

## THE REMOTE SELLER ISSUE IN COLORADO: REEXAMINING *QUILL* AND *BELLAS HESS*

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In *Direct Marketing Association v. Brohl*<sup>1</sup> (*Brohl II*), Justice Kennedy charged the legal system to find an “appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.”<sup>2</sup> He noted that changes in technology and consumer sophistication warrant a reconsideration of the physical presence nexus standard that currently serves to shield remote sellers from the obligation to collect and remit owed sales tax.

Whether a retailer must have a physical presence in the jurisdiction in which a sale occurs before it can be compelled to collect and remit owed sales tax was last addressed by the U.S. Supreme Court in 1992 in *Quill Corporation v. North Dakota*.<sup>3</sup> At that time, out-of-state catalog retailers dominated the remote seller issue. In *Quill*, the Supreme Court affirmed the bright-line rule from *National Bellas Hess v. Department of Revenue*<sup>4</sup> and held that companies without a “substantial nexus” in the state where customers lived did not have to charge sales tax.<sup>5</sup> As retail activity has changed over the last 25 years, from primarily brick-and-mortar businesses to internet sellers, state and local governments have struggled to address both lost sales and use tax revenues and the impacts to resident business communities.<sup>6</sup>

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1. 135 S. Ct. 1124, 1124 (2015) (*Brohl II*).

2. *Id.* at 1135.

3. 504 U.S. 298, 298 (1992).

4. 386 U.S. 753, 753 (1976).

5. *Quill*, 504 U.S. at 298.

6. *See Brohl II*, 135 S.Ct. at 1135 (Kennedy, J., concurring) (contrasting the impacts of *Quill* in 1992, when the national catalog sales were \$180 billion, with e-commerce sales in 2008, which totaled \$3.16 trillion).

This Article first provides an overview of state legislative responses to the *Quill* physical presence requirement. Then, it explores recent Colorado legal and policy developments to provide context for the reexamination of the standard, specifically the rise of the “Amazon Law” and the evolution of the litigation that followed in the *Brohl* cases. Finally, this Article reviews the importance of the remote seller issue to Colorado municipal governments in light of the Taxpayers Bill of Rights and the Gallagher amendments in the Colorado Constitution.

#### STATE CHALLENGES TO THE BOUNDARIES OF THE PHYSICAL PRESENCE NEXUS STANDARD

Reexamining *Quill* and *Bellas Hess* necessarily means establishing a different basis for sales tax nexus. The nexus standard evaluates the character, strength, and purpose of the relationship between a non-resident business and a state or local government to determine if the business has an obligation to collect and remit the tax. Courts evaluate nexus to decide whether a state or local tax violates the dormant Commerce Clause, and the applicable nexus standard depends on the type of tax at issue. Although substantial nexus must exist for most taxes to pass constitutional muster,<sup>7</sup> sales tax must satisfy a special, stricter standard: the physical presence nexus standard.<sup>8</sup>

Since *Quill*, several states adopted policy changes intended to provide a workaround to the physical presence nexus standard. These strategies varied, but each responded to the challenges articulated in *Quill* and *Brohl II*: make a compelling case to Congress to adopt federal laws governing the sales and use tax obligations of remote sellers, or bring an appropriate test case to the federal courts to modify the physical presence standard.<sup>9</sup>

Examining the evolution of state and local strategies post-*Quill* contextualizes Colorado’s approach to the physical presence nexus standard for remote sellers. First, the multi-state approach of the Streamlined Sales Tax Project emerged to simplify collection and to overcome the undue burden of compliance on remote sellers. Then, several states adopted a new approach to establishing physical presence nexus through in-state affiliates of a remote seller. As these tactics continued to evolve, other states focused on the use tax liability of consumers and created a duty on remote

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7. See *Complete Auto. Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (establishing a four-part test used to determine if a tax violates the Commerce Clause which includes whether it “[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State”).

8. *Bellas Hess*, 386 U.S. at 758; *Quill*, 504 U.S. at 317-18.

