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MEMORANDUM

TO: Ohio Manufacturers' Association

FROM: Justin D. Cook, Esq.
Bricker & Eckler LLP

DATE: January 18, 2018

RE: Supreme Court Case – Remote Sellers and Use Tax

On January 12, 2018, the United States Supreme Court granted a writ of certiorari in *State of South Dakota v. Wayfair, Inc.*, 2017 S.D. 56 (Sept. 13, 2017). Depending on the Supreme Court's decision in this case, it could have an enormous impact on businesses nationally. A 1967 United States Supreme Court decision, *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967) prohibited states from requiring sellers to collect and remit use tax on the sale of goods in states where the seller has no physical presence. This "physical presence" standard was affirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and remains the law of the land. In light of the increasing importance of online sales, South Dakota enacted a statute requiring sellers that derive at least \$100,000 in gross revenue from South Dakota sales or that engage in at least 200 South Dakota sales in a calendar year to collect and remit South Dakota use tax, regardless of whether the seller has a physical presence in the state. A number of large online retailers challenged the South Dakota law as unconstitutional, and the Supreme Court will now reexamine the "physical presence" standard.

If the Supreme Court strikes down the "physical presence" standard, states across the country, including Ohio, could require remote sellers to collect and remit use tax in the same manner that sellers operating from a brick and mortar location in the state collect sales tax from customers. Whether Ohio can impose this obligation on remote sellers depends on the Supreme Court's decision in *Wayfair*, which will be heard in the upcoming term.