

ISSUE BRIEF **06.26.18**

How Did the Supreme Court Change Online Sales Taxation?

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Last week, the U.S. Supreme Court ruled that states can impose sales taxes on out-of-state retailers, even if they do not have a physical presence in the state. The decision ends months of suspense and attention on the future of e-commerce. In July 2017, a House subcommittee heard testimony on the right of states to collect sales taxes from out-of-state merchants that do not have a physical presence in the destination state.¹ Several states, eager to defend their right to tax remote sellers, had passed “notice and reporting” laws, which require remote sellers to either collect sales taxes or submit an annual report of each consumer’s purchases to the state government.² Some states have targeted marketplace providers such as Amazon and eBay, which previously have not collected all sales taxes from third-party sellers.³ Not absent from the e-commerce debate is President Donald Trump, who in March 2018 posted a tweet accusing Amazon of treating the U.S. Postal Service as its “delivery boy” and of paying little taxes to state and local governments.⁴ This issue brief reviews the implications of the U.S. Supreme Court ruling and the legislative developments in online sales taxation over the last 12 months.

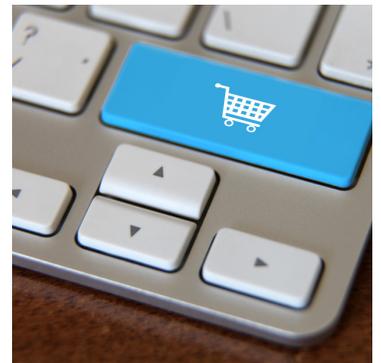
RECAP: UNDERSTANDING THE KEY ISSUES AT STAKE

Prior to the ruling, states could not impose a sales tax collection obligation on remote retailers that do not have a physical

presence in the state;⁵ this is the result of a 1992 Supreme Court ruling, *Quill Corp. v. North Dakota*.⁶ In 2017, South Dakota’s Supreme Court struck down the state’s digital sales tax law (S.B. 106); South Dakota then brought the case to the U.S. Supreme Court, in hopes of overturning *Quill*.

Although earlier estimates varied,⁷ a recent U.S. Government Accountability Office (GAO) report indicated that based on current law, state and local governments were already able to collect most remote sales tax revenues that would be owed.⁸ Most large remote sellers are either established retailers that already have physical stores in many states, or have entered into agreements with state governments to voluntarily collect sales taxes regardless of physical presence. However, the study showed that if states could require out-of-state merchants without a physical presence to collect sales taxes, states would be able to expand their collectible sales tax revenue by \$8 to \$13 billion in aggregate for 2017.⁹ For states that do not have personal income taxes and rely heavily on sales taxes, such as Texas, the revenue gain is close to the \$1 billion range.¹⁰

The report further provided segregated estimates showing that collectible rates and associated revenue gains vary significantly by different types of sellers. For internet retailers, the current collectible tax revenue can reach 86 percent, indicating an additional 14 percent increase in collectible revenue with the reversal of *Quill*. The estimates for marketplace sellers show a



In a split 5–4 decision, the U.S. Supreme Court overturned *Quill* and ruled that states can charge out-of-state retailers sales tax even if they do not have a physical presence in the state.

completely opposite picture: only 14 percent of revenue was collectible under *Quill*; overturning the ruling likely will generate large potential revenue gains. In fact, half of the potentially collectible revenue gains (\$4 to \$6 billion) would come from being able to collect from marketplace sellers.

Not surprisingly, both proponents and opponents of *Quill* drew support from the report: *Quill* advocates have said that since most sales tax revenues are already in the tax net, the issue is more about collection. Because large retailers are already collecting the taxes, changing the current law means compliance burdens would mostly fall on small- and medium-sized enterprises (SMEs). *Quill* challengers interpreted the results differently—i.e., based on the perspective of SMEs—arguing that the lost revenue jeopardizes jobs at SMEs in local communities. They also pointed out that although remote sellers benefit from roads and local infrastructure to reach their customers, they fail to pay sales taxes that fund such state and local government services.

