



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Testimony of

Senator Curtis Bramble, Utah Legislature
Past President, National Conference of State Legislatures

On behalf of

National Conference of State Legislatures

Hearing on

Examining the Wayfair decision and its Ramifications for
Consumers and Small Businesses

Before the

United States House of Representatives
Committee on the Judiciary

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Denver

7700 East First Place
Denver, Colorado 80230-7143
Phone 303.364.7700 Fax 303.364.7800

Washington

444 North Capitol Street, N.W. Suite 515
Washington, D.C. 20001
Phone 202.624.5400 Fax 202.737.1069

Website www.ncsl.org
Email info@ncsl.org

Chairman Goodlatte, Ranking Member Nadler, and distinguished members of the Judiciary Committee, I am pleased to submit this statement on behalf of the National Conference of State Legislatures and respectfully request that it be added to the record.

My name is Curt Bramble and I am a member of the Utah State Senate where I serve on the Revenue and Taxation Committee and Chair the Business and Labor Committee. I am also a past president of the National Conference of State Legislatures, the bipartisan national organization that represents the state legislatures of all fifty states and our nation's commonwealths, territories, possessions, and the District of Columbia. In addition to my public service, I have spent nearly four decades as a Certified Public Accountant (CPA) where I have defended taxpayers and the business community in matters of tax controversy. I look forward to sharing my insights and perspectives during today's hearing.

For decades, states petitioned Congress for the ability to enforce their existing tax laws and close the remote sales tax loophole, but Congress did not act.

In 1999, the National Governors Association and National Conference of State Legislatures convened elected policymakers, tax administrators and retailers from over 40 states to develop a sales tax system that was less complex in order to resolve the issue of "undue burdens" outlined by the Supreme Court's 1992 *Quill*¹ decision. This collaborative effort of state officials culminated in the creation of the Streamlined Sales and Use Tax Agreement², which has been adopted by over half of the states that levy a sales tax. In 2003, the Streamlined states petitioned Congress for the authority to require out-of-state sellers to collect and remit applicable sales taxes, but Congress did not act.

The Marketplace Fairness Act (MFA), legislation that would grant states that met certain simplification requirements the ability to collect already owed sales taxes on out-of-state purchases, overwhelmingly passed the United States Senate, 69-27, in May of 2013, but the House never even held a hearing on the bill. To address the concerns of this committee, members of Congress from both parties who believe that all businesses should compete on a level playing field introduced the Remote Transactions Parity Act (RTPA), which states reluctantly supported given that they would be ceding state sovereignty in order to achieve sales tax parity, but Congress did not act.

¹ *Quill Corp. v. North Dakota* (91-0194), 504 U.S. 298 (1992).

² <http://www.streamlinedsalestax.org/index.php?page=modules>

Even after the Chair of National Governors Association and the President of the National Conference of State Legislatures met with the leadership and the staff of this committee to explain state actions intended to challenge the *Quill* precedent, RTPA was not afforded the chance of a hearing. In the meantime, brick-and-mortar stores in communities across the country closed their doors and eliminated hundreds of thousands of jobs.³ (As a point of comparison, department stores have lost 20 times more workers than the coal mining industry since 2001.⁴) A large share of these job losses were due to the fact that brick-and-mortar stores were unable to fairly compete against online stores that did not follow the same rules, including collecting the legally imposed applicable sales tax, but Congress did not act.

This year, my state of Utah reduced personal and corporate income taxes because we believe that a broader tax base combined with lower tax rates will make our state more competitive and will even further grow our booming economy. Utah is not alone. In recent years, state lawmakers across the country have enacted conservative economic policies by championing tax reform that closes loopholes and special interest carve-outs in favor of flatter and lower overall tax rates for everyone. The idea comes from an economic playbook championed by conservative economist Arthur Laffer, an architect of the Tax Cuts and Jobs Act, whose research⁵ has shown that closing the sales tax loophole and cutting taxes would have profoundly positive economic results. In 2015, Laffer concluded that gross domestic product would grow by more than \$563 billion, and 1.5 million jobs would be created nationwide if Congress had simply untied the hands of governors and state lawmakers in regards to sales tax enforcement. Yet again, Congress did not act.

However, as an elected state policymaker before you today, I ask that Congress continue to do what it always has done in regards to sales tax – not act.

Given that Congress has never had the appetite to address the issue of remote sales tax fairness, I do not see why it should start now.

³ Robert Gebeloff and Karl Russell, “How the Growth of E-Commerce Is Shifting Retail Jobs,” *New York Times*, July 6, 2017.

