No. 22-890

IN THE

Supreme Court of the United States

QUAD GRAPHICS, INC.,
Petitioner,
v.

NORTH CAROLINA DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of Petitioner Quad Graphics, Inc.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- to foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- to stimulate development of skills and knowledge through participation in continuing legal education programs and seminars; to provide additional mechanisms for input by tax professionals in development of tax laws and policy; and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for the College provided timely notice of the College's intent to file this brief, and all parties have consented to the filing of this brief.

- to facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College. This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees, academics, and law school professors, some of whom may appear separately before the Court as *amicus curiae* in this case.

The College submits this amicus brief because the decision below undermines the binding nature of this Court's precedent and threatens to create sales tax jurisdiction chaos between states and non-resident sources of potential tax revenue. The opinion below, if followed and multiplied by similar opinions by other states, would have far-reaching and unpredictable consequences for sales tax reporting, collection, and administration by taxpayers and the advice provided by tax practitioners, including Fellows of the College.

SUMMARY OF ARGUMENT

This Court's *Dilworth* decision laid down a clearly understandable rule regarding the location of a sale for purposes of determining which jurisdiction can levy its sales tax on that event. The North Carolina Supreme Court's decision concluding that *Dilworth* is no longer binding precedent of this Court creates, and will likely proliferate among other states, uncertainty about *Dilworth*'s ongoing salience. Compliance with dozens of state sales tax systems and thousands of local jurisdictions[2] requires that the retailers who collect such taxes, the customers who pay them, and the state and local jurisdictions who administer them have clear guidance from the Court regarding the jurisdictional reach of a sales tax. This Court's input on the issues raised by the decision below would provide essential guidance on which jurisdictions have authority under the Due Process Clause and the Commerce Clause to tax a sale.

"A sales tax is a tax on the freedom to purchase." *McLeod v. J E Dilworth Co.*, 322 U.S. 327, 330, 64

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[2] As of October 2020, it was reported that the United States contains 11,253 sales tax jurisdictions. Jared Walczak & Jeremiah Nguyen, Sales Tax Rates in Major Cities, Midyear 2021, Fn. 1, TAX FOUND. (Aug. 18, 2021), https://taxfoundation.org/publications/sales-tax-rates-in-major-cities (referencing Janelle Cammenga, "How Many Sales Tax Jurisdictions Does Your State Have?" TAX FOUND. (Oct. 14, 2020) , https://www.taxfoundation.org/state-sales-tax-jurisdictions-in-the-us-2020/).

S.Ct. 1023, 1026 (1944). It is a tax levied on a specific transaction – a purchase – and should not be confused with a use tax. "Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." *Id.* at 331, 64 S.Ct. at 1026.

This Court has consistently held that a sale, for purposes of the sales tax, is considered to take place in only one location and is subject to the sales tax only in that location.

> A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future. Such has been the rule even when the parties to a sales contract specifically contemplated interstate movement of the goods either immediately before, or after, the transfer of ownership.

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 186-187, 115 S. Ct. 1331, 1339, 131 L. Ed. 2d 261 (1995).

The opinion below disregards this fundamental jurisdictional limit on a state's authority to impose its sales tax only upon a "sale of goods and services *in the State*." *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2088 (2018) (emphasis added). Instead, the North Carolina Supreme Court's decision empowers the State to impose its unapportioned sales tax, to which no credit applies, on a transaction consummated outside its borders, and within the borders of another state with jurisdiction to impose its own sales tax on that same transaction. Thus, the decision risks reopening two debates this Court settled in *Dilworth* and foreclosed again with emphasis in *Jefferson Lines* – place of a sale and the risk of having to apportion sales tax across several states.

Neither *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) nor *Wayfair* changed this fundamental jurisdictional rule. Only by misreading *Jefferson Lines*, ignoring the parties' stipulation in *Wayfair*, and declaring *Dilworth* "supersede[d]" was the North Carolina Supreme Court able to construct this new framework for sales tax jurisdiction. *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 383 N.C. 356, 366, 881 S.E.2d 810, 819 (2022). This break from the Court's precedent, particularly if allowed to expand into other states'

sales tax jurisprudence, threatens to significantly expand the uncertainty of taxpayers and their tax advisors around sales tax collection and reporting obligations, with concomitant state assessments and penalty levies on taxpayers who follow this Court's precedents.

