No. 08-770

In The
Supreme Court of the United States

DELL MARKETING L.P.
(FORMERLY KNOWN AS DELL CATALOG SALES L.P.),

Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

BRIEF IN OPPOSITION

GARY K. KING
Attorney General
of New Mexico
DAVID K. THOMSON
Deputy Attorney General
408 Galisteo Street
P.O. Box 1508
Santa Fe, NM 87504-1508
(505) 827-6020

ROBERT J. DESIDERIO
Special Assistant
Attorney General
Counsel of Record
SANCHEZ, MOWRER
& DESIDERIO
115 8th Street, SW
P.O. Box 1966
Albuquerque, NM 87103
(505) 247-4321

February 12, 2009

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QUESTION PRESENTED

Whether a state may, consistent with the Commerce Clause, impose gross receipts taxes on sales by an out-of-state mail-order computer vendor with no physical presence in the state based on the substantial in-state presence and activities of a third party contractor that provides warranty services to in-state purchasers of the vendor's computers pursuant to contracts with the vendor through which the vendor exercises detailed management and control of the entire in-state warranty service process.

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INTRODUCTION

The Petition filed by Dell Marketing L.P. (referred to throughout as "Dell") presents no compelling reason supporting the exercise of this Court's jurisdiction. Based on the extraordinarily detailed factual record developed in the proceeding before the Taxation and Revenue Department Hearing Officer on Dell's protest, *see* Pet. at 30a-103a, the New Mexico Court of Appeals made two rulings relevant here:

> First, the New Mexico court rejected Dell's claim that its "substantial nexus" with New Mexico could only be established by a third-party contractor engaged in sales-related solicitation, because that position ignored "the reality of the relationship between BancTec [the warranty-servicing contractor] and the Taxpayer [Dell] and the critical nature of BancTec's activities to Taxpayer's business." Pet. at 21a.
>
> Second, the New Mexico court concluded that substantial nexus exists in this case because, as supported by the comprehensive factual record, "the availability of in-home . . . [warranty services provided by BancTec] was an important factor in establishing . . . [Dell's] market for sales," *id.* at 21a-22a, thereby meeting this Court's well-established *Tyler Pipe* standard for nexus. *See Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue,* 483 U.S. 232, 250 (1987) (quoting *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 715 P.2d 123, 126 (Wash. 1986), *vacated on other grounds*, 483 U.S. 232 (1987)) ("the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are

> significantly associated with the taxpayer's ability to establish and maintain a market in . . . [the taxing state] for the sales.")

Thus, contrary to Dell's claim, this case presents no "division of authority on . . . [an] important constitutional question." Pet. at 2. Nor did the New Mexico court "misread this Court's Commerce Clause jurisprudence," *id.* at 21, in its application of *Scripto* and *Tyler Pipe* to find nexus on the basis of Dell's substantial management and control of BancTec's provision of Dell warranty services in New Mexico and BancTec's significant activities in New Mexico on behalf of Dell. Finally, this case does not implicate any matter of "significant national importance[,]" *id.* at 28; rather, it represents the careful and thorough actions by a state tax protest authority, and the reasoned appellate review of those actions with respect to the fact-bound inquiry mandated by this Court's established jurisprudence on how to determine substantial nexus in this context.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals, fully reproduced in the Pet. at 1a-29a, is now reported at *Dell Catalog Sales L.P. v. Taxation and Revenue Dep't*, No. 26,843, 2009-NMCA-001, 2008 WL 5505860 (N.M. Ct. App. June 2, 2008), *cert. denied*, 189 P.3d 1215 (N.M. 2008).

JURISDICTION

In addition to the jurisdictional matters properly described in the Pet. at 3, on December 22, 2009, the Deputy Clerk of this Court extended the time for the filing of this response to the petition for a writ of certiorari to and including February 13, 2009.

