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Regarding the Subcommittee's Hearing

"Examining the Wayfair Decision and its Ramifications for Consumers and Small Businesses"

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Introduction

Chairman Goodlatte, Ranking Member Nadler, and distinguished members of the committee, thank you for the opportunity to submit testimony regarding the impacts of the Supreme Court's recent decision in the landmark case of *South Dakota v. Wayfair*. My name is Andrew Moylan and I am executive vice president of the National Taxpayers Union Foundation, a non-partisan research and education organization dedicated to showing Americans how taxes, government spending, and regulations affect them. I am also director of the "Interstate Commerce Initiative" at the National Taxpayers Union (NTU), a project that seeks to protect taxpayers from the pernicious effects of states attempting to exercise power outside their borders.

Less than a month ago, the Supreme Court undermined the foundation for decades' worth of growth and innovation when they decided in *South Dakota v. Wayfair* to throw out the precedent that state taxing authority must be confined to a state's borders. With the stroke of a pen, the Court rewrote our understanding of state involvement in interstate commerce and has opened the floodgates to burdensome levies on businesses large and small, regardless of location.

By overturning the decisions in *National Bellas Hess* and *Quill*, the Supreme Court has blessed years of attempts by states to extend their taxing powers to ensnare not just residents but any entity with even limited business transactions in any state. This shift away from a "physical presence" nexus standard to "economic nexus" changes the very nature of state tax power, with widespread ramifications.

This debate is but a smaller, domestic version of fights that large, successful American technology companies find themselves in internationally. The European Union (EU) and the Organization for Economic Cooperation and Development (OECD) have for years been considering (and in some cases employing) various discriminatory tax policy and enforcement schemes intended to intimidate American companies abroad. The latest proposals could even target those companies that have no physical presence in certain EU member countries.[1] These efforts employ the same logic the *Wayfair* majority used—that tax power need not be bound by geography or tangible connection to a jurisdiction—for the same reason that states targeted out-of-state sellers: that governments love nothing more than targeting entities with no power at the ballot box for tax collection.

In its wake, the *Wayfair* court leaves complexity, confusion, and unanswered questions that Congress can begin to resolve. As two state tax practitioners recently wrote, "the only thing any player can be certain of post-*Wayfair* is that a playing field might exist. But no player can be certain of the field's markings, location, or boundaries. Nor does any player know whether it is on the playing field at all."[2] This is no way to resolve important tax and regulatory jurisdiction

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[1] Kevin Glass, National Taxpayers Union Urges Treasury to Aggressively Defend Taxpayers from EU and OECD Tax Schemes, National Taxpayers Union (Feb. 16, 2018), https://www.ntu.org/publications/detail/national-taxpayers-union-urges-treasury-to-aggressively-defend-taxpayers-from-eu-and-oecd-tax-schemes.

[2] Jaye Calhoun & William J. Kolarik II, Implications of the Supreme Court's Historic Decision in Wayfair, TaxNotes (Jul. 23, 2018),

matters, and yet it is what was foisted upon the American public when the Supreme Court handed *Wayfair* to an ill-prepared nation.

I believe Congress should act immediately to press "pause" on frenzied state actions designed to capitalize on an expansive view of *Wayfair*'s grant of new power. A Congressional moratorium could provide the time and space needed for vetting the innumerable unforeseen problems that have arisen in the few short weeks since *Wayfair* was handed down. Absent such action, businesses all across the country, particularly smaller ones that use the internet to help them reach wider audiences, face daunting litigation risks and tax compliance responsibilities.

The *Wayfair* Fallout

The Supreme Court's decision in *South Dakota v. Wayfair* was handed down on June 21, 2018. In the month since, many states have been scrambling to secure new cross-border taxing power for themselves, leaving businesses to remap their tax obligations to an ever-shifting target. One state tax practitioner called the fallout a "lawyer's dream," saying "My kids and their kids and their kids will all be litigating these cases until we get something more discernible."[3]

The reason there are so many potential cases is that innumerable difficult questions that weren't answered prior to *Wayfair*, or even asked in the first place, remain unanswered after the decision.

Retroactivity remains a serious threat

One of the biggest concerns raised during the *Wayfair* proceedings was the threat of a state moving to collect tax retroactively, should its economic nexus statute be found to be constitutional. While South Dakota itself explicitly structured its law to ensure only prospective application, many states with similar statutes have not done so. Our research shows that at least eight states have yet to officially commit to collect only prospectively.[4] Since their statutes contain no explicit disavowal of retroactive collection, taxpayers must rely on benevolent forbearance to avoid back taxes. Several others, like Alabama and Hawaii, only recently backed off of threats to impose retroactive taxation.