If, however, transfer of title and possession outside a taxing state is no longer 'consummation' of a sale for purposes of jurisdiction to impose sales tax, this Court should take up the decision below for review in order to establish an appropriate rule to replace *Dilworth*. Doing so would provide a consistent rule rather than the current risk of patchwork application or non-application of *Dilworth* among state and local jurisdictions due to the likelihood of duplication of the *Quad Graphics* decision among other states.

Finally, review of this case would reinforce the importance of adherence to this Court's precedents until and unless the Court expressly overrules a prior decision. Whether the Court reaffirms *Dilworth* or charts a new course, it should have the final word on this issue.

ARGUMENT

I. PREDICTABILITY IN THE APPLICATION OF STATE SALES TAX LAWS SHOULD REMAIN AN IMPORTANT VALUE

A. Understandable jurisdictional rules for sales tax systems are critical to proper compliance

To properly comply with a sales tax regime retailers must understand the tax system and be able to correctly identify the location of the sale, such that the sales tax applicable for the jurisdiction having authority in that location can be collected from the buyer and remitted to the correct governmental body. Accordingly sales taxation should not require retailers to navigate a complex system where uncertainty burdens those 'who conscientiously try to adhere'" to the sales tax codes. *Dickman v. Comm'r*, 465 U.S. 330, 347, 104 S. Ct. 1086, 1096, 79 L. Ed. 2d 343 (1984) (Powell, J., *dissenting*). To allow taxpayers as much certainty as possible in planning their affairs, "[c]ourts should make a conscious effort to minimize the burden by refraining from any action that would destabilize an understanding of the tax laws." *Id.* The destabilizing effect of States' ad hoc interpretations of whether this Court's precedent has been superseded or abrogated should be self-evident.

This Court does not make a business of overturning its prior decisions *sub silentio*. *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 1096, 146 L. Ed. 2d 1 (2000). If it were to do so, interpreting the state of the law and binding precedent would be mere guesswork for taxpayers and at the whim of lower courts. Taxpayers would lack the clarity necessary to plan for potential tax liabilities and to properly abide by the rules and laws of the States. This is particularly of concern in the field of sales tax, which is a tax designed to be passed along to the customer, not borne by the retailer. N.C. Gen. Stat. § 105-164.7 ("The sales tax imposed by this Article is intended to be passed on to the purchaser of a taxable item and borne by the purchaser instead of by the retailer."); *accord*, *First Agr. Nat. Bank of Berkshire Cnty. v. State Tax Comm'n*, 392 U.S. 339, 347, 88 S. Ct. 2173, 2178, 20 L. Ed. 2d 1138 (1968).

If the retailer cannot determine whether a sale is or is not subject to the laws of a State due to a conflict between *Dilworth* (and other precedents of this Court) and a State taxing authority's assertion that *Dilworth* is no longer good law, there is heightened risk that the retailer will end up bearing the burden, and potentially multiple burdens, of the tax rather than its

customers since the sales tax assessment will fall upon the retailer.[3]

The North Carolina Supreme Court's view that *Dilworth* has been superseded may proliferate in a patchwork manner, as some state courts will point to the decision below as evidence of *Dilworth*'s demise if this Court does not take up the case to declare for itself whether *Dilworth* remains good law. State courts will sometimes presume the correctness of a sister court's conclusion of law where it "has been squarely posed" as a constitutional issue at odds with existing precedent, but this Court "repeatedly denied certiorari on [it]." *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 320 (Iowa 2010). The example of *Geoffrey, Inc. v. S.C. Tax Comm'n*, 313 S.C. 15, 437 S.E.2d 13, 18–19 (S.C.), *cert. denied*, 510 U.S. 992, 114

[3] Most state sales tax systems penalize retailers who erroneously fail to collect sales tax from their customers by recovering the uncollected tax from the retailer, rather than pursuing the customer. *See, e.g., Appeal of J.G. Masonry, Inc.*, 235 Kan. 497, 509, 680 P.2d 291, 300 (1984); *White v. State*, 49 Wash. 2d 716, 725, 306 P.2d 230, 235 (1957) ("The duty of paying the [sales] tax is imposed upon the buyer, and the duty of collecting and transmitting it upon the seller. However, the statute imposes upon the seller the duty of transmitting the tax, whether or not he collects it, and whether or not his failure to collect it is attributable to his own fault."); *Colgate-Palmolive-Peet Co. v. Joseph*, 308 N.Y. 333, 340, 125 N.E.2d 857, 860 (1955) ("The sales tax collected from retail vendors, who have failed to collect it from their vendees, is not an additional gross receipts tax, but a penalty for failing to collect the sales tax.").

