No. 22-890

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

BRIEF FOR NORTH CAROLINA CHAMBER LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The North Carolina Chamber Legal Institute ("NCCLI") is a North Carolina nonprofit corporation organized to enable those interested in improving North Carolina's business and economic development climate to promote their common interests. NCCLI accomplishes this goal by, among other things, challenging those aspects of the state's legal environment and legal system that threaten its business climate, including through advocacy in state and federal courts.

In this case, NCCLI is concerned that the actions of the North Carolina Department of Revenue (the "Department") and the decision of the North Carolina Supreme Court, if allowed to stand, will undermine this Court's exclusive power to determine the fate of its own precedents, introduce uncertainty and instability into the legal system and encourage adventurism by courts and administrative agencies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The North Carolina Supreme Court's decision is a direct challenge to this Court's explicit instructions to lower courts to respect Supreme Court precedents no matter how uncertain they may have become until officially overturned by this Court. *See*

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity – other than amicus curiae and its counsel – made a monetary contribution intended to fund the preparation or submission of this brief. This brief is being filed earlier than ten days before its due date in satisfaction of the notice required by Supreme Court Rule37.2

Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

This case involves an attempt by the Department to impose North Carolina's sales tax on sales occurring outside the state, a practice expressly forbidden by this Court's holding in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944). That decision held that the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, prohibits a state from taxing sales beyond its borders. For a state to tax out-of-state sales "would be to project its powers beyond its boundaries" and assume a power "which the Commerce Clause was meant to end." 322 U.S. at 330. This Court has never disavowed *Dilworth*.

Notwithstanding this directly controlling precedent, the Department assessed a sales tax on Petitioner's sales to North Carolina customers that occurred entirely outside the state.

Petitioner appealed the assessment to the North Carolina Office of Administrative Hearings, where an administrative law judge upheld the assessment without mentioning *Dilworth*.

Petitioner appealed the administrative law judge's decision to the North Carolina Business Court, a special division of the state's Superior Court assigned to hear complex business cases, including cases involving material tax issues. *See* N.C. Gen. Stat. §§ 7A-45.3 and 7A-45.4. The Business Court conducted a lengthy analysis and held that *Dilworth* "remains the law of the land. Absent contrary authority from the United States Supreme Court, the Court concludes that principles set forth in *Dilworth* are controlling." *Quad Graphics, Inc. v. North Carolina Department of Revenue*, No. 20 CVS 7449,

2021 WL 2584282, at *15 (N.C. Super. Ct. June 23, 2021). The Business Court therefor reversed. *Id.*

The Department appealed the Business Court decision to the North Carolina Supreme Court. That court reversed the Business Court and held that *Dilworth*, though never actually overruled, had not "survived" this Court's later decisions in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018). *Quad Graphics, Inc. v. North Carolina Department of Revenue*, 881 S.E.2d 810, 829 (N.C. 2022). As a result, according to the court, the Commerce Clause no longer requires a connection between the location of the sale and the taxing state (a connection referred to as "transactional nexus"). *Id.* at 815, 825.

The Court should grant certiorari in this case to settle once and for all the important question of whether the Commerce Clause continues to require transactional nexus. More importantly, and however the Court may be disposed to decide the nexus question, NCCLI urges the Court to use this case to clearly reiterate its holding in *Rodriguez.*

Since *Rodriguez*, this Court has repeatedly directed the lower federal and state courts to respect and apply controlling Supreme Court precedents no matter how attenuated those precedents may appear to be as a result of later doctrinal developments. The court below admitted that *Dilworth* would directly control this case if it remained good law. The court also never suggested that *Dilworth* had been expressly disavowed by this Court. It nevertheless treated the decision as having been "implicitly" overturned by later decisions of this Court that evidenced a "disassociat[ion]" from the doctrine that

underlay *Dilworth. Quad Graphics, Inc.*, 881 S.E.2d at 817–18. This is exactly what *Rodriguez* forbade.

Failure to address the North Carolina Supreme Court's challenge will seriously erode this Court's authority, the integrity and good order of the legal system and Constitutional protections against administrative overreach.

Requiring state appellate courts to respect Supreme Court precedents until this Court clearly disavows them is essential to our Constitutional order. Permitting state courts to decide for themselves when this Court's prior decisions are sufficiently attenuated to be disregarded would threaten the uniform application of federal law across the county.

