United States House of Representatives
Committee on the Judiciary

Hearing on
"Examining the *Wayfair* Decision and Its Ramifications for Consumers and Small Business"

Written Testimony of
Bartlett D. Cleland, General Counsel and Chief Strategy and Innovation Officer
American Legislative Exchange Council

24 July 2018

Chairman Goodlatte, Ranking Member Nadler, and Members of the Committee:

Thank you very much for the opportunity to discuss the state of the country post-*Wayfair*. My name is Bartlett Cleland, and I am the General Counsel and Chief Strategy and Innovation Officer with the American Legislative Exchange Council, America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism. Comprised of nearly one-quarter of the country's state legislators and stakeholders from across the policy spectrum, ALEC members represent more than 60 million Americans and provide jobs to more than 30 million people in the United States.[1] Proudly, ALEC is celebrating its 45th anniversary this year.

ALEC has a long history of commenting on federal work where sales taxes are concerned, and specifically twenty years on electronic commerce sales tax issues. ALEC has long been educating members and facilitating an exchange amongst members concerning the various ideas from across the fifty states on how to manage remote sales. Providing input to the Committee on the Judiciary during this hearing will be marked as a proud moment in our efforts on this straightforward yet complicated matter for the states. I should also note that ALEC filed an amicus brief in *Wayfair.*[2] I have provided a copy of the brief today to be included in the record if the Chairman so desires.

[1] All Americans deserve an efficient, effective and accountable government that puts the people in control. ALEC provides a forum for experts to discuss business and economic issues facing the states. The ALEC model policy library is home to dynamic and innovative ideas that reduce the cost of everyday life and ensure economic freedom. ALEC ideas and publications are the product of countless hours of research, debate and discussion and serve as a toolkit for anyone who wants to increase the effectiveness and reduce the size, reach and cost of government. ALEC is proud to offer real solutions to the top issues facing the states, and the strength of the ALEC family is proof that good ideas are better when shared.

ALEC is a forum for stakeholders to exchange ideas and develop real, state-based solutions to encourage growth, preserve economic security and protect hardworking taxpayers. ALEC members understand the importance of hearing from all sides of an issue and value public-private partnership in policy discussions. Job creators and state legislators alike come to ALEC to offer important policy perspectives to ensure economic security and opportunity in their communities.

By joining ALEC, state legislators gain the competitive advantage of shared knowledge and experience, as they are able to learn from one another about what policies have succeeded or failed in the states. Similarly, business leaders and policy experts are able to discuss the real-world implications of potential policies with state legislators who best know their communities and economic landscapes.

At ALEC, ideas drive the discussion. Innovation and technology are at the forefront of members' conversations, and ALEC is home to experts who stay ahead of the issues and who provide continuing education to members about the effect changing issues will have on the Americans.

Learn more at www.ALEC.org

[2] https://www.alec.org/publication/brief-amicus-curiae-south-dakota-v-wayfair-inc-et-al/

Please also see other ALEC publications relevant to our discussion here today[3]. I have also provided a copy of that publication to be included in the record if the Chairman so desires.

I also want to acknowledge those who are testifying with me today. I have worked with almost all of them at some point in my career, often more than once. I have great respect for each and every one. They are good people dedicated to that in which they believe. I am honored to be included in this group.

Introduction

As the Committee is well aware, the U.S. Supreme Court released its decision on *Wayfair v. South Dakota* last month. With that decision the Supreme Court threw off decades of precedent, ruling that states can compel retailers to collect sales taxes even if they lack a physical presence in the state. Smaller, resource poor states, indeed won a victory.

Previously, under *Quill*, states and localities could only compel collection of their taxes when the business had a substantial physical presence in the state, such as a store, a sales force, warehouses, etc. The court claimed that such a rule persuaded stores to "avoid physical presence" taking advantage of "a judicially created tax shelter." The much more likely explanation is that businesses took advantage of a new means of communications and used it wisely, some more than others. Particularly small stores have no resources to expand across the country and it is odd that the Court would somehow deem that such a desire is inherent regardless. Larger operations, because of their physical presence in so many places were already collecting and remitting sales tax. Seventeen of the eighteen largest online retailers already collect the taxes for the state tax collectors.

