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## IS THE *WAYFAIR* RULING WAY-UN-FAIR FOR SMALL BUSINESSES?

Kimberly Lechowicz\*

### INTRODUCTION

Imagine: you own an online start-up boutique in Kansas City, Missouri. You are a local entrepreneur trying to spark business in the city for your company which sells personalized tote bags, coffee mugs, and more. Right now, the business is solely online because it is just a hobby you like to dabble in on the weekends to feed your creative side. It is not your main source of income, so you do not invest a lot of time in the accounting side of the business. When tax season comes around, you consult TurboTax to help you prepare your return. Unfortunately for you, a customer on the Kansas side of the city purchases fifteen tote bags totaling a \$200 income, which translates to approximately \$100 in profit. That \$200 of income you made now requires you to collect and remit sales tax for the state of Kansas, regardless of your modest profit. Even if you sold just one tote bag to just one customer in Kansas, the state now has the Supreme Court decision from *South Dakota v. Wayfair* as justification to collect sales taxes from every single out-of-state and online business.<sup>1</sup> This additional tax burden was something you never had to worry about pre-*Wayfair*, but it now requires you to stay up to date with each state you sell products to and each of their respective tax laws. Your fun hobby has now turned into a tax nightmare in the blink of an eye.

Small businesses need to be given guidance from Congress and state governments to navigate the complex and monumental *Wayfair* decision. Without immediate action, the future of small businesses in the economy could be considerably affected by the impact of individual state taxation. This Comment explores the inadvertent and severe consequences the *Wayfair* decision currently poses to small businesses. Part I analyzes the history prior to the United States Supreme Court decision in *Wayfair* to discover what led to the drastic change. Part II introduces the effects on small businesses and the issues that have followed. Part III scrutinizes the Kansas remote tax, its detrimental effects on small businesses, and questions the constitutionality of the tax. Finally, Part IV proposes potential steps Congress and state governments can take in order to lend a helping hand to small businesses.

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<sup>1</sup> Michael Bowen, *After Wayfair, Is Nexus Needed for Remote Tax Obligations?*, LAW360 (Aug. 29, 2019), <https://www.law360.com/articles/1193641>.

## I. THE HISTORY BEHIND THE *WAYFAIR* DECISION

Over the past few decades, the world has transformed its evaluation of company riches from prime brick and mortar, to clicks-per-minute. Online shopping has allowed companies like Amazon to explode the internet and become the one-stop-shop for any customer. While the amount of money consumers are spending online has been constantly increasing for decades, the ability for states to tax those companies has not.<sup>2</sup> In 2001, e-commerce sales accounted for only one percent of total sales.<sup>3</sup> By the end of 2018, it accounted for 14.4 percent of total sales.<sup>4</sup> Even with the sizeable increase, various Supreme Court decisions prohibited states from taxing companies unless they had a substantial nexus through physical presence in the state.<sup>5</sup> This disconnect between online retail purchases and state taxing powers has left states struggling to find other ways to raise funds, and ultimately there was still a significant amount of revenue lost each year.<sup>6</sup>

Implementing legislation that requires companies to collect sales and use tax is just one route a state can take to earn revenue on sales generated within the state.<sup>7</sup> Although commonly lumped together as one tax, sales tax and use tax do have significant differences.<sup>8</sup> A sales tax is imposed on a transaction taking place within the state from which the tax will be collected,<sup>9</sup> whereas a use tax applies to goods purchased outside of a state but that are subsequently transferred into the state.<sup>10</sup> The two taxes are designed to complement each other and work together to equally tax all purchases, whether the goods are acquired in or out of the state.<sup>11</sup> The use tax is intended to minimize tax evasion of the sales tax by consumers traveling out of state to make purchases to escape paying sales tax.<sup>12</sup> Thus, property on which sales tax has already been paid is not generally subject to a use tax, therefore avoiding double taxation.<sup>13</sup> An out-of-state seller's liability to collect and remit sales tax was minimal due to the physical presence needed to invoke

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<sup>2</sup> Nick Surma, Note, *Overturning Quill: Why Wayfair Was Correctly Decided and What Lies Ahead*, 93 N.D. L. REV. 521, 522-23 (2018).

<sup>3</sup> *United States Department of Commerce News*, U.S. CENSUS BUREAU (Feb. 20, 2002, 10:00 AM), <https://www2.census.gov/retail/releases/historical/ecommm/01q4.pdf>.

<sup>4</sup> Jessica Young, *US ecommerce sales grow 14.9% in 2019*, DIGITAL COMMERCE 360 (Feb. 19, 2020), <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>.

<sup>5</sup> See Nat'l Bellas Hess v. Dep't of Revenue, 87 S. Ct. 1389, 1392 (1967); Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1907 (1992).

<sup>6</sup> Young, *supra* note 4.

<sup>7</sup> See *State and Local Revenues*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues>.

<sup>8</sup> 67B Am. Jur. 2d, *Sales and Use Taxes* § 1 (2020).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 67B Am. Jur. 2d *Sales and Use Taxes* § 135 (2020).

<sup>13</sup> *Id.*

“substantial nexus.”<sup>14</sup> Companies must have more than just communications with customers in that state to claim substantial nexus.<sup>15</sup> There must be a physical presence, such as an employee, goods, or an office, in order to collect sales tax.<sup>16</sup> Due to the states’ lack of ability to regulate the collection of sales tax, the states placed the burden on the customers.<sup>17</sup> States like Connecticut would make taxpayers sift through boxes of old receipts to find all their out-of-state purchases that did not already collect sales tax.<sup>18</sup> Despite the effort, only 1.6 percent of people would report and actually pay that tax, preventing the states from collecting millions of dollars of revenue.<sup>19</sup> Even though such a significant percentage of people did not pay their sales tax, the cost for the state to take legal action would outweigh the potential tax collection.<sup>20</sup> This left the states immobilized and in desperate need of a sales tax reform.<sup>21</sup>

Reform came when *Wayfair* completely tore down the “physical” wall that was stopping states from obtaining more taxing power and opened the door to millions of dollars in sales on which to collect sale taxes.<sup>22</sup> Companies will now have a difficult time claiming no substantial nexus in a state where they sold millions of dollars to residents solely online.<sup>23</sup> *Wayfair* eliminated the outdated belief that in order for a company to have substantial nexus, there must be a physical connection in the state.<sup>24</sup> With the ability to connect customers from New York to a retailer in California just by the click of a button, the Supreme Court realized that a company can easily obtain substantial nexus even without a physical presence.<sup>25</sup>

The *Wayfair* decision radically overturned the sales and use tax system that was set in stone for decades before.<sup>26</sup> The buildup to this monumental change came from years of development in the technology and retail industries allowing consumers to purchase items completely online from out-of-state stores and the extensive interconnected economy.<sup>27</sup> The ease of purchasing items online has

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<sup>14</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2087-88 (2018).

<sup>15</sup> *Nat’l Bellas Hess v. Dep’t of Revenue*, 87 S. Ct. 1389, 1392 (1967).

<sup>16</sup> *See id.* at 1390.

<sup>17</sup> Chana Joffe-Walt, *Most People Are Supposed to Pay this Tax. Almost Nobody Actually Pays It.*, PLANET MONEY: NPR (Apr. 16, 2013, 3:55AM), <https://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See Surma, supra* note 2, at 523.

<sup>22</sup> *Id.*

<sup>23</sup> *See generally* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

<sup>24</sup> *Id.* at 2093.

