

# **Bond Case Briefs**

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## **Oyez! The Supreme Court Hears Oral Arguments in Wayfair, and Now We Play the Waiting Game.**

On April 17, 2018, the U.S. Supreme Court heard oral arguments in the case of [South Dakota v. Wayfair, Inc.](#) *Wayfair* is a direct challenge of the Court's holding in [Quill Corp. v. North Dakota, 504 U.S. 298 \(1992\)](#), that, under the dormant Commerce Clause, a remote/online vendor does not have to collect and remit sales/use tax on sales made to customers who reside in a given state unless the vendor has a physical presence in that state. Click [here](#) and [here](#) for background on this issue and its importance to state and local governmental units, and click [here](#) for [SCOTUSblog's](#) analysis of the oral arguments in *Wayfair*.

The Court's decision in *Wayfair* is expected by late June. Until then, we are left to speculate as to how the Court will rule. It is clear from the oral arguments that the Court is divided and that *Wayfair* could be a 5 - 4 decision. It most likely will not, however, be a 5 - 4 decision along the ideological lines to which we've grown accustomed, with the Court's liberal justices (Ginsburg, Breyer, Sotomayor, and Kagan) split from the conservative justices (Thomas, Roberts, Alito, and Gorsuch) and Justice Kennedy providing the deciding vote.

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Based on (i) questions posed and comments made during oral argument (Kennedy, Ginsburg, and Gorsuch), (ii) having openly invited a challenge to *Quill* (Kennedy), and (iii) having previously expressed skepticism of/hostility towards the dormant commerce clause (Thomas and Gorsuch), there are likely four votes in favor of overruling *Quill* - Justices Kennedy, Thomas, Ginsburg, and Gorsuch. It appeared at oral argument that Justices Roberts, Alito, Sotomayor, and Kagan were inclined to preserve the *Quill* decision. These are not the typical Supreme Court blocs.

Justice Breyer expressed at oral argument that he saw the merits of both sides in *Wayfair*, and he has emerged as the swing vote in this case. Which ideologically diverse group will prevail upon Breyer? The fantasy gaming crowd at [FantasySCOTUS](#) (yes, that is a thing) [believes that Justice Breyer will side with Justices Roberts, Alito, Sotomayor, and Kagan to uphold Quill](#). Are the fantasy gamers selling the [Notorious RBG](#) short? We'll find out this June.

**By Michael Cullers on April 26, 2018**

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