Respect for this Court's precedents also is essential to an orderly and efficient judicial system. Licensing lower courts to speculate as to whether Supreme Court precedents remain valid would effectively upend our judicial hierarchy. This Court would find its time consumed with policing the lower state and federal courts.

A policy of tolerating such speculation would be inherently subject to abuse, as lower courts could easily exaggerate the extent to which a prior decision of this Court was infected with doubt in order to rationalize a desired result.

Even when acting with utmost good faith, the lower courts would be required to entertain arguments about the implicit decay of older decisions and to predict whether this Court would continue to honor them.

Allowing lower courts to speculate on these questions also would deprive this Court of the

important prerogative of deciding not only *whether* but *when* to disavow older decisions.

Tolerating a less than strict adherence to Supreme Court precedent by state courts will encourage adventurism by state administrative agencies to probe older precedents in the hope that sympathetic state courts will find a way to rationalize those precedents into premature desuetude. The result would be a significant weakening of Constitutional protections against state administrative overreach.

While proponents of anticipatory overruling have defended the practice as a means to achieve justice expeditiously, such considerations are absent in this case. The Department ignored *Dilworth* and, either deliberately or through negligence, sought to collect a sales tax against Petitioner rather than collecting a use tax from Petitioner's North Carolina customers. The Department created this controversy and would not suffer any injustice if *Dilworth* is applied.

Finally, if anticipatory overruling is ever to be tolerated in defiance of the prudential considerations that militate against it, the practice should be limited to those rare and extraordinary cases where the precedent to be ignored is admitted to be enervated by a universal or near-universal consensus. *Dilworth* is not such a precedent. The court below ignored important arguments in favor of its continuing vitality, and there is no judicial or academic consensus that it is dead.

ARGUMENT

I. THIS COURT HAS FORBIDDEN ANTICIPATORY OVERRULING

The doctrine of "anticipatory overruling," or "overruling from below," is viewed by its adherents as an exception to the fixed rule that lower courts must always adhere to the decisions of higher courts. *See generally* John Hotz, Note, *Anticipatory Stare Decisis*, 8 Kan. L. Rev. 165, 167 (1959). Proponents of the practice argue that it is permissible when a lower court predicts the higher court will no longer follow its own prior decision. *See* Margaret Kniffin, *Overruling Supreme Court Precedents: Anticipatory Actions by United States Courts of Appeal*, 51 Fordham L. Rev. 53 (1982) ("On occasion . . . a United States court of appeals predicts that the Supreme Court will no longer follow one of its own precedents and anticipates the action of the Supreme Court by overturning the precedent.").

Anticipatory overruling, especially of this Court's precedents interpreting the federal Constitution, has always been a rare occurrence. *See, e.g.*, Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 Conn. L. Rev. 843, 851 (1993). In 1989, this Court expressly forbade the practice. *See Rodriguez de Quijas*, 490 U.S. at 484.

Rodriguez involved a challenge to the validity of the Supreme Court's prior decision in *Wilko v. Swan,* 346 U.S. 427 (1953), which held that agreements to arbitrate claims arising under the Securities Act of 1933 (the "1933 Act") violated that Act's anti-waiver provisions and were unenforceable. In a later case involving an almost identical anti-

waiver provision in the Securities Exchange Act of 1934 (the "1934 Act"), the Court disavowed its reasoning in *Wilko* but did not expressly overrule it. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987).

Rodriguez, like *Wilko*, involved an agreement to arbitrate 1933 Act claims. The federal Court of Appeals predicted the Supreme Court would no longer follow *Wilko* but would instead extend the reasoning of *McMahon* to 1933 Act claims. The court therefore treated *Wilko* as no longer binding. Specifically, the court held that "[w]e thus follow the reasoning of *McMahon* . . . which lead directly to the obsolescence of *Wilko* . . . ." *Rodriguez de Quijas v. Shearson/Lehman Bros., Inc.*, 845 F.2d 1296, 1299 (5th Cir. 1988).

On appeal, this Court overruled *Wilko*, but chastised the lower court for attempting to overrule the decision from below:

> We do not suggest the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative

> of overruling its own decisions.

Rodriguez, 490 U.S. at 484.

