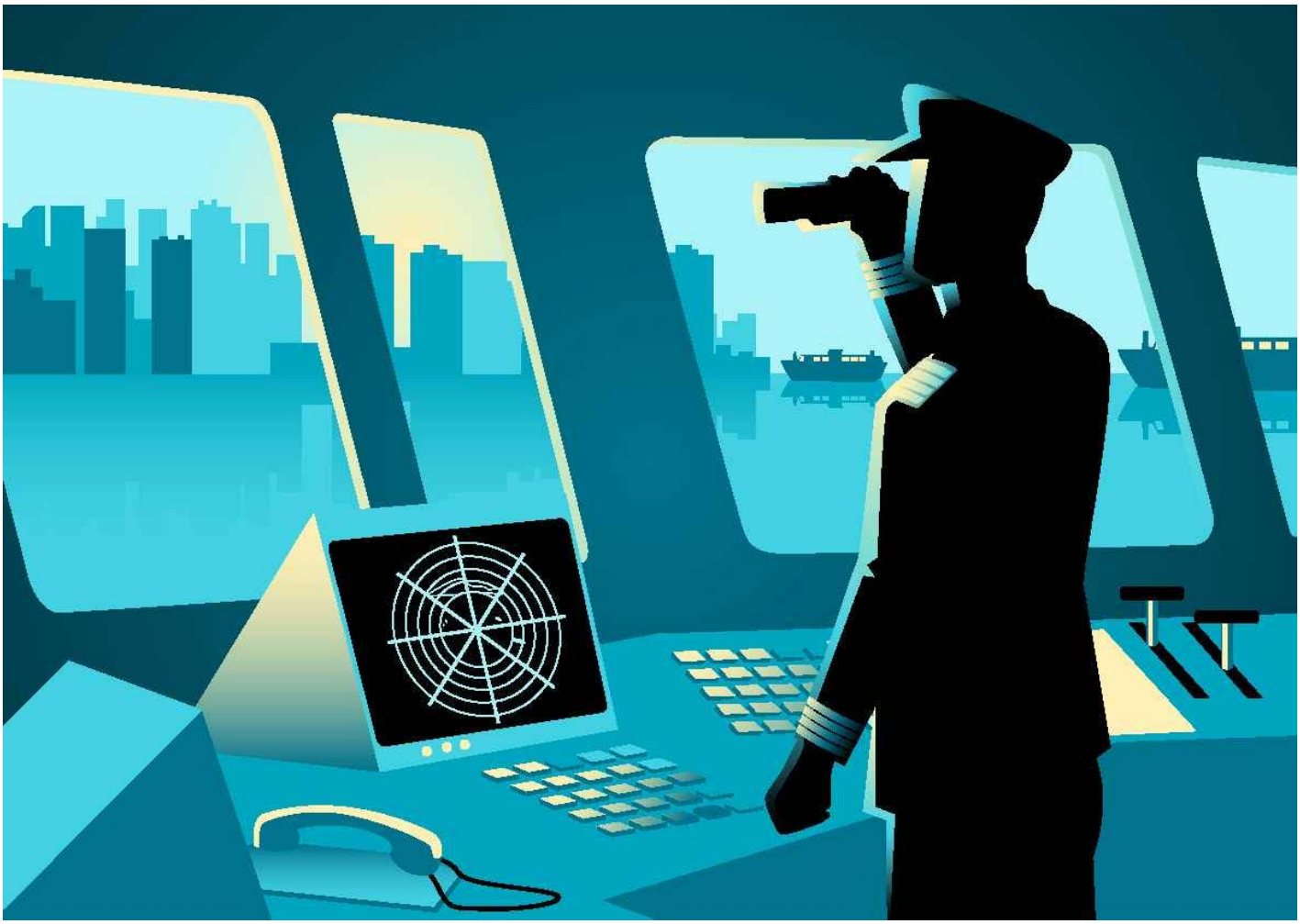
Covering the Waterfront

South Dakota v. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc.

United States Supreme Court (Docket No. 17-494, Oral Argument April 17, 2018)

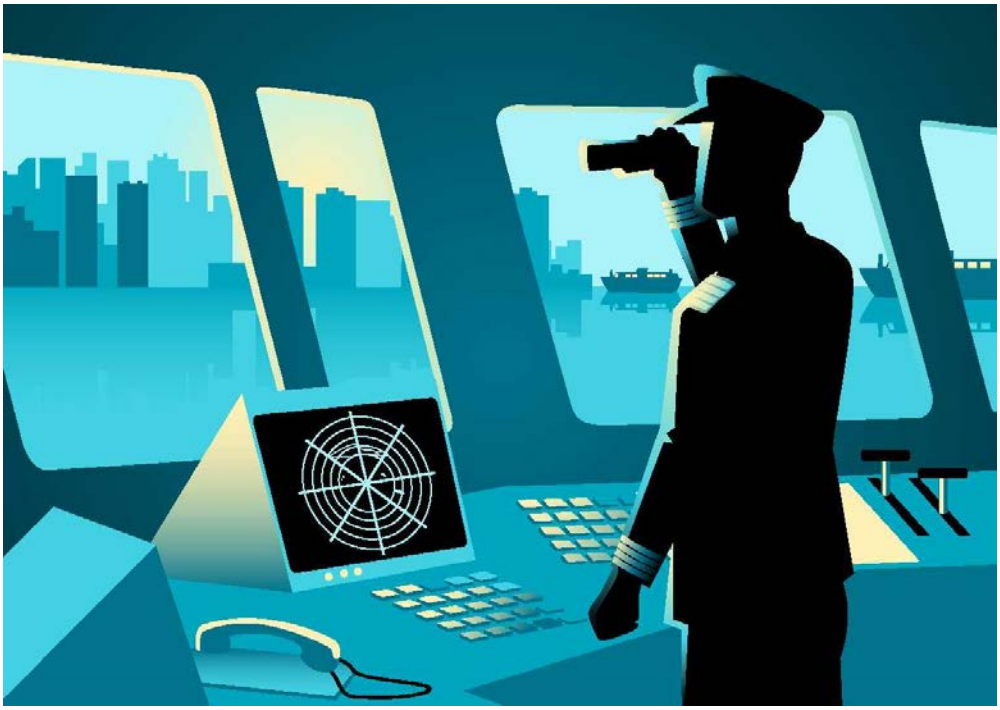


David A. Fruchtman, Esq.

Amicus Curiae Brief and Collected Articles

Covering the Waterfront

- Document I. Analysis of Decision
- Document II. Analysis of Oral Argument
- Document III. David A. Fruchtman Amicus Curiae Brief
- Document IV. Respondents' Brief Citing David A. Fruchtman Amicus Curiae Brief As Authority to U.S. Supreme Court
- Document V. Effect on Law Firms and Service
- Document VI. Analysis of 17 Amicus Curiae Briefs In Support of Petitioner or in Support of Neither Party
- Document VII. Analysis of 23 Amicus Curiae Briefs In Support of Respondents



Document I

US Supreme Court ushers in new era for e-commerce

YOUR TAXES

• By DAVID A. FRUCHTMAN and LEON HARRIS

On June 21, the US Supreme Court ushered in a new era for e-commerce. By a vote a 5-4, the court reversed 50 years of case law (and many more years of practice) and held that retailers without a physical presence in a state may be required to collect that state's sales and use taxes. The decision's impact does not stop at the United States' borders but can, and almost certainly will, be applied to businesses based in Europe, Asia and Israel.

The Judgment

The case, which is known as "Wayfair" after the lead taxpayer, involved three giant e-commerce vendors. The state of South Dakota enacted a statute that, in certain circumstances, purported to dispense with the constitutional physical presence requirement and find tax presence based on the number of sales (200 or more that a retailer delivered into the state annually or the dollar amount of the retailer's sales (more than $100,000) annually. Indisputably, the statute was unconstitutional and unenforceable under the physical presence requirement in effect when it was enacted.

With the June 21 decision, the court held the physical presence requirement to be unsound and invalid. However, the three named taxpayers had sales volumes far in excess of the economic nexus thresholds set forth in the statute. This is an important consideration that is being overlooked by some American state tax practitioners. These practitioners are advising their clients that a single sale delivered into a state creates tax presence. The court did not say or imply this. Rather, there appears to be a range of circumstances in which a retailer that delivers sales into a state will have a good faith (or better) argument that it does not have tax presence.

Issues

Businesses and tax advisers will rightly wonder: (i) What is the tax presence standard that replaces the physical presence requirement? (ii) How does the decision impact retailers who did not file state sales tax returns in prior periods? And (iii) What are they to do next? While there are no definite answers, the following are good starting points:

(i) What standard replaces the physical presence requirement?

The Supreme Court cited no fewer than three alternative tests for evaluating possible tax presence. Each of these tests involves a balancing of some sort by, for example, comparing the size of the retailer's virtual footprint in the state with the state's interest or the burden on the retailer. Moreover, the court was not critical of South Dakota's statutory test, which some will interpret as approval (again, however, given the huge retailers involved, the statute's thresholds were never at issue).

(ii) Retroactive? At oral argument, the justices asked many questions relating to possible retroactive application of the striking of the physical presence test. A changed interpretation should have application for all open periods. However, retailers who relied on the court's past physical presence holdings did not collect taxes on their sales and did not file sales tax returns – meaning that potentially decades of back periods are collectible from those retailers. Few believe this to be a realistic possibility. However, the court has been tolerant of the retroactive imposition of taxes going back several years. Even such a "limited" retroactive application would be a business-crushing liability for some retailers.

(iii) What to do next?

Businesses should prepare a spreadsheet going back 36 months listing the number and dollar amount of sales in each state, segregating sales made to government units and tax exempt entities. Retailers should carefully consider whether to register in a state. This is not a decision to be taken lightly, legal advice is essential.

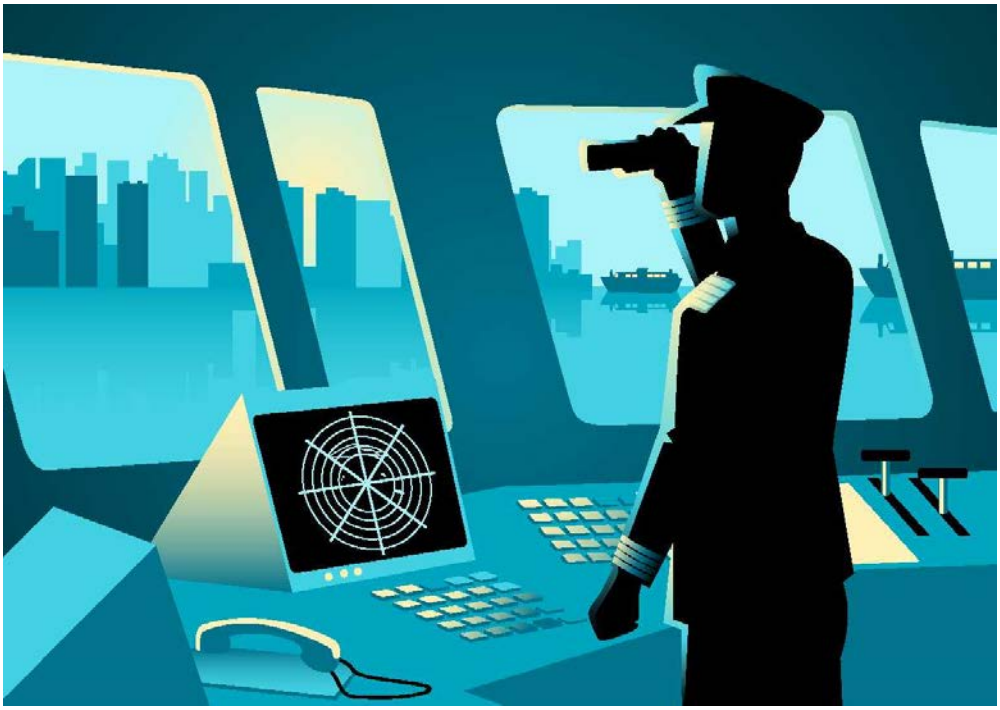
Non-US online businesses

The Wayfair decision has major international implications. America's tax treaties do not apply to state taxes. Therefore, Israeli and other non-US online businesses will now need to check their US state sales and income tax exposure more deeply than before. All this hot on the heels of the recent Trump federal tax reform. However, there are potential arguments available to international retailers that are not available to US domestic retailers. Note also that US state sales and use taxes are not creditable against Israeli tax.

As always, consult experienced tax advisers in each country at an early stage of specific cases.

david.fruchtman@post.harvard.edu / leon@hcat.co

David A. Fruchtman is chairman of Rimon P.C.'s state and local tax practice. Leon Harris is a certified public accountant and tax specialist at Harris Consulting & Tax Ltd.



Document II

Bloomberg Tax

Daily Tax Report™: State

Electronic Commerce

Insight: 'Wayfair': Covering the Waterfront — Snatching Defeat From the Jaws of Victory?

Oral arguments in *South Dakota v. Wayfair*, arguably one of the biggest state tax cases ever before the U.S. Supreme Court, were held April 17. In this article, Rimon P.C.'s David Fruchtman discusses how the arguments exposed two obstacles to South Dakota's position.

BY DAVID FRUCHTMAN

''Instead they defend *Quill* only by alleging that other, pint-sized retailers might face outsized costs under some hypothetically burdensome economic presence regime in another State.'' South Dakota Reply Brief, p. 2.

Careful review of the transcript of the April 17 oral argument in *South Dakota v. Wayfair, et al.*, reveals that this case was South Dakota's to lose. Depending on which side you support, the bad news, or the good news, is that South Dakota (with help) might have done just that.

Mr. Fruchtman chairs Rimon P.C. State and Local (Subnational) Taxation practice. On March 5, he submitted an amicus curiae brief in Wayfair in support of neither party pointing to issues uniquely related to sales taxation of services. While Mr. Fruchtman's amicus brief supports neither party, Respondents, in their March 28 brief, attempt to extend their brief to address sales taxation of services, citing the amicus brief as supporting authority. Respondents' Brief at 56.

Going into the argument, it was widely predicted that Justices Kennedy and Gorsuch would vote to abrogate or limit the reach of *Quill*'s physical presence rule. And it quickly became clear that Justice Ginsburg wants to send this issue to Congress, meaning that South Dakota had three of the five votes needed for abrogation. But when oral arguments concluded, at least two unnecessary but significant obstacles to the state's position were exposed: South Dakota's attitude towards out-of-state small businesses, and other states' possible retroactive application of abrogation of the physical presence test.

Out-of-State Small Businesses

First, regarding South Dakota's attitude toward small businesses, one wonders: How did their Reply Brief get filed with the demeaning characterization (quoted above) of small businesses? ''*Pint-sized*''? Certainly, that is not a respectful way to refer to a business an adult operates to support his or her family.

Moreover, the language clearly was intended to signal to the Supreme Court not to concern itself with small e-commerce businesses. Yet South Dakota is chasing these very same small businesses, with a filing threshold that realistically is in the range of $400-$1600 of sales taxes annually. And, during oral argument, South Dakota told the Court that under *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) the minimum number of in-state transactions necessary for a remote vendor to establish tax presence in South Dakota is ''one sale''. Official Transcript (Tr.) at 6. Justice Soto-

 ISSN 1534-1550

mayor immediately asked, ''So what are we going to do with the costs that you are going to put on small businesses?'' The state attempted to redirect the discussion. But Justice Sotomayor was undeterred and pursued this inquiry—beyond the cost of the software needed to collect taxes—into other categories of costs, including integrating the new software program with the business's existing sales program, maintenance of the data in the software program, and multistate audits. Tr. at 7.

200 Transactions

Under the law before the Court, 200 transactions annually is the only relevant threshold to South Dakota's economic nexus threshold. Small businesses with 200 in-state sales of $25-100 per transaction are going to have to collect state sales taxes of $400-1600 annually (using a combined state and local tax rate of 8 percent). Furthermore, if $100,000 in sales is a reasonable threshold (i.e., the other threshold under the law; at an 8 percent combined state and local rate and if all such sales are taxable, this sales volume generates annual sales taxes of $8,000), then the more realistic number of transactions to establish a meaningful in-state footprint is, say, $80, which implies 1250 transactions annually.

The Solicitor General agreed with South Dakota that one sale is sufficient to create tax presence. Tr. at 22. However, aware of the Justices' discomfort with such a low threshold, the state and Solicitor General opined that either (i) individual businesses could contest a state's assertion of such presence by relying upon the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) which requires engaging counsel or (ii) Congress could step-in to establish a more reasonable minimum threshold (Tr. at 8, 23, and 56).

The inquiries into what South Dakota's approach will mean to small businesses continued when Justice Breyer raised a concern that these tax collection requirements will create an entry barrier inhibiting the development of new businesses (Tr. at 25). South Dakota's troubling posture regarding small businesses was not helped when, in response to Justice Breyer's inquiry, the Solicitor General stated that:

a front-line answer is the dormant Commerce Clause doesn't entitle a fledgling business to the ability to make a profit if the obligation to collect sales taxes in various states pushes it from making a profit to—to sustaining a loss. Tr. at 26.