Years of state experiments to "define nexus down" to the point where mere economic contacts would be construed as physical presence were nothing more than experimental adventurism prior to June 21, 2018. Any law passed prior to that, even with an effective date that pre-dates it, was facially unconstitutional under the *Quill* standard. Businesses operating in such states were protected by *Quill* from having to collect tax if they lacked physical presence.

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https://www.taxnotes.com/state-tax-today/sales-and-use-taxation/implications-supreme-courts-historic-decision-wayfair/2018/07/23/2866l.

[3] Matthew Nesto, Battle Over State Income Tax Nexus Lurks In Post-Wayfair Era, Law360 Tax Authority (Jun. 28, 2018), https://www.law360.com/tax-authority/state-local/articles/1058473.

[4] These states are Indiana, Massachusetts, Mississippi, Minnesota, Ohio, Pennsylvania, Rhode Island, and Washington.

But a real question arises now that South Dakota's experiment has been validated by the Court. If South Dakota's law is constitutional, presumably similar statutes in other states are as well. Suddenly, a law with an effective date in 2017, like Alabama's economic nexus statute, is constitutional and the state could assess tax back to its effective date. More to the point, some state revenue officials may feel as though the letter of the law *forces* them to collect tax as of their statute's effective date.

To make matters worse, statutes of limitations provide no protection in this realm. The clock for such a limitation doesn't start until a return has been filed, but of course the fact that economic nexus statutes were unconstitutional until last month means that no returns will have been filed for most non-resident businesses. That means that back tax liability is effectively unlimited according to the letter of the law in many states.

This would prove incredibly expensive, but also burdensome to comply with to any degree of precision since paperwork is likely to be limited. A company protected by *Quill* with no collection systems in place is not likely to have records that can easily establish tax obligations. Furthermore, retroactive assessment would likely constitute impermissible double-taxation. Though sales tax may not have been collected on transactions prior to *Wayfair*, consumers may well have paid the legally-owed use tax on such sales at the individual level.

Retroactivity is particularly vexing when evaluating businesses operating in states with so-called "affiliate nexus" or "click-through nexus" laws, which attempt to establish physical presence for an out-of-state company based on its business relationships with in-state entities. Economic nexus laws like South Dakota's are of relatively recent vintage, being enacted first legislatively in 2017. But affiliate nexus and click-through nexus laws have a much longer history, dating back at least to 2008, with years of legal challenges yielding somewhat uncertain constitutionality prior to *Wayfair*. State and Circuit Court opinions had generally validated the approach, but the Supreme Court never did take up a case to answer the question once and for all.

Given that the Court has now wiped away the physical presence standard to which affiliate and click-through nexus schemes tried to attach themselves, presumably such laws are now constitutional (though outmoded). The result is that businesses operating in states with affiliate or click-through nexus statutes may face greater retroactivity risk, since those statutes reach further back in time and do so on the basis of an even flimsier connection to the state than economic nexus laws utilize.

Unfortunately, businesses are essentially operating at the mercy of state tax collectors across the country as it relates to retroactivity. Many state statutes fail to explicitly forego collection of back taxes. Neither the Court's opinion in *Wayfair* nor its other jurisprudence on retroactive tax obligations provides clear protection to businesses. And even if states agree not to collect retroactively, they'll retain the power to *audit* retroactively. In fact, many states may choose to do exactly that in order to establish baselines for future tax obligations.

<u>Unanswered questions on licensing and paperwork could destroy billions in commerce</u>

One consequence of South Dakota's sprint from State House to the Supreme Court is that there are innumerable highly-consequential licensing and paperwork questions that have not even begun to be answered. Even if one assumes that states will not pursue retroactive tax collection and that they will otherwise behave responsibly in establishing small seller thresholds and other protections that minimize harm to interstate commerce, there are a number of vexing compliance questions that require time and consideration to resolve.