9. *Quill*, 504 U.S. at 318 (“Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.”); *Brohl II*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (discussing the tenuous nature of the *Quill* decision, the changing economic landscape, and suggesting that the legal system locate a case to challenge *Quill* and *Bellas Hess*).

sellers to provide notice of that liability to their consumers. This notice requirement prompted the remote retailers' constitutional challenge in *Brohl II*. Most recently, another set of states passed legislation involving new nexus criteria for remote sellers – the economic nexus standard. South Dakota enacted a remote seller economic nexus standard in 2016, expressly in response to the call for a test case in *Brohl II*. Policy makers continue to grapple with the economic and legislative outcomes of each approach.

#### REMOVING BURDENS TO COMPLIANCE: THE STREAMLINED SALES TAX PROJECT

In the early 2000s, a multi-state effort began to modernize sales and use tax by simplifying state statutes and updating tax administration: the Streamlined Sales Tax Project (SSTP). The SSTP responds to the complexities of state sales tax systems by identifying and implementing solutions to reduce the burden of tax compliance. The Streamlined Sales and Use Tax Agreement (SSUTA) furthers the SSTP's goals of improving sales and use tax compliance by creating statutory uniformity between the states in areas such as tax definitions, base, rates, exemptions, and sourcing. It also streamlines tax administration through simplified returns and remittances processes and technological solutions.<sup>10</sup> The SSTP exemplifies the potential success of an ambitious, multi-state project to coordinate highly technical legal and tax administration policies and practices. Twenty-four states have adopted the simplification measures in the SSUTA.<sup>11</sup>

Several factors, however, likely influenced other states to approach the remote seller issue differently. Federal statutory proposals introduced over the last seven years have languished,<sup>12</sup> leading to the conclusion that Congress is unwilling or unable make policy in this area. The amount of time and effort needed for state compliance with the SSUTA may also prevent states from becoming full members of the SSTP. Yet another factor is the relatively meager amount of tax revenue that the SSTP has netted for member states when compared to the amount actually owed.<sup>13</sup> Lastly,

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10. See "About Us: The Streamlines Sales Tax Governing Board," <http://www.streamlinedsalestax.org/index.php?page=About-Us>.

11. *Id.*

12. See generally, Main Street Fairness Act, S. 707, 115th Cong. (2017) (corresponds to H.R. 116, 115th Cong. (2017), H.R. 5076, 114th Cong. (2015), H.R. 2701, 112th Cong. (2011), S. 1452, 112th Cong. (2011); H.R. 5660, 111th Cong. (2009)); Marketplace Fairness Act, S. 976, 115th Cong. (2017) (corresponds to S. 698, 114th Cong. (2015), S. 743, 113th Cong. (2013), H.R. 684, 113th Cong. (2013), S.336, 113th Cong. (2013), S. 1832, 112th Cong. (2011)); Remote Transactions Parity Act, H.R. 2193, 115th Cong. (2017) (corresponds to H.R. 2775, 114th Cong. (2015)).

13. See Laura Mahoney, et al., *States See Little Revenue From Online Sales Tax Laws, Keep Pressure on Congress*, BLOOMBERG BNA (Jan. 8, 2014), <http://tinyurl.com/zvaarcv> (stating \$1.3 billion was collected through SSTP between October 2005 and 2012); Donald Bruce, et al., *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537, 543 (2009) (Table 3) (showing \$66 billion-plus owed on e-commerce sales in participating SSTP states over approximately same period).

the unique characteristics of several state and local tax structures may complicate conformity with the agreement.<sup>14</sup> For these reasons, starting in the late 2000s, many states self-initiated legislation to find immediate solutions.

#### THE FIRST APPROACH: AFFILIATE OR “CLICK-THROUGH” NEXUS

New York challenged the premise of the physical presence standard in 2008 by adopting a rebuttable presumption. Now known as the click-through nexus, New York assumed that an in-state associate or affiliate referring sales to a remote seller created a sales tax nexus.<sup>15</sup> New York’s highest state court rejected the facial challenge to the click-through nexus law brought by Amazon and Overstock.com, holding that physical presence under *Quill* could be met if economic activities were performed in the state on the seller’s behalf.<sup>16</sup>

Several states followed New York’s lead<sup>17</sup> and adopted the affiliate approach to establishing a physical nexus for remote sellers. This tactic, however, had two flaws: not all remote sellers used an affiliate model to refer sales; and those remote sellers with affiliates started cancelling the associated contracts to eliminate the establishment of a click-through nexus.<sup>18</sup> Fewer states used this approach as remote sellers responded by cancelling wholesale affiliate contracts. A new strategy then emerged to attack the issue from a new front: notification of consumer use tax obligations.

