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The Threshold Question: Oklahoma's Taxing Task After *South Dakota v. Wayfair*

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Introduction

Prior to the summer of 2018, state tax authorities and competing local businesses unwillingly watched thousands of online shoppers enjoy a sales tax holiday, every day. Hundreds of online sellers benefitted from a well-established legal doctrine that permitted e-commerce giants to profit tax-free off of the almost 80% of Americans who shop online.[1] In June 2018, that changed. The Supreme Court's decision in *South Dakota v. Wayfair, Inc.* allowed states to require out-of-state sellers to remit sales and use taxes even if the seller has no physical presence in the state.[2]

The ability of states to impose local sales taxes on out-of-state sellers carries implications for many stakeholders, but e-commerce businesses and state and local governments will feel the most direct impact. First, retail e-commerce, a $453.5 billion industry,[3] stands to lose the most after this case destroyed a tax haven the industry enjoyed for over twenty-five years. Additionally, the Court's holding imposes heavy burdens on online companies with national sales by allowing states to require these companies to calculate, manage, collect, and remit sales and use taxes to over 10,000 unique tax jurisdictions in the United States.[4]

Second, before this decision, sales-tax-reliant state and local governments suffered the most due to the administrative and legal difficulties associated with collecting taxes from online sales.[5] *Wayfair* removes many of these hurdles and opens the door to new revenue streams for states that fully utilize modern legislative strategies.

What followed the Supreme Court's decision could be described as nothing less than a torrent of state sales tax legislation. Since *Wayfair* was decided in the summer of 2018, forty-four states have adopted the Supreme-Court-approved South Dakota model with only slight variations.[6] Because the Supreme Court created a benchmark by approving South Dakota's sales tax threshold, many states are choosing to avoid the risk of litigation by

1. *See* Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, PEW RES. CTR.: INTERNET & TECH. (Dec. 19, 2016), https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce/ (noting 79% of Americans have purchased a product or service online).

2. 138 S. Ct. 2080, 2098–2100 (2018).

3. Press Release, U.S. Census Bureau News, Quarterly Retail E-Commerce Sales: 4th Quarter 2017 (Feb. 16, 2018), https://www2.census.gov/retail/releases/historical/ecomm/17q4.pdf.

4. Katherine Loughead, *Growing Number of State Sales Tax Jurisdictions Makes South Dakota v. Wayfair That Much More Imperative*, TAX FOUND. (Apr. 17, 2018), https://taxfoundation.org/growing-number-state-sales-tax-jurisdictions-makes-south-dakota-v-wayfair-much-imperative/.

5. Appellant's Brief at 25, *Wayfair*, 138 S. Ct. 2080 (No. 28160), 2017 WL 4083981, at *25 ("As a whole, states and local governments now have $23 billion in annual sales tax revenue that they are unable to force out-of-state retailers to collect.").

6. *Post*-Wayfair *Nexus Activity Roadmap*, BLOOMBERG TAX & ACCOUNTING, https://src.bna.com/Bq4 (last updated May 1, 2020).

mirroring what has already been validated. Although a safe solution, wholesale adoption of the South Dakota model may not be the best solution. Guided by normative tax policy objectives and taking into consideration e-commerce market realities, states may be able to generate fairer and simpler remittance laws by determining what economic threshold entitles the state to collect sales taxes from out-of-state sellers. In other words, these states must take a harder look at the threshold question.

This Comment examines the recent changes to out-of-state and online sales tax law in four parts. Part I explains the basics of sales and use taxes and discusses cases pre-*Wayfair*, highlighting key developments that influenced the Supreme Court's decision and the legislation many states have today. Part II describes how *Wayfair*'s holding expands the power of states to collect sales tax from out-of-state sellers. Part III discusses Oklahoma's current statutory scheme, which both mirrors and contradicts the fabled South Dakota model, and provides two recommendations that endeavor to create a fairer and more easily administered sales tax policy.

I. Taxing Remote Sellers Before Wayfair

On two prior occasions, the Supreme Court faced the question of whether a state could require a seller to collect and remit sales and use taxes on goods sold into the state if the seller had no physical presence in the state.[7] In both cases, the Court found that Commerce Clause and due process concerns prevented a state from imposing collection requirements on sellers that lacked a physical presence in the taxing state.[8] These holdings created the physical presence requirement and exempted sellers without property or employees in the state from state sales tax authority.[9] However, as catalog, phone-order, and online shopping grew, state tax commissions sought to develop work-arounds to the physical presence rule.[10]

A. Sales and Use Taxes

Wayfair is a case about state sales and use taxes in a modern, digital economy.[11] Sales and use taxes are the two types of taxes that a majority of

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7. *See generally* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967).
8. *Quill*, 504 U.S. at 317–18; *Nat'l Bellas*, 386 U.S. at 757–60.
9. *Quill*, 504 U.S. at 317–18; *Nat'l Bellas*, 386 U.S. at 757–60.
10. *See, e.g.*, Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016).
11. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095 (2018).

states[12] employ to collect revenue based on the purchase, consumption, or enjoyment of products or services.[13] For example, if an Oklahoma taxpayer purchases a TV at a store in Oklahoma City, that store is required to collect a sales tax of a specified percentage in addition to the cost of the TV based on the state, county, and city sales tax rates. Alternatively, if that Oklahoma taxpayer purchases a TV online from a store in Dallas, Texas to use in his or her home in Oklahoma City and does not pay a sales tax on the purchase, that taxpayer is obligated to self-report and pay a use tax of the same specified percentage to the Oklahoma Tax Commission.[14]

The two taxes are complementary.[15] The sellers of goods and services collect the sales tax from consumers at the time of purchase.[16] Although the consumer's obligations end upon payment, the seller's obligations have just begun. Even before the seller can charge the sales tax, they must register with the state-level tax authority to receive a sales tax license, determine what items it sells that are subject to sales tax, compute the rate to be charged on those items, and develop a system to collect and manage payments by consumers.[17] Then, after the store receives the sales tax from the consumer, it remits that sales tax to the state tax authority.[18]

By contrast, consumers pay the use tax directly to the state on "tangible personal property purchased" when it is "brought into the state for

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12. Mark Faggiano, *U.S. States with No Sales Tax*, TAXJAR (May 24, 2018), https://blog.taxjar.com/us-states-with-no-sales-tax/ (noting that Alaska, Delaware, Montana, New Hampshire, and Oregon do not have a sales tax); *see also* Brittany M. Taylor, Note, *Back to Basics: Using Existing Tax Collection Practices to Increase Use Tax Compliance*, 18 FORDHAM J. CORP. & FIN. L. 1089, 1095–96 (2013).

13. *See* OKLA. ADMIN. CODE §§ 710:65-1-1 through 710:65-1-11 (2019); *Sales Tax vs. Use Tax*, OKLA. TAX COMM'N, https://www.ok.gov/tax/Businesses/Tax_Types/Business_Sales_Tax/Sales_Tax_vs._Use_Tax.html (last modified July 12, 2019).

14. *See* OKLA. TAX COMM'N, 2018 OKLAHOMA RESIDENT INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS 10 (2018), https://www.ok.gov/tax/documents/511Pkt-18.pdf#page=10.

15. Miller Bros. Co. v. Maryland, 347 U.S. 340, 343 (1954) ("The use tax, not in itself a relatively significant revenue producer, usually appears as a support to the sales tax in two respects. One is protection of the state's revenues by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices.") (footnote omitted).

16. *Sales Tax vs. Use Tax*, *supra* note 13.

17. *See, e.g.*, *Business Sales Tax*, OKLA. TAX COMM'N, https://www.ok.gov/tax/Businesses/Tax_Types/Business_Sales_Tax/ (last modified June 19, 2017).

18. *Id.*

consumption or use."[19] Use taxes are primarily implemented to tax goods that did not originate from a seller within the state and would traditionally be considered outside the jurisdiction of the state.[20] Rather than requiring the seller of these goods to remit the taxes owed, state use taxes require the purchaser to remit the sales tax to the state, typically annually, in addition to filing a state income tax return.[21]

The primary issue plaguing the use tax system is a lack of compliance.[22] In 2013, around 1.6% of national taxpayers actually paid the use tax they were obligated to pay.[23] In Oklahoma, compliance with the use tax typically hovers closer to 4%.[24] Although use taxes are supposed to function like sales taxes, low compliance effectively makes all purchases not subject to a sales tax tax-free—even though the purchase may be subject to use tax.[25] In some cases, online retailers even advertised this fact.[26]

The inability to collect this tax hurts both states and localities. These taxes are levied at the state and local levels, and there are thousands of different jurisdictions across the country, each with their own unique sales and use tax rate.[27] In many jurisdictions, sales and use taxes comprise a

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19. OKLA. ADMIN. CODE § 710-65-21-2 (2019); *see also* 68 OKLA. STAT. § 1401(8) (2011 & Supp. 2019).

20. *See* Sales Tax Inst., *What's the Difference Between Sales and Use Tax?*, YOUTUBE (May 11, 2012), http://youtube.com/watch?time_continue=4&v=WJ6xg45GpSo&feature=emb_logo.

21. *See, e.g.*, *Oklahoma Consumer Use Tax Return*, OKLA. TAX COMM'N (rev. Oct. 2012), https://www.ok.gov/tax/documents/SCU20004-12.pdf.

22. Joe Wertz, *Most Oklahoma Tax Filers Don't Pay 'Unenforceable' Use Tax*, STATEIMPACT OKLA. (Dec. 14, 2011, 12:54 PM), https://stateimpact.npr.org/oklahoma/2011/12/14/most-oklahoma-tax-filers-don't-pay-unenforceable-use-tax/ ("About 1.6 million individual income tax returns are filed each year, said commission spokeswoman Paula Ross. But over the last five years, only 55,000 taxpayers on average—less than 4 percent—declared use taxes when filing their annual income tax forms with the state, the data show.").

23. Chana Joffe-Walt, *Most People Are Supposed to Pay This Tax. Almost Nobody Actually Pays It*, NPR (Apr. 16, 2013, 3:55 AM ET), https://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax.

24. Clark Jolley, *Life After Wayfair*, OKLA. ECON. REP., June/July 2018, at 2, 3.

25. *See* Wertz, *supra* note 22 (noting that the extreme lack of remittance coupled with difficulty of enforcing the tax results in "a very unenforceable tax") (quoting Paula Ross, communications director for the Oklahoma Tax Commission).

26. Petitioner's Brief at 55, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494) ("One of the best things about buying through Wayfair is that we do not have to charge sales tax.") (quoting Wayfair.com's Ordering Information page as of Feb. 26, 2018).

27. *Wayfair*, 138 S. Ct. at 2103 (Roberts, C.J., dissenting) ("Over 10,000 jurisdictions levy sales taxes . . . ."); *see also Rates and Codes for Sales, Use, and Lodging Tax*, OKLA.

large portion of total revenue.[28] Thus, state and local governments' inability to collect may leave large holes in budgets.

This brief explanation illustrates how the mechanics of sales and use taxes raise several policy considerations, each discussed in litigation spanning over fifty years, including the now-overturned physical presence requirement.

