



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

17-002

STATE OF NEBRASKA
OFFICIAL

APR 18 2017

DEPT. OF JUSTICE

SUBJECT: Constitutionality of LB 44 – The Remote Seller Sales Tax Collection Act.

REQUESTED BY: Senator John Kuehn
 Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
 L. Jay Bartel, Assistant Attorney General

INTRODUCTION

You have requested our opinion on the constitutionality of LB 44 in light of the United States Supreme Court decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) [*“Quill”*]. In *Quill*, the Court held that a North Dakota use tax collection statute requiring out-of-state mail order sellers to collect and remit use tax on purchases made by resident consumers violated the “substantial nexus” requirement of the commerce clause of the U.S. Constitution (art. I, § 8, cl. 3). The Court defined “substantial nexus” as “physical presence” in the taxing state. *Id.* at 312. LB 44 proposes to require remote sellers who do not have physical presence in the state to collect and remit sales tax on purchases made by persons in the state if the remote seller’s gross revenue in Nebraska exceeds \$100,000 or the remote seller’s sales in the state comprise two hundred or more separate transactions. LB 44, §§ 3, 4. If a remote seller refuses to collect Nebraska sales tax, the remote seller is subject to notice and reporting requirements, including: (1) Notifying Nebraska purchasers that sales or use tax is due and that the purchaser is required to file a sales or use tax return; (2) Sending a notification to all Nebraska purchasers by January 1 of each year showing the total amount of purchases made in the previous year; and (3) Filing an annual statement for each purchaser with the Department of Revenue

by March 1 of each year showing the total amount paid for Nebraska purchases by such purchasers during the previous year. LB 44, § 5. The bill also provides penalties if the remote seller fails to provide the required notices and statements. *Id.*

For the reasons stated below, we conclude that the sales tax collection obligation imposed on remote sellers having no physical presence in Nebraska is unconstitutional under the commerce clause as interpreted by the U. S. Supreme Court in *Quill*. Moreover, as *Quill's* interpretation of the commerce clause is binding on any state or federal lower court, it can be changed only by the Court or action by Congress exercising its power to regulate interstate commerce. The notice and reporting requirements, if amended, would not be contrary to *Quill*, and would not violate the commerce clause, based on a recent decision of the Tenth Circuit U. S. Court of Appeals.¹ Because the notice and reporting requirements are not severable from the unconstitutional collection obligation under the bill as currently drafted, we conclude that LB 44 is presently unconstitutional in its entirety. The bill may, however, be amended to remedy these constitutional deficiencies.

ANALYSIS

I. LB 44's Requirement That Remote Sellers With No Physical Presence In Nebraska Collect And Remit Sales Tax From Nebraska Purchasers Is Unconstitutional Under *Quill*.

Quill addressed the constitutionality of a North Dakota statute requiring mail-order sellers who had no physical presence in the state to collect and remit use tax on sales to North Dakota residents. North Dakota brought a declaratory judgment action against *Quill* seeking a determination that it was liable for failing to collect and remit use tax. *Quill* argued the collection obligation was unconstitutional under both the due process and commerce clauses of the U.S. Constitution. 504 U.S. at 301-306. In an earlier case, *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967) [*"Bellas Hess"*], the Court held an Illinois statute similar to North Dakota's that required a mail order seller with no physical presence in Illinois to collect use tax on products sold to Illinois residents "violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce." *Id.* at 301. The Supreme Court of North Dakota, however, "declined to follow *Bellas Hess* because 'the tremendous social, economic, commercial, and legal innovations' of the past quarter-century ha[d] rendered its holding 'obsole[te].'" *Id.* (quoting *State by and through Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991)). Reversing North Dakota court's decision that the statute was constitutional, the Court undertook separate inquiries under the due process and

¹ *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir.), *cert. denied* 137 S. Ct. 593 (2016).

commerce clauses. While the Court determined that Quill's contacts with the state were sufficient for due process purposes, it found Quill's lack of physical presence in the state rendered the collection obligation invalid under the commerce clause. 504 U.S. at 308, 317-18.

Addressing the due process issue, the Court stated "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" 504 U.S. at 306 (*quoting Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)). It noted that its "due process jurisprudence ha[d] evolved substantially in the 25 years since *Bellas Hess*..." beyond the point of requiring "physical presence" to permit a state to exercise jurisdiction over a defendant. 504 U.S. at 307-308. Thus, despite Quill's lack of physical presence in North Dakota, the Court found that, as Quill "purposefully directed its activities at North Dakota residents, [the] magnitude of those contacts [was] more than sufficient for due process purposes." 504 U.S. at 308.