SUPPLEMENTAL STATEMENT OF THE CASE

Dell's Statement is substantially correct as far as it goes, but it leaves out critical portions of the evidentiary record before the Hearing Officer, which was the basis for the Commerce Clause decision of the Hearing Officer as affirmed by the New Mexico court.[1] Those additional evidentiary findings are as follows:

1. Dell's computers were initially covered by a limited "return-to-factory" warranty, but in response to customer demands in the mid-1980s, Dell began offering third-party, on-site service contracts to its customers. The first such third-party contract was terminated because of complaints of poor service for which Dell was blamed, and the second was terminated because the increased cost imposed would

[1] For the same reason, Dell's "Question Presented" fails adequately to include important factual predicates to formulate fairly the question that is actually presented in this particular case. *See* Respondent's reformulation of the Question Presented, *supra*.

reduce the number of contracts and make Dell's customers unhappy. *See* Pet. at 34a-36a.

2. Dell then entered into Brokerage Agreements with BancTec, under which Dell sold BancTec service contracts to its customers and BancTec acted as the exclusive provider of on-site repair service for Dell computer products. *See id.* at 36a.

3. Customers had to purchase the BancTec service contract through Dell, and BancTec's name did not appear in Dell's catalogue. Dell set the price for the contract; it often bundled the cost of the service contract into a single price charged for a complete computer set up; BancTec was required to accept all service contracts sold by Dell; and approximately 75 percent of Dell's New Mexico customers purchased the contract. *See id.* at 38a.

4. Under the Brokerage Agreements, customer problems were reported to Dell and not to BancTec; Dell authorized the dispatch of BancTec technicians to the customer's address; and "[d]uring the audit period, *Dell Tech Support dispatched BancTec technicians on 1,273 service calls and installation visits to customers in New Mexico.*" *Id.* at 39a (emphasis added).

5. The Brokerage Agreement set out detailed "Service Call Procedures" and requirements for tracking service calls that BancTec was required to follow. The Agreement also required BancTec service technicians to conduct themselves in a way that would "professionally and positively represent . . .

[BancTec and] Dell Computer Corporation and other [Dell] partners." *Id.* at 39a-40a.

6. In the event a customer was not satisfied with the service, the complaint was registered with Dell and not BancTec; BancTec's warranty ran to Dell and not to the customer; and if BancTec's performance fell below 95 percent for two consecutive months, Dell retained the right to take over BancTec's service obligations. *See id.* at 41a.

7. The availability of in-home service was an important factor in establishing Dell's market for sales. *See id.*

In her analysis of the substantial nexus question, the Hearing Officer gave a detailed recitation of all of the facts of record relevant to nexus, *see id.* at 69a-71a, and found those facts demonstrative of "the degree of control exercised by . . . [Dell]" over "the sale and the manner of execution of BancTec's service contracts with . . . [Dell's] customers." *Id.* at 69a. On the basis of that summary, the Hearing Officer concluded:

> The record in this case provides overwhelming evidence that . . . [Dell] controlled and directed BancTec's performance of repair services for . . . [Dell's] customers. . . . [Dell's] characterization of BancTec as an independent service provider acting solely on its own behalf simply does not correspond to the facts.

Id. at 72a. Furthermore, that detailed factual development, virtually ignored in the Petition, led the New Mexico court to focus on Dell's control of the extensive service being provided in New Mexico, *see id.* at 22a, in holding that Dell, "through its relationship with BancTec and BancTec's activities in New Mexico, had a substantial nexus with New Mexico, and thus, that the Department's imposition of gross receipts tax does not violate the Federal Constitution on Commerce Clause grounds." *Id.* at 23a. Based on that analysis, the New Mexico court concluded:

> Our opinion today merely reflects the reality of today's modes of commerce and recognizes that Taxpayer has chosen to conduct its business in such a manner as to benefit from an in-state presence acting on its behalf, all while trying to avoid paying tax on sales to which other New Mexico businesses are subject.

Id. at 24a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG STATE COURTS REGARDING THE SCOPE OF *SCRIPTO* AND *TYLER PIPE*.

Dell asks this Court to review the decision of the New Mexico Court of Appeals, alleging that a conflict exists among state courts regarding the scope of *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), and *Tyler*

Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987). *See* Pet. at 1-2, 12-21. There is no such conflict concerning the applicable law. Rather, Dell's selective citations to the applicable cases avoids the essential holdings of those cases which, when fairly stated, demonstrate that they all properly apply the principles of *Scripto* and *Tyler Pipe*. The difference in results stems from the different factual circumstances confronted in those cases.

