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 *AMICI CURIAE* OF COUNCIL ON STATE TAXATION AND PROFESSOR RICHARD D. POMP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce.[1] Today COST has grown to an independent membership of over 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST members are extensively engaged in interstate commerce and its membership shares a vital interest in ensuring states do not impede the rights of all businesses engaged in both interstate and international commerce. To that end, it is important to COST members that states impose their sales and use taxes in a manner consistent with the protections afforded by the U.S. Constitution's Commerce Clause. The instant case involves the North Carolina Department of Revenue's (hereinafter "Department") constitutionally prohibited assessment of a sales tax on sales occurring outside the State rather than a constitutionally permitted use tax assessment on the in-state use of the items sold. The case at hand provides this Court a timely opportunity to clarify the U.S. Constitutional requirement under the Commerce Clause for states to make the correct type of tax assessment.

COST has a history of submitting *amicus* briefs to this Court when state and local tax issues are under consideration. COST has submitted *amicus* briefs in

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity aside from amici and its counsel funded its preparation or submission. The parties received timely notice of *amici*'s intent to file this brief.

significant state tax cases considered by this Court including: *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015); *Alabama Department of Revenue v. CSX Transportation, Inc.*, 575 U.S. 21 (2015); *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015); *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019); and *Steiner v. Utah State Tax Commission*, 449 P.3d 189 (Utah 2019), *cert. denied*, 140 S. Ct. 1114 (2020). More recently, COST filed *amicus* briefs in *Ferrellgas Partners, L.P. v. Director, Division of Taxation*, 251 A.3d 760 (N.J. 2021, *cert. denied*, 142 S. Ct. 1440 (2022)); *Washington Bankers Association, et. al. v. State of Washington, Department of Revenue, et al.*, 495 P.3d 808 (Wash. 2021), *cert. denied*, 142 S. Ct. 2828 (2022); and on the merits in *United States of America, ex rel. Tracy Schutte v. SuperValu, Inc.*, 9 F.4th 455 (7th Cir. 2021), *cert granted*, No. 21-1326 (2023) and *United States, ex rel. Thomas Proctor v. Safeway, Inc.*, 30 F.4th 649 (7th Cir. 2022), *cert granted*, No. 22-111 (2023). As a long-standing representative of multijurisdictional taxpayers, COST is uniquely positioned to provide this Court with the analytical underpinnings for why the Department's sales tax assessment violates the Commerce Clause.[2]

For over forty years, Professor Richard Pomp has studied, lectured, taught, published, consulted, and testified on issues of state taxation. He is the author of State and Local Taxation, now in its 9th edition, which has been used by law schools, law firms, accounting firms, and state tax administrations throughout the country. He has served as a consultant on state tax

[2] The Commerce Clause "regulate[s] commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

issues and policies to nearly half of the states, as well as the Multistate Tax Commission. He has testified as an expert witness or submitted an affidavit or report on various aspects of state taxation in over forty states, the United States Bankruptcy Court, and the federal district courts for Alabama and Puerto Rico.

Professor Pomp has received numerous prizes and awards. He regularly teaches courses on sales taxation with a focus on the Commerce and Due Process Clauses of the U.S. Constitution. His views herein do not necessarily represent those of any institution with which he is affiliated.

STATEMENT OF THE CASE

In 1944, this Court decided the companion cases of *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944) and *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944). In *Dilworth*, Arkansas attempted to impose its sales tax on Dilworth, a Tennessee corporation, which solicited sales from Arkansas customers. Those orders were sent back to Dilworth's office in Memphis, Tennessee where they were accepted or rejected. If accepted, the goods were sent by common carrier to Arkansas customers. Title passed upon delivery to the carrier in Memphis, and collection of the sales tax was not made in Arkansas. "In short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." *Dilworth,* 322 U.S. at 328. "We would have to destroy both business and legal notions to deny that under these circumstances the sale–the transfer of ownership–was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." *Id*. at 329.