B. The Physical Presence Requirement

1. National Bellas Hess, Inc. v. Department of Revenue of Illinois

Over fifty years before *Wayfair*, the Supreme Court first considered the physical presence question.[29] The physical presence requirement acted as a protection for interstate commerce by forbidding states from imposing mandatory collection and payment of sales taxes onto sellers who did not have a physical connection to the state, either through property or employees.[30]

In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, an Illinois statute governing the imposition of use tax broadly defined "retailer" as anyone "[e]ngaging in soliciting orders within [Illinois] from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State."[31] This definition was sufficiently broad to require all out-of-state sellers to collect and remit taxes on sales to customers in Illinois. National Bellas Hess (Bellas Hess) was an out-of-state seller that did not wish to comply with the remittance

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TAX COMM'N, https://www.ok.gov/tax/documents/copo3Q18.pdf (last updated July 31, 2018) (noting a 4.5% state tax rate as well as varying county-level and city-level tax rates).

28. *See, e.g.*, COLO. OFFICE OF THE STATE CONTROLLER, COLORADO COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2019, at 31 (2019), https://www.colorado.gov/pacific/osc/cafr ("Individual and fiduciary income taxes ($7,327.5 million), sales and use taxes ($3,592.2 million), and federal grants and contracts ($5,873.0 million) are the largest sources of revenue comprising 90.8 percent of total revenue of $18,496.2 million."); *see also Revenues*, OKPOLICY.ORG.: OKLA. POL'Y INST., https://okpolicy.org/resources/online-budget-guide/revenues/ (last visited Apr. 22, 2020) ("Sales taxes are the largest tax source for Oklahoma governments, followed by the individual income tax. Together these account for 55 percent of Oklahoma tax revenue."); OKLA. TAX COMM'N, ANNUAL REPORT: FISCAL YEAR ENDED JUNE 30, 2019, at 5 (2019), https://www.ok.gov/tax/documents/AR2019.pdf (noting that sales and use taxes generated over $3 billion, with use taxes contributing just over $394 million to this number).

29. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 758–59 (1967).

30. *Id.*

31. *Id.* at 755 (quoting 120 ILL. COMP. STAT. § 439.2 (1965)).

requirements.[32] Bellas Hess operated as a mail-order company with no physical presence in the state.[33] To comply with the remittance requirements, Bellas Hess was required to pay the tax to the Illinois Department of Revenue, provide Illinois purchasers' receipts in the proper form, keep records in accordance with Illinois tax statutes, and submit to tax investigations necessary for enforcement.[34]

Bellas Hess argued that the Illinois statute was unconstitutional under two theories.[35] First, the company argued Illinois' statute violated the Due Process Clause of the Fourteenth Amendment.[36] Second, the company argued the statute imposed "an unconstitutional burden upon interstate commerce."[37] The Illinois Supreme Court ruled against Bellas Hess on these arguments;[38] however, the Supreme Court subsequently reversed, holding that the United States Constitution prevented the state of Illinois from imposing its tax collection provisions on the company.[39]

In its decision, the Court combined the Due Process and Interstate Commerce doctrines to limit burdens on interstate commerce.[40] The Court saw remittance requirements on out-of-state businesses as burdensome entanglements to interstate commerce when the seller's only connection to the state's citizen was through the mail.[41] Because of the administrative difficulties sellers face when attempting to comply with the multitude of tax rates, exemptions, and record-keeping requirements, the Court saw Illinois' remittance policies as oppressive.[42]

2. Quill Corp. v. North Dakota *ex rel*. Heitkamp

Twenty-five years after *Bellas Hess*, the Supreme Court again addressed the question of whether a state could require an out-of-state seller to remit

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32. *Id.* at 755–56.
33. *Id.* at 754.
34. *Id.* at 755.
35. *Id.* at 756.
36. *Id.*
37. *Id.*
38. Dep't of Revenue v. Nat'l Bellas Hess, Inc., 214 N.E.2d 755, 760 (Ill. 1966), *rev'd*, *Nat'l Bellas Hess*, 386 U.S. 753.
39. *Nat'l Bellas Hess*, 386 U.S. at 759–60.
40. *Id.* at 756–58.
41. *Id.* at 759.
42. *Id.* at 759–60 ("The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'") (footnotes omitted).

sales tax on goods sold into the state if the seller had no physical presence in that state.[43] In *Quill Corp. v. North Dakota ex rel. Heitkamp*, the Supreme Court upheld the physical presence requirement.[44] The case involved Quill, a corporation that sold office supplies into North Dakota via catalogs, mail orders, and phone calls.[45] North Dakota enacted legislation that changed the definition of "retailer" to include all persons "engag[ing] in regular or systematic solicitation of" consumers within the state.[46] Because of this legislation, remote sellers—such as Quill—that had no storefronts, salespeople, warehouses, or other physical presence in North Dakota were required to collect and remit a use tax on goods sold into the state.[47]

After Quill refused to collect and remit the use tax, North Dakota's Tax Commissioner filed suit in state court to collect the tax plus interest and penalties.[48] Much like the remote seller in *Bellas Hess*, Quill raised the argument that this remittance requirement violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce.[49]

In an 8-1 decision, the U.S. Supreme Court reversed the North Dakota Supreme Court and upheld *Bellas Hess* on the interstate commerce doctrine alone.[50] Unlike the *Bellas Hess* Court, which intertwined protections provided by the Due Process Clause and the interstate commerce doctrine, a fundamental difference between the two provisions led the *Quill* Court to individually address each claim at length.[51]

First, addressing the Due Process Clause concern, the Court found that Quill satisfied the minimum contacts standard as espoused in *International Shoe Co. v. Washington* because it had purposefully availed itself of North Dakota's jurisdiction.[52] Therefore, Quill subjected itself to in personam

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43. *See* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 302–03 (1992).

44. *Id.* at 317–18.

45. *Id.* at 302.

46. *Id.* at 302–03 (quoting N.D. CENT. CODE § 57-40.2-01(6) (Supp. 1991)).

47. *Id.* at 303.

48. *Id.*

49. *Id.* at 305.

50. *Id.* at 312.

51. *Id.* at 305 ("[T]he Due Process Clause and the Commerce Clause reflect different constitutional concerns. Moreover, while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause.") (internal citation omitted).

52. *Id.* at 307–08.

jurisdiction in North Dakota by voluntarily targeting North Dakota to receive the economic benefits.[53] Second, after finding no violation of the Due Process Clause, the Court turned to the Commerce Clause. Since its decision in *Bellas Hess*, the Supreme Court developed a four-part test for Commerce Clause challenges to taxes.[54]

Under the four-part test established in *Complete Auto v. Brady*, whenever an imposed tax faces a Commerce Clause challenge, the tax is upheld if courts find "the 'tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'"[55] The *Quill* Court focused on the first element of the *Complete Auto* test and found that to show a "substantial nexus," the seller must have a physical presence in the taxing state.[56] The Court explained that this bright-line physical presence requirement carries the benefits of, inter alia, creating consistency in sales that "fosters investment by business and individuals"[57] and avoiding the overwhelming burden of making companies comply with the sales and use tax laws of "the [n]ation's 6,000-plus taxing jurisdictions."[58] Although these burdens took priority, in his dissent in *Quill*, Justice White addressed the "structural concerns" of effectively providing a tax break to the $180-billion-per-year mail-order industry.[59] Ultimately, because Quill lacked any physical presence in North Dakota, North Dakota's tax failed to satisfy the "substantial nexus" element of the *Complete Auto* test.[60]

C. Where There's a Quill*, There's a Way: Circumventing Physical Presence Requirements with* Direct Marketing Ass'n v. Brohl

With the increase in retail e-commerce sales,[61] states became increasingly dissatisfied with the post-*Quill* world. The necessity of a

53. *Id.*

54. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); *see also Quill*, 504 U.S. at 311.

55. *Quill*, 504 U.S. at 311 (quoting *Complete Auto*, 430 U.S. at 279).

56. *Id.*

57. *Id.* at 316.

58. *Id.* at 313 n.6 (citing Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 759–60 (1967)).

59. *Id.* at 329 (White, J., concurring in part and dissenting in part).

60. *Id.* at 317–18.

61. J. Clement, *Desktop Retail E-commerce Sales in the United States from 2002 to 2017 (in Billion U.S. Dollars)*, STATISTA (July 23, 2019), https://www.statista.com/statistics/

physical presence to satisfy the "substantial nexus" element of the *Complete Auto* test inhibited states' abilities to impose taxes on out-of-state sellers. Though Justice White was justifiably concerned about the expansion of mail-order sellers,[62] he could not have imagined the rapid expansion of e-commerce websites that equally benefitted from *Quill*'s holding. By 2012, the United States Department of Commerce reported e-commerce sales at over $225.5 billion.[63] States also started to recognize a new wrinkle in the out-of-state seller debate: marketplace facilitators. Beyond just "remote sellers," States sought ways to collect taxes from large companies, such as Amazon and eBay, who were facilitating and hosting online sales for these remote sellers.[64]

Because of low compliance with self-reporting use taxes owed on online purchases, Colorado passed legislation imposing "notice and reporting requirements" on out-of-state sellers whom they could not require to collect and remit sales taxes.[65] Under the enacted statutory scheme, sellers with no physical presence in Colorado and gross sales of more than $100,000 in the state were required to either voluntarily collect and remit use taxes, or send notices to consumers communicating that the consumer owed a use tax on their purchase and report use tax amounts owed directly to the Colorado state tax authority.[66]

273424/retail-e-commerce-sales-in-the-united-states/ (showing that retail e-commerce sales have almost doubled between 2012 and 2017).

62. *See Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part).

63. Press Release, U.S. Census Bureau News, Quarterly Retail E-Commerce Sales: 4th Quarter 2012 (Feb. 15, 2013), https://www2.census.gov/retail/releases/historical/ecomm/12q4.pdf.

64. *See* Jeanine Poggi, *Amazon Sales Tax: The Battle, State by State*, THESTREET (Oct. 24, 2011, 3:05 PM EDT), https://www.thestreet.com/story/11052898/1/amazon-sales-tax-the-battle-state-by-state.html ("[S]everal states are seeking to get around these restrictions by passing laws that expand the definition of physical presence.").

65. Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 5 (2015) ("With approximately 25 percent of taxes unpaid on Internet sales, Colorado estimated in 2010 that its revenue loss attributable to noncompliance would grow by more than $20 million each year."); *see also* COLO. REV. STAT. § 39–21–112(3.5) (2016).

66. *Direct Mktg.*, 575 U.S. at 5–6; *see also* COLO. CODE REGS. § 201-1:39-21-112.3.5(3) (repealed Jan. 1, 2018) (noting that notice and reporting laws required remote sellers to first, send notices to all Colorado purchasers of taxable products communicating at minimum: (1) the retailer has elected not collect Colorado sales or use tax; (2) simply because the purchase occurred online or remotely, does not mean the purchase is tax exempt; and (3) Colorado requires purchasers to both report all purchases that are taxable in Colorado and for which no tax was collected by the retailer "and pay tax on those purchases" and then report the names and amounts owed to the Colorado Department of Revenue).

