No. 08-1169

IN THE
SUPREME COURT OF THE UNITED STATES

CAPITAL ONE BANK (USA), N.A.,
F/K/A CAPITAL ONE BANK, AND CAPITAL ONE, N.A.,
AS SUCCESSOR TO CAPITAL ONE F.S.B.,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
MASSACHUSETTS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Commerce Clause permits a State to impose a corporate net income tax---one conceded by the taxpayer to be fairly apportioned, non-discriminatory, and fairly related to the services provided by the State---on a taxpayer regularly engaging in transactions involving intangible property with residents in that State, in the absence of a "physical presence" by the taxpayer in the taxing State.

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INTRODUCTION

Pursuant to Supreme Court Rule 15, respondent Commissioner of Revenue of Massachusetts submits this brief in opposition to the petition for a writ of certiorari. The writ should be denied in this case because (1) the decision of the Massachusetts Supreme Judicial Court ("SJC") is consistent with the decisions of this Court and the requirement that a state tax be applied to "an activity with a substantial nexus with the taxing State"; (2) the decision of the SJC enlarges a growing consensus of the States' highest courts rejecting the claim that the Commerce Clause requires a "physical presence" in order to establish a "substantial nexus"; (3) the Court should not grant review based on mere speculation about burdens on interstate and foreign commerce; and (4) the Court should deny review in deference to the constitutional role of Congress in weighing the burdens on interstate commerce.

OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioners' citations concerning the opinions below, the jurisdiction of the Court, and the constitutional and statutory provisions involved.

STATEMENT

The Mass. Financial Institution Excise Tax

The Commissioner is the Massachusetts official authorized to enforce the tax laws of the Commonwealth. Mass. Gen. Laws ch. 14, §§ 1-3; ch. 62C, § 3. She is charged with enforcing the excise tax imposed on financial institutions "engaged in +business in the commonwealth." *See* Mass. Gen. Laws ch. 63, § 2. Capital One Bank ("COB") and Capital One FSB ("FSB" and, together with COB, the "petitioners") do not contest that they are "financial institutions" as defined by Mass. Gen. Laws ch. 63, § 1. Nor do they contest that they are financial institutions "engaged in business in the commonwealth" under the Massachusetts Financial Institutions Excise Tax ("FIET"). The statute defines that phrase as follows:

> (a) having a business location in the commonwealth; (b) having employees, representatives or independent contractors conducting business activities on its behalf in the commonwealth; (c) maintaining, renting or owning any tangible or real property in the commonwealth; (d) regularly performing services in the commonwealth; *(e) regularly engaging in transactions in the commonwealth that involve intangible property and result in income flowing to the taxpayer from residents of the commonwealth;* (f)

> regularly receiving interest income from loans secured by tangible property or real property located in the commonwealth; or (g) regularly soliciting and receiving deposits from customers in the commonwealth. *With respect to the activities described in clauses (d) to (g), inclusive, activities shall be presumed, subject to rebuttal, to be conducted on a regular basis within the commonwealth if any of such activities are conducted with one hundred or more residents of the commonwealth during any taxable year or if the taxpayer has ten million dollars or more of assets attributable to sources within the commonwealth, or has in excess of five hundred thousand dollars in receipts attributable to sources within the commonwealth.*

Mass. Gen. Laws ch. 63, § 1 (emphasis added). The FIET was enacted in 1995. Mass. St. 1995, c. 81, § 1.

The FIET is based on a percentage of a financial institution's net income. Mass. Gen. Laws ch. 63, § 2. Out-of-state financial institutions conducting business both within and without Massachusetts are allowed to apportion their net income based on a statutorily-defined apportionment scheme not challenged in this case. *See* Mass. Gen. Laws ch. 63, § 2A.

Proceedings before the Commissioner of Revenue, the Appellate Tax Board, and Supreme Judicial Court

COB failed to file FIET returns for the taxable years 1995 through 1998. App. 8a, 24a. Similarly, FSB failed to file FIET returns for the taxable years 1996 through 1998. App. 8a, 24a. After notifying the petitioners that they had failed to file, and based on apportionment information provided by the petitioners, the Commissioner assessed taxes against COB in the amount of $1,758,454.96 and against FSB in the amount of $159,075. App 8a, 24a.

