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 IN OPPOSITION

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QUESTIONS PRESENTED

In *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018), this Court rejected a dormant Commerce Clause challenge to a South Dakota law that imposed a sales tax on interstate sales when products are delivered to customers in South Dakota.

Did this Court's decision in *Wayfair* displace an earlier precedent that categorically barred states from taxing interstate sales?

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INTRODUCTION

In *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), this Court considered the constitutionality of a state statute that taxes remote sales. This South Dakota law requires out-of-state sellers to pay a sales tax when they sell goods to in-state consumers and the goods are delivered by common carrier in South Dakota.

A group of retailers challenged this law, claiming that it violated the dormant Commerce Clause. Applying the familiar four-part *Complete Auto* test for addressing claims of this kind, this Court rejected that challenge. And although it left some issues for remand, the Court squarely held that the "substantial nexus" prong of the *Complete Auto* test had been satisfied. That is, the Court held that, when an out-of-state retailer sells goods to an in-state consumer, the state has a constitutionally sufficient connection with that sale to impose a sales tax.

This case concerns a dormant Commerce Clause challenge to a state tax statute that is materially identical to the law this Court upheld in *Wayfair*. Following *Wayfair*, North Carolina was one of many states that amended its sales-tax laws to mirror South Dakota's. Like South Dakota, North Carolina requires remote sellers who deliver goods to North Carolina customers to pay a sales tax. Given this overlap, the North Carolina Supreme Court held below that the State's sales-tax regime was constitutional under *Wayfair*.

Yet Petitioner claims that *Wayfair* is not controlling. In support, it points to *Dilworth*, a case where this Court reached a contrary conclusion to *Wayfair* over seven decades earlier. *See McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327 (1944). Specifically, in *Dilworth*, this Court held that the dormant Commerce Clause categorically bars states from taxing interstate sales—which it defined as a sale where title and possession are transferred in another state. Petitioner goes so far as to claim that, by following *Wayfair*, the state supreme court "effectively overrul[ed *Dilworth*] from below." Pet. 11.

Petitioner is mistaken. It is well-established that when a holding of this Court is flatly irreconcilable with an earlier decision, the later precedent controls. Following this principle, the state supreme court demonstrated fidelity to this Court's precedent when it affirmed the constitutionality of a law that was explicitly designed to mirror a law this Court had recently upheld.

North Carolina is far from the only state that has modeled its sales tax regime to conform to *Wayfair*. And no fewer than forty states have adopted destination-based sourcing—meaning that, under state law, sales are sourced to the place where products are *delivered*, even if title and possession are transferred elsewhere. Petitioner has identified no lower court since *Wayfair* that has cast doubt on this stable regime for state taxation of remote sales.

The North Carolina Department of Revenue agrees with Petitioner that the scope of state authority to tax remote sales is vitally important,

even though use taxes are often available as a substitute. *See* Pet. 28-29 (recounting some of the reasons why the distinction between use and sales taxes matters). But this Court already provided the "need[ed] clarity" in this area of law when it affirmed the constitutionality of South Dakota's sales-tax statute in *Wayfair*. Pet 29. Review in this case would only risk disrupting the status quo and interfering with a settled and workable system for state taxation of remote sales. The petition for a writ of certiorari should be denied.

STATEMENT

A. North Carolina's Sales and Use Tax Regime

Like most states, North Carolina imposes sales and use taxes on products and services that are purchased or consumed within the state. *See* North Carolina Sales and Use Tax Act, *codified at* N.C. Gen. Stat. §§ 105-164.1 through 105-187. These taxes account for around one-third of the state's annual tax revenue. N.C. Dep't of Revenue, S*tatistical Abstract of North Carolina Taxes 2020*, https://bit.ly/3t7w4aC.