General Trading involved facts nearly identical to *Dilworth*. The issue, however, was whether the market state (Iowa) could make the Minnesota-based vendor (General Trading) collect its use tax, which was legally imposed on the Iowa purchaser. Iowa was not trying to make the out-of-state vendor pay or collect its sales tax, which was the issue in *Dilworth.* The Court drew a sharp line between paying a sales tax when the vendor has made no sale in the market state, which was *Dilworth*, and collecting a tax imposed on the purchaser, which was *General Trading*.

As noted by the Court in *Dilworth*,

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

Id. at 330.

"The [use] tax is what it professes to be – a nondiscriminatory excise laid on all personal property consumed in Iowa . . . [t]he extraction is made against the ultimate consumer – the Iowa resident who is

paying taxes to sustain his own state government. To make the [Minnesota seller] the tax collector is a familiar and sanctioned device." *Gen. Trading*, 322 U.S. at 338.

Fast forward to 2018, when the Department assessed sales tax, with penalties, for over $3 million against Petitioner, Quad Graphics, Inc., a marketing company headquartered in Wisconsin. The assessment covered printed materials ordered and shipped by common carrier from outside of North Carolina to customers in North Carolina from 2009 to 2011—facts remarkably similar to *Dilworth*. While the Department could have issued a use tax assessment under the teaching of *General Trading*, the Department argues that this Court has implicitly overruled *Dilworth*, thereby permitting it to assess a sales tax on sales occurring outside the State.

The North Carolina Business Court supported Petitioner by holding 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." Pet. App. 79a. "The sales at issue lacked a sufficient transactional nexus to North Carolina under the Commerce Clause of the United States Constitution since it is undisputed that title to the sales at issue passed to the purchasers and third-party recipients outside of North Carolina." *Id.* at 80a. In other words, under *Dilworth*, which is controlling precedent, no sale occurred in North Carolina, and thus the State could not apply its sales tax.

On appeal to the North Carolina Supreme Court, the majority disagreed with the Business Court's ruling and inappropriately dismantled *Dilworth*, holding that "the formalism doctrine established in *Dilworth*

has not survived the subsequent decisions of the Supreme Court of the United States in *Complete Auto* and *Wayfair* so as to render the sales tax regime of North Carolina violative of the Commerce and the Due Process Clause of the Constitution of the United States." Pet. App. 39a. According to the North Carolina Supreme Court, the Commerce Clause no longer requires that a sale occur within the State as a condition to applying its sales tax. *Id.* at 1a.

This Court is asked to determine whether North Carolina can ignore the longstanding *Dilworth* precedent, which this Court has never overruled—but to the contrary, has endorsed—and uphold a sales tax assessment even though no sale occurred in North Carolina. This case also provides the Court an opportunity to reinforce its warning under *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), that federal and state courts must respect this Court's holdings and it is not their place to overrule a case like *Dilworth*.[3]

SUMMARY OF THE ARGUMENT

The Petitioner comprehensively lays out the application of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), explaining why the Department's imposition of North Carolina's sales tax in this case

[3] This doctrine is also known as "anticipatory overruling." *See generally* Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decision Making*, 73 Tex. L. Rev. 1 (1994); C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 Fordham L. Rev. 39 (1990); Randy Kizel, *The Scope of Precedent*, 113 Mich. L. Rev. 179 (2014); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 Conn. L. Rev. 843 (1993).

violates the Commerce Clause. Pet'r Pet. for Writ of Cert. at 12-13. *Amici* provide additional context emphasizing the critical and substantive distinctions between state sales and use tax regimes that go well beyond mere formalism. For example, a state appropriately imposing its sales tax has the first right to tax a transaction, with other states providing a credit against their use taxes in order to avoid duplicative taxation.