On the commerce clause issue, the Court recognized that "Article I, § 8, cl. 3, of the Constitution expressly authorizes Congress to 'regulate Commerce with foreign nations, and among the several states.'" 504 U.S. at 309. While the clause "says nothing about the protection of interstate commerce in the absence of any action by Congress...", it "is more than an affirmative grant of power; it has a negative sweep as well." *Id.* The Court stated its "interpretation of the 'negative' or 'dormant' Commerce Clause ha[d] evolved substantially over the years, particularly as the Clause concerns limitations on state taxation powers." *Id.* The Court drew a distinction between the due process and commerce clauses based on the different constitutional concerns underlying the two clauses. It reasoned that, while the due process clause is concerned with "the fundamental fairness of governmental activity", the commerce clause is focused on "structural concerns about the effects of state regulation on the national economy." *Id.* at 312. "Thus, the 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Id.* at 313.

The Court noted the four-part test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1974) [*Complete Auto*], under which a tax will be found not to violate the commerce clause if the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 504 U.S. at 311 (*quoting Complete Auto* at 279). *Bellas Hess* involved the first prong, "substantial nexus" with the taxing state, which, in the context of imposing use tax collection duties on an out-of-state seller, required "physical presence". 504 U.S. at 312. The Court declined to overrule *Bellas Hess*' "bright-line rule", as it "firmly establishe[d] the boundaries of legitimate state authority to impose a duty to collect sales and use taxes", and "encourage[d] settled expectations by businesses and individuals." *Id.* at 315-16. Noting it had "frequently relied on the *Bellas Hess* rule in the last 25 years...", the Court found the "rule ha[d] engendered substantial reliance and ha[d] become part of the basic

framework of a sizable industry.” *Id.* at 317. “[T]he doctrine of *stare decisis*...” thus “counsel[ed] adherence to [*Bellas Hess*] settled precedent.” *Id.* Finally, the Court emphasized that Congress had “the ultimate power to resolve” the issue, and was “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.” *Id.* at 318.²

Two years ago, the Court recognized the continuing impact of *Quill* as limiting state authority to impose tax collection obligations on out-of-state sellers. *Direct Marketing Ass’n v. Brohl*, 135 S.Ct. 1124 (2015) (“*Brohl I*”). While emanating from a challenge to the constitutionality of use tax notice and reporting requirements imposed by Colorado on noncollecting sellers lacking a physical presence in the state, the issue in *Brohl I* was whether bringing that challenge in federal court was barred by the Tax Injunction Act, 28 U.S.C. § 1341 [“TIA”]. The TIA provides that federal 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.” § 1341. Citing *Quill*, the majority opinion noted that, “[u]nder our negative Commerce Clause precedents, Colorado [could] not require retailers who lack a physical presence in the State to collect these taxes on behalf of the Department.” 135 S. Ct. at 1127. The Court reversed the Tenth Circuit’s holding that the TIA barred the suit and remanded for further proceedings, finding the notice and reporting requirements imposed by Colorado did not involve the “assessment, levy, or collection” of any state tax. *Id.* at 1131. Nor did the suit “restrain” the “assessment, levy, or collection” of a state tax, as it “merely inhibit[ed] those activities.” *Id.* at 1133.

In a concurring opinion, however, Justice Kennedy wrote separately regarding “what may well be a serious injustice faced by Colorado and many other States.” 135 S Ct. at 1134 (Kennedy, J., concurring). Justice Kennedy characterized *Quill*’s holding as “tenuous”, and as “a holding now inflicting extreme harm and unfairness on the States.” *Id.* He asserted the Court should have taken the opportunity in *Quill* “to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy...,” asserting “[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.” *Id.* at 1134-35. This argument, in his view, “has grown stronger, and the cause more urgent, with time.” *Id.* at 1135. Justice Kennedy noted that in 1992, when *Quill* was decided, “the Internet was in its infancy...,” and that, “[b]y 2008, e-commerce alone totaled \$3.16 trillion per

² Despite the Court’s suggestion in *Quill* that Congress address the issue, Congress has not acted. A version of the Marketplace Fairness Act was approved by the Senate in 2013 (S. 743), but languished in the House of Representatives. Two newer proposals are the Marketplace Fairness Act of 2015 (S. 698) and the Remote Transaction Parity Act (H.R. 2775). At this time, the likelihood of congressional action in the near future appears remote.