<sup>25</sup> *See generally id.*

<sup>26</sup> *See generally id.*; Charles L. Merriweather & John T.M. Whiteman, *Missouri’s Taxation of Remote Sellers in a Post-Wayfair World*, 58 WASH. U. J.L. & POL’Y 95, 95 (2019).

<sup>27</sup> Claire Shook, Comment, *Physical Presence Is In No Wayfair!: Addressing the Supreme Court’s Removal of the Physical Presence Rule and the Need for Congressional Action*, 124 DICK. L. REV.

moved far past a “fad” and into the new social norm with online sales reaching over \$513 billion in 2018.<sup>28</sup> With online sales reaching this considerable amount, the question became: How do states fairly tax those purchases?

When the United States Constitution was adopted, it granted the federal government the authority to “lay and collect taxes.”<sup>29</sup> Even though the federal government received the express authority to collect taxes, the states have always been perceived to have an implicit ability to do so as well.<sup>30</sup> The former thirteen colonies had that power before the ratification of the United States Constitution; thus, the taxing power of the states has rarely come into question.<sup>31</sup> The Due Process Clause of the Fourteenth Amendment and the Commerce Clause guide and restrict the power of taxation of the states.<sup>32</sup> Both limit the power of states to impose and collect tax.<sup>33</sup>

Within the context of taxation, the Due Process Clause of the Fourteenth Amendment requires minimum contact between the state and the business, person, property, or transaction from which it is attempting to collect tax payments.<sup>34</sup> The Commerce Clause, on the other hand, allows Congress to regulate commerce among the states.<sup>35</sup> However, the Commerce Clause forbids state governments from interfering with interstate commerce by discriminating against or creating excessive burdens from out-of-state retailers.<sup>36</sup>

National Bellas Hess, Inc. (“National”), a mail-order business incorporated in Delaware, questioned the authority of states to collect taxes utilizing both the Commerce Clause and the Due Process Clause as a defense.<sup>37</sup> The state of Illinois was requiring National to collect sales tax from its in-state sales despite having no place of business, no representatives, and owning no property within the state.<sup>38</sup> The only interaction within the state was with the United States mail or common carrier when orders were delivered, or when bi-yearly catalogues were mailed to the company’s customers.<sup>39</sup> Illinois determined that any retailer that “engaged in soliciting orders within the State from users by means of catalogues or other advertising” was sufficiently connected to the state

227, 242-43.

<sup>28</sup> *U.S. Census Bureau News*, U.S. DEP’T OF COM. (Mar. 13, 2019, 10:00 AM), <https://www2.census.gov/retail/releases/historical/ecommm/18q4.pdf>.

<sup>29</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>30</sup> *State and Local Taxes*, U.S. DEP’T OF TREASURY (Dec. 5, 2010, 10:24 AM), <https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx>.

<sup>31</sup> *Id.*

<sup>32</sup> J. Scott Rosenbach, Comment, *Ding Dong Quill is Dead: How South Dakota v Wayfair Alters the Substantial Nexus Test Under Complete Auto*, 97 DENV. L. REV. 261, 265 (2019).

<sup>33</sup> *See id.*

<sup>34</sup> Legality of Notice 19-04, Op. Att’y Gen. Derek Schmidt 2019-8 (2019).

<sup>35</sup> Aidan V. Nuttall, Note, *South Dakota v. Wayfair: Erasing a Dull Bright-Line*, 51 LOY. U. CHI. L.J. 623, 629 (2019).

<sup>36</sup> Legality of Notice 19-04, *supra* note 34.

<sup>37</sup> *Nat’l Bellas Hess v. Dep’t of Revenue*, 87 S. Ct. 1389, 1391 (1967).

<sup>38</sup> *Id.* at 1390.

<sup>39</sup> *See id.*

to be classified as a retailer maintaining a place of business in this state.<sup>40</sup> Therefore, by Illinois's determination, National undoubtedly met the standard to collect sales taxes by soliciting orders from residents.<sup>41</sup> National argued that the liability that Illinois is thrusting upon these companies violates the Due Process Clause of the Fourteenth Amendment and creates an unconstitutional burden upon interstate commerce.<sup>42</sup>

National's lack of physical presence in the state was fundamental to the Court's decision.<sup>43</sup> If this tax were upheld, it would have allowed every state, municipality, political subdivision, and school district throughout the nation to impose sales and use taxes on out-of-state sellers with no physical connection to the state.<sup>44</sup> The variations in tax rates, exemptions, and administration and record-keeping requirements would burden the nation's interstate commerce by making it difficult for companies to comply.<sup>45</sup> The fear of that excess burden was a main reason why the Court determined that this state tax was not justified and was a violation of the Due Process Clause.<sup>46</sup> The Court indicated that the question that needs to be asked is whether the state has given anything to a company for which it can legally ask for tax payment in return.<sup>47</sup> In this case, there was no legitimate claim to impose a fair share of the cost of the local government through taxes on this company.<sup>48</sup> The Commerce Clause ensures that the national economy remains free from such unjustifiable local entanglements that would burden interstate commerce.<sup>49</sup> As such, the enacted Illinois sales tax requirement was struck down because it violated both clauses by the lack of connection the company had with the state.<sup>50</sup>

This tax issue has been debated since the 1960s, beginning with *National Bellas Hess, Inc.*<sup>51</sup> Even back in 1967, when the case was being decided, there were dissenters that disagreed with the physical presence requirement to obtain substantial nexus.<sup>52</sup> Justice Fortas argued in his dissent that this "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus'" to require the collecting and remittance of the use tax.<sup>53</sup> Businesses are soliciting consumers who live and work in Illinois, who otherwise could have purchased locally and paid the sales tax to support their

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1391.

<sup>43</sup> *See id.* at 1390-92.

<sup>44</sup> *See generally id.* at 1392-93.

<sup>45</sup> *Id.* at 1393.

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 1391.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1393.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1393-96 (Fortas, J., dissenting).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1394.

state.<sup>54</sup> Instead, these restrictions are encouraging consumers to evade paying sales taxes simply by mailing an order form and purchasing from out-of-state sellers.<sup>55</sup> The “burden” of entangling the economy with this additional requirement for out-of-state sellers is no more than the burden on local businesses.<sup>56</sup> Surprisingly, until the 2018 *Wayfair* decision, the dissenting opinion continued to be the minority opinion.<sup>57</sup>

Decades later, the United States Supreme Court was given the opportunity to reevaluate almost the exact same issue as *National Bellas Hess* in *Quill Corp. v. North Dakota*.<sup>58</sup> “Quill Corp. (“Quill”) was a Delaware corporation with offices and warehouses in Illinois, California, and Georgia.”<sup>59</sup> The company had no employees that worked or resided in North Dakota, nor did the company have any tangible property in the state.<sup>60</sup> Similar to *National*, Quill used the mail and common carriers to solicit business through catalogs and delivery orders.<sup>61</sup> North Dakota defined a “retailer” to include “every person who engages in regular or systematic solicitation of a consumer market in the state.”<sup>62</sup> In North Dakota’s view, Quill was a retailer that was subject to its sales tax even though they had no property or personnel located in the state.<sup>63</sup> Nevertheless, even after a thought-provoking dissenting opinion by Justice Fortas in *National Bellas Hess*, the Court ultimately decided to uphold the prior ruling and strike down North Dakota’s regulation.<sup>64</sup>

Even though the Court was still adhering to the decision from *National Bellas Hess*, *Quill* continued building off of Justice Fortas’s dissenting opinion in *National Bellas Hess* and started paving a way for the *Wayfair* decision.<sup>65</sup> The opinion highlighted the difference in a state’s taxation ability under the Due Process Clause and the Commerce Clause,<sup>66</sup> a significant change from *National Bellas Hess*, which used the strict analysis of physical presence and substantial nexus.<sup>67</sup>

In *Quill*, the Court determined that under the Due Process Clause, an out-of-state seller could have “minimum contacts” with a state, and yet lack the “substantial nexus” required by the Commerce Clause.<sup>68</sup> The Due Process Clause

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1394-96.

