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 DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Defendants Wayfair Inc., Overstock.com, Inc., and Newegg Inc. (collectively, "Defendants") submit this brief in opposition to Plaintiff State of South Dakota's ("State's") motion to remand (Doc. No. 21) ("State's Motion") and supporting memorandum of law (Doc. No. 22) ("State's Brief"). The parties agree that this case presents a single question of federal constitutional law: whether the "physical presence" substantial nexus standard of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)-- an opinion that remains undisturbed by subsequent congressional or Supreme Court action-- bars the imposition of a sales tax collection and reporting obligation upon the Defendants under South Dakota Senate Bill 106 ("S.B. 106" or "the Act")). *See* State's Brief at 9 ("There is no dispute that the central—and perhaps, only—dispute in this case turns on a question of federal law.") This concession by the State places the State's action squarely within the federal question jurisdiction of this Court. No jurisdictional doctrine forecloses the Court's exercise of jurisdiction. No prudential doctrine counsels against it. The State's Motion should be denied.

INTRODUCTION

This action is truly one-of-a-kind. It was brought under a statute, S.B. 106 ("An Act to provide for the collection of sales taxes from certain remote sellers […]") that was purpose-written to upend settled federal constitutional law, in response to *dicta* in the concurring opinion of a single Supreme Court Justice in a recent decision regarding the scope and limits of the federal Tax Injunction Act ("TIA"), 28 U.S.C. §1341. *See* State's Brief at 4 (quoting *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1136 (2015) (Kennedy, J., concurring)). With admirable candor, if without substantive legal foundation,

> The State -- through this declaratory judgment action -- seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

(Doc. No. 1-1, Ex. A, Complaint ¶ 1; *see also* Doc. Nos. 1-2 and 1-3, Exs. B & C, Complaint ¶ 1 (same). In short, this suit was designed by the State as a vehicle for overturning an existing limitation on its own authority under the federal constitution, and presents no other substantive legal issue for resolution. *See* State's Brief at 5 (requested judgment requires abrogation of *Quill* and *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967)) and 9 (the only disputed issue is a question of federal law). If ever there was a case in which federal court jurisdiction was proper, this *sui generis* power grab by the State would seem to be it.[1]

[1] It should go without saying that an effort by a State to contrive a cause of action designed to alter or reverse an existing federal constitutional protection set forth in controlling Supreme Court precedent plainly implicates a fundamental federal interest. The State asserts, however, that such a law is shielded from federal court review. The State's contention serves to highlight why this unique suit by the State deserves careful scrutiny from the Court under the framework of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005), in order to safeguard the proper scope of federal court jurisdiction.

The State's position portends a dangerous precedent. Suppose, for example, that the Alabama legislature passed a statute banning the issuance of marriage licenses to same sex couples, notwithstanding the Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), while suspending implementation of the law, and permitting the State to bring a declaratory judgment action in Alabama state court against recent license applicants, with the stated objective (supported by legislative findings asserting factors not considered by the Supreme Court) of abrogating the

Nevertheless, despite the fact that the Act and this case raise but a single question of federal constitutional law, and that, as the State admits, it cannot win without the abrogation of *Quill*, the State insists that *only* a state court can decide that federal question. On this point, as on the merits, the State is mistaken. Removal is plainly permissible under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg*., 545 U.S. 308 (2005), which the State chooses to ignore, and remand is not required by *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the significance of which the State misapprehends. Nor do the TIA or Eleventh Amendment bar jurisdiction over the State's suit to enforce its taxes against the Defendants. Rather, this Court has federal question jurisdiction to hear and decide the constitutionality of the Act's effort to impose sales tax collection obligations on out-of-state businesses with no physical presence in South Dakota. Neither comity nor abstention counsel that the Court should decline to exercise its authority over the State's enforcement suit.

BACKGROUND

The parties agree on the scope and limits of their dispute. Under *National Bellas Hess* and *Quill*, it is settled federal constitutional law that a state, such as South Dakota, cannot impose sales or use tax collection obligations on any business located outside the state that lacks a "physical presence" inside the state. *See National Bellas Hess*, 386 U.S. at 758-60; *Quill*, 504 U.S. at 313-19; *compare* State's Brief at 5-6 *with* Doc. No. 24 at 2. State laws seeking to impose such requirements violate the Commerce Clause. *See id.*

Notwithstanding this settled federal constitutional law, the Act does just that, expressly imposing sales tax collection and reporting obligations on any remote seller of physical goods, electronic goods, or services for delivery into South Dakota "who does not have a physical

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holding in *Obergefell*. While the State in such a case might well prefer to litigate the issue through the Alabama courts, such a suit should not lightly be found to lie beyond the jurisdiction of the federal courts.

presence in the state" if that seller has a sufficient "economic" presence, measured by gross revenue from sales into South Dakota or the annual number of transactions with South Dakota customers. *See* S.B. 106, § 1. The statute further provides that the State is permitted to bring a declaratory judgment action against any person that it believes meets the new "economic" presence criteria in order to "*establish that the obligation to remit sales tax is applicable and valid under* state and *federal law*." S.B. 106, § 1 (emphasis supplied). That is, the legislature purports to give the State a legal vehicle to bootstrap the overruling of *Quill* by filing a suit against businesses that would be subject to the new collection requirement, *except for the fact that it is admittedly unconstitutional.*

Three days after the Act's enactment, the South Dakota Department of Revenue ("Department") wrote the Defendants threatening them with a declaratory judgment action if they did not voluntarily register to collect South Dakota sales tax. *See* Doc. 1-1, Exs. A-C, Complaint, ¶¶ 35, 37. When the Defendants did not register, the State sued them in state court.

The Complaint makes clear that the State's suit depends exclusively on an issue of federal law. The Complaint begins with an acknowledgement that for the State to prevail "will require the abrogation of the United States Supreme Court's decision in *Quill* […]" *Id.* ¶ 1. It then devotes several paragraphs to describing the relevant legal background, focused entirely upon the federal constitutional standard the State seeks to overturn. *Id.* ¶¶ 2-11.

The Complaint contains no section styled as a cause of action. Importantly, for present purposes, the State proposes two forms of relief it seeks against the Defendants. First, the State requests a declaration "[t]hat the requirements of section 1 of the Act are valid and applicable with respect to the defendants." *Id.*, Prayer for Relief, ¶ 1. In addition, the State invokes the equitable jurisdiction of the court, requesting an affirmative "[…] injunction requiring the defendants to register for a license to collect and remit the sales tax." *Id.*, Prayer for Relief, ¶ 3.