Both *Scripto* and *Tyler Pipe* addressed whether Commerce Clause "substantial nexus"[2] could be established between a taxing state and an out-of-state vendor when an in-state third party – not an employee or agent of the out-of-state vendor – performed services on behalf of the out-of-state vendor. The services in both cases involved solicitation of sales for the out-of-state vendor, and in both cases, this Court held that the substantial solicitation activities of the third party for the benefit of the out-of-state vendor were sufficient to establish nexus between the taxing state and the out-of-state vendor, even in the absence of formal employment or agency

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[2] *Scripto* also involved "minimum contacts" nexus required by the Due Process Clause to allow jurisdictional authority over out-of-state defendants. *See Scripto,* 362 U.S. at 208, 210-11. This Court has distinguished "due process" nexus from the "substantial nexus" required under its Dormant Commerce Clause analysis. *See Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 305 (1992). Due process nexus is not involved in this case.

status. *See Scripto*, 362 U.S. at 211-12; *Tyler Pipe*, 483 U.S. at 250-51.

In neither of those cases, however, nor in any other case, has this Court limited the type of non-employee, non-agent in-state activity on behalf of out-of-state vendors that can result in substantial nexus between the out-of-state vendor and the taxing state. On the contrary, this Court in *Tyler Pipe* made clear that "the crucial factor governing nexus is whether the activities performed in . . . [the taxing state] on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market . . . [in the taxing state] for . . . [its] sales." *Tyler Pipe*, 483 U.S. at 250 (quoting *Tyler Pipe*, 715 P.2d at 126).

Dell's conflict argument fails because it misreads the holdings of two groups of cases to create what can only be described as a false conflict. First, it erroneously characterizes one group of state cases as ruling that "indirect benefits – unlike the solicitation found sufficient to confer nexus in *Scripto* and *Tyler Pipe* – [must be] . . . insufficient to impute the physical presence of the in-state entity to the out-of-state mail order vendor for purposes of taxing the out-of-state vendor's sales." Pet. at 19-20. It then misconstrues another group of cases – including the New Mexico court's ruling in this case – as reading "*Scripto* and *Tyler Pipe* broadly to permit taxation of sales by an out-of-state seller as long as an in-state third party engages in [any] activities that benefit the

out-of-state seller[,]" *Id.* at 20, when that is just not the case.

Although the cases in each group reach different conclusions, no conflict exists among them, because they all ask the same question: Whether the third party's activities performed on behalf of the out-of-state vendor were substantial enough to attribute the third party's presence in the taxing state to the out-of-state vendor because those activities were "significantly associated with the taxpayer's ability to establish and maintain a market . . . [in the taxing state] for . . . [its] sales," as required by *Tyler Pipe*. *Tyler Pipe*, 483 U.S. at 250.

Contrary to Dell's erroneous reading, the Pennsylvania, Connecticut, Ohio and Tennessee court cases only held that the in-state activities of the third party were not significant enough to create nexus under the *Tyler Pipe* standard, while the courts in New Mexico, Louisiana and California concluded that the activities were so significant that they did establish nexus under that standard. All the cases employed the same constitutional standard, and reached different conclusions based only on the particular facts at issue.

A. The Pennsylvania, Connecticut, Ohio and Tennessee Precedents.

Dell erroneously asserts that the courts in the following decisions held that in order to create substantial nexus, the activities of third parties "must

directly promote ... sales[,]" for the out-of-state vendor: *Bloomingdale's By Mail, Ltd. v. Pennsylvania Dep't of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam), *cert. denied*, 504 U.S. 955 (1992); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995); and *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *appeal denied*, (Tenn. May 8, 2000), *cert. denied*, 531 U.S. 927 (2000). *See* Pet. at 13. Contrary to Dell's assertions, none of these cases held that a third party must be involved directly in promoting the in-state vendor's sales for the purpose of establishing substantial nexus.