<sup>56</sup> *Id.* at 1396.

<sup>57</sup> *Id.* at 1394-96 (Fortas, J., dissenting); *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992).

<sup>58</sup> *Quill Corp.*, 112 S. Ct. at 1907.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1907-08.

<sup>62</sup> *Id.* at 1908 (citing N.D. Cent. Code § 57-40.2-01(6)).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1916.

<sup>65</sup> See generally *id.* at 1908-15.

<sup>66</sup> Surma, *supra* note 2, at 527.

<sup>67</sup> *Id.* at 525.

<sup>68</sup> *Id.* at 528.

does not bar enforcement of the state's sales tax if a company purposefully directed its activities to a state's residents, the magnitude of those contacts is more than sufficient for due process purposes, and the sales tax is related to the benefits the business received from the state.<sup>69</sup> This distinction eased the requirement of the Due Process Clause for states from the prior rule acquired from *National Bellas Hess*.<sup>70</sup> The Court recognized that due process jurisprudence has evolved substantially since *National Bellas Hess* and now focuses on whether a party has minimum contacts with the jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.<sup>71</sup> The Court is now less concerned with requiring physical presence and more on the reasonable requirement that the company could defend a suit in that state.<sup>72</sup>

Still, the court in *Quill* maintained the four-part test for the Commerce Clause, which upholds a tax "so long, as the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."<sup>73</sup> This bright-line rule of substantial nexus and physical presence was still very much alive and the majority's view even after *Quill*, but it was still generating controversy like it has been for decades.<sup>74</sup>

Justice Kennedy became the first to call out the flaws in the physical presence rule in his concurring opinion in *Direct Marketing Association v. Brohl*.<sup>75</sup> This case did not call into question the constitutionality of a state requiring companies to collect use tax, like *National Bellas Hess* and *Quill*.<sup>76</sup> Rather, the crux of the matter was whether Colorado's statute could require companies that did not collect sales tax to notify in-state customers of their tax liability.<sup>77</sup> Nonetheless, Justice Kennedy recognized the bigger picture of the "injustice faced by Colorado and many other states."<sup>78</sup> His concurrence emphasized that *Quill* was concluded on stare decisis alone, but that the majority understood that their conclusion was wrong and was now inflicting extreme harm and unfairness on states.<sup>79</sup> This concurrence highlighted the expansion and connection of the web to bring consumers and retailers together.<sup>80</sup> Justice Kennedy pointed out that "a business may be present in a state in a meaningful way without that presence being

<sup>69</sup> See *Quill Corp.*, 112 S. Ct. at 1908-11.

<sup>70</sup> See generally *id.* at 1909-11.

<sup>71</sup> *Id.* at 1910 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339 (1949))).

<sup>72</sup> *Id.*

<sup>73</sup> *Complete Auto Transit, Inc. v. Brady*, 97 S. Ct. 1076, 1079 (1977).

<sup>74</sup> See generally *Quill Corp.*, 112 S. Ct. at 1916-22.

<sup>75</sup> See *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134-36 (2015) (Kennedy, J., concurring).

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 1125-26.

<sup>78</sup> *Id.* at 1134 (Kennedy, J., concurring).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1135.



physical in the traditional sense of the term.”<sup>81</sup> This concurrence became the final building block the states needed to get to the *Wayfair* decision. After the opinion was published, numerous states enacted statutes that attempted to collect sales taxes from sellers that had no physical presence in hopes that these statutes would be held constitutional by the Court if challenged.<sup>82</sup>

South Dakota was one of the states that enacted new legislation based off of the *Quill* concurrence.<sup>83</sup> South Dakota enacted an act “to provide for the collection of sales taxes from certain remote sellers” who deliver more than \$100,000 of goods or services into the state or engage in 200 or more separate transactions for the delivery of goods or services within a single tax year.<sup>84</sup> The act banned retroactively applying the new regulation until its constitutionality was determined by the Court.<sup>85</sup> Following this enactment, South Dakota commenced a civil action against three large corporations, including Wayfair, Inc., for unpaid sales taxes.<sup>86</sup>

Wayfair was a merchant with no employees or property in South Dakota, similar to the situation of *National* and *Quill*.<sup>87</sup> Once again, the issue presented to the Court was: “[A]re out-of-state retailers required to abide by state taxing laws that force them to collect sales tax?”<sup>88</sup> South Dakota accepted Justice Kennedy’s invitation to try to overturn the holding from *Quill*.<sup>89</sup>

The state argued that the “*Quill* rule [was] at war with its own ends; it undermines rather than advances the economic union the dormant commerce clause is meant to promote” by encouraging companies to centralize in one state rather than investing in jobs and infrastructure in other states.<sup>90</sup> It burdens interstate commerce from its own restrictions by unfairly harming local brick-and-mortar businesses.<sup>91</sup> Wayfair rebutted this claim, stating it “would be detrimental to small businesses and startup companies” to force them to “comply with the thousands of state and local tax jurisdictions throughout the United States.”<sup>92</sup>

Even with the additional compliance costs, the reality is that the physical presence rule becomes further removed from economic reality as the online economy becomes increasingly vast and interconnected year after year.<sup>93</sup> Placing the burden only on companies that have a physical presence in a state creates a

<sup>81</sup> *Id.* at 1134-36.

<sup>82</sup> Surma, *supra* note 2, at 537.

<sup>83</sup> See S. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Surma, *supra* note 2, at 538.

<sup>87</sup> South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087-89 (2018).

<sup>88</sup> See *id.*

<sup>89</sup> See Kole M. Brinegar, *Finding the Way: Substantial Nexus After Wayfair*, 53 IND. L. REV. 163, 171 (2020); see also *Wayfair*, 138 S. Ct. at 2084-90.

<sup>90</sup> Surma, *supra* note 2, at 539-40.

<sup>91</sup> *Id.* at 539.

<sup>92</sup> *Id.* at 540.

<sup>93</sup> See *Wayfair*, 138 S. Ct. at 2092.

disproportional advantage to remote retailers.<sup>94</sup> It generates a competitive benefit to these remote retailers by creating a tax shelter for their business solely because they decided to sell their products remotely, something that has become easier as technology has advanced.<sup>95</sup> The Commerce Clause was simply not intended to relieve those engaged in interstate commerce from their share of state tax burden, a consideration that was convincing enough for the Court to overturn *Quill* and decades of previous rulings.<sup>96</sup>

Since *Wayfair* was decided in April 2018, the number of states that require remote sellers to collect and remit sales taxes based on economic nexus has more than doubled, now totaling forty-three states plus the District of Columbia.<sup>97</sup> States are allocated the funding they have long waited for, and companies are now forced to pay their fair share of taxes.<sup>98</sup> Unfortunately for small businesses, *Wayfair*'s argument that overturning *Quill* would be detrimental to their growth had some merit.