S.Ct. 550, 126 L.Ed.2d 451 (1993) is telling, especially given the connection between the nexus issue in that case and the territoriality issue in the present case. Following this Court's denial of certiorari in *Geoffrey*, some lower courts took the lack of input from this Court as an opportunity to "join other state courts that have applied an identical rationale to uphold the constitutionality of other state taxes in a similar context" to define their taxing jurisdiction. *Kmart Corp. v. Tax'n & Revenue Dep't*, 2006-NMSC-006, ¶ 23, 139 N.M. 172, 131 P.3d 22 (2002).

The risk of proliferation of North Carolina's *Quad Graphics* opinion is of far greater concern, since (unlike the decision below) *Geoffrey* did not purport to declare precedent of this Court to have been superseded or abrogated *sub silentio*. Should this Court remain silent in the present case, given the broad applicability of sales tax to sellers across the States, the problems created by uncertainty surrounding taxpayers and tax authorities on the constitutional requirements of and limitations on State sales tax systems will be far greater than the level of uncertainty created by the proliferation of *Geoffrey*.

Being conscious of the need for clarity, when this Court overrules a decision it does so clearly and unequivocally. *See e.g. South Dakota v. Wayfair*, Inc., 138 S. Ct. 2080, 2099 (2018) (expressly stating that *Bellas Hess* and *Quill*'s physical presence test is

overruled, but making no reference to *Dilworth*). By plainly stating when its precedent is overruled, this Court enhances the public's ability to rely on existing decisions generally. The consistency and integrity of the legal process is promoted. Lower courts are not empowered to divine this Court's silent intent, with each of the States deciding for themselves what precedent this Court overruled. Rather, it is this Court "alone [which can] overrule one of its precedents." *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001) quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); internal quotation marks omitted). As the Court has made clear, questions on which the Court does not rule "are not to be considered as having been decided and do not constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170, 125 S. Ct. 577, 586, 160 L. Ed. 2d 548 (2004), *quoting Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925).

In the nearly eighty years since it was decided, the Court has not overruled its definition of a sale or the rule for determining the situs of a sale based on transfer of title and possession, as laid out in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 327, 64 S. Ct. 1023, 1024, 88 L. Ed. 1304 (1944). Taxpayers and tax authorities require an understanding of the applicability of any sales tax collection obligations imposed on retailers in order to ensure compliance with tax laws. In the present case, the Court has the

opportunity to provide the necessary clarity and prevent guesswork by the States.

B. *Dilworth* is, and should remain, the correct interpretation of limits of state power to impose a sales tax over a sale transaction completed outside its borders

The salient facts of *Dilworth* are essentially identical to the present case. J.E. Dilworth Co. was a Tennessee corporation engaged in remote sales into Arkansas, which sales were solicited by traveling salesmen. *Dilworth*, 322 U.S. at 328. Orders had to be accepted at Dilworth's Memphis, Tennessee office and, if approved, goods were shipped from Tennessee to purchasers. *Id.* Title passed to the purchaser upon delivery to the carrier in Memphis, Tennessee and the sales price was not collected in Arkansas. *Id.* "In short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods into Arkansas." *Id.*

In the present case, Petitioner sells printed materials that are created at printing facilities across the United States, none of which are in North Carolina. [Opinion Below at *1]. Petitioner employs sales representatives who solicit orders, but those orders are filled outside North Carolina and the resulting product is delivered to a common carrier outside North Carolina. *Id.* The contracts between Petitioner and its customers state that possession,

legal title, and risk of loss passes to the customers when the product is delivered to the carrier outside North Carolina. *Id.* In short, these are sales made by an out-of-North Carolina vendor that are consummated out-of-North Carolina for the delivery of goods into North Carolina.

The basis of this Court's decision in *Dilworth* was not, as suggested below, based on some adherence to the "free trade philosophy" espoused in *Freeman v. Hewit,* 329 U.S. 249, 252, 67 S.Ct. 274, 91 L.Ed. 265 (1946) and *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 603–10, 71 S.Ct. 508, 95 L.Ed. 573 (1951). *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 383 N.C. 356, 364, 881 S.E.2d 810, 817 (2022). It is not *Spector*-era formalism to determine that a sales tax, which is imposed upon a specific transaction, may only lawfully be imposed by the state in which that transaction occurs, regardless of post-sale activities. State boundaries have substantive effects. "No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction." *New York, L.E. & W.R. Co. v. Com. of Pennsylvania*, 153 U.S. 628, 646, 14 S.Ct. 952, 958, 38 L.Ed. 846 (1894).