Sales tax bonds

One example is the post-*Wayfair* contours of sales tax bond requirements. Many states require retailers operating in the state to take out a sales tax bond to ensure prompt fulfillment of tax obligations. If a business fails to furnish legally-owed sales taxes, the state can assert a claim against the bond to make themselves whole. Now that *Wayfair* exposes businesses to tax obligations all across the country in states where they have no physical presence, it's an open question if it also subjects them to sales tax bond obligations all across the country.[5]

The legally-required amount of a sales tax bond is typically calculated based on average monthly sales obligations. But, of course, businesses that previously didn't collect a state's sales tax because they were protected by *Quill* may not have easy access to full and accurate data that would allow them to easily comply with a surety's application requirements. Even if they are able to determine the correct amount of the bond, the premiums paid to secure the bond could prove significant. Premiums range from 1 percent of the bond's face value to as much as 25 percent in the case of an entity with poor credit, and in some states, required bond amounts can be as high as $100,000. This could add thousands of dollars in paperwork and compliance costs for businesses.

It also creates additional "failure points" for a business. For instance, if a seller makes a mistake in collecting one state's tax that results in a claim against their sales tax bond, that will negatively impact their ability to get reasonably-priced bonds for other states into which they sell. One administrative mistake could have a ripple effect all across the country.

Typically, sales tax bonding is tied to business licensure, but it is unclear in a post-*Wayfair* world whether that link will remain in most states. After all, it's entirely possible that a business that exceeds a state's threshold to require sales tax collection might not be required to secure a business license under current law.

Resale certificates

Another example of an unresolved paperwork nightmare is resale certificates. Business-to-business transactions are typically exempt from sales taxation. This is usually

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[5] Todd Bryant, Will E-commerce Websites Need to Post a Sales Tax Bond? CPA Practice Advisor (Jul. 16, 2018), http://www.cpapracticeadvisor.com/news/12420632/will-e-commerce-websites-need-to-post-a-sales-tax-bond.

established with the use of a resale certificate, whereby the purchasing business affirms that it is buying the items for the purpose of resale. This certificate is then furnished to auditors in order to prove that the transaction is exempt from sales tax collection obligations.

Prior to *Wayfair*, businesses lacking physical presence in a state had no obligation to collect that state's sales tax. Therefore, any business-to-business transactions to retailers in those states could be conducted absent piles of resale certificates. After *Wayfair*, those piles of resale certificates will grow ever-larger since they'll be required for virtually all transactions with out-of-state resellers.

However, 10 states don't accept out-of-state resale certificates at all, most notably California.[6] A vendor would have no choice but to collect and remit sales tax if the retailer to which they're selling is unable to provide a valid resale certificate. There are more complex methods of recovering tax charged on a sale that should have been exempt, but they are burdensome when compared with a resale certificate.[7]

The Court's vagueness invites chaos

Regardless of one's view on the reasoning utilized in the majority's opinion in *Wayfair*, it's hard to argue that the decision wasn't both sweeping and relatively vague. The result is that there's an enormous amount of gray area that states, businesses, and policy experts are trying to define in the face of very thin guidance from the Court.

Uncertain what sales and minimum contact thresholds will pass constitutional muster

The Court did distinguish between large and small sellers, reflecting an understanding that smaller businesses will find it much more difficult to comply with sales tax rules in 45 states and 12,000 taxing jurisdictions. However, it did not give strong guidance to help states determine precise sales and contact thresholds that will ensure their laws pass constitutional muster. It cites positively South Dakota's "safe harbor" provision, also known as a small seller exception, but declines to specify whether the approaches taken by other states would qualify as valid.

South Dakota's law has a small seller exception that exempts from collection responsibility any business that does less than $100,000 of business in the state, or conducts fewer than 200 transactions. But South Dakota is a very small state with an economy that is 47th among the 50 states in gross domestic product (GDP).[8] California, by contrast, is an economic giant with a state GDP more than 50 times greater than South Dakota's.

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[6] Jennifer Dunn, How to Use a California Resale Certificate, TaxJar (Mar. 2, 2016), https://blog.taxjar.com/california-resale-certificate/.
[7] Ned Lenhart, Resellers: How to Recover Sales Taxes Charged By Vendors, TaxJar (Feb. 2, 2016), https://blog.taxjar.com/resellers-how-to-recover-sales-taxes-charged-by-vendors/
[8] Gross Domestic Product by State, Bureau of Economic Analysis (May 4, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=70&step=10&isuri=1&7003=200&7035=-1&7004=sic&7005=1&7006=xx&7036=-1&7001=1200&7002=1&7090=70&7007=-1&7093=levels#reqid=70&step=10&isuri=1&7003=200&7004=naics&7035=-1&7005=1&7006=xx&7001=1200&7036=-1&7002=1&7090=70&7007=-1&7093=levels.

