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

REPLY BRIEF FOR PETITIONER

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CONSTITUTION

The Taxation and Revenue Department of New Mexico ("Department") argues that review of the decision below is unwarranted because state courts' divergent treatment of states' efforts to impose sales or use taxes on out-of-state vendors reflects divergent facts, not divergent constitutional standards. But the Department misreads both the conflicting state court judgments and the decision below. On the one hand, decisions in Connecticut, Ohio, Pennsylvania, and Tennessee have held that the activities of third parties failed to establish constitutional nexus – even where those third parties carried out in-state activities that benefited the out-of-state vendor – where the third party did not solicit sales subjected to tax. By contrast, the decision below upheld the imposition of tax on sales by an out-of-state vendor because an in-state non-agent offered post-sale service on its own behalf.

The different outcomes reflect basic disagreement concerning the principles governing states' power to tax interstate commerce as explained by this Court in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). *Tyler Pipe* holds that "the crucial factor governing nexus is whether the activities performed in th[e] state *on behalf of the taxpayer* are significantly associated with the taxpayer's ability *to establish and maintain a market in th[e] state for the sales.*" 483 U.S. at 250 (emphases added). As leading commentators have recognized, the Court's statement leaves open the question presented here: whether activities of non-agent third parties can be said to help "establish and maintain a market . . . for the sales" subjected to tax where the third parties do not solicit the sales in question. The Court should grant certiorari to resolve that important issue.

ARGUMENT

I. THE DECISION BELOW DEEPENS A SPLIT IN STATE COURT AUTHORITY OVER THE CONSTITUTIONAL STANDARD FOR FINDING SUBSTANTIAL NEXUS

The Department argues that there is no split of authority because states have uniformly understood *Tyler Pipe* and *Scripto* to permit imposition of taxation on out-of-state vendors if (1) an in-state third party is carrying out activities that contribute to the viability of the out-of-state vendor's sales and (2) those in-state activities are sufficiently "substantial" in the judgment of the reviewing court. The Department's effort to reconcile the divergent state court decisions is unpersuasive. Decisions from courts in four states reflect the correct understanding that, where non-agent third parties do not solicit the sales that are subject to tax, their activities cannot create the constitutionally required "nexus" to tax those sales.

A. In *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995), the Ohio Supreme Court held that the "selling activity" of out-of-state vendor Folio did "not have substantial nexus with Ohio" – despite the activities of Saks-Ohio, a physical retailer in the state that shared a corporate parent with Folio – because Saks-Ohio "does not sell any merchandise for Folio," even though Saks-Ohio distributed Folio catalogs and accepted returns of Folio merchandise. *Id.* at 697. The court thus made clear that the critical distinction was between solicitation of sales subject to tax and other activities that "might provide minimal connection under due process standards" but that do not "create substantial nexus" sufficient to satisfy the Commerce Clause. *Id.* The Depart-

ment claims (at 14) that Saks-Ohio's activities were insufficient because they were "for its own, not Folio's, benefit" and because the returns were "minimal." But that is the Department's rationale, not the court's. The court did not (and could not plausibly) say that the acceptance of returns did not benefit Folio – plainly it did – nor did it say that the returns were minimal – only that they were "a minimal *part* of the returns Saks-Ohio received." 652 N.E.2d at 697 (emphasis added).

The court in *Bloomingdale's By Mail, Ltd. v. Commonwealth, Department of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam), addressing a similar situation, likewise held that affiliated retail stores' non-sales activities, including accepting returns, distributing catalogs, and sharing marketing and sales motifs, could not support a finding of nexus for purposes of imposing taxation on an out-of-state catalog vendor. In distinguishing *Scripto* and parallel state authority, the court articulated the very standard that the New Mexico court rejected – that is, the court found an absence of nexus because "Bloomingdale's stores . . . do not solicit orders on By Mail's behalf nor act as its agents in any fashion." *Id.* at 778. The Department attempts (at 11) to reconcile the case by suggesting that the stores accepted only "two returns," but this is incorrect: those "two returns" were made by employees of the state taxing authority, apparently to determine whether such returns would be accepted. *See* 567 A.2d at 776. The decision does not give any indication of the total volume of By Mail returns that Bloomingdale's stores accepted.

