UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA, Plaintiff, v. WAYFAIR INC OVERSTOCK.COM INC NEWEGG INC Defendants.	)))))))))))	3:16-CV-03019-RAL PLAINTIFF'S REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO REMAND

The Plaintiff, the State of South Dakota (the State), submits this reply brief in support of its Motion to Remand. Dkt. 21.

REPLY

Although the State will address Defendants' other contentions below, the heart of this Reply explains that Defendants' scattershot effort to distinguish *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) fails. That case's plainly stated holding could not be more applicable here. *See id.* at 21-22 ("[A] State's suit for a declaration of the validity of state law … is not within the original jurisdiction of the United States district courts."). Because this unanimous decision, and others, require remand, Defendants must ultimately ask this Court to assert its jurisdiction on the basis of "sui generis" and "one-of-a-kind" factors that allegedly distinguish this case from the myriad others in which the Supreme Court has warned against federal jurisdiction over state tax-related cases, including *Franchise Tax Board* and

Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010). But, in general, these claimed differences are not actual distinctions—the purported special facts here were just as true in *Franchise Tax Board* or *Levin*, too—and the force of those cases remains directly on point.

Even if these points were meaningful, however, this kind of jurisdictional adventurism cannot be reconciled with the rule that "*all doubts* about federal jurisdiction should be resolved in favor of remand to state court." *Hubbard v. Federated Mut. Ins. Co.*, 799 F.3d 1224, 1227 (8th Cir. 2015) (emphasis added). Unless this Court can be made certain of its jurisdiction, it is "required" to remand. *In re Business Men's Assurance Co. of America*, 992 F.2d 181, 183 (8th Cir. 1993). Unable to approach that showing, Defendants revealingly try to escape from it by misconstruing this fully settled and fundamental rule of federal removal jurisdiction. *See* Dkt. 26 at 6-9. As demonstrated below, however, this rule has special force in this case, where it would be particularly prejudicial to the Plaintiff State to create jurisdictional doubts that would be absent in state court.

Importantly, Defendants' misunderstanding of these doctrines appears to be rooted in a fundamental misreading of this cause of action, and the reason for its unique design. Defendants assert that federal jurisdiction is appropriate because the State is engaged in a "power grab" that seeks to overturn Supreme Court precedent on the State's "own authority." *See* Dkt. 26 at 2-3 & n.1. Nothing could be further from the truth: The only thing the State can be accused of here is being too deferential to existing doctrine and the concerns of

its possible taxpayers. Defendants' analogies to extreme cases of State nullification of federal law are inapt, and tend only to confirm exactly why federal jurisdiction is both absent and unnecessary here.

At the end of the day, the State built this action in order to facilitate review by the Supreme Court of the United States. It was, after all, Justice Kennedy who invited this review (*Direct Marketing Association v. Brohl*, 135 S.Ct 1124, 1135 (2015)) and the State's response was to craft this action in a manner that stayed any tax imposition pending a final decision. The *only* thing that could frustrate that purpose is a misplaced assertion of original federal jurisdiction. The State respectfully requests that this court remand.

ARGUMENT

I. The Design Of This Action Counsels Strongly Against A Doubtful Assertion Of Federal Jurisdiction.

Defendants' attempt to frame this case as a "sui generis" or "one-of-a-kind" effort by the State to overturn constitutional precedent "on its own authority," or to "usurp Congress's role in making policy for the national marketplace" through some kind of unreviewable state court action. *See* Dkt. 26 at 2, 17. This, however, is backwards—this case is a carefully designed vehicle for the Supreme Court to assert its undisputed authority over federal law while avoiding unnecessary jurisdictional complications *and* potential harms to taxpayers and the State in the interim. Once this case is placed in proper context, it is clear that there are no special reasons to grant federal jurisdiction here when such jurisdiction has been rejected in analogous

cases, and when the settled rule resolving jurisdictional doubts in favor of remand applies to this case at least as strongly as others, if not more so.

A. This case is neither *sui generis* nor any kind of power grab.

Most important, and contrary to Defendants' view, Senate Bill 106 was expressly designed to *prevent* the State from overturning *Quill* on its "own authority" or from harming any taxpayer during the interim period where its provisions were being reviewed by the courts. The "unique" provisions of Senate Bill 106 to which Defendants point, Dkt. 26 at 2 n.1, essentially preserve the status quo unless and until the Supreme Court of the United States abrogates its precedent in this area—which is a nod to the supervening authority of the federal Supreme Court, not the other way around. These provisions, in turn, make original jurisdiction in federal court *less* important, not more so. In the ordinary case, a state court may decide a federal question, the party asserting a federal defense (like Defendants here) may lose, and the Supreme Court may decline certiorari, so that the only decision on the merits of an "important" federal question is rendered by a state court. *See, e.g.*, *Franchise Tax Board*, 463 U.S. at 4 (explaining that jurisdiction was lacking even though key question in the case was "important" question of federal law). But that cannot happen here: Unless the Defendants fold, the State has tailored its own action so that it can only obtain meaningful relief from a federal court, in the form of the Supreme Court of the United States. This illustrates restraint, not some kind of State nullification effort, and the Court

should reject Defendants' effort to paint the Legislature's solicitude towards Defendants as the opposite.

This is particularly so because the legislature did not have to take these steps. The deferential structure of Senate Bill 106 is a matter of legislative grace: Instead of waiting for certainty from the Supreme Court, the State could have made its provisions immediately effective, and simply begun sending out tax bills or initiating audits. That structure would have been more ordinary, but *much* harder on Defendants. *See* Motion at 7 (explaining unique challenges facing taxpayers in this context).[1] Ironically, if the legislature had chosen that path, there would be no question of exclusive state court jurisdiction, because Defendants would be clearly limited to state post-enforcement remedies by the Tax Injunction Act. Defendants' suggestion that this Court should take jurisdiction because the State did *not* just bill the Defendants and force them to sue to protect their rights in state court amounts to an extreme example of looking a gift horse in the mouth.