The Department created this controversy by not assessing Petitioner's tax liability under the State's use tax pursuant to *General Trading*. As correctly reasoned by the dissent in *Quad Graphics* at the North Carolina Supreme Court, "[u]nder *Dilworth* and the facts of this case [the Department's sales tax assessment] violates the Commerce Clause. Had the Department chosen a *use* tax, the result here might be different. Contrary to the facts in *Wayfair*, it is the Department's choice of a tax, and not Quad Graphic's effort to avoid taxes, that brings this constitutional quandary before this Court." Pet. App. 44a (emphasis in original).

Dilworth has not been directly or implicitly overruled by this Court, and it remains applicable to the facts of this case. North Carolina Supreme Court's overturning of *Dilworth* would create chaos with the established national consensus of avoiding violations of the Commerce Clause by the market state providing a credit for the sales tax paid to the origin state. And without intervention by this Court, state legislatures and state courts will be emboldened to ignore this Court's precedents, increasing the risk of taxes that discriminate against interstate commerce and jeopardizing existing reliance and economic interests.

ARGUMENT

I. ONLY THE U.S. SUPREME COURT CAN OVERTURN ITS PRECEDENTS AND NOT LOWER FEDERAL COURTS OR STATE COURTS.

The North Carolina Supreme Court overruling *Dilworth* directly contravenes *Rodriguez*, where this Court warned that it is not within lower courts' purview to reject the Court's precedents that may appear to no longer apply. "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 [lower court] should follow the case which directly controls leaving to this Court the prerogative of overruling its own decision." *Rodriguez*, 490 U.S. at 484. This principle applies to state courts as illustrated by *Bosse v. Oklahoma*, 580 U.S. 1 (2016), where this Court rejected the proposition that its precedent had been "implicitly overruled." *Id.* at 2. Remanding *Bosse* back to the Oklahoma Court of Criminal Appeals, this Court stated, "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Id*. at 3 (citing *Hohn v. United States*, 524 U.S. 236, 252-253 (1998)).

State and local tax laws require consistency. Fifty state courts cannot be free to read the tea leaves of this Court's cases, deciding which ones have implicitly overruled others. This Court needs to reinforce the significance of the *Rodriguez* mandate by preventing the North Carolina Supreme Court from summarily overruling *Dilworth*. This is particularly critical in the realm of state taxation because, as explained in Part IV below, appeals from state courts are to this Court and rarely to any other court in the federal judiciary.

Fifty state courts are unlikely to agree on which cases have been implicitly overruled, and this Court would be strained to resolve the resulting inconsistencies and conflicts.

A recent example of a state respecting this Court's precedent is the South Dakota Supreme Court's invalidation of a law passed by the South Dakota legislature, S.B. 106,[4] which imposed a sales tax collection requirement on an entity without in-state physical presence as required by *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As more fully discussed below, the South Dakota State Supreme Court followed this Court's precedents stating:

> However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled. *Quill* remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes. We are mindful of the Supreme Court's directive to follow its precedent when it "has direct application in a case" and leave to that Court 'the prerogative of overruling its own decisions[.]'

(citing *Rodriguez,* 490 U.S. at 484).[5] Of course, *this Court*—not the South Dakota Supreme Court—did

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[4] *See* 2016 Legis. Assemb., 91st Sess. (S.D. 2016) (enacted S.D. Codified Laws § 10-64-2).

[5] *See* Richard Pomp, *Is Quad Graphics Decision Innocuous or a Jurisprudential Threat*, Bloomberg Daily Tax Report (Jan. 25, 2023, 4:45AM), https://news.bloombergtax.com/tax-insights-and-commentary/is-quad-graphics-decision-innocuous-or-a-jurisprudential-threat ("It's a mystery why North Carolina's [Department] ignored *General Trading's* blueprint, which easily would have

just that in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), and explicitly stated "the Court concludes that the physical presence rule of *Quill* is unsound and incorrect . . . [*Quill*] and [*Bellas Hess*], should be, and now are, overruled" (internal cites omitted).[6] *Id.* at 2099.