The court in *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), similarly distinguished *Scripto* and *Tyler Pipe*, holding that an in-state physical retailer did not create nexus for an out-of-state mail-order company by distributing mail-order catalogs because the catalogs were not distributed "for the purpose of having the [physical retailer's] employees solicit [mail-order] sales from Connecticut residents." *Id.* at 671. The Department does not explain what "facts" (Opp. 12-13) – *other* than the presence of agents or the solicitation of sales – would have satisfied the Connecticut court when the documented non-solicitation activities of the retail stores were insufficient.

Finally, the court in *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), rejected a finding of substantial nexus between the state and the credit card affiliate of a physical retailer because "one could not apply for the . . . credit cards at the . . . retail stores, nor could individuals make a payment . . . at the retail stores." *Id.* at 841. The court held that "*solicitation, which was the most important function* in allowing [the credit card affiliate] to maintain its business, took place through the U.S. Mail, which, under the holding in *Quill* [*Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992),] does not allow a finding of substantial nexus." *Id.* (emphasis added). It was thus the absence of solicitation activities that made *Scripto* and *Tyler Pipe* "clearly distinguishable." *Id.* at 842.

The Department argues (at 14) that *J.C. Penney* can be disregarded because *America Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV, 2002 WL 1751434 (Tenn. Ct. App. July 30, 2002), "clarified" its holding. But the *America Online* court did not

address the issue of whether a third party's activities could be attributed to an out-of-state vendor; instead, it held, reversing a grant of summary judgment to the taxpayer, that there were disputed questions of fact whether the taxpayer *itself* had a physical presence in the state. *See id.* at *3. *America Online* is therefore inapposite.[1]

Contrary to the Department's argument, these courts understood *Scripto* and *Tyler Pipe* to depend on the fact that in-state third parties solicited the sales subjected to tax. One federal court has adopted the reasoning of the state courts described above, observing that "[t]he absence of such activity [*i.e.*, solicitation of sales] by the in-state affiliate was significant in cases finding no nexus." *St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575, 581 (E.D. La. 2007) (citing *Tracy*, *Bannon*, and *Bloomingdale's*). In that case, the court held on similar facts that third-party nexus could not lie unless the third party "marketed [the vendor's] products on [the vendor's] behalf," *id.* at 580, "act[ed] as a marketing presence," was "tantamount to acting as a sales presence," or "has . . . taken or solicited orders on behalf of [the vendor]," *id.* at 581.

B. The New Mexico Court of Appeals rejected the argument that *Scripto* and *Tyler Pipe* stand for the principle that, "for a [non-agent] third party to establish substantial nexus, the third party must be engaged in sales-related activities." Pet. App. 21a; *see* Dell C.A. Br. 32-35. Instead, the New Mexico

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[1] Similarly, the taxpayer in *Arco Building Systems, Inc. v. Chumley*, 209 S.W.3d 63 (Tenn. Ct. App. 2006), carried on activities in the state that placed it "well beyond the narrow safe harbor of *National Bellas Hess*[, *Inc. v. Department of Revenue*, 386 U.S. 753 (1967),] and *Quill*." *Id.* at 75.

court held that BancTec's non-sales activities "helped [Dell] establish and maintain a market" for its computers and were therefore sufficient to subject Dell to gross receipts tax on sales of its computers to New Mexico residents. Pet. App. 21a (internal quotation marks omitted). The New Mexico court thus joined courts in Louisiana and California in holding that activities other than solicitation of the sales subjected to tax met *Scripto*'s and *Tyler Pipe*'s standard for third-party nexus. *See Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176, 189 (Cal. Ct. App. 2005) (rejecting as "too constricted" the "position that a state has no authority to impose a tax collection duty on an out-of-state retailer unless its in-state representative is actually making sales transactions, as was the case in *Scripto* [and] *Tyler Pipe*") (internal quotation marks and emphasis omitted); *State v. Dell Int'l, Inc.*, 922 So. 2d 1257, 1263 (La. Ct. App. 2006); *see also id.* at 1267 (McClendon, J., dissenting) (dissenting on ground that "BancTec does not solicit sales for Dell").

