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 Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The National Association of Manufacturers and National Federation of Independent Business Small Business Legal Center, Inc. submit this brief as *amici curiae* in support of Petitioner.[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of our intention to file this brief at least ten days prior to its filing.

States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 13 million men and women, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The NAM and NFIB Legal Center both have an interest in the fair and efficient collection and remittance of sales taxes. Although sales taxes are passed through to purchasers, businesses bear the administrative costs of computing, collecting, and remitting them. Businesses also pay the back taxes, interest, and penalties when they fail to anticipate changes in the complex details of over 10,000 taxing jurisdictions' laws. Businesses thus sometimes rationally attempt to limit the number of jurisdictions to which they must

remit sales taxes to reduce their compliance costs and minimize their legal risks.

One way that businesses have limited their sales-tax-remittance obligations for decades is to ensure that title to the goods they ship passes inside their State rather than inside the purchaser's State. Under this Court's decision in *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327 (1944), the Commerce Clause forbids States from levying a sales tax on sales consummated outside of their boundaries. But in the decision below, the North Carolina Supreme Court took it upon itself to declare *Dilworth* inconsistent with this Court's later decisions. The NAM and NFIB Legal Center write to explain why the North Carolina Supreme Court's decision defies this Court's precedent, upsets businesses' settled expectations, and will harm businesses if allowed to go unreviewed.

SUMMARY OF THE ARGUMENT

I. Time and again, this Court has warned lower courts not to conclude that an otherwise directly applicable precedent has been implicitly abrogated by later doctrinal developments. For a lower court to decide that an on-point precedent no longer controls is to turn vertical *stare decisis* on its head. Only this Court has the power to overturn one of its cases. And the Court has repeatedly reversed—and even summarily reversed—lower courts that fail to heed this teaching.

The North Carolina Supreme Court violated this cardinal rule when it concluded that *Dilworth* had been implicitly overruled by *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018). To the extent *Wayfair* calls *Dilworth* into question—and it does not—that is for this Court alone to say. North Carolina could have

stipulated to judgment against it below and forthrightly asked this Court to overrule *Dilworth*. It should not be rewarded for successfully having the North Carolina Supreme Court usurp this Court's primacy in developing its own precedent.

In any event, *Dilworth* remains good law. The North Carolina Supreme Court believed that *Dilworth* was irreconcilable with modern decisions holding that interstate transactions are not categorically exempt from state taxation. But *Dilworth* was only based in part on interstate commerce's once-absolute protection from state taxation. *Dilworth* also rests on the still-vibrant principle that States may not tax activities that occur wholly outside the State. Under this Court's case law—and simple common sense—a sale of goods where title transfers outside the taxing State occurs entirely outside the taxing State, even if the goods are later shipped into the State.

That the State may constitutionally levy an economically equivalent *use* tax on the goods says nothing about the distinct constitutional limitations on the State's ability to impose a *sales* tax on the goods. Nor is the distinction between sales and use taxes one of form over function. A sale of goods where title passes outside the taxing State—such as a sale on "F.O.B. shipper" terms—is legally, economically, and practically different than one where title passes inside the taxing State. When title passes outside the taxing State, the buyer owns the goods and assumes the risk that the goods may be damaged or lost in transit, a meaningful difference in manufacturing and business-to-business sales. *Dilworth* rests on sound doctrinal and practical footings.

II. The North Carolina Supreme Court's defiance of *Dilworth* is bad for business. Businesses benefit from clear, bright-line rules like *Dilworth*. Businesses know that if they sell goods to out-of-state buyers, but title transfers outside the buyer's State, the seller need not collect and remit sales tax to the buyer's State. If the North Carolina Supreme Court's decision is allowed to stand, businesses will need to guess which States they ship to will view *Dilworth* as good law and which will view it as overturned by *Wayfair*. And the cost of guessing wrong can be steep; as this case demonstrates, businesses can be on the hook for millions of back taxes, interest, and penalties.

The North Carolina Supreme Court's decision, if left unreviewed, will allow more States to impose the significant burdens of sales-tax collection on out-of-state manufacturers and small businesses. Complying with the byzantine rules of each of America's 10,000 state and local sales-tax jurisdictions takes time and money that manufacturers and small businesses do not have and even state-of-the-art software programs are often not up to the task. *Dilworth* gives manufacturers and small businesses a safe harbor; the North Carolina Supreme Court's decision, if left unreviewed, eliminates it.

