

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

AMERICAN CATALOG MAILERS
ASSOCIATION and NETCHOICE,

Plaintiffs,

vs.

ANDY GERLACH, in his capacity as
the Secretary of the South Dakota
Department of Revenue,

Defendant.

32CIV16-_____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiffs American Catalog Mailers Association (“ACMA”) and NetChoice (together, the “Plaintiffs”) allege the following in support of their Complaint for Declaratory Judgment, which seeks a prospective declaration of rights and obligations under a statute in accordance with the Uniform Declaratory Judgments Act, SDCL Ch. 21-24:

NATURE OF THE ACTION

1. This is an action for declaratory judgment by the ACMA and NetChoice challenging the constitutionality of a newly enacted statute, SB No. 106 (2016) (“SB 106”), that was adopted by the legislature with the express understanding that its terms contradict the United States Supreme



Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), regarding the limitations on state taxing power under the Commerce Clause of the United States Constitution. The Supreme Court in *Quill* held that a State lacks the authority under the Commerce Clause to impose state sales and use tax collection and reporting obligations upon a seller that has no physical presence in the state, either directly or through third parties, and whose only connection with the state is communicating with customers via the instrumentalities of interstate commerce, *i.e.*, telephone, U.S. mail, common carrier, and now the Internet. *See Quill Corp.*, 504 U.S. at 313-19. The new statute, SB 106, imposes the obligation to report South Dakota sales tax expressly upon sellers and service providers that have no physical presence in the state, based solely on making sales over certain minimum thresholds to South Dakota customers via telephone, mail order, email, and the Internet. Because SB 106 violates the *Quill* physical presence requirement, usurps the role of Congress in regulating interstate commerce, and unlawfully expands the State's taxing authority over companies, individuals, and organizations located throughout in the United States, and potentially the world, based solely on their having customers in South Dakota, the law is plainly unconstitutional.

PARTIES

2. Plaintiff American Catalog Mailers Association is incorporated in Washington, D.C. and is the leading trade association in the United States representing the interests of companies, individuals, and organizations engaged in and supporting catalog marketing.
3. Plaintiff NetChoice is incorporated in Washington, D.C., and is a leading trade association of Internet companies and organizations dedicated to advancing the interests of eCommerce businesses and online consumers.
4. Defendant Andy Gerlach is the Secretary of the South Dakota Department of Revenue (“Department”) and is charged with the enforcement of SB 106.

JURISDICTION AND VENUE

5. The Court has jurisdiction to adjudicate this action under the South Dakota Uniform Declaratory Judgments Act, SDCL 21-24-1 *et seq.*
6. Venue is proper in this circuit under SDCL 15-5-2(2) and/or SDCL 15-5-6, because the Defendant is resident here and will be required take action to enforce SB 106 from the Department’s offices in this circuit.

ALLEGATIONS

7. The United States Supreme Court, in *Quill*, held that sellers “who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business” lack the necessary “substantial nexus” with a State for the State to require such out-of-state sellers to collect and remit the State’s sales and use taxes. 504 U.S. at 307, 313-319.
8. The Court in *Quill* reaffirmed that in order for a State to have the authority under the “substantial nexus” standard of the Commerce Clause to require an out-of-state seller to collect or report the State’s sales and use taxes, the seller must have a “physical presence” in the state. *Id.* at 314, 317-18.
9. The United States Supreme Court has not overruled, superseded, or limited its decision in *Quill*.
10. The physical presence requirement of *Quill* currently remains the law of the land under the United States Constitution. The States, including South Dakota, are bound by *Quill*.
11. On March 22, 2016, Governor Daugaard signed into law SB 106.
12. SB 106 provides that “any seller selling tangible personal property, products transferred electronically, or services for delivery into South

Dakota, who does not have a physical presence in the state” is required to remit sales tax if the seller meets either of two, alternative criteria in the prior or the current calendar year: (a) the seller’s gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars (\$100,000); or (b) the seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred (200) or more separate transactions. SB 106, § 1.

13. SB 106 takes effect on May 1, 2016.
14. Both ACMA and NetChoice have members who are directly and adversely affected by the sales tax reporting obligations imposed under SB 106.
15. On information and belief, on or about March 25, 2016, the Department began sending notices to businesses located outside of South Dakota regarding the obligation of remote sellers to register and begin reporting South Dakota sales tax under SB 106 as of May 1, 2016.
16. SB 106 contains a lengthy statement of legislative findings. The findings expressly acknowledge that “existing constitutional doctrine calls this law into question” and that established constitutional

doctrine under *Quill* would have to be “changed to permit the collection obligations of this Act.” *Id.* § 8(10), (11).

17. The findings further acknowledge that “it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine.” *Id.* § 8(9).

18. In light of the holding of *Quill* and the legislative findings regarding the unconstitutionality of SB 106, any assertion by the Secretary that SB 106 does not run afoul of *Quill* and violate the Commerce Clause would not be substantially justified.

COUNT I – Declaratory Judgment

19. Plaintiffs incorporate the allegations of paragraphs 1–18 as if fully set forth herein.

20. *Quill* bars a State from requiring sales and use tax collection and reporting by an out-of-state seller or service provider that has no physical presence in the state.

21. SB 106 expressly requires out-of-state catalog merchants, Internet sellers, and service providers “who do[] not have a physical presence in the state” to report South Dakota sales taxes.

22. This Court is empowered under the Uniform Declaratory Judgments Act, SDCL 21-24-1 *et seq.*, to declare the rights and obligations of the parties under SB 106.
23. SB 106, on its face, violates the Commerce Clause under *Quill*.
24. This Court is bound to follow and enforce Supreme Court precedent.
25. This Court should declare SB 106 unconstitutional and unenforceable and award such further relief as is just and proper.

COUNT II – Declaratory Judgment

26. Plaintiffs incorporate the allegations of paragraphs 1–25 as if fully set forth herein.
27. The Due Process Clause of the United States Constitution, made applicable to the States through the Fourteenth Amendment, requires a definite link and a minimum connection between the state and a person it seeks to tax.
28. The Supreme Court has not determined whether, for purposes of the Due Process Clause, the prescriptive jurisdiction of a state, *i.e.*, its jurisdiction to impose tax or regulatory obligations, is co-extensive with the state’s adjudicative jurisdiction.

29. The minimum thresholds in SB 106 for asserting prescriptive jurisdiction over sellers that have no physical presence in the state are inconsistent with the requirements of the Due Process Clause.
30. This Court is empowered under the Uniform Declaratory Judgments Act, SDCL 21-24-1 *et seq.*, to declare the rights and obligations of the parties under SB 106.
31. This Court should declare SB 106 unconstitutional under the Due Process Clause and award such further relief as is just and proper.

WHEREFORE, Plaintiffs respectfully pray that the Court:

- (A) enter a declaration that SB 106 is unconstitutional and unenforceable on its face;
- (B) enter judgment for the Plaintiffs;
- (C) award the Plaintiffs their attorneys' fees and costs; and
- (D) grant such further relief as the Court deems just and proper.

Dated this 29th day of April, 2016.

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