In *Direct Marketing Ass'n v. Brohl*, Direct Marketing Association (Association), a trade association for businesses selling products through catalogs and the Internet, challenged Colorado's notice and reporting requirements.[67] The case originally rose to the Supreme Court on the question of whether the Tax Injunction Act (TIA), which limits federal courts' ability to restrict "assessment, levy, or collection" of a state tax, barred the suit.[68] After finding the TIA did not preclude the action, the Supreme Court remanded the case to the Tenth Circuit.[69] On remand, the Tenth Circuit found that (1) *Quill*'s physical presence doctrine only applied to the collection of taxes by remote sellers, and (2) Colorado's law did not discriminate, nor did it unduly burden interstate commerce.[70]

Addressing the issue of collection, the Tenth Circuit elucidated that although *Quill* stands for the proposition that out-of-state sellers cannot be compelled to collect and remit state sales tax, "*Quill* does not establish that out-of-state retailers are free from all regulatory requirements—only tax collection and liability."[71]

Second, the Tenth Circuit addressed the Commerce Clause questions of whether Colorado's law discriminated or unduly burdened interstate commerce.[72] If either were shown, Colorado's law would violate the Dormant Commerce Clause. Looking first to discrimination, the Tenth Circuit found no discrimination in violation of the Commerce Clause either on the law's face or in its direct effects.[73] Although "remote sellers" were treated "unequally" compared to in-state sellers, the unequal treatment did not adversely affect remote sellers' businesses due to a concurrent obligation on in-state businesses to collect and remit sales tax.[74] Second, when addressing undue burden, the Tenth Circuit summarily rejected the argument that the Colorado law created an undue burden because the

67. *Direct Mktg.*, 575 U.S. at 6.

68. *Id.* at 7.

69. *Id.* at 16. Of note, in his concurrence to this opinion, Justice Kennedy expressed his general distaste for the physical presence requirement and stated, "The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.* at 18–19 (Kennedy, J., concurring).

70. Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1139, 1145 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 591.

71. *Id.* at 1139–46.

72. *Id.* at 1139.

73. *Id.* at 1143.

74. *Id.*

entirety of the Association's analysis relied on an application of *Quill*, which the court had already interpreted narrowly.[75]

After the Tenth Circuit's decision, the Supreme Court refused certiorari.[76] States subsequently endeavored to use *Direct Marketing Association* as ammunition in considering new legislative proposals utilizing these newfound taxing powers.

II. South Dakota v. Wayfair, Inc.

After *Direct Marketing Association*, states were left with the provocative words of Justice Kennedy's concurrence ringing in their ears: "The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[77] In 2016, only eleven months after Justice Kennedy's directive, South Dakota enacted just the law.[78] The statute imposed remittance requirements on all out-of-state sellers regardless of whether they had a physical presence within the state, so long as the seller met threshold revenue requirements.[79]

A. Statement of the Case

The Supreme Court considered three features of South Dakota's law: (1) the $100,000 in revenue or 200 individual transactions nexus required to impose sales and use taxes, (2) a ban on retroactive imposition of the sales and use tax, and (3) membership in the Streamlined Sales and Use Tax Agreement (a multi-state agreement that provides efficient solutions for sales tax compliance within different states).[80]

Although the many bells and whistles of South Dakota's Senate Bill 106 sought to alleviate the cost of compliance concerns expressed in *Quill*, its existence directly contradicted both *Quill* and *Bellas Hess*. Three companies were named in the suit against South Dakota: Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc.[81] These companies shared two distinct qualities: (1) each sold significantly more than $100,000 of tangible goods into the state of South Dakota; and (2) none possessed employees or real estate in the state.[82] Prior to the passage of South Dakota's law, each

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75. *See id.* at 1147.
76. Direct Mktg. Ass'n v. Brohl, 137 S. Ct. 591 (2016) (denying cert).
77. Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 18–19 (2015) (Kennedy, J., concurring).
78. *See* S.D. CODIFIED LAWS § 10-64-2 (2016).
79. *Id.*
80. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099–2100 (2018).
81. *Id.* at 2089.
82. *Id.*

entity was classified as a "remote seller" because they lacked any physical presence, and none would be required to remit sales tax to the state of South Dakota.[83]

The three sellers did not complete the registration process to obtain a sales tax license.[84] South Dakota filed a declaratory judgment action against the sellers in South Dakota state court seeking judicial approval of the law and an order requiring the sellers to register and remit sales tax.[85]

B. Supreme Court Majority Opinion

After the South Dakota Supreme Court found for the sellers,[86] the Supreme Court of the United States granted certiorari.[87] In a 5-4 decision, the Court reversed the holding of the South Dakota Supreme Court and held that a physical presence was not needed to form a substantial nexus, thus overturning *Quill*.[88] In its decision, the Court addressed two issues: the continuing validity of *Quill*'s physical presence rule and the constitutionality of South Dakota's remote seller sales tax law.

1. Overturning Quill

In overturning *Quill*, the Court revisited *Quill*'s interpretation of the Commerce Clause standard for taxation as espoused in *Complete Auto*.[89] In the eyes of the Court, *Quill* grounded the physical presence requirement in *Complete Auto*'s "substantial nexus" element.[90] Therefore, maintaining a physical presence was the only way to avoid an undue burden on interstate commerce and create the requisite substantial nexus to justify taxation.[91]

When evaluating the physical presence requirement, the Court addressed key internal inconsistencies within *Quill*.[92] First, the Court noted that *Quill*'s primary concern about taxing out-of-state sellers is that the administrative costs of complying with these taxes will be a burden to

83. *See id.*
84. State v. Wayfair Inc., 2017 S.D. 56, ¶ 9, 901 N.W.2d 754, 759, *vacated*, *Wayfair*, 138 S. Ct. 2080.
85. *Id.*
86. *Id.* ¶ 18, 901 N.W.2d at 761.
87. South Dakota v. Wayfair, Inc., 138 S. Ct. 735 (2018) (granting cert).
88. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087, 2099 (2018).
89. *Id.* at 2092.
90. *Id.*
91. *Id.*
92. *Id.*

interstate commerce.[93] However, the Court in *Wayfair* highlighted that "administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State."[94]

Second, *Quill* used the protection of interstate commerce to justify its creation of an online "tax shelter."[95] The Supreme Court described companies unfairly profiting off of this tax break and even characterized Wayfair, the seller, as providing consumers "subtle offer[s] to assist in tax evasion" through its advertising that online purchases from the company are not subject to sales tax.[96] The Supreme Court further appeared frustrated with the arbitrary benefit given to online sellers by way of a clear financial competitive advantage for remote online sellers.[97] Because of this perceived inequality, the Court refused to find that the imposition of remittance requirements would be unfair to remote sellers.[98]

Finally, the Court balanced the burden to be placed on sellers against the solutions available through technology. On one side of the scale, the Court considered the burden on remote sellers.[99] While the Court recognized that compliance with the laws of all tax jurisdictions might be complicated, especially for small businesses, it did not discuss these burdens in detail.[100] On the other side, the Supreme Court noted that currently available

93. *Id.* at 2093 (citing Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 313 n.6 (1992)).

94. *Id.*

95. *Id.* at 2094 ("*Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced."); *see also id.* at 2096 ("What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments.").

96. *Id.* at 2096.

97. *See id.* at 2097 ("The Internet's prevalence and power have changed the dynamics of the national economy. In 1992, mail-order sales in the United States totaled $180 billion. Last year, e-commerce retail sales alone were estimated at $453.5 billion.") (internal citation omitted).

98. *Id.* at 2096 ("Helping [sellers'] customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies *Quill* . . . an increased share of the taxes. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions.").

99. *Id.* at 2098.

100. *See id.* ("Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems."); *id.* at 2099 ("[T]here are various plans already in place to simplify collection; and since in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided.").

technologies would allow remote sellers to handle the burdens of compliance.[101] Overall, taking into account the aforementioned considerations, the Court found no justification for perpetuating the physical presence rule.[102]

2. An Analysis of South Dakota's Law

The majority highlighted three provisions of South Dakota's statutory scheme that addressed the issues of undue burden, fairness, and cost of compliance—all issues raised by both the sellers and the dissenting opinion. The first provision included South Dakota's small-seller safe harbor.[103] This safe harbor looked to eliminate any discrimination against out-of-state sellers who lack a substantial nexus to the taxing state.[104] Using the *Complete Auto* test with the newly modified definition of "substantial nexus," the Court found that South Dakota's threshold—$100,000 in revenue through sales into the state or 200 transactions—marked an administrable definition of conduct that creates a substantial nexus to the state.[105]

Both the sellers in *Wayfair*[106] and the Court's dissent highlighted the complexity of calculating and remitting sales tax in "[o]ver 10,000 jurisdictions."[107] The dissent provided several colorful examples of commonplace items taxed at different rates to explain the complexity of nationwide sales tax laws.[108] The dissent worried that these complexities would disproportionately burden small sellers who lack the financial sophistication to navigate varying state remittance requirements.[109]

101. *Id.* at 2098–99.

102. *Id.* at 2099 ("For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect.").

103. *Id.*

104. *See id.*

105. *Id.*

106. *Id.* at 2098; *see also* Respondent's Brief at 20, *Wayfair*, 138 S. Ct. 2080 (No. 17-494), 2018 WL 1621148, at *20.

107. *Wayfair*, 138 S. Ct. at 2103–04 (Roberts, C.J., dissenting).

108. *See id.* (Roberts, C.J., dissenting) ("New Jersey knitters pay sales tax on yarn purchased for art projects, but not on yarn earmarked for sweaters. Texas taxes sales of plain deodorant at 6.25 percent but imposes no tax on deodorant with antiperspirant. Illinois categorizes Twix and Snickers bars—chocolate-and-caramel confections usually displayed side-by-side in the candy aisle—as food and candy, respectively (Twix have flour; Snickers don't), and taxes them differently.") (citing Brief of Amici Curiae eBay, Inc. in Support of Respondents at 7, 8 & n.3, *Wayfair*, 138 S. Ct. 2080 (No. 17–494)).

109. *Id.* (Roberts, C.J., dissenting).

The majority opinion dismissed the concern that compliance would disproportionately burden small businesses by noting that South Dakota provides "small merchants a reasonable degree of protection" by "requir[ing] a merchant to collect the tax only if it does a considerable amount of business in the State."[110] Because the Supreme Court emphasized the importance of a "small seller safe harbor," or a threshold that exempts small sellers from compliance with collection and remittance requirements, it is clear that providing statutory protection to small sellers is important to the fairness analysis.

The second and third provisions of the act that the Court discussed go beyond the substantial nexus analysis and look to actively limit the burden placed onto sellers.[111] The second provision prohibited retroactive enforcement of sales tax laws, and the third statutorily adopted the Streamlined Sales and Use Tax Agreement.[112] Both of these terms focused on guaranteeing fairness to out-of-state sellers when complying with complex remittance requirements.[113]

When discussing retroactive enforcement, the Court contended that retroactive enforcement is unfair to remote sellers because it would enforce the current remittance requirement on a sales tax scheme in tandem with a prior requirement for citizen-purchasers to pay taxes on the same purchased items.[114] Therefore, because the Court emphasized the ban on retroactive enforcement, it is reasonable to consider statutory provisions that prohibit retroactive enforcement of sales tax laws as a significant factor in the fairness analysis.

Finally, the Supreme Court highlighted South Dakota's membership in the Streamlined Sales and Use Tax Agreement (SSUTA) twice in its decision.[115] The Court described the SSUTA as a tool used to "simplify collection" of sales taxes, thus decreasing the burdens on remote sellers.[116] The SSUTA reduces burdens on remote sellers by providing readily

110. *Id.* at 2098.

111. *See id.* at 2099–2100.

112. *Id.*

113. *See id.* at 2100.

