No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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December 15, 2008

QUESTION PRESENTED

Whether a state may, consistent with the Commerce Clause, impose gross receipts taxes on sales by an out-of-state mail-order vendor with no physical presence in the state based solely on the in-state activities of a third party contractor that provides post-sale services to in-state buyers but that engages in no sales or solicitation activities on behalf of the vendor.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Dell Marketing L.P. (formerly known as Dell Catalog Sales L.P.) states the following:

In November 2006, Dell Catalog Sales L.P. was merged into Dell Marketing L.P. Dell Marketing L.P. is a wholly owned subsidiary of Dell Inc. Dell Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

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Dell Marketing L.P. (formerly known as Dell Catalog Sales L.P.) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

INTRODUCTION

The New Mexico Court of Appeals held that Dell Catalog, an out-of-state computer retailer with no physical presence in New Mexico, was subject to that state's gross receipts tax solely because of the activities of BancTec, a third-party repair provider that independently offered service contracts for the computers that Dell Catalog sold – even though BancTec did not solicit or promote the sales subjected to tax. That decision – which conflicts with decisions of the highest courts of Ohio and Connecticut as well as decisions of at least two intermediate state appellate courts – deepens an existing conflict among the states regarding the federal constitutionality of taxing out-of-state vendors based on activities carried out by non-agent third parties. The decision undermines this Court's long-established – and recently reaffirmed – rule that states lack authority under the Commerce Clause to tax out-of-state mail-order vendors with no physical presence in the state. And the decision sows confusion in an area of the law where this Court has repeatedly held that bright-line rules are needed to avoid burdening interstate commerce.

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992), this Court held that the Constitution prohibits a state from imposing taxes on sales by an out-of-state mail-order vendor that has contact with the state only through the delivery of its goods by mail or common carrier. Such a vendor lacks the "substan-

tial nexus" with the state needed for state taxation to be consistent with the Commerce Clause. The Court has held that an out-of-state vendor may have such a substantial nexus if the "activities" of an in-state third party are "performed . . . on behalf of the taxpayer" and "are significantly associated with the taxpayer's ability to establish and maintain a market . . . for [its] sales." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (internal quotation marks omitted).

This Court has never found nexus on the basis of a third-party's *non-sales* activities. Following the logic of this Court's decisions, several states have held that non-sales activities by third parties – such as accepting returns of mail-order products – fail to establish the required nexus to justify state taxation of a mail-order vendor's sales. The court of appeals' decision – joining prior decisions by other intermediate state courts – applies a conflicting rule, under which a third party's activities can establish substantial nexus so long as the out-of-state vendor derived some benefit from the third party's activities.

The division of authority on this important constitutional question warrants this Court's review. The Court has emphasized the need for clear rules governing state taxing authority to ensure that interstate commerce is free of the threat of unconstitutional state taxation. The need for clarity is accentuated by the rapid growth of Internet-based sales and the role that such commerce plays in the national economy. This Court should therefore grant the petition.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals (Pet. App. 1a-29a) is not reported. The decision and order of the Taxation and Revenue Department of the State of New Mexico (*id.* at 30a-103a) is not reported but is available at 2006 WL 2283430.

JURISDICTION

The New Mexico Court of Appeals entered its judgment on June 3, 2008, and the New Mexico Supreme Court denied a petition for a writ of certiorari on July 18, 2008 (Pet. App. 104a). On October 14, 2008, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including December 15, 2008. *Id.* at 110a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides in relevant part:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]"

Relevant provisions of the Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. § 7-9-1 *et seq.*, are reproduced at Pet. App. 105a-109a.

STATEMENT

1. New Mexico's Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. § 7-9-1 *et seq.*, provides that, "[f]or the privilege of engaging in business" in the state, "an excise tax equal to five percent of gross receipts is imposed on any person engaging in business in New Mexico." *Id.* § 7-9-4(A). The statute defines "gross receipts" to include "the total . . . value of . . . consideration received from selling property in New Mexico." *Id.* § 7-9-3.5(A)(1). Gross receipts taxes are functionally equivalent to sales taxes. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 n.3 (1995).

2. Petitioner Dell Marketing L.P. (formerly known as Dell Catalog Sales L.P.) ("Dell Catalog")[1] is an Internet- and mail-order retailer of computer hardware and accessories. *See* Pet. App. 2a, 32a-33a. Dell Catalog is a Texas limited partnership, and its principal place of business is in Round Rock, Texas. *See id.* at 2a, 32a. As the New Mexico Taxation and Revenue Department ("Department") and the court of appeals found, Dell Catalog "does not own or lease property in New Mexico, has no retail stores within the state, and has no sales agents or employees [in the state]." *Id.* at 2a; *see also id.* at 32a-33a. Dell Catalog does not franchise or license its trade name in New Mexico, *see id.* at 2a, 33a; maintain any "local telephone service with local directory listings" in the state, *id.* at 33a; "maintain any bank accounts or conduct . . . collections" in the state, *id.*; or "drop ship

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[1] Several Dell-related entities have changed their names over the course of the proceedings. Consistent with the opinions below, this petition refers to the relevant entities as they existed during the "audit period" from January 1993 through June 1999. *See* Pet. App. 31a.

goods from manufacturers located in New Mexico," *id.*

Instead, Dell Catalog sold its products during the relevant period solely through a "direct-to-the-customer sales model," *id.* at 2a, in which individual consumers located throughout the United States contacted Dell Catalog in Texas to place an order through the Internet or by electronic mail, telephone, mail, or facsimile, *see id.* at 2a-3a, 33a. Dell Catalog advertised its products through the Internet, national media, and mail-order catalogs. *See id.* at 3a, 33a. When a customer placed an order, Dell Catalog shipped the merchandise from its facilities in Texas or Tennessee directly to the consumer by common carrier or the United States Postal Service. *See id.*; *see also* Dell C.A. Br. 5. The sales contracts between Dell Catalog and its customers specified that title transferred to the customer upon shipment, though Dell Catalog retained the risk of loss until delivery. *See* Pet. App. 3a, 33a-34a.