But regardless, the Court has ruled that the South Dakota law is acceptable. That law requiring merchants to collect taxes for the state only to those businesses with more than $100,000 in sales, or at least 200 transactions, in the state each year. A further thirty-one states levy some sort of online sales tax as well. States with different thresholds to trigger tax collection will still face lawsuits to test whether those schemes might be acceptable as well.

The U.S History with Sales Tax

This country has a very rich history where taxation is concerned, tied tightly to liberty, tax was in part the mid-wife to our founding. One of the major causes of the American Revolution was the main gripe of the colonists – that while they were forced to pay tax they had no say in that taxation. Or as the slogan goes "No taxation without representation." The colonists had no direct representation in a far away government that was requiring the payment of tax and forced compliance.

The insult was acute as the idea of representation before taxation was guaranteed beginning in 1689, 330 years ago. Foreshadowing the current debate parliament actually asserted that the colonists had "virtual representation," an idea as offensive then as it should be to us now. Virtual representation is not real representation, no more than virtual presence is the same as actual presence. But with that

[3] https://www.alec.org/publication/online-sales-tax-state-factor/

insult a Congregational minister Jonathan Mayhew, uttered "no taxation without representation" in a sermon in 1750, and the first steps to revolution were begun. By 1765, the term was in regular use in Boston but amplified poignantly by Massachusetts provincial assembly member James Otis saying "taxation without representation is tyranny." To this day he is still correct.

By 1787 a crisis had arisen and a constitutional convention was called -- the first attempt at a U.S. Constitution, the Articles of Confederation, had failed. The Articles endured for a mere six years before a constitutional crisis erupted of states looting and accosting their neighbor states. The result was a constitutional convention to try to fix the mayhem. In 1789 the U.S. Constitution was agreed to, in part in response to and as a solution for, this problem. The Commerce Clause was included as a means to prevent overly aggressive states from imposing barriers to trade on other states and the citizen of those other states. That is, disrupting interstate commerce. So, the Constitution never granted the power to tax out-of-state but did grant the power of the individual states to protect their citizens from other governments.

The *South Dakota v. Wayfair* decision will now allow states to reach into other states to tax those not in the state and to shift tax collecting liability to merchants from other states. Unsurprisingly, as the states compete they will always try to preference businesses and individuals within their own state and without restraint the days of the Articles of Confederation will be revisited. The concerns are still as valid today as they were in 1789.

Really born during the Great Depression sales taxes began in earnest and caught on fast. As states faced empty coffers they found that taxing sales helped them collect the revenue they needed, largely avoiding income tax for fear of reducing productivity. By 1970, after Vermont adopted a sales tax in 1969, only five states continued without a sales tax: Alaska, Delaware, Montana, New Hampshire, and Oregon. Sales taxes also became the largest source of revenue into the 1990's when economic expansion finally pushed personal income tax into the lead.

By the 1960's despite sales tax being the number one source of income for the states, the states wanted more, and they wanted it from those outside of their state. By 1967 the Supreme Court ruled in *National Bellas Hess* that Illinois could not force National Bellas Hess, based in Missouri, to collect tax for catalog sales in Illinois merely based on the reasoning that the Court never held that a state may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the state is by common carrier or the United States mail. In other words, something more was needed to trigger a "duty to collect" taxes.

The Court went on to note, clearly not seeing what would come just 25 years later in technology, even while clearly seeing what would come 50 years later because of the *Wayfair* decision, "Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so,

indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government."

In 1992 the Supreme Court released its ruling in *Quill v. North Dakota*. There the Court required that a company must have more than a minimal (de minimis) physical presence in a state before that company can be required to collect that state's sales or use taxes. The Quill standard was crafted because the Court found that collecting sales taxes in multiple jurisdictions in several states was too complicated if the retailer did not have a real physical presence. That case was reaffirmed at times, including in March 2002, when the Court ruled that a state must show that an out-of-state taxpayer has a "literal physical presence."

But after the *Wayfair* decision, we seem back where it began but now with a new tool called sales tax for states to deploy against one another. States are now in a world where they have fairly unlimited tax authority that could easily burden interstate commerce – precisely what the Commerce Clause sought to constrain.

Setting the Record Straight

Many myths have arisen over time about a physical presence system and its implications for states and localities. Correctly understanding the facts are critical to understanding the options going forward.