The Defendants promptly removed the action (Doc. No. 1) and-- although the State's Brief fails to mention it-- jointly answered the Complaint (Doc. No. 7). The Defendants' stated basis for removal was as follows:

> The Complaint […] alleges a question of federal law 'arising under the Constitution…of the United States' which is necessarily raised by the Action, is actually disputed and substantial, and over which the exercise of jurisdiction by the federal District Court is both available and proper pursuant to 28 U.S.C. § 1331. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 313-14 (2005).

Notice of Removal (Doc. No. 1), ¶ 10 (first ellipsis added). The State does not contest that removal was timely, complete as to all remaining Defendants, and taken to the appropriate court. *See Id.*, ¶¶ 2-4. Nor, as noted, does the State contest that the Complaint states a question of federal law arising under the United States Constitution. Although the Defendants expressly relied on *Grable*, the leading Supreme Court decision addressing the "arising under" standard in this context, to support their assertion of federal question jurisdiction, the State neither cites nor mentions the *Grable* decision in its brief.

Before turning to the grounds for remand asserted by the State, comment is warranted on the State's repeated references to a pending state court action filed (one day after the State sued the Defendants) by the American Catalog Mailers Association and NetChoice in Hughes County Circuit Court, which also challenges the constitutionality of the Act. *See* State's Brief at 2, 5, 8-9, 13 n.3, & 20-21 (referencing *Am. Catalog Mailers Ass'n v. Gerlach*, 32 Civ. 16-96). The filings in *Am. Catalog Mailers Ass'n v. Gerlach*, 32 Civ. 16-96, attached as Exhibits A and B, hereto, are relevant to the disposition of Plaintiff's Motion, and are properly considered by the Court pursuant to Rule 201 of the Federal Rules of Evidence. *See also Knutson v. City of Fargo*, 600 F.3d 992, 1000 (8th Cir. 2010). The State first references the case to argue that this action "belongs in state court alongside the other case raising the same question brought by the very same counsel representing the Defendants here." State's Brief at 5. The State fails to inform the

Court, however, that in its Answer in the *American Catalog Mailers* case, the State-- which is represented by the same attorneys as in this case-- asserts that the state circuit court also lacks jurisdiction to adjudicate the challenge to the constitutionality of the Act brought by members of the plaintiff trade associations, on grounds of standing, ripeness, and immunity. *See* Answer, *Am. Catalog Mailers Ass'n*, 32 Civ. 16-96 (attached as Exhibit B) at 1 and 5 (Affirmative Defenses). The State goes on to argue, later in its Brief, that retaining federal jurisdiction would "needlessly duplicate the state court's efforts in the sister suit," even though the State vigorously contests the state court's jurisdiction to hear the *American Catalog Mailers* case at all. *See id.* Since the State contests, on multiple grounds, that the state court case can properly proceed, its arguments that this Court should decline jurisdiction in favor of the state court ring hollow, and should be disregarded.[2]

Against this backdrop, we turn to the arguments advanced in the State's Brief.

ARGUMENT

I. THE PRINCIPLE THAT DOUBT MUST BE RESOVLED IN FAVOR OF REMAND IS A PRINCIPLE OF INTERPRETATION THAT DOES NOT DICTATE, AS THE STATE IMPLIES, THAT ANY COLORABLE ARGUMENT DEFEATS FEDERAL JURISDICTION.

Despite acknowledging that its suit presents only a question whether settled, federal constitutional law should be overturned, the State takes a "kitchen sink" approach in its Motion and Brief, arguing both jurisdictional bars and prudential grounds on which it contends the Court

[2] The State further refers to the *American Catalog Mailers* case to support its contention that the state court is purportedly the only forum that can afford the *Defendants* a remedy against the State's unconstitutional imposition of sales tax collection obligations because "it is impossible to imagine Defendants even trying to bring a case raising this issue originally to federal court." State's Brief at 13; Complaint, *Am. Catalog Mailers Ass'n*, 32 Civ. 16–96 (attached as Exhibit A). Setting aside the doubtful significance of that statement, or of any other references to the state court action, the State's insistence that the state court lacks jurisdiction over the *American Catalog Mailers* case means that, according to the State, it is "impossible to imagine" a defendant trying to bring a case challenging the constitutionality of the Act in *either* federal *or* state court. The Court should be wary of the State's contention that it, alone, can dictate the terms on which its admitted effort to expand its own taxing jurisdiction under the Commerce Clause may proceed. *See*, *supra*, note 1.

should decline to hear the case. All of its arguments fail. Before unpacking and addressing those arguments, however, Defendants pause briefly to address an implication of the State's repeated assertions that all doubt must be resolved in favor of remand. *See* State's Brief at 4 (quoting *Hubbard v. Federated Mut. Ins. Co.*, 799 F.3d 1224, 1227 (8th Cir. 2015), and citing *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997); *In re Business Men's Assurance Co. of America*, 992 F.2d 181, 183 (8th Cir. 1993)).

To the extent the State implies that there is a presumption against the assertion of federal jurisdiction in any case where a proponent of remand raises a colorable argument, that position is a gross overstatement. The Supreme Court has, to the contrary, made clear that:

> Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.' *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Parallel state-court proceedings do not detract from that obligation. See *ibid.*

Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 590-91 (2013).

There is no rule of general deference by federal to state courts over federal law questions in considering motions to remand. To state that doubts about jurisdiction should be resolved in favor of remand, rather, is nothing more than the unsurprising statement that the removing party has the burden of establishing federal subject matter jurisdiction. *See Moore v. Kan. City Pub. Schools*, ___ F.3d ___, 2016 WL 3629086, *3 (8th Cir. July 7, 2016). That is an interpretive principle useful, for example, in assessing when a plaintiff's action actually raises a federal question, not a thumb on the scale in favor of state court jurisdiction. *See id.*

Indeed, the line of cases cited by the State has roots in, and applies most readily to, the invocation of diversity jurisdiction under 28 U.S.C. § 1332. *See Hubbard*, 799 F.3d at 1227 (diversity action) (citing *Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 980 (8th Cir. 2011)

(diversity action)); *see also Junk v. Terminix Int'l Co.*, 628 F.3d 439, 446 (8th Cir. 2010) (diversity action). It makes sense for courts to tread lightly in cases in which a defendant is seeking a federal court judgment on a state law issue based only on diversity of citizenship and the amount in controversy. To the extent there is any doubt that complete diversity exists or the necessary dollar threshold is satisfied, a federal court appropriately declines to hear a case that presents no federal issue.