Finally, leaving the North Carolina Supreme Court's decision unreviewed will embolden States hungry for tax revenue to try to overturn this Court's taxation precedents from below. Twice in recent years this Court has had to reassert constitutional limitations on taxation against state taxation authorities, including once against the North Carolina Department of Revenue. The Court should do so again here, cognizant that out-of-state sellers like Quad Graphics

and their customers are rarely politically powerful enough to check taxation authorities through the political process.

ARGUMENT

I. THE NORTH CAROLINA SUPREME COURT DEFIED THIS COURT'S COMMANDS IN DECLARING *DILWORTH* IMPLICITLY OVERRULED AND *DILWORTH* REMAINS ALIVE AND WELL ANYWAY.

The North Carolina Supreme Court's holding that *Dilworth* has been implicitly overruled by this Court's supposedly inconsistent later cases is contrary to this Court's repeated command—applied in case after case—that lower courts should leave it to this Court to decide when a precedent is no longer good law. Worse still, the North Carolina Supreme Court was simply wrong; *Dilworth* fits comfortably into this Court's modern Commerce Clause doctrine. The Court should grant review to say so.

1. As the North Carolina Supreme Court recognized, the question on appeal is whether *Dilworth* "remains controlling precedent in this case." Pet. App. 3a. The answer is "yes."

Dilworth and this case are on all fours. In *Dilworth*, just like here, title to the goods passed from seller to buyer in the seller's State. *Compare Dilworth*, 322 U.S. at 328, *with* Pet. App. 4a. And in *Dilworth*, this Court held that for the buyer's State to impose a sales tax on the transaction "would be to project its powers beyond its boundaries and to tax an interstate transaction." 322 U.S. at 330. The North Carolina Supreme Court therefore should have applied *Dilworth* and held that requiring Quad Graphics to collect North Carolina sales tax on materials shipped to

North Carolina where title to the materials transferred outside of North Carolina violated the Commerce Clause. *See* Pet. App. 44a (Berger, J., dissenting) (explaining that "*Dilworth* applies in this case"); *id.* at 79a (trial court explaining that "the principles set forth in *Dilworth* are controlling"). The North Carolina Supreme Court nonetheless held that *Dilworth* had been "implicitly overrule[d]" by this Court's decision in *Wayfair* because—in the North Carolina Supreme Court's view—the two cases are "flatly irreconcilable." Pet. App. 15a.

That is not how vertical *stare decisis* works. "[V]ertical *stare decisis* is absolute, as it must be in a hierarchal system with 'one supreme Court.'" *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) (quoting U.S. Const. art. III, § 1). This Court "always tell[s] lower courts," *Janus* v. *American Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2500 (2018) (Kagan, J., dissenting), that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *id.* at 486 (Stevens, J., dissenting) (a lower court that refuses to follow this Court's precedent "engage[s] in an indefensible brand of judicial activism"); *see also Hohn* v. *United States*, 524 U.S. 236, 252-253 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). The Court has "reaffirm[ed]" this rule, warning it "do[es] not hold * * * that other courts should

conclude our more recent cases have, by implication, overruled an earlier precedent." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).

The North Carolina Supreme Court thus should have heeded this Court's repeated admonition that "it is this Court's prerogative alone to overrule one of its precedents." *United States* v. *Hatter*, 532 U.S. 557, 567 (2001) (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997)); *accord Rangel-Reyes* v. *United States*, 547 U.S. 1200, 1200 (2006) (Thomas, J., dissenting from denial of certiorari). This Court has in the past summarily reversed lower courts that have forgotten this lesson. *See Bosse* v. *Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam) (summarily reversing the Oklahoma Court of Criminal Appeals' conclusion that a recent case had "implicitly overruled" a prior, directly applicable precedent); *id.* at 4 (Thomas, J., concurring) (concurring in summary reversal because "it is this Court's prerogative alone to overrule one of its precedents") (quoting *State Oil*, 522 U.S. at 20). The Court should consider summary reversal again here. *See* Pet. 2-3.

