

**NO REGULATION WITHOUT REPRESENTATION:
H.R. 2887 AND THE GROWING PROBLEM OF
STATES REGULATING BEYOND THEIR BORDERS**

HEARING
BEFORE THE
SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTEENTH CONGRESS
FIRST SESSION

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JULY 25, 2017
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ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Testimony and letters of support for H.R. 2887 submitted by the Honorable Bob Goodlatte, Virginia, Chairman, Committee on the Judiciary. These materials are available at the Committee and can be accessed on the Committee Repository at:

<http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-20170725-SD002.pdf>

Testimony, letters, and Harvard Journal on Legislation article submitted by the Honorable John Conyers, Jr., Michigan, Ranking Member, Committee on the Judiciary. These materials are available at the Committee and can be accessed on the Committee Repository at:

<http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-20170725-SD003.pdf>

115TH CONGRESS
1ST SESSION

H. R. 2887

To regulate certain State impositions on interstate commerce.

IN THE HOUSE OF REPRESENTATIVES

JUNE 12, 2017

Mr. SENSENBRENNER (for himself, Mr. GOODLATTE, Mr. DESJARLAIS, Mr. MCCLINTOCK, Mr. GROTHMAN, Mr. MEADOWS, Mr. CONAWAY, and Mr. TROTT) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To regulate certain State impositions on interstate commerce.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “No Regulation Without
5 Representation Act of 2017”.

6 **SEC. 2. MINIMUM JURISDICTIONAL STANDARDS FOR STATE**
7 **AND LOCAL TAXATION AND REGULATION OF**
8 **ITEMS IN INTERSTATE COMMERCE.**

9 (a) IN GENERAL.—To the extent otherwise permis-
10 sible under Federal law, a State may tax or regulate a
11 person’s activity in interstate commerce only when such

1 person is physically present in the State during the period
2 in which the tax or regulation is imposed.

3 (b) REQUIREMENTS FOR PHYSICAL PRESENCE.—

4 (1) IN GENERAL.—For purposes of subsection
5 (a), a person has a physical presence in a State only
6 if such person’s business activities in the State in-
7 clude any of the following during the calendar
8 year—

9 (A) maintaining its commercial or legal
10 domicile in the State;

11 (B) owning, holding a leasehold interest in,
12 or maintaining real property such as an office,
13 retail store, warehouse, distribution center,
14 manufacturing operation, or assembly facility in
15 the State;

16 (C) leasing or owning tangible personal
17 property (other than computer software) of
18 more than de minimis value in the State;

19 (D) having one or more employees, agents,
20 or independent contractors present in the State
21 who provide on-site design, installation, or re-
22 pair services on behalf of the remote seller;

23 (E) having one or more employees, exclu-
24 sive agents or exclusive independent contractors
25 present in the State who engage in activities

1 that substantially assist the person to establish
2 or maintain a market in the State; or

3 (F) regularly employing in the State three
4 or more employees for any purpose.

5 (2) DE MINIMIS PHYSICAL PRESENCE.—For
6 purposes of this section, the term “physical pres-
7 ence” shall not include—

8 (A) entering into an agreement under
9 which a person, for a commission or other con-
10 sideration, directly or indirectly refers potential
11 purchasers to a person outside the State,
12 whether by an Internet-based link or platform,
13 Internet Web site or otherwise;

14 (B) any presence in a State, as described
15 in section 2(b)(1), for less than 15 days in a
16 taxable year (or a greater number of days if
17 provided by State law);

18 (C) product placement, setup, or other
19 services offered in connection with delivery of
20 products by an interstate or in-State carrier or
21 other service provider;

22 (D) Internet advertising services provided
23 by in-State residents which are not exclusively
24 directed towards, or do not solicit exclusively,
25 in-State customers;

1 (E) ownership by a person outside the
2 State of an interest in a limited liability com-
3 pany or similar entity organized or with a phys-
4 ical presence in the State;

5 (F) the furnishing of information to cus-
6 tomers or affiliates in such State, or the cov-
7 erage of events or other gathering of informa-
8 tion in such State by such person, or his rep-
9 resentative, which information is used or dis-
10 seminated from a point outside the State; or

11 (G) business activities directly relating to
12 such person's potential or actual purchase of
13 goods or services within the State if the final
14 decision to purchase is made outside the State.

15 (c) PROTECTION OF NON-SELLERS.—A State may
16 not impose or assess a sales, use, or similar tax on a per-
17 son or impose an obligation to collect or report any infor-
18 mation with respect thereto, unless such person is either
19 a purchaser or a seller having a physical presence in the
20 State.

21 **SEC. 3. DISPUTE RESOLUTION.**

22 The district courts of the United States shall have
23 original jurisdiction over civil actions to enforce the provi-
24 sions of this Act, including authority to issue declaratory
25 judgments pursuant to section 2201 of title 28, United

1 States Code, and, notwithstanding the provisions of sec-
2 tion 1341 of such title, injunctive relief, as necessary to
3 carry out any provision of this Act.

4 **SEC. 4. DEFINITIONS AND EFFECTIVE DATE.**

5 (a) DEFINITIONS.—For purposes of this Act:

6 (1) MARKETPLACE PROVIDER.—The term
7 “marketplace provider” includes any person, other
8 than a seller, who facilitates a sale. For purposes of
9 this subsection, a person facilitates a sale when the
10 person both—

11 (A) lists or advertises products for sale in
12 any forum, including a catalog or Internet Web
13 site; and

14 (B) either directly or indirectly through
15 agreements or arrangements with third parties,
16 collects gross receipts from the customer and
17 transmits those receipts to the marketplace sell-
18 er, whether or not such person deducts any fees
19 or other amounts from those receipts prior to
20 transferring them to the marketplace seller.

21 (2) MARKETPLACE SELLER.—The term “mar-
22 ketplace seller” means a person that has any sales
23 facilitated by a marketplace provider.

24 (3) PERSON.—The term “person” has the
25 meaning given such term by section 1 of title 1,

1 United States Code. Each corporation that is a
2 member of a group of affiliated corporations, wheth-
3 er unitary or not, is itself a separate person.

4 (4) PRODUCT.—The term “product” includes
5 any good or service, tangible or intangible.

6 (5) REFERRER.—The term “referrer” shall
7 mean every person who—

8 (A) contracts or otherwise agrees with a
9 seller to list multiple products for sale and the
10 sales prices thereof in any forum, including a
11 catalog or Internet Web site;

12 (B) receives a fee, commission, or other
13 consideration from a seller for the listing;

14 (C) transfers, via telephone, Internet link,
15 or otherwise, a customer to the seller or the
16 seller’s Web site to complete a purchase; and

17 (D) does not collect receipts from the cus-
18 tomer for the transaction.

19 (6) REGULATE.—The term “regulate” means to
20 impose a standard or requirement on the production,
21 manufacture or post-sale disposal of any product
22 sold or offered for sale in interstate commerce as a
23 condition of sale in a State when—

24 (A) such production or manufacture occurs
25 in another State;

1 (B) such requirement is in addition to the
2 requirements applicable to such production or
3 manufacture pursuant to Federal law and the
4 laws of the State and locality in which such
5 production or manufacture occurs;

6 (C) such imposition is not otherwise ex-
7 pressly permitted by Federal law; and

8 (D) such requirement is enforced by a
9 State's executive branch or its agents or con-
10 tractors.

11 (7) SELLER.—The term “seller” does not in-
12 clude—

13 (A) any marketplace provider (except with
14 respect to the sale through the marketplace of
15 products owned by the marketplace provider);

16 (B) any referrer;

17 (C) any carrier, in which the seller does
18 not have an ownership interest, providing trans-
19 portation or delivery services with respect to
20 tangible personal property; and

21 (D) any credit card issuer, transaction or
22 billing processor, or other financial inter-
23 mediary.

24 (8) SIMILAR TAX.—The term “similar tax”
25 means a tax that is imposed with respect to the sale

1 or use of a product, regardless of whether the tax
2 is imposed on the person making the sale or the pur-
3 chaser, with the right or obligation of the person
4 making the sale to obtain reimbursement for the
5 amount of the tax from the purchaser at the time
6 of the transaction.

7 (9) STATE.—The term “State” means the sev-
8 eral States, the District of Columbia, the Common-
9 wealth of Puerto Rico, Guam, American Samoa, the
10 United States Virgin Islands, the Commonwealth of
11 the Northern Mariana Islands, and any other terri-
12 tory or possession of the United States and includes
13 any political subdivision thereof.

14 (10) TAX.—The term “tax” means to—

15 (A) impose an obligation on a person for—

16 (i) the collection of a sales, use, or
17 similar tax; or

18 (ii) the reporting of any information
19 with respect thereto;

20 (B) assess a sales, use or similar tax on a
21 person;

22 (C) treat a person as doing business in a
23 State for purposes of such a tax; or

24 (D) impose on a business or its non-resi-
25 dent owners, directly or indirectly through

XIII

9

1 mechanisms such as combined reporting or con-
2 solidated returns, a net income tax or any other
3 business activity tax measured by the amount
4 of, or economic results of, business or related
5 activity conducted in or derived from sources in
6 the State.

7 (b) EFFECTIVE DATE.—This Act shall apply with re-
8 spect to calendar quarters beginning on or after January
9 1, 2018.

○

NO REGULATION WITHOUT REPRESENTATION: H.R. 2887 AND THE GROWING PROBLEM OF STATES REGULATING BEYOND THEIR BORDERS

TUESDAY, JULY 25, 2017

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. Tom Marino [Chairman of the Subcommittee] presiding.

Present: Representatives Marino, Goodlatte, Farenthold, Issa, Collins, Buck, Ratcliffe, Handel, Cicilline, Conyers, Johnson of Georgia, Jayapal, and Schneider.

Staff Present: Dan Huff, Counsel; Andrea Woodard, Clerk; and Joe Ehrenkrantz, Minority Counsel.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. Welcome, everyone.

Without objection, the Chair is authorized to declare recess of the Committee at any time. We welcome everyone to today's hearing on "No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders." And I now recognize myself for an opening statement and welcome to the hearing.

Justice Jackson wrote that the "vision of the Founders" was "that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . and no foreign State will by . . . regulations exclude them." Extraterritorial regulations let States export onerous regulations and even activist agendas outside the normal checks of the Democratic process. States shift regulatory burdens to out-of-staters or insulate their own residents from the natural effects of job-killing regulations by subjecting other States' workers and employers to them.

There are numerous examples. Connecticut's e-waste law requires manufacturers who supply electronics to "any distribution network" that reaches Connecticut to pay for recycling. The Consumer Electronics Association challenged a similar 2009 New York City law that went further than any "other take-back programs anywhere in the world." My State of Pennsylvania is home to one of the largest natural gas deposits in the country. I worry that

extraterritorial regulation could allow fringe environmentalists to kill those jobs from afar.

If that sounds farfetched, consider this. Colorado law requires electricity generators, including those out-of-State, to ensure that 20 percent of the electricity they sell to Colorado consumers comes from renewable sources. The coal industry challenged the law but lost. The tenth circuit read the Commerce Clause's extraterritoriality jurisprudence narrowly as applying to protectionist price control regulations only.