A LONG-AWAITED DIRECT CHALLENGE

The U.S. Supreme Court agreed to hear *South Dakota v. Wayfair, Inc., et al.*, in January. Prior to the mid-April oral argument, various stakeholders collectively filed 40 *amici curiae* (friend of the court) briefs, offering their views, expertise, and insights on the issue.

Arguments to Overturn *Quill*

The argument most frequently cited by *Quill* opponents was the rapid advancement of internet commerce and the significant change of the business environment. They argued that the physical presence rule is outdated,¹¹ especially considering the fact that the *Quill* ruling was based not on its own constitutional merit, but on the principle of *stare decisis*¹² that governs another 1967 Supreme Court ruling involving mail order retailers.¹³ The *Bellas Hess* case was ruled 50 years ago, before the invention of the internet. As such, U.S. Solicitor General Noel Francisco recommended that the Supreme Court limit *Quill's* application

to only traditional mail order retailers whose single connection to a state is by mail or common carrier.¹⁴

Another viewpoint *Quill* challengers expressed was that local brick-and-mortar businesses are treated unfairly because of the inconsistent tax collection standards between local retailers and remote sellers. They also pointed to states' increasing fiscal deficits, which have been worsened by the inability to collect taxes from remote sellers.

The supporters of taxing remote sellers generally disagreed that compliance costs are prohibitively high, pointing to the extensive use of computer technology by merchants to reduce the burdens and the longstanding simplification effort by states to expand the Streamlined Sales and Use Tax Agreement (SSUTA).¹⁵ Under the agreement, collection and administration laws have been simplified and harmonized across member states. Tax bases, administrative requirements, exemptions, and tax rates are standardized; states also function as the single central authority for all sub-state level taxes.

A viewpoint related to the compliance cost issue deferred to another Supreme Court ruling, which indicates that when a state regulates a business that engages in interstate commerce, incidental burdens may be unavoidable; *Quill* opponents argued that South Dakota's law imposing sales and use tax collection requirements on remote sellers constitutes such an incidental burden.¹⁶ Stated differently, the fact that a business is conducting interstate commerce does not relieve it from tax collection duties, which add to the cost of doing business.¹⁷ Like growing pains, as a business successfully expands, its compliance costs increase. The issue is whether the obligations are excessively burdensome relative to the benefits, and whether the burdens are substantially different across states. *Quill* opponents have said that the benefits outweigh the costs, and that the uneven compliance burden across states can be resolved by replacing the physical presence rule with a balancing test: one state's high compliance burden could be subject to a higher threshold than another state's low burden system.¹⁸

The court concurred with *Quill* opponents' arguments that the physical presence rule gave remote sellers an advantage over brick-and-mortar businesses and deviated from the economic reality of the current online sales environment.

Finally, they contended that the end of *Quill* would not necessarily harm interstate commerce because safeguards against detrimental effects such as reduced interstate business activities and overly burdensome compliance procedures are still in place. For example, Congress still possesses constitutional rights to regulate interstate commerce; it could enact legislation to protect interstate sellers.¹⁹ In addition, the lower courts can certainly act to prevent states from imposing undue burdens on interstate sellers.²⁰

Arguments to Uphold *Quill*

The arguments in support of *Quill* largely focused on compliance costs, thresholds, and retroactivity.

Quill advocates argued that state governments have generally overstated the effectiveness of sales and use tax compliance software, and that compliance costs remain high for SMEs.²¹ A brief pointed to the GAO study's conclusion that such businesses often face the largest compliance cost barriers if states impose a remote sales tax collection burden, and some merchants may simply decide not to expand.²² The declined business activities would eventually lead to lower tax revenue. Physical presence, on the other hand, represents a bright line rule and provides certainty and confidence to small businesses regarding their sales and use tax obligations.²³

The GAO study also stated that software-related expenses include initial set-up costs, annual licensing fees, administrative costs, and options for premium services such as preparing or automatically filing sales tax returns. The costs associated with initial installation and on-going administration could be substantially more than licensing itself. In addition to software-related costs, businesses could experience additional audit and assessment costs due to increased exposure to more tax jurisdictions.

Furthermore, because there are only 24 SSUTA members, the agreement really has not gained nationwide recognition. Certain large states in terms of tax revenue and population—such as California, Florida,

Illinois, New York, and Texas—are not members of the SSUTA. Thus, *Quill* supporters contended that the current sales and use tax compliance procedure is still complicated and non-uniform. There is still a significant need to simplify the process and reduce the compliance burden for companies.