In short, running throughout the argumentation of the state and Solicitor General, there was a conspicuous thread of indifference to the economic pain caused to e-commerce vendors.

Near the conclusion of South Dakota's argument, it realized the gravity of the issue its responses highlighted. It therefore closed its rebuttal with the following statement regarding *in-state* small businesses:

I truly believe that if you go to look at what is at issue here, it goes back to what I originally said. Small businesses are not being treated fairly. We're not asking remote sellers to do anything that we're not already asking our small businesses to do in our state. And that is simply to collect and remit a tax. Tr. at 61.

Observation: While the closing might have softened the unpleasant countenance South Dakota displayed toward remote small businesses, the unfortunate exchanges above should not have occurred. This is not a zero-sum issue between in-state small businesses and remote small businesses. Rather, South Dakota's economic nexus threshold of 200 transactions is far too low, and at oral argument the state—caught unawares—was called to account.

Retroactive Application Second, retroactive consequences of any change to *Quill* have long been a known and obvious issue. To its credit, South Dakota eliminated this issue from its economic presence statute by limiting its statute to prospective application. *See* South Dakota S.B. 106, Section 5 (available at Petitioner's Brief, Appendix A). However, other states have not done likewise, and during oral argument South Dakota had to bear the burden of their inaction.

The Justices raised the issue of retroactivity repeatedly during oral arguments, and when South Dakota was forced out of the safe environment of its statute, there seemed to be no good answers. In the closing minutes of its argument, South Dakota referenced its brief's Appendix B, which in two pages purports to separate into four discrete categories 40 states' laws, rules, cases, and administrative pronouncements involving retroactivity. Tr. at 59 (referencing 38 states rather than the 40 addressed in the appendix; the reason for the different number of states is unclear). But that Appendix has not been vetted and, in a case with stakes as high as those here, it seems doubtful that the Court will attach much if any credence to this summary listing.

Moreover, the Respondents also included two appendices in their brief providing their categorization of state retroactivity treatments. Respondents' Brief, Appendices A and B. Unsurprisingly, the Parties' appendices are inconsistent with each other.

More reliable than either Parties' listings is the *amicus curiae* brief filed by Tax Executives Institute, Inc., (TEI) in support of the Respondents, providing TEI's independent analysis of the states' positions regarding retroactivity. TEI's brief, in addition to states' constant desire for increased tax collections, undercuts South Dakota's attempt to reassure the Court that other states will not apply an abrogation of *Quill* retroactively.

Despite all of this, it was clear that neither the state nor any of the Justices who spoke wanted an abrogation of *Quill*'s physical presence test to be applied retroactively. Therefore, Justice Ginsburg offered two conceivable corrections to the problem of retroactivity. In the first, she suggested that if the Court abrogates *Quill*'s physical presence test, Congress can pass a law prohibiting retroactive application. Tr. at 16-17. Thereafter, the Solicitor General attempted to leverage the ''let Congress do it'' line of thought (Tr. at 19), but was promptly rebuked by Justice Sotomayor: ''That doesn't do any—that doesn't do anything for the interim period and for the dislocation and lawsuits that will—it will engender until there is a congressional settlement.'' Tr. at 19-20.

Later, Justice Ginsburg raised the possibility of the Supreme Court overruling *Quill* prospectively and, thereby, eliminating retroactivity concerns. Tr. at 29. In an exchange that highlighted how vexing the retroactiv-

  TM-WSTR ISSN 1534-1550

Florida Example

Using Florida as an example, South Dakota's appendix categorizes Florida as a state ''with regulations or official guidance that require out-of-state retailers to have a physical presence for collection to apply,'' citing *Share International, Inc.*, 676 So. 2d. 1362 (Fl. 1996) and Florida Technical Assistance Advisement No. 06A-31, 10/24/2006).

Share, however, is an example of how a business's physical presence in a state for a discrete purpose and duration does not necessarily create tax presence for an entire year. And the TAA (which, by its terms ''is binding on the Department only under the facts and circumstances described in the request for this advice'') addresses whether a remote vendor's use of a Florida printer creates Florida tax presence for the remote vendor. Neither *Share* nor the TAA seems pertinent to a question of whether a tax may be applied retroactivity.

Moreover, South Dakota's appendix clearly errs by not citing the two Florida statutes cited in TEI's brief. If not for the protection of *Quill*'s physical presence requirement, one of those statutes requires mail order vendors lacking physical presence in the state to collect Florida sales taxes. Fla. Stat. Section 212.0596(2)(l). And the other statute tolls the otherwise applicable statute of limitations for periods for which no tax return was filed. Fla. Stat. Section 95.091(3)(a)(5). (Florida law defines ''mail order sale'' as ''a sale of tangible personal property, ordered by mail or other means of communication.'' Fla. Stat. Section 212.0596(1).)

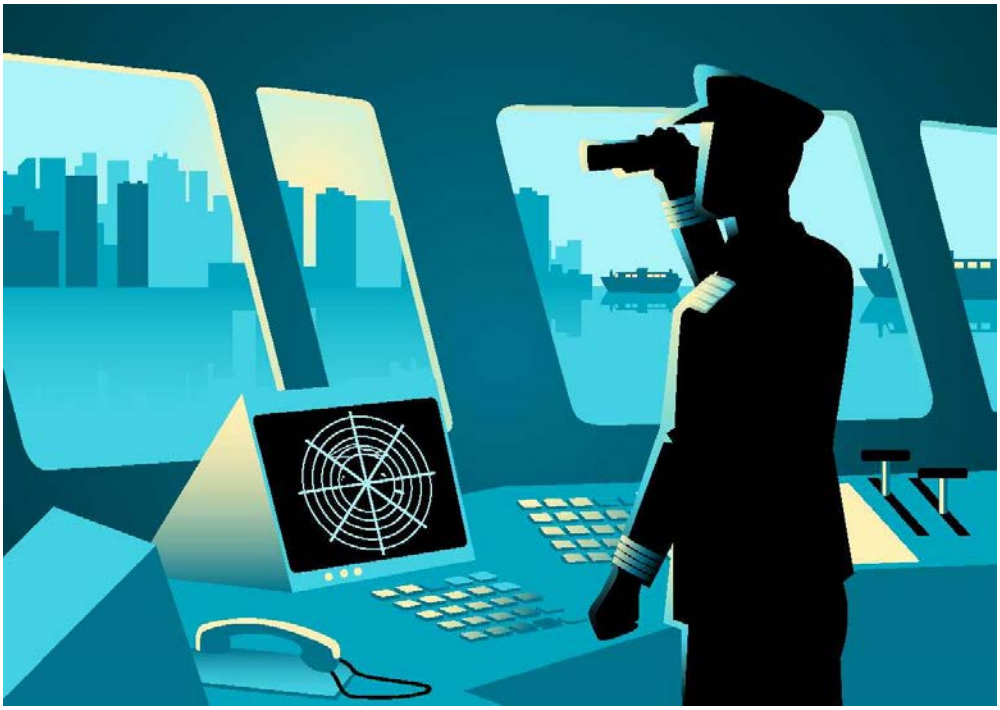
ity problem is, Justice Ginsburg asked the Solicitor General for the United States' view on such prospective Court action. The Solicitor General responded that (i) the Court could not do that but, in the same response, also said that (ii) perhaps the Court could do that:

I—I think the Court has eschewed prospective announcement of constitutional rules in the following sense: That is, the Court has determined sort of correctly, I—I believe, that the Court's role is to interpret the Constitution, not to amend it.

If the Court says in June of this year that the dormant Commerce Clause means X, it can't say that up until now the dormant Commerce Clause meant something else. And in that sense, prospective decision-making is inconsistent with the judicial role.

However, there are circumstances—and qualified immunity is one of them—where even though the newly announced constitutional rule as a rule applies retroactively, the ability of—the availability of particular types of relief may depend on whether people were justifiably uncertain at the time. Tr. at 29-30.

Certainly, the Solicitor General's mention of ''qualified immunity'' and ''relief'' seem totally out of place in this colloquy. This much, however, is clear: The retroactive application of a change to *Quill*'s physical presence test is a major obstacle to the Court approving such a change. Unfortunately for South Dakota, neither it nor the Solicitor General have been able to chart a course around that obstacle.



Document III

No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF FOR DAVID A. FRUCHTMAN AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

DAVID A. FRUCHTMAN
RIMON P.C.
245 Park Avenue, 39th Floor
New York, NY 10167
(646) 681-2268
david.fruchtman@rimonlaw.com

March 5, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae's interest in this case is attributable to his specialized tax practice, as described below.

Amicus is an attorney in private practice and is the chair of Rimon, P.C.'s State and Local (Subnational) Taxation practice. For the last 26 years, his practice has been devoted exclusively to state and local tax planning and controversy issues across the United States. In 2003, he was a Special Deputy Attorney General of the state of Hawaii regarding a specific tax issue. For some 24 years, he has been the co-author of the Illinois chapter of the American Bar Association's annual "Sales and Use Tax Deskbook," and he is a former chairman of the Income and Franchise Taxes Subcommittee of the American Bar Association's state tax committee. He is the author of many articles, has guest lectured at many universities and tax organizations and, for 13 years, lectured at New York University's Summer State and Local Tax Institute on topics including "Constitutional and Other Jurisdictional Constraints on State and Local Taxation."

Amicus is submitting this Brief out of a concern that, because the points raised in this Brief do not favor the result sought by either party, these important

---

[1] Rule 37.6 statement: All parties received notice of *Amicus Curiae's* intent to file this Brief and consented. Further, no counsel for any party authored this Brief in whole or in part and no person or entity other than *Amicus* funded the preparation or submission of this Brief.

considerations will not otherwise be presented to this Court.

STATEMENT OF NONSUPPORT FOR EITHER PARTY

The question presented is "Should this Court abrogate *Quill*'s[2] sales tax only physical presence requirement?"

This Brief is filed pursuant to Supreme Court Rule 37.3(a) and takes no position as to whether this Court should respond "Yes" or "No" to the Question Presented. Rather, this Brief takes the position that *if* the Question Presented is answered "Yes," then the abrogation of *Quill*'s physical presence requirement should be limited to retail sales of tangible personal property. That is, in-state physical presence should continue to be required before a state may impose a sales tax collection responsibility on retailers of services.

Neither party is expected to assert or support the position set forth herein, hence the need for this Brief:

- Petitioner is a state that imposes sales tax on retail sales of all types of tangible personal property, with a few exceptions.[3] Petitioner also imposes sales tax on retail sales of all services, but specifically exempts a lengthy list of services from sales

[2] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[3] SDCL 10-45-2, et seq.

taxation.[4] Petitioner can remove any (or all) of those service exemptions at any time. As such, Petitioner has no interest in arguing that *Quill*'s physical presence requirement should be retained with respect to retail sales of services.

- Respondents are retailers of tangible personal property.[5] As such, Respondents' focus in this case is expected to relate exclusively to Petitioner's attempt to impose sales tax collection and remittance responsibilities on Respondents' sales of goods. Respondents have no interest in arguing that, if the Question Presented is answered "Yes," *Quill*'s physical presence

---

[4] SDCL 10-45-1 and 10-45-12.1, et seq.

[5] *See* Wayfair, Inc. Form 10-K (Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Commission Act of 1934 for the Fiscal Year Ended Dec. 31, 2016), page 2 (describing itself as "one of the world's largest online destinations for the home . . . we have built one of the largest online selections of furniture, décor, decorative accents, housewares, seasonal décor, and other home goods."; Newegg Inc., which on its Newegg.com Internet site, Corporate Summary, Who We Are, describes itself as "a leading online retailer. . . . With more than 10.5 million products . . . " (accessed Feb. 13, 2018); and Overstock.com Form 10-K (Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Commission Act of 1934 for the Fiscal Year Ended Dec. 31, 2016), pages 6-7 (describing itself as "We are an online retailer and incubator of blockchain technology. . . . In our retail business, we deal primarily in price-competitive, new and replenishable merchandise and use the Internet to aggregate both supply and demand to create an efficient marketplace for selling these products" and at page 47 explaining that its blockchain technology activity is insignificant as compared to its retailing business.

requirement should be retained with respect to retail sales of services.

SUMMARY OF ARGUMENT

The reasoning and physical presence requirement of *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967) and *Quill* apply to all remote retailers,[6] including retailers of tangible personal property and retailers of services. Remote retailers in both sectors are potentially subject to sales tax collection and remittance requirements throughout the United States, which the Court in *National Bellas Hess* and *Quill* considered to be an unjustifiable local entanglement with the national economy.

Even if this Court determines that retailers of tangible personal property have outgrown the physical presence requirement, the Court should retain that requirement as applicable to sales of services. This is because, as contrasted with the well-developed principles controlling the taxation of sales of tangible personal property, the taxation of sales of services is in its early stages. The states do not yet know how to impose sales taxes on multistate services, as demonstrated by the fundamental questions that are as-yet unanswered and by three large states' quick repeal of their

[6] "Remote retailer" refers to a retailer that does not have physical presence in a particular state, either by itself or through any representative.

attempts to impose sales taxes on a broad base of services.

The importance of the retention of the physical presence requirement for services is underscored by the enormous amount of sales taxes potentially at issue when services are taxed, which the states are finding impossible to ignore. For example, California found that legislation proposed in 2014 to tax services would have generated $122 billion in sales taxes. While that bill did not become law, efforts to enact a California sales tax on services continue to this day. Moreover, in just over the last five years, there have been high-level proposals and published studies recommending the taxing of a broad base of services in New York, Pennsylvania, Illinois, Kentucky, Georgia, Vermont, Connecticut, and Indiana, as well as California.

It seems clear that the states have begun a period of actively attempting to tax retail sales of services, and of enforcing the collection of those taxes by service providers outside of the taxing state. This process will involve many trials and, unavoidably, many errors. To protect the nation's services sector from being unjustifiably entangled in this experimental process, this Court should retain *National Bellas Hess* and *Quill*'s physical presence requirement for the services sector.

ARGUMENT

A. *National Bellas Hess* and *Quill* Set Forth Long-Enduring and Still Valid Constitutional Principles Protecting All Remote Retailers From Unjustified Local Entanglement.

In *National Bellas Hess*, with Archibald Cox advocating for the remote retailer, this Court interpreted the Commerce Clause[7] to require some physical presence of a retailer in a state before that state can require the retailer to collect its use tax. The Court based its holding on the "welter" of tax compliance rules that would entangle interstate commerce if every state, municipality, and school district were empowered to require remote retailers to administer their taxes. *Id*. at 759-760. The Court concluded that "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements." *Id*. at 760.

This Court and Professor Cox's reasoning provided a barrier between a growing national economy and thousands of tax-hungry jurisdictions. A quarter of a century later, in *Quill*, this Court reaffirmed the importance of that Commerce Clause barrier. The Court did so with reasoning building on *National Bellas Hess*:

> "the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.

---

[7] U.S. Const. art. I, § 8, cl. 3.

> Under the Articles of Confederation, State taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. *See generally* The Federalist Nos. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that that Clause prohibits discrimination against interstate commerce, *see*, *e.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and bars state regulations that unduly burden interstate commerce, *see*, *e.g.*, *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662 (1981)."

Quill at 312.

The *Quill* Court thereafter fully endorsed *National Bellas Hess*'s bright-line rule requiring retailers to have physical presence in a state before those retailers can be subjected to the burdens of the state's sales tax compliance system:

> "Such a [bright-line] rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their

> indispensable power of taxation.' *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959)."

Quill at 315-316. Furthermore, the Court credited the barriers and boundaries of *National Bellas Hess* and *Quill* with nothing less than the growth of an industry:

> Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter-century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.

Quill at 316 (footnote omitted).

B. Retail Sales of Services Involve Considerations Different From Retail Sales of Tangible Personal Property.

In *National Bellas Hess*, this Court explained that the Commerce Clause protects the national economy from "unjustifiable local entanglements." *National Bellas Hess* at 760. The need for protection from unjustifiable entanglements applies to retail sales of services as much as it applies to retail sales of tangible personal property. However, the practicalities in the taxing of these sectors differ, such that the states are still in a "trial and error" phase in the sales taxation of services.

As is discussed below, states have had significant difficulties taxing services even when the services are performed and benefits are received in the same state. The complications when multiple states are involved include all of these and more. In this unstable environment, if the states can require remote service providers to collect and remit their sales taxes, the result will be an unjustifiable local entanglement of the national economy in a welter of local tax laws.[8]

1. The Services Sector Has Thrived in Part Due to an Absence of State Sales Taxes and Sales Tax Compliance Requirements on Service Providers.