Although sales and use taxes are "functionally equivalent," they technically apply to different activities. Walter Hellerstein et al., *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 Tax L. Rev. 47, 65 n.108 (1995). Sales taxes apply to the sales *transaction*, whereas use taxes apply to the *use* of products within a taxing state. The use tax was designed as a workaround to allow states to permissibly tax the consumption of goods, despite

early precedent from this Court that banned states from taxing interstate commerce. *Id.* Thus, all states that have a sales tax also maintain a corresponding use tax. *Id.*

North Carolina's sales tax applies to retail sales that occur in the state. State law determines the location of a sale. Like most states, North Carolina law deems a sale to have occurred in the location where the product or service was delivered. N.C. Gen. Stat. § 105-164.4B(a)(2), (d)(2); *see Wayfair*, 138 S. Ct. at 2092-93 ("Generally speaking, a sale is attributable to its destination." (citation omitted)). This approach is called "destination-based" sourcing. A minority of states, by contrast, use "origin-based" sourcing, meaning sales are deemed to have occurred where the seller is located. 1 Robert Desiderio, *Bender's State Taxation: Principles and Practice* § 13.06 (Charles W. Swenson ed., 2021)

Thus, under state-law sourcing rules, transactions occur in North Carolina when an out-of-state seller's products are delivered to North Carolina purchasers in North Carolina. These North Carolina sales are subject to the sales tax. N.C. Gen. Stat. § 105-164.8(b). Products that are purchased outside of North Carolina but are "stor[ed], use[d], or consum[ed]" in the state are subject to a "[c]omplementary" use tax. *Id.* § 105-164.6(a)(1). For both sales and use taxes, retailers who conduct significant business activity in North Carolina are required to collect the applicable taxes from purchasers and remit those funds to the state. *Id.* § 105-164.8(a).

State law contains numerous safeguards to ensure that sales and use taxes are applied fairly. Most notably, the use tax rate is the same as the applicable sales tax rate. *Id.* § 105-164.6(a). And to avoid double taxation by multiple states, North Carolina provides a credit against the use tax for any sales or use taxes paid on the same item to another state. *Id.* § 105-164.6(c)(2). In addition, to mirror the South Dakota law upheld in *Wayfair*, out-of-state retailers are subject to collection requirements only if they make either $100,000 in sales or 200 sales transactions with North Carolina customers annually. *Id.* § 105-164.8(b)(9)-(10).

North Carolina has also joined the Streamlined Sales and Use Tax Agreement (SSUTA). *See* An Act to Enable North Carolina to Enter the Streamlined Sales and Use Tax Agreement, 2001 N.C. Sess. Laws 1041. The SSUTA is a multistate compact that harmonizes state tax policy to minimize burdens on retailers that sell goods in many states. SSUTA, *State Information*, https://bit.ly/3qDHcZY. Among other things, the SSUTA promulgates uniform tax definitions and sourcing rules and standardizes collection practices. SSUTA, art. I, § 102 (2021), https://bit.ly/3BavhpC. Among these uniform rules is destination-based sourcing for interstate sales—meaning, again, that sales are deemed to take place where goods are delivered. *Id.* §§ 310, 310.1(B)(1), 310.1(C)(1).

B. Quad Fails to Pay Sales Taxes and Then Files this Lawsuit.

Petitioner Quad Graphics is a commercial printing business headquartered in Wisconsin. It prints books, magazines, catalogs, direct mail, and other materials. It then delivers its products by mail or common carrier either directly to its customers or to recipients specified by its customer. Pet. App. 3a-4a.

Quad engages in significant business activity in North Carolina. Between 2009 and 2011, Quad filled orders worth approximately $20 million involving North Carolina customers or direct-mail designees. Quad also solicited customers in the state, including through an employee who resided in North Carolina. Pet. App. 3a-4a.

From 2009 to 2011, Quad did not collect sales taxes on products that it shipped into the state. Pet. App. 4a-5a.

In 2011, the Department conducted a sales-and-use-tax audit of Quad's business activities in North Carolina. Following the audit, the Department determined that Quad had failed to properly collect and remit sales taxes on its sales in the state. The Department determined that Quad was liable for $3,238,022.52 in uncollected state and local sales taxes for the period between September 1, 2009 and December 31, 2011. Pet. App. 4a-5a.

