September 17, 2018

The Honorable Mitch McConnell  The Honorable Chuck Schumer
Majority Leader  Minority Leader
U. S. Senate  U. S. Senate
Washington, DC 20510  Washington, DC 20510

The Honorable Paul Ryan  The Honorable Nancy Pelosi
Speaker of the House  Minority Leader
U. S. House of Representatives  U. S. House of Representatives
Washington, DC 20515  Washington, DC 20515

Dear Sirs and Madam,

On behalf of the undersigned organizations and the companies we represent, with both an online and physical presence, we oppose legislation that would erode the progress towards tax parity that was handed down by the United States Supreme Court in the June 2018 Wayfair decision.

Over the better part of a decade, the stakeholders listed below have undertaken significant efforts to establish economic parity between online and brick-and-mortar sellers that would better reflect the changing dynamics of today’s omnichannel marketplace. In the June 2018 Wayfair ruling, the U.S. Supreme Court struck down the outdated and arbitrary physical nexus standard, stating it was “unsound and incorrect”. In its place, the Court pointed to the sufficient economic nexus standard, paired with a prohibition against imposing undue burden on businesses. The Court also recognized the South Dakota statute at question in the litigation as the standard bearer.

Since the Wayfair decision was handed down, the states have been undertaking an orderly and transparent process to implement policies based on this new standard. As issues related to implementation arise, they are being addressed by state governments. Furthermore, the states are aware of the need to follow the prescription laid out by the Supreme Court, or else they leave themselves open to further litigation that could undermine the ruling that we have all worked for decades to obtain.

At this time, there are no states collecting retroactively under the Wayfair standard. Furthermore, we do not see any state attempting to collect retroactively using the increased authority granted by the Supreme Court. States are addressing the decision judiciously, based on each individual state’s legislative calendar, existing policies and appetite for collection and simplification. Finally, the Court commended the South Dakota economic nexus standard of 200 transactions or $100,000 in sales as an appropriate standard. Given that this issue is about each state’s right to control its budget and revenue authority, we believe that this is a more fitting standard than a national small seller limit that would be filled with legal and implementational problems.

We strongly believe that the time for Congress to act was prior to the Wayfair decision and has now passed. For Congress to insert themselves post-ruling only creates additional uncertainty and further complicates the implementation process, while undermining the level playing field created by the Wayfair decision. If in the future, tangible, not speculative, problems arise from state implementation
of the new standard, we would welcome the opportunity to work with Congress to address those concerns.

Sincerely,

International Council of Shopping Centers
Institute of Real Estate Management (IREM)
Nareit
National Association of Realtors®
National Association of Wholesaler-Distributors
National Retail Federation
Retail Industry Leaders Association
The Real Estate Roundtable