Statement of Christopher Cox

on behalf of

NetChoice

Testimony before the

United States House of Representatives Committee on the Judiciary

Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on:

No Regulation Without Representation: H.R. 2887

and the Growing Problem of States Regulating Beyond Their Borders

July 25, 2017

Chairman Marino, Ranking Member Cicilline, and members of the Committee:

Thank you for holding a hearing on *The Growing Problem of States Regulating Beyond Their Borders* and Chairman Sensenbrenner's bill, H.R. 2887, to address it.

As you know, I have worked with many of you on Internet legislation over the last 20 years, and in particular the Internet Tax Freedom Act (ITFA), which I co-authored with Sen. Ron Wyden in 1998.

I serve as outside counsel to NetChoice, a coalition of leading e-commerce and online companies promoting the value, convenience, and choice of Internet business models.

NetChoice has been deeply engaged on Internet tax issues for 17 years, including testimony before this committee and policy debates in the Wall Street Journal, on CNBC, CSPAN, CNN, and PBS. Since 2004, we have participated in meetings of the Streamlined Sales Tax Project (SSTP), a long-term effort to simplify state sales tax systems in response to the *Quill* ruling of the U.S. Supreme Court.

NetChoice is a founding member of TruST, the coalition for True Simplification of Taxation (www.TrueSimplification.org), a group whose association members also include the American Catalog Mailers Association, the Direct Marketing Association, and the Electronic Retailing Association.

Through these activities and relationships, NetChoice has become deeply aware of the problems facing consumers, small businesses and farmers resulting from the growing tendency of states to attempt regulation beyond their borders. State regulatory and tax overreach is abundantly evident to customers and businesses on the Internet. Even a business located in a single jurisdiction is now threatened with having to comply with 46 different state regulatory regimes for definitions, tax rates, rules, and audits. Customers too find much of this confusing, but the real cost to individuals will come in the form of fewer choices (as smaller companies on the Internet fall away) and higher prices (as costs of regulatory compliance are passed on to consumers).

The bill you are considering today, the No Regulation Without Representation Act of 2017, will arrest this trend toward state regulatory and tax overreach. To enable Congress to work out a solution that recognizes the legitimate sovereignty of every state, this bill codifies present federal case law that prohibits states from regulating and taxing businesses beyond their borders. The bill wisely applies this rule in even-handed fashion. The rule is the same for

determining the extent of state reach for imposing sales tax obligations, labeling mandates, or regulatory restrictions of any kind.

Our national experience with the ITFA is instructive here. Twenty years ago, Congress recognized that commerce over the Internet is uniquely interstate, and that its fundamental purpose would be disrupted if every state and local jurisdiction could take a bite out of it. The decentralized, packet-switched architecture of the Internet, now as then, makes it uniquely susceptible to multiple and discriminatory taxation across a confusing patchwork of thousands of state and local taxing jurisdictions. That is why federal law in the form of the ITFA prohibits U.S. state and local governments from imposing "discriminatory" taxes on online activity.

The ITFA categorizes taxes targeted specifically to the Internet itself or to online commerce as "discriminatory." Discriminatory taxes are outlawed by the ITFA. This has been true throughout the two decades that the law has been in effect. (While it was originally enacted as a limited-time moratorium on discriminatory taxation of electronic commerce, the law was subsequently extended on multiple occasions by Congress, and in February 2016 became permanent.) The original ITFA and the permanent version are identical as concerns the prohibition on discriminatory taxes.

In particular, the ITFA has always prohibited any state or political subdivision from imposing "discriminatory taxes on electronic commerce." ITFA Sec. 1101(a)(2). The prohibition applies to "any tax imposed by a State or political subdivision thereof on electronic commerce." A tax is banned if it "imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means" than via the Internet. ITFA, Sec. 1105(2)(iii). This provision of the law is plainly aimed at preventing states from establishing unique tax rules for Internet transactions.

Yet this is precisely what several states are now doing. In Alabama, South Dakota, Ohio, Massachusetts, Hawaii, South Carolina, Minnesota, and other states, e-commerce is being singled out for unique obligations to remit sales taxes.

Massachusetts Directive 17-1 is typical of the approach states are now taking, which is directly violative of the ITFA. Under Directive 17-1, out-of-state catalog and mail order vendors will not be required to collect Massachusetts sales or use taxes. But out-of-state Internet vendors will. This is the quintessence of the discrimination against Internet commerce that ITFA was written to prevent.

Under Directive 17-1, only Internet vendors are covered. An Internet vendor that meets the arbitrary sales and transactions thresholds set by the Commissioner of Revenue will be required to register with Massachusetts, remit sales and use taxes to Massachusetts, and file monthly returns with the Commonwealth. Non-Internet vendors domiciled outside the Commonwealth will not face these requirements. No other activity by the Internet vendor is necessary to trigger these discriminatory tax collection and reporting obligations. The mere fact that one is an Internet seller who meets the sales and transactions threshold is all that matters.

Massachusetts, Ohio, South Dakota, Alabama, Hawaii, Minnesota, South Carolina, and other states now seeking to stretch their authority to the entire Internet attempt to justify this discriminatory taxation through imaginatively novel concepts of jurisdictional "nexus." Massachusetts, for example, claims that the Internet vendors subject to its requirements "invariably have" contacts with Massachusetts. What is the nature of these contacts? The vendors' out-of-state computers *communicate* with in-state computers. Directive 17-1 specifically cites cookies – text files on the buyer's computer – as evidence of the vendors' "presence" in Massachusetts. Cookies on a customer's computer constitute the vendors' "ownership" of in-state "property," according to the Directive. And this in turn establishes "physical presence within the meaning of *Quill*."[1] This is absurd.

Cookies are not owned by the vendor. They are simple text files sent electronically to manage user experience during their online session. Any computer user can freely delete these cookie files from his or her device. A customer would not be able to delete cookies if someone else "owned" the text files. Ohio similarly pretends that "cookie nexus" is real, while other states are exploring the possibility. It is precisely this sort of sophistry that gave rise to the ITFA in the first place.