Projection of state power outside state borders threatens the delicate balance between independent sovereign states that was strengthened by the adoption of the Commerce Clause as part of the

transition from the Articles of Confederation to the Constitution. "The maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce" is of "special concern" to the Constitution. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). An attempt by North Carolina to "project its legislation into other states" (*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511. 521 (1935) by defining sales completed in foreign states to be a sale in North Carolina is of like-kind with the economic protectionism disapproved of in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 581, 106 S. Ct. 2080, 2085, 90 L. Ed. 2d 552 (1986).

Importantly, this Court's clear limitations on the ability of states to impose their sales tax laws to sales completed outside their borders remain undiminished by *Complete Auto* and *Wayfair*, contrary to the view of the North Carolina Supreme Court.

C. Neither *Complete Auto* nor *Wayfair* changed the scope of state power to impose a sales tax on economic transactions occurring outside their borders

The North Carolina Supreme Court erroneously framed *Dilworth* as being premised upon a blanket restriction of the ability of states to tax interstate commerce, then pivoted to say that "[t]he Supreme Court in *Complete Auto* 'abandoned the abstract

notion that interstate commerce 'itself' cannot be taxed by the States[,]' recognizing, in its place, that 'interstate commerce may be required to pay its fair share of state taxes.'" *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 383 N.C. 356, 364, 881 S.E.2d 810, 817 (2022), quoting *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30–31, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988). While it is accurate to state that *Complete Auto* dispensed with the formalistic notion that interstate commerce was immune from state taxation, the North Carolina Supreme Court was wrong to sacrifice *Dilworth* on the altar of *Complete Auto*.

The ongoing salience of *Dilworth* was illustrated in *Nat'l Geographic Soc. v. California Bd. of Equalization,* 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977), issued less than a month after *Complete Auto*. There, National Geographic challenged the authority of the State of California to impose a *use tax* collection obligation on the mail-order products sold by it to California customers. In upholding the imposition of the California use tax, the Court noted that the only burden on the out-of-state seller was the burden of collecting the California resident's use tax, and contrasted the situation with *Dilworth* (noting that *Dilworth* involved sales tax), in comparison to the use tax cases of *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960) and *Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944). *Nat'l Geographic Soc.*

v. California Bd. of Equalization, 430 U.S. at 558, 97 S. Ct. at 1391, 51 L. Ed. 2d 631 (1977).

Twenty-two years after *Complete Auto*, this Court – *applying Complete Auto* – evaluated whether a state was required to apportion its sales tax imposed on a transaction within the state's borders, but where the purchased service crossed state lines. In *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, Oklahoma imposed its sales tax on the gross income from sales of bus tickets sold in Oklahoma for bus service originating in Oklahoma and crossing into other states. 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995). In applying the external consistency prong (from *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)) of the fair apportionment test (from *Complete Auto*), this Court recognized that taxation of a sale is conceptually different from tax on the income of an interstate business. *Id.,* 514 U.S. at 186, 115 S.Ct. at 1338-1339.

> In reviewing sales taxes for fair share, however, we have had to set a different course. A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without

> any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.

Id. at 186, 115 S.Ct. at 1339.

Even if the parties to the transaction had a specific intent that the purchased article be moved interstate "either immediately before, or after, the transfer of ownership," that intent did not alter the Court's conclusion that the sale is "consummated in only one State" – which is the state empowered to levy the sales tax. *Id.* at 187, 115 S.Ct. at 1339. Critical to this discussion, the *Jefferson Lines* court, as part of its external consistency analysis, cited specifically to *Dilworth*'s holding that "a sales tax could not validly be imposed if the purchaser already had obtained title to the goods as they were shipped from outside the taxing State into the taxing State by common carrier." *Id.*, citing *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944). Thus, "the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place" – the central issue of *Dilworth* – was the basis of the *Jefferson Lines* holding. *Id.*

The final knife which the North Carolina Supreme Court sought to plunge into *Dilworth* is the recent

decision in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018). That Court asserted that it could "confidently look" at *Wayfair* because it was a "materially identical tax regime." *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 383 N.C. 356, 366, 881 S.E.2d 810, 819 (2022). Unfortunately, the cases lack identity of fact; there is a critical difference between *Wayfair* and this case that was misunderstood or disregarded in that opinion.