None of this means that a State can never ask this Court to reconsider its precedents—though, as the petition (at 17-20) and we (*infra* pp. 9-10) explain, *Dilworth* was correctly decided. *Wayfair* itself demonstrates how North Carolina should have proceeded. South Dakota in *Wayfair* recognized that its remote-seller sales-tax-collection law was barred by existing law and conceded the remote-seller's motion for summary judgment in the trial court. *Wayfair*, 138 S. Ct. at 2089. The South Dakota Supreme Court dutifully affirmed the trial court's decision, "mindful of the Supreme Court's directive to follow its precedent when it

'has direct application in a case' and to leave to that Court 'the prerogative of overruling its own decisions.'" *State* v. *Wayfair Inc.*, 901 N.W.2d 754, 761 (S.D. 2017) (quoting *Rodriguez de Quijas*, 490 U.S. at 484). South Dakota then sought this Court's review, arguing that changed circumstances had eroded the basis for the Court's existing physical-nexus requirement. *Wayfair*, 138 S. Ct. at 2089.

If North Carolina wanted to seek reconsideration of *Dilworth*, it could have taken the same path—acceding to an adverse judgment in the North Carolina courts and forthrightly urging *Dilworth*'s overruling in this Court. North Carolina did not, and this Court should not reward the State's successful effort to have its supreme court overrule *Dilworth* from below. "[U]nless [this Court] wish[es] anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower * * * courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982) (per curiam).

2. In any case, the North Carolina Supreme Court was wrong that *Dilworth* and *Wayfair* are "flatly irreconcilable." Pet. App. 15a. The North Carolina Supreme Court recognized that *Wayfair* had "repudiated the formalistic Commerce Clause jurisprudence of eras past as incompatible with modern legal precedents and economic realities," and thus believed that *Dilworth*, which was based in part on that formalism, fell with *Wayfair*. Pet. App. 21a.

But the North Carolina Supreme Court erred in believing that *Dilworth* was *only* based on the formalism that *Wayfair* repudiated. To be sure, *Dilworth* believed that a State imposing a sales tax on an out-of-

state sale impinges on "the power of taxing a transaction forming an unbroken process of interstate commerce," something that *Dilworth* thought the Commerce Clause "vested * * * in the Congress, not in the States." 322 U.S. at 331. But *Dilworth* was *also* founded on the notion that a State imposing a sales tax on a transaction where title to the goods passes outside the State "would be to project [the State's] powers beyond its boundaries." *Id.* at 330; *see also* Pet. 14-16 (further explaining why *Dilworth* remains good law after *Wayfair*).

This separate extraterritoriality holding from *Dilworth* remains good law. From the Nation's earliest days, this Court has recognized that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881); *see also New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914) (calling this territorial limitation an "obvious[ ]" and "necessary result of the Constitution"). Thus, when "States pass beyond their own [territorial] limits * * * there arises a conflict of sovereign power * * * which renders the exercise of such a power incompatible with the rights of other States, and with the [C]onstitution of the United States." *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827) (opinion of Johnson, J.); *see also Boyle* v. *Zacharie*, 31 U.S. (6 Pet.) 635, 643 (1832) (Story, J.) (confirming that Justice Johnson spoke for the *Odgen* majority).

As the Court has summarized the extraterritorial principle in modern times, "the Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Inst.*, 491 U.S.

324, 336 (1989) (internal quotation marks omitted); *accord Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-643 (1982). The Commerce Clause thus forbids state regulation where the "practical effect of [state] regulation is to control [conduct] beyond the boundaries of the state." *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 775 (1945); *see also Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977) (holding that "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power"). These principles, which *Wayfair* never disturbed, are an independent and sufficient basis to apply *Dilworth* and reverse the decision below.

3. The North Carolina Supreme Court believed that requiring Quad Graphics to collect a sales tax on goods shipped to North Carolina—even where title to the goods transferred outside of North Carolina—was permissible because North Carolina could require Quad Graphics to collect an economically equivalent use tax on those goods. *See* Pet. App. 11a. But as *Dilworth* explained, a sales and a use tax—though economic equivalents—rest on different powers. "A sales tax is a tax on the freedom of purchase," while "[a] use tax is a tax on the enjoyment of that which was purchased." *Dilworth*, 322 U.S. at 330. If a State seeks to require an out-of-state seller to collect a *sales* tax from its customers, then the State must have the power to tax the *sale*. And if a State seeks to require an out-of-state seller to collect a *use* tax from its customers, then the State must have the power to tax the *use*. That North Carolina can levy a *different* tax that raises similar amounts of money does not mean that North Carolina can ignore the constitutional

restrictions on the type of tax it actually chooses to impose.