Further, this case is neither "one-of-a-kind" nor any kind of brazen legislative action. The only way a State can create a vehicle for the Supreme Court to reconsider *Quill* (or any other case) is to take an action that violates it, so the State can hardly be faulted for the fact that Senate Bill 106 does so. Instead, the very best the State can do is: (1) acknowledge the conflict, in recognition of the Supreme Court's authority (as the State has done); and (2)

[1] Notably, in Alabama, which has taken this path, Amazon decided to voluntarily collect and remit tax. Thus, the South Dakota legislature's grace—which Defendants paint as somehow darkly motivated—could be costing the State dearly.

limit the interim burden on taxpayers, in recognition of the current precedent and their predicament (as the State has done). Notably, *Quill* itself was an effort by North Dakota to encourage the Supreme Court to reconsider *Bellas Hess*, which it did both by passing a new law and filing a state-law declaratory judgment action in state court. *See State By & Through Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 205 (N.D. 1991). The *Quill* defendants were still able to vindicate their claims of a federal right in a federal court—they proceeded through the state courts, and ultimately prevailed in the Supreme Court of the United States. Original federal jurisdiction is no more required here than it was there, particularly because in this case, unlike in *Quill*, the State has expressly conceded that Supreme Court intervention will be necessary for the State to ultimately prevail.

Relatedly, Defendants have it backwards in suggesting (at 5-6 & n.2) that the State is somehow trying to short-circuit review in *any* court by contesting this Court's jurisdiction here and asserting other jurisdictional defenses in the state court in the *American Catalog Mailers* case. The State's goal is the exact opposite: As its remand motion stresses (at 7), it *wants* a court of competent jurisdiction to decide *this* case as quickly as possible in order to generate a clean vehicle for Supreme Court review. The sole reason it is contesting jurisdiction here is not because it cares which lower courts resolve this matter as such, but because it does not want to freight a case that necessitates Supreme Court action with an unnecessary and avoidable federal jurisdictional problem that could frustrate Supreme Court review and send the case back to

square one years later. Pointedly, if no court has jurisdiction over this suit, then the State will never get a judgment reflecting the law's validity, and under the provisions of Senate Bill 106, it will never collect any tax. That would harm the State, not help it.

Defendants also overstate the relevance of the State's Answer in that case. *See* Dkt. 26 at 6, 30 n.5. First, the State's Answer merely *preserves* the alleged jurisdictional defenses, rather than actually *asserting* them. Second, those defenses largely relate to case-specific factors, like the specific associational Plaintiffs' failure to make any allegations of associational standing or present harm, or their decision to seek attorneys' fees (from which the State is immune). In fact, the State has asked the (identical) attorneys representing the Plaintiffs in that case to simply stay it while the procedural posture of this one is resolved—a request to which they have not responded. Every action the State has taken in either case is designed only to avoid duplication and the waste of judicial resources (not to mention those of the State and Defendants), so that the "legal system" can quickly and efficiently take up Justice Kennedy's invitation. *See DMA v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J. concurring).

B. The settled doctrine of resolving doubts in favor of remand applies to this case *at least* as much as to any other.

Once the misunderstandings above about the State's purpose in this action are corrected, it becomes particularly clear that this Court should apply, with undiluted concentration, the rule that district courts are "required to resolve all doubts about federal jurisdiction in favor of remand." *Business*

Men's Assurance Co., 992 F.2d at 183. Defendants quote neither the actual language nor settled purposes of that rule, because both clearly apply here.

According to Defendants, the rule's stated preference for remand embodies "nothing more than the unsurprising statement that the removing party has the burden of establishing federal subject matter jurisdiction," Dkt. 26 at 7, and only really applies to disputes of fact regarding diversity, *id.* at 7-8. The uniform law of this Circuit and every other is clearly to the contrary. Both the Eighth Circuit and this District Court have routinely invoked the rule that "*all* doubts" regarding jurisdiction should be resolved in favor of remand in cases involving federal question jurisdiction, federal preemption jurisdiction, Eleventh Amendment issues, and the like. *See, e.g.*, *Bates v. Missouri & Northern Arkansas R.R. Co., Inc.*, 548 F.3d 634, 638 (8th Cir. 2008) (federal preemption jurisdiction); *Transit Casualty Co. v. Certain Underwriters at Lloyds's of* London, 119 F.3d 619, 625 (8th Cir. 1997) (federal question jurisdiction); *Business Men's Assurance Co.*, 992 F.2d at 183 (federal question jurisdiction); *Spiger v. United Parcel Services, Inc.*, No. 4:15-CV-04110-KES, 2015 WL 9478237, at *10 (D.S.D. Dec. 29, 2015) (preemption jurisdiction); *Cotton v. State of S.D. By and Through S.D. Dep't of Soc. Serv.*, 843 F. Supp. 564, 568 (D.S.D. 1994) (Eleventh Amendment). The former Chief Judge of this Court has stated the rule in unequivocal terms: "If the propriety of removal is doubtful, the case is to be remanded." *Cotton*, 843 F. Supp. at 568.

These consistent holdings follow the leading treatise on federal jurisdiction, which makes clear that "there is ample case support at all levels of the federal courts—the Supreme Court, the courts of appeal, and the district courts—for the propositions that *removal statutes generally* will be strictly construed, and that *all* doubts should be resolved against removal." *Wright & Miller*, 14B Fed. Prac. & Proc. Juris. § 3721 (4th ed.) (emphases added). That rule is limited neither to the diversity statute, nor to any particular kind of jurisdictional doubt. Indeed, as both that treatise and this Court have pointed out, "the basis of the rule" is not the need to allocate the burden of proof to the (re)moving party, but to avoid "the inexpediency, if not unfairness, of exposing the plaintiff to the possibility that he will win a final judgment in federal court, only to have it determined [on appeal] that the court lacked jurisdiction." *Cotton*, 843 F. Supp. at 568 (quoting *Wright & Miller* § 3721) (alterations in original). As the State's initial motion explained, this rationale arises from the problem that jurisdictional issues are unwaivable, and the courts thus need a means of preventing Defendants from dragging Plaintiffs into a venue of dubious jurisdiction, only to argue (or have the court raise *sua sponte*) on appeal that the court could not grant judgment in Plaintiff's favor because it never had jurisdiction at all. *See* Motion at 9-10. That is best achieved by preferring remand in the face of "*all doubts* about federal jurisdiction," just as the rule says. *See Hubbard*, 799 F.3d at 1227.