In *Bloomingdale's By Mail*, taxpayer, By Mail ("taxpayer"), was a subsidiary of Federated Department Stores, Inc. ("Federated Stores") and sold merchandise nationally by mail order, including to customers in Pennsylvania. *See* 567 A.2d at 775. The customers ordered merchandise advertised in catalogues that had been sent to them by mail; the merchandise was then sent to the customers by common carrier or U.S. mail. *See id.* at 775-76. Customers could return merchandise directly to taxpayer for a refund or exchange. *See id.* at 776. Taxpayer itself had no physical presence in Pennsylvania. *See id.* at 775-76.

A division of Federated Stores operated Bloomingdale's stores in Pennsylvania. *See id.* The Bloomingdale's stores did not solicit orders for taxpayer, nor

did taxpayer solicit orders for them. *See id.* at 778. The only evidence showing any relationship between taxpayer and the Bloomingdale's stores was (i) taxpayer was a subsidiary of Federated Stores which owned the Bloomingdale's stores; (ii) on two occasions, customers of taxpayer returned merchandise to the Bloomingdale's stores; (iii) taxpayer and the Bloomingdale's stores sold similar merchandise; and (iv) taxpayer and the Bloomingdale's stores employed the same advertising and sales motif. *See id.* at 776, 778.

The *Bloomingdale's By Mail* court held that the Bloomingdale's stores' presence in Pennsylvania would not be attributed to taxpayer merely because taxpayer was a subsidiary of Federated Stores. *See id.* at 778. Entity affiliation does not establish nexus between the taxing state and the out-of-state vendor. *See id.* The court also held that two returns, the sale of similar merchandise and the same advertising and sales motif were not sufficient to establish nexus. *See id.* The reasoning of the court was not that nexus could only have been established if the Bloomingdale's stores had solicited orders for taxpayer, but that the evidence failed to show that their total activities were significant enough to establish nexus: "Absent something more, this Court fails to see how such a similarity can constitute a nexus for . . . tax purposes." *Id.* at 778.

In *SFA Folio Collections, Inc. v. Bannon*, Connecticut attempted to impose sales and use taxes on taxpayer, Folio, a mail order subsidiary of Saks &

Company ("Saks"). *See* 585 A.2d at 668-69. Saks also owned Saks-Stamford, which operated a retail store in Connecticut. *See id.* at 669. Thus, Folio and Saks-Stamford were affiliated ("sister") companies. Folio had no physical presence in Connecticut; its only connections to Connecticut were: (i) it mailed catalogues to customers in Connecticut; (ii) customers could call a toll free number to place orders; (iii) Folio advertised in magazines that were not published in Connecticut, but that reached residents of Connecticut; and (iv) Folio sent copies of its catalogues to the Saks-Stamford store, which then used the catalogues to inform employees of fashion trends, as reference guides and for educational purposes. *See id.* at 669, 671.

After concluding that nexus between Folio and Connecticut could not be established merely because Folio and Saks-Stamford were affiliate companies, the court held that Folio had insufficient contacts with Connecticut under *Nat'l Bellas Hess, Inc. v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967), to support its ability to impose sales and use taxes on Folio. *See* 585 A.2d at 671. Specifically, the Court stated that the catalogues that Folio had sent to Saks-Stamford did not create third-party nexus; the catalogues "do not establish a link to Connecticut because these catalogues are used for employee training and reference purposes, not for purpose of having the Saks-Stamford employees solicit Folio sales from Connecticut residents." *Id.* As in *Bloomingdale's By Mail*, the court's decision was not that direct solicitation of

sales is the only activity by which a third party can establish nexus, but that, under the facts, Saks-Stamford's activities did not create nexus between Folio and Connecticut. *See id.*

