



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy.

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Online Sales Tax Decision Up to the Supreme Court | Oas Episode 32 | April 26, 2018

Welcome to “Our American States,” a podcast of meaningful conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I’m your host, Gene Rose.

In 1992 before online shopping became the juggernaut that it is now, the U.S. Supreme Court decided in the case filed as *Quill Corp. vs. North Dakota* that online retailers did not have to collect sales or use taxes unless the company had a physical presence in the state. On April 17th of this year, the Supreme Court heard a case, *South Dakota vs. Wayfair Inc.*, that essentially challenges that 1992 ruling.

On this episode of “Our American States,” we talk with Supreme Court expert Lisa Soronen, who is Executive Director of the State and Local Legal Center, to learn what happened in the courtroom. And we start our program with NCSL President and South Dakota Senator Deb Peters, who filed legislation that resulted in the Supreme Court hearing that challenges the Quill case.

We’re talking with South Dakota State Senator Deb Peters, who is also President of the National Conference of State Legislatures. Senator, legislation you sponsored in your state was intentionally designed to land where it did here on April 17th, in the United States Supreme Court.

Before I get to the reaction of what you heard today, help our audience understand a little bit of the history of why you wanted the Supreme Court to reexamine its stand on online sales taxes.

Deb: Thank you for the question. The reason for the Senate Bill 106 and the path towards the U.S. Supreme Court is because back in 1992, there was a U.S. Supreme Court case, *North Dakota vs. Quill*. That Supreme Court case did not allow states to enforce tax laws for businesses shipping products into our states for sales tax.

We as states get to regulate what agriculture products come into our state. We as states get to regulate cars that come in and move into our state. We regulate all sorts of things. But for some reason, sales tax is now an island on what states get to regulate.

And so what we did with Senate Bill 106 is we just wanted to do a direct challenge to that court case to ensure that states had the ability to regulate sales tax collection that was already legally due and owed to the state.

Gene: I know that NCSL has been working on this issue for many years. What is the organization's hope that the Supreme Court does with this case?

Deb: What we would really like to ensure is to empower states' rights to ensure that states get to maintain their own sales tax laws, and by affirming what the State of South Dakota did, if the Supreme Court chooses to do so, would enhance the state's power of enforcement of state sales tax law.

Gene: And what would the result of that be for states?

Deb: For a state like South Dakota, what it would mean is online retailers would be treated equally as far as what brick-and-mortar retailers have to do. So, for instance, if you sell shoes in South Dakota and that's a taxable item within the state, and it's shipped into the state, it doesn't matter if you went down to the local retailer on Main Street or you had the same shoe shipped in from California – because it's a shoe and it's purchased basically and delivered into the State of South Dakota, those retailers, whether they're on Main Street or selling the product online, have to follow the same tax law for selling shoes.

Gene: And that levels the playing field you believe for everyone?

Deb: That is correct. The whole goal is to ensure that we have parity at the point of sale. So if it's a taxable transaction in the state, then it's a taxable transaction no matter how you purchase the product. If you're doing business in a state, you must follow the laws of the state.

Gene: And some of the major retailers have actually been transitioning toward this type of system, haven't they?

Deb: You know, all of the big-box retailers are already doing this. Amazon is collecting and remitting sales tax in all of the states that have sales tax. Wal-Mart, JC Penny, Target, Best Buy – they have physical nexus in all 50 states, so they've been doing this since the beginning, because they've had physical presence.

What we're trying to accomplish is all of the people selling on platforms across the country that are not following the state tax laws within those states, even though they're conducting business in those states, what we're trying to do is simplify the process to ensure that if you're doing business in a state, you're following not just the sales tax laws of the state, but all laws of the state.

Gene: So Senator, tell us about NCSL's position on this. Why has NCSL worked on this for so long?

Deb: This has been the number one issue for NCSL for as long as I can remember. It's a states' rights issue when it comes to enforcement of state tax law. We've been lobbying Congress since the 1992 court case and we've become active, fully active and engaged lobbying in D.C. once the Streamline Sales Tax Governing Board came into play.

NCSL seeded the money to help start the governing board. That's a fact that a lot of people don't know. And with that came the streamlining of definitions for 24 sales tax states. And that's critical because that shows that NCSL was the leader even after the 1992 court case to get states working together to ensure that we were going to be in compliance and do what we were told after that court case.

Now once the Streamline Sales Tax Governing Board came about and started doing all of this, it became imperative once we streamlined the definitions that we need Congress to act, to ultimately anoint the governing board saying: yup, we agree with you, you've streamlined your process. The court case in 1992 said Congress must act to ensure that states can collect and remit sales tax.

So since about 2006 and '07, NCSL has been knocking on doors and lobbying very actively up on the Hill.