⁴ U.S. Bureau of Labor Statistics, All Employees: Retail Trade: Department Stores (DISCONTINUED) [CES4245210001], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/CES4245210001>, July 22, 2018.

⁵ Laffer, A.B., and D. Arduin. “Pro-Growth Tax Reform and E-Fairness.” Laffer Associates and Let Freedom Ring, July 2013. www.standwithmainstreet.com/ArtLafferStudy.pdf

In the Name of Federalism and Free Markets

“In the name of federalism and free markets, *Quill* does harm to both. The physical presence rule it defines has limited States’ ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.”

– Justice Anthony Kennedy, writing for the majority in *South Dakota v. Wayfair*

Last month, the Supreme Court did something it rarely does – admit that it was wrong. In *South Dakota v. Wayfair*, the Court found that the physical presence rule of *Quill* was “unsound and incorrect,”⁶ especially in the 21st Century economy. Writing for the majority, Justice Anthony Kennedy wrote that “It is inconsistent with the Court’s proper role to ask Congress to address a false constitutional premise of this Court’s own creation.”⁷ Concurring, Justice Neil Gorsuch wrote that “For years [states] have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals.”⁸ Even the four justices who dissented in *Wayfair* agree that the Court’s physical presence standard it established 50 years ago was incorrect. Writing for the minority, Justice Roberts wrote that “I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court.”⁹

While divided in the *Wayfair* decision, the Court unanimously agreed that physical presence is not a sound standard in determining whether a business has substantially availed themselves to a state’s market. The states agree. As Justice Kennedy wrote, “there is nothing unfair about requiring companies that avail themselves of the States’ benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result.”¹⁰ Now that the issue is resolved, Congress does not need to act, nor does it need to pass laws to fix problems that don’t exist or that could possibly occur. Unlike Congress, states do not have the ability to print money or increase debt through deficit spending.

Furthermore, although the Court eliminated the physical presence standard, it also established guidelines and safeguards that states must follow in order to enforce their sales tax laws on remote sales: (1) a safe harbor for small sellers; (2) no retroactive tax collection; (3) single, state-level administration of sales taxes; (4) a simplified tax rate structure; (5) uniform definitions and other rules; and (6) access to software provided by the state, with

⁶ https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf, p. 22.

⁷ *Ibid.*, p. 18.

⁸ https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf, (Gorsuch, N., concurring).

⁹ https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf, (Roberts, J., dissenting).

¹⁰ https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf, p. 17.

immunity for those who rely on it.¹¹ There is no reason to believe that states will not follow these guidelines, which is proven by the laws and actions that states have already implemented since June 21.

Facts aside, I'm sure that we will hear today about the "chaos" that is unfolding on the state level in regards to sales tax. Nothing could be further from the truth. Since the beginning of this year, long before the *Wayfair* decision, states have been working collaboratively to ensure that remote sales tax implementation is done properly should they be afforded the opportunity. This is true in Red States, Blue States, and Purple States. This collaboration did not cease after the Court's ruling. A week after *Wayfair*, the National Conference of State Legislatures (NCSL) met and adopted a statement of principles (attached) to guide State implementation. Last week, the Streamlined Sales Tax Governing Board met to coordinate the response of its member States, and the National Governors Association just held a Governors-only session to hear from experts and discuss the appropriate path forward for States. This week, right now to be more precise, the Multistate Tax Commission is meeting and has devoted a significant portion of its agenda on the future of state action after *Wayfair*. States want to do this right because good tax policy is good for taxpayers and for tax administration.

Even fervent opponents to sales tax fairness, who had previously sounded the alarm of "chaos" should *Quill* be overturned, have changed their tune. Overstock.com, one of the respondents in *Wayfair*, has signaled that the Court's ruling will ultimately benefit the company, because they can now expand without having to worry about the now-vacated physical presence standard. On June 28, the company's CEO and Founder stated that "we have already begun expansion of projects, both digital and physical, into key states in which we have previously been prevented from operating due to tax nexus concerns."¹² Instead of chaos, their company is going to grow.

Last week, my state of Utah became the latest state to enact sound policy in regards to remote sales tax collection. In the legislation¹³, which overwhelmingly passed both chambers, Utah followed South Dakota's lead in not enforcing our laws retroactively and enacting safeguards for small sellers. This is not a rarity. In fact, it is the rule. Only one

¹¹ Joseph Bishop-Henchman, "What Does the Wayfair Decision Really Mean for States, Businesses, and Consumers?," Tax Foundation, July 9, 2018.

¹² "Overstock.com Releases Statement on Initial Result of Voluntary Internet Sales Tax Collection," June 28, 2018, <http://investors.overstock.com/phoenix.zhtml?c=131091&p=irol-newsArticle&ID=2356470>.

