

Testimony of

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On the Issue of

Examining the *Wayfair* Decision

and its Ramifications for Consumers and Small Business

Before the

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Committee on the Judiciary

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Chairman Goodlatte, Ranking Member Nadler, and Members of the Committee, I am Joe Crosby, CEO of MultiState Associates. I have devoted most of my professional life to state tax policy questions, and in particular, to state taxation of interstate commerce.

I appreciate the opportunity to testify today. I advise many businesses and trade associations on state tax policy issues, and my firm works closely on sales tax collection issues with several large retailers and their associations. However, I do not appear here on behalf of any client. The views I will express reflect my independent professional judgment.

There Is No Immediate Problem Requiring a Congressional Solution

I have only one point to make in my testimony today: there is no immediate problem requiring the Congress to respond with legislation to the recent U.S. Supreme Court (“Court”) decision in *South Dakota v. Wayfair* (“*Wayfair*”).

I applaud Chairman Goodlatte for calling this hearing so quickly after the *Wayfair* decision was issued. It is critical that discussions such as this occur to ensure the broadest understanding of the decision and what actions states are taking in the wake of the decision. Perhaps most importantly, this hearing may help dispel myths of crisis that could inspire unwarranted Congressional action.

I have had the privilege of appearing before this Committee before, in 2010, to discuss the role of the Congress in defining nexus and, in 2014, to explore alternative solutions on the internet sales tax issue.

I said then that only Congress could restore to states the authority to require remote sellers to collect sales taxes, because I was convinced the Court would not consider the issue again. I was clearly wrong.

The Court solved the immediate problem which animated prior Congressional discussions regarding sales tax, namely the restriction on State tax authority imposed by *Quill*, thus obviating the prior need for Congressional action.

Further, subsequent to the decision, the States have acted, and are expected to continue to act, responsibly and fairly. States have done nothing which would justify urgent Congressional intervention.

Nearly all of the States with sales taxes have already issued notices or guidance in the weeks following the decision. Many of these States have indicated they are studying the decision and their laws and regulations, and they will be considering rulemakings or recommending legislative changes which will be applied prospectively only.

In addition to individual state responses, organizations of state legislative and executive branch officials have acted rapidly to educate all potentially affected parties:

- The National Conference of State Legislatures (NCSL) convened the week after the decision was issued and adopted a statement of principles¹ to guide the States' responses to *Wayfair*;
- The Streamlined Sales Tax Governing Board held a two-day meeting last week to coordinate the response of its member States, with several non-member States also participating;
- The National Governors Association just Saturday held a Governors-only session to hear from experts and discuss the appropriate path forward for States; and,
- The Multistate Tax Commission is meeting as we sit here today, with a significant portion of its agenda devoted to State action following *Wayfair*.

These organizations and others are working diligently to facilitate and ease registration, collection, and remittance of sales tax by sellers who previously have not collected sales taxes in all the States where such taxes are imposed.

The NCSL has recommended that States: 1) implement sales tax collection for remote sellers on or after January 1, 2019, 2) provide clear guidance with as much advance notice as practicable, and 3) either adopt the Streamlined Sales and Use Tax Agreement (SSUTA) or implement many of the simplifications which comprise that Agreement.

To date, no state has sought to impose a tax collection obligation on remote sellers for periods prior to the decision. Hawaii is thus far the only state to have issued a notice saying non-collecting retailers might have liability for sales made prior to the *Wayfair* decision, but the State quickly amended its announcement to say that collection would be prospective only.²

Congressional Action Should Be Deliberative

Of course, the Congress retains full authority to legislate with regard to the extent of state tax jurisdiction over interstate commerce. There are ancillary issues which it may still be interested in exploring with regard to sales tax, such as the various simplifications which have been proposed in prior Congressional legislation. And there are other areas of state tax where the

¹ National Conference of State Legislatures, "Principles of State Implementation after *South Dakota v. Wayfair*" (June 29, 2018), http://www.ncsl.org/documents/taskforces/SALT_SD_vs_Wayfair.pdf.