Petitioners filed applications for abatement, which the Commissioner denied. App. 8a-9a, 24a. Petitioners appealed the Commissioner's decisions to the Appellate Tax Board (the "Board"). App. 9a, 24a. Following a hearing, the Board issued its decision upholding the Commissioner's denial of abatements. App. 9a-10a, 30a-31a. The Board later issued its Findings of Fact and Report. A. 23a-53a, 2007 WL 1810723 (Mass. App. Tax Board June 22, 2007). The Board rejected petitioners' claim that the Commerce Clause requires that the taxpayer have a physical presence in the taxing State before the State may assess an excise tax based on a corporation's net income from activities conducted within the States. App. 35a-49a. The Board found that petitioners' activities in Massachusetts created the "substantial nexus" required by the Commerce Clause. *Id.* The Board found that these activities included, among other things, substantial, targeted marketing to

Massachusetts customers; millions of dollars in loan receivables; the derivation of hundreds of millions of dollars in income from millions of transactions involving Massachusetts residents and merchants; the use of the Massachusetts court system to collect delinquent accounts; and the use of the Massachusetts Attorney General's Office to resolve disputes with Massachusetts customers. App. 30a-31a, 47a-48a.

The petitioners appealed the Board's decision. The Supreme Judicial Court (SJC) granted their application for direct appellate review. App. 2a. The SJC affirmed. App. 1a-22a. The SJC first described the many activities conducted by the petitioners in Massachusetts and noted that they had not "rebutted the statutory presumption that they have regularly engaged in business in Massachusetts." App. 2a-8a, 12a. Turning to the claim under the Commerce Clause, the court surveyed the decisions of this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill v. North Dakota*, 504 U.S. 298 (1992). The SJC stated that "*Quill* explicitly emphasized, on more than one occasion, a narrow focus on sales and use taxes for the physical presence requirement . . . and did not apply to the imposition of other types of state taxes." App. 17a. Citing the decision of the West Virginia Supreme Court in *Tax Comm'r of W. Va. v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006), *cert. denied sub nom. FIA Card Services, N.A. v. Tax Comm'r of W. Va.*, 127 S.Ct. 2997 (2007), the SJC "conclude[d] that the constitutionality, under the commerce clause, of the . . . FIET is determined not by *Quill's* physical presence test, but by the 'substantial nexus' test articulated in *Complete Auto*." App. 21a-22a. The court then considered the facts set forth below and concluded that the petitioners' "activities in Massachusetts established a substantial nexus with the Commonwealth." App. 22a.

Facts Concerning the Petitioners' Activities in Massachusetts

Pursuant to Supreme Court Rule 15, the respondent supplements the petitioners' statement of the case with the following facts drawn from the decisions of the Board and the SJC. *See* Pet. App. 1a-9a; 23a-31a.

During the years at issue, COB was a Virginia chartered credit card bank offering credit card products. App. 2a-3a, 24a-25a. FSB was a federally chartered savings bank offering lending and deposit products, including secured and unsecured credit cards, to individuals and small businesses. App. 3a, 24a-25a. Both banks were wholly owned subsidiaries of Capital One Financial Corporation ("COFC") and maintained commercial domiciles in Virginia. App. 2a-3a, 24a-25a.

Petitioners' primary assets were consumer loans using "Capital One" credit cards as the credit extension vehicle. App. 4a, 25a. COFC is the owner of the trademark "Capital One" and provides the trademark to the petitioners free of license and royalty to appear on credit cards issued to consumers in Massachusetts. *Id.* Both COB and FSB generated income through finance charges assessed on outstanding loan receivables, fees from credit card transactions, and interest income earned on investment securities and money market investments. App. 8a, 25a.

Petitioners employed a statistical marketing technique to target potential consumers in Massachusetts, primarily through interstate mailings. *See* App. 4a. Petitioners also solicited credit card customers through the internet, outbound telephone communications, and newspaper advertisements, and through third parties at marketing events and at retail establishments. Board Exh. 892; *see* App. 4a, 8a. As a result of petitioners' marketing efforts in Massachusetts, the number of Massachusetts residents with COB credit cards rose from 196,000 in 1995 to 465,000 in 1998, and FSB's Massachusetts customers grew from 3,800 to 7,363 in 1998, the years at issue. App. 8a, 26a. Petitioners spent more than $10 million to acquire Massachusetts customers during the years at issue, given their marketing expenditure of between $50 and $100 per individual cardholder. *Id.*

Petitioners generated millions of dollars of income from the acquisition of customers in Massachusetts. *Id.* During the years at issue, COB's outstanding loan receivables related to Massachusetts customers grew from roughly $72 million to more than $113 million, while FSB's receivables grew from $11.5 million to $16.6 million.