114. *Id.* at 2099 (citing Brief of Amici Curiae Law Professors and Economists in Support of Petitioner at 7 n.5, *Wayfair*, 138 S. Ct. 2080 (No. 17–494)).

115. *Id.* at 2098–99. "This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability." *Id.* at 2100.

116. *Id.* at 2099.

available tax software to remote sellers who sell products to consumers in SSUTA member states.[117] Though not expressly stated, these references indicate the Court may view the SSUTA as a mitigating factor that reduces the burden of complying with sales tax laws for remote sellers.[118]

3. Wayfair *in Summary*

The *Wayfair* decision is important for its removal of a fifty-year-old precedent. The elimination of the physical presence requirement as espoused in *Quill*, regarding the taxation of remote sellers, has already changed sales tax policies across the country.[119] In addition to this groundbreaking precedent, the Court's discussion of South Dakota's law provides guidance for other states to follow when adopting remote seller sales tax legislation.[120] By approving South Dakota's use of specific financial figures to define "substantial nexus," the Supreme Court approved what has been called the "economic nexus" method of sales tax legislation.[121]

III. Oklahoma's Response to Wayfair

Oklahoma's history of legislation in this area exemplifies the chaos surrounding the taxation of remote sellers. Oklahoma's first attempt at collecting sales tax from remote sellers occurred after the decision in *Direct Marketing*, but before the Supreme Court's decision in *Wayfair*. Oklahoma passed a notice and report law comparable to the law in *Direct Marketing*, which required remote sellers to notify customers of their use tax obligations and report the amounts owed to the state.[122] Although this pre-response to *Wayfair* utilized the most advantageous taxing policies at the time, *Wayfair* allowed states to directly collect taxes from sellers rather than merely allowing states to require remote sellers to inform consumers about

117. *Id.* at 2100.

118. *See id.* at 2099–2100.

119. *See Post-*Wayfair *Nexus Activity Roadmap*, *supra* note 6 (summarizing fifty states' actions following *Wayfair* and the related statutes and regulations).

120. Matthew C. Boch, Way*(un)*fair*? United States Supreme Court Decision Ends State Tax Physical Presence Nexus Test*, ARK. LAW., Summer 2018, at 18, 20.

121. Sales Tax Inst., *What Is Economic Nexus?*, VIMEO (Oct. 4, 2018, 4:27 PM EST), https://vimeo.com/293437211 (noting that economic nexus laws utilize a dollar-amount threshold based on a remote seller's gross revenue on sales into the state to subject remote sellers to the sales tax laws of that state).

122. 2017 Okla. Sess. Laws ch. 17, § 3 (H.B. 1019).

their duty to remit use taxes.[123] As such, less than a year after this new legislation came into effect, Oklahoma amended its sales tax laws to take advantage of the powers that *Wayfair* afforded to states.[124]

Oklahoma passed its second and current attempt to collect sales tax from remote sellers in response to *Wayfair* in the spring of 2019. Senate Bill 513 went into effect on November 1, 2019, and—to a great extent—takes advantage of the powers provided by *Wayfair*; however, as the dust continues to settle, it is clear there are many ways Oklahoma can improve its legislation to address current inequalities and inefficiencies. Specifically, the following discussion will focus on two areas: (1) the current economic nexus for remote sellers and marketplace facilitators and (2) the treatment of marketplace facilitators.

A. Oklahoma's Current Statutory Scheme

In May 2019, Oklahoma enacted Senate Bill 513.[125] This bill amended the existing sales and use tax regime by placing a mandatory remittance obligation on remote sellers with revenue from sales into the state exceeding $100,000,[126] similar to South Dakota's law in *Wayfair*.

The legislature enacted this regime to increase compliance with sales and use tax laws that were already in place. Even before Oklahoma's response to *Wayfair*, Oklahoma required citizens who purchased products online and did not pay a sales tax to remit use tax to the state when filing their annual state returns.[127] Despite that requirement, citizens rarely remitted use taxes.[128] In addition to low rates of compliance, state tax departments rarely pursued unpaid taxes due to administrative difficulties associated with assessment and collection.[129]

After the Supreme Court's decision in *Wayfair*, Oklahoma could freely forgo pursuing individual citizens and, instead, pursue sellers.[130] There are

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123. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099–2100 (2018).

124. 2018 Okla. Sess. Laws ch. 414, § 1 (S.B. 513) (effective Nov. 1, 2019).

125. 68 OKLA. STAT. §§ 1391–1397 (Supp. 2019), *amended by* 2018 Okla. Sess. Laws ch. 414, § 1 (S.B. 513).

126. *Id.* § 1392(G).

127. *See* OKLA. ADMIN. CODE § 710:65-21-3 (2019) ("In the event that the vendor is not 'maintaining a place of business in this state' and has not voluntarily agreed to collect the use tax, the Oklahoma purchaser must accrue, report, and remit the use tax.").

128. *See* Jolley, *supra* note 24, at 3 ("The use tax is self-reported by the purchaser and, therefore, not always remitted. Oklahoma has one of the higher use tax participation rates in the country - at just 4% compliance among Oklahoma taxpayers.").

129. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088 (2018).

130. *See* 68 OKLA. STAT. §§ 1392–1397 (Supp. 2019).

three important components in Oklahoma's most recent piece of legislation: (1) specific definitions pertaining to the taxation of different categories of sellers, (2) the economic nexus description and limited notice and report regime, and (3) Oklahoma's membership in the SSUTA.[131]

1. New Definitions for Out-of-State Sellers

First, defining the different types of sellers that do not have a physical presence in the state is one of the most important aspects of this framework. Oklahoma's remote taxation regime applies directly to three types of sellers: (1) remote sellers, (2) marketplace facilitators, and (3) referrers.[132]

Remote sellers are defined as persons who are not "marketplace facilitator[s]" and "do[] not maintain a place of business in [Oklahoma] that . . . sells tangible personal property at retail, the sale or use of which is subject to the tax."[133] Effectively, remote sellers are individuals or companies like the defendants in *Wayfair*. These parties have no physical presence in Oklahoma but make sales into Oklahoma and are therefore subject to these regulations if they meet the economic nexus.

The legislation partially defines remote sellers as entities that are not "marketplace facilitators." Distinct from a remote seller, a "marketplace facilitator" is a person who "facilitates the sale at retail of tangible personal property."[134] This facilitation occurs if the person either lists or advertises the property for sale and "directly or indirectly . . . collects the payment from the purchaser and transmits the payment to the person selling the property."[135] From the legislative history, it is apparent that this definition focuses on Amazon Marketplace,[136] the third-party fulfillment arm of Amazon, as the quintessential marketplace facilitator.[137] Although several

131. *See id.* §§ 1391–1397.

132. *See id.*

133. *Id.* § 1391(8).

134. *Id.* § 1391(3).

135. *Id.* § 1391(3)(a)–(b).

136. *See* Bill Summary of Floor Amendment 1, H.B. 1019, 56th Leg., 2d Spec. Sess. (Okla. 2018), http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1019&Session=172X (follow "Bill Summaries" hyperlink; then follow "Floor Amendment 1" hyperlink).

137. *See also* Tripp Baltz, *State of Wayfair: Amazon Marketplace Bigger than Amazon*, BLOOMBERG: DAILY TAX REP. (Dec. 14, 2018, 4:20 PM), https://news.bloombergtax.com/daily-tax-report-state/state-of-wayfair-amazon-marketplace-bigger-than-amazon (noting Amazon's Marketplace, or Amazon's hosting platform that allows small business and individuals to sell through Amazon's website, will account for 31.3% of annual e-commerce sales and that most state laws will require Amazon to manage the sales tax remittance process).

reports expressly mention Amazon, other websites, such as eBay, Etsy, and Shopify, which allow individuals to sell through the entity's website, also fit into Oklahoma's statutory definition.[138] Oklahoma's statutory scheme places the burden of remitting sales and use taxes on marketplace facilitators because of their relative sophistication compared to the transacting parties and role they play in connecting the "marketplace seller" to buyers.[139]

Similar to marketplace facilitators, "referrers" are persons who connect buyers to sellers "by telecommunications, Internet link or other means" and "receive[] consideration from the . . . seller" but "do[] not collect a receipt from the purchaser for the sale."[140] Although difficult to differentiate from marketplace facilitators, the key distinction is that referrers do not collect the ultimate purchaser's payment for the goods sold or complete the transaction through their own website; rather, the referrer contracts with the seller to redirect any potential buyer to the seller's website.[141]

2. Economic Nexus and Notice and Reporting Requirements

Second, after defining the parties who are subject to the new provisions, Oklahoma's out-of-state seller regime dictates different obligations for remote sellers compared to referrers and marketplace facilitators. Vendors qualifying as remote sellers in Oklahoma are subject to a nearly identical legislative scheme as remote sellers in South Dakota.[142] If a remote seller generates over $100,000 in revenue during the preceding or current calendar year, that seller has no choice but to collect and remit sales tax.[143]

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138. *See* Lizzy Greenburg, *State by State: Marketplace Facilitator Laws Explained*, TAXJAR (Dec. 10, 2018), https://blog.taxjar.com/sales-tax-by-state-marketplace-facilitator-laws-explained/.

139. *Id.*

140. 68 OKLA. STAT. § 1391(7)(a) (Supp. 2019). The statute also exempts "person[s] engaging in the business of printing or publishing a newspaper." *Id.*

141. *See* Richard Cram, *Marketplace Facilitators and Referrers*, MULTISTATE TAX COMM'N (July 24, 2018), http://www.mtc.gov/getattachment/Uniformity/Uniformity-Committee/2018/Agenda-7-2018/marketplace-facilitator-models-7-19-18.pdf.aspx?lang=en-US Referrers (PowerPoint presentation) (providing examples of "referrers" in a comparable statutory scheme).

142. *Compare* 68 OKLA. STAT. § 1392(G)(1) (noting that remote sellers with aggregate sales "worth at least One Hundred Thousand Dollars . . . during the preceding or current calendar year shall collect and remit the [sales] tax"), *with* S.D. CODIFIED LAWS § 10-64-2 (2016) (stating that a remote seller "shall remit the sales tax" if "[t]he seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars").

143. 68 OKLA. STAT. § 1392(G).

The statutory scheme expressly exempts sales made by remote sellers through a marketplace facilitator from counting toward this $100,000 threshold, so long as the marketplace facilitator collects and remits the tax on the sale.[144]

Unlike remote sellers, vendors who qualify as marketplace facilitators or referrers have the option to either remit taxes owed or not. Marketplace facilitators and referrers must elect to either (1) voluntarily remit sales taxes collected from consumers, or (2) comply with the statute's specific notice and reporting requirements.[145] Although voluntarily paying taxes may seem strange, many large companies, such as Amazon, began voluntarily remitting sales tax even before this law's enactment.[146] While some marketplace facilitators elected to pay the sales tax their consumers owed, others were free to elect to follow the notice and report requirements provided in the statute. Sections 1393 through 1395 describe the required information to include in notices sent to purchasers each year and the required report to be sent to the Oklahoma Tax Commission.[147] This framework imposes fines for each failed or incorrect notice or report equal to $20,000 or 20% of total sales into Oklahoma over the previous twelve months.[148]

Further emphasizing the difference between remote sellers and marketplace facilitators and referrers is the economic nexus threshold to make the election. While remote sellers must generate revenue of at least $100,000 to be bound by the statute, marketplace facilitators and referrers need only generate $10,000 before being required to make their election.[149] Although this threshold is significantly lower than the remote seller threshold, marketplace facilitators and referrers are arguably at an advantage because they can elect to pass the obligation to pay a use tax onto buyers (or back onto remote sellers, depending on the size of the vendor) by merely complying with notice requirements.