Dell Catalog resold custom-built computers designed and manufactured by Dell Products L.P., a separate entity that shares a corporate parent with Dell Catalog.[2] *See id.* at 2a, 31a-32a, 33a; *see also* Dell C.A. Br. 5. Dell Catalog purchased the computers from

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[2] Dell Catalog and Dell Products L.P. are both wholly owned by Dell Inc. (known during the relevant time as Dell Computer Corporation). *See* Pet. App. 2a, 31a-32a. Dell Products "engaged in research and development and manufactured computer products." *Id.* at 31a. Those computer products were sold through one of three distinct entities, each of which served a different distribution channel. Dell Catalog served individual consumers, *see id.* at 32a, while Dell Marketing L.P. sold computer products to large enterprises and Dell Direct Sales L.P. sold computer products to small and medium-sized enterprises, *see id.* at 31a.

Dell Products and sold them at retail through the methods described above. *See id.* Dell Catalog also resold "computer peripherals and related accessories" manufactured by "other companies." Pet. App. 33a. Those third-party products included, for example, printers from Epson or Hewlett Packard, or other such items. *See* Dell C.A. Br. 4, 7.

Among the third-party products that Dell Catalog sold were service contracts for on-site repair of Dell computers by a company called BancTec U.S.A., Inc. ("BancTec"). *See* Pet. App. 3a-4a ("[e]ssentially, [Dell Catalog] sold service contracts to its customers who bought computers"), 36a. Dell Catalog began to offer these contracts in response to consumer demand for on-site computer repair beyond the limited warranty that accompanied Dell computers. *See id.* at 3a, 35a-36a.[3] Although the Dell companies considered offering their own service, they ultimately decided that such a business was not within the company's core skills, would require a significant new organizational infrastructure, and would impose significant new liability. *See* Transcript of Hearing Before Hearing Officer Margaret B. Alcock at 87-89, 160-61, *In re Protest of Dell Catalog Sales L.P.*, N.M. ID No. 02-416593-000 (Dec. 5, 2005) ("Tr."). Dell Catalog there-

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[3] Specifically, Dell computers were covered by a "return to factory" warranty from the manufacturer, Dell Products. Under the terms of that warranty – which covered parts and labor for the first year, and parts for the second and third years – the customer was required to return the defective product to Round Rock, Texas, for repair or replacement. *See* Pet. App. 3a, 34a. If the customer was willing to replace a defective part himself, Dell Products would ship the part to the customer with a prepaid return shipping label for return of the defective part. *See id.* at 34a-35a.

fore chose to sell the services of a third-party repair provider. *See* Pet. App. 35a.

After several unsatisfactory experiences with third parties, Dell entered into an arrangement to resell service plans provided by BancTec. *See id.* at 35a-36a. BancTec is a Delaware corporation, and its principal place of business is in Dallas, Texas. *See id.* at 4a, 36a. BancTec was completely separate from Dell Catalog; neither company had any ownership interest in the other. *See id.* BancTec provides on-site repair services for many manufacturers' computer products and for other electronic equipment. *See* Tr. 149-50.

The relationship between BancTec and Dell Catalog was set forth in a series of agreements between the two companies. *See* Pet. App. 36a. Under the terms of those agreements, Dell Catalog would sell the service contracts at a retail price that it was free to determine and would retain the difference between the retail price at which it sold the contracts to customers and the wholesale price at which it compensated BancTec. *See id.* at 35a, 37a. BancTec was paid a fee for each contract based on an agreed-upon formula. *See id.* Dell Catalog set quality-assurance standards that BancTec was required to meet, *see id.* at 5a-6a, 41a, to ensure that BancTec's service, like the other third-party products that Dell Catalog sold, would not damage Dell's reputation. Dell Catalog reported and paid New Mexico gross receipts taxes on BancTec's behalf for the value of the service contracts. *See id.* at 6a, 37a.[4]

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[4] BancTec had a physical presence in New Mexico through its on-site repair employees, offices, and associated infrastructure.

Customers could purchase a BancTec service contract from Dell Catalog when they bought their computers, or at any time thereafter. *See id.* at 38a. Those customers entered into a separate "service contract[]" with BancTec. *Id.* The contract required customers who encountered problems with their Dell computers first to contact Dell Customer Technical Support ("Dell Tech Support").[5] If Dell Tech Support could not resolve the problem over the telephone, Dell Tech Support referred the problem to BancTec so that BancTec could dispatch a repair employee to the customer's premises. *See id.* at 4a, 39a. Although BancTec's agreements with Dell Catalog required that BancTec meet certain performance standards – such as "contact[ing] the customer within thirty minutes of the notice of dispatch, track[ing] every service call, and train[ing] its technicians to meet a certain skill level," *id.* at 5a – the effective provision of on-site repair service was solely BancTec's responsibility. BancTec, for example, was responsible for any property damage that occurred during a service call. *See id.* at 37a. BancTec employees identified themselves as such, and BancTec retained complete discretion over scheduling and personnel matters, and insured its own activities. *See* Dell C.A. Br. 10. BancTec engaged only in on-site repair activities pursuant to its contracts with customers. As the Department found, "BancTec *did not solicit sales or orders on behalf of [Dell Catalog]* or have the authority to bind [Dell Catalog] to any legal obligations in New Mexico." Pet. App. 36a-37a (emphasis added).