Id. The receivables generated income for the petitioners in the form of interest, fees, and penalties. *Id.* COB's income from Massachusetts customers rose from $22 million in 1995 to almost $58 million in 1998, while FSB's Massachusetts income rose from $1.5 million in 1996 to more than $3 million in both 1997 and 1998. *Id.*

Through their agreements with Massachusetts residents, petitioners issued "general purpose" credit cards branded with the "Capital One" trademark. App. 6a-7a, 26a-27a. Pursuant to the agreements, petitioners advanced funds on behalf of their Massachusetts customers for transactions in which the customers used the credit cards to purchase goods or services from merchants in Massachusetts and other States. App. 5a, 27a. Customers were also able to obtain cash advances on their credit accounts by using the "Capital One" cards at banks and automated teller machine locations in Massachusetts. *Id.*.

Petitioners were also members of the Visa and MasterCard associations, which gave them access to the technology and equipment necessary to process credit card transactions in Massachusetts and nationwide. App. 5a-6a, 27a. Within the associations, petitioners were considered "issuing banks" because they issued credit cards branded with the Visa or MasterCard logos. App. 6a, 28a. Other members of the associations included "acquiring banks," which maintained contractual arrangements with merchants that accepted Visa or MasterCard. App. 6a, 27a-29a.

Transactions involving petitioners' credit cards were consistent with typical credit card transactions. App. 6a-7a, 27a-28a. When a customer uses a credit card to pay a merchant for goods or services, the merchant relays the credit card information to an acquiring bank. *Id.* The acquiring bank then transmits the transaction information to the relevant association, which in turn routes it to the issuing bank for approval. *Id.* The issuing bank either authorizes or declines the transaction, and relays the decision back through the association and the acquiring bank to the merchant at the point of sale. *Id.* Assuming the transaction is approved and completed, the merchant submits a payment request to the acquiring bank, which forwards the request to the issuing bank. *Id.* The issuing bank then pays the transaction amount to the acquiring bank, minus an "interchange fee." *Id.* The acquiring bank then subtracts its own fee from the amount received, and pays the remainder to the merchant. *Id.*. During the years at issue, petitioners generated more than $16.2 million collectively in interchange fees relative to Massachusetts customers. App. 7a, 28a.

In the event of non-payment by its customers, petitioners worked with collection agencies and attorney networks in Massachusetts to collect delinquent accounts of Massachusetts customers. App. 7a, 29a. These agencies and in-state attorneys provided collection services to petitioners and instituted legal proceedings on behalf of petitioners in Massachusetts courts. *Id.* Petitioners obtained garnishments, liens against personal property, and writs of execution against real estate located in Massachusetts. *Id.* Petitioners obtained judgments in Virginia courts against Massachusetts customers and then domesticated the judgments to Massachusetts for further enforcement proceedings. App. 7a, 29a-30a. The Massachusetts Attorney General's Office mediated disputes between petitioners and their Massachusetts customers through its Consumer Complaints and Information Section and nineteen Local Consumer Programs. App. 7a-8a, 30a.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SJC IS CONSISTENT WITH *QUILL* AND THE REQUIREMENT IN *COMPLETE AUTO* THAT A STATE TAX BE APPLIED TO "AN ACTIVITY WITH A SUBSTANTIAL NEXUS WITH THE TAXING STATE."

A. The Decision of the SJC Is Consistent with *Quill*'s Express Limitation to Sales and Use Taxes.

Under the Commerce Clause, a State may tax a company engaged in purely interstate commerce provided that the tax is "[1] applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In permitting the States to tax purely interstate commerce, *Complete Auto* overruled *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951)(striking down a Missouri tax on an interstate trucking company). *Id.* *Complete Auto* thus reaffirmed the principle that "interstate commerce may be made to pay its own way." *Id.* at 288-89 n.15.

Here, petitioners concede that the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. They challenge the tax only under the "substantial nexus" test.