At the time Congress was developing the ITFA, the State of Texas was claiming that because email and other messages were being routed through computer servers in that state, this activity met the physical presence test in *Quill*. On July 11, 1997, at a House Subcommittee on Telecommunications hearing on ITFA, Texas tax director Wade Anderson argued that if the web page of an out-of-state company were present on a server in Texas, this would establish tax

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[1] *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992).

presence. (A short time later, Texas abandoned the idea of using the location of the server to create nexus for an out-of-state vendor not otherwise physically present in the state.)

It was in direct response to such sweeping assertions of state jurisdiction over out-of-state activity and persons that ITFA gained so much support in Congress.

It is therefore remarkable now to see other states, 20 years after ITFA became law, making the same types of arguments that Texas did back then. Claims that cookies, software "apps," and server files should constitute nexus were explicitly considered and affirmatively rejected by Congress in the ITFA. This is now and has been for years the law of the land.

The legislative intent of the ITFA was made very plain at the time. As the representative from the Energy & Commerce Committee, and in lieu of committee reports from the Judiciary and Energy & Commerce Committees (the two legislative committees that considered the bill in the House), I prepared a statement of author's intent which was published in the Congressional Record at 144 Cong. Rec. E1288-03 (June 23, 1998) ("Statement of Author's Intent"). No contrary statement of intent was ever made to my knowledge by any co-sponsor or supporter of the ITFA in either the House or Senate, either at the time of its original passage or on the several occasions of its subsequent extensions and ultimate permanent enactment.

As I made clear in the Statement of Author's Intent, the prohibition on discriminatory taxes on electronic commerce in the ITFA is specifically "intended to prohibit States and localities from using Internet-based contacts as a factor in determining whether an out-of-State business has 'substantial nexus' with a taxing jurisdiction."

A specific example provided in the Statement of Author's Intent concerns a state's attempt to discriminate between Internet vendors, on the one hand, and catalog and direct mail sellers, on the other, for purposes of establishing nexus. ITFA intends to provide "certainty" that the rules of Quill's physical-presence test "will continue to apply to electronic commerce just as they apply to mail-order commerce, unless and until a future Congress decides to alter the current nexus requirements."

On this critical point, the Statement of Author's Intent could not be more clear. Citing the Texas position, it explains that the law is meant to expressly reject any theory of "substantial nexus" based on an Internet vendor's electronic contacts with another state, including customers in that state. I quote:

[The non-discrimination provision] is a direct response to testimony from a State tax administrator [Wade Anderson of Texas], who offered his view to Congress at a July 1997 hearing that the *Quill* protections provided to remote sellers without a substantial in-State physical presence should not apply to businesses engaged in electronic commerce. During the hearing, the tax administrator acknowledged that if a resident of his State were to use the telephone to purchase a good from an out-of-State vendor, his State would not be permitted to impose its tax collection obligations on that vendor unless the vendor otherwise had a substantial in-State physical presence. The tax administrator further testified, however, that if instead the Internet were used to place the order, his State would attempt to require the out-of-State vendor to collect taxes. His rationale was that the flow of data over the Internet into his State, the "presence" of a web page on a computer server located in-State, [or] the supposed "agency" relationship between the remote seller and an in-State Internet access provider should be enough to give the remote seller a substantial physical presence in his State.

The Act rejects this approach. The promotion of electronic commerce requires faithful adherence to the U.S. Supreme Court's clear statement in *Quill* that a "bright-line" physical presence—not some malleable theory of electronic or economic presence—is required for a State to claim substantial nexus. Even without the Act, the courts, in light of *Quill*, are likely to view such arguments by State tax administrators with great skepticism. But the Act provides clarity and far greater certainty by specifically outlawing State or local efforts to pursue aggressive theories of nexus. This should result in decreased litigation which will benefit States, localities, taxpayers, and an often overworked court system.

[The ITFA] defines "Discriminatory tax" so as to make it clear that Congress considers the creation or maintaining of a site on the Internet to be so insignificant a physical presence that the use of an in-State computer server in this way by a remote seller shall never be considered in determining nexus. ...

[Even if an in-state service provider] provides these and other ancillary services (such as web page design or account processing) on an in-State computer server, the provider should not be considered an agent for purposes of taxation.

The explicit text of the ITFA outlaws a state's claim of nexus based on the presence of files on an in-state server not owned by the remote seller. Under the federal law, a tax is "discriminatory" and therefore prohibited if "the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation." ITFA Section 1105(2)(B)(i). In other words, the use of an in-state server *may not even be taken into consideration*.

Yet Massachusetts, for example, claims that use of a third-party server or website in Massachusetts to facilitate online sales by an Internet vendor makes the third party controlling the server or maintaining the website the in-state "representative" of the out-of-state vendor. This, the Commonwealth claims, bootstraps a basis for imposing registration, collection, and reporting obligations on the out-of-state Internet vendor.

By specifying uniquely Internet-related factors as the very criteria upon which the Massachusetts sales and use tax collection and reporting obligations are based, Directive 17-1 has made itself a prime example of what the ITFA was meant to prohibit. As does the Ohio approach, its enunciation of aspects unique to Internet commerce such as cookies, apps, CDNs, and online marketplaces offends the plain terms of the ITFA. The express intent of the ITFA is that "electronic presence" or "economic presence" is not a sufficient basis to require an Internet vendor to submit to a state's taxing regime.

The so-called "kill *Quill*" approaches being taken in an increasing number of states do not just violate federal law, but Supreme Court precedent as well. And this is by design. These states do not seem concerned that their laws and regulations deliberately contravene federal authority. They seek to provoke litigation which, it is hoped, will continue all the way to the U.S. Supreme Court. There, it is further hoped, the Court will reverse *Quill v. North Dakota* and its progeny. This should be recognized for the deliberate lawlessness that it is.

