No. 407A21-1 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

QUAD GRAPHICS, INC.,

Petitioner-Appellee

v.

NORTH CAROLINA
DEPARTMENT OF REVENUE,

Respondent-Appellant.

From Wake County

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THE DEPARTMENT OF REVENUE'S NEW REPLY BRIEF

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INTRODUCTION

Quad Graphics, Inc. agrees with the Department that the U.S. Supreme Court's four-part test articulated in *Complete Auto* governs the application of dormant Commerce Clause challenges to state taxes. Quad Br. 22-23. It further agrees that the flexible *Complete Auto* test "formally rejected" *Dilworth*'s "absolutist" view of the dormant Commerce Clause. *Id.* at 22. And the parties do not seriously dispute that, if this Court were to apply the *Complete Auto* test on a blank slate, the taxes here would be constitutional.

The issues in this case have therefore been helpfully narrowed to two discrete legal questions: First, when the Supreme Court affirmed the constitutionality of South Dakota's sales tax on interstate sales in *Wayfair*, did it overturn its contrary holding in *Dilworth*? Second, does state law determine the location of a sale for tax-sourcing purposes? The answer to both of these questions is yes.

First, the Supreme Court's recent decision in *Wayfair* is impossible to reconcile with *Dilworth*. In *Wayfair*, the Court considered a sales-tax statute that, in all relevant respects, mirrors North Carolina's. Indeed, Quad does not even try to identify any way in which the sales taxes here differ from the

sales taxes that South Dakota was allowed to assess in *Wayfair*. And where, as here, two precedents are flatly irreconcilable, the later decision controls.

Quad does not disagree with this principle as a general matter. Instead, Quad merely claims that one "aspect of the holding in *Dilworth* . . . has survived." *Id.* at 23. Specifically, Quad argues that *Dilworth* still requires a "transactional nexus" between the activity sought to be taxed and the taxing state. *Id.* This is true. But *Wayfair* makes clear that the required transactional nexus is satisfied where a retailer purposefully avails itself of a taxing state by delivering goods to its residents. That rule applies here.

Second, *Wayfair* also makes clear that state law determines the location of a sale. In fact, the *Wayfair* Court went so far as to quote and rely on South Dakota's tax-sourcing statute—a statute that, again, is materially indistinguishable from North Carolina's. Like the vast majority of States, North Carolina has adopted destination-based sourcing, which means that a sale takes place where goods are delivered. As a result, even under *Dilworth*, North Carolina would have the authority to tax these transactions, because they took place in our State.

For these reasons, the Department respectfully asks this Court to reverse the judgment below.

ARGUMENT

I. The Supreme Court's Decision In *Wayfair* Directly Overruled *Dilworth* Formalism.

As Quad forthrightly concedes, the Supreme Court long ago abandoned the formalistic approach to the dormant Commerce Clause adopted by *Dilworth*. *See* Quad Br. 21-22 ("Quad does not dispute that *Dilworth* was decided at a time when the Court's interpretation of the Commerce Clause differed substantially from its contemporary view."). *Dilworth* established the rule that States were prohibited from taxing interstate commerce on the theory that the Commerce Clause "create[s] an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). But as Quad agrees, "[t]he *Complete Auto* Court formally rejected this inflexible approach." Quad Br. 22. And it concedes that *Dilworth*'s "now-abandoned flat prohibition on the taxation of interstate commerce" is no longer the law. *Id.* at 23.

These concessions make sense. "[T]he Court's modern Commerce Clause precedents disavow" the kinds of "arbitrary, formalistic distinction[s]" that prevailed in the early twentieth century. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018). Instead, "the now-accepted framework for state

taxation" under the dormant Commerce Clause requires the state tax to clear the four-part test established by *Complete Auto*. *Id.* at 2091 (citing C*omplete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Specifically, the State must show that the tax "(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." *Id.* Because this flexible test is utterly irreconcilable with the *Dilworth* "free trade" rule, even Quad agrees that *Complete Auto* overruled *Dilworth*'s primary holding—that interstate commerce is categorically exempt from state taxation. *See* Quad Br. 21-23.