Quad challenged this assessment in the North Carolina Office of Administrative Hearings. A state administrative law judge affirmed the agency's decision, holding that the sales were properly sourced to North Carolina under the state's sourcing rules. Pet. App. 5a-6a.

Quad filed a petition for judicial review in state trial court. Among other things, it argued that the sales taxes at issue here violate the Commerce Clause. Pet. App. 6a-7a. The trial court agreed, concluding that this Court's decision in *Dilworth* "remains the law of the land." Pet. App. 8a. Under that decision, "a state sales tax survives scrutiny under the Commerce Clause only where . . . the transfer of ownership from the seller to buyer . . . takes place in the taxing state." Pet. App. 71a. Because Quad transferred ownership of the relevant property to a common carrier outside of North Carolina, the trial court held that the state lacked constitutional authority to tax those sales. Pet. App. 79a-80a.

The state supreme court reversed. The court agreed that the "question we are tasked with answering on appeal is whether *Dilworth* remains controlling precedent." Pet. App. 3a. It concluded that it does not.

The court began by recounting the ruling in *Dilworth*, where this Court "interpret[ed] . . . the Commerce Clause as categorically barring states from taxing interstate commerce." Pet. App. 10a. *Dilworth* therefore held that Arkansas could not tax a sale between an out-of-state seller and an in-state purchaser where "title passed upon delivery to a common carrier" outside of Arkansas. Pet. App. 9a. This was true even though the goods were later delivered in Arkansas to Arkansas customers. Pet. App. 9a. The *Dilworth* Court explained this result by declaring, without citation to any authority, that "the very purpose of the Commerce Clause was to create an area of free trade among the several States." Pet. App. 12a (quoting *Dilworth*, 322 U.S. at 330).

In a decision issued the same day, however, this Court also held that states could still impose a *use* tax with the same economic effect as a sales tax. Pet. App. 10a (citing *General Trading, Co. v. State Tax Comm'n*, 322 U.S. 335 (1994)). The Court justified the differing results in *Dilworth* and *General Trading* by pointing to an abstraction: Even though the two taxes "may bring about the same result," they are "different in conception" and so the Court believed that different constitutional rules should apply. Pet. App. 11a (quoting *Dilworth*, 322 U.S. at 330).

The state supreme court went on to explain how, thirty years later, this Court chose to "disavow the 'free trade' theory" of the dormant Commerce Clause first adopted in *Dilworth*. Pet. App. 12a (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). Instead, this Court adopted a new framework focused on "economic realities" and a tax's "practical effect." Pet. App. 13a (quoting *Complete Auto*, 430 U.S. at 278-79). This new pragmatic inquiry rejected the kinds of outdated formalisms exemplified by the *Dilworth/General Trading* dichotomy, where a state tax's constitutionality depended on "the formal language of the tax statute." Pet. App. 13a (quoting *Complete Auto*, 430 U.S. at 278-79). That is, the state supreme court explained, *Complete Auto* marked a rejection of the prior legal regime, in which "the validity of [state tax] statutes hinge[d] on legal terminology, draftsmanship and phraseology." Pet. App. 14a (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 310-11 (1992)).

This pragmatic inquiry yielded a four-part test for assessing the constitutionality of state taxation of interstate commerce. *See* Pet. App. 13a. Specifically,

in what this Court has repeatedly confirmed is "the now-accepted framework for state taxation," a tax is valid if it "(1) applies 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 the State provides." *Wayfair*, 138 S. Ct. at 2091 (citing *Complete Auto*, 430 U.S. at 279).

The state supreme court then analyzed this Court's more-recent decision in *Wayfair*. It explained that *Wayfair* "overruled a line of precedent which prohibited states from requiring sellers to collect and to remit sales or use tax unless they maintained a physical presence within the state." Pet. App. 16a. Instead, *Wayfair* reaffirmed that the *Complete Auto* framework—which is focused on "functional, marketplace dynamics"—governs dormant Commerce Clause challenges to state taxation of interstate commerce. Pet. App. 21a (quoting *Wayfair*, 138 S. Ct. at 2095). As a result, "anachronistic formalisms" like the physical-presence rule could no longer be sustained. Pet. App. 21a. (quoting *Wayfair*, 138 S. Ct. at 2094).