Were the issue one of human rights or civil rights, perhaps civil disobedience would be an acceptable approach. But the issues here are purely commercial. Commercial rules require certainly and clarity. Sowing chaos through extralegal and extraterritorial regulation and taxation of commerce among the states is harmful to the U.S. national market which this Congress is vouchsafed to protect.

H.R. 2887 will arrest this trend. To ensure that residents and businesses of one state are not subject to the taxes and regulation of another, it will codify the physical presence standard for jurisdictional nexus rooted in Article I of the Constitution.

The Commerce Clause is just as necessary now as it was when written, and as it has been throughout our nation's history. In the 18th century, individual states were impeding commerce among the states through regulatory and tax overreach. During the 1960s, some state tax collectors attempted to force out-of-state catalog retailers to collect in-state sales taxes. In response the U.S. Supreme Court, relying on the Commerce Clause, held that states cannot impose taxes on out-of-state businesses "whose only connection with customers in the State is by common carrier or the United States mail."[2]

In 1992, the Supreme Court revisited the issue of remote taxation, this time in the case of an office products catalog seller, Quill.[3] In *Quill*, the Supreme Court was not moved by the state's argument that computer technology created the necessary simplification. While acknowledging the lower court's finding that advances in computer technology had eased the burdens of tax collection, the Court still found the requirement of tax collection unduly burdensome.[4] Observing the patchwork of rates and rules for several thousand sales tax jurisdictions, the Court again held that requiring out-of-state companies to pay sales taxes would place an unreasonable burden on interstate commerce.[5]

Quill has served to protect local businesses that maintain websites from overbearing tax compliance burdens imposed by scores of foreign states where the business has no physical presence. At the same time, it requires every business, large or small, to collect and report sales tax in the same way in every state where the business does have an actual physical presence.

Understanding why the *Quill* standard exists – to protect local businesses engaged in out-of-state commerce from the burdens of multiple and discriminatory taxation – is to recognize its importance today and its relevance to continued enforcement of the ITFA. By enacting H.R. 2887, Congress will be enforcing the Commerce Clause for the benefit of the entire national market. The benefits of this will extend to every consumer in the nation.

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[2] *Nat'l Bellas Hess, Inc.* v. *Dept. of Rev. of Ill.*, 386 U. S. 753, 758 (1967).

[3] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[4] *Id.* at 313.

[5] Moreover, *Quill* was not concerned with "fairness" to individual tax collecting states, as some have argued, but with the burden on interstate commerce that results from multiple tax collection and compliance burdens. "[T]he Commerce Clause and its nexus requirement," the Court said, "are informed not so much by concerns about fairness for the individual [state] as by structural concerns about the effects of state regulation on the national economy."

Fundamental fairness dictates that those who would bear the tax, regulatory, and compliance burdens of a state should have the rights every citizen deserves to protest against unfairness in the imposition of those burdens. Citizens of a state have such recourse against their government, but out-of-state businesses normally do not. The No Regulation Without Representation Act of 2017 recognizes this principle and enforces it through a clear rule consistent with existing federal law and Supreme Court authority.

Likewise, recognition of states' rights requires fairness to each state government. To give effect to this principle, H.R. 2887 recognizes that no state can exercise its sovereignty beyond its borders without intruding on the sovereign prerogatives of another state. Were the federal government to authorize states to impose sales tax compliance burdens on out-of-state sellers, this principle of fairness to every state would be violated.

H.R. 2887, the No Regulation Without Representation Act, is desperately needed to ensure the continued enforcement of the Internet Tax Freedom Act and current U.S. Supreme Court rulings protecting interstate commerce. The benefits from this will extend to businesses and farms of all kinds in every state and to every U.S. consumer.

10th ANNIVERSARY ACMA
AMERICAN CATALOG MAILERS ASSOCIATION

July 25, 2017

The Honorable Tom Marino, Chairman
The Honorable David Cicilline, Ranking Member
U.S. House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
2138 Rayburn House Office Building
Washington, DC 20515

RE: Hearing titled "No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders"

Dear Chairman Marino and Ranking Member Cicilline:

We write to you to express the appreciation of our organization, the American Catalog Mailers Association (ACMA), for the Subcommittee's work and to signify our support for the No Representation Without Regulation Act of 2017 (H.R. 2887).

The ACMA is the only industry association advocating specifically for catalog marketers and their suppliers. The catalog industry represents $300 billion in annual commerce and is part of the larger mailing industry that represents $1.4 trillion of GDP that employs 7.5 million Americans.

While cross border taxation and regulation has long been an issue for small businesses to comply with, in recent years there has been a growing number of rogue states that have unfairly burdened remotely-located catalog and e-commerce businesses that sell their products nationally. The Alabama Department of Revenue issued a notice in late 2015 that required out-of-state businesses to collect and remit Alabama sales tax on sales to Alabama-based customers, regardless of whether the businesses have a physical presence in the state. In 2016, South Dakota passed similar legislation. This past April, the Massachusetts Department of Revenue issued a directive requiring retailers to collect sales tax from out-of-state vendors that use cookies on customers.

These policies are a direct affront to the Supreme Court's 1992 decision in Quill v. North Dakota, where the Court interpreted the Constitution's Commerce Clause to mean that businesses must have physical nexus in a state in order to be required to collect and pay sales and use taxes. However, state policymakers are banking on the fact that small businesses will lack the time and resources to challenge their overreaches in Court, which will allow them to continue these unlawful taxing regimes.

Moreover, Colorado approved legislation in 2010 requiring out-of-state businesses to report the purchases of Colorado residents to the state's Department of Revenue. This "tattletale law" seeks to sidestep the constitutional findings of the Quill decision, but still violates the spirit of the decision and imposes compliance burdens for small businesses in Colorado.

Other states like Louisiana have followed its lead. Interestingly, 78 percent of Coloradans viewed this as a gross violation of their privacy, according to a recent NetChoice poll.