That more permissive standard is in conflict with the analysis of the several cases rejecting imposition of state sales tax. There is no principled reason, under the standard adopted in the decision below, that activities such as accepting returns or distributing catalogs are insufficient to constitute nexus. This Court's review is warranted to address these divergent interpretations of the governing constitutional standard.

II. THE DECISION BELOW UNDERMINES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

The Department insists that the court below correctly resolved the "intensely fact-based question" put before it and emphasizes certain characteristics of BancTec's activities that made it reasonable for the court below to find that those activities could be attributed to Dell for purposes of establishing "substantial nexus." Opp. 19. In so arguing, the Department mistakes a question of governing legal standards – which the petition presents – for a dispute about application of standards to facts. Consequently, the Department fails to address the reasons why the "chancellor's foot" substantial-nexus test adopted below is inconsistent with this Court's decisions.

First, in the context of a state's efforts to impose a sales or use tax on out-of-state mail-order vendors, the in-state activities of a third party sufficient to confer nexus on the seller must be limited to solicitation or other sales activity in order to be consistent with the "bright-line" rule of *Quill*, 504 U.S. at 315, and *Bellas Hess*, 386 U.S. at 758. That rule requires an out-of-state vendor to have some "physical presence in the taxing State" to be subject to use or sales tax on its sales of goods in the state. *Quill*, 504 U.S. at 314. *Scripto* and *Tyler Pipe* effectively close a loophole, preventing "a stampede of tax avoidance" that could occur if mail-order companies could classify their in-state sales forces as independent contractors. *Scripto*, 362 U.S. at 211.

The court below held that the activities that "are significantly associated with" a mail-order vendor's "ability to establish and maintain a market in th[e]

state *for the sales*," *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted; emphasis added), include activities like service provision, which takes place post-sale and the availability of which merely makes the product more attractive. *See* Pet. App. 21a-22a. But service provision is taxed separately. Indeed, it is undisputed in this case that Dell paid New Mexico tax on BancTec's behalf for the value of the services BancTec provided. *See id.* at 6a, 37a. A third party's provision of non-sales-related activity cannot, therefore, form a constitutional basis for taxing *the sales* of an out-of-state vendor.

Second, and relatedly, the New Mexico court's loose standard significantly undermines the bright-line standard that *Quill* expressly chose to retain. *See* 504 U.S. at 315-16. Indeed, the Department's call for an "intensely fact-based" "case-by-case" review, Opp. 21 (internal quotation marks omitted), of a variety of factors that make up any given business relationship – the extent and nature of the activities, the degree of control one party exerts over another, the volume of services provided, and so forth – is precisely the type of inquiry this Court eschewed in *Quill*. This Court's standards under the Commerce Clause seek to promote "settled expectations" and to "foster[] investment" by mail- and Internet-order businesses. 504 U.S. at 316. By contrast, as the Department concedes, the decision below makes every business relationship that such a vendor undertakes subject to "intensely fact-based" scrutiny to determine whether it renders that vendor subject to taxation in the state where its partner is located. Opp. 19. This Court has consistently refused to sanction such uncertainty in such a vital part of the national economy.