The Court does not answer whether California should use the same numeric standard as South Dakota. If it does, as many other states have attempted, the Golden State's law would ensnare vastly more, and vastly smaller, businesses than the Mount Rushmore State. Applying the South Dakota standard to California's economy seems at odds with the Court's desire to minimize burdens on interstate commerce.

On the other hand, Pennsylvania and Washington for example both have laws specifying a minimum threshold of just $10,000 in sales, an exception dramatically lower than South Dakota's and one that would catch many microbusinesses that would find compliance inordinately difficult.[9]

The existence of a small seller exception does not necessarily protect a business from audits to determine whether or not it should be collecting. While enforcement will likely target larger businesses, states will have virtual carte blanche to audit sellers of all sizes. Furthermore, many states could be sufficiently equipped to conduct the equivalent of "correspondence audits" that would allow tax authorities to reach deeply into the small business sector at relatively low cost to the government, but at much greater expense to a given seller. That means that businesses effectively need to begin tracking information about sales into each state from the very first sale into that state, since they may eventually hit whatever the state has set as its threshold. If audited, they'd need to be able to prove that they fell under the threshold.

Remote sellers are particularly disadvantaged in the tax tribunal system that normally allows taxpayers to challenge determinations by the authorities in an impartial dispute resolution setting. Many if not most of the laws establish where the tribunal is seated; while many allow electronic filing of documents and motions, the hearing itself requires the presence of the taxpayer or his representative. That's difficult but not impossible for multistate corporate taxpayers; for a single-state business halfway across the country, this burden would likely be impossible to meet.

Furthermore, there are serious questions of propriety to be raised with regard to states that provide "free" software to aid small businesses in tax compliance. These services are not free, but in fact are funded by taxpayers. This leads to an odd situation where a small business's tax advisor has a built-in financial incentive not to minimize the company's burdens while maintaining fidelity with the law, but rather to maximize collections for its actual patron, the state government.

In addition to its vague approach in defining constitutional small seller exceptions, the Court effectively established a brand new standard for sufficient minimum contacts with a state without doing any of the work of defining the limits of that standard.[10] The majority wrote that a company availing itself of the "substantial privilege of carrying on business" in the state has sufficient connection to it for legal purposes, but then did little more than blithely assert that the particular

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[9] Zach Gladney & Charles Wakefield, INSIGHT: 'Wayfair': What Are the Practical Retroactivity Concerns?, BNA News (July 19, 2018), https://www.bna.com/insight-wayfair-practical-n73014477734/.
[10] Calhoun & Kolarik, Implications of the Supreme Court's Historic Decision in Wayfair.

respondents (Wayfair, Overstock, and NewEgg) in the case met the standard by virtue of being large national companies with an "extensive virtual presence."

As attorneys Jaye Calhoun and William J. Kolarik II recently wrote in Tax Notes, "the only conclusion that can be drawn with certainty is that a business with an 'extensive virtual presence' (whatever that means) has availed itself of the substantial privilege of carrying on business in a taxing jurisdiction. The Court left the question of whether something less than an extensive virtual presence is also sufficient to establish substantial nexus."[11]

Uncertain what impact *Wayfair* has on related sales tax collection schemes

Despite the majority's zeal to remedy what it deemed to be the "unfair and unjust" physical presence rule, it failed to effectively address other schemes states have utilized to manipulate it. For instance, there is nothing in the decision that can be seen to effectively address state laws governing so-called "marketplace" operators - websites offering a platform connecting buyers and sellers with certain sales and transaction support. The decision does not mention such statutes, and thus we are left to guess as to their constitutionality under the new *Wayfair* standard.

While this is largely a function of courts being unequal to the task of legislating comprehensive rules, it nonetheless sows the seeds for more confusion and, potentially, litigation. Practically speaking, *Wayfair* will be viewed as strong evidence in favor of the constitutionality of state marketplace laws. This means that marketplace operators, like Amazon, eBay, and Etsy, will likely be required to collect and remit tax for all sales on their platforms in states with relevant marketplace laws.