It is against this backdrop that the No Regulation without Representation Act of 2017 was introduced. The bill would codify the Supreme Court's Quill decision, which would thus bar states from imposing collection burdens for sales and use taxes on out-of-state businesses lacking physical presence.

The ACMA and its members from coast to coast strongly support this legislation, as it will protect small businesses that sell products nationally from a single location from burdensome state regulatory regimes. Moreover, the legislation is narrowly focused. It does nothing to stop states from regulating within their own borders nor requiring products entering their jurisdiction conform to national standards.

Moreover, this legislation would not prevent the resolution of the remote sales tax issue. Rep. Sensenbrenner's bill narrowly focuses on cross border regulation issues and Congress would remain free to craft laws that recover revenue for the states consistent with the physical presence principle established in Quill. ACMA supports a "level playing field" but not one where brick and mortar retailers deal with a single rate while remote retailers wrestle with over 13,000.
The ACMA reiterates its support for the Subcommittee's work on this issue and looks forward to working with the Subcommittee to meaningfully address the issue of cross border regulation. We also ask that this letter be entered in the hearing record.

Thank you for your consideration.

Sincerely,

Hamilton Davison
President & Executive Director
American Catalog Mailers Association

AMERICANS for TAX REFORM Digital Liberty

Congressman Sensenbrenner (R- Wisc.) introduced H.R. 2887, the No Regulation Without Representation Act, to stop state regulations that tax and regulate businesses that are not physically within their borders. Americans for Tax Reform and Digital Liberty support H.R. 2887.

The following can be attributed to Grover Norquist, President of Americans for Tax Reform:

> "The No Regulation Without Representation Act reigns in government overreach by forbidding any state from 1) imposing a sales tax on businesses physically outside the boundaries of the state, and 2) prohibits any state from exporting regulations onto businesses in other states.
>
> "Regulations can be as abusive as taxes. If the American Revolution was revisited today the slogan would certainly be 'No Taxation and No Regulations without Representation.'
>
> "I commend Congressman Sensenbrenner for introducing the No Regulation without Representation Act and I urge all members of Congress to support this important piece of legislation. "

The following can be attributed to Katie McAuliffe, Executive Director of Digital Liberty:

> "Over the past few years, state legislatures have crossed their bounds by regulating and taxing businesses physically outside the parameters of their own state.
>
> "Regulations that constrict and tax businesses outside of state borders challenge state sovereignty and federalism while making it incredibly difficult for small businesses to flourish under the backbreaking weight of regulations. I commend Congressman Sensenbrenner for addressing this by introducing the No Regulation without Representation Act."

In Quill v. North Dakota, the Supreme Court found that states are sovereign only within their own borders and that the Constitution prohibits state regulations from crossing state borders. Despite the Supreme Court's decision, states have regulated businesses outside the parameters of the state for decades. Sensenbrenner's bill would codify this requirement in relieving small businesses from the heavy weight of government overreach and overregulation.

Testimony of George S. Isaacson, Esq.
Concerning the Hearing Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
July 25, 2017

HOW STATE REGULATORY OVERREACH UNDERMINES FEDERALISM, IMPEDES ECONOMIC GROWTH, AND RESULTS IN RAMPANT BUREAUCRATIZATION TO THE DETRIMENT OF AMERICAN BUSINESSES AND CONSUMERS

Chairman Marino and Members of the Committee, thank you for the opportunity to submit written testimony on this important issue. I am an attorney with a nationwide practice representing catalog companies and electronic merchants in regard to state tax matters for over 35 years. I have testified in the past before both the House Judiciary Committee and the Senate Finance Committee on bills relating to sales/use tax collection by remote sellers.

I am tax counsel to the Data & Marketing Association and successfully represented the DMA before the United States Supreme Court (*DMA v. Brohl*) and have appeared in federal and state courts throughout the country on behalf of catalog companies and electronic merchants. I am also counsel to the American Catalog Mailers Association and NetChoice. In 2011 and 2013, *State Tax Notes* selected me as one of the "top 10 individuals who influenced tax policy and practices," and in 2016, it recognized me as its "Person of the Year."

I teach courses on Constitutional Law at Bowdoin College and speak frequently before business groups and trade associations regarding taxation of interstate transactions and electronic commerce. I am a co–author of "Eyes on eCom

Law," a blog that reports on legal developments of interest to catalog companies and online sellers and am the author of numerous articles regarding the scope and application of the Constitution's Commerce Clause.

The Greek mathematician, Archimedes, is quoted as saying:

> *"Give me a lever long enough and a fulcrum on which to place it, and I shall move the world."*

The contemporary analogue is the effort by state legislatures to leverage the consumer market in their states to extend the state's regulatory reach beyond its borders and impose obligations on companies located in other states. It is one thing for a state to assure that products entering the state do not pose a health or safety risk to that state's residents. It is quite another thing for a state to take the position that if a company accepts orders via a website and subsequently delivers product to consumers throughout the United States by means of the Postal Service, UPS or FedEx, then that business must conform its conduct to the dictates of each state in which it has customers, even though the company has no facilities or employees in the state. Such regulatory requirements may range from waste disposal, to treatment of farm animals, to environmental standards, to employment practices, to contemporary social mores, to taxation.

Warning flags should go up not only over current instances of "beyond-borders" regulation, but also in regard to the likely extension of this dangerous practice to new areas, if the current trend of regulatory overreach continues. For example, as part of its global warming initiative, California now regulates in-state ethanol sales based on the manner in which the ethanol was produced and

distributed in other states. In a similar fashion, to advance its policy regarding the humane treatment of animals, California prohibits the sale of eggs produced out-of-state by chickens kept in cages smaller than that prescribed by California law. The Wisconsin legislature enacted a waste disposal law that prohibited the use of Wisconsin landfills by non-Wisconsin companies unless out-of-state municipalities adopted Wisconsin's recycling standards. The result was that all businesses in those non-Wisconsin communities would be required to adhere to the Wisconsin standards whether or not they had any contact with Wisconsin.

