *Dilworth* was not "determinative," for two reasons. *Id.* at 815. First, the court stated that *Dilworth* "was decided at a time when the Supreme Court had held that state taxes on interstate commerce were per se unconstitutional," but *Complete Auto* "expressly overruled" cases relying on *Dilworth* for that proposition. *Ibid.* That reasoning echoes the majority in this case, which argued that *Complete*

Auto "wholly abandoned the free trade theory" on which *Dilworth* supposedly rested. App. 14a.

Second, the Hawai'i Supreme Court held that the *Dilworth* rule did not apply because Baker & Taylor's "situation … did not involve mere solicitation and a sale that was final as the goods were transferred to a common carrier," but rather "an ongoing, long-term contract … that required sales representatives to frequently meet with" their Hawai'i customers. 82 P.3d at 815. For similar reasons, the court rejected application of *World Book*'s holding that "the passing of title [w]as determinative of whether a sale took place within the state for purposes of a sales tax." *Ibid.* Regardless whether "title passed" within Hawai'i, the court concluded, Baker & Taylor could be taxed on its out-of-state sales based "on its activities within Hawai'i." *Id.* at 816.

The Hawai'i Supreme Court thus held that sales "consummated" outside Hawai'i are nevertheless taxable by the State, so long as the seller conducts sufficient in-state "activities." *Id.* at 815–16 (quotation marks omitted). The court's holding mirrors the *Dilworth* dissenters, who argued that Arkansas should be allowed to tax sales made in Tennessee in light of the "the Arkansas activities of the Tennessee sellers." 322 U.S. at 332 (Douglas, J., dissenting). That argument is irreconcilable with *Dilworth*'s bright-line rule that a state simply has "no power to exact a sales tax" on sales "consummated" beyond its borders. *Id.* at 328.

3. The dispute over *Dilworth*'s continued vitality is not confined to state supreme courts; lower state courts and state agencies have also reached divergent conclusions. These lower court and administrative rulings have outsized effects. Because "a State need not provide predeprivation process for the exaction of taxes," most states (including North Carolina) require a taxpayer to pay the disputed tax *before* seeking a refund, and many "employ

various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment." *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990). As a result, most taxpayers have no real choice but to acquiesce to an adverse ruling, without the opportunity to fully pursue their claims all the way to the state supreme court—much less to this Court.

Most lower courts continue to apply *Dilworth* in assessing the constitutionality of taxes imposed on sales consummated outside the state. See, *e.g.*, *TA Operating Corp.* v. *Dep't of Revenue*, 767 So. 2d 1270, 1271, 1275 (Fla. App. 2000) (citing *Dilworth* for the proposition that Georgia could not tax the sale of fuel that took place in Florida because title to the fuel passed in Florida); *Media Graphics, Inc.* v. *Director, Div. of Taxation*, 7 N.J. Tax 23, 27 (1984) (citing *Dilworth* for the proposition that "imposition of a sales tax is not violative of the Commerce Clause when the sale takes place within the taxing jurisdiction"); *South Tex. Chlorine, Inc.* v. *Bullock*, 792 S.W.2d 275 (Tex. App. 1990) (citing *Dilworth* in concluding that Texas could not impose a sales tax on company's purchases of containers from out-of-state vendors).

State tax agencies are largely in accord. See, *e.g.*, Okla. Tax Comm'n, No. 90-11-15-14 (Nov. 15, 1990) (holding, under *Dilworth*, that Oklahoma oculist's purchase of goods from out-of-state vendors was not subject to Oklahoma sales tax because the out-of-state vendors were "through selling" in the state of their home offices); Tenn. Dep't Rev., Letter Ruling No. 99-14 (May 7, 1999) (determining that, under *Dilworth*, Tennessee could apply a sales tax to goods where the seller transferred products to the purchaser's carrier in Tennessee); Georgia Tax Tribunal, No. TAX-IIT-1340253 (Feb. 11, 2015) ("Under well-settled constitutional jurisprudence, the states

cannot impose sales tax on sales occurring in interstate commerce. *McCleod v. J.D. Dilworth Co.*, 322 U.S. 327 (1944). So in order to tax purchases that arise from sales occurring in interstate commerce, Georgia imposes a complementary use tax on the first incidence of use within the state of property purchased in interstate commerce.").

