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South Dakota Asks Supreme Court to Consider Online Sales Tax.

For years, local authorities have tangled with online retailers over sales tax collection within communities. But this fall, a new development in a blockbuster Supreme Court case could force the issue into the national spotlight.

In Quill Corp. v. North Dakota (1992), the Supreme Court held that states cannot require retailers with no in-state physical presence to collect sales tax. Now, the state of South Dakota has filed a petition in South Dakota v. Wayfair asking the U.S. Supreme Court to hear a challenge to its law requiring out-of-state retailers to collect sales tax.

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 stated in its amicus brief. 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 Kennedy opinion, a number of state legislatures passed legislation requiring remote vendors to collect sales tax. South Dakota's law is the first to be ready for review by the U.S. Supreme Court. In September, the South Dakota Supreme Court ruled that the South Dakota law is unconstitutional because it clearly violates Quill and that it is up to the U.S. Supreme Court to overrule it.

Ruling in South Dakota's favor will require the U.S. Supreme Court to take the unusual step of overruling precedent. In its petition, South Dakota explains why the court should agree to hear this case and rule in its favor: Quill clearly needs to go.

When the court considers overruling its precedent, it looks to whether the existing rule: (1) is constitutional or statutory; (2) has engendered reliance interests; (3) has been undermined by changed circumstances; (4) has been consistently criticized as inconsistent with broader doctrine; and (5) has proven "unworkable" or "outdated" with experience.

Quill fares poorly on every measure. It is a severely criticized, constitutional holding that itself warned when decided that it might later be reconsidered. It is also, in Justice Gorsuch's words, a "precedential island … surrounded by a sea of contrary law." And after 25 years of technological progress and economic changes, it has proven entirely out of date.

At this point, the only thing South Dakota's petition asks the U.S. Supreme Court to do is agree to hear its case. U.S. Supreme Court review is discretionary; four of the nine justices must agree to hear any case. If the U.S. Supreme Court refuses to do so, the South Dakota Supreme Court ruling that South Dakota's law is unconstitutional will stay in place.

It is possible the court could hear this case this term — meaning it would issue an opinion by the end of June 2018.

National League of Cities

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