Third, by subjecting Dell's sales to gross receipts tax on the basis of BancTec's non-sales activity, the court of appeals ignored this Court's further requirement that the relevant third-party activities be undertaken "on behalf of" the taxpayer. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). The court instead found BancTec's non-sales activities sufficient to subject Dell's sales to taxation because BancTec "'served an important need'" for Dell, and Dell "'benefitted financially from the sales of service contracts as well as the ability to have an outsourced repair service.'" Pet. App. 22a (quoting *Dell Catalog Sales, L.P. v. Commissioner of Revenue Servs.*, 834 A.2d 812, 822 (Conn. Super. Ct. 2003)). But these types of benefits are no different in kind from the benefits that any out-of-state vendor receives from the provision of in-state service by authorized service providers or from any of a number of relationships that a vendor might have with in-state suppliers, manufacturers, or other business partners. If such benefits are sufficient, a similar argument could be constructed for imposition of sales or use tax on practically any out-of-state vendor.

The Department seeks to bolster the court's holding by arguing that Dell exerted significant control over BancTec's activities. But the Department quotes primarily from the findings of the hearing officer, on which the court of appeals did not rely. *See, e.g.*, Opp. 5-6. Indeed, the court cited only three findings in support of its decision – that "the availability of in-home service was an important factor in establishing [Dell's] market for sales," that "[a]pproximately seventy-five percent of [Dell's] New Mexico customers purchased a BancTec service contract," and that BancTec technicians made "1,273 service

calls and installation visits to New Mexico customers during the audit period." Pet. App. 21a-22a (brackets and internal quotation marks omitted).

Even on their own terms, the hearing officer's findings do not support the Department's conclusion that BancTec acted on behalf of Dell rather than itself. Despite the Department's mischaracterization in both the Question Presented (at i) and throughout its brief (*e.g.*, at 1-2, 19), it is undisputed in this case that BancTec did *not* provide service under Dell's warranty with its customers. *See* Pet. App. 34a ("Neither Dell Products L.P. nor DCSLP had any obligation to provide on-site repair services to a customer who purchased a Dell computer from DCSLP."). Similarly, the Department has never contended, and the hearing officer did not find, that an agency relationship – the clearest instantiation of one acting "on behalf of" another – existed between Dell and BancTec. *See id.* at 36a-37a ("BancTec did not . . . have the authority to bind DCSLP to any legal obligations in New Mexico.").

Even if a relationship short of agency could result in a third party acting "on behalf of" an out-of-state seller within the meaning of *Tyler Pipe*, the record in the case – contrary to the Department's assertions – demonstrates that BancTec acted on behalf of no one but itself. The Department does not – and cannot – dispute that BancTec carried out its on-site repair activities pursuant to its individual contracts with *its own* customers who bought *BancTec*'s service. *See id.* at 38a.[2]

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[2] The Department states (at 4, 22) that BancTec's name did not appear in Dell's catalogs. The record shows, however, that those catalogs disclosed that on-site service would be provided by a third party and that each customer purchasing a BancTec

The Department cites (at 4-5) the "Service Call Procedures" that were set out in the agreements between BancTec and Dell. But those procedures were merely quality-assurance standards of a type that are routinely incorporated into arm's-length agreements and that Dell demands of third-party hardware and software producers whose products Dell sells. *See, e.g.*, Pet. App. 5a-6a; Hearing Tr. 158, 195-97 (testimony of BancTec representative noting that it was not "unusual" for marketing partners to establish standards to ensure that "our service . . . was . . . reputable and reliable"). Indeed, the record establishes that BancTec retained control over all aspects of its business, including personnel and scheduling decisions. *See* Dell C.A. Br. 10. Similarly, the fact that Dell Technical Support first fielded and tried to resolve customers' complaints has no bearing on the nexus issue. *See* Opp. 4. The assistance provided by Dell Technical Support (from locations outside of New Mexico) was available to all customers who were still under warranty, regardless of whether they had purchased a BancTec service contract. *See* Pet. App. 34a-35a. That customer assistance clearly would not create nexus in the absence of the BancTec relationship, and there is no principled reason why BancTec's fulfillment of its own obligation to its own customers after Dell Technical Support was unable to resolve a customer problem should change that outcome.

