



Testimony of the Kansas Association of Counties to the
House Committee on Taxation
Proponent for HB 2756 • March 1, 2018

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify in support of House Bill 2756, a bill that addresses internet sales in Kansas and the non-payment of taxes on out-of-state purchases. Specifically, HB 2756 requires marketplace facilitators—entities that conduct sales through electronic transactions—to collect and remit sales tax on all taxable retail sales in Kansas. The law would apply to marketplace facilitators with gross receipts from retail sales totaling at least \$50,000. HB 2756 also addresses cellphone purchases and downloaded media. Each change moves Kansas closer to collecting the sales tax that purchasers already owe. Collecting sales tax on internet purchases is a longstanding concern for Kansas counties, and KAC supports making this change to the law.

Historically, the collection of sales tax on internet purchases is a federal issue due to the application of the Commerce Clause,¹ and KAC rarely engages on federal matters. But sales-tax reforms have long been a focus for the National Association of Counties, and despite widespread agreement that the current measures on internet purchases are inadequate, Congress has yet to update the law. So KAC has joined our parent association to highlight the importance of updating the law on internet sales.

Kansas—like other states—is failing to collect sales tax on internet purchases, which creates a disadvantage for our storeowners who commit to maintaining brick-and-mortar stores within the state. The National Conference of State Legislatures conducted a 2012 study that revealed over \$23 billion in sales tax goes uncollected across the United States.² In Kansas, the study estimated \$279,224,028 in uncollected taxes.³ A more recent study places the estimates at \$302 million in uncollected revenue.⁴ You can find more details on Kansas in Appendix A.

¹ U.S. Const., Art. I, § 8, cl. 3.

² Estimated Uncollected Use tax from all Remote Sales in 2012. THE NATIONAL CONFERENCE OF STATE LEGISLATURES. Available at: www.ncsl.org/research/telecommunications-and-information-technology/2012-uncollected-use-tax.aspx.

³ *Id.*

⁴ Delivering Uncollected Revenue. NATIONAL ASSOCIATION OF COUNTIES (2017). Available at: www.explorer.naco.org/profiles/MFA/MITFA_KS.pdf.

Today, 92 counties collect a local sales tax.⁵ Particularly in our rural counties, HB 2756 is the type of legislation that gives Main Street an opportunity to remain competitive and our counties the necessary revenue to support infrastructure, public safety, and law enforcement.

Because the revenue considerations are so significant, states have been experimenting with different collections methods, and HB 2756 adopts measures that other states and businesses have developed. This prompts concerns over constitutional issues, but there is optimism that this legislation will comply with a case currently before the Supreme Court.⁶ I have provided a primer on this issue by Lisa Soronen, Executive Director at the State and Local Legal Center. You can find it in Appendix B.

KAC's member counties have consistently supported legislation that ensures out-of-state retailers play by the same rules as the other businesses that are integral parts of the communities in Kansas. HB 2756 is a worthwhile change to Kansas policy, and we ask this committee to support the bill.

Respectfully,



Nathan Eberline

Kansas Association of Counties

⁵ Monthly County/City Local Sales Tax Distribution Report (2018). KANSAS DEPARTMENT OF REVENUE. Available at: www.ksrevenue.org/pdf/0218lo.pdf.

⁶ *South Dakota v. Wayfair*, 2017 S.D. 56 (2017), ___ U.S. ___ (2018).

DELIVERING UNCOLLECTED REVENUE



SUPPORT REMOTE SALES TAX LEGISLATION



KANSAS

UNCOLLECTED REVENUE, 2013:

UNCOLLECTED REVENUE 2011-2013 GROWTH RATE:

<i>STATE</i>	\$302.1 M	12.6 %
<i>NATIONAL</i>	\$ 26.1 B	10.2 %

Congress should act now on this critical issue for counties by passing legislation like the Marketplace Fairness Act (MFA) or the Remote Transactions Parity Act (RTPA) by the end of the year.

- **MFA/RTPA is not a new tax.** It would allow state and local governments to collect existing sales and use taxes on remote sales.
- MFA/RTPA would enable state and local governments to collect sales taxes that are already owed each year that could be dedicated to providing important local services such as infrastructure, public safety, education and economic development.
- Passing federal legislation would level the playing field for local retailers who are at a competitive disadvantage to online retailers who do not have to collect taxes.



Source: NACo Analysis of data from U.S. Census Bureau; U.S. Bureau of Economic Analysis; Federal Communications Commission; University of Tennessee.