Importantly, the state supreme court emphasized, the *Wayfair* Court applied the *Complete Auto* framework to review a state sales-tax statute that was "materially identical" to North Carolina's here. Pet. App. 16a; *see* Pet. App. 24a-27a (chart comparing the two statutes). And applying that framework, this Court rejected the dormant Commerce Challenge to the South Dakota law.

In doing so, the state supreme court observed, this Court squarely ruled that the South Dakota sales-tax statute satisfied *Complete Auto*'s substantial-nexus

requirement. This Court stated in *Wayfair*: "the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." Pet. App. 28a (quoting *Wayfair*, 138 S. Ct. at 2099). It went on to hold that the statute's business-activity thresholds—which limit sales-tax obligations to companies that deliver $100,000 in goods or services to in-state customers, or make 200 separate transactions—provided "clearly sufficient" nexus with South Dakota under the dormant Commerce Clause. Pet. App. 28a (quoting *Wayfair*, 138 S. Ct. at 2099). This holding, the state supreme court explained, squarely rejected any notion that states are foreclosed from taxing interstate sales, as *Dilworth* had previously held. *See* Pet. App. 28a-30a.

Thus, the state supreme court held that it was bound by this Court's ruling on substantial nexus. Pet. App. 28a-30a. In the wake of *Wayfair*, North Carolina was one of many states that adopted a sales-tax regime mirroring South Dakota's. Pet. App. 23a. Given that progression, the state supreme court held that faithful application of this Court's precedent required it to conclude that substantial nexus was satisfied in this case as well. Pet. App. 28a-30a.

Finally, in reaching this holding, the state supreme court could not have been clearer that it was not engaged in an "anticipatory overruling" of this Court's earlier decision in *Dilworth*. Pet. App. 15a (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the U.S. Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [other courts] should follow the

case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")).

Instead, the state supreme court based its ruling on the fact that this Court had already applied "the *Complete Auto* test to a materially identical tax regime in . . . *Wayfair*"—and upheld that regime as constitutional. Pet. App. 16a. Although *Wayfair* did not explicitly *say* that it was overruling *Dilworth*, the state supreme court observed, "[w]here two precedents are flatly irreconcilable, the latter in time controls." Pet. App. 15a.

REASONS FOR DENYING THE PETITION

I. The North Carolina Supreme Court Correctly Applied This Court's Precedent.

In *Wayfair*, this Court upheld against a dormant Commerce Clause challenge a statute that is virtually indistinguishable from the North Carolina law challenged in this case. Below, the state supreme court faithfully applied *Wayfair* to uphold that law. This routine application of this Court's recent precedent does not warrant this Court's review.

Petitioner's primary argument is that *Dilworth* remains binding precedent, and therefore the state supreme court erred in failing to apply it. Petitioner does not deny that this Court has repudiated *Dilworth*'s underlying *logic*—that the Commerce Clause establishes "an area of free trade among the several States" that categorically bars states from taxing interstate commerce. *Dilworth*, 322 U.S. at 330. To the contrary, Petitioner frankly acknowledges that *Complete Auto* abandoned the "notion 'that

interstate commerce should enjoy a sort of 'free trade' immunity from state taxation.'" Pet. 13 (quoting *Complete Auto*, 430 U.S. at 278).

Instead, Petitioner claims that this Court "has never overturned" the specific *rule* adopted in *Dilworth*: that a state "may not tax transactions occurring wholly outside its borders." Pet. 13. And this rule, Petitioner insists, therefore remains the law, regardless of whether it can be reconciled with subsequent decisions of this Court. *See* Pet. 13. In other words, Petitioner claims that "vertical *stare decisis*" requires lower courts to adhere to any precedent of this Court unless and until this Court overrules it expressly. Pet. 11. Any other result, it claims, threatens "[o]ur federal system" of government itself. Pet. 2.

This argument misapprehends the law of precedent, as well as the law that specifically applies in this case.