Critically here, the Supreme Court in *Complete Auto* never actually cited or discussed *Dilworth* itself. Nor did any other Supreme Court case that confirmed the demise of *Dilworth*'s free-trade rule. Thus, Quad's own positions in this case prove that there is no "magic words" requirement for the Supreme Court to conclusively abandon an outmoded precedent. This point bears repeating: Quad and its supporters affirmatively agree—as they must—that *Dilworth*'s key holding is no longer good law, even though the Supreme Court has never expressly overruled it. *See* Quad App. 132 (agreeing that the key "part of the [*Dilworth*] opinion was clearly overturned by

subsequent cases," and then citing cases that do not cite or discuss *Dilworth*).

This point shows the folly of Quad's and its amicus's claim that the Department has asked the Court to "anticipate" that the U.S. Supreme Court will overrule *Dilworth* at some point in the future. Quad Br. 20; CLI Br. 4. That unfair accusation is premised on the fact that no Supreme Court decision explicitly says that *Dilworth* is overruled. But as Quad's concession makes clear, that is not the standard. Far from asking for an anticipatory overruling, the Department's consistent position has always been that *Dilworth* formalism has—in fact—been overruled by the Supreme Court's flatly irreconcilable holding in *Wayfair*.[1]

To be clear, the Department's position has never been that *Complete Auto* itself accomplished this result. Although *Complete Auto* discarded the logical foundation for *Dilworth* formalism, the Department agrees that this Court is bound by the specific *holdings* of U.S. Supreme Court precedents—

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[1] Tellingly, the amicus brief never even mentions *Wayfair*—the case that directly controls here. *See* CLI Br. 1-16. Any serious attempt to understand the scope of state authority to tax interstate sales necessarily requires examining the Supreme Court's leading recent precedent on the topic. Yet the amicus brief strangely acts as if *Wayfair* never happened.

not their reasoning. As the Department explained in its opening brief, "[e]ven though the Supreme Court has long ago discarded the logic behind *Dilworth*, it is true that the Court had not addressed the precise question raised in that case until recently." Dept. Br. 32-33. The Department went on to explain, however, that "[i]n *Wayfair* . . . the Court specifically held that States could tax interstate sales, so long as they comply with the four-part *Complete Auto* test." *Id.* at 33. Because that specific holding "directly controls" the disposition of the legal question in this case, it supersedes the contradictory prior holding of the Court in *Dilworth*. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Under *Rodriguez*, when courts are faced with apparently contradictory decisions of the Supreme Court, they "should follow the case which directly controls." *Id.* And as Quad's concession shows, where a later decision's *holding* is flatly irreconcilable with the *holding* of a prior case, the later precedent is controlling and the prior decision is overruled.

This basic rule of legal interpretation is not controversial. The Supreme Court has frequently overruled its prior precedents without expressly saying so. As one particularly striking example, everyone agrees that *Brown v. Board of Education* overruled *Plessy v. Ferguson*'s "separate but

equal doctrine"—even though *Brown* never said that it was overruling *Plessy* expressly. *Flemming v. S.C. Elec. & Gas Co.*, 224 F.2d 752, 752 (4th Cir. 1955) (per curiam).[2]

Similarly here, *Wayfair* "directly controls" the outcome in this case. In *Wayfair*, the Supreme Court upheld a South Dakota sales-tax statute against a dormant Commerce Clause challenge under circumstances that were materially identical to those presented here. Like here, South Dakota assessed *sales* taxes—not *use* taxes—against remote sellers who sold goods from out-of-state locations and delivered them to purchasers located in that State. 138 S. Ct. at 2089 (noting the statute "require[d] out-of-state sellers to collect and remit sales tax" on goods delivered into the State). Like here, those remote sellers used common carriers to make in-state deliveries—

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[2] *See also, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 478-79 n.9 (2004) (noting that the Court's decision in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) had overruled *Ahrens v. Clark*, 335 U.S. 188 (1948), even though the Court did not expressly say so); *Hudgens v. NLRB*, 424 U.S. 507, 517-18 (1976) (recognizing that the Court had previously overruled a prior precedent even though the "opinion did not *say* it was overruling the [prior] decision," because "the ultimate holding in [the later opinion] amounted to a total rejection of the holding in the [prior opinion]" (emphasis added)); Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle U. L. Rev. 151, 154 (2009) ("[I]t should be apparent that no special language is necessary to overrule a prior decision; the simple existence of some later, irreconcilably inconsistent holding by the same court is sufficient.").

meaning that ownership was presumably transferred outside of South Dakota. *See id.* And like North Carolina here, South Dakota had adopted destination-based sourcing—meaning that, as a matter of state law, a remote sale is consummated upon delivery to the in-state purchaser. *Id.* at 2092.