Some *Quill* proponents pointed out that although South Dakota's statute applies prospectively, a complete overturn of *Quill* may mean that some states could retroactively impose the sales and use tax collection obligation on remote sellers.²⁴ Eight states have enacted economic presence rules that contradict *Quill*'s physical presence requirement, and these states are seeking to enforce their rules to various degrees. Another 20 states have statutes, regulations, or policies that require retailers to collect sales and use taxes to the extent permitted by the Constitution. Overturning *Quill* without giving specific guidance about retroactivity may prompt these states to start retroactive assessment, which could potentially lead to double taxation.

Finally, some proponents of *Quill* raised concerns that the potential threshold standard for triggering sales tax collection could be too low. South Dakota's law applies to remote merchants who have 200 transactions or more than \$100,000 in in-state sales. Some briefs argued that Congress is in a better position than courts to make economic judgments on threshold issues.²⁵ Some also pointed out that validating South Dakota's threshold was not within the scope of the question presented for the Supreme Court review.

CONGRESSIONAL VIEWPOINTS ON *QUILL*

On the legislative side, a congressional hearing for the No Regulation Without Representation Act, which sought to prevent states from taxing sellers that lack a physical presence, was held in July 2017.²⁶ This proposal established thresholds for *de minimis* physical presence, which closely resembles *Quill*. Although the hearing invited both supporters and opponents of *Quill* to

States are expected to remove the notice and reporting requirements, a welcome development on efficiency and privacy protection grounds. The marketplace provider rules are also expected to increase in the coming months.

The court stated that several features of the South Dakota rules, including the revenue and number of transactions thresholds, lack of retroactivity, and reduced administrative and compliance burdens, are desirable.

testify, it ended with an impasse and the proposal did not advance any further.

Three groups of senators and representatives joined the waves of *amici curiae* briefs and wrote to the Supreme Court; two groups requested that the court preserve *Quill*, while one group advocated for overturning it. However, despite different opinions on *Quill*'s future, all three groups argued that Congress has the authority and should be the party to resolve the issue.

The authors of the first brief, filed in early March, stated that the South Dakota law establishes that merchants have to have a significant connection to the state ("substantial nexus," in this case referring to the number of transactions and sales amounts requirements) in order to meet collection obligations.²⁷ They argued that *Quill* is inequitable and arbitrary because it favors a particular way of conducting business. Such preference, in turn, compels sellers to plan around and avoid establishing a physical presence, therefore forcing state tax agencies to expend their resources on either demonstrating that sellers have a physical presence or enacting notice and reporting laws, a second-best approach that may or may not lead to collection. The senators suggested that overturning *Quill* will not leave remote sellers with excessive burdens, generally for the reasons discussed above.

Finally, the brief stated that Congress is ready to act when needed, and that its inaction so far had been due to the fact that the Founding Fathers deliberately organized the government to deter hasty actions by Congress.

In April, another group of senators filed a brief with the Supreme Court and asked it to uphold *Quill*.²⁸ They reiterated the notion that the Constitution intentionally structured the legislative branch so that it would not move too quickly, and Congress is merely meeting the expectation of the Constitution in taking more time to resolve the issue of taxing remote sales. The senators opposed the overturn of *Quill*, as such action would ruin ongoing congressional negotiation to find workable solutions; adhering to *Quill*, they argued, would allow Congress time to exercise its expertise and authority to regulate interstate commerce.

The last brief, submitted by a group of senators and representatives, similarly argued that Congress is the best institution to address the issue.²⁹ Their concern was that if *Quill* were overturned, states would no longer have any incentive to simplify the sales and use tax collection system for interstate sales.

STATE PERSPECTIVES

Some state representatives expressed disagreement about Congress' leadership role in addressing the issue and its need for more time to reach a conclusion. Bills have been introduced in Congress in almost every legislative session since 2001, but there has been no substantial progress on online sales taxation.³⁰ South Dakota therefore argued that Congress lacks the incentive to take quick actions under the status quo. The public would view Congress allowing states to collect sales taxes from remote sellers as authorizing new or greater tax collections, even though the federal government itself would not get to use the revenue.³¹ As such, the state representatives argued, the Supreme Court was the best party to resolve the deadlock.