#### COLORADO’S APPROACH: CONSUMER USE TAX NOTIFICATIONS (A.K.A. THE “AMAZON LAW”)

Colorado’s General Assembly took a unique approach to the remote seller issue in 2010 when it enacted House Bill 1193. The new legislation resembles the W-2 reporting structure in income tax. It requires non-collecting remote sellers making more than \$100,000 in annual gross sales in Colorado to: (1) notify Colorado purchasers that they are required to file a

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14. See, e.g., COLO. CONST. art. 20, § 6 (granting Colorado home rule cities the right to administer the own sales and use taxes under their charters); *id.* art. V, § 35 (prohibiting the delegation to any special commission, private corporation or association the power “to levy taxes or perform any municipal function”); see also IDAHO CONST. art. VII, § 6; LA. CONST. art. VI, § 29..

15. N.Y. TAX LAW §1101(b)(8)(i)(C)(I), (b)(8)(iv).

16. *Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.*, 987 N.E.2d 621, 625 (N.Y. 2013) (*cert. denied*, *Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.*, 134 S. Ct. 682, 187 L.Ed.2d 549 (2013)).

17. See Nat’l Conference of State Legislatures, *2017 Remote Sales Tax State Legislation*, (Mar. 22, 2017), [http://www.ncsl.org/Portals/1/Documents/Podcast/2017\\_Remote\\_Sales\\_Tax\\_Legislation.pdf](http://www.ncsl.org/Portals/1/Documents/Podcast/2017_Remote_Sales_Tax_Legislation.pdf).

18. See Sam Gustin, *Amazon to Connecticut, Arkansas: ‘Drop Dead’ Over Sales Tax*, WIRED (June 13, 2011), <https://www.wired.com/2011/06/amazon-conn-ark/>; Jan Norman, “Amazon makes threats over Calif. Sales tax bills,” ORANGE CTY. REG. (March 6, 2011), <http://www.oregister.com/2011/03/06/amazon-makes-threats-over-calif-sales-tax-bills/>.

sales or use tax return for tax that has not been paid;<sup>19</sup> (2) send annual notification by mail to Colorado purchasers showing the total amount purchased over the previous calendar year; and (3) file an annual statement with the Colorado Department of Revenue showing the total amount purchased for each customer for the previous calendar year.<sup>20</sup> Failure to provide these notifications and statements subjects retailers to a five or ten dollar fine per instance.<sup>21</sup> House Bill 1193 became informally known as the Amazon Law.

Colorado's consumer-use-tax-notification approach strategically builds on existing consumer obligations in most sales tax jurisdictions to pay a use tax when no sales tax has been collected.<sup>22</sup> Together, these new and existing laws effectively address both the governmental revenue loss and the competitive disadvantage that brick-and-mortar retailers suffer by being compelled to collect and remit sales tax when remote sellers are not.<sup>23</sup>

Two obvious disadvantages exist, however. First, notice and reporting compliance by remote sellers and use tax payment compliance by consumers will undoubtedly improve but not match the higher sales tax compliance rate.<sup>24</sup> Second, the payment of use tax by consumers pursuant to an annual notification may prove unpopular.<sup>25</sup> Sales tax holds the psychological advantage of feeling de minimus because consumers pay in small increments over time. The consumer-use-tax-notification approach, however, could result in an annual lump sum payment of use tax similar to property tax payments. Opponents to this approach lobbied to reduce the notification obligations and eliminate the compliance mechanism, citing privacy concerns.<sup>26</sup> While legislation to curtail the Amazon Law has been unsuccessful to date, it demonstrates the overall lack of enthusiasm by those who bristle at the idea of heightened use tax enforcement.

