



# UPDATED: Will the Supreme Court Address States' Power to Require that Retailers Tax Internet Sales?

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**UPDATE January 16, 2018:** *On January 12, 2018, the U.S. Supreme Court granted South Dakota's petition to hear the case South Dakota v. Wayfair. Oral arguments have not yet been scheduled.*

*The original post from October 26, 2017, follows below.*

On October 2, 2017, South Dakota [petitioned](#) the U.S. Supreme Court to hear a decision by its highest state court that struck down [a state law](#) requiring that certain large retailers without a physical presence in South Dakota collect and remit taxes on Internet sales and other remote sales made to the state's residents. The case, [South Dakota v. Wayfair](#), is notable because the South Dakota law imposing the tax collection obligations is clearly, and intentionally, unconstitutional under the U.S. Supreme Court's holding in the 1992 case [Quill v. North Dakota](#). The state enacted the law with the hopes of challenging [Quill](#), with the legislative findings [explaining](#) that the law "is necessary" in light of the "urgent need for the Supreme Court of the United States to reconsider" [Quill](#). [South Dakota v. Wayfair](#) is also of interest to Congress because the case has the potential to impact the ongoing debate about whether Congress should allow states to require that retailers collect and remit taxes on Internet sales. It remains to be seen whether the Supreme Court will agree to hear [Wayfair](#), but it appears likely that, with [billions of potential tax revenue](#) at stake, other states will continue their efforts to bring this issue to the Court in the absence of congressional action.

In [Wayfair](#), the [South Dakota Supreme Court](#), affirming a lower court's decision, held that the state law was unconstitutional under the U.S. Supreme Court's [Quill](#) decision. In [Quill](#), the Supreme Court relied on the 1967 case [National Bellas Hess v. Department of Revenue](#) to hold that the dormant Commerce Clause—an [implicit restriction](#) in the U.S. Constitution that prohibits states from unduly burdening interstate commerce even in the absence of federal regulation—restricts states from requiring retailers to

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collect and remit taxes on sales made to state residents if the retailer does not have a physical presence in the state. In *Quill*, the Court determined that allowing a state to impose tax collection obligations on retailers who do not have a physical presence in that state would impermissibly burden interstate commerce due to the complexities these retailers would face in complying with the different rules in the nation's numerous taxing jurisdictions. Following the precedent established by *Bellas Hess*, the *Quill* Court also emphasized the benefits associated with using a bright-line standard that "firmly establishes the boundaries of legitimate state authority to impose a duty to collect" taxes. In *Wayfair*, the South Dakota Supreme Court explained that it was bound by the *Quill* precedent and therefore struck down the state's law because it applied to retailers without a physical presence.

Why would South Dakota enact a law that is so clearly in conflict with the Supreme Court's decision in *Quill*? The state enacted the law to develop litigation that could be appealed to the Court so that the state could argue that *Quill*'s physical presence standard should be overturned. The state believes, as do some commentators and other states, that *Quill*'s standard is outdated because technological advances have significantly reduced the burden that retailers would face in collecting and remitting the taxes. On the other hand, other commentators have argued that the *Quill* standard remains relevant and, in particular, reduces the risk of multiple jurisdictions taxing the same sale. These commentators have also highlighted some of the legal uncertainties that could arise when assessing the scope of the states' authority to impose tax obligations in the absence of *Quill*'s bright-line standard.

