NetChoice Promoting Convenience, Choice, and Commerce on The Net

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Senator Dwight Cook, Chairman
Senate Finance and Taxation Committee
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

March 7, 2017

RE: Opposition to SB 2298 - An act relating to revenue and taxation

Dear Chairman Cook,

We ask that you do not pass SB 2298 and avoid making the same mistakes as South Dakota.

SB 2298 creates legal costs for North Dakotans, imposes new burdens on North Dakota's businesses, erodes your ability to protect North Dakota businesses from out-of-state tax collectors, and will likely be seen as a new tax.

First, consider problems created by SB 2298's anticipated legal challenges:

- Will not go into effect for several years, if ever
- Will cost North Dakota taxpayers in attorney's fees and court costs
- May be rendered irrelevant by other state lawsuits or Congressional action

Second, if the SB 2298 survives court challenges, it would:

- Reduce the ability of North Dakota to protect its businesses from burdens imposed by other states
- Rely on new revenue extracted from North Dakota residents – not from out-of-state businesses
- Will generate only minimal new tax revenue
- Establish a new tax regime that is anything but equal, consistent, or fair

Likely seen as a new tax by your constituents

North Dakota residents will likely see SB 2298 as a new tax since any tax collected will come from the pockets of North Dakota citizens, not from out-of-state businesses. Also, SB 2298 is likely to be broadly opposed by North Dakota citizens.

We recently polled Utah residents on similar approaches in that state, and 71% opposed requiring businesses to collect and file sales taxes for up to 46 states. Two-thirds said requiring them to pay tax on online purchases from out-of-state businesses would be a statewide tax increase. We would likely see similar results in a poll of North Dakota citizens. (see Utah polling at NetChoice.org/UtahTaxPoll)

SB 2298 is likely to bring burdens on North Dakota businesses from other states

Just by proposing SB 2298, North Dakota created a dangerous precedent for other state revenue departments to follow. While SB 2298 would apply only to remote sellers, it encourages other states to create similar laws that would impact North Dakota sellers. We call this the "boomerang effect" of the new tax bill.

No revenue would be generated from SB 2298 for several years, if ever. And SB 2298 fritters away tax dollars on an unnecessary lawsuit

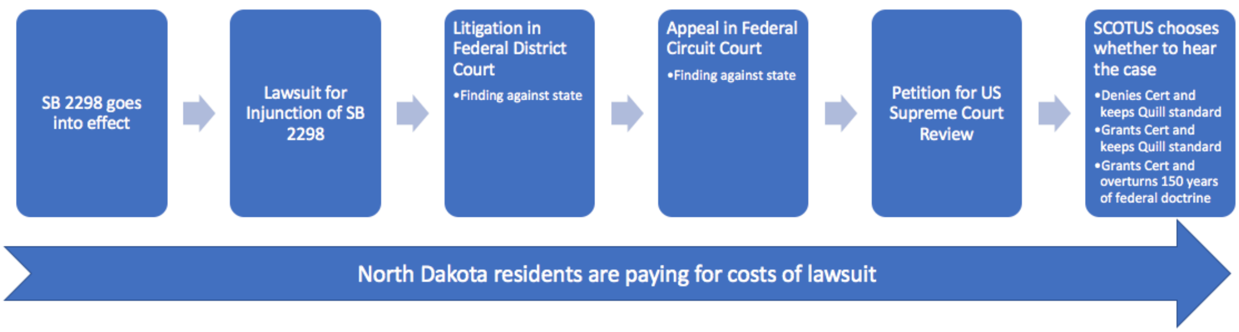
SB 2298 will generate no revenue for the state unless and until the US Supreme Court overturns a century of established federal doctrine.

Following enactment of the law, groups like NetChoice and ACMA intend to seek an injunction and challenge the law.

Immediate injunction of SB 2298 is likely, since even the state of South Dakota[1] has stipulated that its "Kill Quill" law is unconstitutional.

