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

REPLY BRIEF FOR THE PETITIONER

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Rarely does a respondent concede so many factors warranting this Court's review. The North Carolina Department of Revenue agrees (at 2, 13–15) that the decision below conflicts directly with *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (1944). The Department agrees (at 2) that under *Dilworth*, Quad Graphics should not have been assessed a multimillion-dollar tax—including nearly a million dollars in penalties—for its remote sales. The Department agrees (*ibid.*) "that the scope of state authority to tax remote sales is vitally important." The Department does not dispute that "[t]his case presents an ideal vehicle to take up the issue of *Dilworth*'s continued vitality." Pet. 30. And the Department agrees (at 18) that state high courts have split 4-2 on that issue.

The Department instead stakes its opposition on a single argument about the merits—that whether this Court realized it or not, *Dilworth* has *already* been overruled by *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018). But as this Court recently reminded litigants, "[s]peculating about what this Court might have thought about arguments it never addressed needlessly introduces confusion. This Court looks for definitive interpretations, not

holdings in hiding." *Wilkins* v. *United States*, 143 S. Ct. 870, 880 (2023). If state courts need a similar reminder, summary reversal would be an appropriate way to deliver it.

Even if the Department were right about an anti-*Dilworth* holding lurking in *Wayfair*, that would only cinch the case for plenary review. If the *Wayfair* Court was "simply unaware" that it was inadvertently overthrowing a 75-year-old precedent, Br. in Opp. 12, then this case presents a perfect opportunity for deciding *Dilworth*'s fate deliberately and with full briefing. The opportunity comes none too soon: As six amici note in supporting certiorari, the decision below has sown confusion among taxpayers and prompted widespread denunciation from scholars, tax professionals, and the business community. Indeed, just the resulting risk of double taxation would be enough, by itself, to merit this Court's review.

Finally, the Department insists (at 20) that direct consideration of *Dilworth*'s fate would "disrupt [the] stable status quo." But the most disruptive path imaginable would be to give lower courts a green light to disregard on-point Supreme Court precedent whenever they purport to find a holding in hiding.

I. *WAYFAIR* DID NOT IMPLICITLY OVERRULE *DILWORTH*

With a flair for understatement, the Department acknowledges (at 14) that *Wayfair* "was principally concerned with overruling *Quill*'s physical-presence rule, which relates to *personal* nexus." The Department also acknowledges (at 12–13) that "the parties (and amici) [there] failed to identify [*Dilworth*] in their briefing and argument." The Department further concedes (at 13) that *Wayfair* "never expressly said that *Dilworth* is overruled"—or, indeed, referred to the case at all.

The Department nevertheless maintains (at 13–15) that this Court—perhaps "unaware" it was doing so—

implicitly overruled *Dilworth* by holding that South Dakota's law satisfied *Complete Auto*'s substantial-nexus prong. Indeed, *all* of the Department's arguments share this premise. But that argument misunderstands both *Wayfair* and *stare decisis*.

A. Analysis of *Wayfair* must proceed from two maxims. First, "[b]efore a lower court makes the assumption of a tacit overruling, it will want to exhaust all possibilities of reconciling the two decisions." Bryan Garner et al., *The Law of Judicial Precedent* 301–02 (2016). Second, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters* v. *Churchill*, 511 U.S. 661, 678 (1994). These principles, in combination, decide this case: *Wayfair* re-evaluated *Quill*'s physical-presence requirement for personal nexus, but neither the parties nor the Court discussed whether remote sales can satisfy the transactional-nexus requirement. See Pet. 14–16.