Recently, at least two Supreme Court Justices have seemingly expressed doubts about *Quill*. First, Justice Kennedy addressed *Quill* in a concurrence he wrote for the 2015 case *Direct Marketing Association (DMA) v. Brohl*. That case concerned a procedural issue in a challenge to a Colorado law requiring that out-of-state retailers report information to Colorado and their customers about untaxed sales made to state residents. In his concurrence in *DMA*, Justice Kennedy characterized *Quill*'s holding as "tenuous" and "inflicting extreme harm and unfairness on the States," raising the possibility that *Quill* should be reconsidered in light of technological advances and the development of the Internet. Justice Kennedy wrote that, *Quill* "should be left in place only if a powerful showing can be made that its rationale is still correct." The Court's newest member, Justice Gorsuch, also recently addressed *Quill* while a judge on the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit"). In 2016, after the Supreme Court issued its decision in *DMA*, the case was remanded to the Tenth Circuit. Then-Judge Gorsuch was part of the three-judge panel who heard the case on remand. The Tenth Circuit held that the Colorado law was constitutional even though it applies to retailers without a physical presence. The court explained that *Quill* was not applicable to the case because *Quill* concerned tax collection requirements, while the Colorado law imposed only reporting requirements on out-of-state entities. Then-Judge Gorsuch wrote a concurrence in which he described *Quill* as "among the most contentious of all dormant commerce clause cases" and stated that the Tenth Circuit would be required to follow *Quill* "whether or not we profess confidence in the decision itself." Some commentators have interpreted his concurrence to suggest that he has doubts whether *Quill*'s physical presence standard should remain good law. While the Tenth Circuit's *DMA* decision was then appealed to the Supreme Court and the Court was asked to take the case to overrule *Quill*, the Court ultimately decided not to hear the challenge to Colorado's reporting law.

Within months of Justice Kennedy's concurrence in *Brohl*, several states—including South Dakota, Tennessee, and Alabama—enacted laws or adopted regulations in direct conflict with *Quill*. South Dakota's law is the first to be challenged and reach the Supreme Court.

For Congress, *South Dakota v. Wayfair* is of interest because there has long been a debate about whether Congress should pass legislation to permit states to impose tax collection obligations on remote retailers. Under its authority to regulate commerce, Congress has the power to authorize state action that would otherwise violate the dormant Commerce Clause so long as the congressional act is consistent with other provisions in the Constitution. Bills have been introduced in the 115<sup>th</sup> Congress to address this issue in various ways: H.R. 2193 (Remote Transactions Parity Act of 2017); H.R. 2887 (No Regulation Without

Representation Act of 2017); and [S. 976](#) (Marketplace Fairness Act of 2017). If the Supreme Court agrees to hear *Wayfair* and the Court were to overturn or modify *Quill*'s physical presence standard, it could affect congressional deliberations as to whether federal legislation may be warranted and, if so, what such legislation should contain. For example, if the Court were to overturn *Quill* so that states were generally authorized to impose tax collection obligations on remote retailers regardless of their physical presence in a state, Congress would no longer need to affirmatively act to allow states to impose such tax collection. In such a scenario, if Congress shares concerns with those who defend *Quill* that an overruling could result in burdensome or non-uniform rules for Internet sellers, Congress could choose to enact legislation imposing limitations on such authority. For example, Congress might choose to require that states meet simplification requirements relating to their tax collection procedures, audits, and enforcement (perhaps similar to those found in H.R. 2193 and S. 976) or might attempt to limit the scope of the states' tax collection authority (such as in H.R. 2887).

One final point is that Congress's Commerce Clause power might influence any decision by the Court with respect to *Wayfair*. The fact that Congress has the power to pass legislation modifying the physical presence standard might make it less likely that the Court would decide to hear the case or, if it does, overturn *Quill*. Thus, it is possible that the Supreme Court may decide not to hear *Wayfair* and let *Quill* stand—even if a majority of Justices might think that the physical presence standard is outdated—under the theory that this issue is best left to Congress. Should the Court decide not to hear *Wayfair*, it is likely the Court will be asked to hear cases from other states, such as [Tennessee](#) and [Alabama](#), once those lawsuits work their way through the judicial system. If the Supreme Court were to agree to hear *Wayfair* or any of the other cases, it seems that the earliest the Court might hear such a case would be next year. If Congress were to act in the meantime and pass legislation that modified *Quill*'s physical presence standard, this action could make any such cases that directly challenge *Quill* moot under [Article III](#) of the Constitution so that the Court would be without jurisdiction to hear them, although such a conclusion may depend on the specifics of any action taken by Congress.