## II. THE DAMAGING CONSEQUENCES ON SMALL BUSINESSES

It did not take long for small businesses to feel the detrimental effect of the *Wayfair* decision. Just two years after the decision, Halstead Bead Company, owned by Brad and Hillary Scott, is already facing a business's scariest question: should we close our doors permanently due to the repercussions from the *Wayfair* decision?<sup>99</sup> Over forty-five state governments are pursuing claims against the company that has only thirty-two employees.<sup>100</sup> Halstead is physically located in Arizona, but sells its beads all over the country to vendors who buy raw materials to turn their beads into fashion jewelry to sell to customers.<sup>101</sup> Roughly fifteen percent of Halstead's sales are actually taxable, "but [the company] must produce a copy of the vendors' resale exemption certificate should an auditor come to call."<sup>102</sup>

Now, because of the *Wayfair* decision, Halstead is forced to increase spending on tax compliance costs on the fifteen percent of sales that are taxable.<sup>103</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2094.

<sup>96</sup> *Id.*

<sup>97</sup> Michael Cohn, *Cities, Counties and Districts Add Sales Tax Laws after Wayfair*, ACCOUNTINGTODAY (Mar. 09, 2020, 1:16 PM), <https://www.accountingtoday.com/news/more-states-enacting-online-sales-tax-nexus-laws-after-wayfair-decision>.

<sup>98</sup> See *Wayfair* 138 S. Ct. at 2100 (Gorsuch, J. concurring).

<sup>99</sup> Tripp Baltz, *A Retailer's Struggle to Survive a Post-Wayfair Sales Tax World*, BLOOMBERG (Oct. 24, 2019, 1:43 P.M.),

[https://www.bloomberglaw.com/product/tax/document/X1IBVMG8000000?bna\\_news\\_filter=daily-tax-report-state&jcsearch](https://www.bloomberglaw.com/product/tax/document/X1IBVMG8000000?bna_news_filter=daily-tax-report-state&jcsearch).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Otherwise it could incur thousands of dollars in penalties if the company does not comply.<sup>104</sup> Currently, it is estimated that Halstead has spent nearly \$162,000 on compliance costs to collect less than \$68,000 in taxes for the states.<sup>105</sup> This company is spending \$2.39 in compliance costs for every \$1.00 of revenue.<sup>106</sup> The disproportionality of these costs are making it difficult for companies like Halstead to remain in business by forcing their small staff to now handle monthly state notices, jurisdictional data reporting, state filings, and troubleshooting state correspondences.<sup>107</sup> States are threatening to put a lien on the business's property or even go as far as seizing the property.<sup>108</sup> It is now inevitable that Halstead's clients are absorbing these compliance costs in order for the company to remain profitable and in business.<sup>109</sup>

Chief Justice Roberts voiced his fear about the implications this decision would have on small businesses trying to survive the newly renovated and complex tax regulations post-*Wayfair*, stating in his dissent that “the burden will fall disproportionately on small business.”<sup>110</sup> The Court's primary concern in *Wayfair* was to remove the physical presence rule from *Quill* to allow states to tax remote sellers as they would physical businesses.<sup>111</sup> The states were suffering significant budget shortfalls, estimating a loss of approximately \$23.2 billion in sales tax revenue.<sup>112</sup> However, the Court's dismissal of small businesses was alarming, casually discharging the costs this new tax structure would inflict.<sup>113</sup> Unfortunately, those incurred costs will be felt predominantly by the small businesses that do not have the necessary resources, revenue, time, or funds to establish an accounting and legal team to assist with the compliance process.<sup>114</sup> These “small businesses must act quickly to replicate the resources more readily available to a more established multistate business or face significant penalties.”<sup>115</sup>

Conversely, large corporations, like Wayfair, typically have the financial means to utilize their already established accounting and legal teams to navigate compliance issues. Wayfair is a leading online retailer of home goods and

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<sup>104</sup> *See id.*

<sup>105</sup> *Small-Business Owners Discuss Struggle with Wayfair Decision*, NFIB (Dec. 20, 2019), <https://www.nfib.com/content/news/arizona/small-business-owners-discuss-their-real-life-horror-with-the-wayfair-decision/>.

<sup>106</sup> *Id.*

<sup>107</sup> Baltz, *supra* note 99.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2103 (2018) (Roberts, J., dissenting).

<sup>111</sup> *See generally* Surma, *supra* note 2, at 545-46.

<sup>112</sup> *Id.* at 545-46.

<sup>113</sup> *Wayfair*, 138 S. Ct. at 2103 (Roberts, J., dissenting).

<sup>114</sup> *Id.* at 2104.

<sup>115</sup> *South Dakota v. Wayfair, Inc.: How Main Street is Fairing and Whether Federal Intervention is Necessary: Hearing Before the United States House of Representatives Committee on Small Business Subcommittee on Economic Growth, Tax, and Capital Access*, (2020) [hereinafter *Hearings*] (statement of Jamie C. Yesnowitz, American Institute of Certified Public Accountants).

furniture.<sup>116</sup> In 2017, it had net revenues of over \$4.7 billion.<sup>117</sup> Wayfair is by no means a small business. Wayfair, and similar companies, were the focus of the Court's decision, but this decision reaches far beyond these big companies.<sup>118</sup> The effect of this decision does not discriminate based on size; it trickles down to even the smallest companies just trying to survive.

As illustrated by Halstead's position, small businesses now have the stress of calculating additional expenses that come with economic nexus in new jurisdictions, like tax software or accountant salaries.<sup>119</sup> In *Wayfair*, the Court failed to set a rigorous standard in their opinion, but merely removed the previous requirement of physical presence.<sup>120</sup> By not implementing strict safe harbor requirements necessary to avoid creating an undue burden, the Court left it to the states to determine what is constitutional based on the acceptance and interpretation of the South Dakota rule.<sup>121</sup> Each state, jurisdiction, and taxing authority has to interpret the rule and make adjustments based off of their respective needs.<sup>122</sup>

Currently, the states are using nine different thresholds.<sup>123</sup> For example, California's safe harbor nexus is \$500,000 in sales based on the previous calendar year's sales.<sup>124</sup> This safe harbor nexus provides protection for companies who do not sell \$500,000 within the state of California.<sup>125</sup> Those companies do not need to collect and remit sales taxes until they hit that threshold.<sup>126</sup> Pennsylvania, on the other hand, uses a threshold of \$100,000 in sales from the last twelve months.<sup>127</sup> Although the difference between the two states may initially seem slight, trying to recognize the discrepancies among jurisdictions and keep accurate records makes the process burdensome, especially to small businesses that never kept track of this information before *Wayfair*.

Presently, there are over 12,000 jurisdictions in the United States.<sup>128</sup> A company can be subject to audits from forty-five states and the District of Columbia.<sup>129</sup> Once again, imagine the owner of a start-up boutique in Kansas City.

<sup>116</sup> *Wayfair*, 138 S. Ct. at 2089.

<sup>117</sup> *Id.*

<sup>118</sup> *See generally id.*

<sup>119</sup> Baltz, *supra* note 99.

<sup>120</sup> *See generally Wayfair*, 138 S. Ct. at 2095-100.

<sup>121</sup> Hasmik Hmayakyan, *Taxation in the Cyber Age: The Future of Wayfair*, 39 LOY. L.A. ENT. L. REV. 285, 304 (2018-2019).

<sup>122</sup> Maria Tanski-Phillips, *A Seller's Guide to Economic Nexus Laws by State*, PATRIOT (Feb. 2, 2020) <https://www.patriotsoftware.com/blog/accounting/economic-nexus-laws-by-state/>.