Where, however, as in this case, the defendant removes a suit to transfer a clear and substantial question of federal law asserted in the complaint into federal court, there can be no doubt that the case turns on an issue of federal law, and the purported presumption plays no role. Rather, the Court undertakes to determine whether the action is one that satisfies the *Grable* framework (discussed below), and whether it is precluded by any other statute (*e.g.*, the TIA), constitutional restriction, or prudential doctrine. For all the reasons described herein, that process leaves no doubt that the State's affirmative action seeking to overturn an existing federal constitutional standard is squarely within the federal question jurisdiction of the district court ascribed by Congress.

The State effectively argues that resolving doubts in favor of remand requires a federal district court to decline jurisdiction in any case where it can conceive of another court reaching a contrary conclusion on the jurisdictional issue. *See* State's Brief at 4, 9-10. Under that standard, *Grable* itself is wrongly-decided, federal removal jurisdiction would be curtailed to the point where only indisputable cases would qualify for federal review, and the delicate "balance of federal and state judicial responsibilities" struck by the Congress would be perverted, in favor of an artificial rule of decision. In short, the approach the State proposes would relieve the federal district court of its obligation to determine its own jurisdiction, rendering removal practice an exercise in futility.

Fortunately, under the applicable legal standard of federal question jurisdiction, this is not a difficult case, and so there is no need to fall back on a default rule that can only come into play in cases that pose hard questions about whether the dispute arises under federal law in the first place.

II. THERE IS NO IMPEDIMENT TO THE EXERCISE OF FEDERAL QUESTION JURISDICTION.

Although intermingled in its brief, the State's arguments can be divided in two groups. *First*, the State argues that federal jurisdiction is barred under case law interpreting federal question jurisdiction, the Tax Injunction Act, and the Eleventh Amendment. *Second*, the State urges that this Court should decline jurisdiction for prudential reasons, including comity and abstention. We begin with basic principles of removal.

A. Removal is proper under *Grable*.

1. The State's enforcement action against the Defendants expressly asserts, and depends entirely upon, a disputed and substantial federal issue.

Pursuant to 28 U.S.C. § 1441(a), a defendant may remove "a civil action brought in State court of which the district courts of the United States have original jurisdiction," unless otherwise prohibited by an Act of Congress. Under 28 U.S.C. § 1331, federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

It has been established for nearly a century that this "arising under" jurisdiction is not limited to federal causes of action, but applies to state law causes of action that "that implicate significant federal issues." *Grable*, 545 U.S. at 312. Any remaining doubt on this point was put to rest by *Grable*, in which the Supreme Court set forth the standards for federal question jurisdiction where a federal issue is embedded in a state-law claim. The doctrine that such cases may fall within the federal district courts' § 1331 jurisdiction "captures the commonsense notion

that a federal court ought to be able to hear claims recognized under state law that nonetheless *turn on substantial questions of federal law*, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id*. (citation omitted) (emphasis added). Significantly, there is no one–size–fits–all "test for jurisdiction over federal issues embedded in state–law claims between nondiverse parties." *Id*. at 314. Instead, in each case, "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.*

In this case, the first three elements of the *Grable* standard are indisputably satisfied. As asserted by the Defendants in their Notice of Removal (Doc. 1), the Complaint makes clear that the State's action "necessarily raise[s] a stated federal issue," that is "actually disputed" regarding a "substantial" question of constitutional law under the Commerce Clause. *Grable*, 545 U.S. at 314 (brackets added); Doc. No. 1 at 3-4 (citing Complaint, ¶¶ 1-11, 23, 51). The State's Brief confirms each of those elements. State's Brief at 5-9. Furthermore, S.B. 106 itself recognizes that "existing constitutional doctrine calls this law into question," and that its very validity depends on "a decision from the United States Supreme Court abrogating its existing doctrine." S.B. 106, § 8(10). The Act creates a right of action as a matter of state law-- after all, a state legislature cannot create a *federal* cause of action-- but the action it creates is one expressly designed to establish a principle of *federal constitutional law*. *Id*. § 2. This cause of action is the quintessential example of a substantive question arising under the Constitution out of a procedural mechanism created by state law.

2. Exercising jurisdiction in this one-of-a-kind state enforcement action for injunctive, as well as declaratory, relief is consistent with the congressional balance of federal and state judicial responsibilities.

The remaining question under *Grable*, and the one under which all of the State's statutory and comity-based arguments ultimately fail, is whether the adjudication of the action in the federal court would compromise any "congressionally approved balance of federal and state judicial responsibilities." This issue, however, enters the calculus only as a "possible veto" over the District Court's otherwise proper exercise of "arising under" jurisdiction. *Grable*, 545 U.S. at 313. It requires consideration of the "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system," *id.* at 314 (citing *Franchise Tax Board*, 463 U.S. at 8), in order to assess any "disruptive portent in exercising federal jurisdiction."

a. Exercising jurisdiction over the federal constitutional question in this case will not throw open federal court jurisdiction to a horde of new state law claims.

As a starting point in this case, the unique nature of S.B. 106, and the state cause of action it sanctions, do not portend a significant shift in the overall balance of federal and state judicial responsibilities. It is difficult to imagine what non-State plaintiffs or defendants could exploit a ruling that the federal court has jurisdiction over an affirmative enforcement action that is (a) brought by a State against private parties who are protected by established federal constitutional standards, (b) based on a statute avowedly at odds with existing federal constitutional limitations on the State's authority, (c) seeking to overturn or abrogate that standard, in order to (d) validate the requirements of the statute and (e) compel the targeted-parties' compliance. The Act's *sui generis* nature makes certain in this case that the exercise "federal jurisdiction to resolve genuine disagreement over federal [constitutional] provisions" will risk "only a microscopic effect on the federal-state division of labor." *Id.* at 315 (brackets

added). Indeed, the State itself acknowledges as much. *See* State's Brief at 13 (citing *Franchise Tax Board*, 463 U.S. at 21 n. 22) ("[r]ealistically, there is little risk that the States will flood the federal courts with declaratory judgment actions").

Furthermore, and important to the proper understanding of the District Court's federal question jurisdiction under § 1331, the Supreme Court has already ruled that an affirmative suit seeking to enforce a state's tax laws that includes a substantial federal issue can go forward in federal court, notwithstanding the limitation on federal court jurisdiction contained in the Tax Injunction Act. *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 433 (1999); *see, infra*, Sec. II. The unique characteristics of the State's enforcement action are unprecedented, but the exercise of jurisdiction by the federal court over tax collection suits is well-established, where a federal issue is presented, or another basis for federal court jurisdiction is present. *See, e.g., City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 531 F.3d 595, 603-04 (8th Cir. 2008) (TIA does not bar exercise of diversity jurisdiction over declaratory judgment action by city to enforce its taxes). Hearing this case will not skew the delicate balance of federal and state jurisdiction over tax enforcement suits.

b. The reasons for declining jurisdiction in *California Franchise Tax Board* do not apply here.