Wayfair begins with the understanding that the sales tax law at issue "taxes the retail sales of goods and services *in the State*." *Id.* at 2088 (emphasis added). The Court thereafter thoroughly explored the nexus of a remote seller to the taxing state – i.e., whether the seller in the transaction had sufficient connection to the taxing state to permit the exercise of the state's power over that remote seller, requiring the remote seller to comply with the state's sales tax law. *Id.* However, what the Court did *not* do is analyze the nexus of the *sale itself* to the taxing state, for two reasons.

First, the parties stipulated that the sales occurred in South Dakota. "All concede that taxing the sales in question here is lawful. The question is whether the out-of-state seller can be held responsible for its payment…." *Id.* at 2087. The facts as recounted by the South Dakota Supreme Court included a stipulation that "each seller had gross revenue from *the sale* of tangible personal property *in South Dakota* in excess

of $100,000 and/or *sold* tangible personal property *in the state* in 200 or more separate transactions." *State v. Wayfair Inc.*, 2017 S.D. 56, ¶ 14, 901 N.W.2d 754, 760, vacated and remanded sub nom. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (emphases added).

Second, the *Wayfair* Court was primarily addressing *Quill*'s physical presence rule – "an obvious barrier to the Act's validity" – and the Court noted that other Commerce Clause principles "have not yet been litigated or briefed, and so the Court need not resolve them here." *Id.* at 2099. In passing, the Court cited a treatise for the supposition that "[g]enerally speaking, a sale is attributable to its destination." *Id.* at 2092-93, citing 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 11:1, p. 471 (2003). However, the two sentences immediately following that assertion in the treatise, but not cited in *Wayfair*, illustrate the key distinction at the heart of this case: "Generally speaking, a sale is attributable to its destination. *Where the destination is within the same States as its origin, the tax is referred to as a sales tax. If it is an interstate transaction, the tax will be designated some form of use tax.*" 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 11:1, p. 471 (2003) (emphasis added).

Due to the parties' stipulation, it was unnecessary for the Court to consider in *Wayfair* whether the sales

transactions sought to be taxed were consummated outside of South Dakota.[4] But this Court's long-standing jurisdictional teachings require a connection between the tax and the activity sought to be taxed. It is not just the Commerce Clause that limits States from taxing outside their borders; "[w]e have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 778, 112 S. Ct. 2251, 2258, 119 L. Ed. 2d 533 (1992), citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306–308, 112 S.Ct. 1904, 1909–1910, 119 L.Ed.2d 91 (1992). The activity sought to be taxed must occur within the borders of the taxing state; alternatively, if unitary taxation is at issue, then the apportionment of the tax must be fairly attributable to the taxpayer's activities in the taxing state. *Allied-Signal*, 504 U.S. at 780.

II. IF TRANSFER OF TITLE AND POSSESSION OUTSIDE A TAXING STATE IS NO LONGER "CONSUMMATION" OF A SALE FOR PURPOSES OF STATE JURISDICTION

[4] South Dakota expressly asserted that it was taxing only a "local transaction" consummated within the State as contemplated by *Complete Auto* and *Jefferson Lines*. *See* Brief for Petitioner at 22-23, *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018) (No. 17-494). South Dakota's entire argument rested on a stable application of *Dilworth*'s territorial assignment of the place of sale.

TO IMPOSE SALES TAX, THE COURT SHOULD CLARIFY THE CONCEPT OF "CONSUMMATION"

In light of the stipulation in *Wayfair*, the Court had no reason to look at *Dilworth* since there was no question raised whether the transactions being taxed were consummated in South Dakota. However, *Jefferson Lines* and *Dilworth* both conceptualize a "sale" – the activity sought to be taxed – as a transfer of title and possession, with post-sale transfer to a common carrier or interstate shipment via such carrier being irrelevant to the location of the sale. "The out-of-state seller in [*Dilworth*] 'was through selling' outside the taxing State" despite having delivered the purchased article to a common carrier for delivery into the purchaser's state. *Jefferson Lines*, 514 U.S. at 187, quoting *Dilworth*, 332 U.S. at 330.

The *Wayfair* court refers to the delivery of the purchased article, noting that the South Dakota sales tax law "applies only to sellers that deliver more than" a specified dollar threshold or number of transactions into the State. *Wayfair,* 138 S.Ct. at 2099. It makes this reference as part of its analysis of the first prong of the *Complete Auto* test – "whether the tax applies to an activity with a substantial nexus with the taxing State." *Id.* citing *Complete Auto*, 430 U.S. at 279. *Wayfair* appears to presume, based on the parties' stipulated facts regarding the location of the sales, that the volume of sales is the result of the seller

having availed itself of the substantial privilege of carrying on business *in* South Dakota.