There is, moreover, a legal difference between a sale where title passes when the goods are tendered to a shipper outside the taxing State and a sale where title passes when the goods are delivered to the customer inside the taxing State. Legally, this Court has explained that "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 186 (1995). Once the sale is consummated, the "out-of-state seller * * * '[is] through selling' outside the taxing State." *Id.* at 187 (quoting *Dilworth*, 322 U.S. at 330). In taxing a sale of goods in a transaction completed outside North Carolina, North Carolina is unconstitutionally taxing a sale that this Court recognizes as occurring entirely outside North Carolina. North Carolina's unconstitutional imposition stands in distinction to taxing the use of goods in North Carolina—use which, by definition, occurs wholly within the State.

There is a practical and economic difference, too, between a sale where title passes when the goods are tendered to a shipper outside the taxing State and a sale where title passes when the goods are delivered to the customer inside the taxing State. Quad Graphics sold the items at issue here "Freight on Board" or "Free on Board" at the point of shipment. Pet. App. 57a-58a & n.10. A F.O.B. term in a sales contract—common in business-to-business sales—means that title to the goods, and the concomitant risk of loss, passes from seller to buyer at the F.O.B. location. *See Catalytic Combustion Corp.* v. *Vapor Extraction Tech., Inc.*, 618 N.W.2d 272, at ¶ 7 n.3 (Wis. Ct.

App. 2000); *Petrus Mach., Inc.* v. *Radiator Specialty Co.*, 125 S.E.2d 367, 368 (N.C. 1962). At that point, the goods belong to the buyer and if they are lost or destroyed in transit, the buyer must look to the shipper for compensation.

A North Carolina Quad Graphics customer with a F.O.B. shipper term in its contract is thus no different than a North Carolina resident who walks into a hypothetical Quad Graphics retail location while on vacation out-of-state, buys marketing materials, and drives them to the post office to ship home. No one thinks North Carolina could levy a sales tax on the vacationer's purchase, even if Quad Graphics knew of the North Carolinian's plan to ship the goods home after buying them. *Dilworth* applies that commonsense notion by holding that North Carolina cannot tax sales to North Carolinians that are made on F.O.B. shipper terms. *Dilworth* remains good law, even after *Wayfair*.

II. ALLOWING THE NORTH CAROLINA SUPREME COURT'S DECISION TO GO UNREVIEWED WILL HURT MANUFACTURERS AND SMALL BUSINESSES.

Allowing the North Carolina Supreme Court to defy *Dilworth* will subject businesses to significant uncertainty and financial risk. Businesses will have 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. And allowing 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. Both consequences will impair the "national market for goods and services,"

Tennessee Wine & Spirits Retailers Ass'n v. *Thomas*, 139 S. Ct. 2449, 2459 (2019), that the Commerce Clause protects.

1. "[D]efiance of vertical *stare decisis*, if allowed to stand, substantially erodes confidence in the functioning of the legal system." *Andrus* v. *Texas*, 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., dissenting from denial of certiorari). This Court's rule forbidding lower courts from finding its precedents implicitly overturned allows businesses to rely on the bright-line rules in this Court's cases unless and until the Court repudiates them. As Justice Scalia—no friend of the Commerce Clause—has explained, "[i]t is strangely incompatible with" this Court's rule against implied abrogation "to demand that private parties anticipate [the Court's] overrulings." *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring in part and concurring in judgment).

Yet that is just what leaving the North Carolina Supreme Court's decision unreviewed would demand. With *Dilworth*, manufacturers and small businesses benefit from a clear rule: If title to goods shipped to another State passes outside of the State, the manufacturer or small business—known as a "remote seller" in sales-tax lingo—need not collect and remit sales taxes to the State. But if the Court does not correct the North Carolina Supreme Court's defiance of the implied-overruling principle, businesses will now have to guess whether the state courts in every State they ship to will continue to apply *Dilworth*.