Approximately 75 percent of Dell Catalog's computer customers in New Mexico also purchased a BancTec

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[5] Dell Customer Technical Support was located entirely outside of New Mexico. *See* Pet. App. 39a.

service contract, *see id.* at 5a, 38a, and BancTec completed 1,273 service calls in the state during the relevant period, *see id.* at 39a.

3. In July 1999, the Department audited Dell Catalog and determined that it had not reported or paid gross receipts taxes on its sales of computers to New Mexico residents. *See* Pet. App. 6a, 42a-43a. The Department assessed $1,140,735.71 in gross receipts tax and a total tax of $1,817,693.43 including penalties and interest. *See id.* at 6a, 43a.[6]

As relevant here,[7] Dell Catalog protested the assessment on the ground that the state lacked authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, to levy the gross receipts and compensating taxes. As an out-of-state mail-order vendor, Dell Catalog did not possess the requisite "substantial nexus" with the taxing jurisdiction that this Court has required for a tax on interstate commerce to pass muster under the Commerce Clause. Specifically, Dell Catalog argued that it did not have any physical presence in New Mexico, therefore bringing it within the "bright-line" rule of *Quill* and *Bellas Hess*. Dell Catalog argued further that the on-site repair activities of BancTec could not be imputed to Dell Catalog because BancTec neither acted on behalf of Dell

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[6] The amount included $31,908.69 in compensating taxes for the value of the advertising materials that Dell distributed in New Mexico. *See* N.M. Stat. Ann. § 7-9-7. Those taxes were unconstitutionally imposed for substantially the same reasons that the gross receipts taxes were unconstitutionally imposed.

[7] Dell Catalog also argued that the Gross Receipts and Compensating Tax Act did not authorize the Department to collect the assessed taxes because Dell was not "selling property in New Mexico" within the meaning of New Mexico Stat. Ann. § 7-9-3.5(A)(1).

Catalog in undertaking its own contractual obligations to its customers nor engaged in the solicitation of sales that would help to maintain a market for Dell computers.

Following a formal hearing before a Department hearing officer, the Department affirmed the assessment.[8] The hearing officer concluded that the taxes were constitutional because Dell Catalog exerted substantial control over BancTec's activities through the provisions of its agreements with BancTec, *see* Pet. App. 68a-72a, and BancTec's activities "significantly enhanced [Dell Catalog's] ability to establish and maintain its market for Dell computers in New Mexico," *id.* at 83a. The hearing officer rejected Dell Catalog's arguments that a third party's activities could establish the constitutionally required nexus only if the activities were undertaken to promote the sales at issue or were carried out as the vendor's agent. *See id.* at 72a-80a.

4. The court of appeals affirmed.[9] The court found that the tax was constitutional because BancTec's activities created a "substantial nexus" between Dell Catalog and the state. *See* Pet. App. 17a-24a. The court acknowledged that "[t]he United States Supreme Court has not yet addressed the question of whether a third party's non-sales activities in the taxing state can constitute nexus." *Id.* at 21a. In the court of appeals' view, this Court's decisions in *Tyler*

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[8] The hearing officer concluded that the "sale" of computers occurred where possession of the computers was transferred to the buyers, that is, in New Mexico. *See* Pet. App. 50a-52a.

[9] The court of appeals concluded that the sales of computers fell within the tax statute because the goods "had New Mexico as their destination and were, in effect, 'consumed' in New Mexico." Pet. App. 14a.

Pipe and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), which addressed whether third parties engaged in solicitation could establish an out-of-state vendor's nexus with a taxing state, did not foreclose the possibility that *non-solicitation* activities could similarly create a substantial nexus. *See* Pet. App. 19a-21a. Instead, the court reasoned that BancTec's activities "helped [Dell Catalog] 'establish and maintain a market'" for Dell computers. *Id.* at 21a (quoting *Tyler Pipe*, 483 U.S. at 250). The court similarly noted that "'BancTec served an important need'" of Dell Catalog and that Dell Catalog "'benefitted financially from the sales of service contracts as well as the ability to have an outsourced repair service attend to the needs of its customers.'" *Id.* at 22a (quoting *Dell Catalog Sales, L.P. v. Commissioner of Revenue Servs.*, 834 A.2d 812, 822 (Conn. Super. Ct. 2003)). Because BancTec engaged in a significant number of service calls to New Mexico customers, the court of appeals concluded that BancTec's activities in the state were substantial enough to create a nexus between the state and Dell Catalog. *See id.* at 22a-23a.

5. The New Mexico Supreme Court denied Dell Catalog's petition for a writ of certiorari. *See* Pet. App. 104a.

REASONS FOR GRANTING THE PETITION

In holding that Dell Catalog is liable for New Mexico gross receipts tax on sales of its computer products to purchasers in New Mexico, the New Mexico Court of Appeals deepened an existing split of state court authority over the scope of this Court's decisions in *Scripto* and *Tyler Pipe*. Plenary review is warranted both to resolve this conflict and to fortify the bright-line constitutional rule of *Quill* and *Bellas Hess*, which has long been considered essential in promoting legal certainty for a large and growing segment of the national economy. On the merits, this Court should hold that states lack authority under the Commerce Clause to tax mail- and Internet-order vendors based solely on contractual relationships with in-state third-party service providers not engaged in solicitation of sales and not acting on the vendor's behalf.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG STATE COURTS REGARDING THE SCOPE OF *SCRIPTO* AND *TYLER PIPE*

The New Mexico Court of Appeals held that Dell Catalog's sales of computers could be subject to gross receipts taxes because of the activities of BancTec – an unrelated third party that engaged in the repair of computers sold by Dell Catalog and belonging to BancTec's own customers. The court thus held that activities of a non-agent third party – activities that do not promote the sales that are being subjected to state-level taxation – can provide the substantial nexus required to render such taxation consistent with the Commerce Clause. New Mexico's loose interpretation of the substantial-nexus requirement

is consistent with decisions from at least two other jurisdictions, including California and Louisiana.[10]

Those decisions conflict, however, with decisions from at least four other jurisdictions, including Ohio, Connecticut, Pennsylvania, and Tennessee, which hold that the activities of a non-agent third party cannot create the substantial nexus required for taxation of out-of-state sales *unless* those activities directly promote those sales.[11] There is thus a sharp split in authority that warrants review by this Court. *See* Sup. Ct. R. 10(b).