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144. *Id.* § 1392(G)(2).

145. *Id.* § 1392(A).

146. Jolley, *supra* note 24, at 3 ("In efforts to collect more revenue owed to the state, Oklahoma has made agreements with several online retailers, including Amazon and Walmart, to remit taxes voluntarily on sales made directly by themselves."); *see also* Jennifer Dunn, *UPDATED: The Amazon FBA Sales Tax Amnesty: What You Need to Know*, TAXJAR (Oct. 12, 2017), https://blog.taxjar.com/amazon-fba-sales-tax-amnesty/.

147. 68 OKLA. STAT. §§ 1393–1395.

148. *Id.* § 1396(C) (allowing the Oklahoma Tax Commission to reduce any penalty imposed "due to hardship or for good cause shown" until 2023).

149. *Compare id.* § 1392(G) *with id.* § 1392(A).

The remote seller threshold was added in Oklahoma's most recent statutory amendment.[150] Prior to this legislation, remote sellers enjoyed the same election option as marketplace facilitators and referrers—meaning that there was no *requirement* for any vendor outside the state of Oklahoma to remit sales tax.[151] The ability to elect between remittance and notice and reporting requirements exists as a vestige of a pre-*Wayfair* world, and states continuing to operate with this system fail to take advantage of a more efficient means of collecting taxes rightfully owed.

3. Streamlined Sales and Use Tax Agreement

Finally, a salient element of Oklahoma's sales tax statutory scheme that is also highlighted in *Wayfair*[152] is the state's membership in the Streamlined Sales and Use Tax Agreement (SSUTA).[153] The SSUTA is a system that synchronizes member-states' sales and use tax laws by requiring uniform definitions for goods, services, and other rules.[154] The SSUTA also allows out-of-state sellers to register for a single sales tax license that is valid for all member-states.[155] Additionally, the SSUTA provides sellers access to sales tax administration software facilitated by the state, which, if used, makes sellers immune from miscalculation liability.[156]

In general, states attempting to join the SSUTA must comply with the Governing Board Rules.[157] Specifically, these requirements include

150. *See* 2018 Okla. Sess. Laws ch. 414, § 1 (S.B. 513).

151. 2017 Okla. Sess. Laws ch. 17, § 3 (H.B. 1019).

152. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099–2100 (2018).

153. *State Information*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/Shared-Pages/State-Detail (last visited Apr. 22, 2020) (providing that Oklahoma is a full member state).

154. *See generally* STREAMLINED SALES TAX GOVERNING BD., INC., STATE GUIDE TO THE STREAMLINED SALES TAX PROJECT (rev. Mar. 1, 2019), https://www.streamlinedsalestax.org/docs/default-source/guides/state-guide-to-streamlined-sales-tax-project-2019-03-01.pdf?sfvrsn=5cc921f2_4.

155. *About Us*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/about-us/about-sstgb (last visited Apr. 22, 2020).

156. *See What Is a Certified Service Provider (CSP)*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/certified-service-providers/what-is-a-csp (last visited Apr. 22, 2020); *see also Certified Providers*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/certified-service-providers/certified-service-providers-about (last visited Apr. 22, 2020).

157. *See generally* Streamlined Sales Tax Governing Bd., Inc., Rules and Procedures (May 3, 2018), https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta-rules/rules-as-amended-2018-05-03.pdf?sfvrsn=d09623a6_17.

adopting certain standardized definitions[158] and promoting "[u]niformity in the state and local tax bases."[159]

In 2000, the organization began developing tools to simplify the state sales tax system resulting from the Court's holding in *Quill*.[160] Oklahoma enacted the necessary statutory scheme to join the SSUTA in 2003 when it passed the Oklahoma Streamlined Sales and Use Tax Administration Act[161] and formally became a full member of the SSUTA in 2005.[162]

*B. How Oklahoma's Law Compares to Post-*Wayfair *Legislation*

It is not the purpose of this Comment to provide a fifty-state survey of sales tax legislation after the *Wayfair* decision; however, considering other states' responses gives insight into the ways Oklahoma's current legislation can be improved. Oklahoma's legislation contains the remnants of a pre-*Wayfair* world in some respects due to its continued allowance of the "remit or report" election for marketplace facilitators.[163] Additionally, Oklahoma's legislation that went into effect at the end of 2019 nearly verbatim adopts the Supreme-Court-approved South Dakota economic nexus.[164] More than a year after *Wayfair*, it is clear that there may be an opportunity to adopt a simpler and fairer standard of taxation, and Oklahoma is primed to take that step.

1. Oklahoma Exists in the Minority of Jurisdictions Continuing to Allow a Report and Notice Election After Wayfair

Although notice and report statutory schemes were the most assertive strategy available to state tax authorities after *Direct Marking*, many states have shifted away from these laws in favor of implementing remittance

158. *See, e.g.*, *id.* at 32–35 (providing telecommunication definitions); *id.* at 35–36 (providing healthcare definitions); *id.* at 45–50 (alleviating concerns in the *Wayfair* dissent by providing standardized definitions for candy).

159. *About Us*, *supra* note 155.

160. *Id*.

161. *See* 68 OKLA. STAT. § 1354.16 (2011) ("The Legislature further finds that this state should enter into the Streamlined Sales and Use Tax Agreement to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance for all sellers and for all types of commerce.").

162. *Oklahoma*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/state-details/oklahoma (last visited Apr. 22, 2020).

163. *See supra* Section III.A.2.

164. *See* 68 OKLA. STAT. § 1392(G) (Supp. 2019).

requirements on remote sellers and marketplace facilitators.[165] The purpose of legislation in this area of sales and use tax law, whether before or after *Wayfair*, is to increase compliance with already existing use tax obligations.[166] With *Wayfair*, this purpose could be accomplished more effectively by placing the collection and remittance responsibility on sellers and facilitators, rather than on individual consumers through notice and report conditions.[167]

Oklahoma is one of only a few states that gives market facilitators the election of complying with either notice and reporting requirements or remitting the sales tax.[168] State legislatures across the country started dictating remittance requirements for all vendors, including marketplace facilitators, in the spring of 2019.[169] While some states may retain the notice and report alternative, those states usually apply the regime to sellers they statutorily could not force to remit sales tax.[170] For example, a state may require that "noncollecting" sellers, or sellers that do not meet the

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165. Leigh Stanfield, Note, *The Wake of* Wayfair: *Addressing State Taxation Issues After* South Dakota v. Wayfair, 6 BELMONT L. REV. 284, 321 (2019) ("Accordingly, with the physical presence requirement laid to rest and greater options for sales tax imposition available, it is questionable how many states would choose to keep their sales and use tax income eggs squarely in the use tax basket.").

166. Jolley, *supra* note 24, at 2–3.

167. *Id.* at 3 ("Having the tax collected as a sales tax instead of as a use tax doesn't increase the tax or create a new one; it simply shifts compliance from the end user to the entity making the sale.").

168. 68 OKLA. STAT. § 1392(A); *see also* Gail Cole, *Oklahoma Mixes New Economic Nexus Law with Old Reporting Option for Marketplace Facilitators*, CPA PRAC. ADVISOR (May 22, 2019), https://www.cpapracticeadvisor.com/sales-tax-compliance/article/21081703/oklahoma-mixes-new-economic-nexus-law-with-old-reporting-option-for-marketplace-facilitators; *Sales and Use Tax Chart*, BLOOMBERG TAX (Sept. 19, 2019, 3:21 PM), https://www.bloomberglaw.com/product/tax/bbna/chart/2/1001/84a299c00b43e9094ab9e0105908cc14?bc=W1siRG9jdW1lbnQiLCIvcHJvZHVjdC90YXgvZG9jdW1lbnQvWDdBNzM4SDg_c2VjdGlvbl9uYW1lPUpVTVBfVE9fTElOSyJdXQ--66ebf02fc4e68eb4ecc3f81b226791d2a3f526f5 (listing Alabama, Iowa, and Vermont as jurisdictions maintaining this hybrid form of mandatory remittance for some vendors and optional notice or report election for others).

169. Pennsylvania suspended its election requirements on July 1, 2019. *See* 72 PA. STAT. AND CONS. STAT. ANN. § 7213.1(a) (West, Westlaw through 2020 Reg. Sess. Act 14), *suspended by* Act of June 28, 2019, § 33, 2019 Pa. Laws Act 13, https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2019&sessInd=0&act=13. Georgia followed a similar path. *See* GA. CODE ANN. § 48-8-30 (LEXIS through 2019 Reg. Sess.), *amended by* H.R. 182, 2019 Leg. Reg. Sess. (Ga. 2019), http://www.legis.ga.gov/Legislation/20192020/187066.pdf.

170. *See, e.g.*, S.D. CODIFIED LAWS § 10-63-2 (2016).

economic nexus figure, comply with notice and reporting requirements.[171] Therefore, although Oklahoma followed the trend of increasing the economic nexus to $100,000 for remote sellers and mandating that remote sellers who meet this higher threshold remit taxes, the legislature should eliminate the marketplace facilitator's ability to elect to comply with notice and reporting requirements and similarly force them to remit taxes owed.[172]

2. Oklahoma's Remote Seller Safe Harbor Matches the Majority of States

As alluded to above, Oklahoma followed the majority approach to post-*Wayfair* legislation by adopting an economic nexus figure identical to the one approved by the Supreme Court in *Wayfair*.[173] While similar, Oklahoma's law differs from South Dakota's in that Oklahoma's $100,000 economic nexus threshold only applies to remote sellers, while marketplace facilitators are subject to a much lower economic nexus standard.[174]

Oklahoma is one of the few states with differing thresholds for remote sellers, marketplace facilitators, and referrers.[175] Because meeting the economic nexus threshold is the primary prerequisite to being subject to these requirements, the revenue threshold becomes a key feature of the legislation. In Oklahoma, remote sellers are required to remit sales tax once they generate at least $100,000 in revenue;[176] contrarily, marketplace facilitators and referrers are bound to make the required election to remit or report, as discussed above, once they generate a mere $10,000 in revenue.[177]

C. Continued Improvements to the Sales and Use Tax System

Oklahoma's law strangely both diverges from and tracks along with the majority approach to post-*Wayfair* sales tax legislation. While odd, this inconsistency emphasizes the need for change. This Comment recommends

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171. *Id.*; *see also* Pa. Dep't of Revenue, Sales and Use Tax Bulletin 2019-01, at 3 (rev. Jan. 11, 2019), https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPolicies BulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2019-01.pdf (obligating those sellers that do not meet the $100,000 to comply with pre-existing notice and reporting requirements).

172. *See infra* Section III.C.1.

173. *See Post-*Wayfair *Nexus Activity Roadmap*, *supra* note 6.

174. *Compare* 68 OKLA. STAT. § 1392(G)(1) (Supp. 2019), *with* S.D. CODIFIED LAWS § 10-64-2 (2016).

175. *See Sales and Use Tax Chart*, *supra* note 168.

