

## South Dakota v. Wayfair: Will *Quill* Survive?

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In 1992, the Supreme Court made a decision that has, so far, stood the test of time and shaped how states impose sales tax on businesses. *Quill v. North Dakota* involved Quill Corp., a company distributing ads, catalogs, flyers, and floppy disks into North Dakota, and North Dakota's attempt at imposing sales tax on Quill Corp. for their "regular or systematic solicitation" of consumers within the state. The Supreme Court's decision in *Quill* cemented what we know now as the "physical presence test," which requires there to be a physical presence, or a tangible connection, between a state and a business in order for that state to impose taxing obligations. For more than 20 years, states have modeled their taxing systems around the limitations imposed under *Quill*, and anyone engaged in ecommerce knows that understanding where their "nexus" lies is critical in understanding their tax collection and filing requirements within a state.

Since *Quill*, many states have attempted to broaden their taxing authority while still meeting the requirements set forth under *Quill*'s physical presence test. *Quill* was decided before the boom of ecommerce and large internet retailers, in a time where mail order catalogs were the latest trend for interstate sales. An ecommerce business without physical presence in a state cannot be required to charge sales tax on purchases within those states since they lack sufficient nexus. Arguably, this has created a large deficit in a state's taxing ability and the revenue that states are able to generate as ecommerce continues to grow and consume the marketplace. South Dakota, intent on challenging *Quill*, has now forced the Court's hand into making a determination as to whether, in this age of ecommerce, *Quill* should be overturned.

South Dakota passed S.B. 106 in March of 2016, which imposed sales tax registration and collection obligations on sellers that lacked physical presence within the state if the seller in the current or previous calendar year had gross revenue from sales of tangible personal property (TPP) and services delivered within the state exceeding \$100,000, or sold TPP and services for delivery into the state in 200 or more separate transactions. Following this bill, South Dakota sued four out-of-state retailers seeking to affirm the validity of S.B. 106. One of the retailers registered and chose to collect sales tax, and the remaining three moved for summary judgment, which was granted by the Supreme Court of South Dakota under the restrictions imposed by *Quill*. The Supreme Court of the United States granted certiorari of this case in January of 2017, agreeing to look at whether the precedent set under *Quill* should be called into question, or potentially overturned.

While it wouldn't be unprecedented to see the Supreme Court overturn *Quill*, this is not an easy argument for South Dakota to win. Under the principle of stare decisis, overturning a prior precedent set by the Court requires a demonstration of "special justifications." The Court will look to whether their prior decision is inconsistent with other decisions,

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and whether the holding in *Quill* was harmful, important, or detrimental to the doctrine at issue. The court will also determine whether *Quill* should be overturned due to a change in circumstance, and will analyze the distinguishing factors between *Wayfair* and *Quill*, focusing on any statutory, or constitutional interpretations that may factor into the facts of these cases.

Tuesday, April 17, 2018, the Supreme Court began hearing oral arguments in *South Dakota v. Wayfair*. Among some of the more frequent concerns raised by the Justices is the concern over the immense administrative burden that making such a “binary” decision to overturn *Quill* would have on both the states and small businesses. Immediately, the Attorney General for South Dakota was met with questions from the Justices voicing these concerns. Justice Sotomayor, stating she was “concerned about the many unanswered questions that overturning precedents will create,” indicated that this would ensure an influx of lawsuits surrounding such a massive change. Justice Sotomayor also vocalized concerns over retroactive liability for sellers if the Court were to change the physical presence standard, which would only increase the administrative burden on small businesses.

While these administrative concerns are immense, South Dakota also has a strong argument that states could lose billions in revenue over the next decade if they are unable to fully tax retailers within the ecommerce marketplace. Chief Justice Roberts noted that as a country we may be past the point in our history where major ecommerce based retailers are refusing to collect and remit sales tax, noting that the major five players in this field already comply across the board (Amazon, for instance, has charged sales tax appropriately across the country for some time now). His statements highlighted that these large retailers are still successful, even while complying with the varying state taxing liabilities. Chief Justice Roberts noted that we are no longer in a time where large ecommerce retailers are refusing to collect sales tax to enjoy a price advantage over brick and mortar stores, stating “if it is, in fact, a problem that is diminishing rather than expanding, why doesn’t that suggest that there [is] greater significance to the arguments that we should leave *Quill* in place?” The Justices noted that it’s not these larger players in the marketplace that states need be concerned with currently, and it’s not the large players that will feel an increased burden if *Quill* were to be overturned. Instead, small businesses will feel the impact first.

Many of the arguments have come down to whether the Supreme Court should be deciding this issue, or whether action by Congress would be more appropriate. While South Dakota argued that Congress has had more than 20 years to act, thus allowing the Court to step in, the Justices were prompt to point out that “this is something [Congress is] going to leave the way it has been for, whatever it is, 25 years.” The Court also noted that “it would be very strange for [the Supreme Court] to tell Congress it ought to do something in any particular area.” Chief Justice Roberts brought up the possibility that this is an area that Congress has decided to simply leave alone. On the other hand, Justice Kagan cautioned that Congress’s inaction is reason enough to proceed carefully in overturning *Quill*. This inaction may have the effect of raising the bar as to what would be necessary to overturn such a monumental case today.

While it is unclear at this stage what the fate of *Quill* and *Wayfair* will be, it is certain that no decision from this Court will be entered into lightheartedly. The Justices are rightly concerned with the practical impact that such a massive decision would have on small retailers, specifically the increased procedural burden ecommerce vendors would face if states were permitted to impose tax on businesses who lack physical presence. Many states are struggling to increase revenue and balance their budgets, especially after the passage of the Tax Cuts and Jobs Act, which makes it unsurprising that South Dakota is attempting to broaden its taxing authority. However, it is wise for everyone to keep in mind what overturning *Quill* could mean for all sides. We are in an age where the law and technology are in a constant race against each other. If *Quill* remains, the *Wayfair* case could spark a flood of new laws from states attempting to define and re-define what digital touches to a state are consistent with *Quill*.

A decision from this case is set for the end of June. HBK will continue to monitor this case and the impact it may have on our clients.