A. This Court has long held that the Commerce Clause's "express grant to Congress of the power 'to regulate Commerce . . . among the several States'" also "contain[s] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Jefferson Lines*, 514 U.S. at 179 (quoting U.S. Const. art. I, § 8, cl. 3) (ellipsis in original). To ensure that a state tax does not unduly "interfere with interstate commerce," *Quill*, 504 U.S. at 309, this Court applies a four-part test first set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Court will sustain a state tax against a Commerce Clause challenge so long as the

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[10] *See Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005); *State v. Dell Int'l, Inc.*, 922 So. 2d 1257 (La. Ct. App. 2006).

[11] *See SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991); *Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999). *See also St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575 (E.D. La. 2007).

tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279.

With respect to the requirement of a "substantial nexus" between the taxed activity and the state, this Court has crafted and affirmed a "bright-line rule," *Quill*, 504 U.S. at 316, for out-of-state mail-order vendors (like Dell Catalog). "[A] vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Id.* at 311; *see Bellas Hess*, 386 U.S. at 758. Such a vendor must have some "physical presence in the taxing State," *Quill*, 504 U.S. at 314, and must have "substantial[ly]" more than the "slightest presence," *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977) (internal quotation marks omitted). An out-of-state mail-order vendor whose only contacts with the state involve sending goods by mail or common carrier to fill orders from customers in the state enjoys a "safe harbor" from state sales and use taxes. *Quill*, 504 U.S. at 315.

In certain circumstances, the presence of a third party in the taxing state that solicits sales on behalf of the out-of-state vendor may be sufficient to create a nexus between the vendor and the state. In *Scripto*, the Court held that an out-of-state vendor of "mechanical writing instruments" was subject to state tax because it maintained a sales force of 10 "wholesalers or jobbers" to "solicit[]" "[o]rders for its products." 362 U.S. at 208-09. Each of the "brokers" had a "written contract and a specific territory," but they were treated as "independent contractor[s]"

rather than employees. *Id.* at 209. The Court held that the "fine distinction" between employees and independent contractors was "without constitutional significance." *Id.* at 211. The Court held instead that "tagging . . . the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon [his] effectiveness in securing a substantial flow of goods into" the state. *Id.*

More recently, in *Tyler Pipe*, the Court upheld the imposition of a state gross receipts tax on an out-of-state manufacturer that relied on an independent contractor located in the state to conduct all of the manufacturer's sales-related activities. *See* 483 U.S. at 249-51. The contractor "acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders." *Id.* at 249 (internal quotation marks omitted). In particular, "[t]he sales representatives provide[d] Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington market." *Id.* at 250 (internal quotation marks omitted). The Court found these activities to create a nexus between the sales and the state, reasoning 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 this state for the sales." *Id.* (internal quotation marks omitted).

B. *Scripto* and *Tyler Pipe* established that solicitation of sales on an out-of-state vendor's behalf by in-state third parties can create a nexus between a

state and the out-of-state vendor sufficient to impose state taxation consistent with the Commerce Clause. But courts and commentators have suggested that those cases left unclear the "nature and extent," *Scripto*, 362 U.S. at 211, of third-party activities – particularly in contexts other than solicitation – that may be so "significantly associated with the taxpayer's ability to establish and maintain a market . . . for the sales," *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted), that they justify imputing nexus to out-of-state vendors. *See* Pet. App. 21a ("The United States Supreme Court has not yet addressed the question of whether a third party's non-sales activities in the taxing state can constitute nexus."); Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 19.02[2] (3d ed. 1998) ("*Scripto* and *Tyler Pipe* make it clear that nexus of an out-of-state seller may be established by the activities of unrelated third parties who act on behalf of the seller in the state. What remains unclear is the extent to which activities of independent contractors in a state will subject an out-of-state seller to [state taxes]."). State courts have split on the question whether third-party activities other than direct promotion of sales can constitute the requisite nexus to tax an out-of-state vendor.

1. Several state courts have held – correctly in our view – that the activities of a third party that do not directly promote the sales that are subject to taxation do not enhance the vendor's ability to establish or maintain a market for its sales within the meaning of *Tyler Pipe*. Such non-sales-promoting activities are therefore insufficient to justify state-level taxation of the out-of-state vendor's sales.

For example, in *SFA Folio Collections v. Tracy*, the Ohio Supreme Court held that the separate mail-order affiliate of Saks Fifth Avenue, a bricks-and-mortar retailer with stores in the taxing jurisdiction, did not have a substantial nexus with the state by virtue of the stores; the court therefore rejected as inconsistent with the Commerce Clause the Ohio tax commissioner's assessment of a use tax on the mail-order subsidiary. In that case, the stores accepted returns from the mail-order business and distributed the mail-order business's catalogs. *See* 652 N.E.2d at 695-96. The court reasoned that such contacts between the two separate entities were not tantamount to "the in-state affiliate . . . own[ing] or operat[ing] an in-state place of business" for the mail-order affiliate. *Id.* at 697. The court therefore concluded that the mail-order company's "selling activity does not have substantial nexus with Ohio because [it] does not have a physical presence in Ohio." *Id.* (citing *Quill*, 504 U.S. at 314-15).