The cost of guessing wrong is substantial. Quad Graphics here was hit with a $3.24 million sales-tax assessment. Pet. 7. Although only $970,896 of that

was expressly labeled a penalty, *id.*, the entire nearly three-and-a-quarter-million sum is an unexpected cost for the company. Under normal circumstances, a sales tax is passed through to the buyer. But when a seller mistakenly fails to collect and remit sales tax that it should have, the seller is left footing the entire bill. *See* Thomson Reuters Tax & Accounting, *What Triggers a Sales Tax Audit and How Do You Reduce the Risks?* (May 12, 2022), https://tinyurl.com/2p9aycnc (explaining that "[b]y failing to collect sales taxes from customers," remote sellers "[a]re required to pay all past-due taxes out of pocket" as well as "penalties and interest"). There is no way to track down former customers and retroactively collect the sales tax that a state high court holds years later should have been paid. States can even hold entities' owners, directors, and officers responsible for unpaid sales taxes, meaning that a remote seller's professional error in determining its state-tax liability can lead to personal financial ruin. *See* Chris Hopkins, *Responsible Person Rules in the Wake of* Wayfair, J. Accountancy (Nov. 1, 2019), https://tinyurl.com/54eu38x2.

Many remote sellers, including small manufacturers and other businesses, have no legal department or are not otherwise equipped to engage in a 50-state roulette about *Dilworth*'s vitality. *See Wayfair*, 138 S. Ct. at 2104 (Roberts, C.J., dissenting) (observing that "[t]he burden" of requiring remote sellers to collect sales taxes "will fall disproportionately on small businesses"). And allowing States and localities to require remote sellers to collect sales taxes on even goods sold on F.O.B. shipper terms will open up every remote seller to over 10,000 jurisdictions' sales taxes, *see id.*

at 2103, with no way to escape other than refusing to do business with customers in other States.

The fragmented nature of some States' local sales taxes poses a particular burden for remote sellers. Louisiana, for instance, does not have centralized collection and administration of its local sales taxes, meaning that remote sellers must grapple with remitting taxes to—and possible enforcement by—each of the State's local taxing authorities. Andrew Wilford, Nat'l Taxpayers Union Found., *Nearly 50,000 Remote Businesses Out of Compliance With* Wayfair 1 (Nov. 16, 2022), https://tinyurl.com/4dd669p5. The resulting high compliance costs are inevitable; one business reported spending $2.28 in tax-compliance costs for every $1 it remitted in sales taxes. *Id.* at 2; *see also Halstead Bead, Inc.* v. *Richard*, No. 22-30373 (5th Cir.) (challenging Louisiana's system under the Commerce and Due Process Clauses).

Sales-tax authorities can also inflict compliance costs on small businesses through the "low-cost enforcement tools at their disposal," such as so-called letter audits. James R. McTigue, Jr., Director, Tax Policy & Administration, U.S. Gov't Accountability Off., GAO-22-106016, *Remote Sales Tax: Initial Observations on Effects of States' Expanded Authority* 18 (June 14, 2022), https://tinyurl.com/5n7yvck3 (*Remote Sales Tax*). In a letter audit, "a revenue office sends a letter to a business stating that the office suspects they owe sales taxes." *Id.* The letter is cheap and quick for the taxing authority to write and send, but expensive and time-consuming for the remote seller to respond to. Businesses "already expend significant resources responding to audits on sales tax collection and remittance," and which include "making staff

available, developing justification for tax claims, and complying with document or information requests." U.S. Gov't Accountability Off., GAO-18-114, *Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* 21 (Nov. 2017), https://tinyurl.com/3fwcxafb. One business the Government Accountability Office spoke to said it had "8 to 10 audits from different tax authorities" at any given time and that "auditors return every few years," requiring additional staff to respond to. *Id.*

States have claimed that software is the solution, with programs supposedly allowing remote sellers to easily and efficiently calculate and remit sales taxes where it is owed. *See Remote Sales Tax*, *supra*, at 16. But the technology has not lived up to the hype. Businesses have found that software may not be accurate at the local level, and some software providers do not have enough information to assist with local sales-tax collections. *Id.* at 17. Software packages also cannot tell a company where it must register to remit sales tax in the first place. *Id.*

Worse still, when a computer program makes an error, the business is left to pay the consequences. *Id.* (explaining that "businesses are ultimately liable for errors made in tax collection and remission"). One business highlighted in the Government Accountability Office's report "incurred a cost of almost $250,000 beyond taxes owed due to an error in the software code" after it identified a programming glitch that resulted in tax underpayments for over a year. *Id.* The business had to have an employee spend 80 hours fixing the error and had to engage an accounting

company to file *350* amended tax returns and remit underpaid taxes with interest and penalties. *Id.*

