

Stunning!! The US Supreme Court in a 5:4 decision abandons Quill!! 50 years of precedent gone in a "poof"!!

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In a 5:4 decision just issued this morning (*South Dakota v. Wayfair, Inc.*), the US Supreme Court upended 50 years of precedent and renounced the "physical presence" standard it had long held in determining when a remote taxpayer's presence in a state triggered the requirement to collect tax. In an opinion delivered by Justice Anthony Kennedy the Court held that the physical presence rule affirmed in *Quill v. North Dakota* (1992) is "unsound and incorrect" and thus its prior decisions, *Quill* and *National Bellas Hess v. Department of Revenue of Illinois* (1967), are overruled.

In *Quill v. North Dakota*, the US Supreme Court affirmed the existence of a bright-line "physical presence" standard for substantial nexus under the Constitution's Commerce Clause as the jurisdictional basis before a state or locality could impose a duty on a remote retailer to collect use tax from its customers. In a direct challenge to that decision, South Dakota enacted a law in 2016 imposing a tax collection requirement on remote sellers having a mere "economic presence" in the state (i.e., merely having sales to South Dakota customers exceeding \$100,000 in a calendar year, or 200 or more separate sales, no matter what size, into the state in a calendar year).

In September 2017, the South Dakota Supreme Court affirmed a lower court holding which had struck down the South Dakota law as unconstitutional in violation of the *Quill* physical presence requirement. The US Supreme Court accepted cert. this past January, essentially addressing whether in light of today's electronic age and the "legal and practical developments over the last 25 years," its 1992 *Quill* decision (and before that its decision in *National Bellas Hess*) should still be the law of the land.

In its decision this morning overturning *Quill*, Justice Kennedy articulated the decision of the Court making the following points:

- (1) *Quill* is flawed on its own terms. The physical presence rule is not a necessary interpretation of the prior case law, in particular *Complete Auto's* substantial nexus requirement. (*Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274.)
- (2) *Quill* creates rather than resolves market distortions. In effect, it is a judicially created tax shelter for businesses that decide to 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.
- (3) The physical presence rule of *National Bellas Hess* and *Quill* is also an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions citing that forty-one States, two Territories, and the District of Columbia have asked the Court to reject *Quill's* test.

Again citing the Court's own language: When the day-to-day functions of marketing and distribution in the modern economy are considered, it becomes evident that *Quill's* physical presence rule is artificial, not just "at its edges," but in its entirety. Modern e-commerce does not align analytically with a test that relies on the sort of physical presence

defined in *Quill*. And the Court should not maintain a rule that ignores substantial virtual connections to the State. As the Court states: It is not clear why a single employee or a single warehouse should create a substantial nexus while "physical" aspects of pervasive modern technology should not.

Further quoting the Court: The *Quill* Court (in 1992) did not have before it the present realities of the interstate marketplace, where the Internet's prevalence and power have changed the dynamics of the national economy. When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller. The expansion of e-commerce has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes, leading the South Dakota Legislature to declare an emergency.

As the Court indicates, the argument that the physical presence rule is clear and easy to apply is unsound, as attempts to apply the physical presence rule to online retail sales have proved unworkable. Because the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, arguments for reliance based on its clarity are misplaced. Stare decisis may accommodate "legitimate reliance interest[s]" (*United States v. Ross*, 456 U. S. 798, 824), but a business "is in no position to found a constitutional right on the practical opportunities for tax avoidance" (*Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 366). For these reasons the Court concludes that the physical presence rule of *Quill* is unsound and incorrect.

Justice Kennedy's decision was matched with short concurring opinions by Justice Thomas and Justice Gorsuch. Chief Justice Roberts along with Justices Breyer, Sotomayor, and Justice Kagan filed a dissent.

Yet even as the Court erases 50 years of precedent in a "poof" major questions abound: And so, what are now the rules, and to what extent may the States seek to impose their own jurisdictional requirements? The Court does not answer these questions. The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the South Dakota law at issue here. As the Court indicates: "Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here." Also, as a separate matter, under the Commerce Clause Congress has the ultimately authority to "regulate commerce among the several states." However, thus far it has not exercised its power in this area. It remains an open question as to what extent if any Congress may now decide to act.

Stay tuned for more. We are quite sure that we are far from hearing the last on this issue.

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