Gene: And what kind of reaction have you gotten from Congress?

Deb: So in the beginning in the early 2005/2006 range, the conversation was: What are you talking about? We don't understand the issue. We spent a lot of time educating members and their staff as far as what the issue is, why we need Congress to act.

Within the last couple of years after 2013 after the Senate passed the Main Street Fairness Act, the conversation became different. The conversation was no longer on educating about what the issue is, but how to fix it, which has been a turn over the last 20 years. And NCSL has been instrumental in educating members and staff in Washington, D.C. about what this issue is and what it means to states.

Gene: So Senator, I know that some people would say that if the Supreme Court does overturn the Quill decision, that this would just be a new tax on consumers. How do you react to that?

Deb: I would absolutely disagree with that statement. As a Republican from a very conservative state, we don't like taxes, we don't like new taxes; we don't like raising taxes. We prefer a broad base and a low tax rate. And if the Supreme Court were to affirm our position with Senate Bill 106, what we would be able to do is lower that tax rate.

It's not about raising taxes because you have to remember: this particular tax is on the consumer, again, and it is already something that is the law. South Dakota, the use tax that you owe as a consumer if you don't pay tax from the retailer, has been on the books since 1939. If you are not paying your use tax, you are violating current tax law.

So this is not a new tax. You're just avoiding paying the tax that is already legally due and owed to the state. So I would vehemently disagree with this being a new tax.

Gene: And I should point out to our audience, when you're not fulfilling your legislative duties, you're an accountant. There are some who say that if the collection of sales tax becomes required for online sellers, that it would be difficult for them and perhaps put them out of business. What's your reaction to that?

Deb: I would have to say that with the software available and the technology available, that is not the case. It is a simple product that you can buy and it can work with your accounting software, it can work with your shopping cart online; it's streamlined right into the tax collecting remissions. All you have to do is basically map your product.

So if you're selling shoes, you tell the software that you're selling shoes; the software then determines whether it's taxable or not taxable within the variety of different states. So as long as you are telling the software you're selling shoes and you're not selling eggs, it's going to have you collect and remit the proper amount of sales tax based on the laws in the states in which you're doing business, as long as you don't lie to the software about what you're actually selling.

The software exists today. It's up and running. There are over 5,000 businesses using certified service providers within our country today already using it. And if it was so complicated, those businesses would not be using the software today, because they're using it for free.

Gene: So all of this has led up here. On April 17th you were in the Supreme Court. What did you hear? Did you get any sense of where the justices might land on this issue?

Deb: You know, that's a really good question as well. No, I would tell you that we don't really know where any of the justices are going to land. They asked a lot of very detailed questions. They peppered not just the proponents, but they also peppered the opponents on questions. It ranged from mapping transactions of what's taxable and not taxable to why didn't Congress act. I mean, they hit every major issue. And where they're going to ultimately land, I don't think anybody knows but the justices themselves.

I think the staffers are also up-in-the-air. The questions were very good. They were very detailed. And it shows that they understand this issue. They understand it, they understood it in 1992, but the level of complexity of the tax laws has changed. However, I would not say that that's a hindrance because of the availability of doing business today is actually simpler with the transactions and the software available today.

So they understand the commerce industry. They understand that the world has changed from 1967 with *Bellas Hess*. The way people consume data and the way people consume products is different today than back in 1992. They understood a lot of the details about how the software actually works, and asked a lot of really good questions.

Gene: Senator, as the President of the National Conference of State Legislatures, what other information about this issue do you think would be important to share with your colleagues across the country?

Deb: I think it's important to be prepared if you are a sales tax state... there are only four states that are not a sales tax collecting state... that once the Supreme Court comes down with a ruling, that we are going to have to be prepared to burden the proof that we can handle sales tax

transactions and that we are not going to overburden businesses on how to become compliant with our state sales tax laws.

I think we are going to have to move efficiently and effectively and educate our members to ensure that we enact whatever it takes to become in compliance with whatever the Supreme Court decides. And it might come down to legislation to become in compliance and we will have to move swiftly and ensure that businesses are protected as well as the states to ensure compliance.

Gene: We've been talking with South Dakota State Senator Deb Peters, who is also the President of the National Conferences of State Legislatures. Senator Peters, thank you for your time today.

Deb: Thank you.

Gene: Right after this short break, we'll get the details on how each Supreme Court justice signaled his or her vote during the oral arguments.

Break

Gene: We now have as our guest Lisa Soronen, Executive Director of the State and Local Legal Center, which supports the interests of state and local government organizations, including the National Conference of State Legislatures, that come before the U.S. Supreme Court.