Four Justices dissented in *Rodriguez* and would have let *Wilko* stand on *stare decisis* grounds but were even harsher in their criticism of the Court of Appeals, accusing it of engaging in "an indefensible brand of judicial activism." *Id.* at 486. Anticipatory overruling was thus forbidden by a *unanimous* Supreme Court, and even its advocates have conceded its demise. *See generally* C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling,* 59 Fordham L. Rev. 39 (1990).

Rodriguez has been followed by a line of cases requiring the lower courts to respect this Court's decisions no matter how "wobbly" and "moth-eaten" they may be. *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997); *see also, United States v. Hatter*, 532 U.S. 557, 567 (2001) (explaining that "it is this Court's prerogative alone to overrule one of its precedents"); *Hohn v. United States*, 524 U.S. 236, 252–3 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge . . . that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). One commentator has described the state of the law as follows:

> Where a Supreme Court holding applies to a pending dispute, an

> inferior court has only one available course of action. It must issue whatever ruling the holding indicates. There is no room for acting on doubts about the precedent's soundness or making predictions about the Supreme Court's eventual change of heart. An inferior court may not even depart from precedents that the Supreme Court has called into question. Absent a formal overruling, Supreme Court decisions remain indefeasibly binding on all inferior tribunals; finding a precedent to be controlling brings the inquiry to its end.

Randy Kozel, *The Scope of Precedent*, 113 Mich. L. Rev. 179, 203 (2014).

In response to *Rodriguez,* the lower federal courts have renounced any freedom to ignore a Supreme Court precedent, no matter how doubtful its continuing vitality. *See, e.g., United States v. McDowell*, 745 F.3d 115, 124 (4th Cir. 2014) (explaining that despite recent developments, a prior Supreme Court decision "remains good law, and we may not disregard it unless and until the Supreme Court holds to the contrary"); *West v. Anne Arundel*

County, 137 F.3d 752, 760 (4th Cir. 1998) (noting "impropriety of preemptively overturning Supreme Court precedent" and that "any decision to revisit [prior precedent] is not ours to make").

II. *RODRIGUEZ* APPLIES TO STATE APPELLATE COURTS

This Court has applied *Rodriguez* to state appellate courts as well as to the lower federal courts. In *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016), the Court considered a decision of the Oklahoma Court of Criminal Appeals that disregarded the Supreme Court's decision in *Booth v. Maryland*, 482 U.S. 496 (1987). In that case, the Supreme Court had ruled that the Eighth Amendment prohibits presenting two types of testimony to a capital sentencing jury: certain victim impact evidence and the victim's family members' characterizations and opinions of the crime. Four years later, in *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court held that *Booth* was wrong to conclude that the Eighth Amendment prohibited the victim impact evidence. In *Bosse*, the Oklahoma court held that *Payne* had also "implicitly" overruled *Booth's* ban on the family's characterizations and opinions of the crime. On appeal, the Supreme Court noted that the Oklahoma court had acknowledged that *Payne* did not *expressly* overrule *Booth* on the family testimony issue and continued:

> That should have ended its inquiry . . . ; the court was wrong to go further and conclude that *Payne* implicitly overruled *Booth* in its entirety . . . . The Oklahoma Court of

> Criminal Appeals remains bound by *Booth's* prohibition on characterizations and opinion from a victim's family members . . . . unless this Court reconsiders that ban. The state court erred in concluding otherwise.

Bosse, 137 S. Ct. at 2.

Bosse makes it abundantly clear that *Rodriguez's* injunction against anticipatory overruling binds state appellate courts.[2]

III. THE DECISION BELOW IS A CLEAR AND OVERT INSTANCE OF ANTICIPATORY OVERRULING

This case presents the clearest case imaginable of anticipatory overruling. First, the proceedings below acknowledged that *Dilworth* would control the outcome of the case if it remained good law. The Business Court framed the issue thus: "To reach its decision, the Court need only answer one question: is the holding in *Dilworth* the controlling law." *Quad Graphics, Inc.*, 2021 WL 2584282, at *8. On appeal, the North Carolina Supreme Court also framed the issue squarely: "The question we are tasked with answering is whether *Dilworth* remains controlling

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[2] At least one scholar has argued that the Inferior Tribunals Clause (U.S. Const. art I, §8, cl. 9) of the federal Constitution permits the Supreme Court to issue supervisory writs to state courts that ignore Supreme Court precedent in deciding federal questions. *See* James Pfander, *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* 84-87 (2009).

precedent in this case." 881 S.E.2d at 813; *see also id.* at 815 ("The sole question before this Court is whether the holding of the Supreme Court of the United States in *Dilworth* controls the outcome of the case at bar.")