In *SFA Folio Collections, Inc. v. Tracy*, Ohio attempted to find nexus between Folio and Saks Fifth Avenue of Ohio, Inc. ("Saks-Ohio"), both subsidiaries of Saks & Company, Inc. ("Saks"). *See* 652 N.E.2d at 694. Folio had no physical presence in Ohio. *See id.* at 697. Its only relationship to Ohio was that it solicited sales from Ohio residents by catalogue, and it sent catalogues to the Saks-Ohio stores. *See id.* at 694, 697. One store used the catalogues to train employees, while the other store kept catalogues under the counter to show customers who asked for a catalogue. *See id.* at 695. Each store had its own policy with respect to returns of merchandise sold by Folio, and any returns were included in that store's inventory and sold by the store. *See id.* at 695, 697. The store never informed Folio that its merchandise had been returned. *See id.* at 695. The returns were minimal, in comparison to Saks-Ohio total returns. *See id.* at 695, 697. When customers requested merchandise that a store did not have, the store's search for the merchandise did not include a search of Folio's inventory, and the Saks-Ohio stores did not place orders for Folio customers. *See id.* at 695.

After again rejecting nexus based upon the corporate affiliation of Saks-Ohio and Folio, the Ohio Supreme Court held that nexus with Folio could not be established by Saks-Ohio because Saks-Ohio did

not "own or operate an in-state place of business for Folio." *See id.* at 695-97. The court also concluded that the Folio returns accepted by Saks-Ohio stores did not create nexus, because Saks-Folio accepted those returns for its own, not Folio's, benefit, and those returns were minimal. *See id.* at 697.

Dell also relies on *J.C. Penney Nat'l Bank v. Johnson* ("*JCPNB*") to support its argument that a conflict exists among state courts concerning whether a non-agent third party can create substantial nexus when the third party's activities do not promote sales. Pet. at 13, 18. *JCPNB*, however, does not so hold.

The court in *JCPNB* decided against third-party nexus after reviewing all the facts. *See* 19 S.W.3d at 840-42. It concluded that the third parties did not perform services on behalf of taxpayer JCPNB that substantially contributed to the bank's ability to maintain its credit card operations in Tennessee. *See id.* at 841-42. The court's reference to solicitation of sales related to the manner in which third parties could substantially contribute to the bank's maintaining its operations in Tennessee, not as a Commerce Clause substantial nexus requirement. *See id.*

Moreover, *JCPNB* has been clarified in *American Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV, 2002 WL 1751434 (Tenn. Ct. App. July 30, 2002) ("*AOL*"). Like *JCPNB*, the question in *AOL* was whether nexus between an out-of-state vendor and Tennessee was established by the activities of third parties who were not soliciting sales in Tennessee. In

AOL, the third parties were network service providers that facilitated AOL to access AOL servers. *See id.* at *1. *AOL* specifically recognizes that nexus can be established by a third party even if that party did not solicit business for the out-of-state vendor. *See* at *3 (citing *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977)). In finding nexus, the court stated:

> We do not think the record shows that the activities conducted here on AOL's behalf could be termed inconsequential or of only slight significance. We think that AOL's connection with this state amounts to more than the Internet mail and common carrier connections in *Quill* and *Bellas Hess*.

Id. at *3; *see also Arco Bldg. Sys., Inc. v. Chumley*, 209 S.W.3d 63 (Tenn. Ct. App. 2006), *appeal denied* (Tenn. 2006) (nexus established between out-of-state vendor and Tennessee through activities of in-state manufacturers, engineers and companies authorized to collect payment from customers and provide post-delivery consulting services.).

Thus, none of the foregoing cases cited by Dell supports its contention that only sales-related activities can meet the *Tyler Pipe* standard of third-party activities that can sufficiently bind the out-of-state vendor to pay gross receipts taxes on its sales in the

taxing state.[3] As a result, those cases do not stand "in conflict" with the cases from California and Louisiana cited by Dell and the instant New Mexico case, all of which concluded, on the basis of particular facts presented, that the in-state activities of the third party were sufficient to meet the *Tyler Pipe* legal standard.