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19. Use tax is a companion to the sales tax and is due when goods (potentially both tangible personal property and digital goods) are brought into the taxing jurisdiction without paying the sales tax. Both sales and use tax are obligations by the purchaser or consumer; however, sales tax is collected on the purchaser's behalf by the retailer, whereas use tax is paid to the taxing jurisdiction by the consumer. Colorado's use tax is imposed under COLO. REV. STAT. § 39-26-202 (2016).

20. COLO. REV. STAT. § 39-21-112 (3.5) (2016).

21. COLO. REV. STAT. § 39-21-112 (3.5)(c)(II), (3.5)(D)(II)(A), (3.5)(D)(III)(A)-(B) (2016).

22. COLO. REV. STAT. 39-26-104(1)(a), 202(1)(a) (2016).

23. See Nat'l Conference of State Legislatures, *supra* note 17.

24. Use tax compliance by retail consumers is generally poor. See, for example, the fiscal note for Colorado State Senate Bill 238 (2017), <http://leg.colorado.gov/bills/sb17-238> (citing that 79,000 Colorado residents filed use tax in 2015). Compliance with the sales tax that applies to physically-present retailers, however, is conversely high. See *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1132 n.1 (10th Cir. 2016) (*Brohl III*) (noting compliance rate of 98.3%).

25. Joey Bunch, *Online sales taxes pose Colorado question of privacy versus revenue*, COLO. SPRINGS GAZETTE (Apr. 4, 2017), <http://gazette.com/online-sales-taxes-pose-colorado-question-of-privacy-versus-revenue/article/1600338>; Brian Eason, *Colorado's 'Amazon tax' law will soon take effect. But it faces renewed opposition*, DENV. POST (Apr. 4, 2017), <http://www.denverpost.com/2017/04/04/colorado-amazon-tax-law-opposition/>.

26. *Id.*

*DMA v. BROHL*: THE KENNEDY CONCURRENCE HEARD AROUND THE COUNTRY

Before Colorado's newly-passed Amazon Law could even take effect in 2010, a direct-mail and online industry group immediately challenged it as unconstitutional in federal district court for the District of Colorado.<sup>27</sup> The Direct Marketing Association (DMA) asserted an array of constitutional theories against the Colorado Department of Revenue. Most forcefully, they claimed that the Amazon Law violated *Quill* and discriminated against interstate commerce under the dormant Commerce Clause. States and retailers across the country watched closely as this case offered the opportunity to provide a workable solution to *Quill*. Some states tied the implementation of their own "Amazon Law" to the outcome of the *DMA* case.<sup>28</sup> An intensive seven-year litigation battle followed that produced a U.S. Supreme Court opinion, three appellate reversals, two preliminary injunctions from two different courts, and thousands of pages of briefing.

After *DMA* initially won a preliminary injunction to prevent interim enforcement of the Amazon Law, the parties agreed to engage in limited discovery and cross motions for summary judgment on only the *Quill* and discrimination claims. In resolving the summary judgment motions, the district court, Judge Blackburn, agreed with *DMA* that the Amazon Law fell within *Quill*'s sweep because its burdens were "inextricably related in kind and purpose to the burdens condemned in *Quill*."<sup>29</sup> The district court also agreed with *DMA* that the new Amazon Law discriminated against interstate commerce, stating it "impose[s] a notice and reporting burden on out-of-state retailers and that burden is not imposed on in-state retailers."<sup>30</sup>

While the district court and the parties below had focused on the merits, the Tenth Circuit concerned itself with an entirely separate issue: jurisdiction.<sup>31</sup> Drawing the appellate court's attention was the Tax Injunction Act (TIA).<sup>32</sup> It states that the federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."<sup>33</sup> *DMA*'s federal challenge fell within the TIA, the Tenth Circuit concluded, because its effect would "restrain" or "hold back" Colorado's chosen method of enforcing its tax laws and generating revenue.<sup>34</sup> Thus, the appellate panel remanded for dismissal of *DMA*'s federal suit

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27. Direct Mktg. Ass'n v. Huber, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 (D. Colo. 2012).

28. VT. STAT. ANN. tit. 32, §§ 9701(54), 9712 (effective date provisions).

29. *Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175, \*8 (D. Colo. 2012).

