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The Supreme Court Grants Certiorari in Online Sales Tax Case.

The United States Supreme Court recently granted a petition for certiorari in *South Dakota v. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc.,* No. 17-494. This closely watched case will decide whether states can require internet-only retailers to collect sales taxes in states where the online sellers do not have a store or other "physical presence." Given the number of amici that submitted briefs in support of or opposition to the petition—including retailers, taxpayer groups, academics, trade associations, members of Congress, and 35 states—it is clear that this issue is critically important to many different groups.

South Dakota's petition argued that the current rule—under which states can only require online retailers with a "physical presence" within their boundaries to collect the tax that consumers owe on all transactions whether or not the retailer collects the tax—should be reconsidered because it harms local and regional economies and creates an uneven playing field for traditional brick-an--mortar retailers. It asserted that *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)—which reiterated the "sales tax only" rule that had been adopted a quarter century earlier—was decided at a time when internet sales were nothing like they are today. It argued that, while the decision's "legal rationales have imploded with experience, its practical impacts have exploded with the rapid growth of online commerce." It defined the reasons for granting certiorari as follows: "First, under contemporary conditions, Quill's rule is unusually (and increasingly) harmful. Second, *Quill* is not only incorrect, but also now the kind of mistake that should not be reinforced for the sake of stare decisis. And third, this issue cannot wait: The extensive activity in the States and uncertainty in the regulated industry now make it doubly 'unwise' for this Court to delay any further." As the petition noted, Justice Kennedy encouraged such a petition, noting in 2015 that it would be "unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Direct Mktg. Ass'n v. Brohl,* 135 S. Ct. 1124, 1135 (2015) (Kennedy J., concurring).

Amicus briefs in support of the petition were submitted by the Retail Litigation Center; the American Booksellers Association; the International Council of Shopping Centers; the National Association of Wholesaler-Distributors; the National Retail Federation; the South Dakota Retailers Association; the Tax Foundation; the Streamlined Sales Tax Governing Board, Inc.; the National Governors Association; the International Council of Shopping Centers; the American Farm Bureau Federation; the American Lighting Association; four United States Senators and two United States Representatives; the Multistate Tax Commission; Colorado and 34 other States and the District of Columbia; and law professors and economists. In its amicus brief, the Retail Litigation Center, which "represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of industries," explained that brick-and-mortar retailers have "suffer[ed] competitive disadvantage merely for being a physical part of the communities they serve." It argued that, although such retailers have "met these market forces by incorporating technology into their businesses," "no amount of ingenuity can get around the unfair advantage that [is] give[n] to absentee retailers by making their online sales appear duty-free." It also noted that *Quill* has created an extraordinary advantage for internet-only retailers, "distort[ing] interstate commerce and State tax policy" and stripping states and municipalities of much-needed tax dollars.

Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. opposed the petition. They argued that this case is not a proper vehicle for reexamining *Quill*, that South Dakota's petition ignored fundamental principles of *stare decisis*, and that the petition sought "what amounts to an advisory opinion on a barren factual record." They asserted that "South Dakota has manufactured an entirely inappropriate vehicle for . . . [the] Court to reconsider the continuing vitality of *Quill*." Although acknowledging that the "retail marketplace has changed considerably" since 1992, they noted that e-commerce giants such as Amazon have begun to voluntarily collect state sales taxes despite *Quill*, and that smaller internet-only retailers would be stripped of meaningful access to a national sales market, and subjected to a host of complicated compliance issues, if *Quill* were reversed. Instead, they argued, the proper recourse would be for Congress—which is "assign[ed] . . . the responsibility of regulating interstate commerce"—to address the issue through remote sales tax legislation. Amicus briefs opposing the petition were submitted by the National Taxpayers Union Foundation; NetChoice; Hon. Representative, Robert W. Goodlatte; Chris Cox, former member of Congress and co-author of the Internet Tax Freedom Act; the American Catalog Mailers Association; and Americans for Tax Reform. South Dakota filed a reply brief on December 20, 2017.

Both sides agree that the retail environment is rapidly changing with the advent of new technologies. The law often struggles to keep up with the effects of those changes, and this case frames an issue of great importance to many different interest groups on both sides of the issue. We will monitor this proceeding and report on the Court's decision, which is sure to have significant implications for retailers of all types and state and local communities.

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