This Court stated in *National Bellas Hess* that the Commerce Clause protects the national economy from *unjustifiable* local entanglements. *National Bellas Hess* at 760. The states are now highly experienced in sales and use taxation of retail sales of tangible personal property. Nonetheless, they are unable to reliably collect this longstanding and important source of tax revenue. Therefore, this Court might now conclude that remote retailers of tangible personal property have outgrown the physical presence requirement and that the states may enforce their tax collection requirements against such remote retailers. However, even if the Court reaches that conclusion regarding retailers

[8] In one of the important trends in state taxation, the states are actively looking for opportunities to expand their sales taxes to cover a broad-base of services, including services performed in other states. Section B.3 below provides an analysis of this trend.

of tangible personal property, the Commerce Clause concerns and principles set out in *National Bellas Hess* and *Quill* remain valid and apply fully to remote service providers.

At the time of *National Bellas Hess*, the states made little effort to impose sales taxes on retail sales of services. Moreover, the states' focus on retailers of tangible personal property but not on retailers of services remained much the same over the next 25 years. So, while *National Bellas Hess* applies to the services sector no less than it applies to the rest of the national economy, there was little if any development in this area of the law.

State sales and use taxation was much the same 25 years later when this Court decided *Quill*: a focus on the taxation of retail sales of tangible personal property, including remote retailing of tangible personal property. Relatively little sales tax attention was paid to the taxation of retail sales of services.

Those extended periods of quiet for the national economy's services sector fostered the growth of that sector, as was found in a 2000 university study. That study concluded that the services sector was growing because it was relatively untouched by state and local sales taxes:

> "We believe that increased sales taxation [of tangible personal property] is a contributing factor to the growth of the service sector. Across states, after controlling for many other factors, the value of service receipts as a share

> of income is positively correlated with the sales tax rate [on tangible personal property], while the value of retail receipts is inversely correlated (see Table 5, columns (1) and (3)).”[9]

The study's conclusion is strikingly similar to this Court's observation in *Quill*, as is quoted above, that the mail-order industry's dramatic growth was due, in part, to not having to contend with a welter of subnational taxes and tax compliance obligations.

This Court should reject any claim that the states know how to impose sales tax collection obligations on remote retailers of services without unjustifiably harming the services sector of the national economy. The overwhelming evidence is to the contrary, namely:

- The growth in the services sector when it is not entangled with a mass of state and local tax compliance requirements. This gives the states a very high standard to meet to demonstrate a lack of harm to the services sector;
- The small reliance presently by states on tax receipts from sales taxation of services (intrastate and interstate) as, in general, states tax only those few services that are specifically identified; and

---

[9] “*Did Distortionary Sales Taxation Contribute to the Growth of the Service Sector?*”, David Merriman and Mark Skidmore, National Tax Journal, Vol. LIII, pp. 125, 140 (March 2000) (referenced table omitted from this Brief).

- The great difficulties the states have encountered in their attempts to impose broad-based sales taxes on services, including remote services, as is discussed below. This belies any possible claim that the states can impose sales tax collection and remittance obligations on remote service providers without entangling them in local laws.

2. States Have Been Unsuccessful in Their Attempts to Fashion Sales Taxes Applicable to a Broad Base of Services.

The states' posture today regarding the sales taxation of tangible personal property and services is much the same as what it has been since the issuance of *National Bellas Hess*: Almost every state that imposes a sales tax does so on all retail sales of tangible personal property (each state has a few exceptions). States and vendors are very experienced with the taxation of these sales.

In contrast, most states do not impose sales and use taxes on retail sales of services unless those sales are expressly made taxable.[10] Thus, in almost all states only a few services are subject to sales taxation. Consequently, a very large portion of the nation's economy has no familiarity with sales tax laws, regulations, or

[10] Only Hawaii, New Mexico and South Dakota impose sales taxes on a broad-base of services.

principles, and no familiarity with sales tax collection and remittance procedures.

Moreover, the states themselves have not yet resolved many thorny issues raised by taxing retail sales of services, including:

- basic considerations affecting the taxation of both intrastate and interstate sales of services, such as definitions (e.g., what are "legal services"? Do legal services include assistance with a real estate filing? Assistance obtaining a business license? Assistance obtaining a sales tax license? Assistance obtaining a marriage license? What about an unregulated service, such as interior design services – which activities come under the umbrella of that phrase? Which do not?);
- the avoidance of pyramiding of taxes.[11] This complication affects tax collection requirements for both intrastate and interstate sales of services;
- the sourcing and apportioning of sales.[12] This complication affects tax collection

---

[11] "*Expanding Sales Taxation of Services: Options and Issues*," Michael Mazerov, Center on Budget and Policy Priorities, State Tax Today, 2009 STT 161-2 at pp. 51-52 (Aug. 24, 2009). *See also* "*State Sales Taxes on Services: Massachusetts as a Case Study*," Samuel B. Bruskin and Kathleen King Parker, Tax Lawyer, v. 45 at 49 (Section E) (Fall, 1991).

[12] "*Expanding Sales Taxation of Services*" at p. 53. *See also* "*State Sales Taxes on Services*" at Section D.

> requirements of interstate sales of services only.

The pyramiding issue is important because it violates a fundamental principle of sales taxation that only end-consumers should be taxed. When tangible personal property is sold, determining who is the end-consumer of that tangible personal property is generally straightforward.

However, determining who is the end-consumer of services is more difficult. As a result, it is possible that purchasers of services will pay tax on those services, even though the service will be resold (and taxed again) or will be a component of another service (and taxed again). For example, hotels often offer a service of overnight dry cleaning. The hotel pays a drycleaner to do the work. The hotel then marks up the cost of the dry cleaning and charges the guest the higher amount. Here, no tax should be due on the hotel's purchase of the dry-cleaning service, with tax instead being charged on the guest's payment for the service. But whether that result can be achieved will depend on the contours of the state's resale exemption.

Pyramiding of sales taxation of services also creates artificial incentives for businesses to use their own employees to provide a service even if an outside business can perform the service more efficiently.[13] This inefficiency occurs because no sales tax is charged when an employee performs a service for his employer,

---

[13] "*Expanding Sales Taxation*" at 53.

but sales tax is charged when that same employer engages a third-party to perform the service.

Likewise, sourcing and apportioning of sales of services presents a series of complications unparalleled in sales of tangible personal property. These include identifying the location of delivery of a service, identifying the locations where the benefits of the service are received, determining the percentage of the service used in a state, and more.

For example, states are increasingly requiring service providers to collect sales tax on the sale of cloud computing services. However, cloud computing services are not "delivered" in any state in the way that tangible personal property is delivered. Thus, in transactions involving Software as a Service ("SaaS"), the purchaser may be anywhere in the world when accessing the service provider's software. Furthermore, a purchaser might access the SaaS application from multiple states, either because the purchaser is traveling or because several employees in the purchaser's business are authorized to access the SaaS. Moreover, that software itself might be anywhere in the world, including in a location that is unknown to both the purchaser and the service provider.

The states have differing approaches to taxing cloud computing services, and those approaches are continuing to evolve. As such, it is difficult for a remote service provider of cloud computing services to know where it must collect sales taxes and how much tax it is supposed to collect. Left unchecked, the ability of

states to impose a variety of tax collection burdens across state lines will create an unjustifiable local entanglement with these providers, and with the services sector, generally.

Certainly, the states will continue to experiment with methods for taxing sales of services. Unavoidably, this process will involve fundamental missteps, as demonstrated by the unsuccessful attempts by three of the most populous states (Florida, Massachusetts, and Michigan) to impose broad-based sales taxes on the services sector. Each of those attempts was quickly repealed.

Florida's 5% tax on services went into effect in July 1987. From the start, taxpayers were confused regarding the reach and administration of the tax, and the tax met enormous opposition. This culminated in the repeal of the services tax less than six months after it became effective. After that repeal, one of architects of Florida's tax acknowledged the difficulty of imposing sales tax on services, writing that:

> "Once the tax became effective July 1, 1987, confusion over the scope of the tax and difficulties encountered by taxpayers who sought to comply with it added to the swell of public indignation. . . . Multistate businesses claimed that it was simply impossible to comply with the rules for apportioning the sales tax base, particularly when a purchase was made by

> one member of an affiliated group of corporations."[14]

Significantly, remote retailers are directly impacted by both of those items (confusion over the tax's scope and impossibility of apportioning the sales tax base).

Massachusetts and Michigan had even worse experiences when they attempted to impose sales taxes on the services sector. Massachusetts's attempt to tax services became effective on March 6, 1991 and was repealed *two days later*, on March 8, 1991, retroactive to March 6.[15] And, in 2007, Michigan's service tax did not last even one day.[16]

Of the 45 states that impose sales taxes, few have considered in any depth the issues raised by requiring retailers of interstate services to collect sales taxes. The New York State Department of Taxation and Finance ("Department") has addressed the issue in limited circumstances, and its experience is telling:

- In 2013, Department issued an advisory opinion informing a business as to how to collect New York City sales taxes on its sale of a credit rating services.[17] The

---

[14] "*Florida's Sales Tax on Services*," Walter Hellerstein, National Tax Journal, Vol. XLI, pp. 1, 15 (March 1988).

[15] *See* "*State Sales Taxes on Services*," *supra.*

[16] Michigan P.A. 93 of 2007 repealed by P.A. 145 of 2007.

[17] TSB-A-13(27)S (Sept. 9, 2013). (Following New York City's financial crises in the 1970s, responsibility for administration of its sales tax was shifted to the New York State Department of Taxation and Finance. NYC Administrative Code §§ 11-2001(d) and 11-2002(c).)

> business's customer was based in North Carolina, with offices within and without New York State. The advisory opinion instructed the taxpayer to collect New York City sales tax on the sale of the credit rating service if the customer's representative who signed the engagement letter with the taxpayer is in New York City when the taxpayer delivers its rating letter to that representative.
>
> Less than two years later, the Department changed its position. It now advised that credit rating services would be subject to New York City sales tax if the address to which the taxpayer's invoice is sent is in New York City.[18] This is an entirely different method for determining the location of the sale of the service and establishing tax collection responsibility.

There is nothing inherently wrong with either of those approaches to determining tax collection responsibility for sales of services. However, such changing of tax collection rules is a problem for the economy's services sector, especially considering that there are up to 45 states for which such compliance might be required, along with thousands of political subdivisions within those states. And not all rules for determining tax collection obligations will be as unobjectionable as New York's. Litigation regarding more aggressive state approaches is likely.

---

[18] TSB-M-15(4)S (July 24, 2015).

The hazards for the national economy from this state experimentation are obvious. Indeed, this is very much the welter of tax compliance rules, and entanglement of interstate commerce, that concerned the Court in *National Bellas Hess*. Retaining the physical presence requirement of *National Bellas Hess* and *Quill* protects remote service providers from that entanglement while the states experiment with new approaches to taxing services.[19]

3. Notwithstanding the Above, Sales Taxation of the Services Sector Seems Inevitable Due to the Amount of Potential Tax Revenues.

Despite a history of limited or no sales taxation of services, and despite the difficulties and unanswered fundamental questions regarding sales taxation of services, it is virtually certain that the states will continue to attempt by trial and error to create an administrable method of imposing sales taxes on intrastate services.[20] The tax receipts potentially available are so great that no other outcome seems realistic.

---

[19] The states undoubtedly will treat a corporation that is both a retailer of goods and a retailer of services as having company-wide tax presence if any line of its business has tax presence in a state. This treatment may be justified under *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977).

[20] This Brief does not dispute the states' right to impose sales taxes on services, whether (i) wholly performed and wholly received within the one state, or (ii) performed in multiple states and received in multiple states. Rather, this Brief opposes any

Of course, taxing interstate services raises additional complications, which the states could choose to avoid by taxing intrastate services only. However, no state has yet indicated a desire to do this. Rather, every bill, budget proposal, and report discussed below proposes the sales taxation of services without regard to whether doing so crosses state lines.

California's very recent experience demonstrates why broad-based sales taxation of the services sector is highly likely, if not inevitable. On December 1, 2014, California Senate Bill 8 was introduced with the purpose of imposing sales tax on all retail sales of services. The California State Board of Equalization estimated that the new tax would generate $122 billion in new tax revenue for the state and its sub-state units of government during fiscal 2016.[21] To put that figure in perspective, consider that the U.S. Census Bureau reports that during fiscal 2014 all states collected $866 billion from all taxes.[22] Allowing for uncertainty as to whether the Census Bureau treated California municipalities

---

state being permitted to impose sales tax collection responsibility on service providers lacking the in-state physical presence required by the Commerce Clause as interpreted by *National Bellas Hess* and *Quill*.

[21] "*Estimate of Potential Revenue to be Derived From Taxation of Currently Non-Taxable Services,*" California State Board of Equalization (April 14, 2015).

[22] *"State Government Tax Collections Summary Report: 2014,"* U.S. Census Bureau (Released April 16, 2015) (available at https://www.census.gov/content/dam/Census/library/publications/2015/econ/g14-stc.pdf) (accessed on Feb. 23, 2018).

as fiscal bodies independent of the state,[23] California's new tax on services would have generated 7% to 14.1% *of the total amount of all taxes collected by all states during 2014*. Or, considering only sales taxes, California's new tax on services would be 14.8% to 29.6% *of the total amount of sales taxes collected by all states during 2014.* This is in addition to the sales taxes California already collects on the retail sale of tangible personal property.

Although that 2014 California Senate Bill did not become law, efforts to enact a California sales tax on services continue to this day. *See, e.g.*, *"California Lawmaker Says Taxing 'High-End' Services Could Blunt Tax Reform Blow*," Paul Jones, State Tax Today, 2018 STT 2-2 (Jan. 3, 2018).

In just over the last five years, expansions of the types of services subject to sales tax have been proposed in states literally coast-to-coast. Governors, legislators, university studies, "Blue Ribbon" studies, and tax organizations in New York,[24]

---

[23] The Census Bureau report cautions that "The state government tax data presented by the U.S. Census Bureau may differ from data published by state governments because the Census Bureau may be using a different definition of which organizations are covered under the term, 'state government'." *See* "*2014 State Government Tax Collections Methodology*," U.S. Census Bureau (Released April 16, 2015) (available at http://www.census.gov/govs/statetax/population_of_interest.html) (accessed on Feb. 23, 2018).

[24] "*New York Tax Reform Commission Presents Final Report*," Tax Reform and Fairness Commission (Released Nov. 14, 2013) State Tax Today, 2013 STT 221-44 (Nov. 15, 2013) describing, at p. 14, one of its conclusions as "Add additional services to the

Pennsylvania,[25] Illinois,[26] Kentucky,[27] Georgia,[28] Vermont,[29]

---

sales tax base to create greater uniformity between the State and local tax bases."

[25] Governor Tom Wolf's 2015-2016 budget proposal included a recommendation to expand the Commonwealth's sales tax to include many services not then taxable. These included accounting services, investment advisory services, consulting services, advertising services, architectural services, legal services, graphic design services, computer programming services, computer design services and dozens of other services. "*Memorandum: Governor Wolf's Sales Tax Proposal*," Pennsylvania Department of Revenue (March 18, 2015).

[26] "*Issue Brief: Expanding the Base of Illinois' Sales Tax to Consumer Services Will Both Modernize State Tax Policy and Help Stabilize Revenue*," The Center for Tax and Budget Accountability and the Taxpayers' Federation of Illinois, State Tax Today, 2015 STT 97-12 (May 20, 2015).

[27] "*Kentucky Blue Ribbon Commission on Tax Reform Issues Recommendations*," Governor Steve Beshear's Communications Office, State Tax Today, 2012 STT 244-16 (Dec. 17, 2012).

[28] "*Georgia State University Releases Report on State's Eroding Tax Base*," State Tax Today, 2015 STT 197-21 providing a link to "*Georgia's Incredible Shrinking Sales Tax Base*," Robert D. Bushman, Fiscal Research Center, Georgia State University, *see* p. 15 (Oct. 6, 2015) ("The shifts in household consumption toward services and online sales, for example, are likely permanent, but both can also be added to the sales tax base through legislation.").

[29] "Lawmakers Consider Sales Tax on Several Consumer Services," State Tax Notes, Neil Downing, 79 STN 263 (Jan. 25, 2016) which contains a link to a January 15, 2016 study commissioned by the Vermont legislature on the imposition of sales tax on services ("*Economic and Revenue Impacts of Sales Taxation on Selected Services*, *Per H489*," from Tom Kavet, Nic Rockler and Jeff Carr, State Economist for the Administration to Steve Klein, Chief Fiscal Officer (Vermont) Joint Fiscal Office (Jan. 15, 2016). On page two, the study describes one of its conclusions as follows:

Connecticut,[30] Indiana,[31] and, as stated, California have all proposed such an expansion.

"No matter what, the cross-border effects are negative to the economy, but likely to be relatively small for the five taxes [sic: sample taxed services] considered – and probably smaller than for goods in general."

[30] "*Sale Taxation in Connecticut: For Presentation Before the Connecticut Tax Study Panel*," William F. Fox, Tax Analysts Doc. 2015-23784 (Oct. 27, 2015) at p. 20 ("Policy Option 4: Broaden the sales tax to more services used by consumers, including residential utilities and repairs to residential real property.").