Faced with these circumstances—a sales tax imposed on goods delivered into the State—the Supreme Court applied the *Complete Auto* test. *Id.* at 2099. It paid no mind to the fact that the South Dakota statute imposed a *sales* tax, instead of a *use* tax. *See id.* Thus, contrary to the outdated *Dilworth*/*General Trading* dichotomy, the Court confirmed that the same rules apply to both kinds of taxes.

That choice should decide this case. As Quad sees the law, the Supreme Court in *Wayfair* should have instead applied *Dilworth* to strike down the South Dakota statute, on the ground that the statute was denominated as a sales tax, not a use tax. Indeed, before *Wayfair* was decided, some tax commentators confidently declared that South Dakota had made a mistake in drafting its statute, because *Dilworth* formalism

"could prevent South Dakota from taxing out-of-state sales delivered into the state by common carrier." Quad App. 185.[3]

These predictions, of course, were proven wrong. Far from striking down South Dakota's sales-tax statute under *Dilworth*, the Court in *Wayfair* explicitly held that States *could* tax interstate sales so long as those taxes complied with *Complete Auto*. 138 S. Ct. at 2094. And the Court made clear that this test was satisfied when, as here, a state assesses taxes on sales from an out-of-state seller that are delivered by common carrier to in-state customers. *See id.*

Quad tries to resist this conclusion by acting as if the constitutionality of South Dakota's sales-tax statute is still somehow in doubt. *See* Quad Br. 42-44. In support, Quad cites the same tax commentators who wrongly

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[3] *See* Quad App. 187 (predicting that, because of *Dilworth* formalism, "even if [South Dakota] wins on the physical presence issue, it will remain unable to tax the proceeds from the sales of products delivered into the state by common carrier"); *see also id.* at 77 (acknowledging that "the South Dakota statute that was challenged in *Wayfair* conflicted with both *Quill* and *Dilworth* by requiring remote vendors to collect the state's sales tax rather than its use tax"). At the same time, these commentators acknowledged the possibility that the *Wayfair* Court might "address the physical presence nexus rule and ignore transactional nexus, implicitly suggesting that the transactional nexus distinction between sales and use taxes is of little or no importance." *Id*. at 188. This is exactly what occurred.

predicted that *Dilworth* formalism would prevail in *Wayfair*—and who now wistfully speculate that the two decisions might somehow be reconcilable. *Id*.[4] Quad repeats these arguments, claiming that the *Wayfair* Court's reference to sales taxes was "more colloquial than technical" *Id.* at 44. This characterization is difficult to comprehend. The South Dakota tax being challenged in that case *was a sales tax*. By affirming that tax's constitutionality, the Supreme Court squarely held that South Dakota has the authority to impose sales taxes on interstate sales.

Perhaps most significantly, the market agrees. Following the Supreme Court's decision in *Wayfair*, the very same retailers who had challenged South Dakota's taxing statute agreed to start paying South Dakota *sales* taxes on their deliveries to state residents. Quad App. 88-89 n.55. None even attempted to raise *Dilworth* formalism as a continuing defense, as *Dilworth*'s academic defenders had urged them to do. *See, e.g.*, *id.* at 184-89. These highly sophisticated corporations with billions of dollars on the line clearly disagree with Quad that *Dilworth* formalism somehow survived *Wayfair*.

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[4] Even these most ardent defenders of *Dilworth* formalism acknowledge that *Wayfair* "might be viewed as a repudiation of the *Dilworth*/*General Trading Co.* dichotomy." Quad App. 24; *see also id.* at 19, 23-24 (noting that a "broad reading" of *Wayfair* would eliminate *Dilworth* formalism).