The current uncertain state of the law regarding restrictions on the extra-territorial reach of state regulatory authority could easily result in state legislatures prohibiting the entry of goods into their states unless:

- a manufacturer conforms to the destination-state's carbon emission standards;
- an oil company complies with fracking restrictions in connection with the extraction of natural gas that is ultimately transported and sold within the state;
- a corporation pays a "living wage" to all of its employees involved in the production and distribution of products sold within the state;
- a retailer selling goods over the internet employs a minimum percentage of minorities and women in managerial positions.

The apparent theory, weak as it may be, underlying such an ever-expanding extension of state regulatory authority is that the state is granting a "privilege" to an out-of-state company to sell its products to the state's captive consumer population; and, therefore, the state can condition that privilege, as it deems proper, to advance its policy agenda. The problem is that such an expansion of state

regulation beyond state borders dangerously undermines the federal structure of our government and the free flow of commerce guaranteed by the Constitution.

Federalism, which is the division of sovereignty between the state and federal governments, is the cornerstone principle of the United States Constitution. Within their borders, states are sovereign. As a general rule, they can regulate and tax their inhabitants as they choose, including corporations located within their jurisdiction. What prevents (or at least constrains) state legislatures abusing their regulatory and taxing authority is the democratic process. Citizens, and the companies that employ them, are usually an effective check on legislative excesses. Tax too much, or regulate beyond reason, and those who are unfairly taxed and regulated will rise in democratic opposition. That is the genius of the American system of "no taxation [or regulation] without representation."

So, for example, New York State is free to impose whatever regulations it may choose on companies operating within its borders, be they environmental, financial, labor-related, etc., so long as they are not preempted by federal legislation and do not constitute a violation of constitutionally protected liberties (e.g., freedom of speech, religion or equal protection). However, the New York legislature has absolutely no regulatory authority over companies in neighboring New Jersey and Connecticut, or, for that matter, in New Mexico or Arizona. Those companies have no political influence over New York legislators, and out-of-state businesses are vulnerable to regulatory schemes that prejudice them. If, in fact, there are regulatory regimes that require national scope, it is the business of Congress – not

individual state legislatures – to adopt those measures, relying upon the federal legislature's sensitivity and expertise regarding the health of the overall economy and the commercial interests to be affected. Indeed, the Commerce Clause (Art. 1, §8, cl. 3) assures that it is Congress alone that has the power to regulate interstate commerce.

The Commerce Clause, appearing in the very first article of the Constitution, was no mere afterthought by the Framers. It was intended to remedy the acute problem of individual states under the Articles of Confederation restricting trade by imposing duties, tariffs, taxes, and restraints on commerce originating from other states. The resounding success of the Commerce Clause in creating a free trade zone among the former colonies produced the largest and most dynamic economic engine in the history of the world. State regulatory overreach, however, is now creating a crazy-quilt of confusing and conflicting requirements that threaten to cripple investment and innovation in the 21st Century American economy.

When states regulate beyond their borders, they usurp the regulatory authority of the states where companies, farmers, and individual entrepreneurs are actually located and engaged in business. The doctrine of federalism enshrined in the Constitution was intended not only to protect state sovereignty from encroachment by the federal government, but also to protect the sovereign rights of states from trespass by other states. The notion that sovereignty stops at the state border, but is supreme within state boundaries, is in the interest of state rights

Moreover, the danger associated with overreaching state regulation is not limited to its corrosive impact on the foundational principles of federalism and a single national market, it also causes gross confusion and excessive bureaucracy. Should national commerce be subject to regulation by fifty different legislatures, each with its own political dynamics and predilections?

The area of state taxation is a prime illustration of the problems associated with cross-border regulation. There are few undertakings of government that are more complex, confusing, and contentious than state taxes. The political process has been the primary check on what is an acceptable burden to the individuals and companies that are subject to the obligations of state tax laws. When states "export" their tax systems across their borders, however, the out-of-state parties that are directly affected have no voice – and certainly no vote – in restraining the appetite of state legislatures to impose obligations on persons and organizations that have no political ability to resist such measures.

A good example of this phenomenon is the recent spate of state statutes requiring out-of-state retailers (not their in-state competitors) to turn over to a state agency sensitive sales transaction information, including details regarding customers' purchasing history. This is not only an invasion of privacy (e.g., to which political journals does the customer subscribe and what kind of intimate apparel did a customer purchase and to whom was it delivered); but, moreover, the remote seller has no input into such harsh (and business-damaging) legislation. In other

words, the parties most affected by the state legislation have no role in its adoption. This is blatant "regulation without representation."

The confusion and complexity caused by cross-border overreach assumes enormous proportions in regard to state taxes. In-state companies must comply with only one state tax system. It may not be easy, but it's manageable. A small company selling over the Internet, however, could find itself forced to confront the diverse requirements of 50 different state tax systems. Indeed, in the sales tax arena, the problem is even worse. There are over 12,000 state and local sales tax jurisdictions in the United States, with varying rates, tax bases, filing requirements, etc. Should the decision of an entrepreneur to engage in interstate commerce – an activity protected by the U.S. Constitution - subject that individual or company to 12,000 different tax regimes?

This cross-border overreach has serious adverse implications for the U.S. economy. Compare our transaction tax system, for example, to that of the European Union.