In December of 2016, Portland, Oregon passed legislation addressing what the city deemed excessive CEO pay. Beginning January 1 of 2017, a 10 percent tax surcharge is applied to any company whose CEO makes more than 100 times the median employee pay. Pay ratios greater than 250 times the median trigger a 25 percent surcharge. By its terms, the law applies even to out-of-State businesses if they are "delivering goods or providing services to customers within the city." Whether this is good policy can be up for debate, but it should only apply to those who had the ability to vote for the government that imposed the tax.

The Constitution gives Congress the authority to "regulate commerce . . . among the several States." Courts do not view this grant of authority as exclusive, so the question is how much authority States retain in the arena. To answer this question, the judiciary has developed a doctrine known as the "Negative" or "Dormant" Commerce Clause, under which courts will invalidate State laws that either discriminate against or unduly burden interstate commerce.

Courts will also block State laws exhibiting certain forms of extraterritorial reach. However, the survival of Colorado's anti-coal law illustrates the shortcomings of relying on this malleable doctrine. Advocates of greater regulation always cite public safety. In one of the early extraterritorial regulation cases, New York raised its public safety concerns to defend its demand that out-of-State milk producers adhere to New York's minimum price. There are also numerous Federal laws protecting consumer safety covering items in interstate commerce.

I look forward to hearing from the panel of witnesses on the dangers of extraterritorial regulations and the need for Congress to address this issue. The Chair now recognizes the Ranking Member of the full Judiciary Committee on Regulatory Reform, Commercial and Antitrust Law, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. MARINO. Mr. Conyers, just give me one moment. The Ranking Member, Congressman Cicilline from Rhode Island, of this Subcommittee will be with us shortly. So, that is why I ask the Ranking Member of the full Committee to read his opening statement.

Mr. CONYERS. Well, thank you very much, Chairman Marino. I am delighted to be here to join in this serious conversation that we will be having. But before I begin, I would like to just take a moment, if I can, to recognize Joseph Ehrenkrantz for his dedicated service over the past couple years, in which he has diligently served the House Judiciary Committee as a professional staff member.

Mr. Ehrenkrantz began his career with the House Judiciary Committee shortly after his graduation and has worked tirelessly on issues of civil rights, State and local taxation, and voting rights ever since. He has served with energy and enthusiasm and helped coordinate so many of the briefings, markups, and hearings that we have had.

We thank you, sir, for your many outstanding contributions and wish him well. I cannot give you the reason that he is going to begin law school at Georgetown this fall, but I think what he has seen, and heard, and learned on his work here has had an important influence on him. So, we will say farewell but not goodbye.

Now, turning to today's hearing which focuses on the no regulation without representation, it appears that supporters of this legislation intend to address the apparent problem of States regulating beyond their borders. A quarter of a century ago, the United States Supreme Court in the Quill case held that a State may require a business to remit a sales tax only if such business had a physical presence in the State where the goods or services are provided. In an effort to respond to this holding, various legislative responses have been introduced over the years including two of which I was happy to support. Namely, the Remote Transactions Parity Act and the Marketplace Fairness Act.

Although one of these bipartisan measures overwhelmingly passed the Senate in 2013, our Committee has, unfortunately, failed to consider either of these bills. Instead we are focusing today on H.R. 2887, which I think contains a number of problems that we will be looking at more closely. Among its flaws, the bill would eviscerate the 10th Amendment and override the powers of all 50 States by expanding the physical presence standard to all taxes and to all regulations.

H.R. 2887 represents an extreme rethinking of the constitutional role of States in our Nation and would strip essential consumer protection powers and taxing authority from all 50 States, every one of them. To quote the bipartisan National Governors Association and the National Conference of State Legislatures, "This legislation is a direct threat to representative government. It is a direct threat to representative self-government." Simply put, it would preempt tens of thousands of State laws and saddle these States with untenable budget constraints by reducing their ability to collect tax revenues.

Also, this bill appears to ignore the real problems that Main Street retailers face today. Local retailers that have to collect sales taxes are desperately struggling to compete with the reduced prices and convenience offered by remote internet sellers whose online prices are generally lower because many consumers do not pay any sales taxes and thereby can save upwards of 10 percent or even more on the purchase price of these items. Technological advancements have made it easier for consumers to take advantage of this disparity, and the consequences of this loophole are becoming increasingly more apparent.

Since October, at least 10 major, nationwide, brick-and-mortar retailers have filed for bankruptcy. And more than 90,000 workers have been laid off. Retail sector growth is at its weakest since the Great Recession, and recent projections estimate that a quarter of

all shopping malls will close in the next 5 years. Without question, I am a strong supporter of competition, especially when it benefits consumers and encourages innovation. Nevertheless, competitors should compete on things other than sales tax policy. We should ensure parity at the point of sale among retailers and level the playing field.

And lastly, H.R. 2887 by codifying Quill would effectively prevent States and local governments from accessing a substantial part of their tax base. State governments rely on sales and uses taxes for nearly one-third of their total tax revenue. Yet, as more Americans purchase more of their goods on the internet, the States receive less in sales tax revenue. So, we owe it to our local communities and local retailers as well as State and local governments to take up helpful legislation rather than considering measures like the one that is before us this morning. And, accordingly, I urge our Committee Chairman, Goodlatte, and our Subcommittee Chairman, Marino, to instead consider H.R. 2193, the Remote Transaction Parity Act, bipartisan legislation introduced by Representative Kristi Noem early this year.

In closing, I look forward to hearing the testimony for each one of our distinguished witnesses. And I yield back any time that may be remaining, and thank you, Mr. Chairman.

Mr. MARINO. Thank you. The Chair now recognizes the Chairman of the full Judiciary Committee, Congressman Goodlatte of Virginia, for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, for most of American history it was axiomatic that States cannot regulate beyond their borders. This fundamental premise was woven into our founding documents. The principle was reiterated by our courts.

In 1834, Justice Story wrote in his Commentaries on the Conflict of Laws that, “no State or Nation can, by its laws, directly affect, or bind . . . persons not resident therein.” Writing for a unanimous Supreme Court in 1881, Chief Justice Waite observed that, “[n]o State can legislate except with reference to its own jurisdiction.” In 1895, the New York Court of Appeals stated, it is, “a principle of universal application, recognized in all civilized States, that the statutes of one State have . . . no force or effect in another.”

The chief constraint on State regulatory power is the democratic process. Exporting regulations dodges accountability. As the Supreme Court has explained, when “the burden of State regulation falls on the interests outside of the State, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the State are affected.”

Indeed, States have become increasingly aggressive in exporting regulatory burdens.

A 2016 Massachusetts law bans the sale of products from livestock raised in certain types of cages. Since there is only one in-state farm using the targeted cages, Massachusetts Farm Bureau members say they, “Feel like pawns in a national campaign to drive policy in other States.” Alameda County, California forces pharmaceutical companies that sell into the jurisdiction to pay for drug disposal. The chief sponsor of the legislation admitted that

the only thing “wrong” with a preexisting, “publicly-funded [disposal] program,” was that “The taxpayers pay for it.”

North Dakota has one of the country’s largest deposits of lignite coal. The industry employs 4,000 people and provides substantial revenue to the State. In 2016, North Dakota won a 5-year legal battle against a Minnesota law that limited the ability of out-of-State utilities selling power into the State to use coal.

A response from Congress has become increasingly important, because neither the Due Process nor the Commerce Clause of the Constitution has proven a durable, adequate check on extraterritorial State regulation. In both cases, beginning with the New Deal, the original understanding of the Constitution’s protections was watered down or abandoned by courts to make way for big government.

H.R. 2887 would provide a clear congressional response that would, at the same time, protect States’ rights: “If equal States are to retain autonomy over their own affairs, they must refrain from regulating each other’s affairs.” H.R. 2887 would establish just this kind of restraint, by barring States from imposing tax or regulatory burdens on entities that are not physically present.

At the same time, H.R. 2887 specifically permits States to ban the instate sale of items that do not meet Federal health and safety standards or the standards of the producing State.

Opponents of this legislation may warn of a “race to the bottom.” That theory is a handy scare tactic, but scholar Michael Greve writes that, “Modern scholarship has severely undermined [it]s theoretical and empirical foundations.” Furthermore, since H.R. 2887 does not disturb State tort law, producers still have to fear lawsuits from lax standards. There are also a myriad of Federal laws protecting consumer safety.

The No Regulation Without Representation Act respects the States’ role as “laboratories of democracy.” The legislation merely demands that States experiment on their own citizens, not everyone else’s. H.R. 2887 is a bipartisan bill that helps curb State over-regulation by restoring democratic accountability between the regulators and the regulated. I am proud to cosponsor it.

I thank Mr. Sensenbrenner for sponsoring the bill, and I look forward to hearing from our witnesses. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. With no objection, other members’ opening statements will be made part of the record.

I will begin by swearing in our witnesses before introducing them. Would you please stand and raise your right hand? Do you swear or affirm that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

You may be seated. Please let the record reflect that all the witnesses have responded in the affirmative. I will go through and read the intros on each of you, and then you will be able to make your opening statements.

Neil Dierks is chief executive officer of the National Pork Producers Council responsible for the implementation of all NPPC programs. NPPC represents on Capitol Hill the interests of America’s 60,000 pork producers and other participants in the U.S. pork industry. Mr. Dierks is a graduate of Iowa State University. He grew

up on a livestock farm in Eastern Iowa and remains involved in the family farming operation. I live in the middle of several farms, and one is a pork producer.

Mr. Chad DeVeaux. Did I pronounce that correctly?

Mr. DEVEAUX. Yes.

Mr. MARINO. Is a commercial litigation attorney at Atkinson, Andelson, Loya, Ruud & Romo in Southern California. He specializes in constitutional law, particularly the field of horizontal federalism, the laws governing the delineation of power between the States. He has litigated multiple cases concerning the dormant commerce clause and written extensively on the subject, particularly its application to nationwide class actions, agricultural regulations, and marijuana laws. He has also successfully litigated cases involving the First Amendment, procedural and substantive due process, administrative law, and Federal enclave law. He graduated second in his class from the University of Notre Dame's law school and earned a master's of law from Harvard Law School. Welcome.

Andrew Moylan, is that correct, sir?

Mr. MOYLAN. Yes.

Mr. MARINO. Andrew Moylan is executive vice president of the National Taxpayers Union Foundation, a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. He also leads NTU's Interstate Commerce Initiative, a new project to explore the policy implications of governments reaching outside their borders in ways that impede the free flow of goods and information. He was previously executive director of the R Street Institute, a pragmatic, free market think tank, where he conducted policy analysis, oversaw the organization's research, communications, and outreach efforts. Welcome.

With almost 20 years of professional experience in the business community as a certified public accountant, small business owner, and dedicated public servant, Senator Deb Peters is a champion of creating more accountability and transparency in government. Senator Peters became State senator in 2010 after 6 years in the State House of Representatives. In November 2016, she was reelected to her fourth term in the Senate.

Recognized as one of the Governing magazine's public official of the year in 2016, as well as one of the top 40 political rising stars who are under 40 years old by the Washington Post in 2014, she serves as Chair for the Government Operations and Audit Committee as well as an Appropriations Member in the South Dakota Senate. Welcome, Senator.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each of you summarize your testimony in 5 minutes or less. And if you have not been here before, there is a box in front of you that will help you keep the timing. A light will show that green is the go. When it turns to yellow, that gives you about 1 minute. And when it turns to red, that indicates that your 5 minutes have elapsed. And I know when I am sitting there testifying, I pay no attention to the lights.