Just as the South Dakota Supreme Court abided by this Court's precedent, the North Carolina Supreme Court must follow *Dilworth*, until it is expressly overturned by this Court. Contrary to the North Carolina Supreme Court's speculations, *Dilworth* retains important precedential value, particularly as it pertains to the meaningful distinction between sales taxes and use taxes.

II. OVERRULING *DILWORTH* WOULD ALTER EXISTING ECONOMIC RELATIONSHIPS AND INTERFERE WITH THE NATIONAL CONSENSUS ON ELIMINATING DISCRIMINATION AGAINST INTERSTATE COMMERCE.

The North Carolina Supreme Court viewed the difference between a sales tax and a use tax as a mere formality. Whether the sales tax was assessed rather than a use tax was irrelevant. Consistent with these views, whether a sale occurs in the market state was also irrelevant. But these views, if left to stand, would

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supported an assessment for the printing company's failure to collect [the State's] use tax . . . ").

[6] *See also Complete Auto*, the current landmark Commerce Clause case addressing the states' taxing power restrictions that explicitly overruled a prior landmark case: "we now reject the rule of *Spector Motor Service, Inc. v. O'Connor*, [340 U.S. 602 (1951)] that a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce, and that case is overruled." *Complete Auto*, 430 U.S. at 288-289.

upset reliance interests and alter existing economic relationships.

To illustrate, take a remote vendor like Quad Graphics, not making any sales in the market state. Overruling *Dilworth* could alter the relationship between creditors and debtors in the market state. Consider that state statutes authorizing tax increment financing for capital projects designate what revenue sources can be used to pay back the bonds that finance the project. States sometimes designate sales taxes as a revenue source but not use taxes.[7] Should states follow North Carolina's lead and disregard *Dilworth,* they would now tax sales by remote vendors that were previously subject to the use tax. At the state level, this would have no economic effect because it would just shift money from one pot (use tax) to another (sales tax). But in the context of tax increment financing, this would increase the collateral and security for the bonds. If the overruling of *Dilworth* had taken place prior to the issuance of the bonds, the increased collateral would have meant a lower interest rate and lower borrowing costs. Creditors would thus receive a windfall from the overruling.

At the same time, states with the same collateral structure that are slow to follow North Carolina's lead, or that refuse to do so, would have higher borrowing costs in competing for funds. And because when local governments borrow, they are competing with funds from investors throughout the country, the higher interest they would have to pay to attract funding would have ripple effects throughout the market.

Additionally, overriding *Dilworth* would interfere with a national consensus on how to eliminate multiple

[7] *See, e.g.,* Conn. Gen. Stat. § 32-285.

taxation of interstate commerce within sales and use tax systems.[8] A state generally has broad powers to impose its sales tax when title and possession to the sold good passes in the state and both the seller and the purchaser are located in the state. In that situation, the state where that transaction occurred has the right to levy a sales tax on the transaction, and other states imposing a use tax when the good is brought into their jurisdictions would uniformly provide a credit for the out-of-state sales tax. The credit eliminates the discrimination that would otherwise result against interstate commerce if the origin state's sales tax and the market state's sales tax were to both apply. Without a credit, purchasers would have an incentive to buy the good at home and avoid multiple taxation and hence the discrimination that would otherwise result from goods bought out-of-state.

The states have voluntarily adopted a credit mechanism that addresses the issue of multiple taxation. Their approach allows the origin state to stake the first claim to tax a transaction, with a credit provided by the market state against its use tax. As noted in *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175, 194 (1995), "[a state] may rely upon use-taxing States to do so. This is merely a practical consequence of the structure of use taxes, as generally based upon the primacy of taxes on sales, in that use of goods is taxed only to the extent that their prior sale has escaped taxation."