Among the EU's 28 member states (soon to be 27 following Brexit), the European Commission has recognized that the disparate tax regimes "*may involve up to 28 different tax administrations auditing the same companies without any coordination,*" and that the current system imposes a significant risk of "*disproportionate administrative burdens on businesses.*" The Commission found that the complicated VAT system deters companies— particularly small businesses and new market entrants—from engaging in cross-border e-commerce. To address

this problem, the European Commission has proposed to establish a "digital single market" by removing barriers to cross-border online sales. The Commission proposed a one-stop-shop for tax administration to reduce costs and administrative burdens. [1]

Compare the adverse impact on EU commerce resulting from 28 different tax regimes (with only 75 different VAT rates) to the impact in this country of 50 states that would like to impose their widely divergent sales taxes, corporate income taxes, gross receipts taxes, franchise taxes, and excise taxes on businesses located far beyond their borders - with no physical or political presence in the taxing state - not to mention the over 12,000 local tax jurisdictions, each of which would similarly like to impose its tax obligations on non-resident companies.

Take sales taxes for example. The attached color-coded map of the United States, which I prepared with the assistance of others in my office, depicts the gravity of the problem of states independently attempting to extend the regulatory reach of their tax systems. These laws – all of which are directed exclusively at companies with no stores, facilities or employees in the taxing state – are not only grossly overreaching, but also widely discrepant. Such laws are based on insubstantial jurisdictional tripwires; for example - selling as little as $10,000 worth of goods to consumers in the taxing state; using "cookies" in connection with Internet sales; receiving customer referrals from an unrelated party; or advertising

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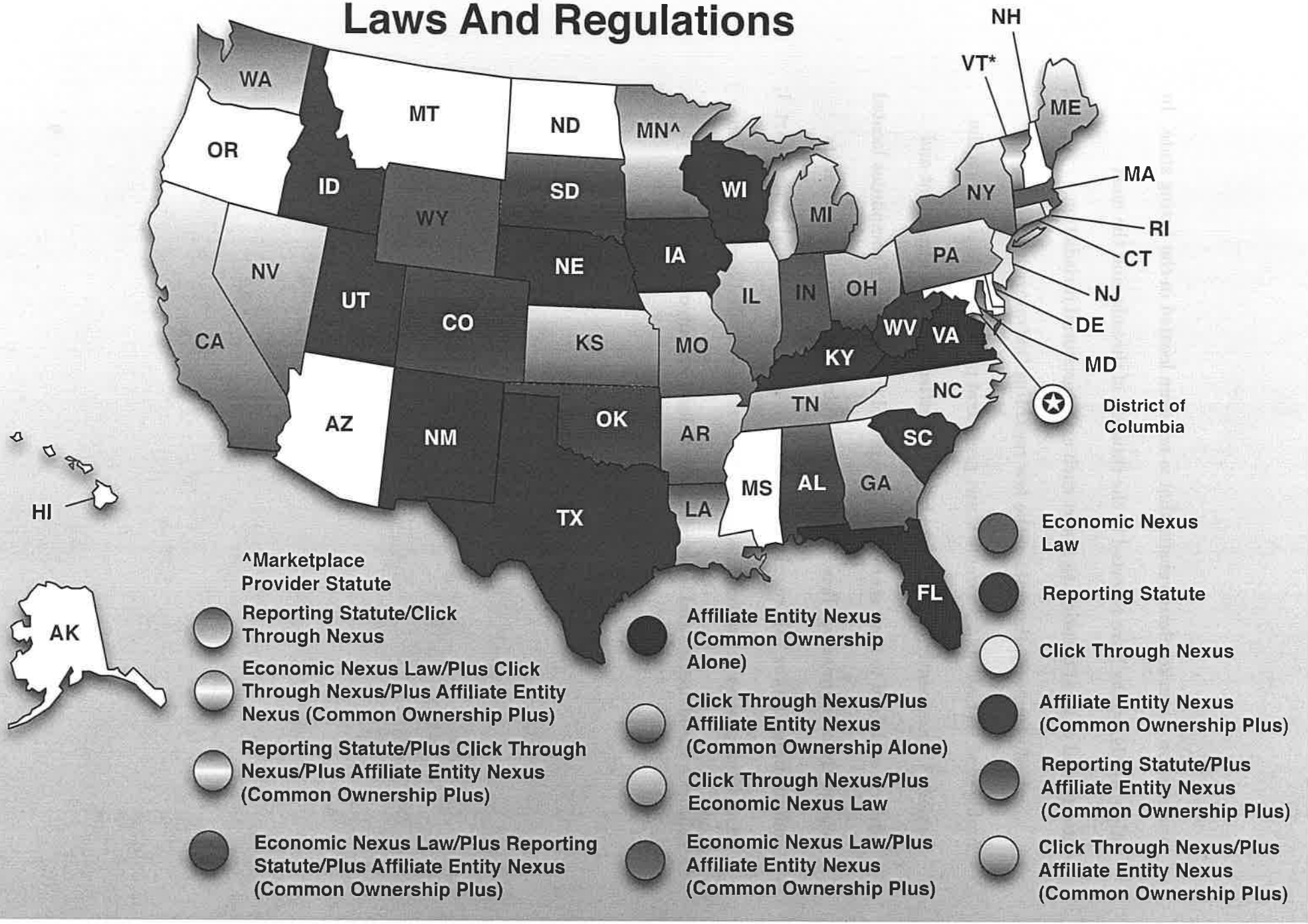
[1] *See* European Commission, "A Digital Single Market Strategy for Europe," Communication From the Commission to the European Parliament, the European Council, the European Economic and Social Committee, and the Committee of the Regions, COM(2015) 192final (May 6, 2015), available at http://bit.ly/1clD1tZ.

products on a marketplace website that is not even located in the taxing state. In other words, states have resorted to the thinnest of threads, and the most attenuated of legal theories, to assert such extraterritorial jurisdiction.

Unfortunately, the state of the law regarding "extraterritoriality" is ambiguous, at best, and Supreme Court precedent provides little clarity on the subject. Consequently, lower courts have not settled upon any consistent and uniform standard to limit state efforts to control the conduct of companies located beyond their boundaries. It is, therefore, appropriate for Congress, under its constitutional power "[t]o regulate Commerce ... among the several States" (Art. 1, §8, cl.3), to protect the national economy from regulatory Balkanization and to reinforce the structure and integrity of our federal system of government.