As for applying that rule to this case, it is hard to imagine one that would more precisely implicate this rule's concern. All the State wants here is a

judgment, free from jurisdictional doubts, holding that Senate Bill 106 *cannot* be upheld absent a change in Supreme Court precedent, so that the State can ask the Supreme Court for precisely that change. Nothing could be more unfair than accidentally preventing the State from ever reaching the Supreme Court because of Defendants' errant decision to drag this case into an unnecessary jurisdictional quagmire. This is why—particularly in this case—Defendants should have to place the jurisdiction of this Court beyond all doubt before the case can be allowed to remain in federal court. Because, as demonstrated below, Defendants cannot do so, this case must be remanded to the state court.

II. *Franchise Tax Board* Plainly Controls

In *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), the United States Supreme Court outlined a four-part test embodying the established rules for deciding when a state cause of action nonetheless presents a federal question. But *Grable* was not a declaratory judgment case, and it did not purport to question in any way the well-settled framework established by *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), and *Franchise Tax Board*, 463 U.S. at 21-22, for determining when state declaratory judgment actions fall within a district court's federal question jurisdiction. *See Grable*, 545 U.S. at 314. Instead, it clearly invoked *Franchise Tax Board* and reaffirmed it as an example of a case where, under *Grable*'s final factor, established standards for dividing authority between state and federal courts demonstrate that Congress would not have intended federal question

jurisdiction to apply. *See id.* Having themselves emphasized that lower courts are bound to specific holdings of the Supreme Court even if they are in tension with later, more generic decisions, *see* Dkt. 24 at 11-12 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)), the Defendants cannot seriously maintain that this Court should apply *Grable*'s generalized balancing test rather than the super-specific holding of *Franchise Tax Board* in resolving this case. That is particularly true because *Grable* on its face endorses *Franchise Tax Board*, not the other way around.

By its own terms, *Franchise Tax Board* clearly controls: it says that "a State's suit for a declaration of the validity of state law … is not within the original jurisdiction of the United States district courts" and so not within their removal jurisdiction either. 463 U.S. at 21-22. Accordingly, even Defendants ultimately acknowledge that they can get no benefit from *Grable* unless they can distinguish *Franchise Tax Board*. *See* Dkt. 26 at 11. They try no less than seven distinctions. While the specificity of *Franchise Tax Board*'s holding perhaps makes this unnecessarily exhaustive, the State addresses each distinction below.

A. Federal-question jurisdiction cannot be supported by cases that proceeded under *other* theories of federal jurisdiction.

Defendants first suggest (Dkt. 26 at 12, 15) that federal-question jurisdiction here is consistent with congressional intent because the Supreme Court and Eighth Circuit have allowed tax enforcement cases to go forward in federal court notwithstanding the Tax Injunction Act. *See id.* (citing *Jefferson*

County, Ala. v. Acker, 527 U.S. 423, 433 (1999) and *City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 531 F.3d 595, 603-04 (8th Cir. 2008)). There are two problems with this argument. First, and most critically, *Acker* and *Jefferson City* are not federal-question cases at all—they proceeded in federal court on the bases of federal officer jurisdiction and diversity jurisdiction respectively. They thus do not suggest that Congress intended there to be federal *question* jurisdiction in a case like this one, even if, like *Acker*, it was an actual tax enforcement suit (which, of course, it is not).

Notably, even outside the particularly state-deferential context of state tax law, Defendants' brief identifies not one case in which a federal court has found federal-question jurisdiction because a State sought a declaratory judgment that its laws or actions were valid as a matter of federal law. That is not surprising, because the unanimous and unambiguous holding of *Franchise Tax Board* says the exact opposite. But Defendants cannot argue that this doctrine admits of exceptions without identifying at least one.

Franchise Tax Board expressly reaches its no-jurisdiction holding while declining to decide whether the Tax Injunction Act might bar the suit. *See* 463 U.S. at 20 & n.21, 27 n.31. Defendants thus err in suggesting that State-brought declaratory judgment actions about the validity of state laws are appropriate for exercises of federal-question jurisdiction as long as they do not violate the Tax Injunction Act—if that were so, *Franchise Tax Board* would have been forced to resolve the TIA question it pretermitted. The bare fact that *Acker* and *Jefferson City* do not bar tax enforcement actions under the TIA thus

does nothing to distinguish this case from *Franchise Tax Board* or to make any point whatsoever about federal-question jurisdiction.

As Defendants admit, the ultimate touchstone of this inquiry is whether Congress intended to open the federal courts to these kinds of cases, and it is obvious that such intent is absent here because Defendants' claim to federal-question jurisdiction under congressional statutes here is *doubly* weaker than the defendants' in *Franchise Tax Board*. In that case, Congress provided a federal cause of action through ERISA that the defendants could have used to raise their federal defenses affirmatively outside of a declaratory judgment posture, and the Supreme Court still concluded that Congress did not intend federal-question jurisdiction to be available respecting a State-initiated declaratory judgment action on the federal ERISA question. *See Franchise Tax Board*, 463 U.S. at 18-20. Defendants here both lack such a federally enacted cause of action *and* would be affirmatively barred from federal court by a congressionally enacted statute if they were suing affirmatively (*i.e.*, the TIA). It is thus impossible for them to maintain that they have a *better* claim to a congressionally granted federal court pass than in *Franchise Tax Board*.

On this point, Defendants' own hypotheticals are quite instructive. In their opening discussion, they imagine a state nullification effort directed at *Obergefell*'s marriage equality holding where the State of Alabama sues in state court for a declaratory judgment to avoid federal courts that would (presumably) be more resistant to nullification. *See* Dkt. 26 at 2-3 & n.1. Leaving aside the troubling suggestion that state courts would not enforce the

Constitution they take an oath to uphold, this strategy would not work: State citizens could simply sue the State for violating federal law under 42 U.S.C. §1983. The reason that solution is unavailable here is the Supreme Court's undisputed determination that Congress did not open the §1983 pathway to dormant Commerce Clause claims about state tax laws precisely because it recognized the superior position of the state courts to adjudicate such claims. *See Nat'l Private Truck Council, Inc. v. Ok. Tax Comm'n*, 515 U.S. 582, 592 (1995). As *Levin* makes clear, claims respecting state tax issues by defendants using the dormant Commerce Clause to maintain a relative tax advantage over their competitors are among the last cases Congress would have wanted to route to the federal courts. *See infra* Part V. There is thus no substance to Defendants' suggestion that this case belongs in federal court as a matter of congressional design.