176. 68 OKLA. STAT. § 1392(G)(1).

177. *Id.* § 1392(A).

two modifications to the recently changed Oklahoma law that would create a simplified tax structure while also fairly placing the responsibility of collecting sales tax on the parties best situated to bear the burden of compliance. The alternative is comprised of two parts: First, Oklahoma should eliminate marketplace facilitators' option to elect compliance with notice and reporting requirements in lieu of remitting sales taxes. This removal would ensure that entities voluntarily operating in the retail or service-provision market are bound to remit sales tax. Second, the state should reduce its recently adjusted small-seller safe harbor from $100,000 to $10,000. This decrease would effectuate a more equitable expansion of the tax base while still accomplishing the intended goals of the Supreme Court's small-seller safe harbor. Together, these two solutions would improve Oklahoma's out-of-state sales tax policy by making it easier on remitting businesses and fairer to the taxpaying public at large.[178]

Of note, these two recommendations are guided by normative tax policy objectives. Both of these recommendations work together to balance the fundamental goals of tax equity and economic efficiency.[179] To reach tax equity, policymakers must allocate the tax burden fairly across all participants, while remaining cognizant of the fact that certain participants are better situated to bear this burden.[180] Moreover, these policies aspire to allocate tax burdens neutrally among participants, avoiding structures that incentivize any participant to change its behavior to decrease its tax liability.[181] This neutrality works to achieve maximum efficiency in the market.[182] In the context of a sales tax, while the burden of paying the tax will always fall on consumers because they pay the tax when they purchase goods,[183] the issues introduced by *Wayfair* relate to the burden of *complying* with the sales tax. In other words, these recommendations do not seek to

178. *See* David Blatt, *Court Ruling Gives Oklahoma the Chance to Fully Fix Online Tax Problem*, OKPOLICY.ORG: OKLA. POL'Y INST. (Oct. 23, 2018), https://okpolicy.org/court-ruling-gives-oklahoma-the-chance-to-fully-fix-online-tax-problem/.

179. *See* James M. Puckett, *Improving Tax Rules by Means-Testing: Bridging Wealth Inequality and "Ability To Pay"*, 70 OKLA. L. REV. 405, 425–29 (2018) (outlining, in the context of federal income tax, the varying scholarly approaches that consider a taxpayer's ability to pay when evaluating equality in taxation); Clay R. Stevens, *Killing Two Birds with One Stone: Elimination of the Punitive Damage Exemption of Section 104(A)(2) Leads to Greater Efficiency and Raises Revenue*, 28 BEVERLY HILLS B. ASS'N J. 168, 174–76 (1994) (providing a brief overview of the fundamental goals of tax policy).

180. Stevens, *supra* note 179, at 174–76.

181. *Id.* at 174–75.

182. *Id.*

183. *See supra* Section I.A.

alter who pays the tax, rather they seek to alter who is responsible for managing the remittance of the funds to be paid by consumers.

1. Oklahoma Should Remove the Notice and Report Election and Require All Marketplace Facilitators to Remit Sales Tax

Oklahoma's current law allows marketplace facilitators to elect to comply with notice and report laws rather than remitting the sales tax.[184] It is possible that the Oklahoma legislature retained this election alternative because there was no need to amend it; it is a common practice of large marketplace facilitators to elect to remit sales tax rather than comply with notice and reporting requirements, especially in Oklahoma.[185] In an effort to prevent any future marketplace facilitator from refusing to abide by industry norms and voluntarily remitting, Oklahoma should now follow the trend adopted by several states[186] and remove the election option, requiring marketplace facilitators (and remote sellers) to remit sales tax.[187] Because the Supreme Court's decision in *Wayfair* broadened states' ability to increase the rate of compliance with sales and use tax laws, allowing

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184. 68 OKLA. STAT. § 1392(A) (Supp. 2019).

185. *See Marketplace Tax Collection*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=202211260 (last visited Apr. 22, 2020) (stating that it has been collecting and remitting Oklahoma state sales tax since July 2018); Michael Mincieli, *Marketplace Sales Tax: Where Etsy Collects and Remits State Sales Tax*, ETSY (Sept. 18, 2019), https://www.etsy.com/seller-handbook/article/marketplace-sales-tax-where-etsy/321914904041 (stating it has been collecting and remitting Oklahoma sales tax since August 2018); *About Marketplace Facilitator States and Sales Tax*, FACEBOOK, https://www.facebook.com/business/help/225860631518504?id=540542143143969 (last visited Apr. 22, 2020) (stating it has collected Oklahoma sales tax since July 1, 2018); *Upcoming Changes in How Internet Sales Tax May Apply to Your eBay Business*, EBAY COMMUNITY (Sept. 13, 2018, 1:10 PM), https://community.ebay.com/t5/Announcements/Upcoming-changes-in-how-Internet-Sales-Tax-may-apply-to-your/ba-p/28962962# (stating it has been collecting and remitting Oklahoma Sales tax since July 1, 2019). *But see Sales Tax Collection Overview*, WALMART, https://sellerhelp.walmart.com/s/guide?article=000006444 (last visited Apr. 22, 2020) (stating that Walmart will collect sales tax on behalf of sellers in jurisdictions where required, but may not in jurisdictions with no mandatory marketplace facilitator remittance requirements) ("Walmart certifies that it is registered to collect sales tax and will remit sales and use tax on the sales of taxable items made through the Walmart Marketplace in the above listed states. Walmart Marketplace sellers [not Walmart itself] will continue to receive taxes collected on orders delivered to all other states not listed above – even if other marketplaces in those states are remitting taxes on your behalf. You will remain responsible for remitting the taxes to the tax authorities in those states until otherwise notified by Walmart.").

186. *See supra* notes 174–75 and accompanying text.

187. Cole, *supra* note 168.

facilitators to choose whether they will continue following with notice and report requirements is no longer the most efficient revenue-generation strategy.

First, this non-collection alternative is no longer legally necessary. Oklahoma likely included this notice and report alternative to remittance because its original legislation was drafted in response to *Direct Marketing*.[188] In *Direct Marketing*, the Court narrowly interpreted *Quill* to prohibit the "collection" of sales tax and found that notice and report requirements were used primarily for "enforcement" of use taxes that sellers were not required to pay.[189] Under this reading, while requiring mandatory remittance of sales tax by remote sellers would violate Commerce Clause principles, notice and report regimes requiring sellers to notify both consumers and state tax authorities of use taxes owed would not.[190]

Because *Direct Marketing* did nothing to overturn *Quill*'s physical presence requirement, at the time Oklahoma's law was passed, notice and report requirements were the most assertive tactics available to states pursuing increased compliance with use taxes.[191] Despite the adoption of this once innovative strategy, the holding in *Wayfair* provided states the ability to require remittance, making Oklahoma's current marketplace facilitator election option legally unnecessary.[192]

Wayfair's holding established that states can step into interstate commerce and require vendors with a "substantial nexus" to the state to carry the burden of remitting taxes, rather than placing that burden on the consumers.[193] This holding, therefore, makes a non-collecting alternative, such as a notice and report law, seemingly obsolete with regard to sellers that meet the substantial nexus threshold.[194]

Second, removing the current election scheme would accomplish the goal of revenue generation more efficiently. The notice and report election laws are merely an improvement to a flawed system when compared to mandatory remittance laws. One of South Dakota's arguments in *Wayfair*

188. *See* 2017 Okla. Sess. Laws ch. 17, § 3 (H.B. 1019).
189. *See* Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 10–11 (2015).
190. *Id.*
191. *See* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1134 (10th Cir. 2016).
192. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099–2100 (2018).
193. *Id.*
194. *See id.*

stemmed from the low rate of compliance with use tax laws nationwide.[195] While research is limited, the low compliance rates associated with use tax laws likely stem from a lack of accountability and the economic impracticality of pursuing collection.[196]

The low compliance with use tax laws indicates that providing notice of these purchases may not lead to the expected increase in compliance. Because of the relative recency and short lifespan of these report and notice regulations, there are very few robust empirical studies on how notice and report laws increase use tax compliance; however, early Colorado revenue reports note that notice and report regimes may lead to only modest increases in revenue relative to the cost of enforcement.[197]

Despite this lack of in-depth research, the idea of "nudge" tactics in use tax compliance is not a completely novel idea. Researchers working with the Department of Revenue in Nebraska found that sending postcards to individual taxpayers notifying them of potential use tax liability increased compliance by less than 1%.[198] Additionally, research conducted in North Carolina shows that educational programs directed at taxpayers and compliance incentives directed at non-collecting remote sellers also failed to increase use tax compliance.[199] Although neither of these programs is identical to a notice and report strategy, the research suggests that even

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195. *Id.* at 2088–89. Oklahoma is no exception to this national trend. *See* Jolley, *supra* note 24, at 3.

196. Michael Mazerov, *States Should Adopt a Version of Colorado's Remote Sales Tax Law*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 3, 2017), https://www.cbpp.org/research/state-budget-and-tax/states-should-adopt-a-version-of-colorados-remote-sales-tax-law ("Despite enormous press attention to the issue of Internet sales taxation in recent years, a 2015 poll found that 38 percent of Americans remained unaware that they must self-remit taxes on online purchases if they are not charged the tax.").

197. *See, e.g.*, COLO. DEP'T OF REVENUE, 2018 ANNUAL REPORT: JULY 1, 2017–JUNE 30, 2018, at 69 (2018), https://www.colorado.gov/pacific/sites/default/files/2018_Annual_Report.pdf (reporting that in the year after Colorado instituted its notice and report regime, consumer use tax revenue increased 11% compared to the prior year).

198. John E. Anderson, *Paying the State Use Tax: Is a "Nudge" Enough?*, 45 PUB. FIN. REV. 261, 269 (2015) ("Based on these raw numbers, the postcard nudge more than doubled the use tax liability rate of reporting and the amount of use tax collected. . . . Of course, the reality is that the nudge only increased the reporting rate from 0.7 percent to 1.6 percent, so the reporting rate is still extremely low.").

199. Scott W. Gaylord & Andrew J. Haile, *Constitutional Threats in the E-Commerce Jungle: First Amendment and Dormant Commerce Clause Limits on Amazon Laws and Use Tax Reporting Statutes*, 89 N.C. L. REV. 2011, 2022–23, 2025 (2011) (describing how strategies to increase use tax compliance in North Carolina, such as taxpayer education programs and state-wide amnesty programs directed at non-remitting remote sellers, have failed to increase compliance due to limitations placed by *Quill*).

specifically notifying individuals of the taxes they owe cannot repair a flawed system that requires them to self-report.

Moreover, notice and report requirements complicate enforcement. In the case of sales and use taxes, the purpose of statutory change is to increase compliance with the already existing laws, thereby increasing revenue. When it comes to choosing between *Wayfair*'s direct collection and remittance model and a notice and report model, the *Wayfair* model is, from a practical standpoint, more efficient and simpler to enforce.

Under the *Direct Marketing* model, state tax authorities subject an additional party to the enforcement process. In other words, when the Oklahoma Tax Commission enforces its notice and report law, not only must it police the self-reporting of use taxes by individuals,[200] but the tax authority must also ensure that marketplace facilitators are complying with the rigidly specific standards of the notice and report statute.[201] Rather than streamlining the process of collection, these laws add a layer of difficulty. Comparatively, the mandatory remittance model, which Oklahoma has already adopted for remote sellers, involves only one party.[202] Tax authorities no longer directly interact with the individual consumer because, under the model, consumers pay the taxes they owe directly to the seller. The mandatory remittance strategy streamlines the process by allowing the tax authority to supervise only one party.