Forty-five states, plus the District of Columbia, impose sales and use taxes. All of these states provide

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[8] A state is obligated to eliminate this discrimination. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937). The credit mechanism, however, is the national consensus approach.

a credit against taxes paid to other states. As summarized in the chart below, in forty-one of these states, the credit is allowed only against their use taxes.[9] This reflects the fact that the market state does not impose its sales tax on out-of-state sales, so there is no need to provide a credit for the origin state's sales tax against a market state's sales tax. [10] Allowing the North Carolina decision to stand and thus allowing both the origin state and the market state to impose their sales tax on the same transaction, would create confusion over which state has the obligation to provide the credit necessary to prevent multiple taxation.

[9] North Carolina is one of those states that limits the availability of its credit to use tax. "A credit is allowed against the [use] tax imposed by this section for . . . the amount of sales or use tax due and paid on the item to another state . . .". NC Gen. Stat. § 105-164.6(c).

[10] In *Goldberg v. Swe*et, 488 U.S. 252 (1989), this Court addressed an Illinois tax on telecommunication services and noted "the risk of multiple taxation is low, and actual *multiple taxation is precluded by [Illinois] credit provision*." *Id*. at 265 (emphasis added)

Chart

State	Credit for Tax (Use Tax or Both)[11]
Alabama	**Limited to use tax** – Ala. Code § 40-23-65
Alaska	No state sales tax
Arizona	**Limited to use tax** - Ariz. Rev. Stat. § 42-5159(A)(2)
Arkansas	**Limited to use tax** - Ark. Code § 26-53-131(a)(1)
California	**Limited to use tax** - Cal. Rev. & Tax. Code § 6406
Colorado	**Limited to use tax** - Colo. Rev. Stat. § 39-26-203(1)(k)
Connecticut	Both sales & use tax - Conn. Gen. Stat. § 12-430(5)
Delaware	No state sales tax
Dist. of Columbia	**Limited to use tax** - D.C. Code § 47-2206
Florida	**Limited to use tax** - Fla. Stat. § 212.06(7)

[11] Some state revenue agencies have indicated that they apply "administrative grace" and would allow a credit against their sales taxes even though not required under their statutes. *See* Karl Frieden, Fred Nicely & Priya D. Nair, *Best and Worst of State Sales Tax Systems*, Council On State Taxation (December 2022), www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/cost-2022-sales-tax-systems-scorecard.pdf.

State	Credit for Tax (Use Tax or Both)[11]
Georgia	Both sales & use tax - Ga. Code § 48-8-42
Hawaii	**Limited to use tax** - Haw. Rev. Stat. § 238–3(i)
Idaho	**Limited to use tax** - Idaho Code § 63-3621(10)
Illinois	**Limited to use tax** - Il. Code 35 ILCS 105/3-55(d)
Indiana	**Limited to use tax** - Ind. Code § 6-2.5-3-5
Iowa	Both sales & use tax - Iowa Code Ann. § 423.22
Kansas	**Limited to use tax** - Kan. Stat. § 79-3705
Kentucky	**Limited to use tax** - Ky. Rev. Stat. § 139.510(1)
Louisiana	**Limited to use tax** - La. Rev. Stat. § 47:303(A)(3)
Maine	**Limited to use tax** - Me. Rev. Stat. tit. 36, § 1862
Maryland	**Limited to use tax** - Md. Code Tax-Gen. § 11-221(c)
Massachusetts	**Limited to use tax** - Mass. Gen. Laws ch. 64I, § 7(c)
Michigan	**Limited to use tax** - Mich. Comp. Laws § 205.94(1)(e)