B. *Franchise Tax Board* expressly holds that it is irrelevant whether there will be a "horde" of similar cases.

Defendants next suggest (at Dkt. 26 at 11) that federal-question jurisdiction is appropriate here, unlike in *Franchise Tax Board*, because approving it is unlikely to flood the federal courts with similar claims. But Defendants then immediately concede that this was true in *Franchise Tax Board*—in fact, the Court actually stopped to identify this fact, hold it irrelevant, and then find that federal-question jurisdiction was still inappropriate. *Franchise Tax Board*, 463 U.S. at 21, n. 22. A consideration

affirmatively dismissed by the unanimous Supreme Court case Defendants are trying to distinguish cannot possibly carry any weight.

C. *Franchise Tax Board* expressly holds that it does not matter if the complaint affirmatively states a federal question.

Defendants next argue (at Dkt. 26 at 13-14) that this case is different from *Franchise Tax Board* because the State here expressly made a federal question an "affirmative element" of its declaratory judgment action. To the extent this is true here, however, it was equally true in *Franchise Tax Board* as well.

As an initial matter, the State's Complaint here asks only for a declaration that "the requirements of section 1 of the Act are valid and applicable with respect to the defendants." Complaint at 19. Neither this prayer for relief, nor any other, mentions *Quill* or anything about federal law. It is thus incorrect that a federal question is an affirmative element of the State's claim: If Defendants want to waive their *Quill* defense and defend solely on the ground that they do not have $100,000 of sales, for example, then the Court can adjudicate that question, grant judgment to the State, and effectively require Defendants to start collecting sales tax without once mentioning federal law. *Accord Franchise Tax Board*, 463 U.S. at 7 (complaint sought "declaration that defendants are 'legally obligated to honor all future levies by the Board.'"). The State of course hopes that this action will have broader significance, as did the state tax board in *Franchise Tax Board*. But Senate Bill 106 carefully preserves the possibility that a particular defendant who has suffered a

judgment against it for any reason will be required to comply with its sales tax obligation, whether the Supreme Court abrogates *Quill* or not. *See* S.B. 106 §3 (making injunction inapplicable if there a "judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer"). Defendants' dormant Commerce Clause argument is surely waivable, and thus remains a defense for them to invoke, not an "element" of the State's claim, placing this case on a precise parallel with *Franchise Tax Board*.

To be sure, as a practical matter, everyone agrees that the animating question in this case is likely to be the *Quill* question of federal law, which is why the State's complaint identifies it. But, once again, these are the literal facts of *Franchise Tax Board*, and ones that it expressly identifies as irrelevant. There, as here, the *only* issue the parties meaningfully disputed was about the scope of ERISA—a federal law—and the state board thus discussed ERISA in its complaint as the sole basis for its declaratory judgment request. *See Franchise Tax Board*, 463 U.S. at 3-4, 6-7. Contrary to Defendants' argument (Dkt. 26 at 13), the Supreme Court's entire point in *Franchise Tax Board* was that, even if "the federal issue is not 'lurking in the background,'" *id.*, and "both parties admit that the only question for decision is raised by a federal preemption defense," the rule against federal-question jurisdiction still applies. *Franchise Tax Board*, 463 U.S. at 12.

Defendants also demonstrate the State's point in emphasizing that the doctrine forbids using a declaratory judgment action to create federal-question

jurisdiction where, otherwise, "the federal claim would arise only as a defense." *See* Dkt. 26 at 14. Notably, it is undisputed that this declaratory judgment action was designed by the legislature precisely so that it could seek immediate affirmative relief rather than issuing assessments and forcing Defendants to either (1) sue for relief in state court; or (2) assert *Quill* as a defense in an enforcement suit. *See* Dkt. 26 at 2, 10 (calling statute "purpose-written" to authorize State to seek affirmative relief, and "designed" to authorize State to seek resolution of federal question). Thus, it is Defendants' own view that—but for this carefully "designed" declaratory judgment procedure—the State's options here would not involve any action that could be originally filed in federal court. And that, under Defendants' own analysis of the doctrine, *see* Dkt. 26 at 13-14, is precisely what leads to the application of the doctrine from *Skelly Oil* and *Franchise Tax Board* that federal-question jurisdiction is unavailable.

D. There would be no federal-question jurisdiction in *any* hypothetical non-declaratory judgment action presenting this question.

Citing *Acker*, Defendants next argue (at Dkt. 26 at 14-15) that this case is different from *Franchise Tax Board* because a federal court would have jurisdiction over a hypothetical non-declaratory judgment by the plaintiff raising the same claims, in the form of a collection suit. This is a fundamental misreading of *Acker*: That case was removed on the basis of federal-officer jurisdiction, which (alone) authorizes a federal court to take jurisdiction where the asserted federal question arises as a defense. If, as here, there were no

federal officers in *Acker*, removal would have failed there under the most basic application of the well-pleaded complaint rule, because those officers were invoking federal law *as a defense* to a state cause of action. *See Acker*, 527 U.S. at 430-31. Accordingly, even assuming the right hypothetical non-declaratory action here is a collection suit, that suit would not present a federal question within the original jurisdiction of a federal court because the *Quill* issue there would simply be a defense to an action that would otherwise proceed entirely under State law.

Moreover, a collection suit is not necessarily the right hypothetical non-declaratory action. In the absence of the state declaratory judgment action created by Senate Bill 106, the State would normally issue a tax assessment, *see* S.D.C.L. § 10-59-8, and because of both the Tax Injunction Act and state-law procedural requirements, *see id.* § 10-59-9, the taxpayer would be forced to pay that assessment and seek a refund exclusively through the State courts. *Id.*; *see also id.* § 10-59-20. If the taxpayer failed to follow that procedure, the State would file a lien, *id.* § 10-59-10, which it could seek to collect through a collection action *or* by distress warrant. *E.g.*, *id.* § 10-56-1. The only possible case in which a federal constitutional issue under *Quill* would arise affirmatively is an action by the taxpayer to recover the tax already paid, and every such action is routed to state court by the Tax Injunction Act. Accordingly, every hypothetical non-declaratory judgment action raising the *Quill* question would be limited to state court as a matter of congressional policy and/or the well-pleaded complaint rule.