30. *Id.* at \*5.

31. Direct Mktg. Ass'n v. Brohl, 735 F.3d 904 (10th Cir. 2013) (*Brohl I*).

32. 28 U.S.C. § 1341.

33. *Id.*

34. *Brohl I*, 735 F.3d at 913.

because jurisdiction properly lied in Colorado state court, not federal court.

DMA responded to the Tenth Circuit's opinion in two-fold. First, before the ink dried on the federal district court's dismissal order, DMA brought a new suit in Denver District Court and won a second preliminary injunction that again prohibited interim enforcement of the Amazon Law.<sup>35</sup> Second, with the law's implementation again stalled, DMA proceeded to seek and obtain certiorari review of the Tenth Circuit's opinion in the U.S. Supreme Court.<sup>36</sup> When the Supreme Court granted certiorari, the Denver District Court stayed all further proceedings, albeit with the preliminary injunction left in place.<sup>37</sup>

At the Supreme Court level, DMA won the battle over federal jurisdiction but also inadvertently contributed to losing the war over the Amazon Law and, perhaps, *Quill*. The Supreme Court agreed with DMA that the TIA did not deprive the federal courts of jurisdiction, concluding that the TIA "is keyed to the acts of assessment, levy and collection" of an actual tax, and enforcement of the Amazon Law's notice and reporting requirements "is none of these."<sup>38</sup>

The majority's unremarkable TIA analysis paled in comparison to the importance of Justice Kennedy's concurrence questioning *Quill*'s continuing viability.<sup>39</sup> Citing statistics highlighted in the briefing, Justice Kennedy observed that *Quill* has worked a "continuing injustice" to not only Colorado and other states that face a "startling revenue shortfall," it also caused "concomitant unfairness" to local, physically present retailers who suffer the burdens of collecting and remitting the owed tax.<sup>40</sup> In Justice Kennedy's view, the "far-reaching systemic and structural changes" to the economy caused by the Internet rendered it "unwise to delay" the Court's reconsideration of *Quill*.<sup>41</sup> He thus urged the legal community to "find an appropriate case" for the Court to reexamine the physical presence standard.<sup>42</sup>

With the jurisdictional issue resolved by the Supreme Court, the Tenth Circuit on remand proceeded to address the merits of the Amazon Law's constitutionality. In *Brohl III*, the same panel from *Brohl I* reversed the district court and upheld the Amazon Law's notice and reporting provisions.<sup>43</sup> On the discrimination claim, the court agreed with Colorado that

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35. Direct Mktg. Ass'n v. Colo. Dep't of Revenue, Denver Dist. Ct. No. 13cv34855 (Feb. 18, 2014).

36. See Direct Mktg. Ass'n v. Brohl, 134 S. Ct. 2901 (2014) (order granting certiorari).

37. Direct Mktg. Ass'n, Denver Dist. Ct. No. 13cv34855 (July 10, 2014).

38. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1131 (2015) (*Brohl II*).

39. *Id.* at 1134–35 (Kennedy, J., concurring).

40. *Id.*

41. *Id.* at 1135.

42. *Id.*

43. Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016) (*Brohl III*).

non-collecting out-of-state retailers “are not similarly situated” to in-state retailers who must comply with tax collection requirements.<sup>44</sup>

On the *Quill* claim, the circuit court, taking its cue from Justice Kennedy, took a narrow view of *Quill* as applying only to tax collection efforts, not the notice and reporting requirements in the Amazon Law.<sup>45</sup> Since the Supreme Court in *Brohl II* determined the Amazon Law did not touch upon the collection of taxes for TIA purposes, the Tenth Circuit reasoned *Quill* similarly did not apply to the Amazon Law’s non-collection components. DMA’s broad view of *Quill*—a case that is properly “confined to the sphere of sales and use tax collection”—could not “be squared” with the Supreme Court’s holding in *Brohl II*.<sup>46</sup> According to the Tenth Circuit, “DMA’s success in *Brohl II* le[d] to the demise of its [*Quill*] argument[.]”<sup>47</sup>