SUPREME COURT DECISION³²

In a split 5-4 decision, the Supreme Court overruled both *Quill* and *Bellas Hess*, using strong words to indicate that the physical presence rule is unsound and incorrect. It concurred with the petitioner's main arguments that the physical presence rule gave remote sellers an advantage over brick-and-mortar businesses and deviated from the economic reality of the current online sales environment. The ruling described *Quill* as a court-created tax shelter that produces an incentive for businesses to avoid establishing a physical presence in multiple states, which prevents business expansions that would otherwise be efficient.

The opinion of the court, unsurprisingly delivered by Justice Anthony Kennedy, further criticized the physical presence rule as an extraordinary imposition on states'

authority to collect taxes and perform public services. This rule essentially helps remote sellers' customers evade a lawful tax, which unfairly shifts the tax burden to consumers who buy from competitors with a physical presence in the state.

The court opinion considered the issue of *stare decisis* and concluded that states' valid exercise of their taxing power outweighs the value of protecting precedence. Because the physical presence rule was the result of an inappropriate ruling by the court, it is the proper entity to correct it. However, Congress maintains the authority to regulate interstate commerce; when Congress exercises its power, the legislation can create new rules that govern interstate commerce.

With the overturn of *Quill* and *Bellas Hess*, the court reverted back to the basic "substantial nexus" test, which is established "when the taxpayer avails itself of the substantial privilege of carrying on business."³³ Because the respondents clearly have economic and virtual contacts with the state, a nexus is established.

There are several issues the court acknowledged but did not formally address, including compliance costs, retroactivity, and complexity. The opinion states that compliance costs are largely unrelated to physical presence and therefore, the physical presence rule is a poor proxy for measuring compliance costs. It believes the use of software will alleviate most of the burdens, and Congress may also pass legislation to address the compliance cost-related problems. Finally, although the possibility that states may seek to retroactively apply the court's ruling and the complexity of the sales tax system are critical issues that could be harmful to interstate commerce, they were not within the scope of issues presented to the court.

The dissenting opinion, drafted by Chief Justice John Roberts, reiterated several key concerns mentioned by the respondents to the South Dakota case. It emphasized the value of the *stare decisis* doctrine and said the court should not overturn its precedents lightly. This opinion agreed with the three *amici curiae* briefs filed by the congressional members, arguing that Congress is the better party to resolve

the issue. However, although the court's decision did not preclude Congress from continuing to pursue a workable legislative solution, it recognized that the ruling may have interrupted Congress's progress made to date. The dissenting opinion also cited the statistics from the GAO study, but interpreted its findings differently, indicating that the erosion of the sales tax base created by *Quill* is not significant and is receding with time.

Finally, contrary to the court opinion, the dissenting opinion argued that the development of compliance software is still in its infancy instead of at a mature stage. The compliance costs for SMEs could remain high, and the opinion left open an invitation to Congress to address issues such as retroactivity and compliance costs.

SOME ISSUES REMAIN

Now that *Quill* gets a "complete burial it justly deserves"³⁴ from the Supreme Court ruling, some developments could be expected, whereas other issues remain relevant for future discussion.

After the Tenth Circuit Court of Appeals gave the Colorado notice and reporting statute its blessing in 2016, nine other states adopted similar rules.³⁵ With *Quill's* overturn, these laws became obsolete. It is therefore expected that states will rewrite the laws to remove the notice and reporting requirements to alleviate burdens from remote merchants. On efficiency and privacy grounds, this is a welcome development. Because the intent of the laws was to make the compliance process deliberately onerous so that out-of-state merchants would collect the tax rather than complying with the notice and reporting requirements, this approach is an inefficient alternative and may not lead to revenue collection. Additionally, if state revenue agencies decide to collect use taxes based on the reports, there may be difficulties matching sales data with taxpayer information because there is currently no specific taxpayer identification such as a Social Security number.³⁶ Some observers have also raised privacy concerns, and courts have previously struck

The dissenting opinion argued that Congress is the better party to resolve the e-commerce taxation issue, and that the development of software is not mature enough to substantially reduce compliance costs.