These market realities also refute Quad's claim that the issue of *Dilworth* formalism arises so rarely because States other than North Carolina are content to assess economically equivalent use taxes. Quad Br. 50. To the contrary, twenty States—bridging partisan, economic, and geographic divides—and the District of Columbia have chosen to file a brief in this Court emphasizing their "paramount interest" in preserving their authority to assess sales taxes. Multistate Br. 2. And this interest is not theoretical: Since *Wayfair*, at least *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."[5] *Id.* at 9 & n.3.

[5] The Department's similar choice to assess a sales tax, as opposed to a use tax, is irrelevant to the constitutional questions at issue in this appeal. There are a number of reasons why States might prefer to assess sales taxes instead of use taxes, even though the two taxes are economically equivalent. First, use taxes are often difficult to collect directly from consumers. Typically, "the use tax is imposed on the purchaser" and "voluntary compliance is notoriously low by individuals"—"hence the pressure to make sure the vendor collects the use tax." Quad App. 93 n.76. Second, even though both sales and use taxes can be collected by retailers, it is far easier for States and retailers to uniformly administer a single type of tax. *See* MTC Br. 17-18. Finally, although Quad has conceded that assessing a use tax would be constitutional here (Br. 5), requiring out-of-state sellers to collect use taxes could potentially raise other constitutional issues.

Thus, *Dilworth*'s continuing vitality arises so rarely because most retailers understand that *Wayfair* settled the issue once and for all.

That understanding is correct. There is simply no good-faith way to reconcile the decision below with *Wayfair*. In *Wayfair*, the Supreme Court affirmed a State's authority to assess a sales tax on out-of-state retailers when they deliver goods to in-state consumers. That holding directly controls here. The Business Court was therefore wrong when it declined to apply the Supreme Court's most-recent directly controlling precedent.

II. Wayfair Explicitly Held that Sales Taxes on Remote Sellers Satisfy the Transactional Nexus Requirement.

Although Quad agrees that *Dilworth*'s core holding is no longer good law, it claims that another "aspect of the holding in *Dilworth* . . . has survived": The requirement that sales taxes may only apply to sales having a "transactional nexus" with the taxing state. Quad Br. 23. Quad's arguments on transactional nexus are also mistaken.

At the outset, Quad dramatically overstates the role that transactional nexus plays in modern dormant Commerce Clause doctrine. Indeed, Quad itself has submitted an article to this Court acknowledging that "the concept of transactional nexus has been thought by many, if not most, state and local

tax practitioners and scholars to be dead." Quad App. 72. The article goes on to note that "taxpayer attempts at transactional nexus arguments over recent years have generally proven unsuccessful." *Id.*; *see id.* at 75 n.1 (citing cases from the Ohio, Washington and Florida Supreme Courts rejecting transactional nexus arguments like the one Quad makes here). Despite this trend, the article states that "not all hope is lost" for taxpayers seeking to make transactional nexus arguments. Quad App. 73. In support, the article cites a solitary decision: The Business Court's ruling below. *Id.* (noting "the recent decision in *Quad Graphics*").

That said, the Department agrees with Quad that *Dilworth* is best viewed as a case about transactional nexus, and that this nexus requirement does survive today—in reduced form—as part of the *Complete Auto* test. *See* Quad Br. 25-26. As a reminder, *Complete Auto*'s first step asks whether a tax "applies to an activity with a substantial nexus with the taxing State." *Wayfair*, 138 S. Ct. at 2091. This requirement overlaps entirely with the concept of transactional nexus. In fact, a connection between the activity being taxed and the taxing jurisdiction is the *definition* of transactional nexus. *See* Quad App. 60 ("transactional nexus" examines "the connection the taxpayer's activities have with the taxing state").