year in the United States.” *Id.* In his view, “[b]ecause of *Quill* and *Bellas Hess*, States have been unable to collect many of the taxes due on these purchases...”, resulting in “a startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay taxes at the register.” *Id.* Calling *Quill* “[a] case questionable when decided”, he noted that “*Quill* now harms States to a degree far greater than could be anticipated earlier.” *Id.* While stating that, given “changes in technology and consumer sophistication, it [was] unwise to delay any longer reconsideration of the Court’s holding in *Quill*...”, he recognized “[t]he instant case [did] not raise this issue in a manner appropriate for the Court to address it.” *Id.* Justice Kennedy concluded by stating the case provided “the means to note the importance of reconsidering doubtful authority...”, and urged “[t]he legal system [to] find an appropriate case for [the] Court to reexamine *Quill* and *Bellas Hess*.” *Id.*

Taking up Justice Kennedy’s invitation to challenge *Quill*, South Dakota enacted a statute in 2016 requiring certain remote sellers to comply with the state’s sales tax laws “as if the seller had a physical presence in the state.” S.B. 106, 2016 Leg., 91st Sess. (S.D. 2016).³ The law applies only to sellers that exceed \$100,000 in gross revenues from sales within South Dakota, or have more than 200 separate transactions within the state in the prior calendar year. S.B. 106, § 1(1)-(2). The statute permits the State to bring a declaratory judgment action in state court to establish that the collection requirement imposed on remote sellers is “valid under state and federal law.” S.B. 106, § 2. The filing of such a declaratory judgment action operates as an injunction prohibiting enforcement of the collection obligation. S.B. 106, § 3. South Dakota proceeded to file an action as allowed by the statute against several remote sellers that did not voluntarily agree to undertake sales tax collection. *State of South Dakota v. Wayfair, Inc., et al.*, 32CIV16-000092 (Sixth Judicial Circuit Court). The companies removed the case to federal district court. *State of South Dakota v. Wayfair, Inc.*, 3:16-cv-03019. The federal district court, however, granted the State’s motion to remand the matter to state court. *Id.* (Order and Opinion Granting Plaintiff’s Motion to Remand to State Court (Jan. 17, 2017)).⁴ On March 6, 2017, the state court granted the defendant retailers’ motion for summary

³ Wyoming recently passed remote seller collection legislation similar to South Dakota. Ch. 85 (H.B. 19), Wyoming Laws 2017 (*to be codified at Wyo. Stat. Ann. §§ 39-15-101 and 39-15-501*). Similar remote seller collection legislation is also being considered in Indiana (S.B. 545).

⁴ The federal district court remanded the case to state court for lack of federal jurisdiction based on *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983). Order and Opinion at 1. The district court concluded the TIA was not a bar to the suit proceeding in federal court, as it originated in state court as a suit brought by the State, and did not involve an action by a taxpayer seeking to enjoin collection. *Id.* at 19-20. A suit to enjoin the collection obligation brought by a remote seller subject to LB 44 would fall squarely within the TIA, precluding suit in federal court.

judgment. *State of South Dakota v. Wayfair, Inc.*, 32CIV16-000092 (Order Granting Defendants' Motion for Summary Judgment). In its order, the circuit court noted the State acknowledged that, under *Quill*, it was "prohibited from imposing sales tax collection and remittance obligations on the Defendants..." and that the court was "required to grant summary judgment in Defendants' favor, because of the *Quill* ruling." *Id.* at 2. The circuit court recognized it was "duty bound to follow applicable precedent of the United States Supreme Court...", and "[t]his [was] true even when changing times and events clearly suggest a different outcome...", as it was "not the role of a state circuit court to disregard a ruling from the United States Supreme Court." *Id.* at 2-3. South Dakota has appealed the circuit court's decision to the South Dakota Supreme Court, and review of the decision by that court will undoubtedly be sought in the U.S. Supreme Court to provide the "appropriate case" referred to by Justice Kennedy to "reexamine *Quill* and *Bellas Hess*." 135 S. Ct. at 1135.⁵

If a "precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). State and lower federal courts are "bound by [the Supreme] Court's interpretation of federal law." *James v. City of Boise*, 136 S. Ct. 685, 686 (2016). See also *Elmendorf v. Taylor*, 23 U.S. 152, 160 (1825) ("[T]he construction given by [the Supreme] Court to the constitution and laws of the United States is received by all as the true construction."). The South Dakota circuit court correctly recognized it was bound to follow *Quill*. The same would be true of any Nebraska court in a suit challenging the constitutionality of the sales tax collection requirement imposed on remote sellers with no physical presence in the state by LB 44. *Quill's* interpretation of the commerce clause is binding on any state or federal lower court, and can be changed only by the Court or action by Congress exercising its power to regulate interstate commerce.