Overall, a pure self-reporting use tax scheme has proven to be an inefficient means of revenue generation. Because of horrendously low compliance rates, states have sought to enforce existing laws through more creative means, such as notice and report laws. Unfortunately, even these strategies have led to only modest increases in compliance. The relative inefficiency of report and notice laws, when compared to mandatory remittance, shows that Oklahoma should remove its election option and pursue a mandatory remittance system for all out-of-state sellers as authorized under *Wayfair*.

2. Oklahoma Should Become One of the First States to Reduce Its Economic Nexus Threshold Below $100,000

Building on the eradication of the notice and report election from the Oklahoma sales and use tax scheme, the second prong of this recommendation argues that the economic nexus threshold for both remote sellers and marketplace facilitators should be reduced to $10,000. This

200. *See* OKLA. ADMIN. CODE 710:65-21-4 (2019).
201. *See* 68 OKLA. STAT. §§ 1393–1395 (Supp. 2019).
202. *See, e.g.*, S.D. CODIFIED LAWS § 10-64-2 (2016).

recommended plan generates two key benefits. First, this decreased economic threshold will eliminate any tax haven small internet sellers may have retained after *Wayfair*. Second, this lower threshold takes into consideration market realities reflecting the sophistication of online sellers.

One of the multitudinous reasons for the Court's decision to remove the physical presence requirement pronounced in *Quill* was to remove a tax haven that mail-order and internet sellers had enjoyed for over fifty years.[203] The Court's goal of equitably subjecting internet sellers to the burden of remittance requirements alongside brick-and-mortar competitors is clear from the language of its opinion;[204] however, the Court's approval of a small-seller safe harbor implicitly preserves that tax haven for a significant class of remote sellers.[205] As such, the goal of the Supreme Court is frustrated by the wholesale approval of South Dakota's statutory scheme.

If the Court intended to place internet sellers on the same footing as local sellers—and it is likely that it did[206]—the widespread adoption of a $100,000 economic threshold is a poor proxy for determining which sellers should be exempt from remitting sales tax. This Comment's recommendation improves the overall fairness of Oklahoma's statutory scheme, not by eliminating the safe harbor[207] but rather by burdening all

203. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094 (2018).

204. *Id.*

205. *See* Janet Attard, *How Much Do Small Businesses Really Earn?*, BUS. KNOW-HOW, https://www.businessknowhow.com/money/earn.htm (last updated Jan. 21, 2020) (noting that one survey indicated 16% of small businesses have under $10,000 in revenue, 35% of small businesses have between $10,000 and $100,000 in revenue, and 49% of small businesses have over $100,000 in revenue).

206. *Wayfair*, 138 S. Ct. 2095–96 ("It is unfair and unjust to those competitors, both local and out of State, who must remit the tax . . . .").

207. During the fall of 2019, the Kansas Department of Revenue issued an opinion stating that they would begin enforcing mandatory remittance laws on all remote vendors—in other words, without a small-seller safe harbor. Kan. Dep't of Revenue, Notice 19-04: Sales Tax Requirements for Retailers Doing Business in Kansas (Aug. 1, 2019), https://www.ksrevenue.org/taxnotices/notice19-04.pdf. Shortly after this ruling, the Kansas Attorney General issued a competing statement, communicating that the Kansas Department of Revenue's current plan was an unconstitutional exercise of powers granted by Wayfair. Taxation—Kansas Compensating Tax—Definitions; Substantial Nexus, Op. Kan. Att'y Gen. No. 2019-8, at 6-8 (Sept. 30, 2019), https://ag.ks.gov/docs/default-source/ag-opinions/2019/2019-008.pdf. According to Kansas's attorney general, once enforced against a seller deriving less than the $100,000 threshold set by Wayfair, Kansas would be violating the Commerce Clause. *Id.* at 4–6. This violation occurs because imposing collection requirements on a seller that did not have a substantial nexus with Kansas creates an undue burden on interstate commerce. *Id.* at 7. Since the Kansas Department of Revenue's statement, debate has swirled as to the constitutionality of proceeding without any safe

voluntary sellers or service providers to the same degree, keeping in mind the valid protectionist purpose that the safe harbor provision serves.

Currently, Oklahoma's law exempts a class of voluntary, profit-seeking sellers—remote, out-of-state vendors—from the remittance obligations with which their similarly-situated business competitors—sellers that have always maintained a physical presence in the state—are required to comply.[208] This discrepancy is most evident in small, single-individual businesses deriving a majority of their business from one state. If the average, single-member small business were to set up a brick-and-mortar location in Oklahoma City, it would be required to comply with all the remittance obligations that the Supreme Court considered so onerous to warrant creating a small-seller safe harbor regardless of its size. Meanwhile, if that same sized business were to set up a purely online presence for selling goods or services, that business would be free from the remittance obligations.[209]

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harbor but while maintaining evidence of the other *Wayfair* factors. *See* Gail Cole, *Kansas Cannot Require Remote Sellers to Collect Sales Tax. Or Can It?*, AVALARA (Oct. 1, 2019), https://www.avalara.com/us/en/blog/2019/10/kansas-cannot-require-remote-sellers-to-collect-sales-tax-or-can-it.html; Michael J. Bologna & Christopher Brown, *State of Wayfair: Kansas AG Calls Remote-Seller Plan Illegal*, BLOOMBERG TAX (Sept. 30, 2019, 4:41 PM), https://news.bloombergtax.com/daily-tax-report-state/state-of-wayfair-kansas-ag-calls-remote-seller-plan-illegal; Jared Walczak, *Kansas Invites Legal Challenge with Aggressive Remote Sales Tax Regime*, TAX FOUND. (Aug. 2, 2019), https://taxfoundation.org/kansas-remote-sales-tax-legal-challenge/. Whether or not Kansas can enforce a safe-harbor-free remittance law on remote sellers is to be seen and is beyond the scope of this paper; however, the pursuit of such a remittance plan may make a diminished economic nexus threshold a feasible compromise or a preferable alternative in the future.

208. Nina Godlewski, *Small Business Revenue Statistics (2020): Annual Sales and Earnings*, FUNDERA, https://www.fundera.com/resources/small-business-revenue-statistics (last updated Dec. 31, 2019).

209. The presented hypothetical utilizes data reported from the U.S. Census Bureau. Elaine Pofeldt, *Million-Dollar, One-Person Business Revolution Accelerates*, FORBES (June 27, 2019, 5:10 PM EDT), https://www.forbes.com/sites/elainepofeldt/2019/06/27/million-dollar-one-person-business-revolution-accelerates/#7f6574245269 (citing *All Sectors: Nonemployer Statistics for the U.S., States, Metropolitan Areas, and Counties*, U.S. CENSUS BUREAU (2017), https://data.census.gov/cedsci/table?q=&table=NS1700NONEMP&tid=NONEMP2017.NS1700NONEMP&d=ANN%20Nonemployer%20Statistics&lastDisplayedRow=303&hidePreview=true&g=). Therein, the statistics reveal that the average "nonemployer" small business receives approximately $47,000 in annual revenue. *Id.* Similarly, only 11% of these nonemployer small businesses make over $100,000. *See id.* As such, this average small business would be far below the "small-seller" safe harbor and free from any remittance obligations, while its local, brick-and-mortar competitor would be encumbered by those remittance obligations. *Id.*

Therefore, rather than arbitrarily entitling internet sellers to a lower cost of business through the current economic nexus threshold, Oklahoma should employ a lower threshold that protects unknowing or infrequent market participants while subjecting voluntary, active sellers to remittance obligations. While there is often some need to dictate thresholds in taxation,[210] legislators should draw this line tactfully, remaining cognizant of the underlying market that revenue threshold represents. A diminished $10,000 threshold would accomplish this goal by drawing a more accurate bright line of who should be required to remit taxes (voluntary, active market participants) and those who should not (accidental or infrequent market participants). Absent modification, the current system effectively maintains the *Quill* physical presence doctrine, which the Court clearly rejected, for a significant class of small sellers. Moreover, this decreased economic nexus would generate equality in taxation treatment and effectuate a neutral allocation of tax compliance burden, comporting with the normative tax policy considerations provided at the outset.[211]

Concededly, further investigation may be necessary to establish the ideal economic threshold for each jurisdiction.[212] Regardless of each state's ultimate conclusion about the ideal threshold, the purpose in determining this figure should be the same: to level the sales tax playing field. Internet-only vendors should not enjoy tax benefits over similarly situated brick-and-mortar vendors simply because they operate outside the taxing state. Conducting sales through a website should not suffice to warrant such differential treatment.

Even considering the added benefits of fairness, it is reasonable to question whether a reduced economic nexus threshold would be found unconstitutional if challenged.[213] Because a pure $10,000 threshold

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210. *See, e.g.*, 26 U.S.C. § 1(j) (Supp. 2018) (establishing income thresholds for the federal income tax).

211. *See* Stevens, *supra* note 179, at 174–75.

212. While a $10,000 threshold may appear to provide proper protection to inadvertent or infrequent market participants, individual research by a taxing jurisdiction may find otherwise.

213. Even if Oklahoma adopted the lowest economic threshold in America, the filing of a subsequent suit would not be guaranteed. *See* Tripp Baltz, *Post-'Wayfair' Lawsuits Suits Likely Coming, but Not Yet*, BLOOMBERG TAX (Feb. 7, 2019, 9:02 AM), https://news.bloombergtax.com/daily-tax-report-state/post-wayfair-lawsuits-suits-likely-coming-but-not-yet (noting that challenges to post-*Wayfair* litigation will not "come until a company can argue it has been 'substantially financially harmed'" and even then, challenging remote seller sales tax legislation "might not be worth it to a vendor . . . because sales tax is an indirect tax, and 'it's other people's money you're defending'").

enforced on all out-of-state vendors would be one of the lowest established thresholds in the country, online sellers may challenge the law on Commerce Clause grounds;[214] however, because of the Court failed to provide explicit guidelines regarding what it considers sufficient to form an economic nexus, it is difficult to determine definitively whether a lower-than-average threshold alone would be sufficient grounds to overturn a remittance obligation. But despite any conjectural difficulties that might accompany such a modification, nothing in the *Wayfair* holding expressly prohibits a diminished economic nexus figure.[215] So long as the state can persuasively argue that its law accords with the standard expressed in *Complete Auto* and complies with other factors listed the *Wayfair*—those that limit burdens on small remote sellers—a decreased economic nexus could withstand judicial scrutiny.[216] This is true for two reasons.