State	Credit for Tax (Use Tax or Both)[11]
Minnesota	**Limited to use tax** - Minn. Stat. § 297A.80
Mississippi	**Limited to use tax** - Miss. Code § 27-67-7(a)
Missouri	**Limited to use tax** - Mo. Rev. Stat. § 144.615(5)
Montana	No state sales tax
Nebraska	**Limited to use tax** - Neb. Rev. Stat. § 77-2704.31
Nevada	**Limited to use tax** - Nev. Admin. Code § 372.055
New Hampshire	No state sales tax
New Jersey	**Limited to use tax** - N.J. Rev. Stat. § 54:32B-11(6)
New Mexico	Both sales & use tax - N.M. Stat. § 7-9-79(A)
New York	**Limited to use tax** - N.Y. Tax Law § 1118(7)
North Carolina	**Limited to use tax** - N.C. Gen. Stat. § 105-164.6(c)
North Dakota	**Limited to use tax** - N.D. Cent. Code § 57-40.2-11
Ohio	**Limited to use tax** - Ohio Rev. Code § 5741.02(C)(5)
Oklahoma	**Limited to use tax** - Okla. Stat. tit. 68, § 1404(3)

State	Credit for Tax (Use Tax or Both)[11]
Oregon	No state sales tax
Pennsylvania	**Limited to use tax** - Pa. Code 61 § 31.15
Rhode Island	**Limited to use tax** - R.I. Gen. Laws § 44-18-30.A
South Carolina	**Limited to use tax** - S.C. Code § 12-36-1310(C)
South Dakota	**Limited to use tax** - S.D. Codified Laws § 10-46-6.1
Tennessee	**Limited to use tax** - Tenn. Code § 67-6-507(a)
Texas	**Limited to use tax** - Tex. Tax Code § 151.303(c)
Utah	Both sales & use tax - Utah Code § 59-12-104(26)
Vermont	**Limited to use tax** - Vt. Stat. tit. 32, § 9744(a)(3)
Virginia	**Limited to use tax** - Va. Code § 58.1-611
Washington	**Limited to use tax** - Wash. Rev. Code § 82.12.035
West Virginia	**Limited to use tax** - W. Va. Code § 11-15A-10a(a)
Wisconsin	**Limited to use tax** - Wis. Stat. § 77.53(16)
Wyoming	**Limited to use tax** - Wyo. Stat. § 39-16-109(d)(iii)

These distinctions are substantive and not mere formalities. Allowing a state to overturn *Dilworth* would threaten established reliance and economic interests and create unpredictable consequences—the only safe prediction is that litigation would result.

III. *COMPLETE AUTO* AND *WAYFAIR* DO NOT DEMONSTRATE THAT THIS COURT HAS IMPLICITLY OVERRULED *DILWORTH*.

In the case at hand, the Department could have assessed a use tax under *General Trading*. The Department, however, for reasons never explained, chose to assess a constitutionally infirm sales tax, and the North Carolina Supreme Court erroneously confirmed the assessment by attempting to overturn *Dilworth*.[12]

The North Carolina Supreme Court cites this Court's decisions in *Complete Auto* and *Wayfair* as justifying the elimination of the distinctions between sales and use taxes and opined, without any inkling of support in this Court's cases, that *Dilworth* was implicitly overturned. Pet. App. 39a. To the contrary, this Court has actually endorsed the *Dilworth*/*General Trading* distinction.

Complete Auto supplies no support for obliterating the distinction between a sales tax and a use tax. In that case, Mississippi imposed its sales tax on the shipment of motor vehicles by rail to Jackson, Mississippi for transit to Mississippi dealers using Compete Auto's trucks. The tax applied only to the

[12] While not known for certain by *amici*, it is presumed the Department could not correct its sales tax assessment by issuing a use tax assessment because the State's statutes of limitations had expired—generally, three years for assessments based on due date of the return or when the return was filed, whichever is later. *See* N.C. Gen. Stat. § 105-241.8.

transportation that occurred within Mississippi and applied whether the transportation originated inside or outside the state. The only issue in the case was that the statute was imposed on the *privilege* of conducting an interstate business.[13] Earlier U.S. Supreme Court cases had drawn a line between a statute that used the "privilege" language and those that did not, holding the former violated the Commerce Clause but not the latter. This formal distinction was held to be a "trap for the unwary draftsman." *Complete Auto*, 430 U.S. at 279. The Court explicitly overturned its earlier case that upheld that distinction. *Id.* at 289.