[31] "*Mikesell Report Says Sales Tax on Services Would Be Feasible in Indiana*," Brian Bardwell, State Tax Today, 2015 STT 69-4 (April 10, 2015) reporting on the study "*Considering Sales Taxation of Services in Indiana: A Report Prepared for the Indiana Fiscal Policy Institute*," John Mikesell, Indiana School of Public and Environmental Affairs, State Tax Today, 2015 STT 55-17 (report dated March 18, 2015). The Report's Executive Summary includes the following conclusion:

> Adding services to the tax base would require considerable attention to insuring [sic: ensuring] that the tax not apply to services purchases made as business inputs. This problem would be particularly acute for services that may be purchased by either households or businesses (dual-use services).

The Report also identifies the following three "administrative concerns":

> (i) Services could be taxed either by redefining the tax to apply to sales both of tangible personal property and services, except those specifically exempt, or by selectively adding certain services to the short list now already taxed. Neither approach is without problems, as experience in Florida, Michigan, and Massachusetts illustrates. The experience does show the problems associated with trying to include services predominantly purchased by businesses in the expanded base.

The states are entering a process of actively attempting to tax retail sales of services, and to enforce collection of those taxes by service providers outside of the taxing state.

C. Any Rollback of the Physical Presence Requirement Should be Confined to Retailers of Tangible Personal Property.

The elimination of physical presence as a prerequisite to the imposition of tax collection responsibilities, combined with the states' interest in imposing sales taxes on the services sector, risks material, adverse effects on the national economy. This Court can avoid that hazard by limiting any rollback of the physical presence requirement to retail sales of tangible personal property.

The states do not now have a mature approach to requiring the collection of sales taxes on interstate sales of services, and it is unknown how long it will take for them to arrive at that point. The only

---

(ii) Small business retailers may have compliance problems. Making the expanded tax as simple to comply with as possible matters for all businesses, especially small entities.

(iii) Many vendors who would face obligations to collect and remit sales tax on services already are in the state retail sales tax system because they sell taxable tangible personal property. Much of the new tax base undoubtedly is with these existing registered vendors. Special attention, however, would be warranted to assist the transition of new vendors into the sales tax system.

certainties are that there will be many trials and errors, and that this will be a contentious process. Therefore, until the states develop an efficient methodology for taxing interstate sales of services, this Court should continue to apply the physical presence requirement to service providers.

D. State Revenue Departments and Tax Practitioners Know How to Distinguish Sales of Services From Sales of Tangible Personal Property.

Imposing tax collection responsibilities on remote retailers of tangible personal property, while not imposing that responsibility on remote retailers of services, requires distinguishing between such retailers based upon what is being sold. Fortunately, that is not the additional burden that it might seem, as for decades this analysis has been a regular practice among state revenue departments and tax practitioners.

The analysis is known as the "true object" test (sometimes also called the "essence of the transaction" test or "dominant purpose" test).[32] Whatever the name,

---

[32] *See, e.g.*, California Code Regs. 1501 ("The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true objects of the contract; that is, is the real object sought by the buyer the service per se or the property produced by the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred.").

the concept is essentially the same: One evaluates whether the purchaser wanted to acquire tangible personal property or a service. For example, the retail sale of prepaid telephone cards has been held to be a nontaxable sale of a service, as the "true object" in purchasing a calling card is the long-distance service. The card serves only as a medium for securing the telephone service.[33]

Most important, for purposes of the position set forth in this Brief, is that the work of distinguishing sales of goods from sales of services is already being done.

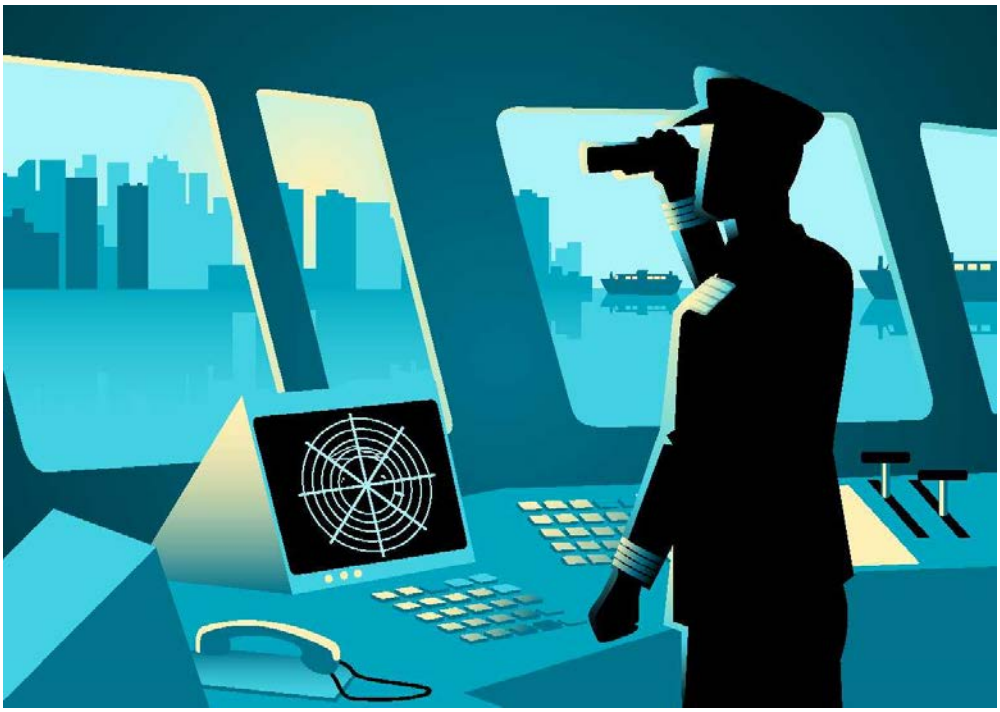
CONCLUSION

Any abrogation of the Commerce Clause's physical presence requirement, as described in *National Bellas Hess* and *Quill*, should be limited to retailers of tangible personal property. The physical presence requirement should continue to apply to sales of services.

Respectfully submitted,

DAVID A. FRUCHTMAN
RIMON, P.C.
245 Park Avenue, 39th Floor
New York, NY 10167
(646) 681-2268
david.fruchtman@rimonlaw.com

[33] *See, e.g.*, Virginia Dept. of Tax., P.D. 94-325 (Oct. 24, 1994).



Document IV

No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

RESPONDENTS' BRIEF

GEORGE S. ISAACSON
Counsel of Record
MARTIN I. EISENSTEIN
MATTHEW P. SCHAEFER
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
(207) 786-3566
gisaacson@brannlaw.com
meisenstein@brannlaw.com
mschaefer@brannlaw.com

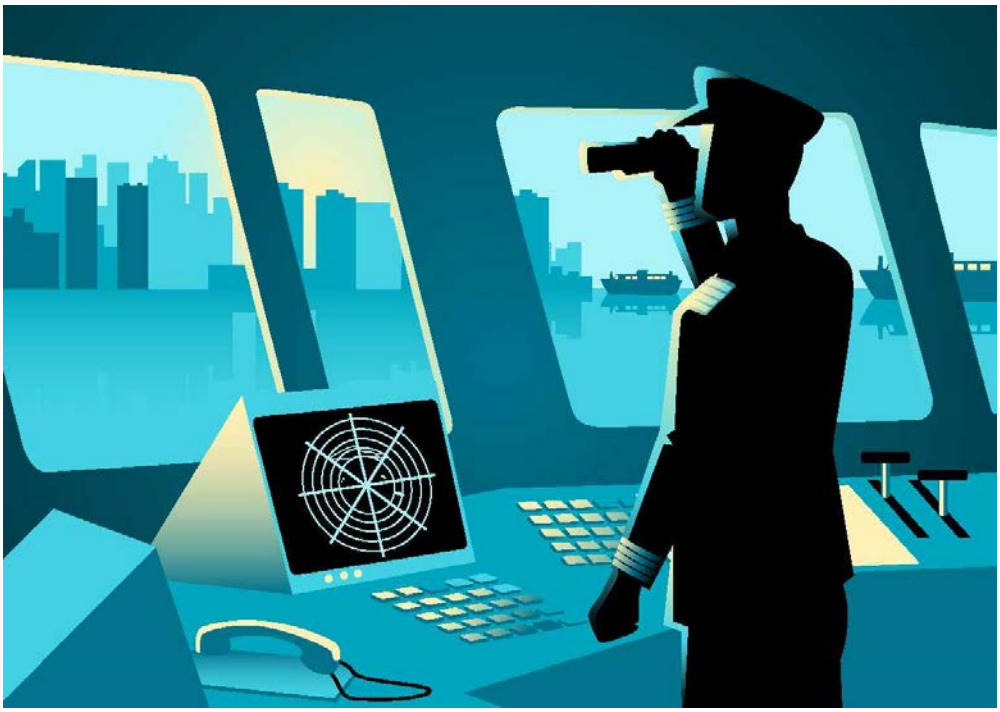
Counsel for Respondents

March 28, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Fourth, rather than minimizing litigation, new kinds of litigation would ensue. Retailers would be prompted to challenge the "highly individualized and context-specific" thresholds of different jurisdictions, based on their particular circumstances. The relative burdens may vary across different industries and market segments (*e.g.*, heavy equipment sellers vs. software providers), prompting even more particularized suits. Not only the level of the thresholds, but their application to specific sellers could be subject to interpretation and dispute.

Fifth, the "sourcing" of retail services transactions – now a much larger portion of the economy than retail sales of goods – is a highly perplexing and contentious area of state sales tax law, for which an economic threshold is particularly ill-suited. *See* Brief of David Frutchman as *Amicus Curiae* Supporting Neither Party at 15 ("sourcing and apportioning of sales of services presents a series of complications unparalleled in sales of tangible personal property"). Whether a particular service transaction, or what portion of it (in cases of multiple users in different locations), should be assigned to a state for purposes of the sales threshold could be difficult to determine. South Dakota already taxes services; other states are sure to follow, given the massive potential for revenue from retail services. *Id.* at 5, 20-23. Sourcing of digital products is equally difficult. In sum, economic thresholds are incompatible with the modern economy – which is increasingly digital, service-oriented, and global – absent significant simplification and uniformity of state tax systems.



Document V

THE NATIONAL LAW JOURNAL

How the Supreme Court's Online Sales Tax Case Could Affect Law Firms

"States are actively looking for opportunities to expand their sales taxes to cover a broad-base of services, including services performed in other states," tax attorney David Fruchtman, chair of the state and local taxation practice at New York's Rimon, writes in an amicus brief in the Wayfair case at the Supreme Court.

By **Marcia Coyle** | April 16, 2018 at 02:55 PM

U.S. Supreme Court building in Washington, D.C. (Photo: Diego M. Radzinschi)

A tax nightmare could face big law firms and other multistate service providers if the U.S. Supreme Court this term requires **retailers to collect sales taxes** in states where the business has no physical presence.

The justices will hear arguments on April 17 in the case *South Dakota v. Wayfair*. South Dakota and its supporters **urge the high court** to overrule its 1992 decision that said only retailers with a physical presence within a state can be required to collect that state's sales tax. Numerous state and local governments **say a ruling for South Dakota** could mean billions of additional dollars for cash-hungry government budgets.

Tax attorney David Fruchtman, chair of the state and local taxation practice at New York's Rimon, **filed an amicus brief** on his own behalf and in support of neither party in the case. He takes no position on whether the 1992 decision *Quill v. North Dakota*—central to the dispute facing the court—should be cast aside. Instead, he urges the justices to keep the physical presence rule for sales taxes on service providers.

From defining "legal services" to locating the delivery point of cloud computing access, "sourcing and apportioning of sales of services presents a series of complications unparalleled in sales of tangible personal property," Fruchtman argued in his brief.

At large, the briefs in the *Wayfair* case focus on the collection of sales taxes by remote web retailers of tangible personal property. A ruling for South Dakota, however, could also apply to remote providers of a broad range of services, such as legal and accounting advice.

Three states—South Dakota, Hawaii and New Mexico—impose sales taxes on a spectrum of in-state services, although with exceptions. Enticed by a largely untapped and huge source of new revenue, "the states are actively

looking for opportunities to expand their sales taxes to cover a broad-base of services, including services performed in other states," according to Fruchtman.

"Of the 45 states that impose sales taxes, few have considered in any depth the issues raised by requiring retailers of interstate services to collect sales taxes," Fruchtman wrote in his brief.

Fruchtman sees two major problems, among others, for law firms serving clients in their home states or across state lines: "pyramiding" of taxes and sourcing issues.

The pyramiding problem for fees from local counsel or experts may occur this way, he hypothesizes in an email to The National Law Journal:

> A law firm engages an antitrust expert to assist on litigation. The expert bills the law firm for his services, which the law firm includes in its bill to the client. The client receives a bill from the law firm for $40,000 ($30K for legal services plus $10K for expert services) and pays taxes on that $40K. The law firm in turn pays the expert the $10K for expert services. Unless the state permits the use of resale certificate with purchases of services, the law firm will have to pay sales taxes on the $10K, and the total amount taxed will be $50K. Had the expert billed and been paid by the client, the client would

> have had a sales tax bill of $40,000 ($30K in legal fees, $10K in expert fees).

"The complexity increases if the law firm, client, and expert are located in different states, as it is possible (and perhaps likely), that the states will use differing approaches for sourcing expert fees," Fruchtman wrote.

And the sourcing of legal fees problem:

> A law firm bills a client $10,000 for advice involving the proper sales tax characterization of the client's sales of a medical device in California. Since the advice related to California taxation, one might reasonably expect that legal fees will be sourced to and taxed by California.
>
> But now suppose the law firm advises the client on how to avoid creating tax presence in California. Since, as before, the advice related to California taxation, one might reasonably expect that legal fees will be sourced to and taxed by California—except that the client does not have tax presence in California. Another state might argue that the sale must be allocated to the client's legal domicile, or to the client's commercial domicile, or on some other basis.

And what if the law firm provides federal tax advice? "Where is the sale taxable?" Fruchtman writes in his amicus brief. "At the client's legal domicile,

to the client's commercial domicile, or among the states where the client has sales, or where the client has property and payroll?"

Challenges to taxing professional services

The states, Fruchtman said, "do not know how to tax many services" and he points to the quick repeals of the attempts by Florida, Massachusetts and Michigan, to impose broad-based sales taxes on the services sector. Retaining the physical presence requirement would allow states to continue to experiment and learn how to tax services with a smaller, more manageable number of providers, he argued.

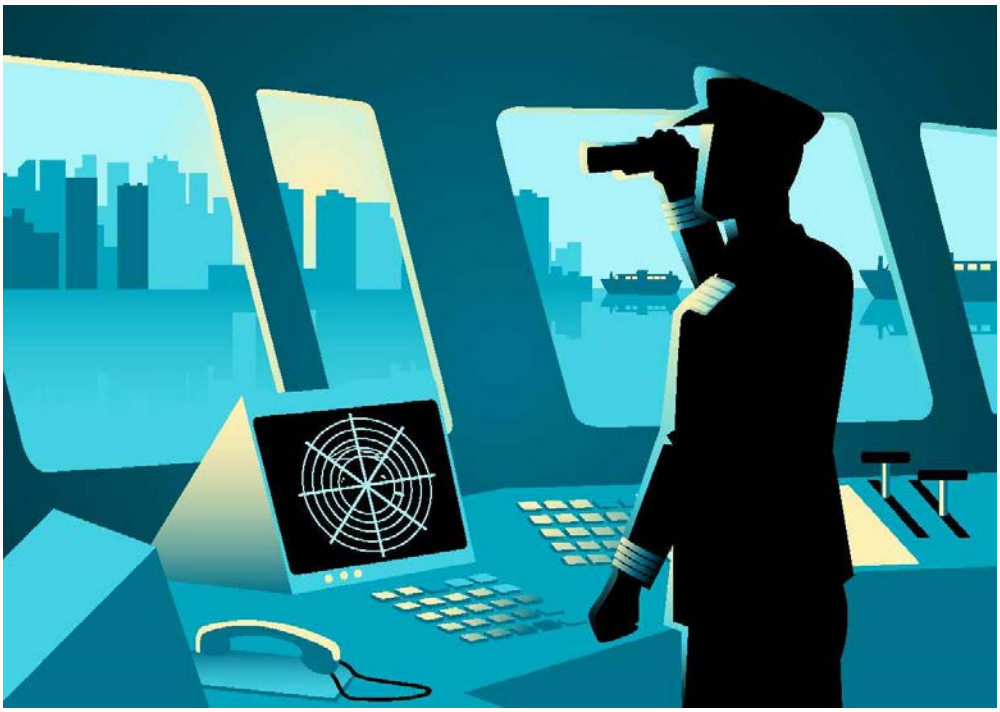
Tax partner David Brunori in the Washington office of Quarles & Brady said he sees little threat to professional service providers.

"No state has successfully expanded its sales tax base to professional services in 30-40 years," Brunori said. "There've been lots of attempts but none successful and the reason is professional service providers tend to be lawyers, doctors, accountants, real estate agents—people with lots of political clout in state legislatures."