As stated by Justice Kennedy in his concurrence in *Brohl I*, there are compelling arguments for the Court to revisit and ultimately overrule its decisions in *Quill* and *Bellas Hess*. The "physical presence" requirement may well be outdated and unrealistic given economic and technological changes which have occurred since *Quill* was decided. Unless or until *Quill* is overruled by the Court or Congress, however, LB 44's imposition of a sales tax collection requirement on remote sellers with no physical presence in the state is unconstitutional under the commerce clause.⁶

⁵ Tennessee and Alabama have adopted regulations challenging *Quill* which impose sales tax collection requirements on out-of-state sellers lacking physical presence in the state. Ala. Admin. Code R. 810-6-1-.90.03; Tenn. Comp. R. & Regs. 1320-05-01-.129. A challenge to Alabama's regulation is pending in the Alabama Tax Tribunal. *Newegg, Inc. v. Alabama Dep't of Revenue*, No. S. 16-613 (filed June 8, 2016).

⁶ Vermont has also enacted legislation similar to South Dakota and Wyoming with the same dollar and transaction thresholds. H. 873, § 27, Vermont Laws 2016.

II. LB 44's Notice And Reporting Requirements, If Amended, Would Not Violate The Commerce Clause.

On remand from the Supreme Court, the U.S. Court of Appeals for the Tenth Circuit addressed whether use tax notice and reporting requirements imposed by Colorado on noncollecting sellers lacking a physical presence in the state violated the commerce clause. *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir.), cert. denied 137 S. Ct. 593 (2016) [*Brohl II*]. In 2010, Colorado enacted legislation imposing notice and reporting obligations on non-collecting retailers. Colo. Rev. Stat. § 39-21-112(3.5)(b)-(d)(I)-(III). A “non-collecting retailer” was defined as “a retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax.” 1 Colo. Code Regs. § 201-1:39-21-112.3.5(1)(a)(i). Retailers making less than \$100,000 in total gross sales in Colorado were exempted from the notice and reporting requirements. *Id.* § 201-1:39-21-112.3.5(1)(a)(iii). The requirements included sending: (1) A “transactional notice” to purchasers advising they may be subject to Colorado’s use tax; (2) An “annual purchase summary” with the dates, categories, and amounts of purchases, again informing purchasers of their obligation to pay use tax; and (3) An annual “customer information report” to the Colorado Department of Revenue listing customer names, addresses, and total amount spent. Colo. Rev. Stat. § 39-21-112(3.5)(c)(I), (d)(I)(A), and (d)(II)(A). Penalties were provided for failure to provide the required notices and reports. Colo. Rev. Stat. § 39-21-112(3.5)(d)(III)(A)-(B). Direct Marketing Association [“DMA”] filed a facial challenge to the Colorado law, asserting, in part, that it “violated the dormant commerce clause because it discriminate[d] against and unduly burden[ed] interstate commerce.” 814 F.3d at 1133-34.

Reversing the federal district court’s decision holding the law unconstitutional, the Tenth Circuit held that Colorado’s remote seller notice and reporting requirements did not violate the dormant commerce clause. Addressing *Quill*’s “bright-line” physical presence rule, the court noted that, “[e]ven though the Supreme Court has not overruled *Quill*, it has not extended the physical presence rule beyond the realm of sales and use tax collection.” 814 F.3d at 1137. The Tenth Circuit concluded *Quill* “applie[d] narrowly to sales and use tax collection”, and its physical presence rule was not applicable to Colorado’s remote seller notice and reporting requirements. *Id.* at 1136, 1139.

In assessing if the Colorado law discriminated against interstate commerce, the court found it was not “facially discriminatory” because it “did not distinguish between in-state and out-of-state economic interests”, but “instead impose[d] differential treatment based on whether the retailer collects Colorado sales or uses taxes.” 814 F.3d at 1141.

Recognizing the preclusive effect of *Quill*, however, the effective date of the collection requirement imposed on remote vendors under the Vermont statute is delayed until “after a controlling court decision or federal legislation abrogates the physical presence requirements of *Quill v. North Dakota*, 504 U.S. 298 (1992).” *Id.* at § 41(5). Similar remote seller collection legislation proposed in North Dakota also has an effective date contingent on the Supreme Court’s issuance of an opinion overruling *Quill*. S.B. 2298.