Although *Complete Auto* ended the formalistic trap for the unwary, it does not mean that it eliminated all distinctions that may be described as formal. "[N]ot all formalism is alike." *Quill*, 504 U.S. at 314. The North Carolina Supreme Court's assertion that *Complete Auto* undermined *Dilworth,* which it viewed as drawing a formal distinction between sales taxes and use taxes, is not based on sound analysis.

Most significantly, the North Carolina Supreme Court conveniently overlooked that less than a month after deciding *Complete Auto,* this Court decided *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), upholding California's power to require the collection of its use tax. That decision actually *endorsed* the distinction drawn between *Dilworth* and *General Trading*. *Id*. at 558. What better proof could there be that *Complete Auto* did not overrule *Dilworth*? And what better illustration of the

[13] "We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Complete Auto*, 430 U.S. at 287.

wisdom of not allowing state courts to speculate when a U.S. Supreme Court case has been implicitly overruled, especially by ignoring evidence that flies in the face of their views? And if even more evidence is needed, *Dilworth* was still being positively cited by this Court nearly 20 years after *Complete Auto* in *Jefferson Lines*, 514 U.S. at 187, and in many cases before that.

The North Carolina Supreme Court was equally wrong in claiming that *Wayfair* implicitly overruled *Dilworth,* having misunderstood the nature of that case.

Wayfair was a test case brought in response to an invitation by Justice Kennedy in his concurring opinion in *Direct Marketing*. "The instant case does not raise this issue in a manner appropriate for the Court to address it . . . [t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Direct Mktg.*, 575 U.S. at 18-19. South Dakota readily accepted this invitation.

In preparation for its attack on *Quill*, South Dakota passed S.B. 106, "to provide for the collection of sales taxes from certain remote sellers . . .". *Wayfair*, 138 S. Ct. at 2088. It requires out-of-state sellers to collect and remit sales tax (but not use tax) "as if the seller had a physical presence in the State." *Id*. at 2089. "Notwithstanding any other provision of the law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state . . . shall remit the sales tax . . . ." South Dakota S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) (enacted S.D. Codified Laws § 10-64-2). Applying this statute, South Dakota imposed its sales tax on Wayfair and two other remote vendors that did not have a physical presence in that State. As mentioned

above, the South Dakota Supreme Court held that the statute as applied was unconstitutional, and this Court overturned the physical presence requirement (and remanded the case to address other Commerce Clause doctrines). *Id.* at 2089, 2099.

The North Carolina Supreme Court heavily relies on the test case of *Wayfair*, which ironically does not cite *Dilworth.* The South Dakota statute levied a sales tax on remote vendors but oddly did not impose an obligation to collect its use tax.[14] The North Carolina Supreme Court makes much of the fact that the South Dakota statute imposed only a sales tax and was vulnerable to a *Dilworth* attack, but none was forthcoming. Apparently, this was seen by that court as proof that *Dilworth* had been implicitly overruled by this Court.

The question the North Carolina Supreme Court never asks, however, is why the taxpayers in *Wayfair* would have wanted to strike down the sales tax under a *Dilworth* argument and postpone resolution of the physical presence requirement to the next round of litigation? Winning on a *Dilworth* argument would have been a pyrrhic victory, as South Dakota would merely have amended its statute to incorporate a use tax and issue a new assessment for failure to collect it. The test case would have then proceeded. Prevailing under *Dilworth* would have been a useless distraction that would have simply delayed the main event. *Wayfair*, which never mentions *Dilworth* for good reasons, cannot be viewed as implicitly overturning it. Consistent with this view, both South Dakota and the taxpayers simply agreed that "South Dakota has the

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[14] See Richard D. Pomp, *Did South Dakota Make a Strategic Error in Drafting its Wayfair Statute?*, 37 J. State Tax'n 39 (2019).

authority to tax these transactions. *Id.* at 2087. Thus, the sales tax versus use tax issue was never before this Court.