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contract received a copy of the contract. *See* Exh. K at 13 (Dell Feb. 1999 catalog) (submitted at Hearing Before Hearing Officer Margaret B. Alcock, *In re Protest of Dell Catalog Sales L.P.*, N.M. ID No. 02-416593-000 (Dec. 5, 2005) ("Hearing")).

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page ii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The different outcomes reflect basic disagreement concerning the principles governing states' power to tax interstate commerce as explained by this Court in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). *Tyler Pipe* holds that "the crucial factor governing nexus is whether the activities performed in th[e] state *on behalf of the taxpayer* are significantly associated with the taxpayer's ability *to establish and maintain a market in th[e] state for the sales*." 483 U.S. at 250 (emphases added). As leading commentators have recognized, the Court's statement leaves open the question presented here: whether activities of non-agent third parties can be said to help "establish and maintain a market . . . for the sales" subjected to tax where the third parties do not solicit the sales in question. The Court should grant certiorari to resolve that important issue.

ARGUMENT

I. THE DECISION BELOW DEEPENS A SPLIT IN STATE COURT AUTHORITY OVER THE CONSTITUTIONAL STANDARD FOR FINDING SUBSTANTIAL NEXUS

The Department argues that there is no split of authority because states have uniformly understood *Tyler Pipe* and *Scripto* to permit imposition of taxation on out-of-state vendors if (1) an in-state third party is carrying out activities that contribute to the viability of the out-of-state vendor's sales and (2) those in-state activities are sufficiently "substantial" in the judgment of the reviewing court. The Department's effort to reconcile the divergent state court decisions is unpersuasive. Decisions from courts in four states reflect the correct understanding that, where non-agent third parties do not solicit the sales that are subject to tax, their activities cannot create the constitutionally required "nexus" to tax those sales.

A. In *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995), the Ohio Supreme Court held that the "selling activity" of out-of-state vendor Folio did "not have substantial nexus with Ohio" – despite the activities of Saks-Ohio, a physical retailer in the state that shared a corporate parent with Folio – because Saks-Ohio "does not sell any merchandise for Folio," even though Saks-Ohio distributed Folio catalogs and accepted returns of Folio merchandise. *Id.* at 697. The court thus made clear that the critical distinction was between solicitation of sales subject to tax and other activities that "might provide minimal connection under due process standards" but that do not "create substantial nexus" sufficient to satisfy the Commerce Clause. *Id.* The Depart-

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The court in *Bloomingdale's By Mail, Ltd. v. Commonwealth, Department of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam), addressing a similar situation, likewise held that affiliated retail stores' non-sales activities, including accepting returns, distributing catalogs, and sharing marketing and sales motifs, could not support a finding of nexus for purposes of imposing taxation on an out-of-state catalog vendor. In distinguishing *Scripto* and parallel state authority, the court articulated the very standard that the New Mexico court rejected – that is, the court found an absence of nexus because "Bloomingdale's stores . . . do not solicit orders on By Mail's behalf nor act as its agents in any fashion." *Id.* at 778. The Department attempts (at 11) to reconcile the case by suggesting that the stores accepted only "two returns," but this is incorrect: those "two returns" were made by employees of the state taxing authority, apparently to determine whether such returns would be accepted. *See* 567 A.2d at 776. The decision does not give any indication of the total volume of By Mail returns that Bloomingdale's stores accepted.

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Finally, the court in *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), rejected a finding of substantial nexus between the state and the credit card affiliate of a physical retailer because "one could not apply for the . . . credit cards at the . . . retail stores, nor could individuals make a payment . . . at the retail stores." *Id.* at 841. The court held that "*solicitation, which was the most important function* in allowing [the credit card affiliate] to maintain its business, took place through the U.S. Mail, which, under the holding in *Quill* [*Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992),] does not allow a finding of substantial nexus." *Id.* (emphasis added). It was thus the absence of solicitation activities that made *Scripto* and *Tyler Pipe* "clearly distinguishable." *Id.* at 842.