Second, neither the Department nor the North Carolina Supreme Court suggested that *Dilworth* had been expressly disavowed by this Court. The Department argued only that *Dilworth* had only been "implicitly" overruled and "effectively abandoned." 2021 WL 2584282, at * 12. Similarly, the North Carolina Supreme Court said only that *Dilworth* "has not survived." 881 S.E.2d at 829. It reached this conclusion by asserting that this Court had "disassociate[d] its approach" to the Commerce Clause from the approach applied in *Dilworth*, that *Dilworth* was based on an "unsteady foundation," that *Dilworth's* theory of the Commerce Clause had been "abandoned," that it had been "implicitly" overruled, and that it was "superseded" by later cases. *Id.* at 817–19.

The North Carolina Supreme Court thus did exactly what *Rodriguez* and its progeny forbade. It determined that *Dilworth* was "wobbly" and "moth-eaten," *Kahn*, 552 U.S. at 20, that later cases had "raised doubts about [its] continuing vitality," *Hohn*, 524 U.S. at 252–3, and had "by implication, overruled [the] earlier precedent," *Agostini*, 521 U.S. at 237.

The North Carolina Supreme Court attempted to dodge the accusation that it was anticipatorily overruling *Dilworth* by stating that there were no "magic words" required for this Court to overrule its prior decisions and that *Dilworth* had been overruled "implicitly." *Id.* at 818. But this is no different from *Rodriguez*, where the Court of Appeals concluded that

McMahon had led to the "obsolescence" of *Wilko,* or *Bosse*, where the Oklahoma Supreme Court concluded that *Payne* had "implicitly" overruled *Booth.* In short, anticipatory overruling does not depend on the use of any "magic words." The court was clearly doing nothing more that attempting to predict what this Court would do if it revisited *Dilworth*. *See id.* at 819 ("[W]e can confidently look to the application by the Supreme Court of the United States of the *Complete Auto* test to a materially identical tax regime . . . to guide our analysis."). That is the very definition of anticipatory overruling. Once the court had determined that *Dilworth* controlled and had not been overturned "[t]hat should have ended its inquiry." *Bosse*, 137 S. Ct. at 2. What the court was doing was not lost on the dissent, which would have relied on *Rodriguez* to uphold the Business Court decision "because this Court is not permitted to disregard the Supreme Court's interpretation of the Commerce Clause and the federal Constitution." *Quad Graphics*, 881 S.E. 2d at 383 (Berger, J., dissenting).

Even while it claimed not to be engaging in anticipatory overruling, the North Carolina Supreme Court compounded its affront to this Court by stating frankly that it *would* engage in anticipatory overruling if necessary to get to the result it thought was correct.

> We are in the fortuitous [sic] position of not having to discern whether *Dilworth* was automatically retained within the Supreme

> Court's decision in *Complete Auto* or *whether we were compelled to engage in anticipatory overruling* of a federal precedent whose underlying logic has been abandoned but whose direct holding has never been specifically readdressed.

Id. at 818–19 (emphasis added). In other words, the court apparently reached a conclusion that *Dilworth* should not stand in the way of the Department's power to tax an out-of-state sale. After spending twenty pages of its opinion arguing that later cases had "effectively" overruled *Dilworth,* the court made clear that if its analysis of those later cases had gone the other way, it would have been "compelled to engage in anticipatory overruling" of *Dilworth*. *Id.*

IV. THE PROHIBITION OF ANTICIPATORY OVERRULING IS BASED ON SOUND POLICY

Important prudential considerations counsel respect for this Court's exclusive prerogative to determine the status of its own precedents. *See generally*, Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* 46 Stan. L. Rev. 817, 839–856 (1994); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 595–602 (1987).

Most importantly, anticipatory overruling threatens the uniform application of the law across the country. The Constitution granted the United States Supreme Court appellate jurisdiction over

state Supreme Court decisions on federal questions because of "the importance, and even the necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-8 (1816) (Story, J.) (emphasis in original). Permitting state Supreme Courts to treat a controlling precedent of this Court on a Constitutional matter as a dead letter, would run the same risk.