The “direct effects” of the law were also found not to be discriminatory because: (1) “[T]he reporting obligation [did] not give in-state retailers a competitive advantage”; (2) “[T]he non-collecting retailers [were] not similarly situated to the in-state retailers, who must comply with tax collection and reporting requirements that [were] not imposed on the out-of-state non-collecting retailers”; and (3) “[T]he reporting requirements [were] designed to increase compliance with preexisting tax obligations, and appl[ied] only to retailers that [were] not otherwise required to comply with the greater burden of tax collection and reporting.” *Id.* at 1143-44. The court thus concluded that “DMA ha[d] not shown the Colorado Law imposes a discriminatory economic burden on out-of-state vendors when viewed against the backdrop of the collecting retailers’ tax collection and reporting obligations.” *Id.* at 1144.

The Tenth Circuit also found the Colorado remote seller reporting requirements did not impose an undue burden on interstate commerce. It found *Quill* was “not binding in light of Supreme Court and Tenth Circuit decisions construing it narrowly to apply only to the duty to collect and remit taxes.” 814 F.3d at 1146. The court noted that the Supreme Court in *Brohl I* “not only characterized *Quill* as establishing the principle that a state ‘may not require retailers who lack a physical presence in the State to *collect* these taxes...’, it also concluded that the notice and reporting requirements in the Colorado Law do not constitute a form of tax collection.” *Id.* (quoting *Brohl I*, 135 S. Ct. at 1127 (emphasis in original)). “Because the Colorado Law’s notice and reporting requirements are regulatory and are not subject to the bright-line rule of *Quill*, [the court determined] this end[ed] the undue burden inquiry.” 814 F.3d at 1147.

LB 44 imposes notice and reporting requirements on remote sellers that “refuse[] to collect Nebraska sales tax.” LB 44, § 5. The notice and reporting obligations established in LB 44 are similar to those contained in Colorado’s statute and regulations. Section 5 of the bill does not, however, independently include the revenue and transaction limits required to impose these obligation, but instead references the limits imposed in Section 4 (gross revenue from sales exceeding \$100,000 or 200 or more separate transactions) that trigger the obligation for remote sellers to collect sales tax. Thus, the notice and reporting requirements could be defended as constitutional against a commerce clause challenge in light of *Brohl II*, provided the bill is amended to specifically include the thresholds within the notice and reporting sections, based on our conclusion that the collection obligation imposed in Section 4 is unconstitutional.⁷

⁷ In a 1995 opinion, we concluded that it was unclear whether legislation proposing to require retailers having “minimum contacts” with the State, but not physical presence, to report information regarding purchases by Nebraska residents, would violate the commerce clause under the *Quill* decision. Op. Att’y Gen. No. 95038 (May 16, 1995). The Tenth Circuit’s recent decision in *Brohl II* supports the validity of imposing notice and reporting requirements on remote sellers without physical presence, and properly limits *Quill* to the imposition of state tax collection requirements.

III. The Mandatory Collection Obligation Imposed By Section 4 of LB 44 Is Contrary to *Quill*'s Physical Presence Rule.

It has been suggested that the collection requirement in Section 4 of LB 44 is not invalid because it is optional, as remote sellers that refuse to collect the tax can comply by satisfying the act's notice and reporting requirements. The Tenth Circuit rejected a similar argument in *Brohl II*. Colorado "contend[ed] the law [was] not discriminatory because out-of-state retailers [could] either (a) comply with the notice and reporting requirements or (b) collect and remit taxes like in-state retailers." 814 F.3d at 1144. The court "disagree[d] with the [State] that out-of-state retailers' having the option to collect and remit sales taxes makes the Colorado Law nondiscriminatory...", stating that "*Quill* unequivocally holds that out-of-state retailers without a physical presence in the state need not collect sales tax." *Id.* It noted that "*Quill* privileges out-of-state retailers in that regard, and the possibility that they might choose to give up that privilege rather than comply with the challenged Colorado Law does not make the Colorado law constitutional." *Id.* As *Quill* applied only to the *collection* of sales and use taxes, however, the court found it was inapplicable to Colorado's notice and reporting obligations. *Id.*