Taxes were due?

There has never really been a question of whether a tax is due. Saying that taxes were not due when sales were made, or intimating such, to justify the argument that revenues were lost, is pure slight-of-hand. The only issue is whether the individual was to be compelled to pay or whether the government could conscript business into doing it to benefit the state. Contrary to arguments, no state had to rely on the "goodwill" of voluntary compliance by a citizen. States have always been free to enforce collection of a use tax on its own citizens. But states have not wanted to take that route because of the unseemly political position it would put politicians in, so instead they have opted to force merchants to collect and remit sale tax, placing all liability on the merchant as well.

Contrary arguments are disingenuous to say the least, or in DC speak, a four Pinocchio.

Taxes are not rising in the state so no tax increases right?

Just because taxes are not being raised on the citizens in one state even as the state raises taxes on those outside the state does not mean that taxes have not indeed increased. In fact, likely worse than a politician choosing to raise taxes on their own constituents, in this case the politician raises taxes on those who cannot fight back, on those who have no voice, on those who must submit or be brought under the audit authority of the government, summoned to a foreign capitol to make accounting of oneself. Sound Orwellian? It should.

Likely the oldest political trick in the book is to make people think that when a tax is being added, expanded or renewed that it is someone else who will pay the tax. But when Senator Russell Long said "Don't tax you, don't tax me, tax that fellow behind the tree!" he likely did not foresee a return to the days when states could in fact do so. But even then, when a state says it will gain revenue from sales taxes, none of which will fall on the citizens of the state remember it is simply a version of the same illusion, because all the other states will have their hands in the pockets of the original state's citizens.

The bottom line - taxing those outside of state is still raising taxes and is additionally repugnant.

Do we now have real federalism?

The short and easy answer is no, the situation post-Wayfair is not a step toward federalism at all.

ALEC has three main principles that guides the organization and its members – the free market, limited government and federalism. The sales tax situation today violates all three of these principles but is particularly repugnant to a true understanding of federalism, in fact it smacks of false federalism.

False federalism[4] is a knee-jerk opposition to the federal government doing anything., combined with the ignorance of understanding that the authority over interstate commerce is not within the realm of the state's, but rather is the domain of the federal government.

The states, and state legislators, are particularly aware of the many things that the federal government is doing that it should not be doing. For years the states have been bludgeoned by Washington with the Commerce Clause. No matter the issue, or how slender the reed for the argument, the Commerce Clause was wielded as a weapon by Congress and the federal government rather than being the shield for the states as designed. But no matter how odious its use has been the Commerce Clause as designed has not been invalidated. Responsible elected officials should take the time and care to understand when the Clause is relevant and when it is not. And here it could not be more relevant, this particular aspect of federalism was created to prevent states from preying upon the businesses and citizens of other states.

False federalism has been championed throughout the decades long attack on physical presence and sales tax. Many self-proclaimed small government, rational tax, free market officials have joined the chorus arguing that states' rights is the power to tax out-of-state residents, as opposed to the power of the individual states to protect their citizens from other governments. As an aside, one wonders how their philosophy would hold up if the Chinese asked for a cut of taxes along with our intellectual property, or the Russians had a side of tax with their U.S. electioneering. Perhaps they are comfortable with some of the United States' largest companies being taxed on nothing more than a digital presence in the European Union even while following the same philosophy and trying to break up or regulate global competitors to European business. Such proponents of false federalism would have to stand on

[4] This is an idea and phraseology that I worked on when I was with the Institute for Policy Innovation so at the very least IPI deserves a hat tip, if not a large portion of the credit for thinking here. More at www.IPI.org

the sidelines, mouths agape, and watch foreign governments begin to loot U.S citizens, and the U.S. politicians will have no principled grounds to stop them. Of course, states have never had such power, unless one counts that short amount of time that the states had powers under the Articles of Confederation.

A belief in this false federalism leads to the belief that a physical presence standard is merely a hinderance to the justifiable limitation in the ability to levy tax on a person, organization or corporation. That is to say, such false federalism leads to the end of any limitation on government power. The desire to expand government authority and tax others so overwhelming that some are willing to toss aside principle, history and reason to reach the precious new revenue.