¹³ S.B 2001. Utah Legislature. Second Special Session, 2018.

state has even considered imposing their law retroactively, but they quickly reversed course. States have patiently waited for decades to enforce their laws equally and are not looking at the past, they are instead focused on ensuring good tax policy in the future.

I'm also sure that we will hear today about now this is a "cash grab" from "money hungry" states, which is absurd. Unlike Congress, states do not have the ability to borrow money to avoid making difficult fiscal decisions. Instead, we balance our budgets. Many states will use the new revenue to invest in our teachers; public safety; ensuring our elections systems are not hacked by other countries; health care; and for badly needed infrastructure projects, another stalled federal promise. Many states, including mine, will use the additional sales tax revenue to lower taxes. For example, the legislation we passed in Utah last week is revenue neutral and will allocate the new revenue for tax relief for our job-creating businesses. Earlier this year, Iowa was able to cut income taxes by over \$2 billion¹⁴ largely because it expanded its sales tax base to include remote sales and digital content. Wisconsin Governor Scott Walker, who in 2013 said that the additional revenues from remote sales tax would be used to lower taxes, reiterated that point and after *Wayfair* said that "one way or the other we'd want to get that back to the hardworking taxpayers."¹⁵ Does this Congress really want to reverse efforts to fund infrastructure, protect our election systems, prepare our nation's workforce for the digital economy, and state tax cuts?

Conclusion

On the day of the *Wayfair* decision, President Donald Trump tweeted "Big Supreme Court win on internet sales tax - about time! Big victory for fairness and for our country. Great victory for consumers and retailers." I could not agree more. Every business should be afforded the right to compete but should do so by playing by the same rules. Nothing more, nothing less.

Any act of Congress to preempt states from enforcing their own laws will create market distortion that will result in higher income and property taxes as the sales tax will no longer be a viable revenue source. Is that what Congress wants?

States not only have the right to enact laws favored by their citizens, they have that obligation. Federal overreach to undo state laws passed by popularly elected officials, is not only undemocratic, it is goes against the foundation of American governance.

¹⁴ HF 2489. Iowa Legislature. Regular Session, 2018.

¹⁵ David A. Lieb, "Republicans Propose Using Sales Tax Money for New Tax Cuts," Associated Press, June 29, 2018.

Principles of State Implementation post *South Dakota v. Wayfair*

The following list of principles offers a first step for policymakers to consider as they look to establish the new laws and regulations required to gain collection authority in lieu of the positive ruling in *South Dakota v. Wayfair*.

- States should ensure that they are fully prepared before begin enforcing their sales tax laws on remote sellers and should consider waiting until January 1, 2019 to begin sales tax collection requirements on remote sellers. States should first review their sales tax statutes in light of the Court's holding to determine whether the State has the statutory basis to require remote sellers to collect tax. If the State does not have clear statutory authority to require remote sellers to collect tax, policymakers will need to develop and enact legislation to level the playing field for all businesses.
- If the State does have statutory authority to require remote sellers to collect sales tax, the State should issue clear guidance to businesses setting forth the date by which the State expects remote sellers to register and begin collecting sales tax.
 - In issuing such guidance, States should provide as much advance notice as practicable and consider requiring registration and collection by first day of a calendar quarter.
 - States should not seek to collect taxes for prior periods.
- In furtherance of efficient tax administration, States which have not already adopted the Streamlined Sales and Use Tax Agreement (SSUTA) should:
 - **Simplify the Registration Process**
 - States should collectively provide a one-stop-shop for sellers who need to register in multiple, if not all, states with a sales tax.
 - A readymade solution to this process currently exists. States should coordinate with the Streamlined Sales Tax Governing Board (SSTGB) to allow all sellers to register to collect tax via the Streamlined system at no charge to the seller, rather than through individual, state by state registrations.
 - **Centralize the Certified Software Provider (CSP) process**
 - It is widely acknowledged that technology provides the solution to the burden placed on sellers as a result of additional collection obligations.
 - States should collectively expand the certification process for CSPs beyond states that have agreed to the SSUTA.
 - Sellers using Certified Software Providers (CSPs) should receive liability protection similar to that provided under the SSUTA.
 - Provide a publicly available taxability and exemption table which can be downloaded in an easily usable format and accessed electronically which indicates the taxability of products and services along with any product and service exemptions and which is regularly updated.
 - Provide a rates and boundary database in an easily downloadable format and which is regularly updated.
- Simplicity and taxpayer compliance would be greatly furthered by additional states adopting the SSUTA.
- States should provide a depository of materials that includes all of the information remote sellers need in order to comply with sales tax laws.