Respecting the Supreme Court's prerogative to police its own decisions also helps to maintain an orderly system of adjudication. This Court has stated that permitting lower courts to second guess the validity of its precedents would lead to "anarchy" within the judicial system. *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *see also United States v. Silverman*, 166 F. Supp. 838, 840 (D. D.C. 1958), *rev'd on other grounds*, 365 U.S. 505 (1961) (warning that anticipatory overruling would lead to a "chaotic situation"); *Family Sec. Life Ins. Co. v. Daniel*, 79 F. Supp. 62, 69 (E.D.S.C. 1948), *rev'd on other grounds,* 336 U.S. 220 (1949) (warning that anticipatory overruling "would bog down the judicial processes . . . in . . . quagmires of uncertainty" and "lay the District Courts open to the gravest public censure"); *N. Virginia Reg'l Park Auth. v. U.S. Civ. Serv. Comm'n*, 437 F.2d 1346, 1350 (4th Cir. 1971) ("Firmness of precedent otherwise could not exist."); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting) (anticipatory overruling would cause "the administration of justice [to] fall into disrepute"); *see generally* Kniffin, *supra,* at 82–83; Caminker, *supra*, at 866.

Anticipatory overruling is also inherently subject to abuse. Inferior courts could easily avoid inconvenient authority "by stretching to circumvent disfavored Supreme Court precedents based on rather flimsy evidence that the Court might overrule them itself." Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 72 (1994); *see also* Kniffin, *supra*, at 85.

Putting aside the potential for abuse, anticipatory overruling suffers from requiring a superhuman predictive capacity. Any undertaking to predict the fate of a precedent at the Supreme Court "would likely amount to no more than a bold but unfruitful venture in speculation." *United States v. Caldwell*, 543 F.2d 1333, 1369–70 (D.C. Cir. 1974).

Even if a lower court could predict with certainty how this Court would treat its own prior decision, "it is the prerogative of the Supreme Court to decide not only whether, *but when*, it will overturn a precedent." Kniffin, *supra*, at 86 (emphasis added). Anticipatory overruling deprives this Court of this important prerogative.

Finally, tolerating anticipatory overruling of this Court's precedents would present a serious threat to Constitutional safeguards against administrative overreach. Where this Court has forbidden a state tax or regulatory practice as unconstitutional, it must be able to rely on the lower courts to enforce that prohibition. This reliance will be lost if lower courts feel free to disregard a precedent of this Court on such vague and arguable grounds that it has been "implicitly overruled," "effectively abandoned" or "superseded," that it has "not survived," that it has

been "disassociated" from modern trends, or that it rests on an "unsteady foundation." This in turn will encourage state administrative agencies to constantly probe existing precedents for doctrinal weakness and to anticipate a sympathetic hearing from their colleagues in the state judiciary. Only a tiny fraction of these cases will ever be subject to review by this Court, and our Constitutional protections against overreaching state administrative power will be seriously diminished.

V. THERE IS NO JUSTIFICATION FOR ANTICIPATORILY OVERRULING *DILWORTH*

Two justifications traditionally have been cited for anticipatory overruling: providing justice to a litigant at the lowest judicial level possible and spurring higher courts to rethink their own precedents. *See, e.g.*, Kniffin, *supra*, at 75; Caminker, *Precedent and Prediction*, *supra*, at 860; Maurice Kelman, *The Force of Precedent in the Lower Courts*, 14 Wayne L. Rev. 3 (1967).

In this case, the North Carolina Supreme Court was not required to disregard *Dilworth* to prevent injustice to the Department. The Department simply had assessed a sales tax when it should have assessed a use tax. The statutory machinery for collecting the use tax on transactions like those at issue has been on the North Carolina statute books for many decades. If the Department had assessed the correct tax from the beginning, this entire proceeding could have been avoided. Indeed, justice required that the North Carolina Supreme Court respect *Dilworth.* The taxpayer in this case no doubt had structured its arrangements to fall within the scope of that

precedent and should not have been required to spend further time and resources warding off the Department's attempts to salvage an improper procedure.