² State of Hawaii Department of Taxation, "Department of Taxation Announcement No. 2018-10" (July 10, 2018), http://files.hawaii.gov/tax/news/announce/ann18-10_amended.pdf.

Congress has considered defining the extent of state tax jurisdiction more clearly, and where properly considered action may be appropriate.³

Some have suggested that while it considers these ancillary issues, the Congress should enact a moratorium on the effect of the *Wayfair* decision, reinstating the so-called physical presence standard, or a prohibition on retroactive State enforcement of any sales tax collection obligation on remote sellers. Even these responses, which are considered by some to be moderate and appropriate, would be devilishly complicated.

As the Court recognized, the physical presence standard is no longer a bright line. Each States' law, therefore, is different, with different definitions of "doing business" (nexus), the implications of connections with agents or "related parties" (affiliates) in a state, and decades of regulations and judicial decisions shaping those laws.

A so-called moratorium would affect all States and in different ways. Such a moratorium would need to define terms such as "sales and use tax", "remote seller", "interstate sales", and, most importantly, "physical presence"—terms which were never defined by the Court because it was not writing a law but rather interpreting the Dormant Commerce Clause as applied to particular facts. In defining these terms and writing a statute, the Congress would be creating new law. It is not possible to neatly and precisely return the law to *status quo ante Wayfair*.

And even if it were possible to turn back the clock, it would be an historic mistake, interfering in a market where the playing field has just and finally been leveled.

Even a "simple" prohibition on retroactive taxation would be fraught with complexity. All of those same terms above would need to be defined, along with "retroactive". Such an effort would surely disrupt existing tax compliance.

Risks of Undue Haste

In addition to these complications, there are significant risks that militate against any immediate legislative response by the Congress to the *Wayfair* decision.

State Revenue Uncertainty: Any Congressional action, even a "mere" moratorium, will not only impede collection of legally due and payable sales taxes on remote sales but could also imperil

³ "All would agree that tension exists between a state's authority to tax and the authority of Congress to regulate interstate commerce. Clearly, one size does not fit all in this area. Congress may well determine that the appropriate state tax nexus standard for the imposition of a tax—such as a business activity tax—is different than that for the imposition of an obligation to collect a tax from others—such as the sales and use tax." See Joseph R. Crosby, "State Taxation: The Role of Congress in Defining Nexus," Testimony before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law (February 4, 2010), <https://judiciary.house.gov/files/hearings/pdf/Crosby100204.pdf>.

collections occurring prior to the *Wayfair* decision. The inherent complexity of such a moratorium (previously discussed), could lead to the consequence, intentionally or otherwise, that sellers currently collecting sales taxes determine they are no longer required to do so. A prohibition on retroactive enforcement could similarly impede state actions to collect taxes which were in process prior to the issuance of the decision.

Interference with Planned State Tax Cuts: Several State lawmakers have publicly stated they will devote additional revenues associated with the collection of sales taxes on remote sales to tax cuts. Nebraska Governor Ricketts has proposed allocating the additional tax revenue to property tax relief.⁴ In South Dakota, both candidates for governor have proposed using the additional revenue to reduce the sales tax rate (which is provided for in current law) or provide property tax relief.⁵ Legislators in Kansas, Missouri, and Tennessee have supported sales tax and income tax rate reductions.⁶ The District of Columbia has proposed reducing commercial property tax rates.⁷

Some states have gone even further. Wisconsin has already publicly estimated the automatic income tax rate decreases which will be effective once remote sales taxes are collected.⁸ Utah has dedicated nearly all of its expected additional revenue to reduce sales taxes on manufacturing machinery and equipment.⁹

If Congress were to intervene now, it would jeopardize all of these planned and proposed tax reductions. The result would be law abiding taxpayers paying higher taxes in the aggregate because legally due and payable sales taxes would not be collected.