<sup>123</sup> *Summary of States' Wayfair and Marketplace Implementation*, BLOOMBERG TAX (July 17, 2020), <https://www.bloomberglaw.com/product/tax/document/X6VGD9RS000000>.

<sup>124</sup> Tanski-Phillips, *supra* note 122.

<sup>125</sup> *Id.*

<sup>126</sup> *See generally id.*

<sup>127</sup> *Id.*

<sup>128</sup> Elaine S. Povich, *As High Court Weighs Online Sales Taxes, States Get Ready to Pounce*, STATELINE (Mar. 13, 2018).

<sup>129</sup> *Id.*

How would the small businessowner keep track of each state's sales, tax regulations, reporting requirements, software needs, and implementation dates? Like Halstead Bead Company, small businesses are spending a tremendous amount of money trying to keep up with changing state tax requirements.<sup>130</sup> Nonetheless, states continue to enact different thresholds, or even no thresholds at all, causing more discrepancies in compliance standards from state to state.<sup>131</sup> In determining economic thresholds on sales, some states count only the amount of taxable sales and omit exempt sales, while others use the aggregate gross sales amount.<sup>132</sup> Sadly, these complex tax regulations mean it may be more beneficial for a company to stay in one state than to grow and sell to customers in other states that subject them to new and different rules.<sup>133</sup>

The *Wayfair* Court attempted to defend its decision despite the additional costs to small businesses by considering that “[e]ventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems.”<sup>134</sup> The indifference and lack of concern for small businesses, giving just a mere hope that affordable software will eventually become available, is disheartening. Small businesses make up a pivotal part of the economy and additional expenses, however trivial or minor some may view them to be, are detrimental to the businesses’ ability to grow and compete.<sup>135</sup>

Further increasing the burden, some states are requiring companies to pay back taxes in order to boost the states’ bank accounts.<sup>136</sup> The *Wayfair* majority never explicitly stated that not requiring back taxes was a requirement for the constitutionality of the South Dakota statute.<sup>137</sup> This ambiguity in the majority opinion has left it to the states to construe what is and what is not constitutional to enact.<sup>138</sup> California required three years of back taxes, believing it was being gracious by not requiring more.<sup>139</sup> The unrealistic requirement for companies to sift through three years of prior sales to determine whether or not sales taxes were collected is unduly time consuming.<sup>140</sup> For small businesses that may have just a few employees, requiring an employee to spend a significant amount of time doing so can be detrimental to the entire business.<sup>141</sup>

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<sup>130</sup> Baltz, *supra* note 99.

<sup>131</sup> Roger Russell, *The Wayfair Burden on Small Businesses*, ACCOUNTING TODAY (Mar. 10, 2020, 4:07 PM), <https://www.accountingtoday.com/news/the-wayfair-burden-on-small-businesses>.

<sup>132</sup> *Id.*

<sup>133</sup> See generally *Hearings*, *supra* note 115 (statement of Jamie C. Yesnowitz).

<sup>134</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018).

<sup>135</sup> See generally *2018 Small Business Profile*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY (2018), <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>.

<sup>136</sup> Editorial Board, *State Tax Collectors Want You*, WALL ST. J., Aug. 12, 2019.

<sup>137</sup> See *Wayfair*, 138 S. Ct. at 2099.

<sup>138</sup> See generally *id.*

<sup>139</sup> Editorial Board, *supra* note 136.

<sup>140</sup> See generally *id.*

<sup>141</sup> *Id.*

In addition, other states are now attempting to tax digital services, which includes any digital downloads or subscriptions.<sup>142</sup> Once again, a large company in this industry, similar to *Wayfair*, generally already has the legal and accounting team to prepare and plan for a change in tax. Startup businesses will be forced to shut down due to the costs of compliance before they even really get an opportunity to open their doors for business. States are interpreting the *Wayfair* decision far beyond what the Court may have envisioned because the decision lacks definitiveness.<sup>143</sup>

Chief Justice Roberts revealed in his dissent that the alleged mistake in *National Bellas Hess* over fifty years ago may have been an unintended factor contributing to the growth of e-commerce, and any important question of economic policy should be undertaken by Congress.<sup>144</sup> Congress has the ability to view current trends and determine if an abrupt policy change would have adverse consequences to the growth of the economy.<sup>145</sup> Congress would be able to better accommodate and investigate competing interests from the states and businesses to avoid any detrimental effects.<sup>146</sup> The benefit of allowing Congress to undertake this issue is that it has the power to create a minimum safe harbor threshold that states would have to follow through legislation.<sup>147</sup> For decades, the United States has been a hub for cultivating start-up companies that eventually become a household name.<sup>148</sup> “E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule.”<sup>149</sup> However, the *Wayfair* decision may be the end of the era of hope for small start-up businesses.

### III. KANSAS TAKES A BOLD STANCE, BUT IS IT CONSTITUTIONAL?

Navigating the individual state tax regulations was difficult prior to *Wayfair* and has become even more challenging since.<sup>150</sup> Justice Kennedy attempted to quiet the lingering concern about small businesses in his opinion in *Wayfair*, harping on the point that “South Dakota affords small merchants a reasonable degree of protection . . . requir[ing] a merchant to collect the tax only if it does a considerable amount of business in the State.”<sup>151</sup> The safe harbor exemption allows for many small businesses to avoid paying taxes in states in

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<sup>142</sup> *Id.*

<sup>143</sup> See Paul Williams, *Kansas Remote Tax Policy Dares to Test Wayfair’s Limits*, LAW360 (Aug. 5, 2019).

<sup>144</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2104 (2018) (Roberts, J., dissenting).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*

<sup>148</sup> *2018 Small Business Profile*, *supra* note 135.

<sup>149</sup> *Wayfair*, 138 S. Ct. at 2103 (Roberts, J., dissenting).

<sup>150</sup> *Hearings*, *supra* note 115, at 8 (statement of Jamie C. Yesnowitz).

<sup>151</sup> *Wayfair*, 138 S. Ct. at 2099.

which they do not have a substantial amount of business.<sup>152</sup> It was one of the key aspects that Justice Kennedy alluded to that the Court focused on when making its decision in the case.<sup>153</sup> Although Justice Kennedy did not explicitly state that a safe harbor exemption is required in order to be constitutional, without it, an undue burden may be imposed on interstate commerce, which would be unconstitutional.<sup>154</sup>

The Court relied on and stressed three key features of the South Dakota law: (1) a safe harbor provision making the law only applicable to remote sellers who annually have over \$100,000 of sales or 200 or more transactions; (2) no retroactive application; and (3) being a member of the Streamlined Sales and Used Tax Agency (SSUTA) to provide a system to reduce administrative and compliance costs.<sup>155</sup> Nonetheless, states have decided to push the boundaries and ignore the significant features of the decision.<sup>156</sup> Kansas implemented a new remote tax policy in light of this decision and the policy's constitutionality has come into question.<sup>157</sup>

Kansas has become the first and only state with a remote tax policy that has not instituted a small business exemption, completely minimizing Justice Kennedy's emphasis on the exemption's importance.<sup>158</sup> A "race to the bottom" instinctively started between states with each continually lowering their standards for nexus thresholds, forcing more businesses to fall within the new sales tax limits.<sup>159</sup> South Dakota provided a dual threshold approach by requiring either \$100,000 in sales or 200 transactions as a minimum threshold.<sup>160</sup> States, including California, Colorado, North Dakota, and South Carolina, changed South Dakota's dual threshold approach to a singular dollar threshold, normally \$100,000.<sup>161</sup> Even this substantial change from South Dakota's rule did not win the race to the bottom.