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B. The New Mexico Court of Appeals rejected the argument that *Scripto* and *Tyler Pipe* stand for the principle that, "for a [non-agent] third party to establish substantial nexus, the third party must be engaged in sales-related activities." Pet. App. 21a; *see* Dell C.A. Br. 32-35. Instead, the New Mexico

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II. THE DECISION BELOW UNDERMINES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

The Department insists that the court below correctly resolved the "intensely fact-based question" put before it and emphasizes certain characteristics of BancTec's activities that made it reasonable for the court below to find that those activities could be attributed to Dell for purposes of establishing "substantial nexus." Opp. 19. In so arguing, the Department mistakes a question of governing legal standards – which the petition presents – for a dispute about application of standards to facts. Consequently, the Department fails to address the reasons why the "chancellor's foot" substantial-nexus test adopted below is inconsistent with this Court's decisions.

First, in the context of a state's efforts to impose a sales or use tax on out-of-state mail-order vendors, the in-state activities of a third party sufficient to confer nexus on the seller must be limited to solicitation or other sales activity in order to be consistent with the "bright-line" rule of *Quill*, 504 U.S. at 315, and *Bellas Hess*, 386 U.S. at 758. That rule requires an out-of-state vendor to have some "physical presence in the taxing State" to be subject to use or sales tax on its sales of goods in the state. *Quill*, 504 U.S. at 314. *Scripto* and *Tyler Pipe* effectively close a loophole, preventing "a stampede of tax avoidance" that could occur if mail-order companies could classify their in-state sales forces as independent contractors. *Scripto*, 362 U.S. at 211.

The court below held that the activities that "are significantly associated with" a mail-order vendor's "ability to establish and maintain a market in th[e]

state *for the sales*," *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted; emphasis added), include activities like service provision, which takes place post-sale and the availability of which merely makes the product more attractive. *See* Pet. App. 21a-22a. But service provision is taxed separately. Indeed, it is undisputed in this case that Dell paid New Mexico tax on BancTec's behalf for the value of the services BancTec provided. *See id.* at 6a, 37a. A third party's provision of non-sales-related activity cannot, therefore, form a constitutional basis for taxing *the sales* of an out-of-state vendor.

Second, and relatedly, the New Mexico court's loose standard significantly undermines the bright-line standard that *Quill* expressly chose to retain. *See* 504 U.S. at 315-16. Indeed, the Department's call for an "intensely fact-based" "case-by-case" review, Opp. 21 (internal quotation marks omitted), of a variety of factors that make up any given business relationship – the extent and nature of the activities, the degree of control one party exerts over another, the volume of services provided, and so forth – is precisely the type of inquiry this Court eschewed in *Quill*. This Court's standards under the Commerce Clause seek to promote "settled expectations" and to "foster[] investment" by mail- and Internet-order businesses. 504 U.S. at 316. By contrast, as the Department concedes, the decision below makes every business relationship that such a vendor undertakes subject to "intensely fact-based" scrutiny to determine whether it renders that vendor subject to taxation in the state where its partner is located. Opp. 19. This Court has consistently refused to sanction such uncertainty in such a vital part of the national economy.

Third, by subjecting Dell's sales to gross receipts tax on the basis of BancTec's non-sales activity, the court of appeals ignored this Court's further requirement that the relevant third-party activities be undertaken "on behalf of" the taxpayer. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). The court instead found BancTec's non-sales activities sufficient to subject Dell's sales to taxation because BancTec "'served an important need'" for Dell, and Dell "'benefitted financially from the sales of service contracts as well as the ability to have an outsourced repair service.'" Pet. App. 22a (quoting *Dell Catalog Sales, L.P. v. Commissioner of Revenue Servs.*, 834 A.2d 812, 822 (Conn. Super. Ct. 2003)). But these types of benefits are no different in kind from the benefits that any out-of-state vendor receives from the provision of in-state service by authorized service providers or from any of a number of relationships that a vendor might have with in-state suppliers, manufacturers, or other business partners. If such benefits are sufficient, a similar argument could be constructed for imposition of sales or use tax on practically any out-of-state vendor.

