



# Legislative UPDATE

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## **Supreme Court Clears the Way for Sales Taxes on Remote Sales**

In a major victory for state and local governments, the United States Supreme Court has held that a South Dakota state law requiring certain remote sellers to collect sales taxes on goods shipped to customers living in South Dakota is constitutional. In doing so, the Court overturned decades of legal precedent providing that companies can collect sales taxes only if they maintain a physical presence in a given state.

Writing for the five-four majority in [\*Wayfair v. South Dakota\*](#), Justice Kennedy rejected the previous holdings of the Supreme Court as outdated and incompatible with the technological realities of a twenty-first century economy. According to Kennedy, simply relying on physical presence to determine whether or not a company can be required to collect sales taxes ignores the fact that companies now have websites accessible in every state. Those company websites might save cookies to customers' hard drives, have apps that can be downloaded anywhere, and may store data that is located in any number of states.

Yet under the old "physical presence" test, none of Kennedy's criteria would have provided the "substantial nexus" to require a company to collect and remit sales taxes. "This Court should not maintain a rule that ignores these substantial virtual connections to the State," wrote Kennedy. South Dakota's law was upheld because it established a clear connection between out-of-state retailers and the state based on both economic and virtual contacts.

In a nod to the role local governments play in today's economy, Justice Kennedy wrote that remote sellers like Wayfair have taken advantage of the Court-created physical presence loophole and are essentially "free-riding" on government provided services that spur commerce:

“What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers’ furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the ‘sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price,’ and help create the ‘climate of consumer confidence’ that facilitates sales[.]”

The Court also quickly dismissed the argument made by Internet retailers that nationwide compliance with all state and local tax laws will be too complex and costly:

“Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems. Indeed, as the physical presence rule no longer controls, those systems may well become available in a short period of time, either from private providers or from state taxing agencies themselves. And in all events, Congress may legislate to address these problems if it deems it necessary and fit to do so.”

So where does the *Wayfair* decision leave Texas and its cities?

At this point, nobody knows for sure. There’s always the possibility that Congress attempts to pass federal law that provides some uniformity across the states. In the meantime – and in the absence of federal legislation – the *Wayfair* decision opens the door for states to model sales tax collection laws after South Dakota’s law.

In Texas, state and local officials will likely be awaiting some guidance from Texas Comptroller Glenn Hegar, whose office administers state and local sales taxes. A distinct possibility is that statutory changes will be necessary in the 2019 legislative session to conform Texas sales tax laws on remote sales to mirror the South Dakota law.

According to the Court, South Dakota’s system maintains certain features that protect it from claims that it imposes “undue burdens” on interstate commerce. Other states, including Texas, might seek to harmonize state law and procedure with these features to put any potential state law on solid legal footing. These features include:

- A “safe harbor” for companies that transact only limited business in the state. South Dakota’s law applies only to sellers that annually deliver more than \$100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods in the state. According to the Court, this quantity of business could not occur unless the seller had an extensive virtual presence in the state.
- Expressly providing that no obligation to remit the sales tax may be applied retroactively.

- Adopting the “Streamlined Sales and Use Tax Agreement,” which standardizes taxes to reduce administrative and compliance costs. (Texas has not yet adopted this agreement.)

The League will continue to monitor state and national reactions to the *Wayfair* decision, and will update the membership of any new developments.

## **Texas Supreme Court:** **Plastic Bag Bans Preempted by State Law**

Today, the Texas Supreme court struck down the City of Laredo’s plastic bag ban. The court, in [\*City of Laredo v. Laredo Merchants Association\*](#), concluded that the ban is preempted by state law.

In 2015, a City of Laredo adopted an ordinance making it unlawful for commercial establishments to provide plastic checkout bags to customers. It was adopted pursuant to a strategic plan aimed at creating a “trash-free city.”

The Texas Health and Safety Code prohibits a city from adopting an ordinance, rule, or regulation to “prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law...” The court concluded that the city’s ban is clearly and unmistakably preempted by the code because: (1) it was adopted for a “solid waste management purpose;” and (2) it prohibits or restricts the sale or use of “containers” or “packages” (i.e., a plastic bag).

The city argued that, by regulating plastic bags, the ordinance aims to *prevent litter* as opposed to *managing solid waste*. It also argued that a “container or package” relates to prohibiting municipal regulation of wasteful product packaging, rather than plastic carryout bags.

The court disagreed and concluded that those terms included plastic checkout bags. Thus, the ordinance is preempted.