Disregarding *Dilworth* also was not necessary to encourage this Court to rethink that decision. If the North Carolina Supreme Court believed *Dilworth* should be overturned, it could have said so in an opinion that nevertheless respected *Dilworth's* existing vitality.

VI. THE NORTH CAROLINA SUPREME COURT IGNORED EVIDENCE OF *DILWORTH'S* VITALITY

Anticipatory overruling "ought not even to be considered" if there is "any significant uncertainty" as to how the Supreme Court will act." Kniffin, *supra*, at 80. The North Carolina Supreme Court reached its conclusion that *Dilworth* "has not survived" by engaging in a selective review of authority that ignored evidence of *Dilworth's* health. This includes evidence internal to the *Complete Auto* and *Wayfair* decisions and external evidence from other state courts and scholarly commentary. In short, the rumors of *Dilworth's* death have been greatly exaggerated.

A. Internal Evidence

1. *Complete Auto*

The court below argued that *Complete Auto* had rejected two premises on which *Dilworth* was said to rest: the "strict formalism" of a distinction between a sales tax and a use tax and the "free trade" theory of the Commerce Clause, later enshrined in *Spector*

Motor Serv. v. O'Connor, 340 U.S. 602 (1951). *Quad Graphics, Inc.*, 881 S.E.2d at 817.

However, the distinction between the sales tax and the use tax is not merely formal. The North Carolina Supreme Court has repeatedly stressed that the two taxes differ in conception and are assessments on distinct taxable events. *See Atwater-Waynick Hosiery Mills, Inc. v. Clayton*, 151 S.E.2d 574, 576 (N.C. 1966); *In re Assessment of Additional N.C. & Orange County Use Taxes*, 322 S.E.2d 155, 158–59 (N.C. 1984). Even if the distinction were treated as merely formal, the formalism is one of the state's own making. The state enacted the two taxes and created the statutory machinery for enforcing them. The Department could have asserted a use tax on the in-state purchasers of the taxpayer's property but chose to assert the sales tax instead. Refusing to give undue weight to formalistic labels does not justify freeing a state agency from respecting distinctions enacted by its own state legislature. As the dissent below noted, "[c]ontrary to the facts in *Wayfair*, it is the Department's choice of tax, and not Quad Graphics' effort to avoid taxes, that brings this constitutional quandary before this Court." *Quad Graphics*, 881 S.E. 2d at 386 (Berger, J., dissenting).

As to the free trade theory, it is true that *Complete Auto* rejected that theory and expressly overruled *Spector Motor*. *See* 430 U.S. at 288–89. But *Complete Auto* never mentioned *Dilworth,* and the court below offered no explanation why *Dilworth* should be assumed to have been overturned *sub silentio* when the Court took pains to overturn *Spector Motor* expressly. Moreover, the fact that *Complete Auto* restated the substantial nexus

requirement while simultaneously overturning *Spector Motor* demonstrates clearly that the nexus requirement is independent of the free trade theory.

Any doubt that *Dilworth* survived *Complete Auto* is dispelled by the fact that this Court cited *Dilworth* in *National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 558 (1977), just one month after deciding *Complete Auto,* and has continued to cite the case in the decades since. In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995), for instance, the Court restated the *Dilworth* rule prohibiting taxation of out-of-state sales in applying the *Complete Auto* test to the taxation of interstate bus service. *See also, e.g., Associated Indus. of Mo. v, Lohman*, 511 U.S. 641, 650 (1994). The decision below ignores this.[3]

2. *Wayfair*

The court below argued that this Court's decision in *Wayfair* "supersedes *Dilworth*," because both cases involved a sales tax. *Quad Graphics, Inc.*, 881 S.E.2d at 819. However, the sole issue in *Wayfair* was whether the Commerce Clause required the taxpayer to have a physical presence in the taxing state. The Court never discussed the issue of transactional nexus, and *Dilworth* was not relevant to the physical presence issue. Indeed, rightly or wrongly, the parties had stipulated that the sales at issue were consummated in South Dakota. 138 S. Ct. at 2092. As one commentator summarized:

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[3] *See also* Hayes Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 Md. Law Rev. 1, 18 (2019) ("the transactional nexus requirement was alive and well" after *Complete Auto*).