The Connecticut Supreme Court reached the same conclusion with respect to the same entities in *SFA Folio Collections v. Bannon*. There, too, the court overturned the Commissioner of Revenue's assessment against the mail-order affiliate on federal constitutional grounds. The court held that its decision was "governed" by *Bellas Hess*, 585 A.2d at 670, and in particular that the retail stores' distribution of catalogs did not create a nexus between the mail-order affiliate and the state because the retail stores did not "solicit" mail-order sales, *id.* at 671. The court distinguished *Scripto* on that ground. *See id.*

The Pennsylvania Supreme Court affirmed the decision of a lower court that considered similar facts and found no nexus between the state and a mail-

order affiliate of a physical department store chain because the stores "do not solicit orders on [the mail-order affiliate's] behalf" or "act as its agents in any fashion," and any similarities in "advertising themes and motifs" were too insubstantial to "constitute a nexus for use tax purposes." *Bloomingdale's By Mail*, 567 A.2d at 778. The lower court distinguished *Scripto* on the ground that the absence of any direct promotion of sales negated the argument that the mail-order subsidiary "ha[d] agents acting on its behalf" in the state. *Id.* The court therefore held that the Pennsylvania Department of Revenue's "attempt to impose . . . a duty [to collect use tax on the mail-order sales] violates the United States Constitution." *Id.*

In *J.C. Penney*, a Tennessee appellate court rejected imposition of franchise and excise taxes against the credit card affiliate of a national retail chain, finding the case to be "governed by *Bellas Hess* and *Quill*." 19 S.W.3d at 839. In particular, the court found that the retail stores "conducted no activities which assisted" the separate credit card subsidiary "in maintaining its credit card business" in the state because "one could not apply for the . . . credit cards at the . . . retail stores" or "make a payment . . . at the retail stores." *Id.* at 840-41. The court distinguished *Scripto* and *Tyler Pipe* on the ground that "[t]he solicitation, which was the most important function in allowing [the credit card subsidiary] to maintain its business, took place through the U.S. Mail." *Id.* at 841.

At least one federal court has reached a similar conclusion. In *Barnesandnoble.com*, a locality attempted to tax Barnesandnoble.com, an Internet-based retailer of books, movies, and music, on the basis of the phy-

sical presence in the jurisdiction of Barnes & Noble retail stores, which were owned by a common corporate parent. *See* 481 F. Supp. 2d at 576. The state argued that several aspects of the two entities' business relationship established a substantial nexus on behalf of the Internet-order company, including their joint participation in discount and gift card programs (whereby "members" could enjoy discounts and gift cards that could be redeemed at both online and physical stores), their cross-promotional advertising arrangements, and their cooperative agreement under which the bricks-and-mortar stores accepted returns of items purchased from the online store. *See id.* at 578. The court disagreed, finding that none of the retail stores' activities was "tantamount to acting as a sales presence" for the online store, as were the third-party activities in *Scripto* and *Tyler Pipe*. *Id.* at 581; *see id.* (noting that physical stores "ha[ve] never taken or solicited orders on behalf of Online and did not provide facilities to place orders with Online"). The court noted that, although "Online may have derived a benefit from Booksellers' advertising of the program," that benefit was "not sufficient to impute [Booksellers'] presence to Online." *Id.* at 581-82.

In each of these cases, the relationship between the out-of-state mail-order vendor and the in-state party could have been said to promote sales in an indirect way – for example, by making it easier to return purchased merchandise. But the courts in these cases correctly determined that such indirect benefits – unlike the solicitation found sufficient to confer nexus in *Scripto* and *Tyler Pipe* – were 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.

2. The court below, by contrast, read *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 activities that benefit the out-of-state seller. *See* Pet. App. 21a. The court specifically rejected any "sales-related" limitation on the third-party's activities that could provide a basis for taxation of the out-of-state vendor, reasoning that the absence of any precedent from this Court approving such taxation "does not equate to a holding that [non-sales] activities *cannot* provide nexus." *Id.* Instead, the court held that "the availability of in-home service was an important factor in establishing [Dell Catalog's] market for sales." *Id.* at 21a-22a (brackets and internal quotation marks omitted). Because BancTec "served an important need" of Dell Catalog and Dell Catalog "benefitted financially from . . . the ability to have an outsourced repair service attend to the needs of its customers," the court found that Dell Catalog had sufficient contact with the state to subject its computer sales to state gross receipts taxation. *Id.* at 22a (internal quotation marks omitted).[12] *See also Dell Int'l*, 922 So. 2d at 1263-66 (reversing summary judgment for related Dell entity).

Other courts have applied the same loose test. In *Borders Online*, for example, a California appellate court held that "there is no requirement that the out-

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[12] The court below drew support from *Dell Catalog Sales*, a Connecticut trial court decision involving the same issue between the same parties. That court ultimately found, however, that the state taxing authority failed to carry its evidentiary burden to show that BancTec itself had "sufficient, substantive physical presence in the state." 834 A.2d at 822-23.

of-state retailer's in-state representative be engaged in the solicitation of sales or in sales transactions to satisfy the substantial nexus required by the [C]ommerce [C]lause." 29 Cal. Rptr. 3d at 1199. Rather, "the analysis turns on the totality of the activities undertaken to maintain a successful market." *Id.* at 1197. That court found that Borders Online, an Internet-based bookseller, had a nexus with the state through the activities of a separate but related company that maintained physical stores. Those activities included accepting returns from the Online affiliate and engaging in cross-marketing and branding such as "the use of similar logos" and store receipts "imprinted with" Online's web address. *Id.* at 1199. The court held that the return policy was "part of [Online's] strategy to build a market in California" and that "[t]he cross-selling synergy" "amply support[ed]" the conclusion that the physical stores' activities created a nexus between the state and the online affiliate. *Id.*

II. THE COURT BELOW ERRED IN FINDING NEXUS ON THE BASIS OF BANCTEC'S NON-SOLICITATION ACTIVITIES

The existence of a conflict among the states regarding the important constitutional question presented justifies review. And review is called for as well because the New Mexico court misread this Court's Commerce Clause jurisprudence and failed to give effect to the policies underlying it.