First, the Court did not explicate a strict standard for what revenue threshold constitutes a "substantial nexus."[217] The majority's analysis

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214. *See* 68 OKLA. STAT. § 1392(A) (Supp. 2019); 72 PA. STAT. AND CONS. STAT. ANN. § 7213.1(a) (West, Westlaw through 2020 Reg. Sess. Act 14), *suspended by* Act of June 28, 2019, § 33, 2019 Pa. Laws Act 13, https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2019&sessInd=0&act=13; *see also* Matthew D. Melinson et al., Wayfair *Decision: Paves Way for States to Gain Revenue from Online Sources*, PA. CPA J., Fall 2018, at 26, 27–28 ("Considering the court's favorable recognition of South Dakota's sales and transactions thresholds in *Wayfair*, it raises the question of whether or not Pennsylvania's $10,000 threshold is too low."); Leslie A. Pappas, *Pennsylvania's Online Sales Tax Guidance Creates Confusion*, BLOOMBERG TAX (Jan. 9, 2019, 4:41 PM), https://news.bloombergtax.com/daily-tax-report-state/pennsylvanias-online-sales-tax-guidance-creates-confusion (stating Pennsylvania's original statute's $10,000 economic threshold may be vulnerable to a legal challenge because its threshold figure "is lower than South Dakota's").

215. John A. Biek, *State Law and State Taxation Corner: The Supreme Court's* Wayfair *Decision Begs for Way More Guidance on What the "Substantial Nexus" Requirement of the Commerce Clause Means for Collection of State Use Taxes*, J. PASSTHROUGH ENTITIES, Sept.–Oct. 2018, at 31, 40 ("It is also possible, however, that states might be able to adopt an even lower sales threshold (or no threshold at all) . . . . Nothing in the *Wayfair* decision would appear to prohibit such aggressive applications of the new economic presence nexus standard for collection of use taxes.").

216. *See* David Gamage et al., *Taxing E-Commerce in the Post-*Wayfair *World*, 58 WASH. U. J.L. & POL'Y 71, 79 (2019) ("Some discussions of the *Wayfair* decision seem to suggest that states must conform to these features of South Dakota's statute. We think that reads far too much into the opinion. The Court certainly did not make these features into requirements. Instead, the *Wayfair* decision held that these features suffice to insulate states from judicial rebuke.") (footnote omitted).

217. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018) ("[S]uch a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of

merely examined whether South Dakota's mandatory collection and remittance requirement violated the Commerce Clause using the "substantial nexus" test expressed in *Complete Auto*.[218] This test requires that "the tax applies to an activity with a substantial nexus with the taxing State."[219] Applying this test, the Court blessed South Dakota's $100,000 in revenue or 200 individual transactions threshold as a proxy for finding a substantial nexus between the remote seller and the taxing state.[220] However, the Court did not conclusively establish that South Dakota's threshold is the lowest figure that satisfies the substantial nexus requirement.[221] Instead, the Court simply stated that a seller could not generate $100,000 in revenue "unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."[222]

Second, in addition to this ambiguous approval of South Dakota's threshold, the Court identified two other factors that decrease the burden on interstate commerce and thus would be important considerations in determining a law's constitutionality: (1) a prohibition on retroactive enforcement of historic sales tax, and (2) membership in the SSUTA.[223] Oklahoma can easily implement these two factors, even with a diminished economic nexus threshold, and can already show evidence that it is doing so.

Unlike other states, Oklahoma currently has not expressed any interest in pursuing retroactive enforcement of sales taxes owed and could easily codify this sentiment as other states have already done.[224] Additionally, like South Dakota, Oklahoma is already a formal member of the SSUTA.[225]

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carrying on business' in that jurisdiction.") (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)); *see also* Richard D. Pomp, *Wayfair and the Myth of Substantial Nexus*, J. ST. TAX'N, Fall 2018, at 21, 23 ("[*Wayfair*'s use of the substantial nexus test] has left the door open to potential litigation over when a privilege might be substantial enough for nexus. About the only thing we now know is that this substantial privilege was satisfied 'based on both the economic and virtual contacts' . . . .").

218. *Wayfair*, 138 S. Ct. at 2099 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

219. *Id.* (citing *Complete Auto*, 430 U.S. at 279).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 2099–2100.

224. *See, e.g.*, TENN. DEP'T OF REVENUE, NOTICE NO. 18-11: SALES TAX COLLECTION BY OUT-OF-STATE DEALERS (Aug. 2018), https://www.tn.gov/content/dam/tn/revenue/documents/notices/sales/sales18-11.pdf.

225. *State Information*, *supra* note 153.

This Agreement applies several strategies to limit the burden felt by sellers in the wake of *Wayfair*.[226]

In addition to abiding by the three highlighted factors from *Wayfair*, Oklahoma has also taken other proactive steps to limit the burden remote sellers will feel when attempting to remit sales taxes. Namely, in October 2018, Oklahoma announced the Oklahoma Taxpayer Access Point (OkTAP), an online portal where remote sellers can apply for a sales tax license as well as report and remit sales taxes.[227] This online access point provides a five-step reporting process that reduces the burden on remote sellers that make sales into Oklahoma.[228]

Because Oklahoma already complies with the latter two *Wayfair* factors, the constitutionality of a reduced economic nexus threshold would theoretically be contingent on a court finding that Oklahoma sufficiently established some small-seller safe harbor—assuming a challenge is filed at all. Abiding by the language of *Wayfair*, even a reduced $10,000 small-seller safe harbor could satisfy the Court's desire to "appl[y] a safe harbor to those who transact only limited business in" the taxing state.[229]

From the standard provided in *Wayfair*, it is clear the Court is concerned about burdening individual, unsophisticated, small sellers with remittance obligations. Therefore, the Court implicitly limited states to only placing remittance obligations on out-of-state vendors that meet the $100,000 economic nexus threshold.[230] While protecting these individual, small sellers is a valiant objective (and one that reinforces the goal of vertical equity wherein the burden of compliance with taxes is borne by the party best positioned to carry it),[231] it fails to recognize the realities of today's modern internet economy.

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226. *About Us*, supra note 155.

227. Press Release, Okla. Tax Comm'n, Coming Soon: A Simplified Remote Seller Registration (Oct. 12, 2018), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=257&article_id=46108.

228. *Id.*; *see also* Tripp Baltz, *State of Wayfair: Toss Transactions, States Suggest*, BLOOMBERG TAX (Oct. 17, 2018, 4:13 PM), https://news.bloombergtax.com/daily-tax-report-state/state-of-wayfair-toss-transactions-states-suggest (noting that this website is not meant to compete with the Streamlined Sales and Use Tax reporting portal, but rather is meant to provide an alternative for remote sellers who only make sales into Oklahoma and not all SSUTA states).

229. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

230. *See id.* at 2100 (applauding South Dakota's statutory scheme's ability "to reduce administrative and compliance costs").

231. Thomas D. Griffith, *Should "Tax Norms" Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115, 1143–59.

When the Supreme Court contemplates the fairness of the economic nexus requirement, it is primarily concerned with the e-commerce market. In this market, vendors of all sizes and levels of sophistication use marketplace facilitators to make their sales, rather than directly facilitating retail sales through their own independent platforms.[232] This market reality depresses the weight of the Court's concern. While there are, without a doubt, more unsophisticated small sellers creating businesses to sell products or provide services online than there have ever been before,[233] these generally unsophisticated entities are not facilitating sales through their own websites that would require them to remit sales tax on their own. Instead, they are using the platforms of powerful marketplace facilitators, such as Amazon, Etsy, Facebook, and eBay, which generally remit sales tax on behalf of sellers that use their platforms.[234]

Considering these market realities, the recommended policy change alleviates the Court's concerns about the burden of compliance placed onto individual remote sellers. By enacting the first prong of this recommended modification, which requires sophisticated marketplace facilitators that meet the economic nexus threshold to remit sales tax for sales made through their platforms, many concerns over the burdens placed on individual sellers by the second prong, which is a reduced economic threshold for all out-of-state sellers, would be made moot. This is because small, unsophisticated sellers, who make sales *through* sophisticated market facilitators, would not be required to take any additional steps to remit sales tax for sales—the facilitator would bear that burden.[235] Moreover, the sales made through remitting marketplace facilitators would not count toward the remote sellers' gross receipts for the purpose of the economic nexus determination, further protecting inadvertent or infrequent sellers.[236]

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232. Emily Dayton, *Amazon Statistics You Should Know: Opportunities to Make the Most of America's Top Online Marketplace*, BIGCOMMERCE, https://www.bigcommerce.com/blog/amazon-statistics/ (last visited Apr. 22, 2020); *The Top 10 Marketplaces for Retailers in 2020*, ASD MARKETWEEK (Mar. 24, 2020), https://www.asdonline.com/blog/amazon-e-commerce/top-10-marketplaces-for-online-sellers.

233. *See* Pofeldt, *supra* note 209 (reporting that the number of nonemployer firms or "those with no paid employees but the owners" was up 38% in 2017 from the number in 2011).

234. *See* Dayton, *supra* note 232.

235. *See* 68 OKLA. STAT. § 1392(G)(2) (Supp. 2019) ("Sales in this state by a remote seller made through a marketplace forum or a referrer's platform where the tax is collected and remitted by the marketplace facilitator or referrer shall not be included in determining whether the remote seller has met the threshold amount provided in this subsection.").

236. *Id.*

Overall, Oklahoma should follow other states' leads by updating its approach to collecting out-of-state vendor sales tax. Because a majority of active online service providers and retailers will sell more than $10,000 worth of products or services each year, the recommended threshold provides a sturdy tax base and allocates the burden of complying with sales tax on the shoulders of all remote vendors equally. Under this updated nexus, the remote sellers savvy enough to facilitate their own retail sales will be placed on the same footing as their brick-and-mortar competitors while those less-sophisticated small sellers making sales through marketplace facilitators will not. Additionally, a $10,000 threshold figure necessarily protects small sellers who either (1) inadvertently enter the retail space in Oklahoma or (2) are truly de minimis sellers in a jurisdiction. While the Supreme Court approved South Dakota's "small"-seller safe harbor of $100,000, a lower threshold can simultaneously accomplish the same objectives, simplify the tax process for medium-sized sellers, and accomplish the fundamental equitable goals of tax policy.

V. Conclusion

There is no question that the Supreme Court's decision in *Wayfair* has created a taxing task for state legislatures to address. By overturning precedent that stood for over fifty years,[237] the Court eliminated a tax haven online sellers had enjoyed for decades.[238] Additionally, the Court eliminated the need to create ineffective workarounds to increase compliance with state use tax systems by allowing states to pursue direct collection and remittance from high-revenue remote sellers.[239] Although this decision recognizes states' rights to pursue sellers with no physical presence, the Supreme Court's opinion leaves room for interpretation as to the scope of the state's power—specifically, which sellers states may force to collect sales tax.[240]

In Oklahoma, *Wayfair* spurred the creation of a new out-of-state vendor sales tax regime.[241] With fractured pieces of both a pre-*Wayfair* and post-*Wayfair* world, the statutory scheme retains some of the inefficient remnants of a world where states could not obligate marketplace facilitators

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237. *See* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967).

238. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096–97 (2018).

239. Gaylord & Haile, *supra* note 199, at 2022–25.

240. Biek, *supra* note 215, at 40.

241. 2018 Okla. Sess. Laws ch. 414, § 1 (S.B. 513) (effective Nov. 1, 2019).

and remote sellers to remit sales tax. Moreover, the portions of Oklahoma's statute adopting the new powers that *Wayfair* provides exist as a nearly verbatim adoption of the South Dakota model; however, as the earliest iteration of this statutory scheme shows, even the posterchild of remote seller sales tax enforcement generates fundamental questions of fairness in how it regulates certain classes of small sellers. While the Supreme Court's first bold step sent state legislatures scrambling to enact their own versions of South Dakota's law, much work remains to be done in order to find the proper revenue figure and answer the economic threshold question.

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