At the outset, it is simply not true that magic words are required to overrule a prior case. Of course, in an ideal world, this Court would always state expressly when it has chosen to overrule an outdated precedent. But such clarity is not always feasible. It is not unusual for a judicial decision to fatally contradict an earlier precedent without expressly saying that it is doing so. Sometimes, for example, a later court is simply unaware that it has reached a holding that is irreconcilable with an earlier case—especially when, as here, that earlier case is outdated and obscure, and the parties (and amici) failed to identify it in their

briefing and argument. As a result, it is well-established that when lower courts are faced with truly inconsistent decisions of this Court, they "should follow the case which directly controls." *Rodriguez*, 490 U.S. at 484.

This basic rule of legal interpretation is hardly controversial. When "two decisions of equal authority are irreconcilable . . . [a] court of last resort generally follows its decision in the most recent case, which must have tacitly overruled any truly inconsistent holding." Bryan Garner, Neil M. Gorsuch, Brett M. Kavanaugh et al., *The Law of Judicial Precedent* 300 (2016). Likewise, when a lower court is confronted with two inconsistent decisions of this Court and thus "a tacit overruling" of the earlier precedent, the lower court "is simply doing its job as part of a vertical hierarchy when it follows the later case." *Id.* at 302. Indeed, no sensible legal system could follow a contrary rule. *Cf. Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2427-28 (2022) (holding that the "Ninth Circuit erred by failing to heed" later decisions of this Court that had "abandoned" the *Lemon* test, even though those decisions had not overruled *Lemon* expressly).

Here, it is true that this Court has never expressly said that *Dilworth* is overruled. But the state supreme court correctly held that *Wayfair* is irreconcilable with *Dilworth*—and therefore that *Wayfair* "directly controls" the outcome of this case. *See Rodriguez*, 490 U.S. at 484. In *Dilworth*, this Court held that states are categorically barred from taxing interstate sales—which it defined as sales transactions where title and

possession are transferred in another state—even when goods are later delivered to in-state customers. 322 U.S. at 328. Seven decades later, in *Wayfair*, this Court affirmed a state's authority to assess a sales tax in precisely the same circumstances. Like here, the South Dakota law upheld in *Wayfair* assesses *sales* taxes—not *use* taxes—against remote sellers who sell goods from out-of-state locations and deliver them to in-state purchasers. 138 S. Ct. at 2089.

Petitioner tries to explain away these contrary rulings by claiming that *Wayfair* addressed only the *personal* nexus component of the substantial nexus test, and not the *transactional* nexus component. Pet. 15. It points out that transactional nexus requires a sufficient connection between the state and the transaction being taxed, whereas personal nexus requires a sufficient connection with the entity being taxed. Pet. 6. Because the Court in *Wayfair* was principally concerned with overruling *Quill*'s physical-presence rule, which relates to *personal* nexus, Petitioner argues that *Wayfair* simply did not address *Dilworth*'s separate *transactional* nexus bar on taxing interstate sales. Pet. 14-16.

This argument cannot be squared with what the *Wayfair* decision actually says. It states: "the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Wayfair*, 138 S. Ct. at 2099. It then explained that "such a nexus is established when the taxpayer avails itself of the substantial privilege of carrying on business in that jurisdiction." *Id.* (cleaned up). It further explained that, as a general

matter, "the sale of goods or services has a sufficient nexus to the State in which the sale is consummated." *Id.* at 2092 (quotation marks omitted). And it noted that, "[g]enerally speaking, a sale is attributable to its destination"—and that South Dakota follows this destination-based sourcing rule. *Id.* at 2092-93 (citation omitted). Then, after discussing the "economic and virtual contacts respondents have with the State," the Court held that "the substantial nexus requirement of *Complete Auto* is satisfied in this case." *Id.* Thus, *Wayfair* could not have been clearer. It held that the *entirety* of the substantial-nexus requirement is satisfied when an out-of-state retailer sells goods that are delivered to an in-state consumer.

Petitioner next argues that *Wayfair*'s holding on transactional nexus is somehow not binding because "the parties had stipulated away the transactional-nexus issue." Pet. 15. But parties cannot "stipulate" that states have greater constitutional authority than the dormant Commerce Clause allows. And even if they could, such a "stipulation" would not change the fact that *Wayfair* squarely held that transactional nexus was satisfied in that case.