IV. ELIMINATING THE RIGHTS OF THE FIFTY STATES TO DISREGARD THIS COURT'S PRECEDENTS DESPITE *RODRIGUEZ* IS ESPECIALLY CRITICAL IN STATE TAXATION BECAUSE THERE IS EXTREMELY LIMITED ACCESS TO THE FEDERAL COURTS FOR REVIEW.

State tax litigation is unique because it is subject to two constraints not existing in other areas of the law: the Tax Injunction Act and the comity doctrine. The Tax Injunction Act bars suits in federal courts to "enjoin, suspend or restrain the assessment, levy or collection" of state taxes, except where no "plain, speedy and efficient remedy" is available in state court." 28 U.S.C. § 1341. Rarely have these conditions been satisfied. Under the comity doctrine, "federal courts refrain from interfer[ing] . . . with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Direct Mktg.*, 575 U.S. at 15 (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010)). This doctrine typically denies access to the federal courts. Both the Tax Injunction Act and the comity doctrine heavily constrain taxpayers' access to lower federal courts in state tax litigation. Indeed, such access is rare.

Such jurisdictional restrictions are unique to state tax controversies. In sharp contrast, other statutory or constitutional disputes involving environmental, health care, voting rights, educational issues and the like have no similar impediments or obstacles to federal review. In state tax litigation, state taxpayers must

rely almost exclusively on state courts to arbitrate potential federal constitutional challenges of state taxes. And as in this case, there will be no check on a state supreme court without action by this Court.

The North Carolina Supreme Court ignored *Rodriquez*'s warning to lower courts not to disregard this Court's precedents. If North Carolina is left unchecked in this case, then 49 other state courts will also be empowered to decide if—and when—this Court's precedent will be ignored. The possibility of abuse is illustrated by the North Carolina Supreme Court's failure to deal with *National Geographic,* which contradicted its argument.

The wisdom of requiring state courts to follow U.S. Supreme Court precedent is obvious. This Court, with all the pressing demands on it, cannot reasonably be expected to police the inevitable tensions and inconsistencies that will arise if states impose their views on precedent, rather than following this Court's precedent.[15] This Court has warned that allowing lower courts to disregard its precedents would lead to anarchy, *Hutto v. Davis*, 454 U.S. 370, 375 (1982). Other federal courts have described the chaotic situation that could otherwise exist. *See, e.g., United States v. Silverman*, 166 F. Supp. 838, 840 (D. D.C. 1958), *rev'd on other grounds*, 365 U.S. 505 (1961). *Quad Graphics* could be a poster child for these concerns. We urge this Court

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[15] For more concerns about the states flouting U.S. Supreme Court precedent, *see* Frederic M. Bloom, *State Courts Unbound*, Cornell Law Review, 93 Cornell L. Rev. 501 (2008) ("And state courts *do* flout Supreme Court precedent. In fact, state courts have done so very recently and very insistently, nowhere more clearly than in cases highlighting the Court's recent docket . . .") (emphasis in original) (citing *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005); *Smith v. Texas*, 550 U.S. 297 (2007)).

to end any flouting of *Rodriguez* and stop any future damage that *Quad Graphics*' might cause.

CONCLUSION

The North Carolina Supreme Court has cavalierly disregarded *Rodriquez,* and in so doing, it has inappropriately dismantled this Court's clear (and still relevant) distinction between sales and use taxes. The best that can be said is that the North Carolina Supreme Court was salvaging the Department's unforced error by failing to assess a use tax. Had the Department done so, this case would not have arisen. This hardly justifies defying *Rodriguez*.

This case presents a powerful reason for granting the Petition for writ of certiorari either to grant plenary review or summarily reverse the North Carolina Supreme Court's decision.

Respectfully submitted,

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