Under *Dilworth*, remote sellers could avoid these headaches by having title to the goods they sell transfer in the State they are located. Under the decision below, however, the costs and burdens that remote sellers have faced in *Wayfair*'s wake will be nearly inescapable.[2]

2. Leaving the North Carolina Supreme Court's decision unreviewed will accelerate the recent trend of state taxing authorities attempting to circumvent this Court's precedents in search of new tax revenue. This Court, for example, rejected Maryland's attempt to raise county-level income taxes by double-taxing income earned in interstate commerce, explaining that "[o]ur existing dormant Commerce Clause cases all but dictate the result reached in this case." *Comptroller of Treasury of Md.* v. *Wynne*, 575 U.S. 542, 550 (2015). The Court rejected the State's argument that "States should have a free hand to tax their residents' out-of-state income because States provide their residents with many services," explaining that although States may provide services, the Court's Commerce Clause precedent protects residents' interstate income just as much as it does the interstate income of

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[2] All States exempt small sellers, typically defined as those who ship goods with an aggregate gross value per year of $100,000 or less into the taxing State, from their remote-seller sales-tax-collection requirements. *See* Jared Walczak & Janelle Fritts, *State Sales Taxes in the Post-*Wayfair *Era*, Tax Found. (Dec. 12, 2019), https://tinyurl.com/4wmavknd (detailing state safe-harbor protections for remote sellers); NFIB, *Out-Of-State Tax Requirements*, https://tinyurl.com/2p87mnd4 (same). But those exemptions are cold comfort for many small manufacturers, who often sell high-cost, but low-profit, industrial goods.

corporations, which also receive many services from the States in which they do business. *Id.* at 553-554.

This Court also rejected the North Carolina Department of Revenue's attempt three Terms ago to tax a non-resident trust whose beneficiaries live in the State, even if the beneficiaries received no income from the trust, could not demand income from the trust, and were not guaranteed to ever receive income from the trust. *North Carolina Dep't of Revenue* v. *The Kimberly Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2217 (2019). The Court's decision, which "merely applie[d] [its] existing precedent," *id.* at 2226 (Alito, J., concurring), rejected North Carolina's plea that the Court's existing due-process cases, applied to trusts, "will lead to opportunistic gaming of state tax systems." *Id.* at 2225. The Court explained that although the "possibility" of taxpayers gaming state tax systems "is understandably troubling to the State," the State's "mere speculation about negative consequences cannot conjure the 'minimum connection' missing between North Carolina and the object of its tax." *Id.* at 2226.

This case is the same. Like Maryland, North Carolina doubtlessly wants to use the sales taxes it obtains from remote sellers like Quad Graphics to provide government services. But *Dilworth* protects remote sellers from collecting state sales tax even when the State wishes to put the taxes towards what it views as a good governmental cause. And just like it did in 2019, North Carolina clearly worries that the *Dilworth* rule will lead to remote sellers gaming the state sales-tax system by selling otherwise taxable goods F.O.B. shipper. But North Carolina's speculation about the negative consequences that come from

retaining *Dilworth* cannot "conjure" the nexus missing between North Carolina and remote sellers' F.O.B. shipper sales. *Kimberly Rice*, 139 S. Ct. at 2226. This Court's precedent trumps North Carolina's views on what constitutes superior tax policy.

The risk of state taxing authorities attempting to upend this Court's precedent from below is real. Although state sales taxes are passed through primarily to state residents, the fact remains that "[s]chemes that discriminate against income earned in other States may be attractive to legislators and a majority of their constituents for precisely this reason." *Wynne*, 575 U.S. at 555. The burdens of tax compliance fall on out-of-state businesses while the benefits of additional revenue inure to in-state interests. Remote sellers have no natural constituency in far-away state houses and "[i]t is likely that only a distinct minority of a State's residents" purchases goods from remote sellers on a F.O.B. shipper basis. *Id.* This Court's intervention is essential to prevent States from balancing their books on the backs of remote sellers that have reasonably relied on *Dilworth*.

CONCLUSION

For these reasons, as well as those in the petition, the petition should be granted.

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APRIL 2023