

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

*Plaintiff,*

v.

WAYFAIR INC.  
OVERSTOCK.COM.INC., and  
NEWEGG INC.

*Defendants.*

No. 28160

STATE OF SOUTH DAKOTA'S  
MOTION FOR REMAND

COMES NOW, the State of South Dakota, by and through its undersigned counsel of record, and hereby respectfully moves this Court for an Order remanding the above-entitled action to the Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota.

PROCEDURAL HISTORY

In 2016, the South Dakota Legislature passed Senate Bill 106, entitled "An act to Provide for the Collection of Sales Taxes from Certain Remote Sellers," now codified in SDCL chapter 10-64 (SB 106). SB 106 authorized the State of South Dakota to require certain out-of-state retailers who lacked a physical presence within the State to collect and remit sales tax. SB 106 also provided a mechanism for the State to seek a declaratory ruling regarding the constitutionality of SB 106 and imposed an automatic injunction during the pendency of any such action. On April 28, 2016, the State filed suit against the above-entitled Defendants and the automatic injunction became effective.

Defendants subsequently filed a motion for summary judgment. At that time, *Nat'l Bellas Hess Inc. v. Dept. of Rev. of Ill.*, 386 U.S. 753, 87 S.Ct. 1389 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992), prohibited the State from imposing sales tax collection and remittance obligations unless the retailer had a physical presence within the state. Given that controlling precedent, the Parties agreed that Defendants would prevail unless the United States Supreme Court were to eliminate the physical presence requirement by overruling *Bellas Hess* and *Quill*. For that reason, the Circuit Court issued an Order Granting Defendants' Motion for Summary Judgment on March 6, 2017. SR 392. Defendants filed the Notice of Entry of Order Granting Defendants' Motion for Summary Judgment on March 7, 2017. SR 393.

The State filed its Notice of Appeal to this Court on March 8, 2017. SR 398. The Court took jurisdiction over this matter pursuant to SDCL 10-64-5 and SDCL 15-26A-3. After briefing, oral argument on the matter was heard on August 29, 2017. On September 13, 2017, this Court issued a ruling upholding the decision of the Circuit Court. *South Dakota v. Wayfair Inc.*, 2017 S.D. 56, 901 N.W.2d 754.

The State filed its Petition for Writ of Certiorari to the United States Supreme Court on October 2, 2017. The State's Petition was granted on January 12, 2018. Oral argument before the United States Supreme Court was held on April 17, 2018.

On June 21, 2018, the United States Supreme Court issued its opinion which concluded that “the physical presence rule of *Quill* is unsound and incorrect” and overruled *Bellas Hess* and *Quill* in that regard. *South Dakota v. Wayfair Inc.*, 138 S.Ct. 2080, 2099 (2018), 2018 WL 3058015. The United States Supreme Court also noted that “[a]ny remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.” *Id.* at 2100. The Court’s Opinion concluded by stating, “[t]he judgment of the Supreme Court of South Dakota is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.” *Id.*

The remand from the United States Supreme Court became effective upon the issuance of the Judgment and Mandate which occurred on July 23, 2017. See Judgment and Mandate attached as Exhibit A; United States Supreme Court Rule 45.2.

### CONCLUSION

Plaintiff respectfully requests this Court remand this matter to the Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota, for proceedings not inconsistent with United State Supreme Court’s Opinion in *South Dakota v. Wayfair Inc.*, 138 S.Ct. 2080 (2018), 2018 WL 3058015.

Dated this 25<sup>th</sup> day of July, 2018.



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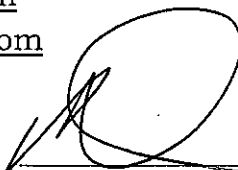
#### CERTIFICATE OF SERVICE

On this 25th day of July, 2018, the undersigned hereby certifies that a true and correct copy of the *State of South Dakota's Motion for Remand*, in the above-entitled matter was served electronically upon the following:

Jeffery L. Bratkiewicz at [jeffb@bangsmccullen.com](mailto:jeffb@bangsmccullen.com)  
Kathryn J. Hoskins at [khoskins@bangsmccullen.com](mailto:khoskins@bangsmccullen.com)

and sent by United States mail, first class, postage prepaid and by electronic mail to:

George S. Isaacson  
Martin I. Eisentein  
Matthew P. Schaefer  
Brann & Isaacson  
184 Main Street  
Lewiston, Maine 04243-3070  
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Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

July 23, 2018

Clerk  
Supreme Court of South Dakota  
500 East Capitol Avenue  
Pierre, SD 57501-5070

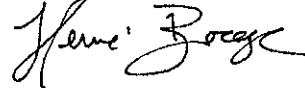
Re: **South Dakota**  
**v. Wayfair, Inc., et al.,**  
**No. 17-494 (Your docket No. 28160-a-GAS)**

Dear Clerk:

Attached please find a certified copy of the mandate and a certified copy of the judgment of this Court in the above-entitled case.

Sincerely,

SCOTT S. HARRIS, Clerk

By 

Herve' Bocage  
Judgments/Mandates Clerk

Enc.

cc: All counsel of record

Exhibit A

# Supreme Court of the United States

No. 17-494

SOUTH DAKOTA,

Petitioner

v.

WAYFAIR, INC., ET AL.

ON WRIT OF CERTIORARI to the Supreme Court of South Dakota.

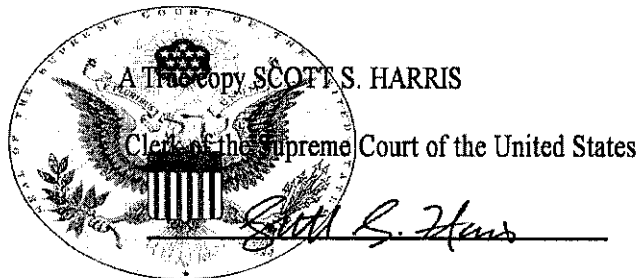
THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Supreme Court of South Dakota for further proceedings not inconsistent with the opinion of this Court.

IT IS FURTHER ORDERED that the State of South Dakota recovers from Wayfair, Inc., et al., One Thousand Six Hundred and Fifty-six Dollars (\$1,656.00) for costs herein expended.

June 21, 2018

Printing of record:	\$1,356.00
Clerk's costs:	<u>300.00</u>
Total:	\$1,656.00



**United States of America, ss:**

**THE PRESIDENT OF THE UNITED STATES OF AMERICA**

17-494

**SOUTH DAKOTA,**

Petitioner

v.

**WAYFAIR, INC., ET AL.**

To the Honorable the Justices of the Supreme Court of South Dakota.

**GREETINGS:**

Supreme Court of South Dakota case, SOUTH DAKOTA, Plaintiff/Appellant v. WAYFAIR, INC., ET AL., Defendants/Appellees, No. 28160-a-GAS, was submitted to the **SUPREME COURT OF THE UNITED STATES** on the transcript of the record and was argued by counsel.

It is ordered and adjudged on June 21, 2018, by this Court that the judgment of the above court in this cause is vacated with costs, and the cause is remanded to the Supreme Court of South Dakota for further proceedings not inconsistent with the opinion of this Court.

**THIS CAUSE IS REMANDED** to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.

Witness the Honorable **JOHN G. ROBERTS, JR.**, Chief Justice of the United States, the 21<sup>st</sup> day of June, in the year Two Thousand and Eighteen.

<b>Printing of record:</b>	<b>\$1,356.00</b>
<b>Clerk's costs:</b>	<u><b>300.00</b></u>
<b>Total:</b>	<b>\$1,656.00</b>