As George Pieler put it in "Return of the Cybertax: Lamar Alexander's Anti-Federalism," published by the Institute for Policy Innovation, "So long as the Internet Tax Moratorium was the law of the land, proponents of broadening the reach of state taxation had a serious tactical problem: how to convince politicians (much less the American people) to let states impose a multitude of diverse and conflicting taxes on economic activities that reached across state borders, in the face of a national policy of encouraging free-flowing electronic commerce. Removing that legal barrier provides a window for state and local tax-raisers to seize the revenue streams generated by the Internet and e-commerce."

The spread in belief of false federalism highlights that the issue of physical presence is perhaps the most important issue of the Internet age–is there any limit to government power or does the power of government now spread beyond the physical borders of a government entity? How far does compliance with state laws reach outside of the state itself? Is the power of government now limitless as the Internet so that any business anywhere that can connect with customers mean that they face various governmental jurisdictions everywhere?

Real federalism is demonstrated in one way by tax competition, and it is a robust competition. ALEC has now issued its 11th edition of Rich States, Poor States examining the competition between states and ranking the states according to good tax policy.[5] Noting my fellow panelist I will point out that Utah continues to be the top of the list for 11 years running.

The states agree on the way forward?
Nothing could be further from the truth.

The "states" and "state legislators" are nowhere near agreement on this issue. We have had legislators already openly ask why they should cheer such a decision given that they see this decision as an intrusion by the judiciary into the legislative, pointing to efforts by the very Chairman of this committee and others to address the challenges. The actions of the U.S. Congress were ignored, and worse ignored by a handful of state legislators in a cynical ploy of several states, led by South Dakota, that undertook a

[5] https://www.alec.org/article/25234/

scheme to overturn current law, intentionally passing unconstitutional laws to bait the Supreme Court into acting.

Many were perfectly satisfied with the physical presence standard and its implications. American Legislative Exchange Council members have voted on the issue many times, in various ways, always with the same result, that expanding the reach and power to match the reach of the internet is an abuse of government power.

Are the laboratories of democracy better off?

As is well known, the states are often referred to as the laboratories of democracy, a designation that states are proud to have. More importantly than a catchphrase they often really are the place where policies are tried, tinkered with, altered and improved. But contrary to the assertion that some have made, the result in *Wayfair* is no "triumph for the 'laboratories of democracy.'"

Some states will now spend time figuring out ways to take from their neighbors while others will spend time and energy figuring out how to defend themselves. In fact, this is not the so-called laboratory setting the drafters of our U.S. Constitution conceived of at all. As already mentioned, the drafters specifically added the Commerce Clause to protect the states so that they could focus on solving the government appropriate challenges that their citizens faced. In fact, before the intentional push to upend the decades old precedent, the policies that various states were pursuing were many and multi-faceted, fascinating to watch with telling results. With the maul now handed them, sadly real experimentation will end.

Does Wayfair signal a free pass for local governments to go after remote sellers?

In its decision, the Court acknowledge that not all remote sales taxation schemes are necessarily permissible. Compliance costs seem to be one consideration in determining whether any particular state tax requirements constitute an undue burden on interstate commerce. As written in the decision, "These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States."

The volume of business done in a particular jurisdiction also seems to be part of the formula. "The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State…"

Perhaps most importantly Congress can act. As noted by Justice Roberts, "Nothing in today's decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue. Armed with today's decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers." Congress should not allow itself to get waylaid. Congress should. Congress should be the body that decides if and how interstate sales should be taxed. The issue should never have been forced out of the hands of Congress into the hands of the

judiciary in the first place. But, in the absence of action as the states are already acting and taking the predictable steps similar to those they took 230 years ago.

The States are Already Acting and Reacting

Within mere hours of the decision some states started counting their "new" revenue, even while they declined to discuss the cost to the citizens of their states. The illusion of the treasure of El Dorado never seems to be dispelled. Several states already had laws in place so that if foreign jurisdictions became taxable areas that they would begin taxing, with some even counting such presumed revenue in their budgets. Several others could not hide their enthusiasm to begin raising taxes. Some states are already demanding sales taxes be paid. Just a handful of examples from recent press reports are instructive.