So, what I will do is diplomatically just sort of pick up the gavel a little bit and ask you to conclude with your statements at a rea-

sonable spot. Mr. Dierks, the floor is yours. Put your microphone on, please.

STATEMENTS OF NEIL DIERKS, CEO, NATIONAL PORK PRODUCERS COUNCIL; CHAD DEVEAUX, ESQ., ASSOCIATE, ATKINSON, ANDELSON, LOYA, RUUD & ROMO; ANDREW MOYLAN, DIRECTOR OF THE INTERSTATE COMMERCE INITIATIVE, NATIONAL TAXPAYERS UNION; AND HONORABLE DEB PETERS, PRESIDENT-ELECT, NATIONAL CONFERENCE OF STATE LEGISLATURES, SENIOR ASSISTANT MAJORITY LEADER, SOUTH DAKOTA LEGISLATURE

STATEMENT OF NEIL DIERKS

Mr. DIERKS. Good morning, Chairman Marino, Ranking Member Cicilline when he arrives, and also, I would say Ranking Member Mr. Conyers and also Chairman Goodlatte from the full Committee. I appreciate the opportunity as well as the thanks to the Subcommittee for this opportunity. As the statement said, I am the CEO of the National Pork Producers Council, which represents interests of America's 60,000 hog farmers. And I did grow up on a farm in Eastern Iowa, a diversified crop livestock farm. And I am involved in that family operation today.

First, today, I want to convey two important messages. The first being that pork producers are not animal rights activists. Lawmakers or regulators should make the decisions about what production practices are best for their animals and for producing safe food. Changes in production practices should be driven by the marketplace, not government fiat or ballot initiatives.

Second, today's pork industry offers American consumers many nutritious choices at affordable prices. Laws and regulations should not restrict the producer's right to choose how to raise and care for their animals or eliminate choices for consumers that have when it comes to producing safe, affordable food for their families.

As you know, there has been a considerable debate over certain animal housing. For our industry, it has been individual pens for housing pregnant sows, often known as gestation stalls. Several States, most with little pork production, have banned gestation stalls, either through ballot initiatives or legislation which was their prerogative, however ill-advised and uninformed their motives.

What NPPC and pork producers object to is one State adopting a law, or regulation, or initiative that dictates the practices of producers in the other 49 States. That is what California in 2010 and Massachusetts did last year in banning the sale of out-of-State pork from pigs born to sows that were housed in gestation stalls which those States have prohibited for their own hog farmers.

I want to point out that California and Massachusetts have very little pork production, and they are telling farmers and States such as Iowa, Minnesota, and North Carolina, Ohio which have a lot of pork production how to run their farms if they want to sell pork in California, Massachusetts.

This has had and will have significant consequences for consumers in the States, for pork producers throughout the country, and ultimately, for all U.S. consumers of pork. Several sow oper-

ations in California, for example, moved out of the State after the voters there, in 2008, approved a ballot initiative banning gestation stalls, as well as battery cages for egg-laying hens, and crates for veal calves. A 2016 Cornell University study found that California's ban on battery cages and on selling eggs from out-of-State hens housed in such cages resulted in a \$0.49 per dozen increase in price. An increase not that severe for the average California household, but the same cannot be said for the poorest California households.

Other research has found that applied to the entire economy, such an increase in egg prices would disproportionately harm lower income households, primarily minorities. And, remember, poor people spend a much larger share of their incomes on food. There is also an economic impact on the producers of those products. For hog farmers, there could be a significant cost for converting their operations from one housing system to another as well as a higher cost of producing pork in some alternative housing systems.

Again, any changes in systems or practices should be based on signals from the marketplace. If all producers were forced to abandon gestation stalls, it would cost the pork industry between \$1.9 billion and more than \$3.2 billion to transition to an alternative housing system. Some of those costs would have to be passed onto consumers.

It seems clear that a prohibition on the instate sale of out-of-State pork from pigs born to sows housed in gestation stalls or any other housing system that might be outlawed is a restraint of trade of interstate commerce, and therefore a violation of the U.S. Constitution's Commerce Clause. NPPC is supporting Congressman Sensenbrenner's H.R. 2887, the No Regulation without Representation Act, to stop such State intrusions on the sovereignty of other States. This legislation will help reign instates restrained of interstate commerce and prevent a patchwork of State laws and regulations affecting the scientifically accepted production practices of producers.

In conclusion, I want to make clear that for the pork industry, States regulating beyond their borders transcends the stall issue. That is just the tip of the iceberg. No doubt, activists will go and have gone after other production practices. And the pork industry will face the prospect of a death by 1,000 cuts resulting in much higher retail pork prices if these non-science-based actions by States are permitted to continue. Of course, this is what the anti-meat activities want. Thank you for the opportunity to testify. Mr. Chairman, I would be happy to answer any questions the Subcommittee has.

Mr. Dierks' written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-Wstate-DierksN-20170725.pdf>.

Mr. MARINO. Thank you, sir.

Mr. DeVeaux.

STATEMENT OF CHAD DEVEAUX

Mr. DEVEAUX. Mr. Chairman, Ranking Member Conyers, and distinguished members of the Committee, it is a great honor to speak to you this morning.

The power of the States to regulate activities beyond their borders is an issue that is literally older than the Constitution itself. Under the Articles of Confederation, States possessed the full scope of power over trade possessed by independent nations. And like too many foreign adversaries of the modern world, they frequently engaged in protectionist economic warfare against their neighbors.

James Madison condemned such trespasses of the States on the rights of each other, particularly, the practice of many States in restricting the commercial intercourse with other States. This spurred mutual jealousies and aggressions, triggering an ever-escalating series of rivalries and reprisals, a series of events which came to a head during the so-called critical period of 1781 to 1787, which led to the Constitutional Convention.

As Justice Stevens observed, the Commerce Clause was the Framers' response to the central problem that gave rise to the Constitution itself. The principal objective of the Constitutional Convention of 1787 was the establishment of a nationwide free-trade zone. As Judge Richard Posner has observed in recent years, the door to rivalries and reprisals can be opened by extraterritorial legislation projecting one State's legislation into neighboring States, even when the law presents no outright discrimination or protectionism in favor of local businesses. Such laws are undemocratic because compliance costs fall on citizens in other States who have no voice in the politics of the enacting State.

For this reason, until recently, our courts have recognized that in the absence of congressional action, the Commerce Clause of its own force, the so-called dormant commerce clause, prohibits States from directly regulating extraterritorial conduct by, precluding the application of State statutes to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State.

Such regulation, exceeds the inherent limit of States' power. This so-called extraterritorial doctrine protects the, autonomy of individual States within their respective spheres by dictating that no State shall have the authority to tell other polities what laws they must enact or how their affairs must be conducted. I have referred to this as the Commerce Clause's sovereign capacity function.

From its inception, the extraterritorial doctrine has weathered unrelenting attack. Critics charged that the doctrine, is a relic of the old world with no useful role to play in the new. And in 2015, the tenth circuit pronounced the doctrine effectively dead. Many hailed this development as a leap forward, arguing that prohibitions against extraterritorial regulation inhibit Brandeisian experimentation: State experimentation with laws that attempt to solve their social and economic problems. But a vibrant extraterritorial doctrine protects regional variation. As the second circuit has noted, consumer protection matters are typically left to control of the States precisely so that different States can apply different regulatory standards based on what is locally appropriate.

Allowing a State to reach into another State's affairs inhibits such variation. How is a State to apply standards that it deems locally appropriate if legislatures in a distant State or even a distant municipality can intercede in its affairs? Worse, as the great Benjamin Cardozo warned long ago, permitting a State to impose its will on other polities invites a speedy end to our national solidarity. Such measure invite rivalries and reprisals. The Constitution, as Justice Cardozo reminded us, was framed under the dominion of a political philosophy less parochial in range.

Mr. DeVeaux's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-Wstate-DeVeauxC-20170725.pdf>.

Mr. MARINO. Thank you.

Mr. Moylan.

STATEMENT OF ANDREW MOYLAN

Mr. MOYLAN. Thank you, Mr. Chairman, for the invitation to testify. My name is Andrew Moylan. I am the executive vice president of the National Taxpayers Union Foundation. And as mentioned, I am also the director of a newly-created Interstate Commerce Initiative at NTU, which is a policy project that focuses on these very issues, the pernicious effects of States attempting to exercise power outside their borders. After spending more than a decade devoting myself to analyzing this growing problem, I came to believe that they required a deeper study which I hope the initiative can give.

Now, much of this is driven by the rise of the internet. The internet has disrupted business models across the economy, but it has also disrupted the business model of governments. Before the internet revolution, individuals and businesses were much more stationary in the conduct of their affairs. It used to be the case that global necessarily meant big. That is no longer the case. Now, the internet allows anyone to act globally. It is vast. It is powerful. It is borderless. But we must not allow the internet to become the vehicle for governments to become similarly vast, powerful, and borderless.

Now, in response to the disruption, we see innumerable examples of States pushing beyond their borders in search of revenue and control. Some have construed this hearing as just being about the issue of internet sales taxes, and I have a great deal to say on that as a manifestation of State overreach. But I want to stress that this is about so much more than that one issue alone. It is about the very nature of State power and the minimum connection that we deem acceptable as the basis for a State to exercise power over an individual or a business.

Some States have proven that they think the answer to that question is basically zero. If you are a Midwestern farmer with the temerity to sell into other States across the country, well, as mentioned Massachusetts and California think that you are subject to their regulatory authority. If you are an individual who does not live in the State but telecommutes for a business that is, New York thinks you are subject to their tax authority. If you are a trucking business with no property, no employees, and no customers in the State, Nebraska has shown that it thinks you are subject to its tax

authority. If I had stronger tendencies toward masochism, I could devote the entirety of my testimony to these examples. But I will spare you along with myself.

So, you will hear from opponents of this bill that it is a dramatic infringement on States' rights, that it would, "Destroy the fundamental principles of federalism that have guided our Nation since its founding." I am a big proponent of the notion that States are better equipped than the Federal Government to address many policy issues. I believe strongly that the Federal Government is too large and too powerful. It has, in fact, usurped a great deal of authority from the States with considerable negative consequences. I have testified to this view multiple times before this very Committee.

But let us make something clear: States do not have rights. States exercise power. People have rights. And States exercise power that they are granted by people. And what is happening across the country is a dramatic infringement on the rights of the people from which States derive their power in the first place, their right to be subject to taxation and regulation only by governments with which they or their businesses have significant connection to laws they can understand and comply with to ensure the free flow of goods and information in interstate commerce.

And if our friends in the States seek a world in which they are not only sovereign within their own borders but also free to exercise power outside them as well, we have just the trick for them. They need simply go back to the 1780s and warn the Founders that we should not draft a new Constitution at all, that this Articles of Confederation thing is working out brilliantly for us. And under that system, we had States exercising power outside their borders with impunity. And Congress had no Commerce Clause power to restrain their abuses. So, tell the Founders that they were wrong, that the careful balance of power between States and the Federal Government that they crafted with the Constitution and that has sustained this Nation for more than two centuries is in fact inferior to a system that collapsed of its own weight in less than a decade.