⁴ Don Walton, "McCollister seeks special legislative session to collect online sales taxes," *Lincoln Journal Star* (July 11, 2018), https://journalstar.com/legislature/mccollister-seeks-special-legislative-session-to-collect-online-sales-taxes/article_546f42bc-1c20-58bf-b9c5-943bcfbfe0a2.html.

⁵ Associated Press, "Noem, Sutton support tax cuts after online sales tax ruling" (July 4, 2018), <https://www.apnews.com/0593310265df4e7e8deb67121f4ae520>.

⁶ David A. Lieb, "Republicans propose using online sales tax money for new tax cuts," PBS Newshour (June 29, 2018), <https://www.pbs.org/newshour/nation/republicans-propose-using-online-sales-tax-money-for-new-tax-cuts>.

⁷ Council of the District of Columbia, B22-0914, "The Interstate Sales Tax Amendment Act of 2018," by Council Chairman Mendelson and Councilmember Evans, <http://lirms.dccouncil.us/Legislation/B22-0914?FromSearchResults=true>.

⁸ Wisconsin Legislative Fiscal Bureau, Memo: "*South Dakota v. Wayfair, Inc.* – Sales and Use Tax Collections on Remote Sales" (July 2, 2018), http://docs.legis.wisconsin.gov/misc/lfb/misc/165_south_dakota_v_wayfair_inc_sales_and_use_tax_collections_on_remote_sales_7_2_18.pdf.

⁹ Julian Hatter, "Utah Legislature Passes Requirement for Online Sales Tax," *U.S. News* (July 18, 2018), <https://www.usnews.com/news/best-states/utah/articles/2018-07-18/utah-lawmakers-to-take-up-online-sales-tax-shipping-hub>.

Restoring the “Physical Presence” Standard, Even Temporarily, Would Cause Economic Harm: In its brief to the Court, South Dakota said the physical presence standard “frequently undermines the very values the dormant commerce clause is meant to service, causing outsized harm to the national economy...and interstate commerce itself”¹⁰ and in fact “creates a substantial burden on many forms of interstate commerce [because] many firms now work hard to avoid engaging in interstate commercial relationships (emphasis original).”¹¹

The Court agreed with South Dakota, saying the physical presence standard “creates rather than resolves market distortions...[and] and also produces an incentive to avoid physical presence in multiple States, affecting development that might be efficient or desirable.”¹²

Perhaps more surprisingly, one of the respondents in the case, Overstock.com, also agrees. Immediately after the decision, Overstock.com announced it would “begin expanding its physical and digital operations, including supply chain, marketing, and recruiting, into states in which tax nexus concerns previously prevented the company from having a direct presence.”¹³

In other words, the physical presence standard impeded Overstock.com from engaging in rational economic behavior and hindered the free flow of commerce among the states which the Commerce Clause was intended to foster.

Thus, were the Congress to act to delay or alter the States’ implementation of new laws and regulations in light of *Wayfair*, it could negatively impact current and planned investments by companies like Overstock.com in cities and states across the country.

“Temporary Solutions” Are Rarely Either Temporary or Solutions: The history of Congressional action on state tax matters demonstrates that temporary solutions, even in the guise of a brief moratorium, often become permanent and in fact hinder the potential for true solutions by investing benefits in narrow classes which are motivated to preserve those benefits.

A prior Congress responded to a Court decision by enacting a temporary law¹⁴ and simultaneously creating a special subcommittee (of this Committee) to develop a long-term solution. The special subcommittee was initially focused on corporate income taxes, but

¹⁰ https://www.supremecourt.gov/DocketPDF/17/17-494/36735/20180226222258706_17-494%20ts.pdf, pp. 28-28.

¹¹ *Ibid*, p. 33.

¹² https://www.supremecourt.gov/opinions/17pdf/17-494_i4el.pdf, p. 3.