When taxes on professional service providers are proposed, Brunori said, "the bar association goes in and kills it. It takes out a bunch of ads and say: 'Governor Smith wants to destroy the foundation of constitutional law!' Or real estate agents will take out ads and say: 'They want to destroy the American dream of home ownership.'"

Brunori said it's "open season" on "tattoo parlors, landscapers, dog walkers" and other nonprofessional service providers—most of whom do not cross state lines.

The *Quill* physical presence test will always be “unloved,” said Fruchtman, because it is “inflexible” and “looks and feels arbitrary.” But, he argued, it works. “Where services are concerned, I recommend that the states leave well enough alone,” he said.



Document VI

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Your Guide To Wayfair: The Briefs In Support

By **David Fruchtman** (April 10, 2018, 10:58 AM EDT)

David Fruchtman

South Dakota v. Wayfair[1], set for argument before the U.S. Supreme Court next week, is the most important sales tax case in the last 25 years. Not surprisingly, Wayfair has engendered the filing of 40 amicus briefs. The amici filing these briefs devoted great amounts of resources bringing to light considerations of which the Supreme Court otherwise would not be made aware — or adding weight and additional authorities to arguments made by the parties.

The points made in these amicus briefs have value for practitioners — even in circumstances removed from Wayfair. Nevertheless, few tax practitioners have the time to read all these briefs.Therefore, the first two articles in this four-part series summarize the major points raised in each of the amicus briefs, including the brief I filed in support of neither party. Where appropriate, observations are also provided.

This first article describes the major points of the 17 amicus briefs filed on or before March 5, 2018. These briefs either support the state of South Dakota or support neither party.

1. Brief for the United States Supporting Petitioner

This is the most important of the amicus briefs, simply by virtue of who filed it. It is also an unusual brief, starting with its change to the "Question Presented." The Supreme Court lists the following as its "Question Presented" in Wayfair:

> Should this Court abrogate Quill's sales-tax-only, physical-presence requirement?

Nevertheless, the United States created its own "Question Presented":

> South Dakota requires certain businesses that do not have a "physical presence in the state" to collect sales taxes on the goods and services they sell to South Dakota customers and to remit those taxes to the State. S.D. Codified Laws Section 10-64-2 (Supp. 2017). The question presented is whether that requirement violates the dormant Commerce Clause.

By this rephrasing, the United States attempted to change the discussion to remove the holding of Quill Corp. v. North Dakota from being central to Wayfair. This attempt is consistent with the United States' primary argument, viz: when the U.S. Supreme Court held in National Bellas Hess Inc. v. Illinois and Quill that the Commerce Clause requires a vendor to have physical presence in a state before the state can require the vendor to collect its sales tax, the Court was creating a safe harbor applicable to mail order vendors only. The United States summarized its primary argument as follows:

> Although the courts below and the parties here construe Quill and Bellas Hess to impose a broader "physical-presence" requirement, neither case compels such a reading. Rather, those cases are more appropriately understood to be artifacts of their time… This Court need not overrule Quill and Bellas Hess, but it should decline to extend them to the distinguishable context of e-commerce.[2]

That is, per the United States, there has never been a physical presence requirement for sales conducted over the internet.

On page 28 of the brief, the United States acknowledges that "The parties have litigated this case, and the courts below decided it, on the premise that Quill's holding affirmatively requires a physical presence in the state as a prerequisite to the imposition of state-tax-collection responsibilities." Nevertheless, the U.S. argues that if the physical presence requirement applies to all retailers, then Quill should be overruled based on an alleged misreading of Complete Auto Transit v. Brady.[3] Of course, the 1967 decision in National Bellas Hess cannot be overruled based on a misreading of Complete Auto Transit, as Complete Auto Transit was not issued for another 10 years. Of necessity, the U.S. therefore offers a rationalization for how, according to it, the Supreme Court can overrule Quill without overruling National Bellas Hess.[4]

Observation

This brief, at one point or another, claims that for 25 years everyone else — including both parties in this case — has been wrong in their understanding of (i) Quill's reach, (ii) the nexus issue presented in Quill (and Wayfair), or (iii) both. That is difficult to accept. Also, in a glaring omission, the United States did not address the retroactive consequences of its position. Nevertheless, a decision adopting the United States' primary argument appears to create essentially unlimited exposure for remote vendors that did not collect sales taxes in states in which they lacked a physical presence.

2. Brief of the National Association of Certified Service Providers and the Software & Information Industry Association in Support of Neither Party

This brief notes that in Quill the Supreme Court justified its conclusion based in part on the difficulty vendors would have complying with tax collection and reporting obligations in thousands of jurisdictions. The brief asserts that "the very technologies that have allowed the explosion of e-commerce since Bellas Hess and Quill have also made it practically effortless for e-commerce retailers to calculate and collect sales tax in additional jurisdictions where they make sales beyond their home States."[5]

Observation

In their argument, the amici use the word "easy" 12 times to describe their view of what is involved in current nationwide sales tax compliance. One should expect the Supreme Court to be skeptical of that characterization.

3. Brief of Professor John S. Baker, Jr. Supporting Neither Party

This brief calls attention to the international aspect of some internet sales. It argues that when a purchaser is in South Dakota and a vendor is abroad, the constitutionality of South Dakota's "tax should be analyzed under the Constitution's Commerce Clause and Import-Export Clause."[6] It further argues that the imposition of sales tax on such transactions appears to impose an impost or a duty on the sale. The brief notes that imposts are defined as "charges imposed at the time and place of importation" and maintains that South Dakota should be required to explain why its tax is not an impost.[7] Nevertheless, the brief stops short of claiming that the tax is an impost. Rather, it asks the Supreme Court to require briefing on this issue.

Observation

This amicus brief does not identify any sales tax cases considering the issue it presents and it seems unlikely that the Supreme Court will delay its proceedings to require the parties to brief the issue. Moreover, it is not apparent that any of the Respondents have an interest in how this question is resolved, so it is not clear that they could effectively address the question. This brief might be ahead of its time and have its greatest utility in showing the way for later challenges by vendors based outside of the United States.

4. Brief for the National Congress of American Indians and Indian Tribes in South Dakota in Support of Neither Party

This brief has a limited goal: It asks the Supreme Court to include a sentence in its opinion stating that Wayfair does not limit the "Tribes' authority to impose sales taxes or Indians' immunity from state sales taxes."[8] The amicus curiae seem to have a general concern arising out of their reliance on sales taxes revenues. That is, there does not seem to be anything about Wayfair that is a specific threat to these amici.

Observation

Obviously, these amicus curiae cannot afford to brief every case and issue that might incidentally affect them. However, it seems that they have a fear, perhaps based on experience, that innocuous-appearing statements in court opinions can hamper their ability to collect sales taxes. In all events, this brief provides a helpful analysis of tribal taxing authority.

5. Brief of Tax Foundation in Support of Neither Party

This brief is mismarked, as it argues that the Supreme Court should abrogate Quill's physical presence requirement and find South Dakota's law constitutional. The brief argues that the Court should replace the physical presence requirement with a rule that expands and contracts with the compliance burdens presented.[9] It further approves of South Dakota's bar against retroactive taxation, apparently attempting to signal to the Court that any revision to Quill's tax presence rule must consider retroactivity in determining whether the new rule avoids unjustified burdens on interstate taxation.

Observation

Section III of this amicus brief contains a helpful compilation of the

divergent approaches taken by the states in trying to squeeze past the physical presence rule.

6. Brief for David A. Fruchtman Supporting Neither Party

This is my brief. It alerts the Supreme Court to the relevance of Quill and National Bellas Hess to the service sector of the nation's economy. It further alerts the Court to the enormous amount of sales taxes potentially involved in the taxation of services and to the imminent expansion of state sales taxation of services. (The brief identifies nine states that have recently proposed legislation or budgets, or issued reports greatly expanding the types of services they tax; a 10th state, New Jersey, has since issued a report recommending the same type of expansion of its sales tax.) However, in contrast to the taxation of sales of goods, sales taxation of services is in an experimental, trial-and-error phase with populous states consistently failing in their attempts to tax a broad base of services. To protect this huge sector of the economy from being unnecessarily hamstrung by multistate experimentation, the brief recommends that the Court retain the physical presence requirement for a state to require service providers to collect the state's sales tax.[10]

7. Brief of the City of Little Rock, Arkansas in Support of Petitioner

This brief attempts to demonstrate the real-world impact of Quill's physical presence requirement. To do so, it alleges that the City of Little Rock's tax collections were reduced by stated amounts, which in turn required short-term borrowing by the city and resulting payments of interest.[11] It also attempts to demonstrate that internet sales have created "new" policing burdens for localities, noting especially an increase in theft of packages from doorsteps, "porch piracy".[12]

Observation

The amicus curiae states that it believes that Quill "barred" it from collecting some sales taxes and then describes the consequences of that loss of revenue.[13] But Quill did not bar the city from collecting any sales taxes. Amicus curiae, and every jurisdiction, has the right to collect sales and use taxes from its residents. Quill addressed only whether a state may require an out-of-state vendor to collect and remit the state's taxes. The amicus might have concluded that it would be unfeasible economically to enforce its use tax laws against its residents, but that is a far cry from being "barred" from collecting such revenue.

8. Brief of South Dakota Retailers Association in Support of Petitioner

This amicus brief provides a discussion of the brick and mortar businesses' perspective on their role as part of their community. This role in the community, the brief argues, is not true of internet vendors.[14] In arguing that the sales tax advantage is important to internet vendors, the brief identifies a decrease in sales Amazon allegedly experienced after it reached agreements with states to collect sales taxes.[15]

9. Brief of Retail Litigation Center Inc., et al. in Support of Petitioner

This brief repeats familiar arguments. It views "the physical-presence requirement [as having] the harshness of Draconian law but not the stability."[16] It argues strenuously that because the Supreme Court made the rule that is the subject of this dispute, it is the Court's obligation to address, fix or revoke that rule rather than looking to Congress to do the same.[17]

10. Brief for Streamlined Sales Tax Governing Board Inc. in Support of Petitioner

This brief argues that "As with its namesake writing device, Quill belongs to another century and is entirely unsuited to today's business world."[18] The brief highlights the Supreme Court's concern in National Bellas Hess and Quill regarding the practical burdens that would be imposed on remote vendors if those vendors were required to comply with up to 6,000 jurisdictions' sales tax laws.[19] The brief further highlights the states' efforts to simplify sales tax administration, the practical problems of which have now been "fully addressed."[20]

Observation

This brief is a good resource for gaining an understanding of the states' effort to simplify the taxation of interstate sales of goods. Without diminishing the states' progress in reducing undue burdens on interstate commerce involving such sales of goods, the claim that practical issues of sales tax compliance have been "fully addressed" is very much debatable. Moreover, the amicus curiae cannot make comparable claims regarding the administration of the sales taxation of services.

11. Brief of the National Governors Association, et al.

This amicus brief was submitted by a long list of important state and local government organizations. The brief opens with a familiar discussion of the alleged adverse effects of Quill on the ability of states to collect and remit sales taxes. The brief is on stronger footing when it

argues that Quill's conclusion was unjustified and unnecessary.[21] It concludes with an argument extolling the use of an economic nexus standard.[22] In that argument, the brief acknowledges that states have differing standards for what constitutes economic nexus, but argues that this is in keeping with the Supreme Court's view that "states can serve as laboratories of democracy."[23]

Observation

In the opening and closing paragraphs of this first argument, the brief incorrectly states that Quill and National Bellas Hess prevent states from collecting sales and use taxes due.[24] A correct statement of law is that Quill and National Bellas Hess prevent states from requiring remote vendors to collect the state's sales taxes, as is acknowledged on page nine of the amicus brief.

12. Brief of Four United States Senators in Support of Petitioners

This brief was filed by Sens. Heitkamp, Alexander, Durbin and Enzai, co-sponsors of the Marketplace Fairness Act which has been introduced in Congress repeatedly. (Durbin is from Illinois, the state directly involved in National Bellas Hess and is from North Dakota, the state directly involved in Quill. In addition, Heitkamp represented North Dakota in the Quill case in her capacity as Tax Commissioner.) The brief argues that South Dakota's economic nexus test satisfies the substantial nexus requirement of Complete Auto Transit and that the use of a bright-line, physical presence test is both over-inclusive and under-inclusive under the substantial nexus requirement of Complete Auto Transit.[25]

Observation

This is a strong brief that makes several points well. A notable weakness is in the claims made by the senators that states will not attempt to make tax compliance more difficult for out-of-state sellers than for in-state sellers, and that "Congress is standing by (to assist remote vendors) should states overstep."[26] Real-world experience is directly to the contrary on both counts. Indeed, on page 13 the brief is forced to acknowledge that some states already have more aggressive tests of tax presence than the one at issue in Wayfair. Moreover, a four-page addendum lists the "principal" attempts in Congress since 2000 to reverse the result in Quill.[27] None of the attempts succeeded.

13. Brief of Multistate Tax Commission and Federation of Tax Administrators in Support of Petitioner

This brief makes several important points. For example, the brief argues

for economic nexus tests, what it calls "sales thresholds," while admitting that these thresholds will lead to litigation — similar to current circumstances under the physical presence test.[28] The brief also addresses the retroactivity issue with refreshing candor, arguing that the Supreme Court should use language that changes the physical-presence test on a prospective-only basis. However, if the Court cannot find reasoning that would allow for the use of such language, the brief argues that it should overrule Quill retroactively.[29]

Observation

The brief asserts that the bright-line, physical-presence test of Quill and National Bellas Hess has engendered litigation. As support, it cites numerous cases as well the many examples in a study by a publishing house, involving contacts that cross the physical presence bright-line (e.g., some type of property interest or representative in the state).[30] For the most part, these cases and examples can be viewed as addressing whether a crossing of the bright-line may be treated as de minimis, which is a separate issue touched upon in a footnote in Quill but is not central to that decision.

14. Brief for International Council of Shopping Centers, et. al. in Support of Petitioner

This brief is well written and covers a range of topics. These include the direct and indirect economic consequences of Quill, which reduce state sales tax collections while also, according to the brief, reducing the revenues of in-state retailers. According to the brief, those reduced revenues reduce the amount of rent paid for retail space, which reduces property values, which reduce property taxes and has other collateral consequences.[31] In addition, the amici argue that the physical presence rule of Quill — rather than accomplishing the dormant commerce clause objective of leveling the playing field between in-state and remote retailers — has tilted the playing field in favor of remote retailers.[32] The amici argue that adherence to principles of stare decisis cannot justify such a result.[33]

Observation

The brief includes the statement that "… the dramatic economic and technological changes over the past 25 years have substantially undermined Quill's reasoning and made its unfairness to retailers, States, and others all the more apparent." This is a concise statement of the position taken in many of the amicus briefs. That statement is both correct and incorrect. It is correct in its assertion that "the dramatic economic and technological changes over the past 25 years have … made

[Quill's impact on in-state] retailers, States, and others all the more apparent. However, it is incorrect in its assertion that "the dramatic economic and technological changes over the past 25 years have substantially undermined Quill's reasoning." Rather, if those changes have proved anything with respect to Quill, it is only that the segment of the U.S. economy that retails goods has outgrown Quill. "Undermining" Quill's reasoning requires greater and different proof.

15. Brief of Brill, Knoll, Mason and Viard in Support of Petitioner

This brief does not address the Question Presented by the Supreme Court. Instead, it focuses on an economic analysis of the South Dakota law at issue. It approves of the law.

Observation

While it is plain that the amici disapprove of Quill's physical presence test — they call it a "harmful anachronism"[34] — the brief does not opine as to whether the test should be abrogated. Instead, the amici's conclusion seems to be that "From an economic standpoint, a bright-line physical presence requirement prohibiting S.B 106 makes no sense."[35] Conceivably, the amici believe that the South Dakota statute and the physical presence test can exist side-by-side, with the South Dakota statute controlling in all states that have adopted it and Quill's physical presence test controlling in all other states.

16. Brief of Law Professors and Economists in Support of Petitioner

This Brief contains a longer-than-usual argument regarding stare decisis. The stare decisis argument contains a sentence on page seven which, the brief claims, provides the Court with the legal authority it needs to apply an opinion abrogating Quill prospectively. It would have been interesting to read more from the amici about a possible resolution to this critical issue.

Observation

Unfortunately, when trying to persuade the Court that remote vendors have no legitimate reliance interests in Quill's physical presence test, the amici slip into inaccurate and misleading rhetoric about "tax evasion."[36] Tax evasion is a crime with specific statutory elements and there is no evidence that the vast majority of end-users "evade" paying taxes, as amici claim.[37] Because vendors do not owe the tax, they, too, are not evading anything. On page 14, the brief again accuses end-users of tax evasion (this time without implying that remote vendors are responsible for end-users' noncompliance). Fortunately, on page 20, the amici recognize end-user noncompliance as being a function of how

difficult the states have made use tax compliance —"Even the most fastidious personal record keepers will face difficult challenges in interpreting and applying state and local use tax laws that impose different rates on different products" — which contradicts the assertions regarding "tax evasion."