B. The New Mexico, Louisiana and California Precedents

Dell erroneously asserts that in this case the New Mexico court "read *Scripto* and *Tyler Pipe* . . . to permit taxation of sales by an out-of-state seller as long as an in-state third party engages in [any] activities that benefit the out-of-state seller." Pet. at 20. In doing so, Dell misstates the clear holding here and the basis for it. It ignores the important ruling of the Hearing Officer, that:

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[3] The same is true of the one federal court decision cited by Dell Pet. at 13, N. 11. *See St. Tammany Parish Tax Collector v. Barnesandnoble.com,* 481 F. Supp. 2d 575 (E.D. La. 2007). That case did point out that the policy of a related company to accept returns from the out-of-state, internet seller was not comparable to the sales contractor in *Scripto* and *Tyler Pipe,* but it also made clear that its ruling was based on the lack of comparability to "the level of sales or *sales support activity* undertaken by in-state agents in other cases in which courts have found nexus." *Id.* at 582 (emphasis added) (citing, among other cases, *State v. Dell Int'l, Inc.,* 922 So. 2d 1257 (La. App. 2006), and *Borders Online, LLC v. State Bd. of Equalization,* 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005) – both cases Dell erroneously claims are in conflict with *St. Tammany Parish*).

> The record in this case provides overwhelming evidence that . . . [Dell] controlled and directed BancTec's performance of repair services for . . . [Dell's] customers. . . . [Dell's] characterization of BancTec as an independent service provider acting solely on its own behalf simply does not correspond with the facts.

Pet. at 72a.

Dell further ignores that it was on the basis of such "overwhelming evidence" that the New Mexico court was compelled to hold that Dell, "through its relationship with BancTec and BancTec's activities in New Mexico, had a substantial nexus with New Mexico, and thus, that the Department's imposition of gross receipts tax does not violate the Federal Constitution on Commerce Clause grounds." *Id.* at 23a. Thus, this case is nothing more than a proper application of the *Tyler Pipe* principle – that where the out-of-state vendor so controls and manages the activities of the in-state contractor and those activities are "significantly associated with the taxpayer's ability to establish and maintain a market," there is sufficient nexus to hold the vendor responsible to pay gross receipts taxes in that state.

Dell similarly mischaracterizes the relevant Louisiana and California precedents to create a false conflict with previously discussed cases that find no sufficient nexus. *State v. Dell Int'l, Inc.*, 922 So.2d 1257 (La. App. 2006), is identical to the instant case, and like this case, the result in favor of nexus was

based on "the extent and the nature of the services provided by BancTec to Dell's Louisiana customers as well as the impact of this service on Dell's ability to establish and maintain a lucrative market in . . . [Louisiana]." *Id.* at 1266.

Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005), rejected Dell's claim that an in-state representative must be engaged in solicitation of sales because it concluded – on the basis of a substantial evidentiary record – that the activities of the in-state representative were part of the out-of-state vendor's "strategy to build a market in California[,]" by "cross-selling synergy" involving the in-state entity accepting returns from the online affiliate; using similar logos; and in-state store receipts imprinted with Online's web addresses. *See id.* at 190.

Finally, Dell relies on one sentence from the Hellerstein treatise, *see* Pet. at 16, to suggest a confusion in the law that neither exists, nor is supported by a fair reading of the treatise's balanced treatment of the subject of this law suit. The Hellerstein treatise indicates that although this Court has not specifically addressed the question presented here, that question has been properly decided by state courts on a fact specific, case-by-case basis. *See* Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶¶ 19.02[2]-[2][a0] (Warren Gorham & Lamont 3d ed. 1998) ("Hellerstein"). Furthermore, the Hellerstein treatise does not indicate that any conflict exists among state courts. *See id.*

Thus, all the cases represent a proper and consistent application of *Scripto* and *Tyler Pipe*. Dell's effort to characterize the cases differently creates a false conflict that does not merit this Court's time and attention.

II. THE NEW MEXICO COURT DID NOT ERR IN FINDING NEXUS ON THE BASIS OF DELL'S DETAILED MANAGEMENT AND CONTROL OF BANCTEC'S SUBSTANTIAL PROVISION OF DELL'S WARRANTY SERVICES IN NEW MEXICO

Dell's contention that the lower court erred in finding nexus on the basis of anything other than third party sales solicitation efforts on behalf of Dell, *see* Pet. at 21-28, is as unworthy of review as its claim of conflict among the states, *see* Point I, *supra*, and for many of the same reasons. First, there is no authority in the precedents of this Court or the state courts for the proposition that the in-state actions of third parties can *only* be attributed to out-of-state vendors for "substantial nexus" purposes if those third-party in-state activities can be categorized as "sales activities." Second, contrary to Dell's contention, the New Mexico court did not "misread this Court's Commerce Clause jurisprudence[,]" *id.* at 21; rather Dell mischaracterizes the basis of an intensely fact-based question resolved by the New Mexico court (and the rulings of the other lower courts in this area). When the factual record gaps in the Petition are filled, it becomes clear that the decision of the

New Mexico court was eminently correct, and not in need of the further review of this Court.