Section 4 of LB 44 provides remote sellers meeting the required gross revenue and transaction thresholds "shall be subject to the Nebraska Revenue Act of 1967" and "shall remit the sales tax due" under the Revenue Act. "As a general rule, in the construction of statutes, the word 'shall' is considered mandatory and inconsistent with the idea of discretion." *Loup City Public Schools v. Nebraska Dep't of Revenue*, 252 Neb. 387, 393, 562 N.W.2d 551, 555 (1997). The remittance obligation imposed by Section 4 of LB 44 is mandatory. Indeed, the notice and reporting provisions apply only if a remote seller "refuses to collect Nebraska sales tax" in contravention of the mandatory collection obligation imposed under Section 4. LB 44, § 5. As the Tenth Circuit instructed in *Brohl II*, however, *Quill* precludes states from imposing a collection requirement on remote sellers lacking physical presence in the taxing state. Providing an "option" to those sellers by satisfying notice and reporting requirements does not make the collection requirement constitutional.

IV. As The Notice and Reporting Requirements Are Not Severable From The Unconstitutional Collection Requirement, LB 44, In Its Current Form, Is Unconstitutional In Its Entirety.

We have concluded that Section 4 of LB 44, which mandates that remote sellers not having a physical presence in Nebraska meeting specified revenue and transaction requirements collect and remit sales tax, is unconstitutional under *Quill*. As the collection requirement in Section 4 is invalid, the question which remains is whether it is severable from the notice and reporting provisions in Section 5. "The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions." *Big John's Billiards, Inc. v. State*, 288 Neb. 938, 951, 852 N.W.2d 727, 739 (2014).

To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating the Legislature would have enacted the bill without the invalid portion. *Id.*

Applying this test, the bill is not workable without the invalid portion, as the notice and reporting requirements in Section 5 do not independently set out the criteria for determining which remote sellers must meet those requirements, which are part of the invalid Section 4. Accordingly, the valid provisions cannot be enforced independently. Moreover, the invalid portion is likely an inducement to passage of the invalid portion, and, as such, severing the invalid portion would do violence to the Legislature's intent. Finally, the statute contains no severability clause. Applying each of the severability factors, we conclude that LB 44, in its present form, is unconstitutional in its entirety.

That is not to say, however, that the bill could not be amended to satisfy constitutional requirements. If the unconstitutional mandatory collection requirement was removed, and the notice and reporting requirements were amended to add the criteria for determining which remote sellers would be subject to those requirements, the bill would track the statute and regulations implementing Colorado's notice and reporting requirements which were held not to violate the commerce clause in *Brohl II*. If a collection requirement is enacted, it could be made valid by delaying its effective date to such time as *Quill* is overruled or federal legislation is enacted to permit states to require remote sellers without physical presence to collect sales tax, as was done in Vermont.⁸ Further, amending the notice and reporting requirement to provide that a remote seller who "voluntarily" agrees to collect and remit sales tax is excused from such requirements would also remedy any constitutional concern, as it does not attempt to mandate collection in contravention of *Quill*. While the bill in its present form is unconstitutional, the Legislature has options to remedy these constitutional deficiencies.

CONCLUSION

In sum, we conclude that the sales tax collection obligation imposed on remote sellers having no physical presence in Nebraska under Section 4 of LB 44 is unconstitutional under the commerce clause as interpreted by the U. S. Supreme Court in *Quill*. Moreover, as *Quill's* interpretation of the commerce clause is binding on any state or federal lower court, it can be changed only by the Supreme Court or action by Congress exercising its power to regulate interstate commerce. The notice and reporting requirements in Section 5, if amended, would not be contrary to *Quill*, and would not violate the commerce clause, based on the Tenth Circuit's recent decision *Brohl II*.

⁸ See footnote 6, *supra*.

Because the notice and reporting requirements are not severable from the unconstitutional collection obligation under the bill as currently drafted, however, we conclude that LB 44 is presently unconstitutional in its entirety. As explained above, the bill could be amended to remedy these constitutional defects.

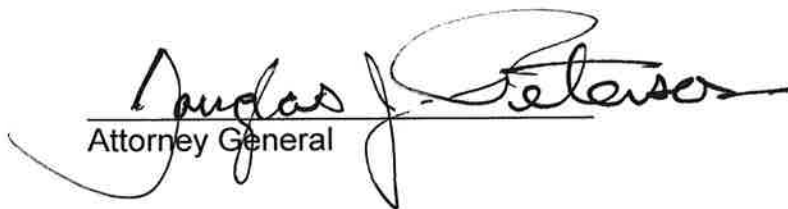
Very truly yours,

DOUGLAS J. PETERSON
Attorney General



L. Jay Bartel
Assistant Attorney General

Approved by:



Attorney General

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