E. *Franchise Tax Board* expressly holds that it does not matter if the State seeks non-declaratory relief.

Defendants next suggest (Dkt. 26 at 15-16) that this case is somehow different from *Franchise Tax Board* because the State is also seeking an injunction. But this claim for relief is merely a request, authorized entirely by State law, for an injunction respecting Defendants' "performing activity without license or permit," such as making retail sales without a sales tax license. *See* S.D.C.L. § 10-59-14. Defendants are defending against that injunction request by invoking their *Quill* defense. And the most-basic application of the well-pleaded complaint rule holds that this does not result in a federal question within the original jurisdiction of the district courts. *See Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) ("Federal jurisdiction cannot be predicated on an actual or anticipated defense").

Moreover, this is one more "distinction" that is, in fact, a precise statement of the very facts of *Franchise Tax Board* itself. There, the state actor also sought parallel affirmative relief, in the form of a levy upon the defendant trust—a form of relief that cannot be meaningfully distinguished from an injunction. The Court's first holding in *Franchise Tax Board* is that this request is obviously outside the court's federal question jurisdiction because the federal law issue is a standard defense. *See Franchise Tax Board*, 463 U.S. at 13 ("The well-pleaded complaint rule was framed to deal with precisely such a situation."). This asserted distinction is accordingly an aspect of this case

already affirmatively addressed by *Franchise Tax Board*, not the other way around.

F. The substance of the suit does not matter, and is in any event remarkably similar to *Franchise Tax Board*'s.

Defendants next suggest (at Dkt. 26 at 16-17) that the substance of this suit is better suited to federal court than *Franchise Tax Board* was, either because it is less complex, or because it is more oriented towards congressional power, or because it involves overturning existing precedent. Notably, Defendants cite no cases identifying any of these factors as important—let alone dispositive—and the State is aware of none.

Moreover, many of these asserted distinctions are hard to understand. For example, Defendants suggest that this case specially calls for federal jurisdiction because it involves Congress's power under the Commerce Clause. But ERISA preemption (at issue in *Franchise Tax Board*) arises directly from Congress's power under the Commerce Clause because ERISA is an express congressional regulation of commerce with an express preemption provision; this connection to congressional power is far more immediate than the rule that states cannot require out-of-state sales tax collection even in the absence of congressional action. . Accordingly, a State that seizes property protected by ERISA "usurp[s] Congress's role" much more tangibly than one that imposes a tax-collection duty only unless and until Congress says otherwise. *See* Dkt. 26 at 17. The very premise of *Franchise Tax Board* is that the only real substance of that dispute was a critically "important" issue of federal law. 463 U.S. at 3-4. Defendants' suggestion that their *dormant* Commerce Clause claim is

somehow more "important" than an affirmative assertion of Congress's power under the Commerce Clause is just special pleading.

G. The State's argument is not a "one-size-fits-all" rule, and even if it were, that could not possibly be a bad thing.

Finally, Defendants close (at Dkt. 26 at 16-17) with the argument that the State's insistence on applying *Franchise Tax Board* as a rule is somehow inconsistent with *Grable*, which requires that there be no "one-size-fits-all" approach to federal-question jurisdiction. As an initial matter, *Grable* cannot abrogate *Franchise Tax Board*'s clearly stated rule because it expressly reaffirms *Franchise Tax Board*. Nor does *Grable* suggest that, because disputes about federal-question jurisdiction will require a careful contextual analysis of the type of case at issue, the lower courts should decline to follow settled rules from earlier decisions in closely analogous cases. Defendants may prefer a "nuanced" approach in which every case can be a candidate for federal jurisdiction based on "*sui generis*" factors to be evaluated according to the length of the Chancellor's foot. But jurisdictional rules are supposed to be clear, *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1133 (2015); *Heckler v. Edwards*, 465 U.S. 870, 877 (1984), and at an absolute minimum, when it comes to *removal* from a plaintiff's chosen forum, defendants must place jurisdiction beyond doubt to keep the case in this court. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Central Iowa Power Co-op v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009); *supra* 9-10. Defendants cannot prevail in that effort by faulting the

State for urging this Court to follow a rule stated too clearly on the face of a unanimous Supreme Court decision.

Moreover, the State's argument here is not a one-size-fits-all approach at all because, as explained above, this case parallels *Franchise Tax Board* in one way after another. It would not affect this case in any way to assume that there may be some other state-law declaratory judgment actions brought by the states themselves that raise removable federal questions—perhaps including genuine examples of state nullification where the harm to Defendants was immediate, and they could argue (as they do not here) that the state forum was in any way inadequate. But this is not that case: On every factor that matters, this case is as poorly suited to federal court as the case in *Franchise Tax Board*, perhaps even more so. Its holding thus clearly governs, and this Court must remand for lack of jurisdiction.

III. The Eleventh Amendment Bars This Removal

As explained in the State's opening brief, this case is also barred from this Court by the Eleventh Amendment and the State's related sovereign immunity, because the State has clearly withheld its consent to federal jurisdiction, and cannot be forced into a federal forum absent a valid congressional abrogation of that immunity. Defendants argue that the Eleventh Amendment does not bar removal "where the State is a plaintiff," because that is not a suit "commenced or prosecuted against one of the United States." Dkt. 26 at 21 (quoting *South Dakota ex rel. S.D.R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 935 (D.S.D. 2003)). Defendants

are correct that some courts have interpreted the plain text of the Eleventh Amendment in this fashion. The problem, however, is that the Eighth Circuit has taken the opposite view, and its law controls here. *Contra* Dkt. 26 at 21 (asking Court to follow reading of that law adopted by Ninth Circuit). Notably, while the Defendants attempt to limit the Eighth Circuit's key case to its facts, its *rationale* is unambiguously dispositive here.