Then-Judge Neil Gorsuch authored a concurring opinion to explain that the gravamen of the appeal, in his view, was entirely about the “power of precedent,” namely *Quill*’s precedent.<sup>48</sup> The soon-to-be Justice viewed DMA’s argument that *Quill* should apply as “reasonable,” but ultimately declined to endorse it because of the “exceptional narrowness” of what he termed *Quill*’s “ratio decidendi.”<sup>49</sup> *Quill*’s ratio, Judge Gorsuch believed, was all about the “doctrine of *stare decisis* and the respect due a still earlier decision,” and not about the comparability of one tax burden to another.<sup>50</sup> He noted that the *Quill* Court in 1992 adhered to *Bella Hess*’ earlier physical presence rule from 1967 only to protect the “reliance interests” that had grown around it.<sup>51</sup> Against the backdrop of that tax collection rule, Judge Gorsuch opined, “we are under no obligation to extend that rule to comparable tax and regulatory obligations.”<sup>52</sup> Rather, *Quill*’s ratio deliberately ensures that the physical presence rule “would never expand but would, if anything, wash away with the tides of time.”<sup>53</sup>

Although both parties sought certiorari review in the U.S. Supreme Court—DMA on the merits of *Brohl III* and the Colorado Department of Revenue on the continued viability of *Quill*, hoping to take Justice Kennedy up on his earlier invitation—the Court denied certiorari.<sup>54</sup> With the federal judgment having preclusive effect on the related state court litigation, the parties agreed to voluntarily dismiss the long-stayed state court

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44. *Id.* at 1143.

45. *Id.* at 1136.

46. *Id.* at 1147.

47. *Id.*

48. *Id.* at 1148.

49. *Id.* at 1147–48.

50. *Id.* at 1149.

51. *Id.* at 1149 (citing *Nat’l Bellas Hess v. Dep’t of Rev.*, 386 U.S. 753, 753 (1967)).

52. *Id.*

53. *Id.* at 1151.

54. *Direct Mktg. Ass’n v. Brohl*, 137 S. Ct. 591 (2016) (order denying certiorari); *Brohl v. Direct Mktg. Ass’n*, 137 S. Ct. 593 (2016) (same).

case, dissolve the preliminary injunction, and adhere to a July 1, 2017 implementation date for the Amazon Law.<sup>55</sup>

REJECTIONS OF PHYSICAL PRESENCE NEXUS FOR SALES TAX:  
ECONOMIC NEXUS LEGISLATION

Following the Amazon Law litigation, a newer concept emerged surrounding the remote seller issue: economic nexus. Economic nexus, first adopted in the mid-2000s, required non-resident businesses to pay non-income business activity taxes when sales or gross receipts in a state exceed set economic thresholds.<sup>56</sup> State legislatures adapted this approach to the remote seller issue by requiring internet sellers to collect and remit sales tax when their in-state sales exceed certain dollar thresholds.

South Dakota's legislature took this approach when it enacted Senate Bill 106 in 2016.<sup>57</sup> This bill established two thresholds which trigger the obligation for remote sellers to collect and remit sales tax: (1) when gross revenues from in-state sales of goods (both tangible personal property and digitally delivered products) or services exceed \$100,000 annually; or (2) when the retailer's separate transactions in the state exceed 200 transactions annually.<sup>58</sup>

The legislative intent section for Senate Bill 106 included several points articulating the growing concerns of state and local governments on this issue:

- the erosion of the tax base as goods, services, and digitally delivered products migrate to remote sales platforms;<sup>59</sup>
- the greater impact of these trends on state and local governments that do not impose an income tax;<sup>60</sup>
- the active marketing of remote sales as “tax free”;<sup>61</sup>
- the benefit to remote sellers of the state's economy and infrastructure;<sup>62</sup> and

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55. *Direct Mktg. Ass'n*, Denver Dist. Ct. No. 13cv34855 (Feb. 28, 2017).