So, I will close by saying this. Any reasonable conception of limited government must recognize that there are limits on State power just as it recognizes that there are limits on Federal power. States are sovereign within their own territory, but their power must stop at border's edge. Absent reasonable guidelines like those laid out in H.R. 2887, the alternative is an unthinkable morass of cross-border taxes and regulations that undermines interstate commerce and subjects taxpayers to the authorities of governments with which they have no connection.

H.R. 2887 would prevent that in very plain language consistent with Congress' proper constitutional role while preserving States' legitimate prerogatives to conduct their own affairs. It is a simple bill. It is a smart bill, and I think it deserves your support. And I look forward to the committee's questions. Thank you.

Mr. Moylan's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-Wstate-MoylanA-20170725.pdf>.

Mr. MARINO. Thank you.

Senator Peters.

STATEMENT OF DEB PETERS

Ms. PETERS. Good morning.

Mr. MARINO. Good morning.

Ms. PETERS. I am Deb Peters. I am a Republican elected official from the State of South Dakota, and I want to thank Chairman Marino, Ranking Member Cicilline, and Chairman Goodlatte, and Ranking Member Conyers, and distinguished members of the Subcommittee. I am pleased to submit my written statements on behalf of the National Conference of State Legislatures and respectfully request that they be added to the record.

In drafting the United States Constitution, the Framers envisioned a union of sovereign States that granted limited power to the Federal Government. This was reinforced by the ratification of the 10th Amendment which protects against centralized power and reserves powers to the States that were not delegated to the Federal Government.

The 10th Amendment has defined American federalism: the relationship between Federal and State governments by preserving broad powers to the States and to the people. States have used this sovereignty to enact laws to protect the health, safety, and welfare of their citizens. State lawmakers understand that Federal Government has the power over important policy arenas such as national defense and interstate commerce. However, we also understand the role of State governance. Each State is unique and is confronted with different problems and policy choices from their constituents. There are rare instances where a national one-size-fits-all approach is the best policy for citizens in every State.

Unfortunately, Congress and the Federal Government often ignore States' concerns and enact rules and laws that one, preempt States, put undue burden on State finances, and are extremely difficult to implement. And as Congress and State legislatures represent the same constituencies, the people who often suffer from failed national one-size-fits-all policies are the same people we all represent. Since the beginning of the 20th century, Congress has increasingly eroded the regulatory powers of States, primarily through the Commerce Clause. This erosion of State sovereignty has only been accelerated in recent years as Congressional thirst to dictate State governance apparently cannot be quenched. The Framers of our Constitution should be alarmed.

Ultimately, States have the constitutional right and obligation to enact laws that are not only in the best interest of their citizens and businesses but that reflect the popular approval of their citizens. State sovereignty, or states' rights, is not a doctrine of convenience. Rather it is an idea that States and their citizens know best how to govern themselves. The No Regulation without Representation Act embodies the Federal encroachment of State sovereignty the Framers feared. This legislation violates the Tenth Amendment guarantee that sovereign rights of the States cannot be abridged by Congress and aims to eliminate states' powers within their borders.

While the full scope of thousands of State laws and regulations would be preempted by this bill would be almost impossible to

quantify, I did include a couple of examples in my written testimony. And I do not want to talk about them today. But with respect to remote sales tax collection, this bill unjustifiably preempts States' authority as it goes beyond physical presence standard established in the Supreme Court Quill decision in 1992. And for the record, this bill today does not codify the Quill decision.

Since 2002, broadly supported legislation has been introduced into Congress to fix remote sales tax collection problems which has included the Marketplace Fairness Act, MFA, and the Remote Transaction Parity Act, RTPAs. Just for the record, it has been 1,541 days since MFA overwhelmingly passed the United States Senate with a 69 to 27 vote in 2013. It has been 1,502 since that legislation was referred to this Subcommittee. It has been 750 days since RTPA was first referred to this Subcommittee in 2015. RTPA was just reintroduced into this Congress 89 days ago, and it was referred to this Committee 81 days ago.

However, today's hearing is not on MFA or on RTPA. Instead, it is on a bill referred to this Committee just 6 days ago. This bill does not fix remote sales tax collection problems. It exacerbates it. This bill is one of the most preemptive legislative measures ever introduced into Congress. NCL adamantly opposes it, and I urge Congress to do so as well.

I appreciate the opportunity to testify today. I am also proud to sit here as an elected official from South Dakota supporting Representative Kristi Noem's commonsense legislation, the Remote Transaction Parity Act. RTPA should have been a part of today's hearing and is widely supported by businesses, governors, and State legislatures. As sovereign States, we look forward to constructively working with Congress and the administration to usher in a new era of federalism in the United States which will return decision making back to the States. States are the laboratories of democracy, and we need the power and the flexibility to innovate, create, and adapt policies and procedures that best meet the needs of our citizens. As your counterparts in the States, we look forward to continuing the partnership that will advance State legislatures' role in innovative policy making that our forefathers have envisioned.

And with that, I will stand by for questions. Thank you.

Hon. Peters' written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-Wstate-PetersD-20170725.pdf>.

Mr. MARINO. Thank you. The Chair now recognizes the Chairman of the full Judiciary Committee, Chairman Goodlatte, for his 5 minutes of questioning.

Chairman GOODLATTE. Thank you, Mr. Chairman. Senator Peters, welcome. I want to thank all the witnesses for their testimony. I am particularly interested in yours because you did not address the problem that this legislation is attempting to address. Let me give you an example.

California's controversial low-carbon fuel standard purports to regulate the out-of-State production of ethanol sold into California in order to reduce carbon emissions. I want to read you a lengthy quote from an appellate brief challenging the law. "The LCFS is an

attempt to impose the views of one large State, California, on the other 49 States. As sovereign States, Amici recognize California's ability to regulate conduct that occurs wholly within its borders such as imposition of stricter emission limits on ethanol-producing facilities and other activities within California.

But here, the LCFS reaches out across the Rockies and into the Plains to regulate Amici States' ethanol industry, corn farming, and a host of activities that are far removed from California. The only difference is how ethanol is produced in other States which is not California's right to decide. Here, the whole premise of California's approach is to use California's economic power to control out-of-State activities. California wants to discourage such activity because it believes it contributes to global warming. But Amici States may want to encourage cultivation and other economic activity. That is our decision to make.

The penalty is also affected by California's views about various farming practices. California is thus seeking to change out-of-State farming practices based on its views of what is more sustainable. It is none of California's business how farmers in other States choose to grow their corn. The United States is a common market. California may not blockade out-of-State products in an attempt to force changes in out-of-State farming policies." This is the case of *Rocky Mountain Farmers v. Goldstein*. Do you know what State signed the appellate brief that I just read from?

Ms. PETERS. I do not know as I am not an attorney.

Chairman GOODLATTE. Well, the answer is that one of the States that signed it was the State of South Dakota. Do you think South Dakota has a strong point in arguing against California's attempt to regulate corn farmers in South Dakota?

Ms. PETERS. Mr. Chairman, I do not disagree with you, Mr. Chairman.

Chairman GOODLATTE. Good. That is all I am asking. Do you—

Ms. PETERS. However, I would like the opportunity to answer your question.

Chairman GOODLATTE. Okay.

Ms. PETERS. You are right. This bill attempts to create solutions for ethanol, pork, taxes, you name it, ethanol, corn, eggs, you name it.

Chairman GOODLATTE. It does not attempt to create any solutions. What it attempts to do is stop States from regulating businesses and people outside their jurisdiction.

Ms. PETERS. Mr. Chairman, if I can continue? I do not disagree with you, but specific issues with specific problems should be regulated on a case-by-case basis. You cannot just drop a one-size-fits-all thing that is going to help our pork producers, or our cattle industry, or our egg industry. And for that matter, now you are trying to throw in legal discussions about tax policy on digital goods, and mobile workforce, and employees in workforce.

Chairman GOODLATTE. This does not—

Ms. PETERS. It should all be one—

Chairman GOODLATTE [continuing]. Does not help.

Ms. PETERS [continuing]. Case-by-case—

Chairman GOODLATTE. Mr. Chairman, the time is mine. This does not solve any of those problems. What it does is prevent

States from attempting to regulate businesses outside of their jurisdiction. That is all that it attempts to do, and that is why it is important. The Ninth Circuit rejected South Dakota's challenge. H.R. 2887, the bill that Mr. Sensenbrenner introduced, would shield South Dakota farmers from precisely such regulatory overreach. Does that not suggest the need for congressional action?

Ms. PETERS. Mr. Chairman, again as I would say, it is not this body's responsibility to talk about my constituents. The people, if they vote to institute a law—

Chairman GOODLATTE. I am talking about—

Ms. PETERS [continuing]. That regulates eggs, then it is up to them.

Chairman GOODLATTE. Reclaiming my time, I am talking about my constituents. My constituents in the State of Virginia, and I very much respect your respect for the 10th Amendment to the United States Constitution. But that amendment preserves the powers of the States within their borders, not to regulate commerce outside their jurisdiction. And that is what the Constitution reserves for the Congress through the Commerce Clause. And this legislation is simply attempting to respond to what the courts have ignored for a number of years now.

Ms. PETERS. Mr. Chairman, if I can respond as well?

Chairman GOODLATTE. You can.

Ms. PETERS. My constituency should be able to do what they wish. And if my businesses in my community cannot sell in California because they do not follow California law, that is open and free market. And that is their decision. Now, do I think that that is an issue that we need to address? Absolutely. However, I do not believe that this particular piece of legislation is the right answer to fix the ag community. I think the ag community should come up with a solution separately from a tax solution, separately from a legal solution, or separately from a regulatory solution.

Chairman GOODLATTE. Mr. Moylan, would you care to respond to that?

Mr. MOYLAN. I would make one point that the epitome of a one-size-fits-all solution is quite literally in the State of California a one-hen-cage-size fits all solution that I talked about in my written testimony where California has attempted to regulate the size of cages of hens grown for egg production. And they are attempting to force that standard on businesses in Missouri and other kinds of places that have much more dairy production. That is a one-size-fits-all solution, and that is a bad application of a one-size-fits-all solution.

I would say one other thing, though, that there are some situations where a one-size-fits-all solution actually is appropriate. And it is when we are talking about basic constitutional principles. The First Amendment is a one-size-fits-all solution. Now specific application of regulations consistent with the First Amendment after that, of course, States have different approaches in how they regulate any number of different things. But when we are talking about basic, baseline constitutional principles like that, that is what I think this bill does, is it establishes a basic, baseline constitutional principle that you have to have a physical presence in a State be-

fore you can be expected to comply with their laws. So, I think that that phrasing provides an interesting bit of analysis.

Chairman GOODLATTE. Thank you. Thank you, Mr. Chairman.

Mr. MARINO. The Chair now recognizes the Ranking Member of the full Judiciary Committee, Congressman Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. Senator Peters, you really put this thing into a perspective that I think is very important. Now, Chairman Goodlatte is a very experienced national legislator, and I wanted to give you a chance if you wanted to get your idea to him across to take 1 minute or 2 on that if you would, please.

Ms. PETERS. Thank you, Mr. Conyers. To put it into a perspective as far as states' rights and constituencies, we all represent the same people. Our citizens and our communities bring things to us.

For example, in my written statement, Salvia. Salvia is a dangerous hallucinogenic drug that has not been addressed by Congress or put as illegal across the country. But it has been an issue that was brought to us in the legislature because it is a dangerous hallucinogenic drug that causes psychotropic experiences similar to LSD. Because that was a constituency issue, it was brought to us, we made it illegal to consume it, to sell it. We found out that that particular drug was being sold in t-shirt shops as an herb. But it was not dealt with at the Federal Government. So, the States took it upon themselves to ban it and regulate it.

