

In [*South Dakota v. Wayfair*](#) the Supreme Court ruled that states and local governments can require vendors with no physical presence in the state to collect sales tax. According to the Court, in a 5-4 decision, “economic and virtual contacts” are enough to create a “substantial nexus” with the state allowing the state to require collection.

In 1967 in [*National Bellas Hess v. Department of Revenue of Illinois*](#), the Supreme Court held that per its Commerce Clause jurisprudence, states and local governments cannot require businesses to collect sales tax unless the business has a physical presence in the state.

Twenty-five years later in [*Quill v. North Dakota*](#) (1992), the Supreme Court reaffirmed the physical presence requirement but admitted that “contemporary Commerce Clause jurisprudence might not dictate the same result” as the Court had reached in *Bellas Hess*.

Customers buying from remote sellers still owe sale tax but they rarely pay it when the remote seller does not collect it. Congress had the authority to overrule *Bellas Hess* and *Quill* but never did so.

In March 2015 Justice Kennedy wrote a concurring opinion stating that the “legal system should find an appropriate case for this Court to reexamine *Quill*.” Justice Kennedy criticized *Quill* in [*Direct Marketing Association v. Brohl*](#) for many of the same reasons the State and Local Legal Center (SLLC) stated in its *amicus* brief in that case. Specifically, internet sales have risen astronomically since 1992 and states and local governments are unable to collect most taxes due on sales from out-of-state vendors.

Following the 2015 Kennedy opinion a number of state legislatures passed laws requiring remote vendors to collect sales tax in order to challenge *Quill*. South Dakota’s [law](#) was the first ready for Supreme Court review. It requires out-of-state retailers to collect sales tax if they annually conduct \$100,000 worth of business or 200 separate transactions in South Dakota.

In an opinion written by Justice Kennedy the Court offered three reasons for why it was abandoning the physical presence rule. “First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be ‘applied to an activity with a substantial nexus with the taxing State.’ Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow.”

While the dissenting Justices, in an opinion written by Chief Justice Roberts, would have left it to Congress to act, Justice Kennedy opined the Court should be “vigilant” in correcting its error. “Courts have acted as the front line of review in this limited sphere; and hence it is important that their principles be accurate and logical, whether or not Congress can or will act in response.”

To require a vendor to collect sales tax the vendor must still have a “substantial nexus” with the state. The Court found a “substantial nexus” in this case based on the “economic and virtual contacts” Wayfair has with the state. A business could not do \$100,000 worth of business or 200 separate transactions in South Dakota “unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”

Finally, the Court acknowledged that questions remain whether “some other principle in the Court’s Commerce Clause doctrine might invalidate the Act.” But the Court cited to three features of South Dakota’s tax system that “appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement.”

Tillman Breckenridge, Bailey Glasser, and Patricia Roberts, William & Mary Law School Appellate and Supreme Court Clinic, wrote the SLLC [amicus brief](#) which the following organizations joined: the National Governors Association, the [National Conference of State Legislatures](#), the [Council of State Governments](#), the [National Association of Counties](#), the [National League of Cities](#), the [United States Conference of Mayors](#), the [International City/County Management Association](#), the [International Municipal Lawyers Association](#), the Government Finance Officers Association, National Public Labor Relations Association, the International Public Management Association for Human Resources, National State Treasurers Association, National School Boards Association, AASA, the School Superintendents Association, the National Association of Elementary School Principals, and the Association of School Business Officials International.

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