The case on which the State chiefly relies, the 1983 Supreme Court opinion in *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983), does not foreclose federal court jurisdiction in this case. The essence of the State's position is that because the Supreme Court found federal jurisdiction lacking over the tax agency's state declaratory judgment action in *Franchise Tax Board*, to which the taxpayer raised a defense under federal law (in that case, preemption under the Employment Retirement Income Security Act ("ERISA")), federal jurisdiction does not lie in this case. State's Brief at 11. The errors in the State's argument regarding *Franchise Tax Board* are numerous.

First, unlike *Franchise Tax Board* and the earlier decision it sought to honor, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), and contrary to the State's contention in this case, the federal question here does *not* arise "only as a defense" to a state cause of action. *See* State's Brief at 11 (*citing Franchise Tax Board*, 463 U.S. at 16). Rather, the State in this case has asserted the federal constitutional issue (namely, the continued vitality of the *Quill* physical presence standard of substantial nexus) as an *affirmative* element-- indeed, the only essential element-- of its declaratory judgment action. S.B. 106 thus provides that the state may bring a declaratory judgment to establish that the requirements of the law are "valid under state and *federal law*." S.B. 106, § 2. The State in its Complaint affirmatively, and correctly, asserts that a ruling on the federal constitutional issue is *necessary to its right to obtain the relief it seeks.* Complaint ¶¶ 1, 51. In other words, this is not a case, like *Franchise Tax Board, Skelly Oil,* or *Gully v. First National Bank*, 299 U.S. 109 (1936), where "a finding upon the evidence that [state] law has been obeyed may compose the controversy altogether, leaving no room for a contention that the federal law has been infringed," except as a defense. *Franchise Tax Board,* 463 U.S. at 12 (citing *Gully*, 299 U.S. at 117). The State cannot prevail in this action merely by showing that the Defendants have no physical presence in South Dakota and meet either the $100,000 sales or 200 transactions threshold of S.B. 106, because *Quill* blocks the way. In short, the federal issue is not "lurking in the background," *id.*, it is the central, and indeed the only disputed issue in the State's *affirmative* case.

The distinction is crucial because the threat posed in *Franchise Tax Board* was the use of state declaratory judgment statutes as an end-run around the holding of *Skelly Oil* that "*if*, but for the availability of the declaratory judgment procedure, *the federal claim would arise only as a defense to a state created action*, jurisdiction is lacking." *Franchise Tax Board*, 463 U.S. at 16 (italics added) (quotation omitted). In order to foreclose parties from using state declaratory

judgment statutes to turn federal defenses to state-law actions into federal questions for jurisdictional purposes, the Supreme Court extended the holding of *Skelly Oil* to state law declaratory judgment actions. *See id*. at 18-19. Indeed, the preliminary holding of *Franchise Tax Board* makes clear that federal jurisdiction is lacking only in cases directly paralleling *Skelly Oil*: "We hold federal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint for a state declaratory judgment, *but Skelly Oil would bar jurisdiction if the plaintiff had sought a federal declaratory judgment*." *Id.* (italics added). Since this case is not controlled by *Skelly Oil*, the later decision in *Franchise Tax Board* is no bar to jurisdiction.

Second, the Court's decision in *Skelly Oil* demonstrates another fundamental difference between this case and *Franchise Tax Board.* The basic principle on which both *Skelly Oil* and *Franchise Tax Board* rest, which the State acknowledges at page 11 of its brief, is that a declaratory judgment action (whether federal or state) neither extends, nor diminishes, the scope of a federal court's jurisdiction under § 1331. *Franchise Tax Board*, 463 U.S. at 15 (in enacting the federal declaratory judgment statute, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction") (citing *Skelly Oil*, 339 U.S. at 671). Since the mechanism of a declaratory judgment action cannot establish whether a federal question is presented, a federal court views the case through a different lens. Instead, as the State notes, the court's jurisdiction is evaluated with reference to a "hypothetical action" for non-declaratory relief. State's Brief at 11.

That exercise, properly conducted here, confirms federal court jurisdiction. One approach, adopted by the Supreme Court in *Skelly Oil*, is to examine how the plaintiff would be required to proceed, absent the declaratory judgment option. 339 U.S. at 672 (examining a hypothetical state law contract claim for damages). Taking the same approach here, the State

would be required to issue assessments and pursue a collection action against the Defendants in order to challenge *Quill*. Under *Jefferson County v. Acker*, however, a federal district court has jurisdiction over a collection action initiated by state or local tax authorities seeking to enforce a tax obligation, notwithstanding the TIA. *See, infra*, Sec. II. The State's recommended analysis thus establishes that its suit against the Defendants is properly within the jurisdiction of the court.[3]

Moreover, the fact that the TIA, a federal jurisdictional statute reflecting the "federal-state line" drawn by Congress, *Grable*, 545 U.S. at 314, allows suits to enforce taxes to go forward in federal court is particularly significant to evaluating jurisdiction here. As the Court explained in *Grable*, determining federal jurisdiction under § 1331 requires "sensitive judgments about congressional intent." *Id.* at 318. The fact that Congress chose not to foreclose federal court jurisdiction over enforcement suits brought by taxing authorities when it enacted the TIA in 1937 provides an "important clue" that "arising under" jurisdiction extends to a suit by the State asserting a federal question. *Id.* The further fact that the Supreme Court expressly approved federal court jurisdiction in *Acker*, where a federal question was introduced by the defendants, eliminates any remaining doubt.

Third, unlike the taxing authority in *Franchise Tax Board*, the State in this case seeks not only a declaratory judgment but also requests equitable relief in the form of an affirmative injunction compelling the Defendants to obtain a sales tax license and collect and remit sales tax. The addition of injunctive relief is important, because federal court equity jurisdiction has deep roots, pre-dating the adoption of federal question jurisdiction in 1875 and even the enactment of

[3] The State's reliance on *Franchise Tax Board* is misplaced here because the Supreme Court posited a different approach to the hypothetical action in that case. There the Court noted that "Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." 463 U.S. at 19. But that approach is neither necessary, nor apt, in this case, where the federal constitutional issue arises in *the State's* affirmative case. Instead, the *Skelly Oil* approach is proper and establishes the Court's "arising under" jurisdiction.

the Federal Judiciary Act in 1789. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999); *cf. Grable*, at 315-16 (noting the long history of courts exercising federal question jurisdiction over quiet title actions). A hypothetical collection action by the State (were relief not barred by *Quill*) based on assessments issued to the Defendants might also invoke the equity jurisdiction of the federal court, in order to compel sales tax registration and forward-going collection, not merely monetary recovery for past due taxes.