56. In the Interstate Income Act of 1959, Public Law 86-272, Congress limited states from collecting net income tax from businesses that merely travel to or send representatives to a state to solicit orders for goods. 15 U.S.C. §§ 381–384 (2012). This Act does not apply to business activity taxes, such as a gross receipts tax, because these types of taxes do not meet the definition of a net income tax. 15 U.S.C. § 383 (2012). See American Institute of Certified Public Accountants, *AICPA State Tax Nexus Guide* (2014), [http://www.aicpa.org/membership/downloadabledocuments/sample\\_files\\_/tax-section/sample-2014-state-tax-20nexus-guide.pdf](http://www.aicpa.org/membership/downloadabledocuments/sample_files_/tax-section/sample-2014-state-tax-20nexus-guide.pdf) (describing the economic nexus issue for state and local tax practitioners).

57. S.B. 106, 2016 Leg., 91<sup>st</sup> Sess. (S.D. 2016).

58. *Id.* at § 1(1) - (2).

59. *Id.* at §8(1), (4).

60. *Id.* at §8(2).

61. *Id.* at §8(3).

62. *Id.* at §8(5).

- the falling cost and reduced burdens of collection, given modern computing and software.<sup>63</sup>

Further, the South Dakota legislature included in this intent section a statement that the new law directly responded to Justice Kennedy's challenge in *Brohl II* to bring a test case to reconsider *Quill*, and the growing arguments and urgency for addressing the remote seller issue.<sup>64</sup>

Recognizing existing constitutional doctrines may restrict implementation of South Dakota's law,<sup>65</sup> Senate Bill 106 expressly authorized the state to seek a declaratory judgment and included a statutory injunction of the law's implementation until a binding judgment established the constitutionality of the law.<sup>66</sup> South Dakota filed such a declaratory judgment action on April 28, 2016, which is now working its way through the courts.<sup>67</sup>

#### COLORADO MUNICIPAL GOVERNMENTS AND THE REMOTE SELLER ISSUE

Several provisions in Colorado's constitution make the remote seller issue especially salient for municipal governments. Under Article XX, seventy home rule municipalities<sup>68</sup> in Colorado have established locally administered sales and use tax codes.<sup>69</sup> Because these sales and use tax bases are broader than the state's base, self-collecting municipalities collect greater revenues than the state.<sup>70</sup> Colorado's complex tax system allows the state to collect for itself and for many local sales tax jurisdictions. The legislature's adoption of additional sales and use tax exemptions, as well as the home rule self-collecting municipalities, add complexity to an already multifaceted system.<sup>71</sup>

Two other state constitutional amendments contribute to Colorado's unique landscape for municipal fiscal health: the Gallagher amendment

63. *Id.* at §8(6).

64. *Id.* at §8(7)–(9).

65. *Id.* at §8(10).

66. *Id.* at § 2.

67. The declaratory judgment action was filed in the South Dakota Sixth Judicial Circuit. The defendants, Wayfair Inc., Overstock.com Inc., and Newegg Inc., filed a notice of removal to federal district court. On January 17, 2017, the U.S. District Court granted the state's motion to remand the dispute back to state court. *South Dakota v. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc.*, -- F.Supp.3d ----, No. 3:16-CV-03019 (D.S.D. January 17, 2017).

68. COLO. DEPT. OF REV., *Colorado Sales/Use Tax Rates* DR 1001 (May 1, 2017), [www.tax-colorado.com](http://www.tax-colorado.com).

69. COLO. CONST. art. 20, § 6(g) (home rule, section on taxing authority); *Winslow v. City & Cnty. Of Denver*, 960 P.2d 685 (Colo. 1998) (recognizing that sales tax is essential to self-government, and in most respects a matter of "local & municipal concern").

70. COLO. DEPT. OF REV., *Uniform Sales and Use Tax Base Throughout the State: Recommendations to the General Assembly to Establish a Revenue-Neutral Uniform Sales and Use Tax Base Throughout the State, Required by HB13-1288* (2013), <https://www.colorado.gov/pacific/sites/default/files/Uniform%20Sales%20and%20Use%20Tax%20Base.pdf>.