Less clear is how these laws might apply to more atypical platforms, like Craigslist or Facebook Marketplace. Most states define a marketplace as a platform that processes payments or receives consideration related to retail sales into the state. A platform like Etsy clearly meets that definition, while Craigslist likely doesn't by virtue of not processing any payments and receiving no other consideration. Facebook Marketplace and other platforms like it, though, present a much more difficult question. Does the fact that Facebook accepts payment for ads constitute "consideration" for purposes of establishing marketplace collection responsibilities? The answer would seem to be yes, subjecting a whole new swathe of websites to nationwide tax obligations.

Also unclear is the status of so-called "notice and report" and "collect or report" statutes. These schemes utilized the requirement of extensive transaction reporting to the state to compel businesses to either affirmatively notify consumers of their use tax obligations or, in more aggressive examples, to collect and remit sales taxes as though the business had a physical presence. States that have such laws on the books are likely to regard *Wayfair* as further evidence in favor of their constitutionality after surviving at the Circuit Court level. The continued enforcement of such laws is unclear moving forward.

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[11] Ibid.

The Court's vagueness is creating major problems as states attempt to seize authority without regard to constitutionality

The *Wayfair* majority's somewhat fuzzy ruling is already causing significant issues as states attempt to capitalize on it to secure new tax power without any particular regard to constitutionality. Some states are proceeding with collection schemes despite clearly not meeting the few markers the Court did lay out as guidance.

The Court cited positively the fact that South Dakota is a member state of the Streamlined Sales and Use Tax Agreement, a group of states that joined together voluntarily to simplify sales taxes. SSUTA member states agree to certain simplifications, like state administration of sales taxes and uniform rules. But some states that are not SSUTA members and have done little of the work of simplifying their codes are nonetheless moving forward with collection schemes despite the Court's opinion.

Louisiana has both state-level and parish-level sales taxation and is not a member of SSUTA. Regardless, policymakers there have plowed ahead with consideration of various proposals to seize new tax power post-*Wayfair*, despite the strong likelihood that such plans would fail a constitutional challenge.[12] Even their workarounds attempting to meet Court approval are likely unconstitutional.

One such scheme would see the creation of a central repository for tax remittance for remote sellers only, with a flat 8.45 percent sales tax rate. But this plan would likely fail both when analyzed against *Wayfair* as well as against existing prohibitions against discriminatory taxation. Louisiana is perhaps the poster child for a state unprepared to constitutionally capitalize on *Wayfair*'s new tax power, and yet it marches on undeterred.

And it's not just states looking to expand their power that are responding. Sellers in states without a sales tax, like New Hampshire, would face particularly crippling burdens since they'd be faced with having to collect a sales tax for the very first time. As a result, the Live Free or Die State is taking an aggressive approach to protecting its sellers from out-of-state tax collectors. The state legislature just hosted a special session to hammer out legislation forcing out-of-state entities to register with the New Hampshire Attorney General and prove that the tax obligation they're attempting to enforce is in fact lawful and not unfairly targeting small businesses.[13] The boundaries here are exceptionally unclear and New Hampshire's valiant attempt to shield its businesses is likely to end up in litigation

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[12] Scott Drenkard & Ben Strachman, Louisiana Legislature Partially Extends Sales Tax Hike, Fate of Online Sales Tax Still Uncertain, Tax Foundation (Jul. 12, 2018), https://taxfoundation.org/louisiana-legislature-partially-extends-sales-tax-hike-fate-online-sales-tax-still-uncertain/.

[13] Todd Bookman, N.H. Lawmakers Finalize Language of Special Session Sales Tax Bill, New Hampshire Public Radio (Jul. 19, 2018), http://www.nhpr.org/post/nh-lawmakers-finalize-language-special-session-sales-tax-bill#stream/0.

To the extent that any state is acting administratively, either pursuant to duly-passed legislation or more generally in an effort to seize new tax power through executive action, it is likewise unclear how administrative procedure reviews in states that have them will proceed. Some jurisdictions have rulemaking processes which could be circumvented, suspended, or otherwise made inconvenient for the public to offer comments. Taxpayers may be forgiven for wondering if states, in their haste to begin enforcing collection, will give short shrift to these processes. Even so, exactly how administrative regulations (as opposed to nonbinding guidelines or advisories) of one state will mesh with those of another, and remain consistent to the business required to abide by them, is an open question.

Wayfair's **impact is not limited to sales tax**

Though many proponents of South Dakota's law insisted time and again that *Wayfair* was only a sales tax case with a limited scope, we can observe with increasing clarity the widespread impacts across virtually all tax law and regulation.