¹³ Overstock.com Investor, Press Release: “Overstock.com Expanding Physical, Digital Presence Following U.S. Supreme Court Ruling” (June 25, 2018), <http://investors.overstock.com/phoenix.zhtml?c=131091&p=irol-newsArticle&ID=2355858>; and Press Release: “Overstock.com Releases Statement on Initial Result of Voluntary Internet Sales Tax Collection” (June 28, 2018), <http://investors.overstock.com/phoenix.zhtml?c=131091&p=irol-newsArticle&ID=2356470>.

¹⁴ Senate Rpt. No. 658, August 11, 1959, noted the legislation “is not a permanent solution to the problem” but rather was intended to “serve as an effective stopgap or temporary solution while further studies are made of the problem.”

following a subsequent Court decision, the Congress expanded its remit to include sales and use taxes. The committee met over seven years, ultimately producing a six volume report.

That effort, commonly known as the Willis Committee Report, likely sits on a shelf somewhere nearby, where it has been gathering dust since 1965. And the “temporary” law which animated it, commonly known as P.L. 86-272, was enacted in 1959 and remains unaltered today (except by the 1961 Act to expand the special subcommittee’s scope to sales and use taxes).¹⁵

More recently, in 1998, the Internet Tax Freedom Act temporarily prohibited taxes on internet access and multiple and discriminatory taxes on the internet. At the same time, it created the Advisory Commission on Electronic Commerce (ACEC) to advise Congress on a variety of electronic commerce tax issues, including sales and use tax collection by remote sellers.

The ACEC failed to achieve the two-thirds majority sufficient to issue formal findings or recommendations in its April 2000 report to the Congress¹⁶, while the temporary moratorium has now been made permanent.

Both examples clearly demonstrate that temporary solutions have a history of becoming permanent and leaving the crux of the issue unsolved.

Hasty Action Will Result in More Litigation: Some have contended that, absent rapid action by Congress, litigation will bloom across the country as States seek to require remote sellers to collect sales tax. That contention is likely incorrect for multiple reasons.

First, as previously noted, States have not yet engaged in any actions inconsistent with the Court’s decision. Only a very few States have already moved forward subsequent to the decision to require remote sellers to register and collect tax, and those States generally look very similar to South Dakota: members of the SSUTA with legislation setting collection thresholds which protect small businesses and which prohibit retroactive enforcement.

Second, a remote seller prevailing in litigation would likely never result in a refund of taxes collected and remitted. It is without question that the taxes are due and payable; the only question is whether the State can require the remote seller to collect and remit those taxes. Thus, there is little incentive to engage in costly litigation absent egregious State action.

Finally, even were a remote seller to prevail in litigation in the face of such egregious State action, the losing State’s remedy would be simply to amend its law consistent with the particulars of the decision. For example, if the court in question determined that a multiplicity of local sales tax rates posed a constitutionally impermissible burden on interstate commerce, the State could quickly address that flaw via legislation and again compel collection.

¹⁵ See, for example, W. Val Oveson, “Lessons in State Tax Simplification,” *State Tax Notes* (January 28, 2002).

¹⁶ Advisory Commission on Electronic Commerce, “Report to Congress” (April 2000), <http://govinfo.library.unt.edu/ecommerce/report.htm>.

At best, a victory would result in an enhanced sales and use tax system, a result which could be achieved much more expeditiously and cost effectively by appealing to the legislature in the first place. Remote sellers would have that goal in common with their Main Street counterparts.

A federal law would likely lead to even more litigation. The aforementioned P.L. 86-272 has resulted in frequent litigation, with more than 60 reported cases since its enactment, including a U.S. Supreme Court case in 1992 (Wisconsin Department of Revenue v. William Wrigley Jr. Co.) and a Minnesota tax court case just a few years ago. There is no reason to think a Congressional Act will generate less litigation than State implementation of *Wayfair*.

Conclusion

I reiterate my sole point: there is no immediate problem requiring a Congressional solution.

Any future Congressional legislative response to this issue should follow regular order, to ensure a deliberative process that provides for a full understanding of all the implications of any proposed law.