However, the Department departs from Quad in two respects that are decisive here. First, as Quad's own sources again confirm, transactional nexus is a minimal requirement that entails only a "simple threshold connection" between the activity being taxed and the taxing state. *Id.* at 18 (discussing *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 18 (1995)). It is "not a means of prioritizing different states' tax claims"—meaning that multiple states can have transactional nexus with a given transaction. *Id.* In this way, transactional nexus generally approximates the "minimum contacts" analysis that applies under the Due Process Clause. For example, in *D.H. Holmes Company v. McNamara,* the U.S. Supreme Court found that the "distribution of [a retailer's] catalogs" to in-state residents "reflects a substantial nexus" with the state. 486 U.S. 24, 32 (1988). On those facts—which mirror those here—the Court found the taxpayer's argument that there was no transactional nexus to "verge[ ] on the nonsensical." *Id.*

Tellingly, the term "transactional nexus" has only appeared *once* in a decision by U.S. Supreme Court—in Justice White's dissent in *Quill Corp. v. North Dakota*. 504 U.S. 298, 324 (1992). In that dissent, Justice White analyzed the Court's then-recent decision in *National Geographic*, which held that States may tax *all* sales to in-state customers, so long as the seller

has *any* in-state physical presence. *Id.* (citing *Nat'l Geographic Soc. v. Cal. Bd. Of Equalization,* 430 U.S. 551 (1977)). That is, under *National Geographic*, there was no requirement that a particular sale to an in-state customer had any connection whatsoever with the company's in-state physical presence. As Justice White explained, that holding "decoupl[ed] any notion of a *transactional* nexus from the inquiry," and instead adopted "a due process-type minimum contacts analysis that examined whether a link existed between the seller and the State wholly apart from the seller's in-state transaction that was being taxed." *Id.*; *see also National Geographic*, 430 U.S. at 560 ("The Society argues . . . that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State. We disagree.").

To be sure, the *Quill* majority disclaimed that the nexus required under the dormant Commerce Clause mirrors the "minimum contacts" inquiry required for due process. 504 U.S. at 312. But of course, *Wayfair* expressly overturned *Quill*. Thus, Justice White's understanding of transactional nexus, articulated in his *Quill* dissent, more accurately describes the law as it stands today. Under that understanding,

transactional nexus is satisfied whenever a retailer purposefully "avails itself" of a forum by directing commercial activity at the forum state. *Wayfair*, 138 S. Ct. at 2099. By its terms, this standard mirrors the "purposeful availment" test for establishing minimum contacts under the Due Process Clause. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985).

Second, Quad is incorrect that *Wayfair* did not address transactional nexus. To the contrary, as Quad elsewhere concedes, by choosing to assess a *sales* tax on interstate sales, South Dakota squarely "put the issue of transactional nexus on the table" in *Wayfair*. Quad Br. 51. (citation omitted). And the Supreme Court obliged by addressing the issue directly. The Court reaffirmed Justice White's insight that the "nexus requirement" under the dormant Commerce Clause "is closely related to the due process requirement that there be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Wayfair*, 138 S. Ct. at 2093 (citation and quotation marks omitted). And it further held that "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). Because under South Dakota law, like here, the "sale is consummated" upon delivery to the in-state consumer, the Court held that

the nexus between South Dakota and in-state deliveries was "clearly sufficient" to satisfy *Complete Auto*'s nexus requirement. 138 S. Ct. at 2099.

Quad tries to explain away this ruling by claiming that *Wayfair* addressed only the *personal* nexus component of the nexus test, not the *transactional* nexus component. Quad Br. 40. This argument cannot be squared with what the decision actually says. The decision 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." 138 S. Ct. at 2099. It 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). And 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.*

In so ruling, the Supreme Court could not have been clearer: It held that the substantial nexus requirement—*as a whole*—had been satisfied. And Quad agrees that "[t]he 'substantial nexus' prong of *Complete Auto* is comprised of two independent concepts—personal nexus and transactional nexus." Quad Br. 23. As a result, the *Wayfair* Court necessarily held that South Dakota had made *both* showings: (1) that Wayfair had made sufficient

sales to South Dakota customers to establish personal nexus, *and* (2) that those sales to South Dakota customers established transactional nexus. Quad's argument to the contrary asks this Court to read *Wayfair* to mean something other than what it says.

III. State Law Determines the Location of an Interstate Sale.

As shown above, the Supreme Court in *Wayfair* specifically held that States have authority to tax interstate sales in circumstances that are materially indistinguishable from those here. Because this holding is flatly irreconcilable with *Dilworth*'s contrary rule, *Wayfair*'s later-in-time ruling "directly controls" the outcome of this case. *Rodriguez*, 490 U.S. at 484.