New Jersey

According to press reports, New Jersey, within a couple days, the House and Senate hurried along legislation to gouge "any out-of-state companies which sell more than $100,000 goods to the state or conduct more than 200 transactions with anyone in the state," with a 6.625 percent tax. The big argument amongst the looters was merely whether the state legislator's projection of a $300 million windfall is correct or the governor's $25 million prediction.

Wisconsin

Following press reports that Wisconsin could reap $187 million annually from remote taxation, the governor said, "It shouldn't be a tax increase. It should be leveling the playing field for retailers and other operations in the state." One wonders if there is not a tax increase or expansion of government where the "new" revenue would come from. But without a more critical eye promises are quickly made, "Wisconsin Gov. Scott Walker, running for re-election this year, has suggested the extra revenue could be used to expand tax breaks for seniors or households with children," the AP reported.

Nebraska

Similarly, in Nebraska, the governor has said that "new revenue should go to property tax relief." Some Nebraska lawmakers want to reduce taxes on food. One legislator penned an op-ed insisting that Nebraska must rewrite legislation so that the state can hold those "who engage[s] in business as a retailer" to be a criminal unless they have paid their sales tax permit. Already, the expansion beyond sales tax collection alone has begun.

New Hampshire

In New Hampshire, one of the states that does not have a sales tax, legislators are concerned that other states will now impose their taxes on their citizens. In a move to protect their citizens the legislature called a special session that actually begins tomorrow. They are considering, "AN ACT requiring notice and approval of certain actions to commence audits of collection liabilities arising under certain sales and use tax statutes and prohibiting New Hampshire remote sellers from disclosing private customer information to foreign taxing authorities in connection with the collection of certain sales and use taxes.

This bill prohibits foreign taxing jurisdictions from requesting information from, conducting examinations of, or imposing sales and use tax collection obligations on sellers in New Hampshire , unless the foreign taxing jurisdiction provides notice to the New Hampshire attorney general. This bill also prohibits sellers in New Hampshire from providing private customer information to any foreign taxing authority for purposes of determining liability for collection of certain sales or use taxes unless the seller has provided a written notice of the request for such information to the attorney general. The bill does allow sellers to comply with any directive of a foreign taxing authority, while preserving the seller's rights under the statute, if the seller determines that such compliance is in the seller's best interest."

Any political windfall from presumed increased revenues will prove illusory. The increased revenue will not come out of the ether, rather it will come out of the pockets of individuals and merchants in other states. State merchants will see increased compliance costs, and hence less profit. Taxes on their citizens will increase resulting in less money for them to spend. The notion that "free money" is at hand simply demonstrates the lack of critical thinking that has gone into where things will head.

What Should Happen Now?

Congress can and should act. As the Supreme Court and the U.S. Constitution say: Congress has authority to protect interstate commerce. Interstate commerce is clearly at risk, just given the actions taken so far and the actions hinted at by others. Five states, the no sales tax states, will all be looking for a way to protect their citizens from a sales tax since the citizens of those states have clearly indicated that such taxes are not acceptable to them. Likely, smaller states with less resources will begin to aggressively tax those in other jurisdictions seemingly under the false notion that any asset gained will come without a liability. Action needs to be taken now as sellers are already being burdened.

Moratorium on cross border "looting."

At a minimum the U.S. Congress should act, calling a time out to allow enough time to sort through what states are already doing and then to consider if the current lack of a physical presence standard is the best policy for interstate commerce. Without doubt online sales have changed how sales are conducted, just as catalog sales did before, but that does not mean that principles and the Constitution should be thrown out. Rather, time needs to be taken to consider the wisest path forward not for merchants, not for state coffers, but for all of those involved in interstate commerce.

With a firm and complete moratorium in place Congress could then consider next steps without the pressure of watching the interstate tax situation deteriorate further.

Reinstate Physical Presence - Yes, Mr. Sensenbrenner is on to something!

Congressman Sensenbrenner noticed a trend a while ago and acted by suggesting a solution. As the individual states were continuing to try to expand their taxing authority he introduced legislation to codify *Quill*. He, along with many others in Congress, took the time to understand that internet commerce is the paragon of interstate commerce. The benefits it provides would be unsettled and

diminished if every jurisdiction that had some touch to a transaction actually took a bite, or even a nibble.