The present case provides a clean opportunity for the Court to address the question unaddressed by *Wayfair* yet lingering in *Dilworth* and *Jefferson Lines* – whether a tax imposed on a discrete sales transaction involving undisputed transfer of title outside the taxing state and transfer of possession outside the taxing state to a common carrier for ultimate delivery into the taxing state is or is not subject to the taxing state's sales tax. There is no question that the same state could tax the use of property within that state and that an obligation may be imposed on the seller to collect that use tax.

The Court has an opportunity in this case to re-confirm that the historically understood commercial concept of a sale as a transfer of possession and title is the "activity sought to be taxed" and that pre- or post-sale activities do not broaden jurisdiction to impose a sales tax. Such a ruling would not impair the States' tax collection function, since states retain constitutional authority to impose use tax on the buyer and to require collection of that use tax by the seller. *Nat'l Geographic Soc. v. California Bd. of Equalization,* 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977); *General Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335 (1944). The Court may thus conclude since states can require a remote seller to collect a state's use tax for deliveries into the state

which are possessed and used by the purchaser, expansion of the concept of a "sale" to encompass such deliveries is unnecessary.

Alternatively, if *Wayfair* was intended to imply a break from precedent beyond *Bellas Hess* and *Quill*, the Court should provide clear guidance regarding the validity of *Dilworth*. The Court might determine that a state law can define that a sale is not complete until the buyer has physical possession, and thus delivery to a common carrier is part of the sale process which crosses into the taxing state's jurisdiction. Such a ruling would likely need to address the jurisdiction of the seller's state to tax the same sale and consider which state is required to cede to the other's conception of where the sale occurs, by either providing a credit system or apportioning the sales tax. *See*, e.g., *Comptroller of Maryland v. Wynne*, 575 U.S. 542, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015). Nonetheless, clear guidance is needed so that taxpayers are not caught between *Dilworth* and state court decisions declaring *Dilworth* abrogated.

III. THE COURT SHOULD REAFFIRM THAT ITS PRECEDENTS ARE BINDING LAW UNTIL THE COURT STATES OTHERWISE

It is beyond question that *Wayfair* charted a new course in sales tax law by removing the requirement of physical presence nexus. But as significant a decision as it was, the impulse to read the decision as

obliterating eight decades of sales tax jurisprudence goes too far. Neither *Complete Auto* nor *Wayfair* abrogated *Dilworth* and other limitations on extraterritorial use of state tax power. Until this Court expressly overrules *Dilworth*, lower courts should not muddy the tax waters by deciding for themselves which of this Court's precedents are out-of-date. As this Court has recently seen, the impulse of state tax authorities to write off this Court's older precedent rather than to allow the Court to decide such matters for itself led North Carolina to attempt a similar extra-territorial exercise of state tax power.

In *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, North Carolina sought to impose tax on a trust located out of the state, based solely on the presence of an in-state beneficiary. 139 S. Ct. 2213, 204 L. Ed. 2d 621 (2019). This Court concluded that the Due Process Clause prohibited North Carolina from taxing the trust based only on the in-state residency of a trust beneficiary. *Id.* at 2224. In its argument in that case, North Carolina characterized *Safe Deposit & Trust Co. of Baltimore v. Virginia*, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180 (1929), and *Brooke v. Norfolk,* 277 U.S. 27, 48 S.Ct. 422, 72 L.Ed. 767 (1928) as *Pennoyer*-era decisions that had been superseded by developments in the law of due process. Yet the Court pointed out that these 1920's-era cases, along with more recent jurisprudence, "reflect a common governing principle[.]" *Kaestner*, 139 S.Ct. at 2221. So too does *Dilworth* reflect a

common governing principle in the Court's sales tax jurisprudence, demarcating a plain line that is understandable and administrable.

The Court should take up the opportunity to dispel the notion that its *Wayfair* decision destroyed time-tested conceptions of the nature and location of a sale transaction. But if that was the Court's intent in *Wayfair*, then the Court should still take up the case to reemphasize that it is capable of plainly stating when its tax precedents are no longer good law. Taxpayers and tax authorities, as well as lower courts, should not be speculating in the absence of express statements from the Court.

CONCLUSION

For the foregoing reasons, the College respectfully requests that the Court grant the Petition.

Respectfully submitted,

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