The Court applied the substantial nexus test to the collection of a use tax in *Quill.* A use tax is typically imposed on the storage, use, or consumption of goods or services purchased outside the taxing State for storage, use, or consumption within the taxing State. *See* Mass. Gen. Laws ch. 64I, § 2. The company in *Quill* was an out-of-state mail order house that had no affiliates or representatives, and only *de minimis* tangible or intangible property in the taxing State. The only connection between the company and its customers in the taxing State was "by common carrier or the United States mail." *Quill,* 504 U.S. at 301 (quotation omitted). The Supreme Court of North Dakota had declined to follow *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753, 758 (1967)—another mail-order sales and use tax case—on the ground that the holding was "obsolete." *Id.* Although this Court in *Quill* agreed "with much of the state court's reasoning" and held that the tax satisfied due process, it reversed the state-court judgment, reaffirmed *National Bellas Hess*, and held that the lack of a physical presence by the taxpayer demonstrated a lack of "substantial nexus" under the Commerce Clause. *Id.*

The rule maintained in *Quill*, however, is not controlling here. In preserving the *National Bellas Hess* rule for sales and use taxes, this Court relied heavily on the principle of *stare decisis*. *Id.* at 311, 317-18. The Court observed that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." *Id.* at 311, 318. The Court also relied on factors specific to sales and use taxation and the mail-order industry: the Court stated that the rule in *National Bellas Hess* had "engendered substantial reliance and has become part of the basic framework of a sizable industry." *Id.* at 317. Relying on these factors, *Quill* reaffirmed that substantial nexus for a *sales or use tax collection duty* requires the physical presence of the taxpayer in the taxing State, *id.* at 316-17, but carefully noted that it "has not, in [its] review of other types of taxes, articulated the same physical-presence requirement . . . ." *Id.* at 314; *see id.* at 317 ("concerning other types of taxes we have not adopted a similar bright-line, physical presence requirement"). Justice Scalia's concurring opinion, which was joined by Justices Kennedy and Thomas, relied even more heavily on *stare decisis*. *Id.* at 320. Given the Court's express limitation of its holding, and the Court's substantial reliance on the principle of *stare decisis*, there is no basis for the claim that the decision below is in conflict with *Quill*.

B. The Fact-Specific Ruling Below Is Consistent with *Complete Auto* Because the Petitioners' Activities Have a Substantial Nexus with Massachusetts.

The SJC correctly adhered to the Court's express limitation of *Quill* to sales and use taxes and applied the *Complete Auto* test without imposing a threshold requirement that petitioners have a physical presence in Massachusetts. *Complete Auto's* substantive focus on "activities" readily supports that judgment, given the petitioners' commercial contacts with Massachusetts. As the SJC stated, petitioners "provided valuable financial services . . . using Massachusetts banking and credit facilities," including an extensive network of banks and merchants (App. 5a-6a) and the use of "the Massachusetts court system to recover payments for delinquent accounts." *Id.*

The decision below thus represents a straight-forward application of *Complete Auto's* substantive focus on "activities." In the absence of a governing precedent like *Bellas Hess,* there is no warrant to transform the *Complete Auto* nexus test to demand physical presence as the *sine qua non* of corporate income taxation. Under petitioners' theory, a business employing one person, renting a storefront in Massachusetts, and generating $100,000 of revenue, would have physical presence and thus be subject to taxation; indeed, under *National Geographic Society v. California Bd. of Equalization,* 430 U.S. 551 (1977), the existence of the store-front would allow taxation even of activities of the business that were unrelated to the building. Yet petitioners, who receive millions of dollars of revenue from interest payments and fees from Massachusetts residents doing business with Massachusetts firms (App. 22a), would be immune from a fairly apportioned, non-discriminatory corporate excise tax. This result is not compelled by *stare decisis*, as in *Quill* (in light of *Bellas Hess*). Indeed, it conflicts with the focus on substance required by *Complete Auto*, which generally requires that interstate commerce "pay its own way." *Id.* at 288-89 n.15. The decision of the SJC is fully consistent with *Complete Auto* and does not warrant review by this Court.

II. RATHER THAN CREATING A CONFLICT AMONG STATE COURTS, THE DECISION OF THE SJC ENLARGES A GROWING CONSENSUS OF THE STATES' HIGHEST COURTS REJECTING THE CLAIM THAT THE COMMERCE CLAUSE REQUIRES A "PHYSICAL PRESENCE" IN ORDER TO ESTABLISH A "SUBSTANTIAL NEXUS."