Kansas took home the prize when its legislature released Notice 19-04 on August 1, 2019.<sup>162</sup> The notice stated that the state planned to impose its sales and use tax collection requirements to the fullest extent permitted by law.<sup>163</sup> To Kansas, this means that the state can now require all online and out of state remote sellers to register with the state and collect sales taxes.<sup>164</sup> There is no longer a safe harbor

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<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

<sup>154</sup> *See generally id.*

<sup>155</sup> *Id.* at 2099-2100; Michael T. Fatale, Symposium, *Wayfair, What's Fair, and Undue Burden*, 22 CHAP. L. REV. 19, 45 (2019).

<sup>156</sup> *See* Legality of Notice 19-04, *supra* note 34, at 2-3.

<sup>157</sup> *See generally id.*

<sup>158</sup> Paul Williams, *Kan. Remote Seller Policy Constitutional, Tax Chief Asserts*, LAW360 (Sept. 25, 2019).

<sup>159</sup> Bowen, *supra* note 1.

<sup>160</sup> *Wayfair*, 138 S. Ct. at 2089.

<sup>161</sup> Bowen, *supra* note 1.

<sup>162</sup> *Kansas Notice 19-04* (Aug. 1, 2019).

<sup>163</sup> Legality of Notice 19-04, *supra* note 34, at 9.

<sup>164</sup> *Id.*

threshold to protect small businesses.<sup>165</sup> Every single business that sells their goods or services in the state of Kansas must register.<sup>166</sup>

This has been extremely controversial for professionals within the state as Governor Laura Kelly seems to be ignoring warning signs from the Attorney General on the constitutionality of this notice.<sup>167</sup> (There are significant issues with the formal process, or lack thereof, that the governor used to change the tax law, but that lies beyond the scope of this Comment.<sup>168</sup> This Comment addresses whether the lack of protection for small businesses is constitutional, or if it violates the Commerce Clause by creating an undue burden on interstate commerce).

In *Wayfair*, the Court questioned the constitutional definition of “presence” in relation to the rationality to require taxes.<sup>169</sup> It determined that “presence” was no longer defined as simply physical, but that there could also be an economical presence that would warrant the collection of taxes.<sup>170</sup> What the Court did not decide, much less change, was what “substantial nexus” means.<sup>171</sup> On the contrary, it acknowledged that “other aspects of the court’s Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines.”<sup>172</sup> An understanding of what the Court overruled is vital because without it, if the Court did remove the substantial nexus requirement, states would gain the power to tax anyone who was connected to the state no matter how nominal.

However, case law still requires that states demonstrate that a retailer has a “substantial nexus” and that no undue burden would be inflicted on an out-of-state retailer.<sup>173</sup> *Quill* articulated the need for a substantial presence in a state and *Wayfair* did not alter that rule.<sup>174</sup> The Court defended *Quill*’s holding regarding “substantial nexus” by prominently noting that there were sufficient safeguards in place to protect from undue burdens if there was no substantial nexus for small businesses.<sup>175</sup> Tax practitioners and policy analysts have taken the position that even though the Court did not definitively state that the small business exemption was necessary in their decision, it will likely pose an undue burden on interstate commerce if one is not offered.<sup>176</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> Williams, *supra* note 143.

<sup>167</sup> Paul Williams, *Kansas Tax Chief Not Worried About Remote Seller Litigation*, LAW360 (Oct. 16, 2019).

<sup>168</sup> Paul Williams, *Kan. Overhaul Should Modernize State Code, Panel Told*, LAW360 (Sept. 24, 2019).

<sup>169</sup> Bowen, *supra* note 1.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018).

<sup>173</sup> *Legality of Notice 19-04*, *supra* note 34, at 3.

<sup>174</sup> *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1913 (1992).

<sup>175</sup> *Wayfair*, 138 S. Ct. at 2099.

<sup>176</sup> *See* Williams, *supra* note 143.



Despite backlash and caution from lawmakers, professionals, and businesses, Governor Kelly continued to support her stance that a safe harbor provision is not necessary to prevent undue burden.<sup>177</sup> Earlier in the year, she vetoed a bill passed by the Kansas Legislature intended to establish a safe harbor threshold of \$100,000 in sales with respect to the new remote sales tax.<sup>178</sup> Governor Kelly and the state of Kansas have taken the position that establishing an economic nexus threshold for remote sellers would discriminate against in-state companies that lack a similar tax exemption.<sup>179</sup>

As noted previously, the issue with the Court's opinion in *Wayfair* is that it did not reestablish a bright-line rule after it diminished the old one.<sup>180</sup> It relied heavily on the key features mentioned above, but did not explicitly require them.<sup>181</sup> The Court held that South Dakota's policy was sufficient to avoid any undue burden on the seller, not that it was the only avenue states had to take to avoid undue burden.<sup>182</sup> If what the Court relied on was a checklist, then all states would have to adopt South Dakota's statute verbatim, including the safe harbor threshold and membership with the SSUTA.<sup>183</sup> Noticeably, states have not done this, and numerous interpretations have unfolded.<sup>184</sup> Unfortunately, Kansas's interpretation is causing an undue burden on interstate commerce and crossing the line into unconstitutionality.

The *Wayfair* Court relied on the fact that South Dakota was one of the twenty states that are full members of SSUTA.<sup>185</sup> SSUTA requires state-level tax administration to adopt uniform definitions of products and services, simplified tax rate structures, and other uniform rules.<sup>186</sup> It provides sellers access to sales tax software at no cost and generally deems users immune from audit liability.<sup>187</sup>

Kansas Revenue Secretary Mark Burghart released a statement to Deputy Attorney General Andaya stating his case for why this tax law is constitutional and does not promote undue burden on small businesses.<sup>188</sup> His key argument, similar

<sup>177</sup> *Id.*

<sup>178</sup> Tripp Baltz, *Kansas Only State Making Small Businesses Pay Remote Sales Tax*, BLOOMBERG TAX (Aug. 1, 2019, 4:23 PM; Updated Aug. 1, 2019, 5:16 PM).

<sup>179</sup> Williams, *supra* note 158.

<sup>180</sup> Rosenbach, *supra* note 32, at 276; Steven M. Hogan & Alan J. LaCerra, *South Dakota v. Wayfair: The Case That Changes Everything*, 93-APR FLA. B.J. 22, 26 (2019).

<sup>181</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099-100 (2018).

<sup>182</sup> Letter from Mark Burghart, Secretary of Revenue, Kansas Department of Revenue, to Athena E. Andaya, Deputy Attorney General (Sept. 4, 2019) (on file with Kansas Attorney General Office).

<sup>183</sup> *Id.*

<sup>184</sup> *Summary of States' Wayfair and Marketplace Implementation*, *supra* note 123.

<sup>185</sup> *Wayfair*, 138 S. Ct. at 2099-100.

<sup>186</sup> Craig Johnson, *Streamlined Sales Tax Governing Board, Inc.*, (2018), <https://www.streamlinedsalestax.org/about-us/about-sstgb>.

<sup>187</sup> Craig Johnson, *Streamlined Sales Tax Governing Board, Inc. – FAQs – General Information About Streamlined* (2018), <https://www.streamlinedsalestax.org/Shared-Pages/faqs/faqs---about-streamlined>.