Some lower courts, however, have questioned *Dilworth*'s continuing vitality, sometimes even where a court of last resort in that state had relied on *Dilworth* after *Complete Auto* was decided. The Ohio Court of Appeals, for example, recently upheld the imposition of a commercial-activities tax on a Georgia corporation's sales to Ohio purchasers, notwithstanding that "title to the goods passe[d] in Georgia." *Greenscapes Home & Garden Prods.* v. *Testa*, 129 N.E.3d 1060, 1062–63, 1071 (Ohio App. 2019). In upholding the assessment, the court deemed the corporation's "reliance on [*Dilworth*] misplaced" because *Dilworth* "was decided at a time when the Supreme Court had held that state taxes on interstate commerce were per se unconstitutional." *Id.* at 1071. According to the court, "the U.S. Supreme Court overruled this line of cases" in *Complete Auto*, as made clear by *Wayfair*'s failure to "question South Dakota's authority to tax the transaction" at issue there. *Id.* at 1071–72; see, *e.g.*, *Dep't of Revenue* v. *Care Computer Sys.*, 4 P.3d 469, 471 (Ariz. Ct. App. 2000) (rejecting *Dilworth* argument because *Complete Auto* "explicitly rejected the formalistic Commerce Clause doctrine" reflected there).

The disagreement about *Dilworth* is not limited to state judiciaries. Even different branches of the *same* state government have staked out different positions. For instance, in *Bloomingdale Brothers*, New York's Court of Appeals expressly held that *Dilworth* prohibited the State of New York from imposing a sales tax on a transaction "taking place wholly within another state." 513 N.E.2d at 234. But in the proceedings below in this case, the

Attorney General of New York joined a multi-state amicus brief arguing that the *Dilworth* rule "has long been rejected." Br. for D.C. et al. as *Amici Curiae* Supporting Appellant at 3, *Quad Graphics* (N.C. 2022).

III. THE QUESTIONS PRESENTED MERIT REVIEW IN THIS CASE

A. *This Court's Intervention Is Needed Now*

1. Few issues matter as much to the integrity of our federalist system as the sanctity of this Court's precedents. Vertical *stare decisis* "is both wise and necessary: it promotes consistency and predictability while discouraging adventurous second-guessing by widely dispersed subaltern judges." Bryan Garner et al., *The Law of Judicial Precedent* 30 (2016). Allowing lower courts to disregard "a precedent of this Court," on the ground that its reasoning appears to them to be outdated, would invite "anarchy." *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982). Under such circumstances, caselaw becomes "not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them." *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 112 (1944) (Roberts, J., dissenting).

For that reason, the questions presented by this case cannot wait. Percolation is a virtue when it allows lower courts to examine new legal questions and contribute to this Court's understanding of them; it is a vice when it erodes this Court's authority over its own precedents. See, *e.g.*, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 728 (1984) ("The Supreme Court should hear cases in which a lower court has disregarded authoritative Supreme Court precedent squarely on point. … [T]here is no clear benefit in awaiting further percolation."). No good can come from allowing lower courts to decide for themselves whether

this Court's cases have been "implicitly overrule[d]." App. 15a.

2. The questions presented are also enormously important for taxpayers and tax collectors alike.

The majority below dismissed the "*Dilworth/General Trading* dichotomy" between sales and use taxes as "a formalistic distinction that turned upon legal draftsmanship as opposed to differences in … practical effect." App. 14a. Even if the distinction were purely "semantic," of course, that would not justify ignoring the State's choice to impose a sales rather than use tax, for "words are how the law constrains power." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1486 (2021). "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Ibid.*

But in fact, the distinction is *not* purely semantic. State legislatures sometimes choose to tax sales and uses differently. In *Bloomingdale Brothers*, for instance, the New York Legislature had excluded "use by donees of gifts" from the State's use tax. 513 N.E.2d at 235. The State Taxing Commission thus tried to "avoid [such] limitations of the use tax" by instead taxing the out-of-state sales themselves, a ploy that the Court of Appeals rejected as "inconsistent with the Legislature's stated intent." *Ibid.* In other words, while legislatures *may* impose equivalent sales and use taxes, they are not *required* to do so. And when they opt to treat them differently, respecting "the Legislature's stated intent" requires faithful application of the *Dilworth* rule.