MISSING REVENUE IS CRITICAL FOR SERVICES INCLUDING:



ROAD AND BRIDGE MAINTENANCE



LAW ENFORCEMENT



PUBLIC HEALTH



EDUCATION



ECONOMIC DEVELOPMENT



SOLID WASTE DISPOSAL



ENVIRONMENTAL COMPLIANCE

Appendix B



Supreme Court to Decide Billion Dollar Sales Tax Case

January 2018

By: Lisa Soronen, State and Local Legal Center, Washington, D.C.

The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.

In November 2017 a Government Accountability Office [report](#) estimated that states and local governments could “gain from about \$8 billion to about \$13 billion in 2017 if states were given authority to require sales tax collection from all remote sellers.”

In January 2018 the Supreme Court agreed to decide [South Dakota v. Wayfair](#). In this case South Dakota is asking the Supreme Court to rule that states and local governments may require retailers with no in-state physical presence to collect sales tax.

This case is huge news for states and local governments. This article describes how we got here and why it is likely South Dakota will win.

In 1967 in [National Bellas Hess v. Department of Revenue of Illinois](#), the Supreme Court held that per its Commerce Clause jurisprudence, states and local governments cannot require businesses to collect sales tax unless the business has a physical presence in the state.

Twenty-five years later in [Quill v. North Dakota](#) (1992), the Supreme Court reaffirmed the physical presence requirement but admitted that “contemporary Commerce Clause jurisprudence might not dictate the same result” as the Court had reached in *Bellas Hess*.

Customers buying from remote sellers still owe sale tax but they rarely pay it when the remote seller does not collect it. Congress has the authority to overrule *Bellas Hess* and *Quill* but has thus far not done so.

To improve sales tax collection, in 2010 Colorado began requiring remote sellers to inform Colorado purchasers annually of their purchases and send the same information to the Colorado Department of Revenue. The Direct Marketing Association sued Colorado in federal court claiming that the notice and reporting requirements were unconstitutional under *Quill*. The issue the Supreme Court decided in [Direct Marketing Association v. Brohl](#) (2014), was whether the

Tax Injunction Act barred a federal court from deciding this case. The Supreme Court held it did not.

The State and Local Legal Center (SLLC) filed an [amicus brief](#) in [Direct Marketing Association v. Brohl](#) describing the devastating economic impact of *Quill* on states and local governments. Justice Kennedy wrote a concurring opinion stating that the “legal system should find an appropriate case for this Court to reexamine *Quill*.” Justice Kennedy criticized *Quill* for many of the same reasons the SLLC stated in its *amicus* brief. Specifically, internet sales have risen astronomically since 1992 and states and local governments have been unable to collect most taxes due on sales from out-of-state vendors.

Following the Kennedy opinion a number of state legislatures passed laws requiring remote vendors to collect sales tax in clear violation of *Quill*. South Dakota’s [law](#) was the first ready for Supreme Court review.

In September 2017 South Dakota’s highest state court ruled that the South Dakota law is unconstitutional because it clearly violates *Quill* and it is up to the U.S. Supreme Court to overrule *Quill*. In October 2017 South Dakota filed a [certiorari petition](#) asking the Supreme Court to hear its case and overrule *Quill*. The SLLC filed an [amicus brief](#) supporting South Dakota’s petition. The Supreme Court ultimately agreed to decide the case.

It seems likely the Supreme Court will rule in favor of South Dakota and overturn *Quill* for a number of reasons. It is unlikely the Supreme Court accepted this case to congratulate the South Dakota Supreme Court on correctly ruling that South Dakota’s law is unconstitutional. Said another way, if the Supreme Court wanted to leave the *Quill* rule in place it probably would have simply refused to hear *South Dakota v. Wayfair*.

It is easy to count at least three votes in favor of South Dakota in this case. First, Justice Kennedy of course. Second, Justice Thomas. While he voted against North Dakota in *Quill* he has since entirely rejected the concept of the dormant Commerce Clause, on which the *Quill* decisions rests. Third, Justice Gorsuch. The Tenth Circuit ultimately decided [Direct Marketing Association v. Brohl](#) ruling that Colorado’s notice and reporting law didn’t violate *Quill*. Then-judge Gorsuch wrote a concurring opinion strongly implying that given the opportunity the Supreme Court should overrule *Quill*.

That said, the Supreme Court, and the Roberts Court in particular, is generally reticent about overturning precedent. The *Quill* decision illustrates as much. The Supreme Court looks at five factors in determining whether to overrule a case. One factor is whether a rule has proven “unworkable” and/or “outdated . . . after being ‘tested by experience.’” This factor weighs strongly in favor of overturning *Quill*. As Justice Kennedy pointed out in [Direct Marketing Association v. Brohl](#): “When the Court decided *Quill*, mail order sales in the United States totaled \$180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled \$3.16 trillion per year in the United States.”

The Court will hold oral argument in this case in April meaning it will issue an opinion by the end of June 2018.