<sup>188</sup> Burghart, *supra* note 182.

to South Dakota's argument, is that Kansas is a member of SSUTA.<sup>189</sup> Since Kansas is a member, small businesses have the ability to register with SSUTA and get a list of services for free, thus alleviating any undue burden.<sup>190</sup> To Burghart, undue burden is measured in the amount of money that is spent.<sup>191</sup> Burghart believes there is an undue burden if a seller's expenses in complying with a state's tax scheme are proportionately too high for the taxes it collected and remits.<sup>192</sup>

Burghart's belief that money is what causes an undue burden is not erroneous, but it is not a full analysis of the issue. For small businesses, time can be just as valuable as money, and the amount of time that would be spent understanding the guidelines and completing the required registrations can be a hefty burden when dealing with numerous states. SSUTA does provide a vast amount of great resources for small businesses, but it still requires these businesses to spend the time to understand their products and become acclimated to their systems.<sup>193</sup> A small online company trying to sell personalized products is not going to have this kind of time to spend on registrations.

Furthermore, at the time of publication, only twenty states are members of SSUTA.<sup>194</sup> States that are not members of SSUTA have no obligation to provide any aid in compliance with their tax laws.<sup>195</sup> The burden of obtaining potential software falls on the businesses.<sup>196</sup> Unwittingly, the Court created false hope that software would become available at a reasonable cost to make it easier for small businesses to cope with this issue.<sup>197</sup> More than two years later, small businesses are still waiting for this reasonably affordable software to be created.<sup>198</sup> Companies bear the burden to learn how to utilize any software that is released for each state.<sup>199</sup> Even if the software itself is inexpensive, the time it takes to understand the software is expensive for businesses with limited resources and employees.<sup>200</sup> The Attorney General of Kansas, Derek Schmidt, was asked by a state senator and state representative to take a stance on the constitutionality of the newly adopted tax standard.<sup>201</sup> Schmidt observed that the *Wayfair* Court realized that South Dakota designed its statute to prevent undue burden upon interstate commerce by

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<sup>189</sup> *See id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Johnson, *supra* note 186.

<sup>194</sup> STREAMLINED SALES TAX GOVERNING BD., INC., *State Information*, <https://www.streamlinedsalestax.org/Shared-Pages/State-Detail>.

<sup>195</sup> *See generally id.*

<sup>196</sup> Keegan Shepardson, *The Void: How the Wayfair Decision is Affecting Small Business in New Hampshire*, SBA'S OFFICE OF ADVOCACY (Oct. 4, 2019).

<sup>197</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018).

<sup>198</sup> Shepardson, *supra* note 196.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Legality of Notice 19-04, *supra* note 34.

including that safe harbor protection.<sup>202</sup> Although not stated as a requirement, it was sufficient evidence that undue burden was not likely. The Court simply limited the requirements needed to show substantial nexus; it did not eliminate *all* limitations imposed by the Commerce Clause.<sup>203</sup>

In Governor Kelly's response to Kansas Attorney General opinion, she stated that "[t]his is about protecting our friends . . . doing business on Main Street . . . [t]hey are working hard, playing by the rules and deserve to be on a level playing field with out-of-state retailers."<sup>204</sup> This argument is reminiscent of South Dakota's position in *Wayfair*; consumers have the ability to purchase items across state borders. The tax law should not foster tax evasion; on the contrary, it should make all businesses pay their fair share of taxes regardless of physical or virtual location. One Governor Council co-chairwoman mentioned that she was a small-businesswoman in Kansas and argued that an out of state business with the same amount of income would be exempt from the tax when she would not, ostensibly making the playing field uneven.<sup>205</sup> Since the decision to aggressively tax remote sellers, over 3,200 out-of-state businesses have registered to collect Kansas sales taxes.<sup>206</sup>

George Isaacson, the attorney who argued the case for Wayfair, believes the fact that a small remote seller must register and potentially file taxes in Kansas is indicative of the precise burden the Court was hoping to avoid.<sup>207</sup> The idea that a single sale in the state creates a "substantial nexus" seems unreasonable.<sup>208</sup> The *Wayfair* Court did not remove all substantial nexus regulations and declare that every single business that operates in every state has a nexus.<sup>209</sup> They simply redefined the term "presence."<sup>210</sup>

The Kansas remote sales tax taken at face value on its own, just as one state not having a small business safe harbor, may not unduly burden interstate commerce. However, if all fifty states decide to remove the safe harbor provision from their tax regulation, small businesses will have a plethora of compliance regulations to abide by and that *will* create an undue burden.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Laura Kelly, *Governor Responds to the Attorney General's Opinion on Notice 19-04*, KAN. OFF. OF THE GOVERNOR (Oct. 1, 2019), <https://governor.kansas.gov/governor-responds-to-the-attorney-generals-opinion-on-notice-19-04/>.

<sup>205</sup> Paul Williams, *Kan. Tax Panel Questions Need for Remote Seller Thresholds*, LAW360, Nov. 14, 2019.

<sup>206</sup> Kansas City Star Editorial Board, *Online Shopping Just Got a Bit More Expensive in Kansas. Here's Why That's Good News*, KANSAS CITY STAR (Oct. 7, 2019).

<sup>207</sup> Williams, *supra* note 143.

<sup>208</sup> *See id.*

<sup>209</sup> *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087-100 (2018); Annette Nellen, *New State and Local Tax Obligations in Cyberspace*, 74 BUS. LAW. 279, 282 (2019).

<sup>210</sup> *Id.*

#### IV. WHAT CHANGES CAN BE MADE TO RELIEVE SMALL BUSINESSES

Each state has the right to impose taxes as it sees fit within the constraints of the Constitution.<sup>211</sup> It is one of the most lucrative ways states can raise funds to provide services to their citizens.<sup>212</sup> However, there must be a reasonable balance between a state's rights to tax and the needs of businesses to operate efficiently.<sup>213</sup> The *Wayfair* decision may be the most important state and local tax decision in recent decades, as it removed the obstacles states had faced for decades when trying to tax remote sellers.<sup>214</sup> *Quill's* narrow holding of physical presence is no longer a logical constraint and the doors have been opened for states to tax e-commerce.<sup>215</sup> With all this new power comes new challenges.<sup>216</sup> The *Wayfair* Court acknowledged the concern for potential burdens for businesses, but pointed out that Congress had the ability to intervene if necessary.<sup>217</sup> Now that states have adopted a variety of new standards burdening countless small businesses, it is imperative that Congress intervenes.<sup>218</sup>

Congress and state governments need to investigate and analyze current tax trends to make an informed decision on how to help small businesses.<sup>219</sup> They should consider the following acts that could minimize the undue burden of compliance on small businesses: (1) join the Streamlined Sales and Use Tax Agreement (SSUTA); (2) incorporate a *de minimis* threshold for small businesses and standardize when there is a nexus; (3) offer free compliance software and immunity for vendors who properly rely on such software; (4) prohibit retroactive application of the new standard; and (5) narrowly tailor this decision to apply to sales and use tax.<sup>220</sup>

SSUTA's goal is "to find solutions for the complexity in state sales tax systems."<sup>221</sup> The purpose is to "simplify and modernize sales and use tax administration to substantially reduce the burden of tax compliance."<sup>222</sup> One benefit of SSUTA membership is that the state has contracts with Certified Service Providers that can handle nearly all of a seller's sales and use tax responsibilities

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<sup>211</sup> *State and Local Taxes*, *supra* note 30.