According to the Department (at 12), a lower court may decide that this Court was "simply unaware" it had resolved unraised and unbriefed questions. Even if lower courts were *ever* allowed to perform that kind of psychoanalysis, but see *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004), it was surely inappropriate here, where the unacknowledged issue concerns the fate of a decades-old precedent that affects millions of transactions daily. At minimum, a lower court would need a "superspecial justification" before being so presumptuous. *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

B. Nothing of the sort exists here. The Department argues (at 11) that *Wayfair* "upheld against a dormant Commerce Clause challenge a [South Dakota] statute that is virtually indistinguishable from the North Carolina law challenged in this case." But this Court sits to resolve specific questions raised by specific litigants in specific cases, not to give laws a blanket thumbs-up or thumbs-down. The

Wayfair respondents challenged the taxes assessed against them solely on the ground that those taxes failed to satisfy *Quill*'s physical-presence rule; South Dakota defended its tax by arguing that "this Court [should] abrogate *Quill*'s … physical-presence requirement." Pet. i, No. 17-494. This Court then "granted certiorari … to reconsider the scope and validity of the physical presence rule," 138 S. Ct. at 2088; decided that "the physical presence rule of *Quill* [was] unsound" and should be "overruled," *id.* at 2099; and remanded for resolution of "[a]ny remaining claims regarding the application of the Commerce Clause in the absence of *Quill*," *id.* at 2100. The Court did what it was asked to do—nothing more.

The Department tries (at 14–15) to widen *Wayfair*'s holding by quoting general language from the opinion about how "the substantial nexus requirement of *Complete Auto* is satisfied in this case." 138 S. Ct. at 2099. That language means what it says: The requirement was satisfied *in that case* based on how the parties framed the dispute. In arguing otherwise, the Department ignores this Court's instruction to read "general language in judicial opinions … as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Turkiye Halk Bankasi A.S.* v. *United States*, 143 S. Ct. 940, 950 (2023) (citation omitted); see *Wilkins*, 143 S. Ct. at 880.

That instruction has particular force here because the parties in *Wayfair* stipulated away the transactional-nexus issue by "agree[ing] that South Dakota ha[d] the authority to tax *these transactions*." *Wayfair*, 138 S. Ct. at 2092 (emphasis added). The Department responds (at 15) that parties "cannot 'stipulate' that states have greater constitutional authority than the dormant Commerce Clause allows." But parties *can* waive claims and defenses,

even constitutional ones. Parties routinely challenge governmental action on some grounds but not others, and parties can stipulate to facts that may limit a court's ability to rule on certain constitutional issues. Indeed, *Wayfair* was litigated without a real record because, as South Dakota's counsel explained, "*Quill* [made] every fact beyond physical presence irrelevant." Transcript of Oral Argument at 58, *South Dakota* v. *Wayfair Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494). Absent a record, this Court could not have known—and had no reason to care—whether title to and possession of the taxpayers' goods passed outside of South Dakota.[1]

C. The Department argues (at 16) that *Wayfair* "made clear that state law—not the Constitution—determines the location of a sale." Apparently the Department thinks that *Wayfair* implicitly overruled yet *another* precedent: In *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, 514 U.S. 175 (1995), this Court accepted as "settled" that "the taxable event of the consummated sale of goods [is] … unique" to the "particular time and place" where the "transfer of ownership and possession" occurred. *Id.* at 187–88. That rule makes sense. States cannot be the ultimate arbiters of where a sale occurs because their laws can conflict and lead to double taxation. See pp. 7–8, *infra*.

In any event, *Wayfair* did not give states the power to legislate geography. The Department misinterprets *Wayfair*'s statement that "[g]enerally speaking, a sale is attributable to its destination." 138 S. Ct. at 2092–93 (quoting 2 Charles A. Trost & Paul J. Hartman, *Federal Limitations on State and Local Taxation* 2d § 11:1, p. 471

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[1] For similar reasons, the Department errs (at 19–20) in deriving meaning from the fact that the *Wayfair* taxpayers failed to bring a separate *Dilworth* challenge. The record does not reveal where the relevant sales were consummated (and thus whether a *Dilworth* challenge would have had merit).

(2003)). In context, that simply meant that the destination dictates the nature of the tax: "Where the destination is within the same State 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*." Trost & Hartman, *supra*, § 11:1, p. 471 (emphasis added).

II. STATE COURTS ARE DIVIDED ABOUT *DILWORTH*

The Department concedes (at 18) the 4-2 split among state high courts over whether *Dilworth* has been overruled, with the majority favoring Quad Graphics' view. The Department also acknowledges (*ibid.*) that the cases comprising the split "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."