Over-Reaching Sales Tax Jurisdiction Laws And Regulations



July 24, 2017

Dear Members of Congress:

On behalf of the undersigned agricultural trade organizations, we write to urge your support for H.R. 2887, the No Regulation Without Representation Act. Introduced by Representative Jim Sensenbrenner (R-WI), this legislation prohibits a state from imposing tax or regulatory burdens on businesses not physically located in the state.

Americans enjoy the most abundant, safest, highest quality and most affordable food in the world thanks to the efficiency and productivity of our nation's farmers and ranchers. While just two percent of the U.S. population is responsible for growing the basic essentials for living – from the food we eat and beverages we drink to the fiber that makes the clothing we wear – agriculture, food and related industries account for 11.1 percent of U.S. employment and a 5.5 percent of gross domestic product (GDP).

Unfortunately, the already challenging work of agricultural production has grown increasingly complex due to politicized taxation policies and regulatory decisions imposed at the state level that negatively impact consumers and businesses nationwide. These decisions are often driven by activists with varied agendas that seek to ban products when out-of-state companies refuse to comply with arbitrary mandates under state law. These mandates are not grounded in sound science, lack common sense and result only in increased food prices for consumers.

It's important to note that the No Regulation Without Representation Act of 2017 does not prohibit states from regulating businesses within their borders. Further, states remain free to insist that products entering their borders comply with national standards. Put simply, H.R. 2887 enforces the Constitutional provisions prohibiting states from imposing regulatory mandates on agricultural producers and businesses in other states.

Excessive taxation and regulatory burdens weigh heavily on America's farmers and ranchers. As such, the undersigned organizations respectfully request your support for this legislation to protect the free flow of goods in interstate commerce, prevent food costs from rising and allow consumers to continue to choose among a vast array of food products.

Sincerely,

National Cattlemen's Beef Association
National Pork Producers Council
North American Meat Association

July 25, 2017

Written Testimony for the U.S. House Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law Hearing Titled "No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders"

Submitted by Charles A. Wagner III, Vice Chairman of Jewelry Television

Chairman Tom Marino and Ranking Member David Cicilline, thank you for holding today's subcommittee hearing on cross-border reach.

Jewelry Television (JTV) is a television and Internet home shopping company based in Knoxville, TN, specializing in the sale of jewelry and gemstones. Founded in 1993, JTV today employs over 1,300 people in Knoxville, TN.

JTV strongly supports the No Regulation Without Representation Act of 2017 (H.R. 2887). From our perspective as a remote retailer, this bill serves as an effective check against states imposing regulatory and taxation burdens on out-of-state businesses that have no nexus and no representation and cannot easily fight back. These laws and regulations are seriously burdening interstate commerce and our Company's ability to sell into all fifty states.

Our company now regularly receives several notices per month from states where we do not have nexus, demanding information about our sales and customers and warning that we are or may be liable to provide information about our customers and to pay sales tax, gross receipts tax, business income tax, and other taxes in their state based on sales to customers residing in their state. While these notices were previously only an occasional issue, they are now a regular occurrence that threaten our sales into the regulating states and are consuming our management's time and requiring large legal expenses to address. H.R. 2887 would put a stop to the out-of-state laws and regulations that we believe defy the Supreme Court's 1992 *Quill* decision and the spirit of the Commerce Clause of the U.S. Constitution.

In our opinion, many of the regulatory and taxation schemes being adopted by states are nothing but clever attempts to replace sales tax revenues lost due to the *Quill* decision. H.R. 2887 acts as an important step in addressing this broader remote sales tax issue, but it alone is not a solution to the remote sales tax issue. For over 6 years, JTV has advocated for a federal legislative solution to the issue, one that helps to level the playing field for remote retailers and brick-and-mortar retailers in a way that is simple to implement. Simplicity is the key.

For retailers of JTV's size, it would be practically impossible to comply with tax rates and reporting requirements of over 13,000 different taxing jurisdictions in the 45 states

with sales taxes. But it also would not be fair to simply use JTV's origin-rate. Tennessee is a no income tax state that relies heavily on a high sales tax, and we would be at a competitive disadvantage to other remote retailers in lower-sales tax states. Instead, JTV supports a one-rate-per-state solution, with one reporting requirement per state. This would effectively mean 45 different rates, with 45 reporting requirements, a level of complexity that is manageable. One rate per state, calculated by each sate as a rate between the state's high and low rates and statistically pro-rated based on economic activity within each taxing district, would be simple, would level the playing field between brick and mortar and remote retailers, and is eminently fair to the states. The states would receive taxes from remote sales in aggregate amounts essentially the same as nexus sales, remote sellers would collect and remit those taxes to one central location within the state, with the state having responsibility to make distributions to the state taxing districts.

Respectfully, we believe it is time for the U.S. Congress to act to protect interstate commerce, which is so important to our Country's economy. We hope that the Judiciary Committee soon votes to pass H.R. 2887 and also soon considers a fair federal legislative solution to the remote sales tax issue.

May 15, 2017

Open Letter to the House of Representatives: Support the "No Regulation without Representation Act of 2017"

Dear Representatives:

We, the undersigned organizations representing millions of Americans, **write to express gratitude to Congressman Jim Sensenbrenner for his introduction of the No Regulation without Representation Act of 2017 and to voice our support for the legislation. The bill codifies the requirement that businesses have to be physically located in a state before they can be taxed or regulated, protecting them while maintaining state sovereignty.**

The United States has benefited under our federalist system that has allowed states to be laboratories of democracy. Businesses and the people that own and run them can choose the state tax and regulatory climate that suits their own unique needs and preferences, and they can hold their state elected officials accountable. Unfortunately, a number of worrisome legislative trends at the state level threaten to erode that foundation of federalism by empowering states to exercise power outside their borders. For example, bills that would dramatically expand authority to collect sales taxes, label restaurant menus, and even determine the appropriate size of chicken cages could impose undue economic burdens on citizens by government officials who are in no way accountable to them. If unchecked, such efforts could substantially harm interstate commerce.