In *Bellas Hess* and *Quill*, this Court established a "bright-line" rule, *Quill*, 504 U.S. at 315, that the Commerce Clause bars a state from taxing out-of-state mail-order vendors that lack a physical presence in the state and "'whose only connection with customers in the taxing State is by common carrier

or the United States mail,'" *id.* (quoting *Bellas Hess*, 386 U.S. at 758) (brackets omitted). Dell Catalog's sales of computers – taken alone – would qualify for that "safe harbor" from state taxation. *Id.* The state court erred in holding that BancTec's separate computer-repair activities could subject Dell Catalog's sales to state taxation when those activities did not solicit the sales at issue. The effect of the state court's standard is to undermine the substantial-nexus requirement by allowing a state to 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 its sale. The Court should disapprove that expansion of state power to tax sales by out-of-state vendors, an expansion that threatens to overwhelm any effective constitutional limitation on the states' power.[13]

[13] *Quill* and *Bellas Hess* retain their vitality. As this Court noted in *Quill*, "Congress is . . . free to decide whether, when, and to what extent the States may burden interstate mail-order concerns" with state taxes. 504 U.S. at 318. In the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Tit. XI, 112 Stat. 2681, 2681-719 (1998) ("ITFA"), Congress relied on existing limitations on state taxing power under the Commerce Clause to establish a moratorium on certain state taxation of Internet-based sales of goods and services. *See* ITFA § 1104(2)(B)(i), 112 Stat. 2681-725 (providing that "the sole ability to access a site on a remote seller's out-of-State computer server" is not a basis for imposition of state taxation); *id.* § 1104(2)(B)(ii), 112 Stat. 2681-725 (providing that an in-state Internet-access provider cannot be deemed an "agent" of the seller based solely on "the display of a remote seller's information" or "the processing of orders" through the provider's servers); *see also* S. Rep. No. 105-276, at 5 (1998) (noting, after discussing *Quill*, that the bill does not "modif[y] the present-law rules for determining when an interstate seller has a 'nexus' with a State"). Congress has repeatedly extended the life of the moratorium, most recently

A. In *Scripto* and *Tyler Pipe*, this Court found that the in-state *solicitation* activities of unrelated third parties could be imputed to the out-of-state vendors to establish a substantial nexus between those vendors and the taxing states. As applied to mail-order vendors, the holding in those cases is consistent with the bright-line rule of *Bellas Hess* and *Quill*. The *Bellas Hess* and *Quill* rule draws a "sharp distinction . . . between mail order sellers with retail outlets, *solicitors*, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Bellas Hess*, 386 U.S. at 758 (emphasis added); *see Quill*, 504 U.S. at 311. The Court was careful to distinguish between sellers whose only contact with the taxing state is their shipment of out-of-state goods to in-state customers and sellers that directly or indirectly engage in actual sales activities within the state. Only sellers that engage in the latter activity are "accorded the protection and services of the taxing State" such that the state can justifiably tax the sales. *Bellas Hess*, 386 U.S. at 757.

Scripto and *Tyler Pipe* recognize that the relevant in-state sales activities need not be undertaken by the vendor itself, but may instead be undertaken by a third party on the vendor's behalf. Imputing that third party's contacts to the out-of-state vendor ensures that mail-order (or other) sellers cannot engage in "a stampede of tax avoidance" through "formal contractual shifts" from in-state employees to in-state independent contractors. *Scripto*, 362 U.S. at 211 (internal quotation marks omitted); *see also*

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until 2014. *See* Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, § 2, 121 Stat. 1024, 1024.

Tyler Pipe, 483 U.S. at 250-51; *Barnesandnoble.com*, 481 F. Supp. 2d at 581 ("In *Tyler Pipe* and *Scripto*, the Supreme Court was concerned that companies could avoid tax obligations merely by reclassifying employees, such as salespeople, as independent contractors."). Those cases thus reflect and give effect to the distinction between in-state solicitation, which subjects the goods sold to state taxation, and the mere shipping of goods into the state, which does not.

The third-party conduct at issue here differs from the conduct in *Scripto* and *Tyler Pipe* because it does *not* involve the solicitation of sales. Rather, BancTec offered an in-state repair service and did not solicit sales for Dell Catalog at all. Accordingly, unlike in-state solicitation, BancTec's activities are not related to the "activity" to which the state "tax is applied" – the *sales*. *Complete Auto*, 430 U.S. at 279.

The state court believed that the inquiry "whether the activities . . . are significantly associated with the taxpayer'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), asks whether the third-party's activities facilitates the out-of-state vendor's sales by making its products more attractive. *See* Pet. App. 21a-22a. But that reading turns the substantial-nexus requirement on its head. The mere existence of in-state service providers specializing in Dell computers could not subject Dell Catalog's mail-order sales to taxation. That Dell Catalog assisted BancTec to pursue its in-state repair activities – activities that *were* subject to in-state taxation – does not mean that BancTec was promoting Dell Catalog's sales in the constitutionally relevant sense. To the contrary, it is undisputed that BancTec did not solicit sales for Dell Catalog.

Moreover, the state court ignored this Court's requirement that the relevant activities must be carried out "on behalf of" the taxpayer. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). BancTec did not undertake any activities on behalf of Dell Catalog; rather, BancTec carried out its repair activities to fulfill its own obligations to the customers who bought its service contracts. *See* Pet. App. 38a. The court below appears to have equated "on behalf of" with "for the benefit of." But those two concepts are not the same.