But *Wayfair* supports another independent basis for reversal as well: It confirms that the sales took place in North Carolina. Thus, even under *Dilworth*—which bars States from taxing interstate sales—the taxes here are fully consistent with the dormant Commerce Clause.

All of Quad's arguments are rooted in the premise that Quad's sales to North Carolina customers took place in Wisconsin, where Quad is located. Quad Br. 11; *see id.* at 2 (reframing the question presented as whether "North Carolina ha[s] a constitutionally-sufficient nexus with sales transactions completed in *Wisconsin*"). It derives this presumption from the facts of

Dilworth itself, which it sees as establishing a constitutional rule that a sale is "completed" where ownership is transferred. *Id.* at 4.

However, as the Department explained in its opening brief, the Constitution says nothing about the location of cross-border sales. Instead, tax sourcing is determined by state law. Dep't Br. 45-50. And were there any doubt on this score, *Wayfair* definitively dispelled it. Quoting South Dakota's tax-sourcing statute, the Court explained that the State may tax "sales of 'tangible personal property, products transferred electronically, or services *for delivery into South Dakota.*'" 138 S. Ct. at 2092. This destination-based sourcing rule, the Court pointed out, was typical: "Generally speaking, a sale is attributable to its destination." 138 S. Ct. at 2092-93. And the Court noted that "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.* at 2092 (quoting *Oklahoma Tax Commission*, 514 U.S. at 184). Thus, *Wayfair* made clear that state-law sourcing rules determine where a sale is consummated for purposes of the dormant Commerce Clause.

Here, there is no question that, under those sourcing rules, Quad's sales took place in North Carolina. While another case might raise difficult choice-of-law or apportionment questions, both Wisconsin and North

Carolina follow destination-based sourcing—meaning the sales take place where goods are delivered. *See* N.C. Gen. Stat. §§ 105-164.4B(a)(2), 105-164.4B(d)(2); Wis. Stat. § 77.522(b). Thus, under both Wisconsin and North Carolina law, the sales here would be sourced to North Carolina.

Indeed, destination-based sourcing rules are a key component of the multistate Streamlined Sales and Use Tax Agreement that the Supreme Court praised in *Wayfair* as mitigating any dormant Commerce Clause concern in that case. SSUTA, art. I, § 102 (2021), https://bit.ly/3BavhpC; *see Wayfair*, 138 S. Ct. at 2100. All told, at least forty states have adopted destination-based sourcing rules. Multistate Br. 13. If Quad is right that the Constitution instead requires sales to be sourced where title passes, then all of these state laws are unconstitutional. But that cannot be right. After all, as noted, the Supreme Court unhesitatingly applied South Dakota's destination-based sourcing rule in *Wayfair* itself.

Finally, it bears noting that Quad's understanding of the sourcing rules would embroil courts in a tangled web of technical tax-sourcing disputes. In today's interconnected and digital economy, determining where a sale takes place can be extraordinarily complicated. Where does a sale take place when a user in North Carolina purchases a digital good from a California-based

company that is routed through a server located in New Mexico? What about when a person located in New York provides a service to a person in North Carolina using technology located in Minnesota? The Constitution does not supply answers to these and myriad other technical tax-sourcing questions. But if Quad's position were correct, courts would be required to create constitutional doctrine on tax-sourcing out of whole cloth. To avoid this morass, the Supreme Court has wisely chosen to incorporate state law into its dormant Commerce Clause analysis instead.

Likewise, if Quad's substantive understanding of the tax-sourcing rule were embraced by the courts, state tax administration would be left paralyzed. How are the several states supposed to know where millions of contracting parties agreed to transfer ownership? And what is to stop entities from evading their tax obligations altogether by contractually agreeing to transfer ownership in a jurisdiction without a sales tax? Quad provides no answers.

In sum, *Wayfair* again resolves the final contested issue in this case: how to determine the location of an interstate sale. *Wayfair* confirmed that state law controls this key issue. And here, under state law, Quad's sales took place in North Carolina. For this independent reason, the dormant

Commerce Clause is no bar to the Department's authority to tax Quad's sales to North Carolina customers.

CONCLUSION

The Department respectfully requests that this Court reverse the judgment below.

This the 24th day of May, 2022.

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