Defendants' theory is that when a State voluntarily commences an action as a plaintiff in state court, it lacks any claim of sovereign immunity. *See* Dkt. 26 at 21 ("Because it brought this action as Plaintiff, the State cannot … appeal[] to sovereign immunity."). But the exact holding from the Eighth Circuit on this question says the opposite: "[W]hen a state voluntarily appears as a plaintiff and subjects itself *to a federal court's jurisdiction*, we do not say that the Eleventh Amendment is irrelevant or that the state never had immunity. Instead, we find that the state has waived this immunity by *agreeing* to participate as a plaintiff." *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 506 (8th Cir. 1995) (emphasis added). Accordingly, the Eighth Circuit made absolutely clear in *FAG Bearings* that it did not matter whether the State was coerced into federal court as a plaintiff or defendant, because "concern and respect for state sovereignty are implicated whenever a state is involuntarily subjected to an action, regardless of the role it is forced to play in the litigation." *Id.* Here, as in *FAG Bearings*, the State has refused to consent to being a plaintiff in federal court. Under binding Eighth Circuit precedent, the

State retains its sovereign immunity from being hailed into federal court on either side of the "v" until it provides an "unmistakable and explicit waiver." *Id.*

The State's motion also explains that sovereign immunity applies because, in substance, this case is a suit "against the state" in which Defendants will attempt to invalidate a state law. Defendants' contrary argument is that they are not in substance prosecuting an action against the State because they do not "seek[] a declaration that federal law protects [them] from tax collection"—instead, they say, they already have the relevant declaration from *Quill*, and are simply opposing the State's effort to overturn it. *See* Dkt. 26 at 22. But Defendants later admit in their brief that even they do not think that is correct: The determination that *Quill* governs this case will, they say, "have preclusive effect" because the Court will be "invalidating S.B. 106." *Id.* at 27. Once again, the rationale of *FAG Bearings* is dispositive, because it holds that a "suit is against the state" for Eleventh Amendment purposes, if "the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" 50 F.3d at 505 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)). Defendants cannot maintain that winning this action will have "preclusive effect" and yet somehow not "restrain the Government from acting." The rule may be otherwise in other courts, but in the Eighth Circuit, sovereign immunity plainly forecloses the removal of this suit.

IV. The Tax Injunction Act Bars This Suit

The State's motion also explained that the Tax Injunction Act bars this action because it will require the Court to make a declaration respecting the validity of a state tax regime, and *California v. Grace Brethren Church*, 457 U.S. 393 (1982) expressly denies this Court the power to enter any such judgment. As with the Eleventh Amendment, Defendants' Tax Injunction Act analysis simply fails to recognize the dispositive legal precedent. It is true, as Defendants suggest, that a federal court can take jurisdiction over a suit to *collect* a tax initiated by a State notwithstanding the Tax Injunction Act (assuming, of course, that there is an appropriate jurisdictional basis for removal, such as the presence of a federal officer). Dkt. 26 at 19 (citing *Acker*, 527 U.S. at 433-34). But it is equally true that this is *not* a suit to collect a tax, and the consequence of this Court's decision thus would not simply be the denial of the State's right to collect a particular tax already allegedly due from these Defendants. Instead, as the Defendants admit, the consequence of a decision in Defendants' favor here will be that this Court will "invalidat[e] S.B. 106" with "preclusive effect." If that does not amount to a binding declaration that Senate Bill 106 is unconstitutional, nothing does. And the Supreme Court has unambiguously held that the Tax Injunction Act "prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *Grace Brethren Church*, 457 U.S. at 408. This Court should be wary of accepting Defendants' invitation to take jurisdiction because they do not seek a declaration that Senate Bill 106 in unconstitutional, when they simultaneously

assert that a judgment in their favor would in fact provide such a binding declaration.

At an absolute minimum, this fact pattern raises a serious doubt about the availability of federal jurisdiction under the Tax Injunction Act—one that the Supreme Court has not decided perhaps only because, in cases presenting a similar fact pattern, it has held that federal jurisdiction was lacking for *other* reasons. *See, e.g.*, *Franchise Tax Board*, 463 U.S. at 20 n.21, 27 n.31 (twice expressly reserving possibility that case in nearly identical posture was barred by the Tax Injunction Act). As explained above, it would be highly prejudicial to the State to inject this case with an unnecessary federal jurisdictional problem that could frustrate eventual Supreme Court review, particularly because the State has conceded that no lower court—state or federal—should provide the remedy the State is ultimately seeking from the Supreme Court. Accordingly, for Defendants to obtain removal, they must demonstrate that this Court's jurisdiction is free from "all doubt." Given how precisely the holding of *Grace Brethren Church* applies to this case, that is not a showing Defendants can make.

V. Even If This Court Could Take Jurisdiction Over This Case, Comity Requires That This Jurisdiction Be Declined.

If this Court rejects all of the arguments above and concludes that federal jurisdiction is available over this case, it would be to no end, because the unanimous holding in *Levin* would still unambiguously require declining jurisdiction as a matter of federal-state comity. *Levin* is squarely on point—involving, like this case, a dormant Commerce Clause challenge to a state tax

regime by economic actors seeking to obtain or retain a privileged tax position relative to their direct competitors. And this case presents additional reasons for a comity-based remand not even present in *Levin*. *See* Motion at 19-23. Defendants can neither distinguish *Levin* nor reject these plus-factors by labeling them a *Younger*-abstention argument and then rejecting that argument on technical grounds. The point is simply that this kind of state tax case is almost never entertained in the equity jurisdiction of the federal courts, and there are a host of good reasons why.

A. Defendants misread *Levin* by trying to cabin the principle of comity to the same scope as the Tax Injunction Act.

As an initial matter, Defendants indicate the weakness of their position by trying to convince the Court that the comity principle has the same reach as the Tax Injunction Act, or is similarly limited to affirmative actions by taxpayers to restrict tax collections. *See* Dkt. 26 at 23-25. The cases say the exact opposite.

Indeed, *Levin* itself is clear on this point: As it says, "the comity doctrine is more embracive than the TIA." *Levin*, 560 U.S. at 424. In *DMA v. Brohl*, 135 S. Ct. at 1134 (2015)—the very case in which Justice Kennedy issued his invitation to bring *Quill* vehicles to the Court—the Supreme Court held that while the Tax Injunction Act did not apply, comity might, and it remanded that question to the Court of Appeals.[2] *See* 135 S. Ct. at 1133-34. The observation that comity concerns clearly extend beyond the TIA's reach is ubiquitous in

[2] The state of Colorado then waived the comity argument on remand. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1134 n.7 (10th Cir. 2016).

Supreme Court case law. *See, e.g.*, *Levin*, 560 U.S. at 423 ("Our post-[TIA] decisions, however, confirm the continuing sway of comity considerations, independent of the Act."); *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 590 (1991) (similar); *Fair Assessment in Real Estate Assoc. Inc. v. McNary*, 454 U.S. 100, 110 (1981) ("Neither the legislative history of the [TIA], nor that of its precursor, suggests that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in those sections. Thus, the principle of comity … was not restricted by its passage.").