To be sure, the availability of BancTec's service may have made Dell computers more attractive to New Mexico consumers. But it will frequently be true that there exists an in-state infrastructure to support an out-of-state seller's product – providers of repair service; in-state vendors of replacement parts and supplies like ink, paper, or chemicals; providers of ancillary equipment or training. The out-of-state vendor may facilitate those in-state activities by providing training, specifications, or proprietary equipment to those third parties. More generally, an out-of-state vendor may cultivate relationships with in-state actors, relationships that have the effect of indirectly promoting the vendor's business. The third parties' in-state activities in all such cases would be subject to taxation by the state – as BancTec's activities were in this case. But they cannot – consistent with this Court's Commerce Clause jurisprudence – subject the out-of-state vendor's sales to taxation.

B. *National Geographic* is not to the contrary. In that case, the taxpayer itself maintained two offices within the taxing state. Although the offices were not directly involved in the taxpayer's mail-order sales, this Court held that their existence established

a sufficient nexus between the taxpayer's out-of-state mail-order sales business and the taxing state to subject those sales to state-level taxation. *See* 430 U.S. at 561 (stating that "the Society's two offices, without regard to the nature of their activities," had a sufficient connection with the state for taxation purposes).

National Geographic may be read to suggest that, if Dell Catalog *itself* performed repair service in New Mexico, the fact that the repair personnel refrained from sales activities would not pose any constitutional bar to taxation of Dell Catalog's sales. But such a rule would have no application here, because Dell Catalog did not offer repair service in New Mexico, nor did BancTec offer such service on Dell Catalog's behalf. Rather, as the court below recognized, BancTec was an independent third party that was not acting as Dell Catalog's agent. *See* Pet. App. 3a-4a; *cf.* Declaratory Ruling, *In re Gateway 2000, Inc.*, Docket No. 96-30-6-0033, 1996 Iowa Tax LEXIS 2, at *5 (Iowa Dep't Revenue & Fin. Mar. 19, 1996) ("[T]he service warranty work performed under the service warrantor's own on-site service warranty is not performed on behalf of or at the direction of [the computer manufacturer].") (internal quotation marks omitted).

In any event, the question whether *National Geographic* reflects the Court's current interpretation of the Commerce Clause has itself provoked a split of authority among the states. Although the *National Geographic* Court stated the question presented in terms of both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause, *see* 430 U.S. at 554, the Court has "not always been precise in distinguishing between the two." *Quill*, 504 U.S. at 305. *National Geographic*'s holding

appears to reflect Due Process Clause principles – not necessarily Commerce Clause principles. The Court stated, for example, that "the relevant constitutional test . . . is . . . whether the facts demonstrate 'some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax.'" 430 U.S. at 561 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)) (alteration, emphasis, and third ellipsis in original). The quoted passage from *Miller Bros.* interprets the Due Process Clause, *not* the Commerce Clause. *See Miller Bros.*, 347 U.S. at 344-45 ("[D]ue process requires some definite link, some minimum connection, between a state and the person . . . it seeks to tax.").

The Court has since held that "the nexus requirements of the Due Process and Commerce Clauses are not identical." *Quill*, 504 U.S. at 312. Because "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy," *id.*, "[a] tax may be consistent with due process and yet unduly burden interstate commerce," *id.* at 313 n.7. Thus, state courts after *Quill* have divided on the question whether a vendor's *own* in-state activity unrelated to its sales can subject the vendor's sales to taxation. *Compare In re Appeal of Intercard, Inc.*, 14 P.3d 1111, 1113-14, 1122-23 (Kan. 2000) (holding that 11 in-person technician calls to install purchased goods, in the absence of in-state solicitation, were "insufficient to establish a substantial nexus to Kansas"), *with Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954, 962 (N.Y. 1995) (holding that vendor's 41 in-state "trouble-shooting visits . . . enhanced sales and significantly contributed to [vendor's] ability to establish and maintain a market").

Here, BancTec's activities involved post-sale service and repair – not sales – and those activities cannot be imputed to Dell Catalog. Even if they were relevant, those repair activities, like the returns and distribution of catalogs in *SFA Folio Collections v. Tracy*, "might provide minimal connection under due process standards," but they "do not create substantial nexus" under the Commerce Clause, 652 N.E.2d at 697, because they are unrelated to the sales of computers that are the object of the tax.

III. THE QUESTION PRESENTED IS ONE OF SIGNIFICANT NATIONAL IMPORTANCE AND IS LIKELY TO RECUR

This case involves the constitutional limits on state taxation of goods sold by mail or over the Internet – a roughly $190 billion industry. *See* U.S. Census Bureau, *2006 E-commerce Multi-sector Report*, Table 6/historical (May 16, 2008) ("*2006 Report*"), *available at* http://www.census.gov/eos/www/2006/historical/2006ht.pdf. Without further guidance from this Court, participants in this growing and increasingly important retail sector will be hampered in their business planning and investment, with the threat of state-level taxation shadowing cooperative efforts with independent third parties.

A. As the Court stated more than 40 years ago, "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions" involved in these cases. *Bellas Hess*, 386 U.S. at 759. The Court recognized the special characteristics of the mail-order industry and "demarcat[ed] . . . a discrete realm of commercial activity that is free from interstate taxation." *Quill*, 504 U.S. at 315; *see also* Hellerstein & Hellerstein, *State Taxation* ¶ 19.02[3][c][vi] (noting that *Quill* "may

arguably be read to have established a 'bright-line' physical-presence standard only for sales and use taxes on the mail-order industry alone, relegating other industries and other taxes to 'the more flexible balancing analyses' the Court's 'Commerce Clause jurisprudence now favors'") (quoting *Quill*, 504 U.S. at 314).