Fourth, in addition to the fundamental differences between this case and *Franchise Tax Board* regarding how the federal law issue arises and how the State's suit is properly analyzed when evaluating non-declaratory relief, this case and *Franchise Tax Board* are also highly dissimilar in terms of the substantive issues they present for possible federal court review. *Franchise Tax Board* addressed a difficult question regarding the interrelationship of state tax law and ERISA. ERISA, the Court noted, creates a federal cause of action for some parties. However, under ERISA, Congress had expressly limited who could bring an action, and State actors were not among those so authorized. The Court ultimately adopted very narrow holding, inapplicable here:

> We hold that a suit by state tax authorities both to enforce its levies against funds held in trust pursuant to an ERISA-covered employee benefit plan, and to declare the validity of the levies notwithstanding ERISA, is neither a creature of ERISA itself nor a suit of which the federal courts will take jurisdiction because it turns on a question of federal law.

463 U.S. at 28. Of course, the complexities of ERISA preemption have no bearing in this case. Rather, the State's suit presents a direct challenge to an established federal constitutional doctrine (physical presence nexus) embodied in a specific judicial precedent (*Quill*).

Moreover, the tax authorities in *Franchise Tax Board* were primarily seeking to recover taxes due under certain tax liens, a purely state law claim that presented no federal issue whatsoever. *Id.* at 5, 13. In contrast to such a routine matter of state tax administration, the State

here undertakes to overturn an existing constitutional standard, in the hope of expanding the scope of its authority to impose tax obligations on companies located beyond its borders and having no physical presence in South Dakota. But the regulation of interstate commerce is a matter assigned to Congress by the Commerce Clause. U.S. Const., art. I, sec. 8, cl. 3. The State in this action is therefore not merely administering its taxes, it is seeking to usurp Congress' role in making policy for the national marketplace. That is an inherently federal interest, over which a federal court may properly exercise federal question jurisdiction.

Finally, what all of these differences highlight is that *Grable's* case-specific analysis requires careful consideration of the particular elements and circumstances of the State's action. Furthermore, as noted above, *Grable* cited and took account of *Franchise Tax Board* in formulating its flexible, case–by–case test. The State's attempt to use a "one–size–fits–all" approach through a one–dimensional comparison (*i.e.*, both cases include a declaratory judgment action filed by the State authority) in order to assess federal court jurisdiction in two drastically different cases is inherently at odds with the Court's nuanced approach in *Grable*. The contrast between the two cases could hardly be starker. In sum, nothing in *Franchise Tax Board* supports the conclusion that this Court's exercise of jurisdiction over the State's claim poses a disruptive threat to the exercise of federal jurisdiction. No "veto" of the clear federal question jurisdiction established by the State's claim is appropriate merely because the State created, and then filed, its own tailor–made declaratory judgment action against the Defendants.

We turn now to the State's remaining arguments, which are similarly devoid of merit.

B. The Tax Injunction Act does not bar the State's enforcement suit.

The State argues that the Tax Injunction Act prevents the Court from exercising jurisdiction. The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient

remedy may be had in the courts of such State." 28 U.S.C. § 1341. By the statute's plain terms, because the State's suit against the Defendants does not seek to prevent the assessment or collection of taxes, but rather has as its stated goal freeing the state from the constitutional restrictions reaffirmed in *Quill*, so that the State may require the Defendants to collect and remit South Dakota sales taxes, the TIA plainly does not apply.

Were there any doubt that the TIA's plain meaning disposes of the State's contention, the Supreme Court has consistently articulated the TIA's limitation on federal court jurisdiction as designed to prevent a *taxpayer* from invoking the equity jurisdiction of the federal court as an alternative avenue for disputing state tax liability. *See, e.g.*, *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 523-24 (1981) (concluding that Congress intended to require taxpayers in all circumstances to pursue available state refund claims before obtaining access to federal courts); *Acker*, 527 U.S. at 435 ("The Tax Injunction Act was thus shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings.").

In *California v. Grace Brethren Church*, 457 U.S. 393 (1982), the Court explained that the TIA's principle of "non-interference" with state taxes is necessary because, "[i]f federal [equitable] relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law." *Id.* at 410 (*quoting Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971)) (Brennan, J., concurring in part, dissenting in part) (brackets added). Thus, "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Hibbs v. Winn*, 542 U.S. 88, 104-05 (2004).

The TIA bars anticipatory relief to stop the collection of taxes, including both injunctive and declaratory judgment relief *against* anticipated collection activity. *Grace Brethren Church*, 457 U.S. at 408. "But a suit [by a taxing authority] to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description of suits barred from federal district court adjudication." *Acker*, 527 U.S. at 433-34 (brackets added) (citing *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 818 (5th Cir. 1990)). Accordingly, the Supreme Court has "h[e]ld that the Tax Injunction Act…does not bar collection suits, nor does it prevent taxpayers from urging defenses in such suits that the tax for which collection is sought is invalid." *Id*. at 435 (brackets and ellipsis added).

In so holding, the Supreme Court rejected the statement of the Second Circuit Court of Appeals that, through the TIA, Congress intended to limit federal court authority to hear tax enforcement actions in which the validity of a state or local tax might reasonably be raised as a defense. *Id*. at 434 (quoting *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, 551 (2d Cir. 1991)). "We do not agree," the Supreme Court wrote, "that the Act's purpose requires us to disregard the text formulation Congress adopted." *Id*. Citing the legislative history of the TIA, and the federal statute on which its text was based, the high court noted that Congress intended only to preclude suits brought by taxpayers against state tax departments, not to "preclude the States from enforcing their taxes in [federal] court." *Id*. at 435 (brackets added). Thus, the TIA forecloses taxpayers from taking their disputes over collection and enforcement actions to federal court; it does not deny access to federal court for actions by a State to enforce or collect tax from a taxpayer, "nor does it prevent taxpayers from urging defenses in such suits that the tax […] is invalid." *Id*. (ellipsis added).