17. Brief for Colorado and 40 other states, Two United States Territories and the District of Columbia Supporting Petitioner

This brief emphasizes the harmful effects it claims Quill has had on the amici states, identifying amounts cut from state programs. In each case, it is argued, collection of sales tax revenue would have eliminated the need for such cuts.[38] The brief further argues that the physical-presence rule violates state sovereignty by rendering state laws regarding tax collection unenforceable.[39]

Observation

The brief asserts that states will not take advantage of the opportunity to impose tax collection responsibilities retroactively. In the "unlikely event" that happens, the brief claims that the states' "customary procedures for resolving tax disputes, and the right to judicial review, will provide the retailer with an appropriate opportunity to be heard."[40] Taxpayers and private practitioners will take no comfort from these comments, and one suspects that the Supreme Court will not accept these unsupported assertions at face value. Rather, retroactivity is a formidable problem for appellant.

David A. Fruchtman chairs Rimon P.C.'s State and Local Taxation practice. He submitted an amicus brief in Wayfair in support of neither party. The amicus brief analyzes issues related to sales taxation of services, as contrasted with the sales of goods involved in Wayfair. While Fruchtman's amicus brief supports neither party, Respondents,extend their March 28, 2018, brief to address sales taxation of services and cite the Fruchtman brief as supporting authority. (Respondents' Brief at 56.)

[1] South Dakota v. Wayfair Inc., Overstock.com Inc., and Newegg Inc., U. S. Supreme Court Docket no. 17-494

[2] Id. at 8-9.

[3] 430 U.S. 274 (1977). Id. at 28-29.

[4] Id. at 31-32.

[5] Id. at 5-6.

[6] Id. at 2.

[7] Id. at 10-11.

[8] Id. at 32.

[9] Id. at 2-3 and 10.

[10] This brief is an expansion of a 2015 article "Congress Should Exclude Sales of Services From Any Remote Vendor Tax Collection Legislation," Daily Tax Report (Bloomberg BNA August 14, 2015).

[11] Id. at 3-4.

[12] Id. at 6.

[13] Id. at 1.

[14] Id. at 8-9.

[15] Id. at 8.

[16] Id. at 36.

[17] Id. at 37-39.

[18] Id. at 4.

[19] Id. at 7.

[20] Id. at 8-9.

[21] Id. at 18-20.

[22] Id. at 21-25.

[23] Id. at 24.

[24] Id. at 8 and 17.

[25] Id. at 6-7.

[26] Id. at, e.g., 3, 4, 11, 12, and 20-24.

[27] Id. at 20 and addendum.

[28] Id. at 29.

[29] Id. at 18.

[30] Id. at 12-15.

[31] Id. at 5-15.

[32] Id. at 22-24.

[33] Id. at 24-27.

[34] Id. at 2

[35] Id. at 3.

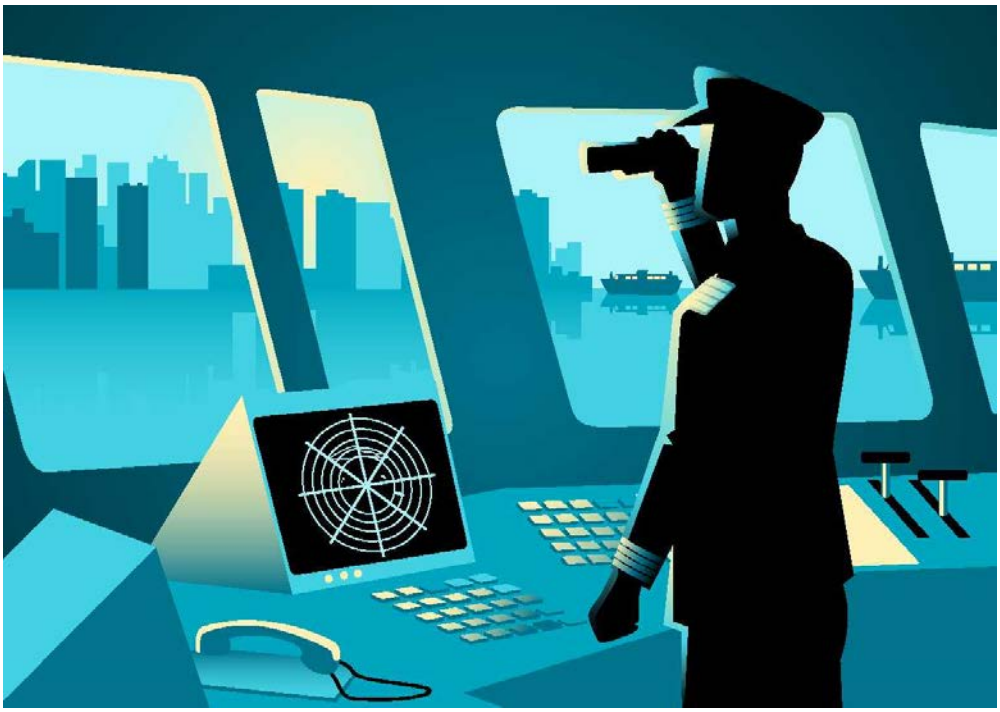
[36] Id. at 6.

[37] This claim essentially accuses most taxpayers of criminality. It would be more factually accurate to say that the majority of end-users do not pay use tax — as amici themselves mention later in their brief.

[38] Id. at 8.

[39] Id. at 12.

[40] Id. at 20.



Document VII

Bloomberg Tax

Daily Tax Report™: State

Electronic Commerce

'Wayfair': Covering the Waterfront—Amicus Briefs Supporting Respondents

Oral arguments in *South Dakota v. Wayfair*, arguably one of the biggest state tax cases ever before the U.S. Supreme Court, are scheduled for April 17. In this article, Rimon P.C.'s David Fruchtman discusses the 23 *amicus* briefs filed in support of the e-retailers.

BY DAVID FRUCHTMAN

On April 17, the U.S. Supreme court will hear oral arguments in *South Dakota v. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc.* Before then, the Justices or their clerks will have read 40 *amicus curiae* briefs. Some of the *amicus* briefs support South Dakota, some support Wayfair, and some support neither party. But all of those *amicus* briefs are the end product of substantial efforts to alert the Court to considerations that the *amici* believe to be important to this case.

For practitioners, these *amicus* briefs—well-researched, usually well-written, and part of the record at the U.S. Supreme Court—are valuable assets that can be used in assembling arguments for other administrative disputes or court cases. However, because few practitioners have the time to read 40 briefs to determine which contain analyses pertinent to issues of interest to them, this series digests all 40 *amicus* briefs.

Set forth below are one-paragraph summaries of central points of the 23 *amicus* briefs filed between March 28 and April 4, all of which support Respondents Wayfair, et al. Where appropriate, observations are also provided. (An earlier article summarizing central points of the 17 *amicus* briefs filed on or before March 5, all of which supported the state of South Dakota or neither party, is available on my Rimon P.C. professional biography.)

1. Brief of House Judiciary Committee Chairman Bob Goodlatte, et al. as *Amici Curiae* in Support of Respondents. This brief defends the authority of Congress to decide whether to overturn *Quill*. It notes that Congress has acted on Internet tax issues, but thus far has not overruled *Quill*. *Id.* at 5, 8-14, and 18-22. The brief is highly critical of South Dakota's fast-track approach to this litigation and the minimal record that has been generated. *Id.* at 6-7 and 12.

Observations: This is a thoughtful and well-written brief. In my opinion, of the 40 *amicus* briefs filed, this is the one to read if you have time to read only one. On page 2, the brief states that the *amici* are ''concerned with the unintended consequences of a potential decision by this Court to deem 'virtual presence' sufficient for jurisdictional purposes.'' *See, also, Id.* at 31. The caution exhibited contrasts with the unvetted position

Mr. Fruchtman chairs Rimon P.C. State and Local (Subnational) Taxation practice. On March 5, he submitted an amicus curiae brief in Wayfair in support of neither party pointing to issues uniquely related to sales taxation of services. While Mr. Fruchtman's amicus brief supports neither party, Respondents, in their March 28 brief, attempt to extend their brief to address sales taxation of services, citing the amicus brief as supporting authority. Respondents' Brief at 56.

 ISSN 1534-1550

Amicus Curiae Briefs

U.S. Supreme Court rules allow for the filing of *Amicus Curiae* briefs by non-parties to a case. Supreme Court Rule 37 explains that ''An Amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An Amicus curiae brief that does not serve this purpose burdens the Court, and its ##64257;ling is not favored.''

The lawyer submitting the brief must be admitted to the Supreme Court Bar. Beyond that, there are timing and other rules relating to such briefs, depending on whether (i) the brief will be filed before the Court has considered a petition for certiorari or, instead, at the merits stage after such a petition has been granted, and (ii) the brief supports the appellant, the respondent, or neither party. There are also specific requirements relating to the brief's appearance and the number of copies needed for the Court and opposing party (47 copies are required—40 for the Supreme Court, three for each party, and one file stamped copy for the *Amicus Curiae*).

There are other requirements, of course, and anyone wanting to file an *Amicus Curiae* brief should first read the Supreme Court's rules in their entirety (they are available on the Court's Website).

in the United States' *amicus* brief that *Quill* should be limited to mail-order vendors.

2. Brief for the State of New Hampshire as *Amicus Curiae* in Support of Respondents. This brief frames all of its arguments under a rubric of *stare decisis*. These arguments include a detailed discussion of the standard for changing a legal principle that was established via case law. Such changes require showing both that the precedent was wrong and that there is a ''special justification'' demonstrating a need to abandon precedent. *Id.* at 5. The elements required to show a special justification are discussed, including a lengthy discussion of the property interests and contract rights that will be affected if *Quill*'s physical presence rule is abrogated. *Id.* at 6-9. The brief argues that such reliance interests extend to New Hampshire consumers who, having chosen to live in a no-tax state, would now have to pay sales taxes on purchases formerly treated as nontaxable. *Id.* at 13. The brief includes an insightful observation regarding Congress's ability to fashion prospective changes (in contrast to the Supreme Court's much more limited capabilities in this regard). It also incorporates familiar arguments regarding Congressional inaction to evaluate the strength of the claim that *stare decisis* prevents abrogation of the physical presence requirement. *Id.* at 14-17.

Observations: This brief provides a good starting point for an analysis of *stare decisis*. Note, however, that it is doubtful that New Hampshire residents have a property interest, a contract interest, or a vested right of any sort in their decision to reside in a no-tax state.

3. Brief for the State of Montana as *Amicus Curiae* in Support of Respondents. This brief defends the interests of small and medium-sized businesses in states lacking a sales tax, of which Montana is one. In its first argument, the brief relies on *stare decisis*. *Id.* at 4. The brief then moves to its strongest argument: that overturning *Quill* will place unreasonable compliance burdens on businesses because (i) the six most populous states do not provide free software as provided pursuant to the Streamlined Sales and Use Tax Agreement (SSUTA), and (ii) even SSUTA software is expensive to set up and difficult to use for businesses not experienced in sales tax compliance. *Id.* at 5-6. The brief also sounds the alarm on due process considerations, arguing that the contacts required under South Dakota's irrebuttable economic nexus threshold (annual sales involving at least 200 transactions or more than $100,000) are far less than the activity at issue in *Quill* (which was, 26 years earlier, $1 million in annual sales to 3,000 customers). The brief maintains that the substantially smaller amounts required by South Dakota's economic nexus threshold do not *per se* establish that the vendor was targeting the South Dakota market. *Id.* at 10-13.

4. Brief of America's Collectibles Network, Inc. d/b/a Jewelry Television as *Amicus Curiae* in Support of Respondents. This brief opens with a direct challenge to what it views as the Petitioner's linchpin assertion: that practical difficulties in collecting multistate sales taxes have vanished. *Id.* at 6-8. It also argues persuasively that the complications that burden multistate tax collection are of the states' own making. *Id.* at 8. The brief challenges, with specificity, Colorado's law that is the high-water mark among all states in requiring remote vendors to comply with state tax regulatory requirements. *Id.* at 13-17 (this reporting law was upheld as being Constitutional in *Direct Marketing Association v. Brohl*, 81 F 3d 1129 (10th Cir 2016), cert. denied, 137 U.S. 591 (2016)). The brief concludes that Colorado's requirements are impossibly complicated. *Id.* at 16. Thereafter, uniquely among the *amicus* briefs filed, the brief describes the complications that arise when customers return merchandise. *Id.* at 18. Refunding payments on returned items requires tracking the exact amount of sales tax the customer paid on the returned item.

Observations: This brief takes a detailed look at the practicalities of multistate sales tax compliance for smaller businesses. While it is impossible to know the order in which the Court's law clerks and perhaps the Justices themselves will read the briefs, this brief and Montana's brief make important contributions to the long line of briefs arguing that large businesses are already collecting sales taxes and that small businesses are going to be harmed by the elimination of the physical presence requirement. The overall sense from this brief, Montana's brief, and other briefs analyzing South Dakota's thresholds is that, within South Dakota's statute:

- Two hundred transactions annually is the only truly relevant threshold (For a business to have $100,000 in Internet sales and fewer than 200 transactions, the business's average transaction size would have to exceed $500). The upshot being that many small businesses with 200 in-state sales of $25-

   ISSN 1534-1550

100 per transaction are going to have to collect state sales taxes of $400-1600 annually (using a combined state and local tax rate of 8 percent) even though their compliance costs assuredly are going to exceed the taxes collected. *See also* Etsy brief at 24 (discussed below).

■ If $100,000 in sales is a reasonable threshold (i.e., at an 8 percent combined state and local rate and if all such sales are taxable, the annual sales taxes due will be $8,000), then the more realistic size of transactions to establish a meaningful in-state footprint is, say, $80, which implies 1250 transactions annually.

■ Retroactivity takes two forms. First, it occurs annually as the statute seems to require that at the 200th transaction the business becomes liable for taxes not collected on the first 199 transactions. *See also* Etsy brief at 24. And second, if the Court abrogates *Quill*'s physical presence test, then, depending on how tailored the Court's language is when it makes that abrogation, many businesses are going to be liable for many years of uncollected back taxes. For more on this, see the excellent *amicus* brief of the Tax Executives Institute, digested below.

5. Brief of U.S. Senators Ted Cruz, Steve Daines, and Mike Lee as *Amici Curiae* in Support of Respondents. This brief begins with a ''Question Presented'' that, different from the Question Presented per the Supreme Court, asks the following: ''Should this Court defer to the federal legislative branch in determining national policy for interstate internet sales taxes, or should it overturn *Quill v. North Dakota*, leaving it to states to legislate in this area and thereby disrupt the ongoing federal legislative process?'' The brief states that ''When this Court decided *Quill*, it relied explicitly on Congress' silence on this question. It would thus be highly inappropriate for this Court to now take the same silence as a reason to overturn that long-settled precedent.'' *Id.* at 4. The *amici* also provide their thoughts on *stare decisis* and explain their belief that *Quill* was correctly decided.

Observations: These *amici* appear to be endlessly patient with the following concept: ''The Constitution intentionally structured the legislative branch so that it would not move too quickly, and the House is merely meeting that expectation.'' *Id.* at 9. However, after 26 years, there are indications that the Court's patience may be exhausted. Indeed, the Court ought to consider the possibility that it, rather than any economic or legislative forces, has created the obstacles to Congressional action on this issue. As stated in the *amicus* brief of the Retail Litigation Center, Inc., et al. in support of Petitioner at p. 38: ''[I]t is hard to see how the judiciary can wash its hands of a problem it created.'' *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008).

6. Brief for Washington State Tax Practitioners as *Amici Curiae* in Support of Respondents. This brief takes an in-depth look at the authorities and reasoning underlying *Complete Auto Transit*, and finds Petitioner's understanding of the case to be incorrect. These cases all involved activities of the taxpayer in the state. In contrast, the Respondents did not have any recognized local activities, noting *National Bellas Hess* rejected ''advertising nexus''. *Id.* at 14 and 17. The brief also observes that the tax at issue is imposed on the vendor who may, if it so chooses, obtain reimbursement from purchasers. The South Dakota Supreme Court incorrectly treated the tax at issue as involving a tax collection and remittance obligation. The *amici* reject Petitioner's implicit assertion that this difference is immaterial to the issue at hand. *Id.* at 25-28.

Observation: This brief is an excellent resource for anyone wanting to understand *Complete Auto Transit* beyond what has become a ritualistic recitation of its four-part test.

7. Brief of Americans for Tax Reform as *Amicus Curiae* in Support of Respondents. This brief argues that some businesses satisfying South Dakota's economic-nexus threshold will encounter undue compliance, audit, and other burdens. *Id.* at 5-14. For example, it notes that taxable characterizations of sales vary from state to state and require the exercise of judgment by the vendor. *Id.* at 7-8. The process is time-consuming, and the burden on remote vendors undue. The brief also takes offense at the process by which the state presented the issue—via test legislation and fast-track litigation—and asks the court to sustain *Quill* so as not to encourage the use of such an approach. *Id.* at 22-24.