That determination deserves to be reaffirmed. In *Quill*, the Court specifically rejected a challenge to the *Bellas Hess* rule predicated upon the changed circumstances of the national economy. Indeed, the lower court in *Quill* justified its rejection of the *Bellas Hess* rule in part based on changes in the "economic, social, and commercial landscape" since *Bellas Hess*. *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992). The North Dakota Supreme Court observed that, in the years since *Bellas Hess*, mail-order retailing "ha[d] grown from a relatively inconsequential market niche into a goliath," *id.*, and that technological changes rendered the techniques of mail-order retailing in the early-1990s vastly different from those in the late 1960s, *see id.* at 209. In the lower court's view, these developments undermined both the exclusively interstate character of such sales and the desirability of shielding such activities from state taxation. *See id.* at 213-15.

This Court rejected that reasoning, noting instead that the *Bellas Hess* rule "has engendered substantial reliance and has become part of the basic framework of a sizable industry." *Quill*, 504 U.S. at 317. Indeed, as the *Quill* court noted, "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation." *Id.* at 316.

The same can be said about the development of Internet commerce in the years following *Quill*. Today, the mail- and Internet-order industry has undergone another round of technological changes and plays an even larger role in the national economy. Internet commerce barely existed as late as 1995. By 1999, it had grown to just under $12 billion in retail sales, and by 2006 that figure had grown to $75 billion. *See 2006 Report*, Table 6/historical; U.S. Census Bureau, *1999 E-commerce Multi-sector Report*, Table 5 (Mar. 7, 2001), *available at* http://www.census.gov/eos/www/1999/1999estatstables.pdf. That dramatic growth has been accompanied by significant benefits for American consumers, promoting intense competition and expanded choices. And, while the scale and scope of mail- and Internet-order commerce has increased dramatically since *Quill*, its fundamentally interstate character has not changed; the justifications for the bright-line rule that the *Quill* Court found compelling retain their force today.

B. This Court's review is needed because the states' various interpretations of this Court's Commerce Clause jurisprudence have created significant disuniformity and confusion with respect to the state tax obligations of mail-order and Internet retailers. The creation of conflicting obligations to the various states on the part of fundamentally interstate businesses is precisely what the Commerce Clause is supposed to prevent. As the Court recognized in *Bellas Hess*, the "welter of complicated obligations to local jurisdictions with no legitimate claim to impose" a tax undermines "[t]he very purpose of the Commerce Clause," which is "to ensure a national economy free from such unjustifiable local entanglements." 386 U.S. at 759-60. The Court reiterated that concern

in *Quill*, noting that any "artificiality" created by a "clear rule" is outweighed by the benefits of such a rule. 504 U.S. at 315. In particular, "[s]uch a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." *Id.*

In this case, reaffirming that third-party nexus can be created only by sales-related activities will bring much-needed uniformity to a controversial area of the law. The conflicting court decisions described above cast a shadow of uncertainty on the taxation policies of a majority of the states. At least 25 states and the District of Columbia have taken the position that "providing in-state warranty repair services through third party repair service providers . . . creates constitutional nexus" for imposing state taxes. Multistate Tax Commission, Nexus Program Bulletin No. 95-1, at 2 (Dec. 20, 1995; rev. Sept. 10, 1996), *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Nexus_Program/Archives/Nexus_Bulletins/NB%2095-1.pdf.[14] The states might use this uncertainty as leverage to seek voluntary payment of taxes by mail- and Internet-order vendors. Nineteen states have signed the Streamlined Sales and Use Tax Agreement, which implements a voluntary online seller registration system by which registrants pay "streamlined" state sales and use taxes prospectively in return for amnesty. *See* Press Release,

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[14] As described above, the provision of in-state repair services by BancTec is governed not by warranty but by an independent service contract. There is sufficient overlap, however, between fact patterns involving warranty and non-warranty repair service that the bulletin released above may foreshadow states' resolution of cases like this one.

Streamlined Sales Tax Governing Board, Inc., *Sales Tax Simplification Agreement Becomes Effective Today and Launches Key Element: Amnesty Program* at 1 (Oct. 3, 2005) ("While current law does not require e-commerce and direct mail companies to collect and remit sales taxes on transactions that occur in jurisdictions where they do not have a physical presence, the states expect some of these companies may come forward and volunteer to collect taxes under the simplified system."), *available at* http://www.streamlinedsalestax.org/press_rel/Press%20Release%20Inaugural%20Gov%20Board%20-%20Final.pdf.

Furthermore, the Court has recognized the importance of clear rules in this area: "a bright-line rule in the area of sales and use taxes . . . encourages settled expectations and, in doing so, fosters investment by businesses and individuals." *Quill*, 504 U.S. at 316. The decision below threatens to replace the bright-line rule of *Bellas Hess* and *Quill* with a detailed and fact-specific inquiry into the activities of any in-state business partners of the out-of-state vendor. That time-consuming and uncertain inquiry will retard growth and innovation in a critical area of the national economy.

C. Finally, although this case involves a decision of an intermediate state court, it is nevertheless an appropriate vehicle to consider the question. This Court has not hesitated to review decisions of intermediate state appellate courts after denial of further discretionary review when those decisions raise significant questions about the scope of the dormant Commerce Clause. *See, e.g.*, *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dep't of Revenue*, 128 S. Ct. 1498, 1504 (2008); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 308 (1994). The division of

authority is well developed, with state courts sharply divided over the question whether a third party's non-sales-solicitation activities may establish the substantial nexus required under the Commerce Clause. And, in the absence of any relevant factual dispute, the Court's resolution of the question presented will control the legality of the tax imposed below.

CONCLUSION

The petition for a writ of certiorari should be granted.

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