71. *Id.* at 4–5 (discussing the differences between the state's base and the tax base for statutory cities and towns, as well as counties).

and the Taxpayer Bill of Rights (TABOR).<sup>72</sup> These amendments, both made to Article X of the Colorado Constitution, result in a less productive property tax revenue source for municipalities than sales tax. Over the last thirty-five years, the Gallagher amendment reduced local property tax collections as its ratio formula of residential to commercial property operated to reduce the residential assessment rate from 30% before the amendment was enacted,<sup>73</sup> adjusted downward per the constitutional formula to 7.2% in 2017.<sup>74</sup> The Gallagher amendment modified the assessment of the property prior to the tax being paid. It successfully provided tax relief for homeowners by reducing the value of property subject to tax; however, it greatly reduced the residential property tax base and arguably shifted the burden of the tax onto the commercial property category.

TABOR, likewise, has impacted municipalities' decisions to levy property taxes.<sup>75</sup> TABOR limits the revenue collected by all tax sources, including the property tax. This may result in a refund of duly assessed and paid taxes.<sup>76</sup> If tax revenues are collected above the TABOR limit (population growth + inflation), they must be returned to taxpayers. TABOR further requires voter approval for tax increases or changes to the assessment ratio.<sup>77</sup> TABOR's intent has been successfully effectuated by limiting the growth of government, requiring voter approval of tax increases, and limiting tax revenue collections. TABOR's vote requirement, however, presents challenges to municipalities seeking to offset the lost tax revenue caused by the remote seller issue. And because of the perceived de minimus impact of the sales tax relative to the property tax, municipalities often prefer to ask voters for a sales tax increase instead of a property tax increase in public elections. In other states, property tax generates 52% and sales tax 17% of total municipal tax revenues.<sup>78</sup> In Colorado, sales and use tax generates 69% of total municipal tax revenues while property tax generates only 19%.<sup>79</sup> Colorado's unique intersection of

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72. COLO. CONST. art. X, §§ 3, 15, 20.

73. See Colo. Dept. of Local Affairs, *Residential Assessment Rate*, <https://www.colorado.gov/pacific/dola/residential-assessment-rate>.

74. Colo. House Bill 1349 (2017), [http://leg.colorado.gov/bill-search?search\\_api\\_views\\_fulltext=hb17-1349](http://leg.colorado.gov/bill-search?search_api_views_fulltext=hb17-1349).

75. *Id.* § 20.

76. *Id.* § 20(7)(d).

77. *Id.* § 20(4).

78. Data exported from the Urban Institute's State and Local Finance Initiative - Data Query System, allows the user to query data from the Census of Governments State and Local Finance series. The revenue data for this report was last collected by the U.S. Government in 2012 (and is updated every five years). See URBAN INSTITUTE, *State and Local Finance Initiative*, Data Query System (SLF-DQS), <http://slfdqs.taxpolicycenter.org/index.htm> (last visited July 21, 2017).

79. This data was requested from the Colorado Department of Local Affairs (DOLA), which collects and publishes the revenue and spending plans for local governments. See DEPT. OF LOCAL AFFAIRS, *County & Municipal Financial Compendium* (2017), <https://www.colorado.gov/pacific/dola/county-municipal-financial-compendium>.

home rule jurisdictions, the limitation on residential property tax assessment, and voter approval for tax increases make the accelerating revenue losses from remote sales an acute issue in Colorado municipalities.

#### CONCLUSION

Today, seven years after it was enacted, the Amazon Law is in effect in Colorado, though the company for which it is informally named is no longer subject to the law. Amazon began collecting and remitting Colorado sales and use tax during the pendency of the case.<sup>80</sup> For other online purchases, however, customers and internet retailers alike may see heightened enforcement efforts under the Amazon Law, continuing the slow trend of leveling the playing field between online retailers and brick-and-mortar stores. The greatest impact of Colorado's Amazon Law may be its triggering of Justice Kennedy's observation in *Brohl II* that the time has come to reexamine *Quill*. Colorado's residents have much at stake, due to a unique constitutional framework. Colorado's state and local governments must closely follow these developments to understand the benefits and consequences of changes in this quickly evolving area of legislation and case law.

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80. Brian Eason, *Colorado's "Amazon tax" law is now in effect. Here's what it means for shoppers and big sellers*, DENV. POST (July 7, 2017), <http://www.denverpost.com/2017/07/07/colorados-amazon-tax-law-meaning/>.