The unconstitutional nature of these proposals is cause for alarm. **The Supreme Court ruled unequivocally in its 1992 decision, *Quill v. North Dakota* that a physical presence is required as sufficient nexus to impose sales taxes.** In other words, it underscored the common sense notion that a state is sovereign within its own borders but cannot exercise power outside them. They also held that the dormant commerce clause of the Constitution forbids states from imposing cross-border regulations.

We commend Congressman Sensenbrenner for defending the Constitution, his constituents, and taxpayers across the nation by introducing this important legislation. States must maintain the right to govern their home businesses as they see fit, and to protect them from the reach of other state governments.

We strongly urge every member of Congress to cosponsor and support the No Regulation without Representation Act. Passage of this bill would codify important Constitutional protections on behalf of consumers, taxpayers, and small businesses.

Sincerely,

Brandon Arnold, Executive Vice President
National Taxpayers Union

Lisa B. Nelson, CEO
ALEC Action

National Taxpayers Union

ALEC ACTION

AMERICANS FOR PROSPERITY

AMERICANS for TAX REFORM

Center for Freedom and Prosperity

COMPETITIVE ENTERPRISE INSTITUTE

Richard Viguerie's CONSERVATIVEHQ

COUNCIL FOR CITIZENS AGAINST GOVERNMENT WASTE

Chrissy Harbin, Vice President of External Affairs
Americans for Prosperity

Grover Norquist, President
Americans for Tax Reform

Andrew F. Quinlan, President
Center for Freedom and Prosperity

Jessica Melugin, Adjunct Fellow
Competitive Enterprise Institute

Richard Viguerie, Chairman
ConservativeHQ.com

Tom Schatz, President
Council for Citizens Against Government Waste

Katie McAuliffe, Executive Director
Digital Liberty

Jim Babka, President
DownsizeDC.org, Inc.

Adam Brandon, President
FreedomWorks

Matt Kibbe, President
Free the People

Heather R. Higgins, President and CEO
Independent Women's Voice

Andrew Langer, President
Institute for Liberty

Brian Williams, Legislative Director
National Center for Policy Analysis

Andrew Moylan, Executive Director
R Street Institute

David Williams, President
Taxpayers Protection Alliance

Judson Phillips, Founder
Tea Party Nation

Digital Liberty

Downsize DC

FreedomWorks

Free the People

Independent Women's Voice
A VOICE FOR THE MAINSTREAM

Institute for Liberty
Defending America's Right To Be Free

National Center for Policy Analysis

R Street
Free markets. Real solutions.

Taxpayers Protection Alliance

TPN
Tea Party Nation

P.O. Box 2277, Harrisonburg, VA 22801; 540-433-2451; hobey@vapoultry.com

July 24, 2017

The Honorable Jim Sensenbrenner
2449 Rayburn House Office building
Washington, D.C. 20515

Dear Congressman Sensenbrenner:

I am writing concerning HR 2887, the No Regulation Without Representation Act of 2017. Virginia Poultry Federation, founded in 1925, represents poultry farmers and processors in the Commonwealth of Virginia. We are encouraged by the prospect of this legislation and appreciate the chance to comment.

In recent years, farmers and food producers have faced the prospect of a patchwork of state requirements related to such issues as food safety and animal welfare. Examples include California's egg production laws and Vermont's GMO labeling laws. Notwithstanding their merits or lack thereof, such individual state regulatory standards can impose unreasonable burdens upon out-of-state producers involved in interstate commerce who have no say in their development and composition. The cost of compliance will potentially harm producers economically and lead to higher prices for consumers.

The United States is blessed with the world's safest and most abundant and affordable food supply. Our food security is due in large part to the unrestricted flow of agricultural commodities and food products across state lines, and the regulation of food safety and production standards at the federal level by USDA and FDA.

We are pleased to see consideration of legislation to address these concerns, and thank you for your efforts with regard to HR 2887.

Sincerely,

Hobey Bauhan

Hobey Bauhan
President

Virginia Cattlemens Association

PO Box 9
Daleville, VA 24083-0009
Office: 540-992-1009
Fax: 540-992-4632
Email: jcarter@vacattlemen.org
Website: www.vacattlemen.org

Affiliated with The National Cattlemen's Beef Association

July 12, 2017

The Honorable Jim Sensenbrenner
2449 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Sensenbrenner,

On behalf of the members of the Virginia Cattlemen's Association I appreciate the opportunity to contact you and express our support for HR 2887 No Regulation Without Representation Act of 2017. The Virginia Cattlemen's Association is the Commonwealth's oldest and largest cattle and beef industry producer organization. Since 1944 our 6500 members have proactively worked to assure growth and added value in a complimentary economic and land use landscape of Virginia agriculture.

The assurance of free and unrestricted trade of agricultural commodities within and across state borders as well as internationally are key contributors to agricultural prosperity and continued food security. The United States has agencies such as USDA and FDA whose charge it is to provide and enforce standards of health and sanitation for pre and post production of agricultural commodities for an abundant and wholesome food supply. Unfortunately in recent years there is an increasing movement around the country resulting in states creating laws that impose their own standards for production on farm products produced within in their borders and applying to products imported for retail sale in their state as well. This regulatory movement has been targeted among states with minor production of products such as eggs, veal and pork with support of anti-conventional agriculture to regulate food animal production and retail food products available to consumers.

The Virginia Cattlemen's Association supports national standards for pre and post-harvest of food production as well as individual state's ability to regulate intrastate trade. The Virginia Cattlemen's Association opposes any legislation among states that seeks to impose additional standards for agricultural commodities that require additional tax or regulatory burden for interstate trade. The members of Virginia Cattlemen's Association recognize our national product standards, support free interstate trade and consequently support HR 2887.

Sincerely,

Andy Smith
President – Virginia Cattlemen's Association