A. The Law Governing the In-State Activities of Third Parties Sufficient to Establish the "Substantial Nexus" of an Out-Of-State Vendor with no Presence in the Taxing State.

Dell is correct that *Bellas Hess* and *Quill* established a bright-line rule that "the Commerce Clause bars a state from taxing out-of-state mail-order vendors that lack a physical presence . . . [when the] '*only connection* with customers in the taxing State is by common carrier or the United States mail[.]' " Pet. at 21-22 (emphasis added). And it is true that *Scripto* and *Tyler Pipe* made clear that the sales-related activities of third parties on behalf of such out-of-state vendors can be sufficient to meet the "substantial nexus" Commerce Clause requirement. But none of this Court's cases, either before or after *Bellas Hess* and *Quill,* has ever established that only sales related activities of third parties can ever meet that requirement. *See* Hellerstein, *supra*, ¶ 19.02[2][a0] ("There is nothing in either *Scripto* or *Tyler Pipe* to suggest that their analysis should be so narrowly confined, and courts have properly rejected such a crabbed reading of those opinions. . . . Plainly, there are market-maintaining and market-establishing activities that do not involve solicitation.").

Rather, as explained in Respondent's review of the *Tyler Pipe* standard, and the thoroughly consistent state court cases applying that standard, *see* Point I, *supra,* the question always involves a fact-based inquiry into the nature, scope and extent of the third-party's in-state activities and the extent to which such activities further the out-of-state vendor's attempt to create and maintain a market in that state. *See* Hellerstein, *supra,* ¶ 19.02[2][e] ("Ultimately, the line between those types of activities of independent parties that will and will not subject an out-of-state seller to use tax collection obligations will have to be worked out on a case-by-case basis.") Under that standard, the factual record in this case overwhelmingly supports a finding of "substantial nexus" between Dell and New Mexico sufficient to support the taxation of Dell's New Mexico sales, especially given the heavy involvement of Dell with respect to the control and details of the services provided by BancTec, the third party service provider. *See* Point I, *supra.*

B. Dell's Mischaracterization of the Intensely Fact-Based Question Resolved by the New Mexico Court.

By ignoring the substantial factual record in this case, Dell continues to mischaracterize both the ruling and implications of the New Mexico court's judgment. Nothing in that judgment even remotely suggests that a state may "tax an out-of-state entity based on in-state activities of unrelated third parties,

not undertaken on the taxpayer's behalf, merely because those activities facilitate the *use* of a product after the sale." Pet. at 22. Rather, in this case the evidence was overwhelming that BancTec is much more than an "unrelated third party," *see* Pet. at 69a-72a; that much of BancTec's considerable in-state activity was undertaken on Dell's behalf, *see id.*; and that those activities do much more for Dell than facilitate "use of a product after the sale." *See id.* Indeed, the evidence established that BancTec's activities on behalf of itself *and Dell*, were "an important factor" in the establishment and maintenance of Dell's market for sales in New Mexico. *See id.* at 41a.

In the face of this substantial record, Dell cannot support its contention here that "BancTec's activities are not related to the 'activity' to which the state 'tax is applied.'" *id.* at 24. Even Dell's one attempt to dip into the record – its citation to *id.* at 38a – does not support its direct contention that BancTec *only* "carried out its repair activities to fulfill its own obligations to the customers." *Id.* at 25.