New nexus standard likely applies to all business taxes

Many practitioners have written that the case essentially rewrote nexus standards for all forms of taxation, not just sales. University of Arizona law professor John Swain was recently quoted as saying, "After *Wayfair*, the physical presence test clearly doesn't apply to income taxes, and states will definitely be more confident in asserting nexus over non-physically present taxpayers," while Chuck Jones of Grant Thornton LLP said it could "encourage additional states to enact corporate income tax factor-presence nexus standards," including those based on sales.[14]

As but one example to vividly illustrate that point, Wells Fargo surprised many analysts when it reported a staggering $481 million income tax expense in the 2nd quarter as a result of *Wayfair*.[15] Though Wells Fargo is nobody's idea of an online retailer, the banking giant nonetheless said it foresees huge impact to its bottom line resulting from this decision. The company believes that some of its affiliated entities may now face income tax assessments for jurisdictions where they do business but have no physical presence.

Wells Fargo is unlikely to be the only company booking such expenses. David Pope, attorney at Baker & McKenzie LLP, was quoted as saying, "I think states are more likely to take an aggressive approach on income taxes now that they have the *Wayfair* decision." That could mean significant new obligations for businesses that were previously protected by *Quill*'s physical presence standard.

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[14] Paul Jones, Wayfair May End Dispute Over Corporate Income Tax Nexus, TaxNotes (Jun. 29, 2018), https://www.taxnotes.com/state-tax-today/nexus/wayfair-may-end-dispute-over-corporate-income-tax-nexus/2018/06/29/2866s.

[15] Michael Rapoport, Wells Fargo's $481 Million Tax Surprise, Wall Street Journal (Jul. 13, 2018), https://www.wsj.com/articles/wells-fargos-481-million-tax-surprise-1531499680.

Furthermore, publicly-traded companies are legally required to disclose retroactive and foreseeable future tax burdens on Form 10-Q with the Securities and Exchange Commission.[16] This helps fulfill obligations to be forthcoming with shareholders and the public about a company's financial picture. The deadline for filing for 2nd quarter information is in little more than two weeks from now, putting many companies in the impossible position of being legally required to report on obligations that are essentially unknowable with precision at this point.

Effectively, the Court and governments reading the tea leaves of the decision are creating an uncertain investment climate for business managers and their shareholders whose impact may be far higher than the revenues immediately at stake. Starved of capital because of nervous or hesitant investors, some companies could shelve expansion or marketing plans that could ensure their long-term health

Some may point to existing federal law, in the form of the Interstate Income Tax Act (or P.L. 86-272), as protecting businesses from income tax obligations in states where they lack physical presence. But IITA is written to protect those that sell only tangible personal property from income taxation.[17] Selling services could trigger income taxation, and sales of any type could trigger income tax audits. This could have an impact on the widespread availability of integrated "white glove services," like in-home furniture assembly.

No injunctive relief in sight

Many of the aforementioned problems could manifest themselves in litigation to make black and white the many shades of gray in the Court's ruling in *Wayfair*. But because the majority's opinion was relatively vague and highly deferential to state tax power, it leaves few options for taxpayers to secure injunctive relief against an unconstitutional scheme.

For instance, suppose Pennsylvania were to move forward with implementing its economic nexus law while maintaining its exceptionally low $10,000 sales threshold for its safe harbor provision. Such a law might prove unconstitutional under *Wayfair*'s analysis, but it's not a clear enough question that a court would deem it likely enough to justify an injunction against its enforcement.

In order to effectively challenge the constitutionality of that threshold, it would require a small business to face assessment and sue. While a suit worked its way through the courts, the likelihood is that the small business in question would need to continue complying with the rule. That could potentially take years and millions of dollars, a daunting proposition for even the largest of businesses. Faced with such a choice, most businesses would rationally choose to cut their losses and comply with the law, even if they felt it was unconstitutional. For additional insight into the type of cost-benefit analysis a business would make, the September 2017

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[16] Form 10-Q Instructions, Securities and Exchange Commission, https://www.sec.gov/files/form10-q.pdf.
[17] 15 U.S. Code 381.

testimony of NTU and NTUF President Pete Sepp before the Ways and Means Committee regarding small businesses facing IRS audit determinations is instructive.[18]

Congress should act immediately to enact a moratorium on state responses to *Wayfair*

While these challenges are formidable, Congress is empowered to take remedial action and should do so immediately. Congress should move swiftly to enact a moratorium on state actions building on the *Wayfair* decision to allow lawmakers, businesses, and expert analysts to resolve the many legal and policy questions that have arisen in recent weeks.