<sup>212</sup> *Id.*

<sup>213</sup> *Hearings*, *supra* note 115 (statement of Jamie C. Yesnowitz).

<sup>214</sup> D. Gamage, D. Shanske, & A. Thimmesch, *Taxing E-Commerce in the Post-Wayfair World*, 58 WASH. U. J.L. & POL'Y 71, 71 (2019).

<sup>215</sup> See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099-100 (2018).

<sup>216</sup> See *generally*, Gamage et al., *supra* note 214, at 71-73.

<sup>217</sup> *Id.* at 73.

<sup>218</sup> See Hmayakyan, *supra* note 121, at 286.

<sup>219</sup> Richard D. Pomp, *Wayfair: Its Implications and Missed Opportunities*, 58 Wash. U. J.L. & Pol'y 1, 11 (2019) (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting)).

<sup>220</sup> Gamage et al., *supra* note 214, at 71-72.

<sup>221</sup> Johnson, *supra* note 186.

<sup>222</sup> *Id.*

for no charge if they are a remote seller.<sup>223</sup> If states join SSUTA, this can provide significant relief for small businesses. States that are members of SSUTA are required to have simplified and uniform state and local tax rates, administration of exemptions, and a central electronic registration system.<sup>224</sup> Membership forces states to simplify their complex state and local tax system.<sup>225</sup> Sellers that are able to qualify as volunteer sellers benefit from no SSUTA registration fees in participating states, no calculation fees, no monthly filing fees, and audit protection from member states.<sup>226</sup> These benefits and services reduce compliance costs and give small businesses the protection the Court believed they could obtain when considering the effect of undue burden in *Wayfair*.<sup>227</sup>

The lack of uniform minimum nexus requirements is one of the most prevalent issues that has risen from the *Wayfair* decision.<sup>228</sup> Many believe that Congress should consider establishing a minimum nexus requirement because it creates fairness and consistency.<sup>229</sup> The playing field would be leveled between out-of-state sellers and in-state sellers by requiring the collection and remittance of sales tax on every single transaction, regardless of any minimum nexus.<sup>230</sup> The lack of protection for small businesses would discourage any small seller from selling their products to other states and diminish the ability of the economy to grow.<sup>231</sup> Congress should adopt a standard similar to the South Dakota nexus requirement providing a compromise between states and businesses. A safe harbor would prevent states from suffering a loss in tax revenue while still protecting businesses that are not established or large enough to handle compliance costs.<sup>232</sup> A uniform standard for nexus would ease the compliance burden for small businesses.<sup>233</sup>

If a standard safe harbor threshold is utilized, Congress then needs to determine when a seller should collect sales taxes<sup>234</sup> and provide for a 90-day grace period.<sup>235</sup> For businesses that are hovering right around the thresholds, the question becomes: Should they avoid charging sales tax in hopes that they will not reach

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<sup>223</sup> *Certified Service Providers*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/certified-service-providers/certified-service-providers-about>.

<sup>224</sup> Johnson, *supra* note 186.

<sup>225</sup> *Action Items to Become a Member State*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/for-states/becoming-a-sst-member-state>. (last visited Nov. 5, 2020).

<sup>226</sup> *Do You Qualify for Free Sales Tax Calculation & Reporting Services?*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/certified-service-providers/freeservices>. (last visited Nov. 5, 2020).

<sup>227</sup> Johnson, *supra* note 186.

<sup>228</sup> See Hmayakyan, *supra* note 121, at 311.

<sup>229</sup> See *id.* at 311-12.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 313.

<sup>233</sup> *Id.* at 311-13.

<sup>234</sup> *Id.* at 313.

<sup>235</sup> *Hearings*, *supra* note 115 (statement of Jamie C. Yesnowitz).

the threshold?<sup>236</sup> It would become arduous for companies to review all their sales for the year and figure out what sales tax they owe, as well as if the consumer paid the use tax on the item. Many smaller companies choose to not calculate sales taxes throughout the year because they have not hit the threshold in the past.<sup>237</sup> Making the determination that a company starts collecting sales tax once they hit the threshold and providing a 90-day grace period would provide a clear standard for businesses to follow and would relieve the stress of frantically looking back on sales when taxes become due.<sup>238</sup> It would provide a reasonable amount of time after the close of the fiscal or calendar year before a remote seller is required to register to collect and remit the sales tax, minimizing the onerous time burden.<sup>239</sup>

Finally, Congress should narrowly tailor the decision in *Wayfair* to only sales and use tax application.<sup>240</sup> Companies are nervous to see how far states are going to take the new nexus standards and whether the standards will bleed into the income tax world.<sup>241</sup> Predominately, the standard from *Quill* is not considered to apply to income taxes, but some disagree.<sup>242</sup> For example, Wells Fargo is one company that announced it will be making a \$481 million adjustment to its earnings based on the *Wayfair* decision.<sup>243</sup> This decision was not prompted by potential sales tax exposure, but because some of its affiliated entities were relying on *Quill* to not pay income taxes in states.<sup>244</sup> Especially with extreme stances like in Kansas, Congress should consider legislation to rein in the interpretations of this decision. Congress has the power to establish parameters of the *Wayfair* decision so states know how to properly navigate their tax requirements.<sup>245</sup> While it is not feasible to completely streamline all sales and income tax regimes, it is possible for Congress to set minimum standards for both to make it easier for small businesses to confidently comply.<sup>246</sup>

The *Wayfair* decision was long anticipated in the tax industry. It provides states with taxing power they should have against companies that have substantial presence within the state.<sup>247</sup> Nevertheless, the lack of uniformity among states has caused harm for small businesses that must be addressed.<sup>248</sup> Justice Roberts was not wrong when he foreshadowed that “the burden will fall disproportionately on

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<sup>236</sup> Hmayakyan, *supra* note 121, at 313-14.

<sup>237</sup> *Id.*

<sup>238</sup> See generally *Hearings*, *supra* note 115 (statement of Jamie C. Yesnowitz).

<sup>239</sup> *Id.*

<sup>240</sup> Gamage et al., *supra* note 214, at 83-86.

<sup>241</sup> *Id.*; *One by One, States Respond to South Dakota v. Wayfair*, RIA ST. & LOC. TAX UPDATE (Aug. 1, 2018).

<sup>242</sup> *Id.* at 83-84.

<sup>243</sup> *Id.* at 83.

<sup>244</sup> *Id.*

<sup>245</sup> *Hearings*, *supra* note 115 (statement of Jamie C. Yesnowitz).

<sup>246</sup> *Id.*

<sup>247</sup> Nuttall, *supra* note 35, at 627-28.

<sup>248</sup> See *Hearings*, *supra* note 115 (statement of Jamie C. Yesnowitz).

small business[es].”<sup>249</sup> Small businesses employ almost 59 million people in the United States.<sup>250</sup> Around 240,000 businesses were established in one quarter alone.<sup>251</sup> Action needs to be taken to protect those chasing their dream so they are not stopped by Uncle Sam before they even get started.

Your small online boutique shop could become the next big thing, but that business must be given the opportunity to grow. Large corporations did not become what they are overnight, but instead, with years of growth and protection from proportionally unfair taxes. Dismantling that protection and replacing it with numerous state tax regulations and registration requirements can steer people away from chasing their dreams and diminish the presence of small businesses in the national economy.

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<sup>249</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2103 (2018) (Roberts, J., dissenting).

<sup>250</sup> *2018 Small Business Profile*, *supra* note 135.

<sup>251</sup> *Id.*