



SUMMARY: *SOUTH DAKOTA V. WAYFAIR*

On June 21, 2018, the Supreme Court rendered its opinion in *South Dakota v. Wayfair* by a 5-4 vote to overturn the physical nexus standard established in the 1967 ruling, *Bellas Hess v. Illinois* and upheld in the 1992 pre-internet decision, *Quill Corp. v. North Dakota*. Justice Kennedy wrote the majority opinion, joined by Justices Thomas, Ginsburg, Alito and Gorsuch. This decision upended over 50 years of a standard the Court now views as “flawed.” The Court discussed at length that the *Quill* rule “creates, rather than resolves market distortions” and called it effectively a “judicially created tax shelter for businesses that limit their physical presence in a state but sell their goods and services to the State’s consumers, something that has become easier and more prevalent as technology has advanced.” The court also ruled in this case that “*stare decisis* or relying on precedent can no longer support the Court’s prohibition of a valid exercise of the States’ sovereign power.”

The Supreme Court’s decision marks a victory for local businesses and communities as the antiquated physical presence sales tax collection rule is no more. The high court ruled in clear, unambiguous terms that “the physical presence rule of *Quill* is unsound and incorrect.” The Court recognized that by giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes, the physical presence rule “has limited States’ ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.” The Court established that substantial nexus will be the new standard; and that other aspects of the Court’s Commerce Clause doctrine, such as discrimination against or undue burdens upon interstate commerce, can protect small businesses and others engaged in commerce across state lines.

With this new standard established, the majority opinion noted the approach of the South Dakota law – i.e. that it applies only to sellers that annually deliver more than \$100,000 of goods into the state or have 200 or more separate sales transactions into the state – satisfies the substantial nexus requirements under the Commerce Clause. The Court went on to recognize that these and other features of the law – such as no retroactivity collection obligation and the fact that South Dakota is a member of the Streamlined Sales and Use Tax Agreement (SSUTA) meet the new standard set forth in this ruling.

Dissent

Chief Justice Roberts wrote the dissenting opinion, joined by Justices Breyer, Sotomayor and Kagan. In general, their view is that although the physical presence standard as determined in *Bellas Hess* was wrongly decided, Congress should change the rules that affect ecommerce due to “the potential to disrupt the development of such a critical segment of the economy.” Their opinion says that the majority “breezily disregards the costs that its decision will impose on retailers” and that the “burden will fall disproportionately on small businesses,” which the Justices note are items Congress could fix as part of a legislative solution.

The Court reiterated that Congress may act to address any of the concerns with the new standard. In fact, Justice Kennedy’s majority opinion acknowledges that “Congress may legislate to address these problems if it deems it necessary and fit to do so.” Congress has had 20 years and held more than 40 hearings on the topic, with little or no progress. It is possible that this case may finally be the catalyst for Capitol Hill to act – barely 24 hours after the ruling, that is what longtime efairness opponents are clamoring.

What's next?

Clearly this opinion will have an immediate and significant impact on sales and use tax collection obligations across the country. Legal counsel suggests this is something every company and state must immediately and carefully evaluate within the context of existing state and local collection authority.

At the same time, with South Dakota's law as a model, lawmakers now have the opportunity to create tax policy that treats all sales transactions the same regardless of where they take place. Over a dozen states have laws identical or substantially similar to South Dakota's. In a certain number of these states, the state taxing authorities were enjoined from enforcing the law pending the *Wayfair* decision. Proponents will request those states to begin enforcing these laws in the near future. In addition, the other states that are also full members of SSUTA are likely to act quickly to enact their own economic nexus standards and thresholds, or interpret existing laws to capture sellers without a physical presence in the state. For those states that have not yet completed the necessary simplification and other changes to their tax codes, the court's action is a powerful incentive to do so. Since many states are already out of session for the year, we will not see widespread collection until 2019 or beyond.

ICSC believes any legislative solution moving forward should emphasize fairness and make online-only sellers play by the same rules as brick-and-mortar retailers. It should be clear, concise and end the current climate of uncertainty, which negatively impacts the local businesses that are complying with the law. Following the model that innovative states like South Dakota have established is a good start and states have much to gain from the increased revenues the *Wayfair* decision enables.

For more information:

Betsy Laird

Senior Vice President, Global Public Policy

blaird@icsc.org

Jennifer Platt

Vice President, Federal Operations

jplatt@icsc.org

Christine Mott

Vice President, Legal

cmott@icsc.org