Acker controls. In applying its teachings, however, it is vital to attend to the difference in the procedural posture of this case from the usual case in which a declaration regarding the

constitutionality of a tax statute is sought. In the typical case, such as *Grace Brethren*, on which the State relies, a *taxpayer* seeks a judgment that a tax asserted against it by a state tax agency is *un*constitutional. Thus, in *Grace Brethren*, the Supreme Court "conclude[d] that the [Tax Injunction] Act […] prohibits a district court from issuing a declaratory judgment holding state tax laws *unconstitutional*." 457 U.S. at 408 (brackets and ellipsis added). That is because a declaration sought by a taxpayer that a duly-enacted state tax law, which is presumed to be constitutional, *see Wyatt v. Kundert*, 375 N.W.2d 186, 191 (S.D. 1985), is, instead, unconstitutional, would plainly suspend or restrain the collection of state taxes. *Grace Brethren*, 457 U.S. at 408.

If that is true, however, the converse must be as well. A declaratory judgment filed by a *State* seeking a declaration that a state tax statute is *constitutional* over admittedly binding Supreme Court authority to the contrary, and then an injunction requiring an out-of-state seller to register to collect and remit tax, cannot be an action to "enjoin, suspend, or restrain" the collection of tax. It is rather an action to lay the groundwork for a future collection action. This case is not *Grace Brethren*, but its opposite, namely, an action to enable tax enforcement and collection for which a favorable answer to a question of federal constitutional law is the condition precedent. The Tax Injunction Act does not bar this Court from adjudicating the State's claim.

C. Eleventh Amendment immunity does not bar removal.

The Eleventh Amendment, both by its express terms and in keeping with precedent, does not apply to an enforcement action filed by the State. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted against* one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI (emphasis added). "The

Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims *against* a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). That is, "the Eleventh Amendment limits the jurisdiction of federal courts only as to suits against a state." *Gilliam v. City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975). "It is well settled that the Eleventh Amendment applies only to suits 'commenced or prosecuted against' the State and does not bar removal where the State is a plaintiff." *South Dakota ex rel. S.D.R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 208 F. Supp. 2d 919, 935 (D.S.D. 2003) (collecting cases); *see also California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 848 (9th Cir. 2004) ("[W]e hold that a state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to a federal court of competent jurisdiction. In so holding, our conclusion is consistent with that of our sister circuits."). Because it brought this action as Plaintiff, the State cannot avoid removal by appealing to sovereign immunity.

The case of *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (8th Cir. 1995), does not hold to the contrary. As the Ninth Circuit rightly observed, "that case merely stands for the proposition that involuntary joinder of a State as a party to litigation can violate Eleventh Amendment sovereign immunity." *Dynegy*, 375 F.3d at 848 n.14. In *FAG Bearings*, a group of citizens filed suit seeking relief from a private company for groundwater contamination under federal environmental laws. The defendant then moved for involuntary joinder of the Missouri Department of Natural Resources, which had previously expressed the intent of filing its own action against the defendant for remediation. The defendant sought to join the state agency to avoid duplicative, multiple, or inconsistent obligations as a result of separate suits. Over the state agency's objection, the district court joined the department as a defendant, and then suggested that it could later be realigned as a plaintiff. The agency filed an interlocutory appeal.

The Eighth Circuit held that the Eleventh Amendment barred involuntary joinder of the state agency because joinder would "compel [the agency] to act by forcing it to prosecute [the defendant] at a time and place dictated by the federal courts. This disrespect for state autonomy in decision-making is precisely what the Eleventh Amendment was intended to avoid." *FAG Bearings*, 50 F.3d at 505-06. "Permitting coercive joinder," the appellate panel continued, "also undermines the two aims of the Eleventh Amendment: protection of a state's autonomy and protection for its pocketbook." *Id*. at 506 (citing *Hess*, 115 S. Ct. at 400). Under the unusual circumstances of that case, the court concluded that a defendant could not force a state actor's hands by making it, in effect, an unwilling plaintiff in an action the state actor had neither brought nor voluntarily sought to join.

None of those concerns is present here. By removing this action, Defendants have neither forced the State's hand nor threatened its autonomy or purse. The State filed suit at a time of its choosing, one month after the enactment of S.B. 106. It did so of its own accord and on its own budget, and hand-picked the Defendants it wanted to sue first. Removal to a court of competent jurisdiction to resolve the federal question the State itself posed is not a coercive act that threatens South Dakota's sovereignty. In choosing to bring a claim arising under federal law against the Defendants, out-of-state sellers that are beyond the jurisdiction of the Department of Revenue absent a change in federal constitutional law, the State knowingly and willingly waived any protection it might have claimed.

This is simply not, as the State contends, "a case where a party seeks a declaration that federal law protects it from tax collection." State's Brief at 25-26. The only judicial declaration Defendants want or need was made in 1992, when the Supreme Court issued its opinion in *Quill*. This is a case in which the State seeks the judicial revocation of existing federal law, and then, on that basis, to impose tax collection obligations on Defendants that do not and cannot exist

today. If the State wants such relief, it must accept the consequences of the decision to seek it, one of which is exposure to the removal of an action posing a federal question to federal district court.

For the foregoing reasons, the federal question jurisdiction of this Court under § 1331 is secure, and the maintenance of the action in this Court is not barred by the Tax Injunction Act or the Eleventh Amendment.

III. PRUDENTIAL CONSIDERATIONS DO NOT COUNSEL REMAND.

That leaves the State's arguments that the related prudential doctrines of comity under *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), and abstention under *Younger v. Harris*, 401 U.S. 37 (1971), nonetheless require the Court to refrain from exercising its acknowledged jurisdiction. Under the facts of this case, neither doctrine counsels, let alone requires, remand.

A. Comity does not necessitate remand.

Comity is not a bar to federal jurisdiction. The principle of comity, from which the TIA derives, is "a reluctance to interfere by prevention with the fiscal operations of state governments." *Fair Assessment,* 454 U.S. at 108 (quoting *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276, 282 (1909)). This principle applies with "particular force" in the area of state taxation, for the reasons described cogently in *Great Lakes Dredge & Dock v. Huffman,* 319 U.S. 293 (1943), and serves the same purpose, *i.e.*, to preclude jurisdiction over challenges to state taxes that deviate from established procedures for determining and collecting state tax liability. 319 U.S at 301. In short, because this is an affirmative action by the State seeking to expand its taxing authority by overturning an existing constitutional limitation, the doctrine of comity has no more applicability than does the TIA.