The Department seeks to bolster the court's holding by arguing that Dell exerted significant control over BancTec's activities. But the Department quotes primarily from the findings of the hearing officer, on which the court of appeals did not rely. *See, e.g.*, Opp. 5-6. Indeed, the court cited only three findings in support of its decision – that "the availability of in-home service was an important factor in establishing [Dell's] market for sales," that "[a]pproximately seventy-five percent of [Dell's] New Mexico customers purchased a BancTec service contract," and that BancTec technicians made "1,273 service

calls and installation visits to New Mexico customers during the audit period." Pet. App. 21a-22a (brackets and internal quotation marks omitted).

Even on their own terms, the hearing officer's findings do not support the Department's conclusion that BancTec acted on behalf of Dell rather than itself. Despite the Department's mischaracterization in both the Question Presented (at i) and throughout its brief (*e.g.*, at 1-2, 19), it is undisputed in this case that BancTec did *not* provide service under Dell's warranty with its customers. *See* Pet. App. 34a ("Neither Dell Products L.P. nor DCSLP had any obligation to provide on-site repair services to a customer who purchased a Dell computer from DCSLP."). Similarly, the Department has never contended, and the hearing officer did not find, that an agency relationship – the clearest instantiation of one acting "on behalf of" another – existed between Dell and BancTec. *See id.* at 36a-37a ("BancTec did not . . . have the authority to bind DCSLP to any legal obligations in New Mexico.").

Even if a relationship short of agency could result in a third party acting "on behalf of" an out-of-state seller within the meaning of *Tyler Pipe*, the record in the case – contrary to the Department's assertions – demonstrates that BancTec acted on behalf of no one but itself. The Department does not – and cannot – dispute that BancTec carried out its on-site repair activities pursuant to its individual contracts with *its own* customers who bought *BancTec*'s service. *See id.* at 38a.[2]

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[2] The Department states (at 4, 22) that BancTec's name did not appear in Dell's catalogs. The record shows, however, that those catalogs disclosed that on-site service would be provided by a third party and that each customer purchasing a BancTec

The Department cites (at 4-5) the "Service Call Procedures" that were set out in the agreements between BancTec and Dell. But those procedures were merely quality-assurance standards of a type that are routinely incorporated into arm's-length agreements and that Dell demands of third-party hardware and software producers whose products Dell sells. *See, e.g.*, Pet. App. 5a-6a; Hearing Tr. 158, 195-97 (testimony of BancTec representative noting that it was not "unusual" for marketing partners to establish standards to ensure that "our service . . . was . . . reputable and reliable"). Indeed, the record establishes that BancTec retained control over all aspects of its business, including personnel and scheduling decisions. *See* Dell C.A. Br. 10. Similarly, the fact that Dell Technical Support first fielded and tried to resolve customers' complaints has no bearing on the nexus issue. *See* Opp. 4. The assistance provided by Dell Technical Support (from locations outside of New Mexico) was available to all customers who were still under warranty, regardless of whether they had purchased a BancTec service contract. *See* Pet. App. 34a-35a. That customer assistance clearly would not create nexus in the absence of the BancTec relationship, and there is no principled reason why BancTec's fulfillment of its own obligation to its own customers after Dell Technical Support was unable to resolve a customer problem should change that outcome.

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contract received a copy of the contract. *See* Exh. K at 13 (Dell Feb. 1999 catalog) (submitted at Hearing Before Hearing Officer Margaret B. Alcock, *In re Protest of Dell Catalog Sales L.P.*, N.M. ID No. 02-416593-000 (Dec. 5, 2005) ("Hearing")).

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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