Lisa, when we last talked back in October, you used words like: cataclysmic and higher-than-high-octane to describe what might happen if the U.S. Supreme Court took up this South Dakota tax case. Are those words still appropriate?

Lisa: Absolutely. They did. And it still remains that billions of dollars are on the line as long as state and local governments can't collect sales tax from online vendors and other remote sellers.

So most Supreme Court cases don't have billions of dollars attached to them, and even if they do, it's not that state and local governments are likely to be the beneficiaries. But this is one of those unique and amazing cases where both billions of dollars are on the line and state and local governments could be the ones to collect this money. They will be the ones to collect the money if the Supreme Court rules in favor of South Dakota.

Gene: Were you surprised in any way that the Court took up the case?

Lisa: I wasn't. Justice Kennedy had of course asked the legal system to bring him a case and I have to believe, or I had to believe at the time and I still mostly do, that Justice Kennedy believed he had the five votes to overturn Quill. It only takes four justices to review a case and, with Justice Gorsuch on the Court, he's also indicated an interest in overturning Quill. It seemed like the stars were aligned for the Court to take the case.

Gene: So I assume you were at the Supreme Court. What aspects of the case did the justices seem to focus on in the courtroom?

Lisa: I would say there are a couple of things that the Court focused on in the oral argument. First, the role of Congress played an important part; it was front and center. A lot of the justices discussed this.

So the Supreme Court came up with the rule in Quill, of course, and so the Supreme Court can undo it, and in general, the Congress cannot undo rules pertaining to the Constitution and this has to do with the dormant commerce clause, which is part of the Constitution. But it's Congress that really has commerce clause authority. So in this space, Congress can act. They could have acted in 1967 when the first case came down. They could have acted in 1992 and after that, and they haven't.

So a couple of the justices, Justice Kagan in some ways maybe the most articulately and prominently, said, you know: Look, this issue is better in Congress' radar and they haven't done anything about it. So why should we get involved?

Justice Ginsburg had a great response in saying: Look, this is a rule that we created. Why shouldn't we take responsibility for it? Why should we wait for someone else to handle it, in other words, Congress? So Congress' role played a prominent part.

The second issue that played a big role in the oral argument is the concept of burdens. A number of the justices were very troubled by the idea that small businesses might have to collect sales tax when they haven't had to collect it before, and that that would be very difficult if they were only doing a small amount of business in the state.

Justice Gorsuch sort of pointed out that the same requirement doesn't apply to like a small business that's in state; they can't say well, at some dollar threshold we're just not going to collect sales tax. But I guess I should back up and say that South Dakota's law says that if you make less than 200 transactions in the state or you collect less than \$100,000, then you don't have to collect sales tax. So in South Dakota there is a threshold that would benefit small businesses.

So some of the justices talked about that as being a good idea and as a good alternative to Quill's physical presence test. But the burden on small businesses was a big issue in the oral argument.

The third issue that the Court focused a good deal on is retroactivity. So in theory, if the Court says some practice is constitutional, it's always been constitutional – the Constitution doesn't really change. So in theory, if the Supreme Court says that Quill is no longer the law of the land and out-of-state retailers can be required to collect sales tax, they should have been collecting it before. And that creates all sorts of practical problems, like the fact that people didn't know they owed the taxes, the fact that the online retailers may not be ready or able to sort of collect retroactive taxes.

The South Dakota attorney said: Look, states aren't going to do this; they're not going to ask to collect retroactive... they're just not going to do it. And the Solicitor General who represents the United States said: the rule should be retroactive, but if you, the Supreme Court, don't want to make it retroactive, you can make it perspective, like that's your choice.

So those issues in particular got a lot of play at the Supreme Court.

Gene: And I know that you've studied the personalities and reactions of the justices. Did you glean anything from any of the justices specifically during these proceedings?

Lisa: Yeah, absolutely. I think there are two justices whose reaction and take on the case really sort of stood out. One is Justice Sotomayor. Justice Sotomayor, in general, is quite outspoken; she tends to ask a lot of questions. And this case was no exception. She started right out of the gate, asked a number of questions of South Dakota's attorney, all hostile to the notion that Quill should be overturned. I would say she's probably the only justice that sort of firmly and unequivocally indicated she's not interested in overturning Quill.

On the flipside, one of her more liberal colleagues, Justice Ginsburg, was possibly the most active I've ever seen her in oral argument. She asked tons and tons of questions, all indicating that she was interested in considering overturning Quill.

So it was very interesting to see these two liberal justices, both being outspoken, but on the opposite side of the equation.

Gene: So what's your best guess on when a decision will be reached, and do you have any guesses on what the final outcome will be?