A closer look at the principles motivating comity in the area of state taxes drives home the point. The significance of comity in state tax matters was articulated by Justice Brennan in an oft-quoted passage from *Perez v. Ledesma*:

> [I]f federal [equitable relief] were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

401 U.S. 82, 127 n. 17 (brackets added) (concurring in part and dissenting in part).

None of the concerns resting at the core of the comity principle are presented by this case. The State's suit does not seek to "test [a] state tax assessment"—rather, it seeks a change in law that would allow the State to issue state tax assessments. There are no "ordinary procedural requirements" associated with the taxes the state wishes to impose, at least as to these Defendants, because the state has no authority to require them to collect tax. Therefore, there is no risk that the Defendants will escape any procedural requirements, or that during the pendency of the State's suit revenue otherwise due and owing will go uncollected or the state budget will be negatively affected by the action. There are no disputed issues of state law on which the federal constitutional question at the heart of this case depends. In sum, just as this case is "a poor fit under the TIA, so it [is] a poor fit for comity." *Levin*, 560 U.S. at 430 (brackets added).

The State argues, however, that the particular factors considered in *Levin* foreclose jurisdiction over this case. *Levin*, found that a "confluence of factors," taken together, dictated dismissal, on comity grounds, of a suit alleging discriminatory treatment of a group of "independent marketers" under Ohio's system for the taxation of natural gas. *Id*. at 431. Here again, because *Levin* represents a suit challenging the state's tax system, whereas this case concerns a suit filed by the state to enhance its taxing authority, *Levin* does not have any

relevance. A review of the factors identified by the Supreme Court as animating comity in that case makes the conclusion crystal clear.

In order for comity to apply under *Levin*, each of three factors must be present: (1) the State must enjoy wide-regulatory latitude over the subject matter of the suit; (2) a party seeking to invoke federal court jurisdiction must be attempting to use the federal court to improve its competitive position vis-a-vis others similarly situated; and (3) the State courts must be better positioned than the federal court to correct any violation of the law. *Levin*, 560 U.S. at 431-32. The Court concluded that "[i]ndividually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process." *Id*. at 432 (brackets added). Thus, to demonstrate the need for remand on comity grounds under *Levin*, the State would need to show that all three of these factors have been met. None has.

First, although the state has broad authority as to tax matters generally, the State enjoys no regulatory latitude to impose taxes on out-of-state sellers as a result of *Quill*, no regulatory authority to seek to abrogate an existing constitutional standard, and no regulatory authority over the larger question of the proper standards under which sellers that have no physical presence in a State should be required to collect sales and use taxes. The subject matter of the State's action is one where it is presently precluded from exercising authority. The scope and limits of the Commerce Clause's protection remains a wholly federal question, not a matter over which the State has any regulatory say. There is, in short, absolutely no basis on which a federal court should defer to a state court to adjudicate this case.

Second, Defendants are not seeking and cannot gain a competitive advantage by defending themselves in this action against a suit against them by the State. The *Quill* physical presence standard is the law of the land and is designed to protect interstate sellers from unduly

burdensome state regulation. *Quill*, 504 U.S. at 313. It may be that the State believes that this constitutional protection affords out-of-state sellers an unfair competitive advantage against in-state sellers when competing for South Dakota customers, *see* State's Brief at 17, but the physical presence standard serves to safeguard remote sellers from the excessive burdens of tax compliance in the nation's thousands of state and local taxing jurisdictions. *Quill*, 504 U.S. at 313 n.6. Accepting that existing protection, and resisting a suit that seeks to overturn it, can hardly constitute seeking to "gain an advantage." Moreover, the State's myopic view fails to recognize that retailers such as the Defendants must collect and remit taxes in their home states, and so any purported competitive advantage as to South Dakota customers is one to which these companies located outside of South Dakota are exposed from remote competition for customers in their own home states, each of which (California, Massachusetts, Utah) has a considerably larger customer base than South Dakota.

Third, there is no choice of remedies available to the state court that is not available to the federal court. As a matter of black letter law, because lower courts are duty bound to follow Supreme Court precedent, there is only one possible outcome initially in either state or federal court-- refusal of the State's requested declaratory relief, because it is at odds with *Quill*. *See Hennepin County v. Fed. Nat'l Mortg. Ass'n*, 742 F.3d 818, 823 (8th Cir. 2014) (lower courts must follow Supreme Court precedent). But even if the State could prevail in the lower courts, because S.B. 106 fixes statutory standards that no court can arbitrarily adjust, there is still only a single remedy that the State would receive, whether from this Court or the state court: a declaration in favor, or against, the validity of the $100,000 and 200 transaction thresholds under the Commerce Clause. This is not a case, like *Levin*, where the state court could choose between extending a benefit to additional parties or withdrawing it from a party that already enjoyed it.

The kind of remedial discretion to decide how best to deal with unlawful discrimination at issue in *Levin* does not exist here.

The State's arguments about greater remedial options in state court amount to little more than wild speculation about future circumstances and litigation that have little to do with what a court could do in passing on the validity of S.B. 106 as enacted. *See* State's Brief at 17-18. Many of the dire consequences painted by the State also seem to ignore that a ruling by the federal court invalidating S.B. 106 will have preclusive effect. Furthermore, in suggesting that sending the case back to the state court will benefit the Defendants because, for example, this court cannot enter a sweeping injunction against further enforcement of the statute by the State, the ready answer is that *Quill* itself, as binding Supreme Court precedent (coupled with a ruling against the State in this action), should serve as a more comprehensive deterrent to unlawful enforcement activity by the State than any injunction. The Defendants thus do not (at least, should not) need, and have not asked this court, for an injunction. They simply request judgment as a matter of law and a dismissal of the Complaint.

In sum, where the doctrine of comity under *Levin* requires all three factors to be met before it may be invoked to refrain from exercising jurisdiction, none is met here. Comity does not require remand.

B. *Younger* abstention is not warranted.

That leaves the related question of abstention. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). It "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id*. There is no doctrine that requires abstention just because resolution of a federal question in a federal court may result in the overturning of state policy. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,*

491 U.S. 350, 363 (1989) (quoting *Zablocki v. Redhall*, 434 U.S. 374, 380 n.5 (1978)). Accordingly, there can certainly be no doctrine requiring abstention just because a state has enacted a statute (and certain limited, procedural mechanisms) premised on the hoped–for future abrogation of a *federal* policy by the Supreme Court.