This bill today will not allow my State, because it is shipped in from somewhere else. It cannot be grown in my State, but it is shipped in. And this will not allow me as my State to take a dangerous drug that my constituencies have said is a dangerous drug and to ban it.

Another example is pine beetles in South Dakota. We have just finally beat the pine beetle epidemic in the State of South Dakota, and we had to change a lot of regulations on regulating transportation and a lot of things. We have a lot of Federal land in the State of South Dakota, and we had to work with the Federal Government. But because of the differences in how we manage land, the Federal Government versus State government versus the localities, whether you are a private landowner or not, we had to make a variety of different changes. But this law, if it passed, would not allow us to make those proper changes to protect our trees, and our mountains, and our environment.

So, with that, those are just two really quick examples of things that are not tax-related that would really force States to not be able to deal with the constituencies and the issues that are local. And that is where the power should be left.

Mr. CONYERS. Senator Peters, what do you think would be the effect of this bill on jobs and economic growth in the States?

Ms. PETERS. I think that is a really unique question, and I appreciate the opportunity to address it. You know, the States are laboratories of democracy. With the flexibility granted to us from this esteemed body, we are able to be creative and innovative in how things work. California has a unique set of jobs and circumstances in Silicon Valley. They have been able to adapt the rules and laws to generate jobs within Silicon Valley based on technology changes. South Dakota has been able to do the same.

I think this particular piece of legislation will actually inhibit jobs, inhibit economic growth because it will not allow States to foster, and develop, and help create policies and procedures to ensure economic development across our States.

Mr. CONYERS. Let me ask you about the Quill decision which was decided 25 years ago. Have we not improved our technology to the point where the burden on collecting sales tax is practically non-existent?

Ms. PETERS. Again, thank you very much for that question. I am a CPA in real life. I am a part-time legislator, part-time CPA, and full-time mother of two teenage boys. So, the whole idea and the whole concept of a court case in 1992 which reaffirmed a court case from 1967, putting this into perspective, 1967; I was not born yet. In 1992, I was a junior in high school, and I am sitting before Congress talking about an issue that happened before I was born.

So, talking about technology and—

Mr. CONYERS. You are pretty good at that.

Ms. PETERS. Thank you. But talking about the way technology has changed since 1967, let's put it into perspective. John McCain was shot down over North Vietnam in 1967. A lot has changed since 1967. The world has changed. The way we do business has changed. Technology has changed the way we do business. So, it is an interesting discussion to have about sales tax and talk about technology.

If you look at RTPA and some of the safeguards in RTPA to protect business, and States' overreach, and over auditing, they include in RTPA the ability for States to provide the software for free to the businesses to use. The technology is there. Over 24 to 26 States are currently using it today. If you want to talk about Californian egg laws, if California supplied all of the cages to the farmers, then I have no problem with California changing the law to protect the citizens because that is what they voted for.

Mr. PETERS. Sure. Thank you—

Ms. PETERS. But that is part of the problem. So, thank you, Mr. Conyers.

Mr. CONYERS. Thanks so much. I want, Mr. Chairman, to submit for the record letters, especially—one, two, three, four, five, six, seven—seven different organizations, but especially the first one, Marketplace Fairness Coalition, signed by over 120 companies and associations and 12 unions, all of the biggies. And the Governors Association and the Conference of State Legislators, as well as for our Ranking Member, Mr. Cicilline and a letter from Representative Noem.

Mr. MARINO. Without objection.

These materials are available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-20170725-SD003.pdf>.

Mr. CONYERS. Thank you, sir. And I want to thank our witness, as a CPA and an expert on the considerations to this bill, we value your presence here today. And I thank you very much. Yield back, Mr. Chairman.

Mr. MARINO. Thank you.

Chairman GOODLATTE. Mr. Chairman.

Mr. MARINO. Yes, sir.

Chairman GOODLATTE. Mr. Chairman, I ask unanimous consent just going to send to enter in the record the following testimony and letters of support for H.R. 2887: a letter of support from the National Cattlemen's Beef Association, North American Meat Association, the National Pork Producers Council; letter of support from the Virginia Cattlemen's Association; a letter of support from 18 conservative organizations, including Americans for Tax Reform, National Taxpayers Union, ALEC Action, Americans for Prosperity, Center for Peace, Freedom, and Prosperity, Competitive Enterprise Institute, Conservative HQ.com, Council for Citizens Against Government Waste, Digital Liberty, DownsizeDC.org, Incorporated, Freedom Works, Free the People, Independent Women's Voice, Institute for Liberty, National Center for Policy Analysis, R Street Institute, Taxpayers Protection Alliance, Tea Party Nation; a letter of support from the American Catalog Mailers Association; a letter of support and testimony from Net Choice; a letter of support and testimony from Overstock, testimony from George Isaacson; a Supreme Court litigator and expert on federalism and nexus.

Mr. MARINO. Without objection.

These materials are available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170725/106310/HMTG-115-JU05-20170725-SD002.pdf>.

Chairman GOODLATTE. Thank you, Mr. Chairman.

Mr. MARINO. The Chair now recognizes the Vice Chairman of the Subcommittee Farenthold from Texas.

Mr. FARENTHOLD. Thank you, Mr. Chairman. Mr. DeVeaux, I would like to start with you. One of my concerns is how we define regulation in this bill. Currently the draft restrains regulation on production, manufacture, or post-sale disposal of a product. In your opinion, are these categories broad enough to cover the across State border regulatory overreach that is happening? And if not, what else would you include?

Mr. DEVEAUX. Well, yeah, I do think it is broad enough. It encompasses about everything in terms of the issue, but—

Mr. FARENTHOLD. Great. I just want to make sure we were not leaving something out and have to come back and revisit this issue. Senator Peters, you talk about the Marketplace Fairness Act and Remote Transaction Parity Act. What effect do you believe this legislation would have on the internet sales tax debate?

Ms. PETERS. I think it puts us back to when sales tax was enacted in 1939 in the State of South Dakota, and the world has changed since then.

Mr. FARENTHOLD. All right. So, Mr. Moylan, do you have some thoughts on that?

Mr. MOYLAN. I do, you will be surprised to hear. My thoughts are that this legislation, I think is a very important first step. It is not the only step, but it is a very important first step in helping to sort of reset what has been a very difficult and, frankly, a very poisonous debate over many years in Washington. And the reason I think it is an important first step is because it underscores that incredibly important basic constitutional principle that a business or an individual should not have to comply with the laws of a State unless they are physically present in that State, that that ensures that connection.

And then, I think it is the perfectly reasonable purview of this Congress or, you know, other entities to consider are there things consistent with those principles that might help to address the issues? I have testified before this Committee about what my own thoughts are about that approach. But I think this is an important first step, and what it does is it helps us to clear up this morass of State level litigation where States are passing knowingly unconstitutional bills in order to draw litigation. This is the kind of thing that throws businesses into turmoil and a tremendous amount of—

Mr. FARENTHOLD. Can we talk a little more about the sales tax issue? One of my most unpleasant memories of operating a small business before I came to Congress was the sales tax audit. They sent two folks who we had to provide an office for. It stuck around my office for about two weeks, and poked around on our computers, and every file we had. We had an employee dedicated to finding documents for them and helping them out. That was one State. That was Texas auditing a Texas company. If I were subject to having to pay sales tax in all 50 States, what is stopping each one of those 50 States from sending somebody in to audit me every year? I mean, I could not afford that.

Mr. MOYLAN. Well, my condolences for your experience, and I would say—

Mr. FARENTHOLD. We did come out only owing about \$200. I consider that a win.

Mr. MOYLAN. Well, it could have been worse then. What I would say are two things. We heard about, well has technology not advanced? And I think that, you know, maybe you are a good example of this. I often say about the complexity issue and technology, if you think that technology can solve sales tax complexity, you must think that TurboTax has solved income tax complexity. And anyone who has filed income taxes through TurboTax knows that the challenge in filing your taxes with TurboTax is not in doing the math. We really have had the technology to do the math for decades at this point.

The challenge is in deciding what credits you might actually qualify for, do you meet a multiple part test, did you spend enough to meet this threshold? These are the decisions that software cannot answer for you. And as a business, you cannot answer just by software whether something is included in a tax base or not. And so, even getting free software which I will steal a line from a friend of mine that it is free like a puppy, you know, because then you have to pay to integrate it. You have to pay to maintain it and operate it inside your systems. Even if you pay for free software for people, it does not solve that fundamental problem. And so, I think while the world has changed a great deal, there are some things that we have not yet figured out how to solve with—

Mr. FARENTHOLD. All right. And just before I let go of the sales tax issue, I have got one more question for you. Some States are now forcing online retailers to report to the State on private and often sensitive online purchase information by State residents, I guess in an effort to come after those individual residents to collect the use tax. Does that not strike you as a serious privacy violation?

Mr. MOYLAN. It does indeed. I think it provides some very serious concerns about privacy. We have seen the way that, unfortunately, the way that government agencies handle sensitive information for individuals. And we are talking about the most sensitive personal information and financial information as it relates to sales tax. And so, I think that that is a major concern. And that is why, you know, we have this ongoing litigation in all of these different States. That is why I think this bill is important, is to help clarify that debate, help, you know, get us past some of these arguments that we are going over and over in all of these States now. Establish that baseline principle, and then allow us to have what I think is a more intelligent conversation after that.

Mr. FARENTHOLD. Thank you very much for your answer. Mr. Chairman, I see my time has expired.

Mr. MARINO. Thank you. The Chair now recognizes the Ranking Member of the Subcommittee. The time goes to Mr. Cicilline for his opening statement.

Mr. CICILLINE. Thank you, Mr. Chairman, and thank you to our witnesses for being here today. Small, locally-owned businesses are the lifeblood of our communities. Whether it is the local bookstore, coffee shop, hardware store, restaurant, or grocer, these small-scale businesses form the backbone of communities that are more prosperous, entrepreneurial, and connected as the Institute for Local Self Reliance reports.

Leading studies have also found that more than half of every dollar invested in locally-owned business stays in the community. That is because locally-owned businesses invest in labor, goods, and services located within our communities. Profits are paid to local owners who live in the community and local workers who receive higher wages at locally owned businesses. And in times of economic downturn or recession, locally-owned businesses create and retain jobs at a higher rate than larger corporations as leading economists at Yale University and the University of Bristol found in 2012.

But for decades, the value of goods sold by locally owned business has diminished due to tax loopholes for online purchases. Even though taxes are owed on these purchases in nearly every State, few consumers are aware of this requirement or can reasonably be expected to track and report their own taxes from online purchases, also known as use taxes. The result of this tax loophole has been catastrophic. Over 3,000 stores are expected to close this year, double the number of closings during this period last year, while the number of monthly job losses in the retail sector far exceeds the losses in every other sector of the economy combined.

And every week, as businesses and retailers are forced to close their doors, hardworking Americans want to know why has Congress failed to act? I am a proud cosponsor of H.R. 2193, the Remote Transaction Parity Act, which would end these unfair tax breaks that stack the deck against locally owned businesses. This bill is a job and economic opportunity creator.

