

SOUTH DAKOTA V. WAYFAIR: THE END OF THE “PHYSICAL PRESENCE” TEST AND THE FUTURE REACH OF SALES TAX

Posted on June 21, 2018 by Michelle F. Schwerin



Tag: [Michelle Schwerin](#)



In a 5-4 decision this morning, the Supreme Court upheld the South Dakota law requiring certain retailers to collect and remit sales tax regardless of whether the retailer had a physical presence. The Supreme Court characterized the “physical presence” test as “unsound and incorrect”.

History on the Matter

In 1967, the Supreme Court first determined that a state may only require retailers to collect and remit sales tax if the retailer is “physically present” in that state. In 1992, the Supreme Court upheld that decision applying the “physical presence test” to state sales tax.

Over the past 26 years, this precedent prohibited states from taxing out-of-state retailers. In light of a growing prevalence of internet retailers and online sales, the Supreme Court accepted for consideration a challenge to the “physical presence” test in a case captioned *South Dakota v. Wayfair*. In 1992, less than 2% of Americans had internet access. Now, about 89% have internet access.

In 2016, South Dakota passed a digital sales tax statute, [S.B. 106](#) (S.D. Codified Laws Chapter 10-64),

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

"to provide for the collection of sales taxes from certain remote sellers." The law's author, Senator Deb Peters, reported that the state intended to use the law to challenge *Quill*. It subsequently sued large online retailers for their failures to comply with the state's sales tax obligation.

The South Dakota law at issue imposes sales tax obligations on retailers that engage in at least 200 transactions with customers in South Dakota or have at least \$100,000 in sales in South Dakota per year.

Supreme Court Opinion: *South Dakota v. Wayfair*

Justice Anthony Kennedy wrote the [opinion](#), and Justices Clarence Thomas and Neil Gorsuch each filed concurring opinions. Chief Justice John Roberts [wrote a dissenting opinion](#), in which he was joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

What does this mean for the states?

The Supreme Court's decision now gives states the authority to compel out-of-state retailers to collect and remit sales tax. Several states already have legislation similar to South Dakota's and we expect many other states to follow suit. Forty-one states, the District of Columbia and two territories filed briefs in favor of the Supreme Court's decision.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.