Once SB 2298 is enjoined, North Dakota could not enforce SB 2298. At the same time, North Dakota would be spending state funds trying to defend the law in court until it ultimately comes before the US Supreme Court.

If the US Supreme Court chooses not to hear the case, the existing *Quill* standard would remain in effect and SB 2298 could not be enforced.



It is likely that the US Supreme Court will have already decided on the *Quill* question even before the SB 2298 makes its way through the courts. Already courts are reviewing the legality of a similar law in South Dakota[2] and regulation in Alabama.[3] SB 2298 acts as a pile-on with no material benefit to North Dakota while still costing the state.

A "Win" for SB 2298 erodes state sovereignty

Advocates for SB 2298 claim that the purpose of the New Tax law is to overturn the current *Quill* standard[4] of physical presence. Today, the *Quill* standard stops tax collectors in California, New York, or Illinois from harassing North Dakota businesses that have no physical presence in those states.

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[1] *See South Dakota v. Wayfair Inc. et al*, Case No. 3:2016cv03019 (S.D. Dist. Ct. May 15, 2016).
[2] *See* Sandra Guy, *South Dakota sues four big online retailers over sales taxes*, Internet Retailer (April 29. 2016).
[3] *See* Chris Morran*, Newegg Challenges Alabama Over Collection Of Online Sales Tax*, Consumerist (June 14, 2016)
[4] *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992) further confirmed the physical presence standard for sales tax collection. It protected Quill, a Delaware corporation with offices and warehouses in Illinois, California, and Georgia, from North Dakota tax collectors and North Dakota tax rules – a state where Quill had no physical presence.

But a "Win" for SB 2298 would remove the protections of *Quill* and reduce the ability of North Dakota to protect its businesses from tax collectors across the country, forcing North Dakota businesses to travel across the country to defend themselves in foreign state courts.

State tax collectors would be the true "winners" if this SB 2298 succeeds in overturning the *Quill* standard. North Dakota citizens and North Dakota businesses would be the losers.

No new money would come into North Dakota

Even if SB 2298 survived a Supreme Court challenge, *no new money would flow into North Dakota*. Any sales taxes collected as the result of SB 2298 would come from the pockets of North Dakota residents -- not from out-of- state businesses.

Minimal tax revenue would be generated from SB 2298

Today, most of the top e-retailers already collect for North Dakota. That includes Amazon, who accounted for 41% of online sales in Q1 2016.[5]

Some SB 2298 advocates cite a 2009 University of Tennessee[6] study to suggest a large windfall of uncollected sales taxes. However, the UT study is woefully out-of-date and fails to account for existing tax collection by Amazon and several other large e-retailers.

So, the question, assuming SB 2298 survives in court, is whether the minimal tax revenue extracted from North Dakota citizens is enough to justify the legal costs, executive branch overreach, and erosion of state sovereignty?

SB 2298 creates a new tax that is not equal, consistent, or fair

Tax advocates justify SB 2298 by saying it "creates a level playing field for all sellers." However, SB 2298 foists disproportionate collection burdens on catalog and online retailers. When a customer enters a gift shop in Fargo's Airport, the store does not ask for that customer's home address so she can look-up the tax rate and later remit the tax to the customer's home state.

But SB 2298 would impose the burden of look-up, tax filing, and audit -- if the sale occurs through a phone call, mail order, or the internet. We fail to see how that would be equal, consistent, or fair.

We ask that you reject SB 2298 and protect North Dakota businesses from out-of-state tax auditors, protect North Dakota citizens from a new tax, and avoid costly litigation the state is likely to lose.

Thank you for considering our views and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Senior Policy Counsel, NetChoice

NetChoice is a trade association of e-Commerce and online businesses. [*www.netchoice.org*](http://www.netchoice.org)

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[5] Ken Kam, *The Market Is Underestimating Amazon*, Forbes (May 27, 2016).
[6] Bruce, Fox, and Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee (2009).