Observations: In their brief, Americans for Tax Reform (ATR) raise familiar concerns regarding retroactivity (*Id.* at 14-17) and deference to Congress to decide whether to retain or overturn *Quill* (*Id.* at 17-22). However, ATR is confused regarding the position in my brief, which is stated as follows:

''The question presented is 'Should this Court abrogate *Quill*'s sales tax only physical presence requirement?' This Brief. . .takes no position as to whether this Court should respond 'Yes' or 'No' to the Question Presented. Rather, this Brief takes the position that *if* the Question Presented is answered 'Yes,' then the abrogation of *Quill*'s physical presence requirement should be limited to retail sales of tangible personal property.''

Fruchtman brief at p. 2. Inexplicably, ATR interpreted that statement of ''no position'' to mean that I am arguing that South Dakota's economic-nexus threshold is constitutional. ATR brief at 22. To the contrary, I argue nothing of the sort.

8. Brief of Tax Executives Institute, Inc. as *Amicus Curiae* in Support of Respondents. This brief focuses entirely on the retroactivity issue. The brief notes that only three of 11 states with economic nexus standards have included provisions in their law limiting retroactivity. *Id.* at 5-8. It further notes that 20 states without economic nexus rules permit retroactive tax assessments, nine of which do not start the running of a statute of limitations until the remote seller files a sales tax return. *Id.* at 8-10. The brief lists states and identifies their relevant statutes.

Observations: While many briefs address retroactivity, this brief does an outstanding job of exposing how potentially out of control this consequence of *Quill*'s reversal can be. In this regard, the brief does precisely what the Court desires from an *amicus* brief. The continued existence of the retroactivity issue, which has long been known, is perplexing. The states have desired an opportunity to overturn *Quill* for decades. But now that they have that opportunity, they are unprepared. Every state desirous of overturning *Quill* should have enacted a law stating that, if the physical presence requirement of *Quill* is reversed, the change will be ap-

plied prospectively only. This would have eliminated one of the most important obstacles to *Quill*'s reversal.

9. Brief of American Catalog Mailers Association as *Amicus Curiae* in Support of Respondents. This brief's first nine pages of argument are used to describe tax administration issues confronting catalog businesses. *Id.* at 8-16. The remainder of the brief is devoted almost entirely to catalog vendors' twists on familiar issues. In addition, the brief objects to the argument in the United States' *amicus curiae* brief that *Quill* should be applied to mail order companies only, which the *amicus* interprets to mean pure mail order companies. *Id* at 23.

Observations: This brief demonstrates why many experts believe this tax presence issue belongs before Congress. The Argument section contains pages of facts followed by pages of policy arguments. There is some legal argumentation, but it is not the brief's focus.

10. Brief of Flipper LLC as *Amicus Curiae* in Support of Respondents. This brief involves one of Amazon.com's third-party merchants. The brief's premise is that Amazon.com's third-party merchant program requires special attention in evaluating the Constitutionality of South Dakota law. *Id.* at 5.

Observations: The brief's premise that Constitutional principles must consider any one company's business model is dubious. The resolution of ambiguities in the business arrangements described in this brief are, first and foremost, private matters between the parties to the arrangements rather than Constitutional concerns. Moreover, regarding the third-party merchants, it is difficult to understand why any business, no matter how small, can or should be relieved of its tax collection and remittance responsibilities by engaging another company to service nearly every aspect of its customers' purchases—from taking purchase orders to maintaining inventory to fulfillment. (Note that in general: (i) Participants in another business's taxable sales or in another business's tax administration process may be held responsible and liable for that business's failure to collect and remit sales taxes; (ii) Under some scenarios, Amazon.com's third-party merchants and Amazon.com may be held jointly and severally liable for underremittances of sales taxes on sales to end-users; and (iii) Whether the third-party merchant or Amazon.com can obtain reimbursement from the other for taxes paid under points (i) or (ii) above is a private matter between those parties.)

11. Brief of eBay, Inc., et al. as *Amici Curiae* in Support of Respondents. This lengthy brief provides eBay's thoughts on a number of issues already addressed in Respondents' brief. It provides examples of complications in determining taxability, tax rates (even with zip codes), classifications of merchandise, and a short list of other complications not resolved by the mere provision of free software. *Id.* at 7-9. The brief observes that the likelihood of errors in amounts of tax collected invite *qui tam* lawsuits (private lawsuits brought when taxes are under-collected) and class action lawsuits (private lawsuits brought when taxes are over-collected). *Id.* at 13-15. The brief also contains an analysis of due process considerations—reminding the Supreme Court that *Quill* reduced, but did not eliminate, what must be shown to satisfy due process requirements in a sales tax nexus scenario. The level of activity required by South Dakota's economic nexus test does not, *per se*, satisfy due process minimum connection requirements. *Id.* at 28-35 (see especially page 33, footnote 11).

Observations: (1) As much as anything else, this brief and others demonstrate the hazards of fast-tracking cases without a developed record. As is stated in the House Judiciary Committee brief at 6, litigating what is in large part a policy issue invites the filing of competing ''Brandeis briefs,'' which reference streams of studies conducted or funded by interested parties, but which escape the scrutiny that the legislative process provides. Indisputably, Congress is better-positioned to sort through these competing studies and policy arguments.

(2) Anyone interested in reading a post-*Quill* ''eureka'' moment when a state supreme court justice realized that due process personal jurisdiction requirements continue to present a separate and meaningful obstacle for state tax collectors should read Louisiana Chief Justice Calogero's concurrence in *Bridges v. Autozone*, 900 So.2d 784 (La. S. Ct., 3/24/2005). For background and more on this case, *see* ''*Advising Foreign Businesses on U.S. State and Local Taxation,*'' Fruchtman, Tax Management International Journal, 42 TMIJ 205, 04/12/2013 (footnote 10) (available in full on my Rimon P.C. professional biography).

12. Brief of Chris Cox, Former Member of Congress; James S. Gilmore III, Former Governor of Virginia; and NetChoice as *Amici Curiae* in Support of Respondents. This brief does exactly what the Supreme Court asks of an *amicus* brief by providing significant new information—here with a 15-page analysis of the interaction between South Dakota law and the Internet Tax Freedom Act (ITFA). IFTA is a nationwide moratorium on discriminatory taxation of electronic commerce. *Id.* at 7 (footnote 7) and 11. The brief explains that Congress enacted IFTA after *Quill* was decided, and, following IFTA's initial enactment, it has been reenacted by Congress four times until IFTA was made permanent in 2016. The brief asserts that organizations of state, county, and city legislators and executives fought IFTA's enactment because IFTA impeded their desire to impose taxes of their choosing. *Id.* at 7-8. Nevertheless, Congress insisted on having ''a national policy that does not burden small and micro enterprises on the Internet by forcing them to comply with thousands of varying state and local tax regimes.'' *Id.* at 9-10. The brief further asserts that ''Congress prohibited any state from *even considering* in its nexus determination the fact that consumers in the State can access the remote seller's out-of-state computer server.'' Id at 12 (emphasis in original). The *amici* conclude that South Dakota law violates IFTA. *Id.* at 14.

Observations: Congress's activity on IFTA demonstrates that it is engaged with Internet tax issues. Therefore, one can reasonably infer that the lack of a Congressional adjustment to *Quill*'s physical presence test is intentional. Finally, the brief addresses due process issues and characterizes South Dakota's petition as primarily attempting to establish new policy rather than setting forth legal arguments.

13. Brief of the Computer & Communications Industry Association as *Amicus Curiae* in Support of Respondents.

  TM-WSTR ISSN 1534-1550

This brief makes two important arguments. It argues that abrogation of *Quill*'s physical presence requirement will cause foreign businesses to become subject to state and local sales tax rules. The brief argues that the burden on such businesses would be substantial and could invite retaliation by other countries against U.S. internet vendors. *Id.* at 5. The brief also argues that even a reversal of *Quill* will not level the playing field between brick and mortar and e-commerce companies, as the compliance required of brick and mortar vendors will be much less burdensome than that required of remote vendors. The former need to comply with the laws of only one state, while the latter will need to comply with the laws of many states. *Id.* at 8.

Observations: The brief seems to imply that the abrogation of *Quill*'s physical presence rule could lead to ''double taxation'' of ''Internet businesses operating overseas.'' *Id.* at 3. Unfortunately, the brief does not explain how (or identify where) that might occur. If, for example, foreign jurisdictions impose sales taxes on the exporting of goods by treating the goods as sold at the shipping origin, that would be important to know (in contrast, state sales taxes generally are imposed at the shipping destination). Likewise, if a foreign value added tax is the concern, it would be important to know whether there is complete double taxation with state sales taxation or, instead, mere overlap in the portion of the sales price equivalent to the value added by the foreign vendor.

14. Brief of the American Academy of Attorney-Certified Public Accountants as *Amicus Curiae* in Support of Respondents. This brief provides background from a group of experienced tax practitioners as to selected burdens of South Dakota's law. These include the difficulties of determining taxability, obtaining proper documentation to qualify sales as exempt and, of course, doing all that is required accurately in the few seconds between when a purchase order is received and when it is accepted. *Id.* at 4. Further, the vendor must do all of this, to the varying requirements of perhaps many states, while maintaining records in good form to be able to defend against audits that might occur years into the future and for which the vendor bears the burden of proof. *Id.* 6-7. It is a daunting task not diminished by the mere provision of software that calculates liability based on information input by the vendor. *Id.* The consequences of errors are discussed, including the possible assessment of civil penalties (likely), the imposition of criminal penalties (unlikely), and the filing of private lawsuits for under-collecting taxes (*qui tam* lawsuits) or for over-collecting taxes (class action lawsuits). *Id.* at 11-15.

Observations: The brief states that there are 10,000 jurisdictions that have their own laws and regulations. *Id.* at 4. Other briefs in support of Respondents use a figure of 12,000 jurisdictions. Both of these figures are very much in dispute, with the states arguing for a much smaller number of jurisdictions. Also, much of this brief reads like testimony prepared for a legislative body rather than a brief to a court. *See, e.g.*, page 8 which contains an argument relating to out-of-state audits and ''gotcha tax audits,'' both of which are presented without any authority cited.

15. Brief for the Cato Institute as *Amicus Curiae* in Support of Respondents. This brief, like some others, materially rewrites the Question Presented. The *amicus* here wants to respond to the following question:

''Can a state compel all businesses engaged in interstate commerce to monitor their sales in that state and collect that state's sales tax, or can such a mandate only be applied to businesses with a physical presence in the state, as this Court held in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)?''

This brief opens with a metaphysical assertion that South Dakota is trying to reach outside the state ''to shift its revenue burden on to the national market.'' *Id.* at 3. (The state, by contrast, asserts that it is grabbing vendors that reach into the state.) The brief further argues that South Dakota's economic presence standard bears no necessary relationship to the fourth prong of *Complete Auto Transit*, which requires that the tax at issue must be ''fairly related to the services provided by the state.'' *Id.* at 7. The brief concludes with an argument that the state is looking for an easy way out of enforcing its use tax. *Id.* at 12-14.

Observations: The *amicus* has the better of the metaphysical argument, as in South Dakota the law imposes the sales tax on vendors and merely permits (but does not require) those vendors to obtain reimbursement from their customers. However, other *amicus* briefs have stronger analyses of potential due process issues.

16. Brief of the Competitive Enterprise Institute as *Amicus Curiae* in Support of Respondents. This brief takes a different tack from the others, adopting a nomenclature and approach unfamiliar to those in state tax field. The *amicus* brief's seven-page summary is by far the longest of any of the *amicus* briefs and contrasts the interaction among the states (what the brief calls ''horizontal federalism'') with the interaction between the states and the ''general'' government (''general'' is apparently meant to refer to the federal government). The brief refers to interaction between the states and the general/federal government as ''vertical'' federalism. *Id.* at 4. The argument section opens with the indisputable statement that the constitution protects each state from encroachment by any other state. *Id.* at 10. But the obvious question is what constitutes ''encroachment.'' Unfortunately, this brief does not provide clear direction as to how one might answer this question. Ultimately, in the current environment, the brief prefers the *Quill* physical presence test to a situation not involving that test. *Id.* at 23.

Observations: At least to someone not in the fraternity of constitutional scholars, the brief seems to contain statements of constitutional knowledge that start and end without addressing any issue in this case. As one example, page 16 describes prohibitions on states entering into compacts with one another absent Congressional approval. ''Unapproved compacts,'' it explains, ''can be challenged by persons injured thereby.'' *Id.* at 16. However, it is not clear from the brief why this matters to the case at bar. (The discussion does not appear to be referencing SSUTA.) On page 26, the brief castigates South Dakota and other states for ''seeking to commandeer outsiders for tax-collection services,'' but it is not clear from this brief why vendors who are making a market nationwide (including in South Dakota) should be treated as ''outsiders.''

17. Brief of National Auctioneers Association, et al. as *Amicus Curiae* in Support of Respondents. This brief begins by disabusing readers of any misperception they might have that the mega-auction houses of New York

represent the norm in the auctioneering business. Rather, typical auction houses are small businesses that, of their nature, receive bids from potential purchasers near and far. The brief identifies a gamut of issues that will burden small and medium business if the physical presence requirement is overturned. These include multistate compliance burdens that no small business can satisfy by itself—meaning that it will have to pay for additional outside professional services and making irrelevant the SSUTA states' boasts of free software. *Id.* at 3-4 and 15. The brief touches on the recent GAO report which indicates that the states' sales tax losses are a fraction of what the states claim. *Id.* at 8. Then, returning to the compliance burden, the brief argues that the states' economic presence thresholds lose their usefulness because, rather than requiring tax collection beginning in prospectively at the 201st sale in a state, they kick in retroactively at the 201st sale, making the vendor liable for taxes it did not collect on the earlier sales. *Id.* at 10.

Observations: Most, if not all, of the issues identified in this brief are covered in other briefs, frequently with greater depth. However, this brief adds value by compiling these concerns in one place and focusing on the impact that they will have on small businesses. The analysis of the illusory nature of the nexus thresholds is helpful, reflecting the frustration businesses and private practitioners have experienced over and over again with the states' indifference to the unfairness and harm caused by the imposition of retroactive tax obligations. Unfortunately, the U.S. Supreme Court and other courts have been full partners in these retroactive miscarriages of justice.

18. Brief for National Taxpayers Union Foundation, et al. as *Amici Curiae* **in Support of Respondents.** This brief argues that *Wayfair* implicates more than state sales and use taxation. *Id.* at 2. The *amici* argue that the case implicates taxation without representation generally as well as extraterritorial regulation (*Id.* at 7 and 14-18), inherent limits on state power (*Id.* at 8), and ''tyranny'' of a remote taxing body over those governed who have no vote (*Id.* at 15). The brief argues that the imposition of a responsibility to collect taxes is more unpopular than remote taxation itself. *Id.* at 10. It also raises due process arguments that can be found in other briefs as well. *Id.* at 28.

19. Brief for Colony Brands, Inc. as *Amicus Curiae* **in Support of Respondents.** This brief argues at length that South Dakota's statute violates the ''speaking with one voice'' requirement of the foreign Commerce Clause. *Id.* at 6-19. Specifically, it argues that accessing a foreign internet server from within the United States does not create a permanent establishment under the meaning of the United States tax treaties with foreign countries, and therefore such access should not create a presence for state tax purposes. *Id.* at 9.

Observations: This brief confronts two fundamental challenges: First, it argues that South Dakota violates the ''speaking with one voice'' foreign Commerce Clause requirement. However, even though the United States is an active participant in this case, it never mentions that concern. Second, there is no evidence that the Respondents have foreign interests that would cause them to share *amicus's* concern. Also noteworthy is that it is only on page 16 that the brief acknowledges that the states are not bound by U.S. income tax treaties. This is a crucial point, as it is well-established that state taxes are permitted to operate by different tax presence rules than federal income taxes. For example, under Article 5 of the U.S. Model Income Tax treaty (11/15/06), the following three in-state contacts do not result in the creation of a permanent establishment for federal income tax purposes, but under the U.S. Constitution, as interpreted and applied by the states, these contacts create sales tax presence: (i) Maintaining a stock of goods belonging to the foreign business solely for the purpose of storage, display, or delivery; (ii) Maintaining a fixed place of business solely for the purpose of purchasing goods or collecting information for the foreign business; and (iii) Maintaining a stock of goods belonging to the foreign business solely for the purpose of processing by another enterprise. Moreover, the brief does not acknowledge that international concepts of tax presence are evolving. For example, in April, 2016, the Israel Tax Authority issued Circular 4/2016, which asserted tax jurisdiction over foreign businesses having a ''significant digital presence'' in Israel. In all, it seems that this *amicus* brief's greatest value will be in its being considered by future litigants and thought-leaders in tandem with Professor John S. Baker's *amicus* brief filed in support of neither party.