In determining whether to grant certiorari, the Court generally requires that a conflict of decisions be "real and embarrassing." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (quotation omitted). In this case, there is no conflict of sufficient degree or type. The overwhelming majority of state courts that have addressed the issue since the decision in *Quill* in 1992 have held that a physical presence is not required for a State to impose a fairly apportioned, non-discriminatory net income tax on corporations doing business in the taxing State. No state supreme court has held otherwise. The three intermediate appellate court decisions cited by the petitioners—all at least nine years old—do not establish a current and significant conflict of state authority. In fact, any conflict of state decisions, if it had ever reached maturity, is now well past its shelf life.

A year after the decision in *Quill*, the Supreme Court of South Carolina upheld an income-based tax under the Commerce Clause, ruling that substantial nexus was created by the use of the taxpayer's trademarks within the taxing State. *See Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13, 18 (S.C.), *cert. denied*, 510 U.S. 992 (1993). The court held that "by licensing intangibles for use in this State and deriving income from their use here, Geoffrey has a 'substantial nexus' with South Carolina." *Id.* In the seventeen years after *Quill*, the clear majority of the state courts that have addressed the issue have similarly declined to apply a physical presence requirement to an income-based tax. *See Geoffrey, Inc. v. Okla. Tax Comm'n,* 132 P.3d 632, 638 (Okla. Civ. App. Ct. 2006)(trademark licensing); *Lanco, Inc. v. Dir., Div. of Taxation*, 908 A.2d 176, 177 (N.J. 2006), *cert. denied*, 127 S.Ct. 2974 (2007)(same); *A&F Trademark, Inc. v. Tolson*, 605 S.E.2d 187, 195 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005)(same); *Kmart Props., Inc. v. Taxation and Revenue Dep't*, 131 P.3d 27 (N.M. Ct. App. 2001), *cert. granted*, 40 P.3d 1008

(N.M. 2002), *cert. quashed*, 131 P.3d 22 (N.M. 2005) (same); *Bridges v. Geoffrey, Inc.*, 984 So.2d 115 (La. Ct. App. 2008) (same); *Secretary, Dep't of Revenue v. Gap (Apparel), Inc.*, 886 S.2d 459, 462 (La. Ct. App. 2004) (same); *Comptroller of the Treasury v. SYL, Inc.,* 825 A.2d 399 (Md. 2003)(same); s*ee also General Motors Corp. v. City of Seattle*, 25 P.3d 1022, 1029 (Wash. Ct. App. 2001); *Couchot v. State Lottery Comm'n*, 659 N.E.2d 1225, 1230 (Ohio 1996)("no indication in *Quill* that the Supreme Court will extend the physical presence requirement to cases involving taxation measured by income derived from the state"); *Borden Chems. & Plastics v. Zehnder*, 726 N.E.2d 73, 80 (Ill. App. Ct. 2000)("Plaintiff argues that in *Quill*, the Supreme Court 'left open' the question of whether a physical presence is required in order to satisfy the substantial nexus requirement in other tax cases. We disagree."); *Buehner Block Co. v. Wyoming Dep't of Revenue*, 139 P.3d 1150, 1158 n.6 (Wyo. 2006) (*Bellas Hess* and *Quill* "created [a] specialized jurisprudence" applicable to "sales and use tax case[s]"). The SJC reached the same conclusion in a case involving the licensing of trademarks, *Geoffrey, Inc. v. Commissioner of Revenue*, 899 N.E.2d 87 (Mass. 2009), *petition for cert. filed*, U.S. No. 08-1207, decided on the same day as the present case.[1]

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[1] Petitioners seek to distinguish the above "trademark subsidiary cases" by the fact that petitioners here allegedly "did not earn income through the in-state use of their intellectual or other property by a commonly-controlled affiliate." Pet. 25 n.7. The SJC stated that "[w]hile these cases are instructive with respect to their analysis of *Quill*, they are not directly on point factually." App. 21a. These decisions, however, some by the

Regarding out-of-state credit card companies such as the petitioners, the two state supreme court decisions on point agree. The SJC in this case cited the decision of the West Virginia Supreme Court in *MBNA Am. Bank*, 640 S.E.2d at 232-33, which held that (1) *Quill* was "grounded primarily on *stare decisis*, (2) the Court "appears to have expressly limited *Quill's* scope to sales and use taxes," and (3) "franchise and income taxes . . . do not appear to cause the same degree of compliance burdens." *Id.*; *see also MBNA Am. Bank, N.A. v. Ind. Dep't of State Revenue*, 895 N.E.2d 140 (Ind. Tax Ct. 2008) (citing West Virginia *MBNA Am. Bank* decision and rejecting requirement of physical presence).