Even when sales and use taxes are assessed at the same rate, moreover, they may operate according to different background principles. For example, municipalities often issue bonds "secured by future revenue streams" from "dedicated sales taxes—not use taxes." Richard D. Pomp, *Is* Quad Graphics *Decision Innocuous*

or a Jurisprudential Threat?, Bloomberg Tax (Jan. 25, 2023), http://bit.ly/3StaA2v. And taxing jurisdictions can typically levy a sales tax on those selling to the federal government or to Native American tribes, but they typically *cannot* assess an equivalent use tax on the same transactions because of these entities' sovereign immunity. See *United States* v. *New Mexico*, 455 U.S. 720, 733–34 (1982); *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458–59 (1995).

States, municipalities, and other taxing jurisdictions accordingly need clarity about whether *Dilworth* remains precedential in order to know what kinds of taxes they can assess on what kinds of conduct. Individuals and businesses likewise need to know how to structure their activities to comply with the sales-tax rules of over 10,000 different jurisdictions (and counting). See *Wayfair*, 138 S. Ct. at 2103 (Roberts, C.J., dissenting). Indeed, counsel for the North Carolina Department of Revenue stressed during oral argument below that while "a lot of this stuff can seem obscure … it really is quite important." Oral Arg. 12:39–46, *Quad Graphics* (N.C. 2022). The State's amici agreed, emphasizing the need to resolve "uncertainty" regarding *Dilworth*'s continued vitality. Br. for D.C. et al. as *Amici Curiae* Supporting Appellant at 4, *Quad Graphics* (N.C. 2022). But the decision below only created *more* uncertainty; this Court alone can provided the nationwide clarity that should be the watchword of tax law.

3. The *Dilworth* rule also serves important interests of political accountability. Sales and use taxes, by virtue of being "assessments upon different transactions," *Dilworth*, 322 U.S. at 330, have different political valences: Sales taxes are often seen as taxes on businesses; under a use tax, by contrast, "[t]he exaction is made against the ultimate consumer—the [in-state] resident who is paying taxes to sustain his own state government." *General Trading*, 322 U.S. at 338. Elected officials thus face

incentives to impose sales taxes on out-of-state businesses rather than use taxes on their own voters.

Moreover, as noted above (and per Justice Scalia), the anti-extraterritoriality principle on which *Dilworth* rests is equally applicable to state attempts to *regulate* out-of-state sales. See *Quill*, 504 U.S. at 319 (Scalia, J., concurring in part and in the judgment). State laws that impose local values—and regulatory burdens—on sales by out-of-state businesses "may be attractive to legislators and a majority of their constituents for precisely this reason." *Comptroller of Treasury of Maryland* v. *Wynne*, 575 U.S. 542, 555 (2015).

B. *This Case Is an Ideal Vehicle*

This case presents an ideal vehicle to take up the issue of *Dilworth*'s continued vitality.

First, the parties have "stipulated" to a record that reflects all relevant facts. App. 6a. As both courts below highlighted, "[t]he facts of this case are neither particularly complicated nor in dispute." App. 3a; see App. 47a (similar). Indeed, the North Carolina Supreme Court summarized those facts in a single paragraph—most notably that "possession, legal title, and risk of loss for any ordered materials passed from petitioner to its customers when those materials were delivered to carriers outside of North Carolina." App. 4a.

Second, in light of the undisputed facts, all agree that the dispositive issue is "whether *Dilworth* remains controlling precedent." App. 3a. Both the majority and dissent below thus described *Dilworth*'s applicability as the "sole question" to be addressed. App. 9a; see App. 40a (Berger, J., dissenting) ("As the trial court correctly noted, resolution of this case is determined by [the] response to one question: 'is the holding in *Dilworth* the controlling law.'").

Finally, this case starkly illustrates the constitutional issue presented: For following this Court's precedent, Quad Graphics was not merely assessed an unconstitutional *tax*, but also hit with $970,896 in *penalties*. See ROA R_000027. Taxpayers should not have to speculate whether state courts will ignore directly-on-point U.S. Supreme Court precedent, with million-dollar penalties for those who guess wrong. See *Quill*, 504 U.S. at 321 (Scalia, J. concurring in part and in the judgment) ("It is my view, in short, that reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance"). As this Court recently explained, "the Due Process Clause's promise [is] that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner* v. *United States*, — S. Ct. —, — (2023) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). Surely this Court's precedents can be relied upon to provide such "fair warning."

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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