## **Some Wireless Providers Attempt to Hoodwink City Officials**

In the face of rules contemplated by the Federal Communications Commission (FCC) that could preempt city authority over right-of-way management and compensation (see this [previous article](#)), some wireless providers are asking city officials to sign a letter to an FCC commissioner.

The letter does not advocate for municipal authority. Rather, it urges the FCC to move forward with rules that may harm cities. It is being “pitched” to city leaders as a way that they can show support for broadband deployment. That may sound reasonable, particularly to those who aren’t familiar with the small cell issues cities are facing, but it will likely be used at the FCC to help justify preemption of municipal authority.

City officials who are asked to add their name may see language like:

*As mayor of (city), I know that technology fosters ingenuity and economic growth in our cities and towns. That is why it's critical we work together to bring small cells and, ultimately, 5G to cities across the nation. Your efforts to create model infrastructure rules that expedite small cell deployment while retaining reasonable protections for city rights-of-way should be applauded.*

*Expediting small wireless facility deployment is critical to delivering wireless access to advanced technology, broadband, and 911 services to residences, businesses, and schools. At the same time, cities should establish a fair and predictable process that retains protections for rights-of-way. A smart small cell policy should include:*

- *Comprehensive but transparent guidelines;*
- *Reasonable compensation; and*
- *Expedited yet thorough review timeline.*

*Through a thoughtful approach to small cells, some cities are working diligently to pave the way for the future while protecting the needs of the city. While some cities have moved quickly, others may benefit from a model policy that accelerates small cell deployments while retaining fair and reasonable protections for cities.*

*Working together we can provide a smart policy that fosters the technology needs of tomorrow and protecting the rights of cities throughout the country.*

*Thank you for your efforts to help ensure our cities remain competitive and encourage ongoing investment in our future."*

There is no doubt that city officials in Texas support broadband deployment. However, the decimation of municipal authority over rights-of-way isn't the best way to do that. Unbeknownst to most who would be asked to sign, that is what the language above is advocating.

In fact, the Texas Legislature has already passed legislation (S.B. 1004) that limits municipal authority. More troubling, the legislation caps the rental fees that wireless providers pay to use public property. The cap results in a taxpayer subsidy to wireless providers, and it is being challenged in state court by a coalition of cities led by the City of McAllen.

The League has already filed multiple comments with the FCC and met with members of Congress and FCC staff on the issue. With regards to a form letter, member city officials should go with their conscience, but they should do so with their eyes wide open. For more information, please contact Scott Houston, TML general counsel, at 512-231-7400 or shouston@tml.org.

## Get Involved: Volunteer to Develop the TML Legislative Program

Texas Municipal League advocacy efforts are based on a “legislative program” that is developed by member city officials. The program is essential to the legitimacy of the League’s advocacy efforts. To develop the program, city officials provide input in primarily two ways.

First, a member city, TML region, or TML affiliate may submit a resolution for consideration at the League’s annual conference. At the 2018 annual conference, the “resolutions committee” will consider submissions and make recommendations for the entire membership to consider at the annual business meeting. The resolutions committee is appointed by the TML president in advance. The business meeting consists of one representative from each city, designated by that city prior to the meeting.

For 2019, the resolutions committee will be eliminated in favor of a more streamlined process wherein resolutions go directly to the entire membership at the annual business meeting. The implementation of this change will require a transition year in 2018. In 2018, the Resolutions Committee and Business Meetings will take place in one room, as consecutive meetings, at the TML annual conference on October 11, 2018.

Second, member city officials can participate in a policy committee process during each interim. In 2018, the committee process will be slightly different than in years past. In lieu of multiple committees, recommendations will come from the participants in the League’s “Municipal Policy Summit.” The Summit members have already been appointed by TML President Holly Gray-Moore, Mayor Pro Tem of the City of Roanoke. Those members will meet on August 23-24 in Austin to participate in an intensive, two-day workshop during which League staff will brief the participants on the myriad legislative issues faced by cities. After each subject-matter briefing, the participants will make recommendations on the issues. Those recommendations will be in the form of a resolution that is submitted for consideration to the TML Resolutions Committee.

President Gray-Moore will soon appoint members to the Resolutions Committee. No particular expertise is needed. Volunteers need only have a willingness to learn and the ability to come to Fort Worth on October 11, 2018, to participate. The deadline to apply is **July 13, 2018**.

If you have questions or would like to volunteer for service, please email JJ Rocha, TML Legislative Liaison, at [jj@tml.org](mailto:jj@tml.org). Please include your full contact information. Due to space limitations and other considerations, not all those who apply will be appointed, but will certainly be considered for future volunteer opportunities.

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