Conservative economic experts report that this commonsense measure would create more than 1.5 million jobs over a decade and reduce or eliminate State budget shortfalls by providing equal treatment for all businesses. This State revenue is critical to helping our communities invest in infrastructure projects like bridges,

roads, and broadband internet access, not to mention important public services like education, healthcare, and law enforcement.

These are projects and services that our communities need to flourish in the 21st century economy. And to those who argue that this is a new tax, several States including Wisconsin, have already signed laws into place to ensure that revenue collected through this bill will result in tax reductions. And yet rather than act on this legislation which has broad, bipartisan support, we are now considering H.R. 2887, which might more accurately be called the Destroying Locally-Owned Business and State Sovereignty Act.

H.R. 2887 prohibits States from collecting taxes on purchases from out-of-State sellers unless they are physically present in the State for at least 15 days in a taxable year. This legislation in my view is a dangerous and transparent attempt to bait our local stores to negotiate against the interests of local communities. It should come as no surprise that this bill was drafted without input from locally-owned businesses, brick and mortar stores, or State and local governments. At a time when online commerce is a large and rapidly growing portion of all sales, H.R. 2887 has carve-outs for online commerce and would prevent States from collecting taxes on goods from out-of-State sellers.

And according to the Congressional Budget Office, requiring physical presence requirement for corporate income taxes alone, as this bill would do, would steal billions from State budgets every year. Worse still, this legislation is an existential threat to the sovereignty of State governments. And this is no exaggeration. H.R. 2887 prohibits States from imposing standards on commerce made by out-of-State manufacturers and sellers unless they have a physical presence within the State for 15 days in a taxable year.

As the coalition of leading administrative and constitutional law scholars note, this bill unconstitutionally ejects States from their role in the Federal system and is anathema to long-settled constitutional law, bedrock principles of federalism, and State innovation. Yes, I am. Okay. I am going to yield back and return later for my questions.

Mr. MARINO. The Chair now recognizes Congressman Buck for his questioning.

Mr. BUCK. Thank you, Mr. Chairman. Mr. Dierks, quick question since you seem lonely over there. I just want to know your thoughts on some of the comments by Senator Peters. Is it in your opinion that a State like California may regulate commerce in a State like South Dakota?

Mr. DIERKS. No, we understand California's ability to regulate their own citizens. It is by making requirements of what gets sold in a given State that producers in South Dakota, Iowa, Missouri, or whatever respond to. And part of the problem is it puts a wedge in between the marketplace and what the customer wants. We are all for the marketplace, and if the marketplace demands it, our industry is plastic. We will respond to it.

What we get is a false signal of a requirement, and generally what we see in our industry with these housing changes is that there has been some adoption. It has been slow. And one of the common things we hear is that there is no economic incentive to do it, and for a lot of producers, there is quite a burden to retrofit

operations that have a long life to them in order to fill a desire in a State that I would argue, if there was a market for, the marketplace would have demanded.

Mr. BUCK. Okay. Mr. DeVeaux.

Mr. DIERKS. Rather than—

Mr. BUCK. I am going to move on. Mr. DeVeaux, any comments on that?

Mr. DEVEAUX. Well, I mean I would say the key thing to think about, and I am, with respect to all witnesses here, my bigger concern in terms of the sovereignty issue is not so much just the parties that are being regulated themselves but the consumers in the various States. Because these kind of effects will raise the cost of agricultural products in other States for consumers. You know, the folks here have lobbies to help protect them, but the consumers that go to the grocery stores in Ohio do not.

So, my own personal stake in it would be it is above my paygrade to make a judgment about whether Massachusetts is right and Nebraska is wrong or Nebraska is right and Massachusetts is wrong. It is more a function of—

Mr. BUCK. I did not ask that. I asked whether a State like California can regulate commerce from South Dakota, regulate what a farmer in South Dakota does.

Mr. DEVEAUX. Well, I mean, under the current constitutional tests that are being applied by the courts, they effectively can because basically the rule is that if the State is imposing a law that burdens interstate commerce, it is subjected to what is called the Pike test. And under the Pike test, the question is: is the burden on interstate commerce clearly excessive in relation to the putative local benefit? And that test is extremely deferential to the regulating States. And virtually the only time that something does not pass the Pike test are cases where the regulation serves no local benefit.

Mr. BUCK. Mr. Moylan, let me ask you a question, maybe make it a little more specific. Can the State of California place a tax on products that are exported from the State of South Dakota to the State of California?

Mr. MOYLAN. Well, you have cut right to the heart of what this bill is about. And the answer is that there is some gray area today, and that this bill would eliminate that gray area, I think, in an important fashion. But rather than sort of restating what some of my colleagues have said, I would make a different point which is that often the response to, well if you do not like California's laws then do not sell into California. That is something that we hear an awful lot in these instances. And I think that it is interesting because it reveals the very interstate commerce burden that this bill is intent on trying to address. That folks say, well—

Mr. BUCK. And would not we end up—

Mr. MOYLAN [continuing]. Do not sell, that is the commerce burden we are talking about—

Mr. BUCK. Would we not end up in that situation with 50 different statutory schemes that would face 50 different burdens on a producer in any given State? Whether it is a tax, whether it is an environmental regulation, whatever the regulation is, practically no farmer in my district in Colorado which is close to South

Dakota—only Wyoming separates the two of us—and Wyoming is fairly big. But no farmer could possibly comply with 50 different regulatory burdens. And the whole point of promoting interstate commerce, the whole point of moving from the Articles of Confederation to the Constitution was to promote a marketplace that would be fair to especially small business in America. Comments?

Mr. MOYLAN. I think that is right, and I think that, unfortunately, what we are seeing is that this gray area is pushing us farther down this slippery slope and faster toward that scenario that you describe of having to comply with all of these different jurisdictions, faster than many folks thought. And that is why this bill is necessary.

Mr. BUCK. I yield back, Mr. Chairman.

Mr. MARINO. The Chair now again recognizes Ranking Member Congressman Cicilline for his questions.

Mr. CICILLINE. Thank you, Mr. Chairman, and thank you again to the witnesses. A group of leading administrative and constitutional law scholars have noted that H.R. 2887 will undermine “a vast scope of State regulation that would fall under H.R. 2887’s prohibitions, licensing for service professions, consumer protections, tort reforms, oil and gas extraction laws, environmental health and safety protections, agricultural standards, and even State quarantine laws.”

Well, let me first ask Mr. Moylan, how do you justify a 15-day physical presence requirement for essential protections for State citizens? It is a State’s, of course, interest and obligation to protect its citizens. Why should it be dependent in fulfilling that responsibility on a 15-day physical presence requirement?

Mr. MOYLAN. Well, I would answer first by saying that it is not at all clear to me that each one of those laws would be invalidated by H.R. 2887. We have—

Mr. CICILLINE. Why not?

Mr. MOYLAN. Well, one example that was prior to your arriving was Senator Peters talked about the issue of Salvia, a drug that they have banned in the State of South Dakota. It is not at all clear to me that this bill would prevent South Dakota from regulating the production or consumption of that drug. And to the extent that there are genuine interstate commerce issues, which there likely are if it is being transported into the State, then that is an area where we would expect the States and the Federal Government to work together to come up with a solution that is consistent with the Commerce Clause.

And that is where I think a 15-day physical presence standard is certainly reasonable for any sort of business that might be engaged, is in that sort of limited slice. But I think this broad swath that folks posit is a little bit overblown in my opinion.

Mr. CICILLINE. Senator Peters, I apologize for promoting you to the House. Would you speak to that, what you think the implication would be on States’ responsibilities to protect its citizens in those areas that I described or that these leading administrative and constitutional law scholars referenced of consumer protection, health and safety standards, quarantines, et cetera?

Ms. PETERS. Thank you very much for your question. You know, I do not even know where to begin with some of the issues that

you have raised simply because this is such a broad piece of legislation. It encompasses everything from energy to agriculture to tax policy; it is almost like we have decided that we cannot fix it all in one fell swoop. So, let's just bring the bunker buster bomb and drop it instead of taking the surgical knife and saying, hey, I got a problem with the way California is legislating eggs and pork.

Well, let's take the surgical knife then and the scalpel, and let's legislate that smart. Let's be smart. Let's do our homework. Let's do the hard work and make the tough decision. When you want to talk about 15 days, just think about every State and all of the little special events that you have in your State. South Dakota, we have the Sturgis Bike Rally. That is a 14- to 15-day event. We have retailers from all over the country and the world that fly into the State of South Dakota for a 2-week event. And guess what? It does not matter what they are. They could be selling Salvia. We do not have legalized marijuana in South Dakota. So, they could be selling marijuana because they would not meet the 15-day test.

If you are going to start a bill with saying, wait a minute. That is not our intent, and you have to create a laundry list of exceptions like drugs. Then we have a problem. It is too broad. It is not specific enough to address the specific problems that we are here to talk about.

Mr. CICILLINE. Thank you. I mean, I think that is further supported by another letter that was submitted for the record from one of our colleagues, Kristi Noem, who sought to testify before this Committee. A member of the Republican Caucus, and I think it shows that even within their own Caucus, there are some concerns about this.

Finally, the Congressional Budget Office has previously estimated that requiring physical presence for business activity would lead to losses of more than \$2 billion in the first full year after enactment and at least that amount in subsequent years. The National Conference of State Legislatures estimates that the loss would be \$26 billion. If you use the figure, the low figure of the \$2 billion, that would be, just to give you some perspective, \$1 billion a year would pay for the salary of 17,000 public school teachers, and over 16,000 police officers, or 31,000 paramedics.

So, I mean, I wonder what the expectation is of the witnesses of what States would do with this crushing loss of revenue as a result of enactment of this. Maybe Senator Peters, you could talk about what you think the implications would be for a State such as yours?

Ms. PETERS. Just to give an example for the State of South Dakota, 80 percent of our budget is a consumption tax. If you want to talk about tying the hands of these devices that have changed the way economies have worked, and how businesses do business, and how people buy and sell things, and you are going to tie our hands, now remember I am a Republican from a conservative State that relies on their budget, 80 percent consumption tax. That has been the goal is to tax and keep taxes at the local level to keep it so they support the local governments. If this bill goes into effect today, you are going to throw us into a whole another taxing regime like an income tax or a personal income tax. We do not have

those today, but if you tie my hands that funds 80 percent of my budget, I have to figure out something.

And then, how do you pay for the police, the fire, the schools, the education, and all of the Federal mandates that the Federal Government puts on us for Medicaid and et cetera?

Mr. CICILLINE. Thank you very much. I yield back, Mr. Chairman.

Mr. MARINO. The Chair recognizes Mr. Ratcliffe I see is back. Sorry about that. Mr. Ratcliffe is from Texas.

Mr. RATCLIFFE. Thank you, Mr. Chairman. I appreciate all the witnesses being here today. Mr. Dierks, let me start with you. Your written testimony describes the pork production process as being very complex. Now, the district that I represent has broader but similar agricultural processes and concerns, if you will. As you know, there are some activist groups have sought to use ballot initiatives and legislation in other States to essentially impose regulatory burdens on agricultural businesses in Texas.

Democratic accountability is supposed to provide an important check and balance, if you will, on overregulation. But if that regulation is extraterritorial, that check and balance is essentially circumvented. Would you agree?

Mr. DIERKS. With the extraterritorial side it is. I mean, from the people in Texas taking mandates from Massachusetts, for instance.