Petitioners claim that "[o]ther state courts have reached the opposite conclusion," but they tell only part of the story. Pet. 22-25. These older decisions from state intermediate appellate courts[2]

States' highest courts, expressly support the proposition that economic *activity* of a certain nature and degree may create substantial nexus without a physical presence in the taxing State. The presence and use of trademarks in the taxing States in such cases merely illustrate *one* way in which transactions involving intangibles may result in substantial income flowing to a taxpayer from residents of a taxing State.

[2] United States Supreme Court Rule 10(b) generally limits the Court's consideration of a conflict of state decision to those by "the highest court of a state." *Id.* Thus, the Court "tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of Supreme Court review." R.L. Stern, *et al.*, *Supreme Court Practice* (9th ed.) 256 .

do not establish a conflict of authority that is worthy of review.

Only one of the three decisions cited by the petitioners strikes a State's franchise or income tax because of a lack of physical presence by the taxpayer in the taxing State. *See J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831, 840-41 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000). However, a later decision by the same intermediate appellate court cautions against too broad a reading of the decision in *J.C. Penney*. *America Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV, 2002 WL 1751434 at *2 (Tenn. Ct. App. July 30, 2002), declined to read *J.C. Penney* to "substitute 'physical presence' for 'nexus' as the first prong of the *Complete Auto Transit* test" in a challenge to a tax on an internet service provider. Petitioners claim that in *America Online* "Tennessee has not retreated from the holding in *J.C. Penney*," Pet. 22-23, but the implication of *America Online* is clear: *J.C. Penney* stands alone among the States and the decision has limited force even on its home field. *Cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of [a lower court] to reconcile its internal difficulties.").

Nor does the 1993 decision of the Michigan Court of Appeals in *Guardian Industries Corp. v. Department of Treasury*, 499 N.W.2d 349 (Mich. App. 1993), demonstrate a significant split of state authority. *Guardian* did not strike down any tax, much less resolve the issue presented here. Rather, it involved the question whether certain taxpayers with undeniable physical presence in Michigan could exclude from Michigan's "single business tax" certain of its "sales" of tangible personal property outside Michigan on the ground that they were taxable in other States. *Id.* at 352, 353. In the unusual posture in which the case arose, it was the taxpayers that urged that their nexus in other States was sufficient for taxation by those States. Conversely, the State of Michigan was urging that nexus was insufficient; and the taxing authorities in the other States were not involved in the case. One taxpayer stipulated that its activities in the non-Michigan States were limited to mere solicitation, and so was found not to be taxable there by the non-Michigan States. *Guardian* thus turned on whether the level of these activities forfeited the statutory immunity conferred by P.L. 86-272, 15 U.S.C. § 381, not whether they reached the threshold level of constitutional nexus. *Guardian* thus does not hold that a state income or franchise tax requires a physical presence; at most, it holds that in some circumstances a tax on a company whose in-state activities do not exceed the solicitation of sales of tangible goods may be foreclosed by a federal law limiting state taxation, such as P.L. 86-272. But that issue is not the same as that presented here. Finally, *Guardian* has little remaining force even in Michigan: the Michigan legislature has eliminated the tax at issue in *Guardian* and enacted a new tax that does not require a physical presence. MCL 208.1200(1).

Nor does the 2000 decision of the Texas Court of Appeals in *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. App. 2000), establish a current and significant conflict. In striking down the application of a state franchise tax, the Texas intermediate appellate court repeatedly stressed that the State had applied its franchise tax "solely" on the basis of the taxpayer's passive possession of a "certificate of authority" to do business in Texas. *Id.* at 298, 299, 300.[3] Despite broader *dicta*, therefore, *id.* at 300, *Rylander* does not strike an income or franchise tax where the taxing State actually relies on active and extensive transactions in intangible property with residents of that State.

