



The Supreme Court is taking this case because Congress has failed to act on online sales tax legislation. | Win McNamee/Getty Images | Getty

A taxing case on the Supreme Court's docket

By **BERNIE BECKER** | 04/16/2018 05:03 AM EDT

The Supreme Court is about to take its third whack in a half-century at an issue that's long divided the business community and government officials — should states have more power to collect sales taxes from out-of-state companies that sell products to their residents?

It's a case that covers core U.S. legal dilemmas, like the reach of the Commerce Clause, and illustrates the increasing influence the internet and technology have on Americans' everyday lives. But in a twist fit for today's Washington, one of President Donald Trump's personal feuds — this one with Amazon and its founder, Jeff Bezos — is also in the mix.

Here's what you need to know about *South Dakota v. Wayfair*, on which the Supreme Court will hear arguments on Tuesday.

How the case got to the court

In short, the Supreme Court is taking this case because Congress has failed to act on online sales tax legislation.

The court last ruled in 1992's *Quill v. North Dakota* that a state can only force retailers with a physical location within its borders, like a brick-and-mortar shop or a warehouse, to collect sales taxes. But the court also called lawmakers better equipped to resolve the issue, and invited Congress to enact legislation.

Quill, which itself followed a 1967 Supreme Court case, dealt with mail-order sales, and the justices clearly didn't foresee the emergence of online shopping in that ruling.

The GAO says that states could have collected up to an extra \$13 billion in sales taxes in 2017 from out-of-state companies. And with most states having to balance their budgets each year, state officials have increasingly sought to get their hands on that money.

Marty Jackley, South Dakota's attorney general, noted that sales tax revenue makes up 63 percent of the general budget for his state, which doesn't have an income tax.

"It's a significant issue for especially the small states," said Jackley, who will argue for his state at the court on Tuesday.

The closest Congress came to taking up the judiciary's invitation to legislate was in 2013, when the Senate passed a measure that would have swept away the physical presence requirement. But a key House lawmaker, Judiciary Chairman Bob Goodlatte (R-Va.), has never been a fan of that legislation, and the issue in general divides Republicans — some want nothing to do with anything that could be even remotely derided as a tax increase, while others cast the effort to expand taxing power as a defense of states' rights.

With legislation stalled, Justice Anthony Kennedy invited a legal challenge to *Quill* in a related 2015 case, and South Dakota promptly enacted a law that violated the current precedent to quickly get the current case before the court.

Rep. Kristi Noem (R-S.D.) made one last effort to pass online sales tax legislation, H.R. 2193 (115), before Tuesday's arguments, but was unable to attach her measure to last month's big spending bill.

What the opposition says

The defendants in the case are three prominent online retailers — Wayfair, Newegg and Overstock. (A fourth company, Systemax, began collecting sales tax from South Dakota customers and was dropped from the lawsuit.) Those companies argue that charging sales taxes remains a heavy and costly administrative exercise, even as technology has made it easier to purchase items and despite products like special software to simplify collection.

“State sales and use tax systems remain inordinately complex and burdensome during the Internet era, just as they were before it began,” the companies wrote in their brief.

Conservative groups that want to maintain the current precedent say they’re interested in keeping states’ taxing power in check, and that overturning *Quill* would amount to taxation without representation.

Amazon's role

Trump has repeatedly jumped on to Twitter to accuse the Seattle-based online shopping titan of ducking its taxes. But the truth is far more nuanced than that, as was Amazon’s own evolution on online sales tax policy. (And that’s not even getting into Amazon’s corporate tax practices, where studies have found the company pays a low effective rate.)

Amazon currently supports legislative efforts to give states increased sales tax power, as do big-box retailers and their D.C. interest groups, but has yet to comment on the Supreme Court case. As it happens, Amazon also collects in all 45 states that have a statewide sales tax, after expanding its network of distribution centers to facilitate faster deliveries.

But that’s also a shift for the company, which fought efforts to allow broader state tax collection when it had a smaller delivery apparatus.

Treasury Secretary Steven Mnuchin has noted that Amazon generally doesn’t collect sales tax on its marketplace, where it essentially acts as a middleman between the customer and another company. Those purchases account for about half of Amazon’s unit sales, according to some estimates, but the company currently collects on those transactions in only two states — Washington and Pennsylvania.

Where the Trump administration stands

It perhaps shouldn’t be a surprise that Trump — a real estate developer who’s made his living in brick and mortar — would agree that the current precedent tips the scales toward online retailers.

So it didn't raise many eyebrows when Trump's solicitor general, Noel Francisco, wrote a brief backing South Dakota's position, especially since the president has said Amazon is putting thousands of retailers out of business.

Technically, the administration's position is that the *Quill* precedent could survive, but that the court should rule that states can tax even out-of-state online retailers because of their "pervasive and continuous virtual presence."

Francisco also gets 10 minutes during Tuesday's arguments, further underscoring how strongly the administration feels about the issue.

Reading the court

Trying to figure out how the nine justices might act before arguments are even heard can be tricky. But South Dakota, its backers, other experts and even some supporters of the defendants acknowledge the plaintiffs have reasons to be confident.

For starters, the court didn't have to take up the case if it was interested in keeping the current *Quill* precedent. Close followers of tax law also say that, starting with Kennedy's statements back in 2015, it's not hard to believe that at least five justices would side with South Dakota.

As an appellate judge, Justice Neil Gorsuch wrote that the *Quill* ruling might have an "expiration date," in dealing with the same case where Kennedy questioned the current precedent.

The Tax Foundation's Joseph Bishop-Henchman has projected that Justices Clarence Thomas, Ruth Bader Ginsburg and Elena Kagan would uphold the state law, while the other four justices are either wild cards or might join a narrowly crafted decision favoring South Dakota.

What's next?

If it's tough to predict how the justices might rule, it's even more of a challenge to tease out the impact of that ruling. But if the current precedent survives, lawmakers will still push an online sales tax bill, though the same dynamics that have stalled legislation for years will still exist.

Would Congress need to act if the Supreme Court upholds the South Dakota law? There's a range of opinions on that front, though it would clearly depend on how sweeping a ruling comes from the court.

Noem and other congressional supporters of expanded state sales tax power have said it would be chaos for businesses if *Quill* is swept away without the sort of protections and streamlined collection procedures offered by their legislation. But some experts say the court could also guide states toward what it sees as more reasonable sales tax frameworks.

Harley Duncan of KPMG said the court would seek to limit undue burdens on interstate commerce if it did overturn the current precedent, and could talk up what it sees as favorable aspects of the South Dakota law. Companies have to collect only after meeting certain sales thresholds — \$100,000 worth of sales or 200 transactions — under that law, which also wouldn't seek any retroactive revenues.

“The Court could on that basis determine that the South Dakota statute does not pose an undue burden on interstate commerce, which might then steer other states in that direction,” Duncan said.