In fact, *Levin* is the worst possible precedent Defendants could cite for the idea that the TIA in any way marks the scope or limits of the comity doctrine, or that comity should be limited to situations where suits "test a state tax assessment" or temporarily cause "revenue otherwise due and owing [to] go uncollected" in arguable violation of the TIA. *See* Dkt. 26 at 24. The very reason *Levin* came to the Supreme Court was because a number of circuits had misinterpreted a footnote in *Hibbs v. Winn*, 542 U.S. 88 (2004), in *just that way*—that is, as essentially limiting application of the comity doctrine to situations where "plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *See Levin*, 560 U.S. 420 (quoting *Hibbs*, 542 U.S. at 107 n.9). The whole point of *Levin* is that this proposition is *incorrect*—the Supreme Court unanimously reversed the Sixth Circuit because comity applies even if (as in *Levin*) the suit was not brought by taxpayers asking to "arrest … state tax collection" or challenging a particular assessment. *See Levin*, 560 U.S. at 425, 427, 430-31. This Court should not adopt an

interpretation of a unanimous Supreme Court precedent that is in direct contradiction with that case's own holding.

Just as important, the Supreme Court has emphatically rejected Defendants' argument that comity concerns "do[] not have any relevance" in a "suit filed by the state to enhance its taxing authority." Dkt. 26 at 24-25. In *Acker*, the Court expressly reserved judgment on whether other comity-based doctrines might call for a federal court to stay its hand, even where (1) *the State was the plaintiff*, and (2) the Court had held that the TIA did not apply. *See Acker*, 527 U.S. at 435 n.5. Defendants have no case announcing any principle like the one they articulate, and it would be surprising if it were true: *Levin* itself cites to the (at least) century-old proposition that equitable relief from federal courts regarding state tax issues should be denied "in *all cases* where the Federal rights [asserted] could otherwise be preserved unimpaired." *Levin*, 560 U.S. at 422 (emphasis added) (quoting *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909)). As *Levin* puts it: "So long as the state remedy [i]s 'plain, adequate, and complete,' … 'such relief should be denied in every case where the asserted federal right may be preserved without it.'" 560 U.S. at 422 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932)).

Although these unambiguous holdings are cited in the State's opening motion (at 14-15), Defendants have no response. That is perhaps because it is almost impossible to find cases in which the Supreme Court has rejected the application of the comity doctrine to a suit about the validity of a state tax. Notably, in all of the pages Defendants spend attempting to distinguish *Levin*,

they do not cite a single one. *See* Dkt. 26 at 23-27. That is hardly surprising because one of the best accepted "principles of federalism" that grounds the comity doctrine, *see Fair Assessment*, 454 U.S. at 111, is that the state courts are ideal forums for adjudicating even federal law challenges to state tax regimes, and as long as they are available to speedily hear such cases, there is no need for federal courts to intervene.

Defendants are accordingly incorrect that the sole basis for applying the comity doctrine is concern about interfering with state tax administration, rather than deference to state-court expertise as a matter of cooperative federalism. It is instructive that Defendants quote a *footnote* from a *dissent* by Justice Brennan (the author of *Franchise Tax Board*) for the animating purpose of the comity doctrine. See Dkt. 26 at 24 (citing *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971)). This footnote hangs from the proposition that the Court's state-tax comity cases "relate not so much to considerations of federalism as to the peculiar needs of tax administration." *Perez*, 401 U.S. at 127. And while that was certainly Justice Brennan's view, Chief Justice Rehnquist's opinion for the majority in *Fair Assessment*, which Justice Brennan refused to join on just these grounds, makes quite clear that the comity doctrine in state tax cases, and its "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes … were, of course, *principles of federalism*." 454 U.S. at 111 (emphasis added).

In truth, the only state tax cases in which the Supreme Court has ever found against a comity argument are truly extraordinary cases (cases the

Defendants do not even cite) in which the federal rights asserted were core, fundamental rights and the state action at issue involved very worrisome efforts to deploy the State's own resources to further racial discrimination or alleged violations of the Establishment Clause. *See Levin*, 560 U.S. at 430 (distinguishing *Hibbs* and "other cases of the same genre" challenging "state allocations to maintain racially segregated schools"). For that reason, the three factors that *Levin* identified (discussed below) are best understood as a means of distinguishing truly unique cases involving "fundamental right[s] or classification[s] that attract[] [strict] scrutiny," from "run-of-the-mine" tax cases in which economic actors assert a right under the dormant Commerce Clause or other federal law to a superior position vis-à-vis their competitors. *Id.* at 430-31.

B. The three *Levin* factors are not all necessary and, in any event, are all present here.

When it comes to the specific factors the Court pointed to in *Levin*, Defendants first tellingly argue that all three are necessary for the comity doctrine to apply. *See* Dkt. 26 at 25. This is obviously incorrect. *Levin*'s holding was that these three factors in combination were *sufficient* for comity to *require* remand to state court; the Court did not hold that these three factors were *necessary*. *See Levin*, 560 U.S. at 432 ("Individually, these considerations *may* not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process.") (emphasis added). That language of course means that, in some

cases, less than all of the factors may be sufficient, and that, in still other cases, additional factors might likewise indicate that remand is necessary.

That quibble is unimportant here because each factor is present. For the first factor, Defendants suggest that this is not a case in which the State "enjoys wide regulatory latitude" because *Quill* already holds that the State does not have the latitude it seeks. Dkt. 26 at 25. In addition to assuming the merits *answer* as a means of determining which court has jurisdiction over the *question*—which is never a logically sound approach to jurisdiction—this argument simply misses the point of the Supreme Court's discussion. It was plainly distinguishing cases involving "economic legislation" from cases involving a "fundamental right" or "classification that attracts heightened judicial scrutiny." *Levin*, 560 U.S. at 426, 431. The reference to "wide regulatory latitude" is to the rational-basis review that applies when an equal protection or dormant Commerce Clause suit challenges economic policy decisions (as in *Levin* and this case), rather than the heightened scrutiny that applies when those same doctrines are invoked to challenge discrimination against protected minorities or classes. The Court's point was simply that *Levin*, being about financial interests, was not in the same "genre" as cases like *Hibbs* when it came to the importance of the asserted federal right. That is obviously just as true here—Defendants plainly do not fall in any constitutionally

protected class.[3]

For the second factor, Defendants again argue that they "are not seeking and cannot gain a competitive advantage" because *Quill* already grants them one. *See* Dkt. 26 at 25-26. This argument again assumes the merits, while itself lacking merit. The point of the second factor was to distinguish *Levin* from cases like *Hibbs* in which "outsiders to the tax expenditure" whose "own tax liability was not a relevant factor" nonetheless challenged the design of the state-tax regime for providing an unconstitutional benefit based on something like race or religion. *Levin*, 560 U.S. at 430. The Court said respondents met this factor because, unlike the *Hibbs* plaintiffs, they "d[id] object to their own tax situation," and wanted to strengthen their "competitive position." *Id.* at 430-31. Again, this is obviously true here; this is a dollars-and-cents fight in which Defendants are trying desperately to cling to a tax subsidy that *Quill* provides them relative to other sellers with any kind of physical presence in the State.