In sum, because *Wayfair* is simply irreconcilable with the Court's earlier decision in *Dilworth*, the state supreme court correctly chose to apply this Court's later precedent.

Wayfair also confirms that the decision below was correct for another reason. It confirms that the sales took place in North Carolina.

All of Petitioner's arguments are rooted in the false premise that its sales to North Carolina customers took place outside the State. *See* Pet. i (framing the question presented as whether North Carolina may tax "sales that occur outside its borders"). But *Wayfair* made clear that state law—not the Constitution—determines the location of a sale. Specifically, the Court noted that South Dakota's tax-sourcing statute "applies to sales of 'tangible personal property, products transferred electronically, or services *for delivery into South Dakota.*'" 138 S. Ct. at 2092 (quoting the South Dakota statute). It went on to observe that, under the dormant Commerce Clause, "the sale of goods or services '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.* (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 184 (1995)). In other words, the *Wayfair* Court pointed to South Dakota law to determine the location where the sale was consummated. And it made clear that the dormant Commerce Clause accommodates these state-law sourcing rules.

Here too, North Carolina's sourcing statute adopts a destination-based sourcing rule. Thus, just as in *Wayfair*, when an out-of-state seller delivers goods by common carrier to a North Carolina purchaser or its designee, that sale takes place in North Carolina. N.C. Gen. Stat. §§ 105-164.4B(a)(2), (d)(2). And again, this destination-based sourcing rule is typical: "Generally speaking, a sale is attributable to its destination." *Wayfair*, 138 S. Ct. at 2092-93 (citation omitted). All told, at least forty states and the District of Columbia

have adopted destination-based sourcing rules—including all members of the multistate SSUTA. Brief for the District of Columbia et al. as Amici Curiae Supporting Respondent at 13, *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 382 N.C. 356, 2022-NCSC-133 (No. 407A21).

Thus, *Wayfair* confirms that the Constitution says nothing about the location of cross-border sales. Instead, tax sourcing is determined by state law. Here, there is no question that, under those sourcing rules, Petitioner's sales here took place in North Carolina.[1]

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In sum, there is simply no good-faith way to reconcile *Dilworth* with *Wayfair*. The state supreme court was therefore right to adhere to this Court's most-recent controlling precedent.

II. There Is No Meaningful Split of Authority.

Petitioner next argues that review is warranted because the question of *Dilworth*'s continuing vitality has divided the state courts. But any split of authority that Petitioner has identified is badly outdated and therefore does not justify this Court's review.

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[1] While another case might raise difficult choice-of-law or apportionment questions, this case does not. Both Wisconsin (where Petitioner is located) and North Carolina follow destination-based sourcing. *See* N.C. Gen. Stat. §§ 105-164.4B(a)(2), (d)(2); Wis. Stat. § 77.522(1)(b). Thus, under both Wisconsin and North Carolina law, the sales here would be sourced to North Carolina.

At the outset, Petitioner's claim of a split fatally undermines its plea for summary reversal. If the state courts are widely divided on the governing rules in this area, as Petitioner claims, the proper course would be for this Court to grant plenary review—not summarily reverse the thoughtful and comprehensive decision below.

But such review is not needed. Petitioner claims to identify a 4-2 split among state high courts on whether *Dilworth* remains good law. Pet. 20-24. It also identifies a 3-2 split among the state intermediate appellate courts. Pet. 25-26. To be sure, these cases do depart from one another on whether the modern *Complete Auto* framework for analyzing dormant Commerce Clause challenges to state taxation displaces *Dilworth*'s contrary rule. Missing from Petitioner's analysis, however, is any discussion of these decisions' *timing*. All but one of these eleven decisions predate this Court's decision in *Wayfair*. *See* Pet. 20-26. They therefore cannot speak to the decisive question here: whether *Wayfair*'s decision to uphold a sales-tax regime materially identical to the one challenged in this case displaces *Dilworth*.