How many jurisdictions could possibly be involved? That is hard to say but it could be a couple or tens or thousands depending on the tax law that might be crafted and exactly how the transaction physically played out. The internet is an architecture of highly decentralized multiple mostly private systems. To suggest that such a system is ripe for discriminatory tax treatment by multiple taxes is hardly surprising to those who understand tax and the internet. These are the facts that led to a federal law to prohibit discriminatory taxes online.

But a critical and underlying part of avoiding such discrimination was the requirement for physical presence. Requiring physical presence made clear that bits of data travelling through a jurisdiction on a private communications system would not be enough to trigger a tax obligation or an audit and compliance responsibility. An updated, legislated approach to physical presence should consider how business is transacted today, and the trends of where it is heading. To bifurcate the world of sales into "brick-and-mortar" and "online" is at best quaint but frankly smacks of ignorance of the real world where businesses are finding interesting ways of blending all their resources to gain a marketplace advantage.

And while *Wayfair* was a sales tax case, tax lawyers, tax accountants and politicians are just now beginning to consider its full impact. That impact could easily include business income tax, individual income tax, and regulation issues that cross state borders. In fact, there is really little reason to believe that ultimately those taxes, and perhaps more, will not become part of a cross border tax crush.

Regardless, however crafted a physical presence standard should be reinstated.

Require Simplification

Whatever standards Congress pursues simplification should be at the heart. Congress should be emboldened to act in this space particularly as the Court has indicted that it views favorably a simplified statewide administration program for sales taxes, but stopped short of clearly requiring it in order for a collection regime to be constitutional. Clear standards should be a baseline, particularly as coming from Congress there is a better chance that they would be clear as opposed endless court cases to determine what clear and simplified really mean.

The Court however also pointed in the direction of the Streamlined Sales Tax Project (SST) to demonstrate that simplification could be undertaken. However, Congress needs to act. While the SST governance board is happily comprised of state legislators and also tax commissioners, they also can eliminate simplifications from an agreement anytime they want. This makes any simplification at best uncertain, and could even be fleeting achieving only a political purpose. Moreover, such decisions should be put in place by legislators in their home states not left to unelected middle management.

So the role of Congress should be to set minimum standards via legislation, such as single rates for remote sales and one that is no greater than a weighted average of state and local rates, and uniform

definitions of taxable products, services and any exemptions, amongst other simplifications. ALEC is always ready to help the Congress create a list of suggested simplifications and find a means to ensure all of the states we represent, which is to say all fifty states, are treated fairly.

When completed, merchants should be able to immediately understand what taxes are applicable and consumers what taxes they are subjected to when they are making purchases. Honestly, this is a great rule of thumb for taxation in general. Confusing, conflicting and multiple taxes are a breeding ground for tyranny as the people lose power that government has taken through complexity.

But Congress must begin to act. Already states are demanding sales taxes, even for time periods before the *Wayfair* decision, paying little attention to any simplification.

Require Full and complete reimbursement

Congress should make mandatory that states or localities must pay the full and complete costs of all compliance if the state or local government is mandating that merchants collect cross border taxes with appropriate costs for not doing so quickly and completely. Currently states do not adequately, much less completely, compensate merchants for their conscripted service. That is to say, merchants are on the hook for most of the cost of collecting and remitting sales taxes, and further bear all of the liability for not doing so perfectly. This is an unfunded mandate placed on a segment of industry for no purpose other than to benefit the state. To say the least this smacks of unfairness. But that burden is set to grow exponentially in a post-*Wayfair* world.

Further, Congress should insist that liability for failure to adequately collect when the attempt was made in good faith be placed at the feet of state not the merchant. These are not costs that a merchant should be made to bear.

Conclusion

This hearing is critical as a starting point for Congress to begin formulating a solution that will create sensible and fair rules that end confusion and reduce the burdens for merchants, consumers and citizens. Indeed, Congress must act. The Supreme Court has invited action, history justifies it and sooner or later the situation will demand it. Rather than waiting, the time to begin work is now. A system that is simple, easy to understand, that draws bright lines and that treats merchants fairly should be the goal.

Thank you once again for the invitation to testify. I am happy to respond to questions.

Respectfully submitted,

Bartlett D. Cleland
American Legislative Exchange Council