Mr. RATCLIFFE. Mr.—

Mr. DIERKS. I mean, it would. And our industry tends to be as close to the marketplace as possible. So, if the consumer demands it, it will be responded to. If there is something that comes in as you said, activist groups that target States that do not have, in our case, pork production, which is where we have seen these things happen. And ballot initiatives that are worded in such a way that everybody would agree with them because it talks about soft, fluffy things like a Hallmark gift card. But then, it is the devil is in the detail. And that devil suddenly brings issues at hand.

And what is interesting about it is some see this as oh, these sophisticated pork producers' operations. Well, unlike the reference that Mr. Goodlatte gave to Massachusetts, we did not have any operations producers from Massachusetts using individual maternity pens gestation housing. And, actually, what they are doing to their citizens to the State of Massachusetts is that they are creating an atmosphere where those people that have created a niche market will be swamped by commodity product that meets the different requirement from out of State.

Mr. RATCLIFFE. Thank you. Mr. DeVeaux, I want to give you a chance to comment on that because I know you talked a little bit about the extraterritorial legislation. So do you agree with that, and are those concerns limited to potential for protectionism? Or are there other concerns?

Mr. DEVEAUX. Well, there is always protectionism lurking potentially because it is often easy to disguise what might otherwise be, you know, a well-intentioned safety measure.

For example, there is the famous case where North Carolina enacted a law that required that all the apples sold in the State had to be labeled pursuant to USDA labeling, apple-rating regulations. And it was not too much of a secret that, you know, North Carolina

had its own apple industry. And the premier apple producing State was Washington, and Washington had its own labeling system. And this was litigated to the Supreme Court on the argument that, you know, that it was all about safety because we can have our confidence in the USDA rating system. And the court in a somewhat muddled opinion came to the conclusion that the law was unconstitutional. But they did not really address the, you know, I think the elephant in the room that it was protectionism.

Mr. RATCLIFFE. Thank you. My remaining time, Mr. Moylan, I want to turn to you on this remote sales tax issue. And I certainly appreciate there are stakeholders on either side of the issue. I know that because they are in my office all the time and a lot of the other members up here experience that as well. And that is why we ultimately want to get to the right place on this. So, when stakeholders come into my office and argue that the physical nexus requirement effectively creates a class of sellers that are above the law. Above the law in the sense that they benefit from States to which they are selling but are not required to pay taxes that other sellers have to pay; what should I be telling them to address those concerns?

Mr. MOYLAN. Well, what I would say is that the law applies equally to all sellers today regardless if their business model is purely brick and mortar, a mixture sort of brick and click, or remote retail only. And the law as it stands today, because of the Quill decision, is if that business has a physical presence in the State that they are required to comply with its tax laws. And if they do not, they are not required.

And that is not a loophole that was intended to advantage internet retail. The internet was but a glimmer in the broader economy's eye, rather, in 1992. And so, I understand that there are concerns. But sometimes there are differences in business models that are not appropriate for, you know, undermining basic principles, I think, to address. And so, that is what I see happening is that in sort of a competitive sense, a lot of folks are coming and saying, we expect a more difficult, more burdensome collection standard for the business that we are competing with than the one that we use.

And the reason I say that is that still today 93 percent of sales happen in brick and mortar businesses. It is growing, but it is only 7 percent in online retail. For those 93 percent of sales, they effectively operate on a simple rule where they collect tax based on where that business is located. And what they are asking for that other 7 percent is that they have to jump through a bunch of hoops to figure out where every one of their customers is coming from. And that is not the standard that those 93 percent of sales operate on. And so, I think that that is what my response to that would be.

Mr. RATCLIFFE. Thank you all for being here. My time is expired. Chairman, I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the Congressman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate you yielding the time. And, Mr. Chairman, I appreciate the important issues that this legislation is intended to address. I have and will continue to be a firm supporter of this Subcommittee's work to enact

meaningful regulatory reform. This is a Committee in which I take great pride of being a part of and have been since my time in Congress just a few short years ago.

While I have nothing but the utmost respect for the work of the bill's sponsor, Mr. Sensenbrenner, I cannot support the approach that we are taking in this Subcommittee today in considering this legislation alone. My concern is that the breadth of this legislation goes well beyond the State regulatory overreach. There is no one that I would put my record up against who has fought harder against predatory, and at times abusive, State regulatory practices from poultry to pork to others.

The bill that we are currently considering, for all intents and purposes, although talked about in the regulatory issue, codifies a Supreme Court decision in *Quill Corporation v. North Dakota* by prohibiting States from requiring remote retailers to collect taxes on goods sold into their jurisdiction. In doing so, it would simultaneously ignore the unambiguous invitation from the Quill Court and impliedly close the door on any opportunities to address this issue in a way that weighs the needs of States, their citizens, on-line retailers, local businesses, and the economy as a whole.

To be clear, I believe that it is critical that Congress act to address the remote taxation issue and that we do so in a way that is clear and fair. However, defaulting to a physical presence standard similar to the one adopted by the Quill Court ignores the reality of a modern economy. Justice Kennedy pointed out these realities last year when he wrote in a concurring opinion in the *Direct Marketing v. Brohl* case stating, "a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." But one does not have to look to modern day to suggest that Congress should play meaningful examination of a departure from the physical presence standard.

Justice Stevens in writing for the opinion for the Quill majority stated, "Congress is now free to decide whether, when, and to what extent the States may burden interstate, mail order concerns with the duty to collect sales and use tax." I believe that the members of this Committee should dedicate ourselves to doing just that. I believe that it is the responsibility of this Committee to consider and pass legislation to address the complex array of issues presented by our increasingly digital economy. I believe that it is our responsibility to do so in a way that is considerate of states' authority and the need to collect taxes without burdening businesses and the inherent complexities of compliance with the laws of thousands of jurisdictions throughout this country.

But only when we consider the full range of options such as the Remote Transaction Parity Act and the Marketplace Fairness Act can we find solutions that work for all stakeholders. I am confident this Committee can strike the careful balance between the authority of States to collect taxes and the need to minimize the burden on remote sellers.

In light of this conversation, I have been in Congress for 4 and a half years. I have taken more meetings on this one issue than anything combined. I have had people from one side of the town square in my little town of Gainesville and the other side of the

town square in Gainesville come to me with very similar business models. The first one comes in passionately against the proposition of online or remote sales tax. The other one coming in saying, you have got to do this. Friends, we go to church together, ball games together, everything else.

When we understand this issue, and believe me, I am not endorsing the other bills that I spoke of. I believe they have problems, and I believe those are problems that we have been addressing and talking about behind the scenes here for many years in this Committee. I believe as we move forward here that a discussion of regulatory burden and the discussion of remote sales tax are unfairly bonded in this bill.

It is one thing to say watch what we are doing here while at the same time saying do not pay attention to this part over here. And the actual reality is as much as I respect the purpose here, it is simply a codification of Quill. And in that sense, I think we can do better. I think we can do more to address this issue. Do I believe that there is a new economy coming? Yes. Do I believe that it is going to be difficult for States and localities who have depended on a traditional form of income to do that? You also do not get any more conservative on my side on the collection of taxes and the spending. As I have said on other occasions, we do not have a collection problem. We got a spending problem, and that includes the State level on which I served in the Georgia State House.

At this point in time, I welcome this discussion. But I welcome a full and open discussion with all players at the table discussing where this Congress does its best work. And that is when we take the accounts of all and look at the issues from a straight up format, and go so at that. With no dispersion on anyone, this is the first step. I am glad to have this hearing, but those are my thoughts as we move forward. And my hope is we will find a solution that will end the plethora of meetings that I have endured. With that, Mr. Chairman, I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the Congresswoman from Washington, Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chair. The No Regulation without Representation Act is one of the most coercive and intrusive pieces of measures that I have seen. And it would, unfortunately, fundamentally upend the role of States and the American government. The consequences specifically to my home State of Washington are severe. The bill would preempt a State's ability to collect taxes unless the business is physically present in a State.

In Washington State, nearly 30 percent of our revenue comes from retail sales and use taxes. We do not actually have an income tax in our State. This bill could result in billions of lost revenue for our State which would hurt our ability to pay for critical goods and services including education, construction, and emergency responders, among other things. And I am particularly concerned about the impact on education because, in our State, we have had an ongoing Supreme Court ruling stating that our State is out of compliance with our Constitution around education funding. And it is, in fact, a paramount duty. This bill would significantly undermine our ability to find solutions for that education problem in our

State and to make sure all our kids receive a high-quality education.

But it would also undermine the constitutional right of States to protect the health, safety, and welfare of their citizens. It would eliminate State regulatory authority over any company or its products unless that company has a very tightly defined physical presence in that State. Again, in the State of Washington, we have environmental protections and regulations that exceed some of the Federal protections. So, our CEPA laws are much stronger than our NEPA laws. And it would be extremely disturbing to States' rights if we were to actually supersede that through this bill.

The provisions are also disturbing because of the current administration's failure to take environmental protections or concerns seriously. And as a result, States like mine, California, New York have launched a climate alliance to continue to advance environmental justice. So, I have a couple of questions for Ms. Peters. And if you can speak specifically to constitutionality, what are your constitutional concerns with H.R. 2887? And what effect would it have on States' constitutional authority to establish general safety standards?

Ms. PETERS. Thank you very much for the question. I, actually, am an accountant not a constitutional attorney. So, my perspective is a little bit different. Being an elected official in the State of South Dakota, we view State regulation a little bit different than what the State of Washington does. But we do come together when it comes to a lot of things when it deals with sales tax.

So, as far as what this bill does, I think it obliterates our States' abilities to do what our citizenry have elected us to do within our own States. So, if the State of Washington wants to exceed the Federal regulations, then I think that is the State of Washington's right. Now, if this bill wanted to just deal with environmental issues, then we need a bill to deal with environmental issues and regulations. If we wanted to talk about ag and the issues within exporting ag products across State lines, let's have a bill that talks about that.

I think this bill, as I said before, talks too globally about too many different issues. And it literally just obliterates the whole process instead of just doing the surgical fixes that I think we need to have throughout all of the discusses whether we are talking tax policy, environmental issues, ag issues, and the like. So, I hope that answers your question.

Ms. JAYAPAL. Well, let me follow up since you are an accountant and ask you about State tax collection. There are leading experts that have suggested that requiring physical presence as you said would trample on State tax policy decisions. What specific effects might you see on State revenue for States like yours or ours?

Ms. PETERS. The 15 days within this particular piece of legislation will be catastrophic, especially if you look at a lot of the special events that are going on. Every State has a variety of different special events. In South Dakota, we are a very small State, 850,000 people total. The Sturgis Bike Rally brings in 2 million people. So, if you take that 15 days and those retailers that come into our State, they come in. They set up a shop. They sell and buy goods

within our State for a variety of different things, whether it is tattoos or t-shirts or a variety of different things.

And this would take away that entire sales tax collection and remit for that county because we are local control county sales tax, not just a little bit at the State. It would decimate those counties for that revenue, and they rely on that revenue for that one special event for the rest of the year to pay for roads, bridges, and a variety of different things at the local level. This bill is just too broad to narrow it down to a lot of different things.