The Department nevertheless dismisses (at 17) this acknowledged disarray as no longer "meaningful" now that *Wayfair* has overruled *Dilworth*. That argument, of course, merely begs the question presented. And the Department, having penalized Quad Graphics almost a million dollars for failing to pay tax on out-of-state sales that were made before *Wayfair*, should not now be heard to argue that *Wayfair* changed everything.

The Department's attempt (at 19) to characterize the split as "stale[]" fails in any event. As an initial matter, the Department's position that *Wayfair* overruled *Dilworth* is revisionist history. Below, the Department repeatedly identified *Complete Auto* as the pivotal case that "supplanted" *Dilworth*. Dep't of Rev. Br. at 38 n.12, *Quad Graphics, Inc.* v. *N.C. Dep't of Rev.*, 881 S.E.2d 810 (N.C. 2022) (No. 407A21). As for *Wayfair*, the Department said it merely "confirmed beyond doubt that *Dilworth* is a dead letter." *Id.* at 37; see *id.* at 33.

The Department's amici agreed. Twenty states and the District of Columbia argued that "[a]s Respondent-

Appellant [*i.e.*, the Department] describes," *Dilworth*'s rule "was discarded in favor of a flexible, multifactor test *long before* the Court considered South Dakota's sales tax in *Wayfair*." Br. for D.C. et al. Supporting Appellant at 5, *Quad Graphics* (N.C. 2022) (emphasis added); see Br. for Multistate Tax Commission Supporting Appellant at 2–12, *Quad Graphics* (N.C. 2022) (similar).

The same view is reflected in the two state courts that have addressed the question after *Wayfair*. The North Carolina Supreme Court framed its analysis in terms of whether *Complete Auto* had "abandoned" the "*Dilworth/General Trading* dichotomy." Pet. App. 14a; see *id.* at 15a–16a. Like the Department, the court looked to *Wayfair* primarily to confirm its earlier conclusion that the dichotomy had been abandoned. See *id.* at 15a (declaring itself in the "fortuitous position of not having to discern whether *Dilworth* was automatically retained within the Supreme Court's decision in *Complete Auto*"). The Ohio Court of Appeals similarly opined that "[i]n *Complete Auto*, the U.S. Supreme Court overruled [the *Dilworth*] line of cases." *Greenscapes Home & Garden Prods., Inc.* v. *Testa*, 129 N.E.3d 1060, 1071 (2019).

The Department emphasizes (at 19–21) the relatively modest number of post-*Wayfair* cases that address *Dilworth*, arguing (at 21) that it shows *Wayfair* "resolved" the preexisting split. More likely, it reflects the difficulty of challenging state tax assessments, which States require taxpayers to pay before disputing. See *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990); see also NAM Br. 15; Am. College of Tax Counsel Br. 9 n.3.

Finally, even if the Department's predictions of a post-*Wayfair* consensus might eventually come true, it would not justify leaving the decision below in place. Waiting for a bottom-up consensus is uniquely inappropriate

when the question is whether this Court has overruled one of its own decisions. See Pet. 27–28.[2]

III. The Petition Cleanly Presents a Question of Vital Importance

The Department agrees (at 2) that clarity in the law governing taxation of out-of-state sales is "vitally important." The Department also *disagrees* with the majority below that *Dilworth* rests on "a formalistic distinction," Pet. App. 14a, instead agreeing with Quad Graphics (at 3) that "the distinction between use and sales taxes matters." The Department further agrees (at 18) that the "decisive" question in this case is whether *Dilworth* remains controlling precedent—a question that this case cleanly presents, see Pet. 30–31.

A. The Department instead opposes review by recycling its argument (at 20) that "*Wayfair* settled the question of state authority to tax remote sales once and for all." But even if the scope of *Wayfair*'s holding were beyond debate, it is fantasy for the Department to claim (*ibid.*) that there exists a "settled," "broadly accepted," and "stable status quo" regarding the taxation of remote sales.