20. Brief for Etsy, Inc. as *Amicus Curiae* **Supporting Respondents.** This *amicus curiae* for this brief is an online marketplace used by, among others, almost 2 million businesses having fewer than nine employees. Etsy's users sell handmade goods, crafts, and vintage products. *Id.* at 1 and 4. The brief therefore raises a sound challenge to Petitioner's assertions that this case involves small, local businesses against mammoth e-commerce businesses. *Id.* at 5. Clearly, many small businesses rely on the lack of costs of entry to sell minor amounts of merchandise over the Internet. The arguments raised here have been discussed in other briefs, including the error of thinking that other states will adopt South Dakota's thresholds or that those thresholds are appropriate for more populous states, and deference to *stare decisis*.

Observations: Under Etsy's business model, the marketplace receives payments from customers and disburses amounts to vendors. Etsy raises valid points regarding the uncertain taxability of transactions, but these either are true of all vendors or can be addressed in a contract with its vendors. However, one can easily imagine the states requiring Etsy to administer their sales tax laws properly, without being particularly sympathetic to the concerns Etsy raises regarding the difficulty of administering nationwide online sales. As is discussed above in the observations to eBay's brief, the states generally have it within their power to collect unremitted tax from the vendor or the administrator of the online marketplace.

21. Brief of Online Merchants Guild as *Amicus Curiae* **in Support of Respondents.** Amici are merchants who sell goods via Amazon, Etsy, eBay, and Walmart platforms. *Id.* at 1. Amici offer that Petitioner's professed desire to save brick and mortar stores from unfair competition is, in fact, a pretext for Petitioner's real goal—to collect taxes on sales made by the small companies selling through platforms such as those identified above. *Id.* at 3.

   ISSN 1534-1550

Observations: This is an unusual brief that it repeatedly charges Petitioner with making untrue statements and charges the Multistate Tax Commission with offering a tax ''sham-nesty'' program. *See e.g.*, pp. 3, 4, and 7. The story behind this brief seems to extend beyond this case and seems to involve a suspicion that the states and Amazon have reached a deal under which (allegedly) Amazon will not be treated as a retailer of goods sold through its marketplace and (apparently or allegedly) will not be held derivatively liable for deficiencies in sales tax on the sales that it administers. There is no way to unwind this theory in this space. Therefore, I note only that Counsel of Record on this brief is an apparently experienced state tax lawyer and part-time professor at Pace University. Anyone wanting to learn more should contact him directly.

22. Brief of the United Network Equipment Dealers Association and the Owners' Rights Initiative as *Amici Curiae* in Support of Respondents. This brief argues that abrogation of *Quill's* physical presence rule will increase the number of audits to which remote businesses will be subject. *Id.* at 5. Especially when those businesses are small, the cost and overall attention required by multistate audits will be ''ruinous'' to those businesses. Id. Over three pages, the brief lists examples of burdens resulting from audits. *Id.* at 12-14.

23. Brief for the American Legislative Exchange Council as Amicus Curiae in Support of Respondents. This *amicus* describes itself as a nonpartisan collection of 2,000 state legislators nationwide. Its brief opens with an educational, in-depth, analysis of the Commerce Clause. *Id.* at 5-21. On page 23, the brief opines that ''hardworking individual and business taxpayers deserve protection from out-of-state tax collectors and regulators. . . .Overturning the *Quill* precedent will erode the protection of state borders as effective limits on state tax power. '' *Id.* at 23. The brief thereafter argues for the value of a bright line test, *Id.* at 24, and against the imposition of multistate tax collection responsibilities on small retailers. *Id.* at 25-28.

Observations: Some might criticize this brief for lacking the pure advocacy of other briefs, but in the view of this author the brief is elevating and meaningful precisely because it seeks to inform as well as persuade. In that, it has much in common with the Washington State Tax Practitioners' brief, which assists the Court by explaining the history and meaning of *Complete Auto Transit*.

RIMÔN

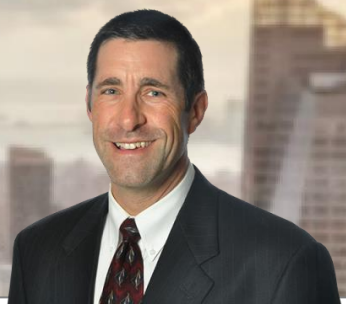
David A. Fruchtman, Counsel

david.fruchtman@rimonlaw.com / (646) 681-2268

OFFICE: New York City

PRACTICE TEAMS: Tax

AREAS OF FOCUS: State and Local (Subnational) Tax, Corporate and International Tax



PROFESSIONAL EXPERIENCE

David A. Fruchtman chairs Rimon's State and Local (Subnational) Taxation practice.

Mr. Fruchtman's clients include market-leading heavy equipment manufacturers, marketing companies, travel lodging providers and vehicle rental companies, as well as mid-sized retailers and other businesses. His clients are listed on the NYSE, on NASDAQ and are privately held.

Mr. Fruchtman has assisted clients on issues in all 50 states, on matters involving income taxes, franchise taxes, sales and use taxes, real property transfer taxes and a variety of other state and local taxes. His practice is equally divided between tax planning and tax controversy work.

His planning work includes tax efficient structuring of businesses and transactions, and frequently requires working with tax authorities to obtain favorable letter rulings. He enjoys advising foreign companies that are expanding into the United States, and in 2010 assisted an American affiliate of an Israeli company in one of Wall Street's most successful IPOs of the year.

EDUCATION

- Harvard University, J.D.
- University of Wisconsin, B.B.A with distinction

BARS & COURTS

- U.S. Supreme Court
- U.S. Tax Court
- New York
- Illinois

PREVIOUS EXPERIENCE

- Horwood Marcus & Berk (Of Counsel)
- Winston & Strawn LLP (Partner)
- McDermott Will & Emery (Partner)

In contested matters, Mr. Fruchtman's clients share his philosophy of working cooperatively with state revenue departments. They recognize that saving a few dollars today in exchange for a damaged relationship is not a sound approach. Mr. Fruchtman therefore looks to obtain excellent results while negotiating intelligently with taxing authorities. He prefers to become involved in tax disputes in the late stages of an audit rather than after an assessment has been issued. And, because negotiated resolutions are not always possible, he has successfully represented clients before courts and administrative tribunals across the country. In 2003, he was a Special Deputy Attorney General to the state of Hawaii.

Mr. Fruchtman is the author of "**Nonlitigated Resolutions of Multistate Tax Disputes: Three Case Studies Show How Taxpayers, States Can Find Common Ground**" (published in BNA Daily Tax Reports (March 3, 2011) and in two other tax publications), of the booklets "'**Covering the Waterfront' *Wayfair* Amicus Curiae Brief and Collected Articles**" and "**Advising Foreign Businesses About U.S. Subnational Taxes**", of the Hebrew language booklet "American State and Local Taxes: Risks and Opportunities -- What Israeli Businesses Must Know" (available upon request), and of many other tax articles and updates.

He lectured at NYU's Summer State and Local Tax Institute for 13 years (on **Constitutional issues**, **LLC and partnership taxation**, and **escheat of abandoned property issues**), was the chairman of the Income and Franchise Taxes Subcommittee of the American Bar Association's state tax committee, and has been co-author of the Illinois chapter of the ABA's Sales and Use Tax Deskbook for more than 20 years. He has lectured on state tax issues at Tax Executives Institutes, American Bar Association meetings, Chicago Tax Club, the Israel Export Institute, the Israel-America Chamber of Commerce, Duke Law School, Georgetown University Law Center, the University of South Carolina School of Law, ITT Chicago Kent Law School, the University of Wisconsin School of Business, and many seminars in the United States and Israel.

Mr. Fruchtman has been repeatedly recognized as a New York and Illinois Super Lawyer, an annual listing of 2-5% of the states' lawyers who have achieved significant professional accomplishment.

When not working, Mr. Fruchtman enjoys family time and running, and was the pitcher/commissioner/umpire/popcorn maker of the sandlot baseball league he formed with his daughters. In 2017, when he was old enough to know better, he ran twelve marathons in twelve weeks.

Mr. Fruchtman is a graduate of Harvard Law School and the University of Wisconsin. Before Rimon, Mr. Fruchtman was the partner in charge of State and Local taxation at Winston & Strawn LLP, a partner at McDermott Will & Emery and Of Counsel to Horwood Marcus & Berk.

PUBLICATIONS

U.S. Supreme Court Brief and Treatises

- Income Taxes: Definition of a Unitary Business, *Bloomberg BNA State Tax Library* (May 7, 2018)
- Amicus Brief in *South Dakota v. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc.* (U.S. Supreme Court Docket No. 17-494, Filed March 5, 2018)
- Combined/Consolidated Returns (Professional Commentator), *RIA Checkpoint Catalyst Topic 1013* (April 2016)

Booklets

- **"Covering the Waterfront" *Wayfair* Amicus Curiae Brief and Collected Articles**
- **Advising Foreign Businesses About U.S. Subnational Taxes**

Articles and Outlines from Speeches

- State and Local Taxation -- Headline News and Trends. Client and CPE Presentation (January 15, 2019.) View the recording of the presentation
- Advising Foreign Businesses About American State and Local; Taxation -- And a Few Words About Tax Haven Legislation. *Lecture to Georgetown University Law Center Graduate Tax Class* (October 24, 2018)
- State and Local Taxation -- Headline News and Trends. *Client and CPE Presentation* (October 17, 2018)
- Looking Back *(Reflections on Wayfair)* and Looking Forward (*Sales Taxation of Services*) *Lecture to Duke University Law School Tax Class* (October 16, 2018)
- Illinois Sales and Use Taxes *American Bar Association Sales and Use Tax Deskbook:* 31st ed., (2017-2018) (September 2018)
- Quoted in "Retroactivity Threat Looms for Companies After *Wayfair* Case," International Tax Review (July 12, 2018)
- "U.S. Supreme Court Ushers in a New Era for E-Commerce," *Jerusalem Post* (June 29, 2018)
- Quoted in "Supreme Court Ruling Gives Brick-and Mortar Stores Hope for Level Playing Field," *Standard & Poor's Global Market Intelligence* (June 27, 2018)
- Featured in "US Supreme Court Decision in *Wayfair* Sales Tax Case Imminent," International Tax Review (June 13, 2018)
- "US State Taxes: Be Aware or Be Liable," Jerusalem Post (June 8, 2018)
- Overview of State and Local Taxation, *Joint Presentation By Rimon P.C. and Wilkin and Guttenplan* (May 14, 2018.) Recording of the presentation available here.
- Bloomberg Tax Q&A with David Fruchtman, Author of the New Unitary Business Portfolio, *Daily Tax Report* (May 7, 2018)
- State and Local Taxation -- Headline News and Trends, *Client and CPE Presentation* (May 2, 2018)
- "*Wayfair*': Covering the Waterfront — Snatching Defeat from the Jaws of Victory?" *Daily Tax Reports* (April 23, 2018)
- "'*Wayfair*': Covering the Waterfront—Amicus Briefs Supporting Respondents," *Daily Tax Reports* (April 17, 2018)
- Featured in "How the Supreme Court's Online Sales Tax Case Could Affect Law Firms," *National Law Journal* (April 16, 2018)
- Your Guide to *Wayfair*: The Briefs in Support of Petitioner and Neither Party. *Law360* (April 10, 2018)
- Low Hanging Fruit: Anti-Quill Legislation Should Not Apply to Services and Avoiding Unnecessary Litigation *Presentation to the Hotel Tax Executives Conference* (May 5, 2017)
- Repeatedly cited in Unclaimed Life Insurance Proceeds and the Duty to Search: Who Is the True Beneficiary? Baylor Law Review article (Fall 2016)
- Advising Foreign Businesses About American State and Local Taxation --And a Few Words About Tax Haven Legislation *Lecture to Georgetown University Law Center Graduate Tax Class* (November 2, 2016)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (November 1, 2016)
- State and Local Taxation -- Headline News and Trends *Special "Open Mike" Presentation to the Institute of Professionals in Taxation* (August 17, 2016)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (May 19, 2016)
- U.S. Operations: An Israeli Circular and a U.S. Indictment *Jerusalem Post* (May 5, 2016)

- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (February 2, 2016)
- Advising Foreign Businesses About American State and Local Taxation -- And a Few Words About Tax Haven Legislation *Lecture to Georgetown University Law Center Graduate Tax Class* (November 11, 2015)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (November 4, 2015)
- Illinois Sales and Use Taxes *American Bar Association Sales and Use Tax Deskbook*: 28th ed., (2014-2015) (October 2015)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (September 10, 2015)
- Congress Should Exclude Sales of Services from Any Remote Vendor Tax Collection Legislation *Bloomberg BNA. Daily Tax Report* (August 14, 2015) and *Tax Management Weekly State Tax Report* (August 21, 2015)
- Learning to Love Tax Amnesties in Israel and the United States *Jerusalem Post* (August 12, 2015)
- U.S. State and Local Sales and Use Taxes: Bad News, Good News and the Smoke from a Distant Fire *Jerusalem Post* (July 7, 2015)
- 24 Months Through the Crystal Ball: Emerging Trends in State and Local Taxation (Part II) *Tax Management Weekly State Tax Report* (June 19, 2015) and *Daily Tax Report* (July 20, 2015)
- SALT Community Reacts to Michigan Judge's IBM Order *State Tax Notes* (May 25, 2015)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (April 28, 2015)
- 24 Months Through the Crystal Ball: Emerging Trends in State and Local Taxation (Part I) *Tax Management Multistate Tax Report* (March 19, 2015)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (January 21, 2015)
- 2014 State and Local (Subnational) Tax Round-Up *Client Alert* (January 2015)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (November 21, 2014)
- Advising Foreign Businesses About American State and Local (Subnational) Taxation *University of South Carolina School of Law* (November 3, 2014)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (May 28, 2014)
- State Sales Taxes and Foreign Value Added Taxes: Common Issues and Planning Considerations *BNA Seminar* (April 29, 2014)
- David Fruchtman Responds to Bucks's Article on Corporate Income Shifting *State Tax Notes* (March 31, 2014)
- State and Local Taxation -- Headline News and Trends *Client and CPE Presentation* (January 21, 2014)
- Advising Foreign Businesses on U.S. State and Local Taxation *Tax Management International Journal* (2013)
- American State and Local Taxes for Businesses Headquartered Abroad *Daily Tax Report* (2013)
- The Most Important Sales Tax Change in Almost 50 Years *Client Alert*
- Tax Refund Opportunity *Client Alert*
- American State and Local Taxes: Know What You Do Not Know -- "The Big Three" *Israel-America Chamber of Commerce* (November 5, 2012)
- A Peek Into the Future: State and Local Tax in 2015 *Client Presentation* (2012)
- Illinois Sales and Use Tax *American Bar Association Sales and Use Tax Deskbook*: 25th ed., 14.1-14.26 (2011-2012)
- American State and Local Taxes: Trends and Developments *The Israel Export and International Cooperation Institute (*March 18, 2012)
- Constitutional and Other Jurisdictional Constraints on State and Local Taxation *New York University* (July 2011)
- Nonlitigated Resolutions of Multistate Tax Disputes: Three Case Studies Show How Taxpayers, States Can Find Common Ground *Daily Tax Report* (March 2011)
- Doing Business in the U.S. *Israel-America Chamber of Commerce*
- American State and Local Taxes Demand Attention *Israel Export and International Cooperation Institute* (June 15, 2006)
- Fundamentals of the Escheat of Abandoned Property *New York University* (2006)
- Operating as a Partnership or Limited Liability Company - State Income Tax Consequences to the Entity, its Partners and its Members *New York University* (2006)
- Illinois Sales and Use Taxes *American Bar Association Sales and Use Tax Deskbook* (2006-2007)
- Your Tax in '06: Planning for America's 'Hidden' Taxes *Jerusalem Post* (February 15, 2006)
- Aircraft Acquisitions, Exchanges, Leases and Refinancing: Multistate Sales and Use Tax Considerations *Chicago Tax Club* (October 30, 2002)
- Illinois Legislature Considers Business Income Election *Interstate Tax Insights* (Vol. 3, No. 9, 2002)
- American Bar Association Section on Taxation Comments on Multistate Tax Commission's Proposed Statutory Language on Reporting Options for Nonresident Members of Passthrough Entities *State Tax Notes* (May 6, 2002)
- State Apportionment Factor Consequences of the Section 338(h)(10) Election *Journal of Business Entities* (May/June 2001)

- New York State and New York City: A Comparison of Their Corporate Income Taxes and the Attribution of Expenses to Subsidiary Capital *Chicago Tax Club* (October 1998)

Newsletters

- Sales Tax 2013 Representatives, Whistleblowers, Class Actions and Federal Legislation
- State Income Taxation of Israeli Citizens
- Doing Business in the United States, Part 1
- Doing Business in the United States, Part 2
- Purchases and Sales of United States Businesses, Part 1
- Purchases and Sales of United States Businesses, Part 2
- Unclaimed Property Liabilities
- United States Supreme Court Cases May Affect Israeli Businesses
- State and Local Real Property Transfer Taxes
- Income Taxation by American States and Cities
- Personal Liability of 'Responsible Persons' for Their Business' Unpaid Taxes
- American Sales and Use Taxes
- Introduction to American State and Local Taxes

HONORS AND RECOGNITION

- Rated by Super Lawyers