> [A] more conservative reading of the *Wayfair* decision indicates that the case is properly viewed solely as a personal nexus case, leaving intact the transactional nexus jurisprudence and the *Dilworth/General Trading Co.* dichotomy. The parties did not raise or brief the transactional nexus issue, and the Court did not raise it *sua sponte* during any of the proceedings. The issue is not directly mentioned in the decision. Referring to use taxes as sales taxes is a common colloquial practice. Lower court decisions have continued to rely on the historical transactional nexus doctrine, and *Wayfair's* indirect references to any transactional nexus issues in the case do not engage with the historical doctrine.

Holderness, *supra* note 3, at 24. If the Court in *Wayfair* had intended to overturn *Dilworth*, it could have done so, just as it expressly overruled *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298

(1992). However, as the court below noted, it overturned these case "without ever addressing *Dilworth*." 881 S.E.2d at 821. It is more logical to assume that by failing to address *Dilworth* while specifically overturning *Quill* and *Bellas Hess,* the Court intended to preserve *Dilworth* than it is to assume the opposite. In any event, the Court should not be treated as having eliminated a Constitutional protection for interstate commerce when the issue was neither briefed nor argued nor squarely addressed in the Court's decision. As the dissent below put it, "[n]otably, the Supreme Court in *Wayfair* only addressed personal nexus. The Court did not address the transactional nexus – leaving that aspect of *Dilworth* undisturbed." *Quad Graphics*, 881 S.E. 2d at 385 (Berger, J., dissenting).

B. External Evidence

Conceding, *arguendo* and *contra* this Court's own statement, that some precedents may be so "moth-eaten" that they can be safely disregarded by lower courts, the prudential arguments against overruling from below counsel extreme caution. If a precedent of this Court is to be disregarded, there should be a near unanimous consensus that it is no longer valid. While some precedents could perhaps be posited as meeting this standard, *Dilworth* is not one of them.

Most obviously, the conflicting decisions of North Carolina's Business Court and Supreme Court and the split decision at the North Carolina Supreme Court perfectly illustrate the lack of consensus regarding *Dilworth's* validity within the North Carolina judiciary.

There also is no consensus on the status of *Dilworth* among state supreme courts. Although the decision below is the only state supreme court decision to have revisited *Dilworth* since the *Wayfair* decision, a majority of state high courts that have considered the impact of *Complete Auto* on *Dilworth* have held that *Dilworth* lives. *See, e.g., Sears, Roebuck & Co. v. Lindley*, 436 N.E.2d 1029 (Ohio 1982), *Bloomingdale Brothers, Division of Federated Department Stores, Inc. v. Chu*, 513 N.E.2d 233 (N.Y. 1987), *Worldbook, Inc. v. Revenue Division*, 590 N.W.2d 293 (Mich. 1999), *State v. Dorhout*, 513 N.W.2d 390 (S.D. 1994); *but see Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804 (Haw. 2004).

In addition, there is no scholarly consensus that either *Complete Auto* or *Wayfair* undermined *Dilworth's* transactional nexus requirement. As one prominent scholar explained "*Wayfair* leaves the transactional nexus doctrine in a vague state." Holderness, *supra* note 3, at 24; *see also* Breen M. Schiller and Daniel L. Staley, *The Reemergence of Transactional Nexus*, 40 J. St. Tax'n 7, 10 (2021) ("transactional nexus appears to be intact").

The lack of consensus that *Complete Auto* and *Wayfair* drained the life out of *Dilworth* has practical as well as intellectual significance. In the absence of a consensus that *Dilworth* is dead, taxpayers like Petitioner rationally continue to structure their operations and fulfill their state tax compliance obligations on the assumption that they are still protected from taxation of their extraterritorial sales. The reasonable expectations and reliance interests of the taxpayer community, founded upon this Court's

precedents, should remain undisturbed until this Court declares otherwise.

CONCLUSION

This Court's longstanding prohibition of anticipatory overruling is a vital safeguard of the Court's prerogatives and of judicial order and efficiency. More importantly, the prohibition is critical to the maintenance of one Constitution for the whole country and should be given its maximum force in cases like this touching on important Constitutional issues.

The decision below represents a clear and direct challenge to this Court and requires an equally clear and direct response. Failure to deliver that response inevitably will erode this Court's power and encourage a restless adventurism among lower state and federal courts and administrative agencies to probe doctrinal weaknesses in any opinion that stands between them and their judicial or regulatory goals.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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