Lisa: Okay, so the Supreme Court will issue a decision by the end of June of this year. My best guess is that it will come up the week of June 18th, and the reason why I picked that week is because the Supreme Court is hearing this case very late in its term, so it's not likely to issue a decision in a month, and even in two months will put us basically at the end of June. So that's when I expect that we'll receive a decision in this case.

Now, how is it likely to turn out? It's always hard to sort of guess based on oral argument. But I think there are certainly four votes for overturning Quill, and those votes are Justice Kennedy who wrote the concurring opinion in a previous case saying the legal system should bring up the case to overturn Quill. At oral argument he asked questions that indicated he was still more than willing to overturn Quill.

Justice Gorsuch when he was Judge Gorsuch wrote a concurring opinion, also questioning whether Quill was meritorious. He also asked questions indicating he would be willing to overturn Quill.

And then, like I said, we have Justice Ginsburg who was very vocal about her lack of support for Quill. And finally we have Justice Thomas. He doesn't ask questions in oral argument really ever, and he didn't on this case. But in 2003 he said that he no longer believed in the dormant commerce clause and this case rests on the dormant commerce clause. So we can probably count his vote.

So then the question is: Can we get one more vote, because you only need five votes to win, right? And so Justice Sotomayor, we have to just sort of count out. Justice Kagan didn't ask a lot of questions, but she did indicate that she believed that Congress should handle this problem. So it's hard to sort of rely on her.

Justice Breyer was very interesting in the oral argument. He said that he read the briefs of one side and he agreed with them; he read the briefs of the other side and he agreed with them. And he was really torn and he didn't know what to do. Part of the reason why he didn't know what to do was that he thought that there were conflicting facts about how burdensome it was to collect, how much money state and local governments were really losing. So I think his uncertainty maybe weighs in favor of him keeping the status quo.

Then we have Justice Alito. He asked a number of questions that on the surface of things seem sort of hostile to the idea that Quill should be overturned. For example, he said if state and local governments could force all retailers to collect, wouldn't they, just as sort of a money grab? And that might be hostile to overturning Quill, but if you think about it, the solution to that scenario is saying: we, the Supreme Court, like the South Dakota rule where states can't require everyone to collect; they can just require businesses that do so much business at a certain dollar amount threshold or a certain transaction threshold. So maybe Justice Alito isn't so hostile after all.

And Justice Roberts asked questions on both sides, which is something that he has typically done in oral arguments. Particularly since Justice Scalia has died, he's just taken a more active role. A lot of his questions were hostile towards overturning Quill, but he did ask about: is it possible to have a test like South Dakota's where not everyone has to collect, just people at a certain threshold have to collect? And that indicates that he might be open to what South Dakota is doing.

So the tricky part is that there isn't a clear 5th vote for overturning Quill. That's the tricky part. But the good news is that there are at least four justices that maybe could be persuaded. And so we're all holding our breath and crossing our fingers and hoping that one of those justices... if I had to guess, I'd say most likely Justice Roberts and maybe Justice Breyer hopefully will come through for us. But it's always hard to tell and justices are unpredictable and oral argument isn't the whole story. But I think states have reason to be optimistic.

Gene: So what other observations do you have Lisa that would be important for legislators and legislative staff to know about this case and where it stands?

Lisa: I would say this: if the Supreme Court overturns Quill, it really has two choices. One choice is to say: states can require anyone who does one cent of business in the states to collect. That's one avenue to go. The other thing that the Court could do, and what it's more likely to do, is to say: okay states, we're going to get rid of the physical presence test under Quill. We're going to allow you to require online and remote retailers to collect, but only at a certain dollar threshold or a transaction threshold, like South Dakota.

The Court, if it overturns Quill, it's probably going to go the second route. And it may be really explicit about what it thinks the appropriate economic test is, or it may not. It may just say, you know, we think South Dakota's test is appropriate for South Dakota. But remember, states have very diverse economies. South Dakota's economy is nothing like California's economy. So an economic nexus could be different in California than it could be in South Dakota.

So many states have laws that currently prohibit online and remote retailers from collecting sales tax, and those statutes comply with the Quill decision. If the Supreme Court overturns Quill

and exchanges an economic nexus test for a physical presence test, and states want to collect, they're going to have to modify their laws. And they may get a lot of guidance from the Supreme Court in how to modify their laws, or they might not. Also, Congress could get involved and give them more guidance or different guidance.

So state legislatures have to be aware that this decision is going to come down and prepare for it, but with the caveat that the Supreme Court may not make all things clear necessarily in its decision and that Congress may modify its ruling later on.

Gene: We've been talking with Lisa Soronen, Executive Director of the State and Local Legal Center. Lisa, thank you for being a guest on "Our American States."

Lisa: You're welcome. It was nice talking with you.

Gene: And that concludes this edition of "Our American States." We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.