Such a moratorium could be structured in several different ways. One approach is to simply say that no state may collect pursuant to *Wayfair* until further legislative proceedings in Congress. This would give the House and Senate time to legislate on the important questions raised in this testimony and elsewhere. While this would entail establishing with some specificity definitions for key terms the language would use, this is a surmountable challenge given the ample text of duly-passed statutes from which to draw.

My own preference would be for Congress to use that time to pass H.R. 2887, Representative Jim Sensenbrenner's (R-WI) "No Regulation Without Representation Act," to bring clarity to sales tax, income tax, and regulatory issues in interstate commerce. I testified to this committee last year in support of that bill and continue to believe that it's the best approach to putting a stop to the morass of legislation and litigation that has characterized this issue in recent years.[19] Congress could then work to craft a sales tax collection standard that meets with Chairman Goodlatte's seven sales tax principles. I testified to this committee in 2014 about my own view that the right approach is uniform origin sourcing to ensure sales tax collection on all sales in a manner that maintains the physical presence standard and minimizes burdens to interstate commerce.[20]

If an indefinite moratorium period is viewed as too drastic a measure, Congress could simply pass a moratorium with a defined end date, say one or two years after enactment. This would stop the mad scramble of states looking to cash in on *Wayfair* this year despite serious questions as to the constitutionality of their approach. The interim period could be used to address many of the issues listed here and others that are raised as implementation nears.

A Congressionally-imposed moratorium is not an uncommon, exotic tactic. The landmark "Internet Tax Freedom Act," later made permanent, started as a simple Congressional moratorium on states imposing internet access taxes or discriminatory taxation on internet

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[18] Pete Sepp, Testimony Before the House Subcommittee on Oversight, Committee on Ways and Means (Sept. 13, 2017) https://www.ntu.org/publications/detail/irs-reform-resolving-taxpayer-disputes

[19] Andrew Moylan, Testimony Before the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Jul. 24, 2017), https://judiciary.house.gov/wp-content/uploads/2017/07/Moylan-Testimony.pdf.

[20] Andrew Moylan, Testimony Before the House Committee on the Judiciary (March 10, 2014), https://judiciary.house.gov/wp-content/uploads/2016/02/Moylan-Testimony-2.pdf.

commerce.[21] In 2016, legislation made that prohibition permanent and pre-empted several states that had passed laws that had previously been "grandfathered."

Another bill utilizing a moratorium, championed by a leading member of this committee in Representative Zoe Lofgren (D-CA) and a bipartisan group of her colleagues, was the "Wireless Tax Fairness Act."[22] This bill passed the House on a voice vote in 2011 and would have instituted a five-year moratorium on the imposition of discriminatory taxes on wireless service.

A moratorium is not an attempt to simply undo *Wayfair*. Though I would very much like to do that because I believe the case was wrongly-decided and harmful to common-sense principles of limited government and federalism, one need not agree with my assessment of the case to support a prudent "cooling off period." Doing so will allow all governments to thoughtfully consider the redesign of their tax systems in a post-*Wayfair* world and protect taxpayers' rights.

It should be noted that neither the Remote Transactions Parity Act, nor the related Marketplace Fairness Act, is adequate to the task of ordering a chaotic state tax situation post-*Wayfair*. The problem that needs addressing is state aggression and carelessness, and that's not solved by abetting such aggression and carelessness. Perhaps more to the point, both bills would likely need to be rewritten to more accurately address the current landscape.

Conclusion

Congress has two paths before it, and today's hearing can offer some clarity about just how rocky each might be. One path is for Congress to simply stand still as solvable problem is stacked on solvable problem. The other is for it to take the relatively modest step of pausing proceedings to ensure careful deliberation and smooth implementation of responses to the Supreme Court's ruling in *Wayfair*. The latter course is more prudent, and more consistent with Congress's duty to protect the free flow of interstate commerce.

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[21] 105th Congress, H.R.4328 (Oct. 21, 1998), https://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf.

[22] 114th Congress, H.R.4287 (Dec. 17, 2015), https://www.congress.gov/bill/114th-congress/house-bill/4287.