Thus, this is not a case about an "unrelated third party," undertaking activities within the taxing state only for its own benefit, and only to facilitate the "*use* of a product after the sale," *Id.* at 22 – not where Dell did not disclose to its customers in its catalogues that the service contract was with BancTec; maintained all the service repair relationship with the customers; maintained detailed direction and control over those services; and did so because of the importance of those services to its creation and maintenance of its

market in New Mexico. Under these particular, and well-developed factual circumstances, the New Mexico court properly concluded that its decision properly recognizes "the reality of today's modes of commerce and recognizes that Taxpayer has chosen to conduct its business in such a manner as to benefit from an in-state presence acting on its behalf, all while trying to avoid paying tax on sales to which other New Mexico businesses are subject." *Id.* at 24a.

Indeed, Declaratory Ruling, *In re Gateway 2000, Inc.*, No. 96-30-6-0033, 1996 Iowa Tax LEXIS 2 (Iowa Dep't Revenue & Fin. Mar. 19, 1996), cited by Dell, *see* Pet. at 26, fully supports Respondent, when one considers the full quote from that case. As the Director in that Declaratory Ruling made clear, it was *"[b]ased upon the factual situation presented,"* that he was able to conclude that the service warranty work in that case was "not performed on 'behalf of or at the direction of'" the computer manufacturer. *Id.* at *5 (emphasis added). And Dell further fails to point out that the "factual situation presented" in that case involved a service provider who sold its own contracts to customers; the customers requested services directly from the service company and not from Gateway; Gateway did not obtain the service fees and reimburse the provider for its work; and Gateway did not control the flow of replacement parts, *see id.* at *1-3 – all in marked distinction from the instant case where Dell controlled all of the features of the service contract, thereby insuring that the service was "performed on behalf of" and "at the direction of" Dell.

III. THE ISSUE PRESENTED IS NOT ONE OF SIGNIFICANT NATIONAL IMPORTANCE

Dell grossly overstates matters when it implies that this case "involves the constitutional limits on state taxation" for the entire industry of Internet sales. Pet. at 28. That is just not so. Rather, it only affects those out-of-state vendors that make a business judgment to build, and micro-manage, a large service component; that insist upon control over whether such service is to be provided, and under what circumstances; that do not fully disclose the identity of the third party service provider in its dealings with its buyers; and that does all the foregoing as a way to serve its own interest in the maintenance of its local market.

Once again, Dell asserts a need for this Court's review based on a "disuniformity and confusion" flowing from "various interpretations of this Court's Commerce Clause jurisprudence," Pet. at 30, which do not exist. Rather, as fully elaborated above, *see* Point I, *supra,* this Court has established a uniform, and workable, legal principle which the lower courts have no difficulty applying: A state may impose its sales and use taxes on an out-of-state vendor who contracts with an in-state third party to perform services for the out-of-state vendor that are significant and on behalf of the out-of-state vendor as part of the out-of-state vendor's overall plan to establish and maintain its market in that state. As illustrated by the cases discussed in Point I, *supra*, the court's analysis must focus on the record in each case to

determine whether that evidence is sufficient to support a conclusion that the third-party activities were significant and in furtherance of establishing and maintaining a market in the state. *See Dell Catalog Sales, L.P. v. Comm'r of Revenue Serv.*, 834 A.2d 812 (Conn. Super. Ct. 2003) and *In re Gateway 2000, Inc., supra,* 1996 Iowa Tax LEXIS at *2, where the court and Director concluded that the facts did not support a finding of substantial nexus. Taxpayers, like Dell, who attempt to avoid taxes, by means of arrangements whereby they control the third parties' activities will be subject to taxes; those that do not, will not be subject to taxes. The principle is consistent with *Quill*, *Scripto* and *Tyler Pipe*. Dell, and similar Internet and catalogue sellers, can plan their business accordingly.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY K. KING
Attorney General
of New Mexico
DAVID K. THOMSON
Deputy Attorney General
408 Galisteo Street
P.O. Box 1508
Santa Fe, NM 87504-1508
(505) 827-6020

ROBERT J. DESIDERIO
Special Assistant
Attorney General
Counsel of Record
SANCHEZ, MOWRER
& DESIDERIO
115 8th Street, SW
P.O. Box 1966
Albuquerque, NM 87103
(505) 247-4321

February 12, 2009