Start with tax scholars, tax professionals, and business entities, nearly all of whom agree that *Dilworth* remains binding precedent. See Pet. 14, 16. They warn that the decision below "threatens to create sales tax jurisdiction chaos," Am. College of Tax Counsel Br. 2; "upsets businesses' settled expectations," NAM Br. 3; "introduce[s] uncertainty and instability into the legal system,"

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[2] The Department claims (at 18) that the existence of a split "fatally undermines" Quad Graphics' request for summary reversal. But summary reversal is proper when a lower court disregards this Court's precedent, which almost always puts that court at odds with sister tribunals. See, *e.g.*, *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam); *City of Tahlequah* v. *Bond*, 142 S. Ct. 9, 12 (2021) (per curiam).

N.C. Chamber Legal Inst. Br. 1; and "jeopardiz[es] existing reliance and economic interests," Council on State Taxation Br. 7. Countless businesses around the country are already being forced "to guess whether the courts in each of the States they ship to will continue to follow *Dilworth* on pain of millions in back taxes and penalties if they guess wrong." NAM Br. 13.

The Department ignores these pleas, insisting (at 20–21) that two post-*Wayfair* cases represent a "stable status quo" for its position. But two decisions (only one from a court of last resort) cannot be called a trend, much less a stable status quo—especially when both treated *Complete Auto*, not *Wayfair*, as the pivotal case. See *supra* Part II.

B. The Department notes (at 16–17) that "forty states and the District of Columbia have adopted destination-based sourcing rules." The reality is more complex: "state policies remain in flux," and many of these laws are "justly see[n] … as temporary, to be amended or replaced once there has been time for greater scrutiny of the complex issues arising from *Wayfair*." Tax Foundation, State Sales Taxes in the Post-Wayfair Era 3 (Dec. 2019), https://bit.ly/3BUWX4I.

But even accepting the Department's count, that means ten States have adopted *different* rules, creating fertile ground for conflict and double taxation. Consider, for instance, a retailer who sells a product from Texas, which has an origin-based sourcing law, see Tex. Tax Code § 321.203, for delivery to North Carolina, which has a destination-based sourcing law, see N.C. Gen. Stat. § 105-164.4B(a)(2), (d)(2). In that case, *both States* would levy sales taxes on the transaction. Because neither State offers a credit against its own sales taxes, see Tex. Tax Code § 151.303(c) (providing a credit against its "use tax" but *not* its sales tax); N.C. Gen. Stat. § 105-164.6(c) (same), the result would be double taxation: The retailer would be

liable for sales tax in both States, with neither crediting any tax paid to the other.

The *Dilworth* rule avoids such results by treating a sale as a "discrete event" that occurs at "a particular time and place." *Jefferson Lines*, 514 U.S. at 186–87. The Department's test, by contrast, presents "difficult choice-of-law [and] apportionment questions." Br. in Opp. 17 n.1.

C. The destabilizing effect of the decision below is not limited to *Dilworth*. "[A]llowing the North Carolina Supreme Court's decision to stand will encourage state taxing authorities to continue to try to subvert this Court's precedents in a quest to raise revenue from politically less-powerful out-of-state sellers." NAM Br. 13. Such incentives are particularly pernicious in the taxation context, where "taxpayers must rely almost exclusively on state courts to arbitrate potential federal constitutional challenges of state taxes." Council on State Taxation Br. 22–23. The result will be "an uncharted sea of doubt and difficulty," where taxpayers "will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed." *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting).

D. The Department protests (at 21) that the act of granting certiorari would *itself* "disrupt" a "stable and settled" status quo. That argument is particularly ironic given the Department's advocacy for state courts to "read the tea leaves" of this Court's opinions, Council on State Taxation Br. 8, and to decide for themselves which decisions have "implicitly" been "supersede[d]," Pet. App. 15a–16a.

In fact, certiorari would not "disrupt" anything. If this Court agrees with the Department that *Dilworth* should go, saying so will powerfully reinforce the "status quo" that the Department claims already exists. But if this Court agrees with Quad Graphics that *Dilworth* remains

good law, that pronouncement will confirm that several States—including North Carolina—are unconstitutionally taxing sales outside their borders. Either way, the road forward for States, taxpayers, and courts will be clear. There is nothing "disruptive" in allowing this Court to determine the continuing vitality of its own precedent. Indeed, it is hard to imagine anything more integral to our federal system of government.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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