Finally, for the third factor, Defendants deny that this is a case where the TIA constrains this Court's remedial options because all they are asking for is a denial of the State's requested declaration. Dkt. 26 at 26-27. There are two problems with this argument. First, in the very next breath, Defendants admit

[3] Put otherwise, the inquiry is open and shut once Defendants admit "the state has broad authority as to tax matters." Dkt. 26 at 25. Here, just as in *Levin*, Defendants seek federal court review of a state tax regulation. And here, just as in *Levin*, the state enjoys wide regulatory latitude over its ability to design and enforce tax regulations. *See id.* at 421, 426–28 ("And 'in taxation, even more than in other fields, [state] legislatures possess the greatest freedom in classification.'") (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

that their request is more serious, and they expect that this Court will issue a ruling "invalidating S.B. 106 [that] will have preclusive effect." *Id.* at 27. That relief obviously violates the Tax Injunction Act, and the State's point was that the prospect that such relief might be necessary or appropriate is *at a minimum* a good reason to keep this case in a forum that could provide it if necessary. Second, *Levin* expressly rejects an approach based on the "simplicity of the relief [Defendants] seek," and instead looks through their request to analyze the relative "leeway" of state and federal courts to "cure the alleged violation." *Levin*, 560 U.S. at 430-31. In this regard, it is clear that the state courts have much greater leeway here because they can issue an injunction that prohibits the state from (for example) seeking back taxes in the event that the Supreme Court ultimately overturns *Quill*.

Importantly, while Defendants call this "wild speculation" about the need to dissuade the State from "unlawful activity" for which they "should not need" an injunction, they do not even try to respond to the concrete hypothetical in the State's motion. *See* Dkt. 26 at 27; Motion at 18-19. If this Court denies the State the declaration it seeks, and three years from now, the Supreme Court overturns *Quill* in a case arising from Alabama or some other State, other sellers—and even these Defendants—will arguably owe years of back taxes they failed to collect. [4] Defendants will not (as they now say) be able to rest on *Quill*

[4] This is not to say that future state tax administrators will necessarily decide to seek such taxes: They may decide not to as a matter of policy, or as a matter of state law. Both of those decisions are outside the power of this Court, however, and this is precisely why this suit is better resolved through state processes.

because it will have been overturned, nor will they be able to rest on this Court's judgment if (as Defendants now say) it does not actually grant them any affirmative, pre-enforcement relief in violation of the TIA. At best, there will be complicated arguments necessarily limited to the state courts about the effect of this Court's judgment before it was abrogated by a subsequent Supreme Court decision. It is better to avoid these kinds of complications by relying on the greater leeway of the State courts to enjoin enforcement of Senate Bill 106 unless and until the Supreme Court overturns *Quill*.

Finally, Defendants do not contest that other factors in this case at least favor remand. For example, they do not attempt to refute the proposition that judicial economy would be served by returning this case to state court—where another case raising the same issues and involving the same lawyers is still pending. Nor do they contest that "considerations of comity" recommend against "snatch[ing] cases which a State has brought from the courts of that State," *Franchise Tax Board*, 463 U.S. at 21 n.22. Nor do they contest that Senate Bill 106 contains a procedural bargain requiring expedition that cannot be enforced in federal court. Nor do they contest that the point of this removal attempt may be to freight the State's case with a difficult jurisdictional issue that could delay the Supreme Court review the State seeks, costing the State *years* of uncollected taxes as a result. *See* Motion 19-23. These factors obviously enhance the three discussed above, demonstrating how the case for comity here is even stronger than in *Levin* itself.

Rather than contest these realities, all Defendants argue is that they are not sufficient to trigger "across-the-board" abstention under the Supreme Court's *Younger* doctrine. *See* Dkt. 26 at 27-31. The State, however, did not ask for *Younger* abstention, and arguments about the considerations that would mandate it are thus unhelpful. A comparison of the headings in the briefing is particularly striking: The State argued that "additional considerations also recommend a remand *on comity grounds*," Motion 19 (emphasis added) and the Defendants responded that "*Younger* abstention is not warranted." Dkt. 26 at 27. Notably, as Defendants admit, *Younger* abstention will almost never apply to state tax cases by its terms because it is limited to criminal prosecutions and cases of a similar ilk, *see* Dkt. 26 at 28, and yet that has not stopped the Supreme Court from citing to *Younger* and its concern with "unduly interfer[ing] with legitimate activities of the States" in cases involving the comity doctrine. *See Levin*, 560 U.S. at 431 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). Defendants' argument thus just misses the indisputable point, which is that considerations of the kind that animate *Younger* can obviously enhance the case for comity in all the undisputed ways identified above.

CONCLUSION

The State respectfully requests that this Court remand for lack of jurisdiction or as a matter of comity. Because remand is required by settled precedent, the State suggests that oral argument is not necessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that Plaintiff's Reply to Defendants' Brief in Opposition to Remand is within the limitation provided for in South Dakota District Court Local Rules using bookman old style typeface in 12 point type. Respondents' Memorandum contains 9,852 words. I further certify reliance on the word count of the word processing software used to prepare this brief, which is Microsoft Word 2010.

Dated this 26th day of August, 2016.

/s/ Richard M. Williams
Richard M. Williams
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed Plaintiff's Reply to Defendants' Brief in Opposition to Remand, thereof with the Clerk of Court for the United States District Court for the Southern Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Richard M. Williams
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