Ms. JAYAPAL. Thank you. I appreciate that, and I know that we have other bills that have been introduced by members including our Ranking Member, Mr. Conyers, and I think would do a better job of trying to address some of these critical issues. They are critical. They do need to be addressed. With that, I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the congressman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. Ms. Peters, since you do not like the bill, I am going to concentrate on you because I do not necessarily love this bill. I do not see it as perfect in its current form. But let me go through some questions for you because draft bills around here often get improved not by the proponents but by the dissidents. So, in my home State of California, we have a different standard for made in USA such that if under current law, if you put made in USA on a North Dakota product, including a soybean, bag of soybeans, California may sue your companies because they are not made in USA based on our definition. Is that okay?

Ms. PETERS. Mr. Chairman, I think and I do not want to not answer your question—

Mr. ISSA. Start with a yes or no, and then you can explain—

Ms. PETERS. Sure.

Mr. ISSA [continuing]. Your yes or no.

Ms. PETERS. And I do not really because this bill, I would be a yes and a no because I do not like regulation period—

Mr. ISSA. Okay. Explain your yes and no, please.

Ms. PETERS. Sure. Well, you know, it is up to California to make the rules that apply to California.

Mr. ISSA. Okay. So—

Ms. PETERS. If you have citizens that want that, that is fine.

Mr. ISSA. South Dakota's commodities, your number one commodity you export is soybean, oil cake, and other solid residue. Go figure, whatever that is. Your number two is brewing distillation.

Ms. PETERS. Yep.

Mr. ISSA. You are big on booze. Your number three is meat, swine, ham shoulders, bone-in. And then, we get to other swine which I would have probably said should have been combined. So, you are big in pork. You are big in soybean, and you are big in booze.

Ms. PETERS. Yes.

Mr. ISSA. Okay. The question is if you produce a bottle of whiskey, can California choose not to accept it as whiskey even though you have complied with all the Federal laws?

Ms. PETERS. I think that is what this hearing is here to address. I just would like to go back to the California egg discussion a little

bit. The citizens of California voted for a law that I do not necessarily agree with.

Mr. ISSA. So, you are——

Ms. PETERS. However, the citizens of California——

Mr. ISSA. But you do not export eggs.

Ms. PETERS [continuing]. Wanted it.

Mr. ISSA. We do not export eggs so let's talk South Dakota. Your booze is banned in California. Is that okay?

Ms. PETERS. At this point, yeah.

Mr. ISSA. So——

Ms. PETERS. It is the law.

Mr. ISSA. The fact that the Supreme Court ruled that it cannot be is not a problem to you? When Michigan tried to have two different standards, the Court clearly slapped it down even though the 21st Amendment specifically, unlike other products, gave an exception to the interstate commerce clause. It is okay with you?

Ms. PETERS. Well, no, but that is why we are talking to you today.

Mr. ISSA. Okay. So, there is a problem that needs to be fixed. I will go to the other folks for a moment. The Supreme Court took on Michigan when they tried to have two sets of standards, they specifically made it clear that my California wine was not, since it was legal in the State, had to be allowed into Michigan and no secondary license was required. My question is have we not already made a decision at least as to interstate commerce, even with the 21st Amendment which gave special powers to the States, has the Supreme Court not already spoken that interstate commerce is to be protected? And are not we just dealing with the regulations to prohibit it? A do-good policy to be parochial down to the State, the county, and the city.

And who is my pork producer here? Since I swined twice in South Dakota, would you mind going first?

Mr. DIERKS. Well the second swine I believe was breeding stock, live animals, going to other parts of the country.

Mr. ISSA. But I tell you, the two of them together is an awful lot of pork that would never leave South Dakota if other States decided to simply protect a domestic industry in each of their States. Is not that true?

Mr. DIERKS. That is true, and that is true for the Upper Midwest, North Carolina. I am not a constitutional attorney even though we have one here that can address your specific question on it. But I think, I mean, that is the root issue that we have. We are having mandates made in States that citizens of other States are left to deal with even though they had no say in it. And unfortunately, that is our concern, and that is why we are supportive of the bill.

Mr. ISSA. Okay. I am going to broaden the question because Ms. Peters had a point. Products and services are different are they not? With a product, in other words, you are exporting booze, pigs, live or not live. You are exporting a product which clearly our Founders thought of. Ms. Peters' example which I do share her concern, services including the physical presence of coming in for an event. We could have a bill that dealt with physical presence by in-

dividuals. Whether they are employees of somebody or not becomes a question.

And by the way, having overseen the District of Columbia for years, I am well aware that professional teams that come into every State in the Union pretty much pay apportioned taxes while they are there on that professional football, basketball. The District of Columbia does not have that authority which is why the Washington Redskins do not play in Washington. So, would you give us sort of all the answers you want but specifically as to how we could look at goods versus services differently?

Mr. DEVEAUX. Well, I mean, the constitutional rules that pertain to regulation of commerce are different from, you know, the rules that pertain to taxation. Although the Quill decision is rooted in the same body of law. I mean, one of the things that Quill does, I think, is it really draws a line and explains the difference between what the Commerce Clause or the dormant commerce doctrine says about State sovereignty versus the interests of due process. Due process is about protecting the rights of individuals.

So, if an individual has contact with a State, does business with a citizen of that State, for due process purposes, he is sort of on notice that that State has an interest in the transaction. And that is satisfied. For Commerce Clause purposes, presence says something about what, you know, the regulatory authority of States, what power they are intended to have within a system where they need to respect their neighbors, right? So they are two different questions.

Mr. ISSA. But I think for Ms. Peters, the difference between an event in which people come in and sales tax is collected as a result of a presence and a sale, a retail sale, in which you tax instate and out-of-State products the same versus simply saying that we do not like the way you use GMOs as your source stock for whiskey. Therefore, we, in California, are going to prohibit your whiskey. That is what I wanted to understand.

Mr. DEVEAUX. Yeah.

Mr. ISSA. Because I think not all regulations are created equal versus taxation.

Mr. DEVEAUX. And those are two very different things. I mean, with the GMO issue, I mean, there could be a lurking protectionism there much like Michigan was trying to protect its wine industry. I mean, their statute was a little more clear because it basically identified states qua States not saying too many sulfides or something. You know, there is always a way you could come up with that, and I am kind of surprised that some of the other wine producing States have not thought of that, you know, in terms of trying to craft a bill to—

Mr. ISSA. Thank you, Mr. Chairman. You have been very generous. I yield back.

Mr. MARINO. Thank you. I have a couple of questions now. Mr. DeVaux, you are an expert in federalism.

Mr. DEVEAUX. Yes.

Mr. MARINO. I think we are missing, for most of the conversation, here the actual point. And that is the constitutionality and the 10th Amendment. What, in your opinion, is H.R. 2887, the leg-

isolation that we are debating here today, consistent with the 10th Amendment?

Mr. DEVEAUX. Well it is, and I do not mean that to disparage the views of any other panelists here. What I would say is that the 10th Amendment just confirms what ought to have been obvious from the framework the Framers set up for us, that going into the convention, we effectively had 13 independent countries that possessed the full range of sovereign authority. And when each State ratified the Constitution, they only gave away powers to the Federal Government that were expressly conveyed in that document.

So, they retained all the sovereignty that they had that they did not give up. But one of the things they gave up was authority to regulate interstate commerce. Well, there are three categories. The Supreme Court has identified three categories of regulatory authority the commerce power supposedly gives. In the most recent cases, the cases that walk it back like *Lopez* and *Morrison*, the first category is regulation of channels of interstate commerce or instrumentalities of interstate commerce. So, channels are roads, navigable waterways, fiber optic cables. Instrumentalities are things, goods, people traveling between States in those channels, right? And then, there is this third category that was recognized in *Wickard v. Filburn*, you know, about there is also the necessary and proper clause augments this power to allow Congress also in some limited circumstances to regulate intrastate activities that have a substantial effect on interstate commerce.

That is where the 10th Amendment comes in because in that situation we are not talking about just regulating interstate commerce. We are regulating beyond interstate commerce in order to achieve the necessary and proper effect, right? So, when you are talking about regulating goods and goods traveling in interstate commerce, Congress' power is plenary. There is no restraint on it.

Whether, you know, so the power to enact this bill is there. Reasonable minds can differ about whether it is a good idea, that is your job. But I do not think there is a 10th Amendment component to it because we are talking about instrumentalities.

Mr. MARINO. Mr. Dierks, let's talk about the States imposing regulatory burdens on out-of-State producers. You see an increase: how much of an increase? Give me an example of the burdens that it is placing on the agricultural industry.

Mr. DIERKS. There are burdens. Some of those burdens, for instance, the California situation and the Massachusetts situation are just being perfected now. And it is difficult to clearly identify all the burdens. Harry Kaiser at Cornell University, as I said in my testimony and it is in my written testimony, did a study on the impact of California's cage laying situation and came up that it increased the price of eggs in California \$0.49 a dozen. The issue with that though is that, and for most of us it is not a big deal.

But for the, you know, as Americans we spend 10 percent of our disposable income on food. But if you are the bottom quartile of our society, you are spending 30 to 40 percent of your income on food. We are just starting to see those play in. Massachusetts is yet to be perfected, as it were, on the exact language. So, it is a burden in that what happens is you go back, you take a look at return investment. There are some producers that are making decisions to

reinvest, but there is no incentive in the marketplace. And the reality of it is there is no clear way. In my written testimony, it really gets down to what the AVMA, the American Society of Swine Veterinarians, say. It is not about steel or design. It is about care and management, so we are trying to figure that out right now.

Mr. MARINO. Thank you. Mr. Moylan, absent this legislation that we are discussing today, 2887, could States expand renewable portfolio standards to ban energy produced out-of-State by fracking?

Mr. MOYLAN. Yes. You are identifying a big risk absent passage of this legislation. And it is a point that I was sort of looking for an opportunity to bring up earlier, but this gives me a good one which is that—

Mr. MARINO. Well, I have to give the credit to my legal counsel here.

Mr. MOYLAN. Well, great minds think alike perhaps, but I think there is a risk of activism, sort of projection of activist legislation I guess you could say. And I mean that on both sides ideologically. There is a risk of more Liberal States saying to, you know, producers in Conservative States, you cannot ship something here unless it complies with our, you know, thoughts on hen cage sizes, or GMOs, or what have you. But there is also a risk in the reverse of more Conservative States attempting to say, you know, you could imagine any number of different scenarios that products imported from States that do not have right to work laws are for some reason prohibited. Or that do not comply with, you know, their thoughts on minimum wage, what have you.

You brought up the issue of energy production which I know is a big issue in your State. And so, yes, there is a real risk that, sort of, through projecting their own power across borders that States that are intent on engaging in that kind of activism can use some of that gray area that exists today to make real mischief. And not just, you know, mischief that is, you know, of interest for funny examples here or there, but things that are real genuine burdens on interstate commerce.

And if you will forgive me the brief diversion into libertarian theory, but I cannot help myself. It is a classic case of what is seen and what is unseen. You know, we do not see the employee that was not sent to that trade show because a business was worried about incurring nexus there. We do not see the diversions around State lines because they are concerned about their trucks getting pulled over at weigh stations and being essentially held up for resources. Those are things that are hard for us to see when people do not engage in that activity. But that is exactly the interstate commerce burden that we are talking about here and that this bill is intended to address.

Mr. MARINO. Okay. This concludes our hearing today. I want to thank all of you for being here. It was a rather good discussion. Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional material for the record. This hearing is adjourned.

[Whereupon, at 12:06 p.m., the Subcommittee was adjourned.]