The next key development is whether Congress will soon act to address critical issues such as reducing compliance costs and simplifying the tax collection process, which will promote interstate commerce and advance economic development.

down certain overly excessive disclosure requirements on privacy grounds.³⁷

With the Supreme Court's blessing, many states are expected to enact their own legislation, incorporating key elements or the entirety of the South Dakota law. The court did signal that several features of the South Dakota rules, including the revenue and number of transactions thresholds, lack of retroactivity, and reduced administrative and compliance burdens, are desirable because they did not discriminate against or impose undue burdens on interstate commerce. Although it is not immediately clear whether all existing types of digital nexuses are considered equivalent to South Dakota's economic nexus, the court did comment that the "economic and virtual contacts" in the underlying case is clearly sufficient.

On the other hand, the level of compliance costs, and to what extent current sales and use collection practices are streamlined, remain crucial and unsolved issues. Both sides of the South Dakota case insisted that their arguments regarding compliance costs, which range from extremely low to extremely high, were accurate. Although the court decided to side with South Dakota, the sales and use tax compliance system can be simpler, which would in turn enhance interstate commerce. The best way to accomplish this, the Supreme Court indicated, is to bring in Congress as the facilitator.

The second remaining issue is the marketplace provider field. Over the last year, through several news articles as well as tweets by Trump, it became apparent that although Amazon has been collecting state sales taxes nationwide, it does not collect all sales taxes on behalf of third-party sellers when it simply functions as a "marketplace provider" or "facilitator." While Amazon has become the dominant e-commerce merchant, other platform providers such as eBay and Etsy are subject to similar considerations. Several states, including Minnesota, Pennsylvania, Rhode Island, and Washington, passed laws requiring marketplace providers to collect sales taxes on the sellers' behalf, whereas California's state revenue department goes directly after marketplace sellers for unpaid

taxes. The marketplace provider issue is not within the scope of the Supreme Court case, but it is generally anticipated that marketplace provider legislation will increase substantially in the coming months.

CONCLUSION

The Supreme Court decision is certainly a necessary and welcome milestone. Prior to the ruling, states had been developing creative patchworks to bypass or redefine physical presence, which were not necessarily in the best interest of interstate commerce. The ruling puts these workarounds to bed, and states can now focus on promoting interstate commerce. The immediate and favorable development would be the elimination of state notice and reporting requirements, which had issues on efficiency and privacy grounds. States are expected to enact their own laws requiring remote sellers to collect sales taxes, taking into consideration features of the South Dakota law. Additionally, although not directly addressed by the court, states may be more confident in pursuing legislation targeting marketplace providers.

The most important future development lies in the issues not addressed in the court ruling, regarding compliance costs and simplification of the sales and use tax collection process. Congressional action to address these areas remains crucial—all parties agree that Congress has the constitutional authority to regulate interstate commerce. A more streamlined, simplified, and uniform compliance process would further promote interstate commerce and advance economic development.

ENDNOTES

1. *No Regulation Without Representation Act*: Hearing on H.R. 2887, July 25, 2017, before the *House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law*, <http://bit.ly/2K2VLDR>.

2. These states include Georgia, Pennsylvania, Rhode Island, Vermont, and Washington.

3. These states include Minnesota, Pennsylvania, Rhode Island, and Washington.

4. Donald Trump, “Unlike others, they pay little or no taxes to state & local governments, use our Postal System as their Delivery Boy, and are putting many thousands of retailers out of business!” Twitter, March 29, 2018, <https://twitter.com/realdonaldtrump/status/979326715272065024>.

5. For background information, see Joyce Beebe, *E-Commerce: Recent Developments in State Taxation of Online Sales*, Issue brief no. 07.13.17, Rice University’s Baker Institute for Public Policy, Houston, Texas, <http://bit.ly/2yyQvSS>.

6. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

7. For example, a publication led by National Conference of State Legislatures indicated that such revenue loss amounts to \$25.9 billion in 2015. See “Uncollected Sales and Use Tax from Remote Sales: Revised Figures (March 2017),” Washington, D.C.: National Conference of State Legislatures; New York: International Council of Shopping Centers, <http://bit.ly/2tCi9t>. An update of this estimate for 2018 increases the potential revenue loss to \$33.9 billion. See (1) Brief of petitioner South Dakota, February 26, 2018, <http://bit.ly/2KhEQwo>, and (2) International Council of Shopping Centers: Case for Fairness, <http://bit.ly/2Kev910>.

8. United States Government Accountability Office, “Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (GAO-18-114),” November 2017. This brief limits the discussion to business-to-consumer (B2C) sales, not including business-to-business (B2B) sales. The potential revenue gains are very limited on the B2B side because compliance costs have been high.

9. The report’s methodology focuses on “collectible tax revenue,” which is what states have the authority to collect. The analysis did not examine actual compliance rates.

10. See GAO report, Appendix II. The low estimate for Texas’ potential revenue gains in 2017 is \$763 million and the high estimate is \$1.2 billion.

11. Brief amici curiae of Colorado and 40 other states, et al., March 5, 2018, <http://bit.ly/2McyjBcP>.

12. *Stare decisis*, or precedential value, means that weight should be given to previous court opinions.

13. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

14. Brief amici curiae of United States, March 5, 2018, <http://bit.ly/2MgAtiz>.

15. Brief amici curiae of Streamlined Sales Tax Governing Board, Inc., March 5, 2018, <http://bit.ly/2tjdAns>.

16. Brief amici curiae of United States, March 5, 2018, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Similar arguments are also made in (1) Brief amici curiae of Four United States Senators, March 5, 2018, <http://bit.ly/2MRilYv>, and (2) Brief amici curiae of Tax Foundation, March 5, 2018, <http://bit.ly/2MfIYKH>.

17. Brief amici curiae of Colorado and 40 other states, et al., March 5, 2018.

18. Ryan Prete, “Trump’s Solicitor General to High Court: Undo Digital Tax Law,” *Bloomberg BNA*, March 7, 2018, <http://bit.ly/2lgAYa8>.

19. Brief amici curiae of United States, March 5, 2018.

20. Brief amici curiae of Four United States Senators, March 5, 2018.

21. Brief of respondents Wayfair, Inc. et al., March 28, 2018, <http://bit.ly/2yv58GS>.

22. Brief amici curiae of State of Montana, April 4, 2018, <http://bit.ly/2Mht6rc>.

23. Brief amici curiae of State of New Hampshire, April 4, 2018, <http://bit.ly/2yyJfq3>.

24. For examples, see (1) Brief of respondents Wayfair, Inc. et al., March 28, 2018, (2) Brief amici curiae of State of Montana, April 4, 2018, and (3) Brief amici curiae of Tax Executives Institute, Inc., April 4, 2018, <http://bit.ly/2K93kF2>.

25. See (1) Brief of respondents Wayfair, Inc. et al., March 28, 2018, and (2) Brief amici curiae of State of Montana, April 4, 2018.

26. *No Regulation Without Representation Act*: Hearing on H.R. 2887, July 25, 2017, before the *House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law*.

27. Brief amici curiae of Four United States Senators, Addendum, March 5, 2018.
28. Brief amici curiae of United States Senators Ted Cruz, Steve Daines, and Mike Lee, April 4, 2018, <http://bit.ly/2Kazy2w>.
29. Brief amici curiae of House Judiciary Committee Chairman Bob Goodlatte, et al., April 4, 2018, <http://bit.ly/2Mdk6Do>.
30. Brief amici curiae of Four United States Senators, March 5, 2018. See Addendum for a list of bills introduced.
31. Brief of petitioner South Dakota, February 26, 2018.
32. *South Dakota v. Wayfair, Inc., et al*, 585 U.S. (2018). See <http://bit.ly/2KObQdb>.
33. *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1977).
34. Brief amici curiae of Colorado and 40 other states, et al., March 5, 2018.
35. Brief amici curiae of Tax Foundation, March 5, 2018.
36. United States GAO, "Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (GAO-18-114)," November 2017.
37. *Amazon.com LLC v Lay*, 758 F. Supp. 2d 1154 (see also Brief amici curiae of Tax Foundation, March 5, 2018).

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