On that question, there is no split. As Petitioner itself recounts, the only other lower court case to address the continuing vitality of *Dilworth* after *Wayfair* aligns with the decision below. *See* Pet. 26 (discussing *Greenscapes Home & Garden Prods., Inc. v. Testa*, 129 N.E.3d 1060, 1071-72 (Ohio Ct. App. 2019)). Specifically, in *Greenscapes*, the Ohio Court of Appeals held that *Dilworth*'s per se rule against taxing interstate commerce had been overruled by the

Complete Auto framework. 129 N.E.3d at 1071. It went on to observe that *Dilworth*'s demise in the specific context of state authority to tax interstate sales had been confirmed by *Wayfair*. *See id.* at 1072-73.

The staleness of the split is reinforced by the fact that the alleged split includes a case arising from South Dakota. *See* Pet. 22-23 (citing *State* v. *Dorhout*, 513 N.W.2d 390 (S.D. 1994)). According to Petitioner, the South Dakota Supreme Court is among the four state high courts that continue to adhere to *Dilworth*, even after *Complete Auto*. Pet. 23. But following this Court's decision in *Wayfair*, the very same out-of-state retailers who had challenged South Dakota's taxing statute agreed to start paying *sales* taxes on their deliveries to in-state residents. Richard D. Pomp, Wayfair*: Its Implications and Missed Opportunities*, 58 Wash. U. J. L. & Pub. Pol'y 1, 9 n.55 (2019). None even attempted to raise *Dilworth* as a continuing defense on remand—as *Dilworth*'s academic defenders had previously urged them to do. *See, e.g.*, Hayes R. Holderness & Matthew C. Boch, *Did South Dakota Neglect Transactional Nexus in Its Bill to Kill* Quill*?*, Bloomberg BNA Tax Mgmnt. Wkly. State Tax Rep. (Dec. 6, 2017); *see also Wayfair*, 138 S. Ct. at 2100 ("Any remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.").

These highly sophisticated entities with billions of dollars on the line clearly disagreed with Petitioner that *Dilworth* somehow survived *Wayfair*. This

business decision only underscores the key reason why review here is not warranted: It is broadly accepted that *Wayfair* settled the question of state authority to tax remote sales once and for all. By seeking this Court's review here, Petitioner seeks to disrupt that stable status quo.

Below, twenty states and the District of Columbia filed a brief to emphasize their "paramount interest" in preserving their authority to assess sales taxes on remote sales. D.C. Amicus Br., *supra*, at 17. This diverse coalition bridged partisan, economic, and geographic divides—from Alabama to New York, and Idaho to Connecticut. *See id.* All of these states (and many more) share an interest in the stability of their tax laws: Since *Wayfair*, *dozens of states* "have started requiring remote retailers to collect sales taxes when they deliver more than a threshold quantity of goods and services into the state each year." *Id.* at 9 & n.3; *see also, e.g.*, *How States Responded to South Dakota v. Wayfair in 2018*, Thomson Reuters (Dec. 21, 2018), https://bit.ly/42LfY4T ("Less than six months after the U.S. Supreme Court overturned the physical presence rule for sales and use tax nexus with its ruling in *South Dakota v. Wayfair*, the vast majority of states have enacted or announced economic nexus policies, and the trend continues into the end of the year.").

Given that the great majority of states *already* follow sourcing rules that mirror North Carolina's, Petitioner's claim that this Court's review is needed to prevent states from enacting similar laws is passing strange. Pet. 29-30. And despite the cascade of state laws mirroring South Dakota's, the decision below is

only one of two post-*Wayfair* cases that has even considered whether *Dilworth* still remains good law. Both reached the same conclusion: Because *Dilworth* is irreconcilable with *Wayfair*, the later decision controls.

In sum, the law here is stable and settled. Any split of authority on whether *Dilworth* remains binding was resolved when this Court decided *Wayfair*. After *Wayfair*, the ground rules are clear: States can enact sales-tax regimes that mirror the South Dakota law upheld in that case. Petitioner provides no good reason for this Court to disrupt this workable status quo by granting review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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