Furthermore, the mere existence of a pending state court proceeding centered on the same subject matter does not mandate abstention. *Sprint*, 134 S. Ct. at 588. "[E]ven in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Id*. at 593 (quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (internal quotation omitted)). "The moving force behind *Younger* abstention is the promotion of comity between state and federal judicial bodies." *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002). "Under *Younger*[], federal courts should abstain from exercising jurisdiction in cases in which equitable relief would interfere with pending state proceedings *in a way that offends principles of comity and federalism*." *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004) (brackets and emphasis added). Abstention applies solely to the "exceptional" cases that pose the danger of unduly interfering with state proceedings. *Sprint*, 134 S. Ct. at 588.

Specifically, *Younger* extends to three classes of "exceptional" cases, "but no further." *Id*. at 594. They include: (1) ongoing state criminal prosecutions; *id*. at 591; (2) civil enforcement proceedings "akin to criminal prosecutions," such as state ethics committee investigations; *id*. at 588, 591 & 593; and (3) civil proceedings involving orders uniquely in furtherance of state courts' ability to perform their judicial functions. *Id*. at 591. A declaratory judgment action seeking the reversal of a Supreme Court holding under the federal Constitution simply will not interfere with a state's prosecutorial authority under state law or a state court's judicial authority. To the contrary, "it has never been suggested that *Younger* requires abstention

in deference to a state judicial proceeding reviewing legislative […] action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 368 (ellipsis added).

For reasons addressed in the previous section, the removal of this action does not offend any principle of comity. And federalism concerns of undue interference in state court proceedings are not implicated. The only ongoing state proceeding to which the State points is the action filed by the American Catalog Mailers Association and NetChoice in state court, which challenges the constitutionality of the Act. *See* State's Brief at 5, 8-9, 13 & n.3, and 20-21. Even setting aside the fact that the State vigorously asserts that the state court lacks jurisdiction over the *American Catalog Mailers* case, as discussed, a federal proceeding does not interfere with a state proceeding just because it presents a common legal issue. Undue interference must be something more than the standard "interference" that occurs on any occasion on which a judicial opinion has a precedential or persuasive legal effect on a later-decided action raising the same issue. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 363.[4]

Abstention case law is, moreover, clear that the fact that parties have "the same lawyers," *id*. at 20, or "'similar business activities and problems,'" is "not enough to warrant across-the-board abstention" if the parties are "'unrelated in terms of ownership, control, or management.'" *Cedar Rapids Cellular Tel.*, 280 F.3d at 882 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975)). In *Cedar Rapids Cellular Telephone*, the Eighth Circuit drew this distinction in clear terms. On the one hand, the appellate court concluded that the trial court had been right to abstain from hearing claims of parties to a federal court action in which parties to the state court

[4] Furthermore, there has been no action in the state court case beyond the filing of the plaintiffs' complaint and defendants' answer challenging jurisdiction. This action, in contrast, has already advanced to the dispositive motions stage. There is no risk of interference with the state court case as a procedural matter.

had action had a controlling interest, but, on the other hand, had been wrong to abstain from hearing the claims of similarly situated, but unrelated parties. 280 F.3d at 881-82. The dispositive question is not whether the parties have the same counsel or seek a judgment on the same legal issue, but whether there is such a close relationship between the parties in the federal action and the parties in the state action that their interests are "intertwined." *See id*. Other than the presence of the same counsel (on both sides of the case) and the same federal question, the parties to this action and the state court action filed by the American Catalog Mailers Association are not related and their interests are not at all intertwined in the manner contemplated by *Cedar Rapids Cellular Telephone* so as to support the exceptional remedy of abstention.[5]

Finally, there is no "careful procedural balance struck by Senate Bill 106" that will be undone by the assertion of federal question jurisdiction in this action. State's Brief at 21. Unlike the case of *Moe v. Brookings County, S.D.*, 659 F.2d 880 (8th Cir. 1981)-- in which, as the State points out, state law had created an elaborate review system that should not be bypassed-- all S.B. 106 has done is create a cause of action that the State can file to seek the overturn of *Quill*. The only procedural protections to which the State points are "rules designed to speed the case toward resolution on the merits." State's Brief at 22. These protections are not, however, unique to state law practice, and have no particular force. Under the Act, the court is encouraged to "act as expeditiously as possible." S.B. 106, § 2. And, under the Act, the court is to presume that the dispute may be resolved on summary judgment, although it is not required to do so. S.B. 106, § 2. Fed. R. Civ. P. 56 allows this Court to decide this case on summary judgment in an expeditious fashion, and Defendants have already filed a summary judgment motion and

[5] That conclusion is bolstered by the State's own argument in the *American Catalog Mailers Association* action that the state court lacks jurisdiction to hear that case on grounds of standing, ripeness, and immunity. *See* Answer, *Am. Catalog Mailers Ass'n*, 32 Civ. 16-96. By the terms of the State's own argument, the positions of Defendants in this case and the plaintiffs in that one cannot be sufficiently intertwined because, according to the State, the Circuit Court had jurisdiction over this case (until removed), but lacked jurisdiction over that case from the get-go.

accompanying brief on an agreed schedule. *See* Doc. Nos. 23-25. Thus, the State is receiving all expedition to which the statute entitles it. More to the immediate point, the procedural mechanisms to obtain a swift judgment not only exist in the federal system, their existence does not create a *federalism* problem by disrupting, *e.g.*, a carefully constructed regulatory regime as in *Moe*. While the State complains of the lack of procedural protections in general terms, it points to no specific protection of the Act that is *both* lacking in this Court *and* could lead to undue interference by the federal court in state law matters.

Whether summary judgment enters under Federal Rule of Civil Procedure 56 or its state-law analogue, SDCL § 15-6-56, the judgment will be based on the *Quill* physical presence standard of substantial nexus, because both parties agree that the physical presence standard, and the validity of S.B. 106 in light of it, present the only issue in the case. That is a question arising under the federal Constitution that is within this Court's jurisdiction. The State's protests notwithstanding, removal was proper, and this case should proceed to judgment in this Court.

CONCLUSION

Based on the foregoing, the Court should deny the State's Motion to Remand.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Defendants' Brief in Opposition to Plaintiff's Motion to Remand complies with the Type-Volume requirements under D.S.D. Civ. LR 7.1(B)(1). The Brief was prepared using Microsoft Word 2010 and contains proportionately-spaced 12-point Times New Roman font and, according to the software's word and character count feature, contains 11,033 words.

Dated this 12th day of August, 2016.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants, hereby certifies that on August 12, 2016, the foregoing Defendants' Brief in Opposition to Plaintiff's Motion to Remand was electronically filed with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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