In sum, the decisions of the state courts do not demonstrate "growing disagreement and confusion." Pet. 26. Nor do they reflect a conflict that is "substantial and mature." Pet. 25. They represent instead (1) a growing consensus among recent decisions and (2) minor historical anomalies from States that have joined or might later defer to the recent and clear trend. *Cf. Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938, 943 (9th Cir. 1998) ("Because of the importance of predictability to commercial relations, as well as

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3 Texas relied on the certificate of authority because it was state "*policy*" that "the licensing of intangibles, including patents, in Texas did not create franchise tax nexus." *Id.* at 302 (emphasis in original). Thus, Texas did not rely on the patent royalty payments that Bandag received from its Texas affiliate. The court indicated that the taxpayer's "sole activity" of relevance connecting it to Texas was "communication by United States mail and common carriers," without identifying any economic activity (except perhaps its licensing activities, which Texas did not count) that was the subject of such communication. Id. at 300.

deference to our sister circuits, we shall not lightly create an intercircuit conflict affecting commerce nationally."). For these reasons, the decisions cited by petitioners do not support plenary review of the issue presented at this time.

III. THE COURT SHOULD NOT GRANT REVIEW BASED ON MERE SPECULATION ABOUT BURDENS ON INTERSTATE AND FOREIGN COMMERCE.

A. Speculative Claims About an "Undue Burden" on Interstate Commerce Do Not Support Plenary Review of the Issue Presented.

Petitioners argue that the "question presented is critically important to interstate commerce." Pet. 26. They claim that "when a state abandons the physical presence requirement, it adversely affects interstate commerce by creating confusion and placing onerous burdens on multistate firms." *Id.* For the reasons stated below, these alleged burdens on interstate commerce do not justify plenary review in this case.

The SJC correctly rejected the same exaggerated predictions of doom by corporate net-income taxpayers and *amici curiae*. Contrasting the sales and use taxes addressed in *Quill*, the SJC stated that "an income-based excise . . . typically is paid only once a year (except when quarterly estimated taxes are required), to one taxing jurisdiction on the state level, and the payment of such an excise does not entail collection obligations *vis-à-vis* consumers." App. 20a n.17 (citations omitted). The SJC continued:

> Determinations about whether the [petitioners] are subject to the FIET . . . or how to apportion income from business activity that is taxable within [Massachusetts] are the sorts of decisions that, more broadly, can confront all taxpayers, local or out-of-state, when calculating, reporting, and paying taxes on their income. While the making of these determinations is certainly more complex for large corporate taxpayers, it is part of the cost of doing business and is not, in our opinion, unduly burdensome on interstate commerce, particularly where such taxpayers, like the [petitioners] are earning substantial income from their business activities in Massachusetts and where the common usage of computer technology and specialized software has eased the administrative burdens of tax compliance.

Id.

Having failed to convince the SJC of an "undue burden" on commerce, petitioners and *amici curiae* now flood the Court with a new round of speculation about the impact of the nexus rule upheld in this case. But speculation does not establish clear proof that this case is of such "gravity and importance" as to warrant review by this Court. *See In Re Woods*, 143 U.S. 202, 206 (1892).

As the party urging a new rule of physical presence for corporate income taxes, petitioners have the burden to show an impact requiring intervention by this Court. Petitioners have not met their burden. They grossly exaggerate when they claim that the SJC decision has "major implications for every taxpayer whose activities cross state lines." Pet. 27. Such taxpayers selling tangible goods, if they have no physical presence in the taxing State, may be protected from tax by P.L. 86-272, 15 U.S.C. § 381. Petitioners similarly cite "small and medium size businesses," but these firms may be protected by (1) statutory thresholds protecting *de minimis* contacts, *see, e.g.*, Mass. Gen. Laws ch. 63, § 2A, or (2) the Due Process Clause. Petitioners also overstate the "enormous practical difficulties" in "ascertaining and satisfying their tax obligations" (Pet. 3): these alleged "burdens" may result merely from valid differences among the States in their methods of taxation.

Nor is plenary review supported by petitioners' citations to more recent state statutes and administrative actions declining to require a physical presence for the taxation of out-of-state firms doing business within a taxing State. *See* Pet. 30-33. Petitioners do not cite new litigation or practical problems arising from these developments, thus tending to prove that the approach is workable and not unduly burdensome. If issues later arise, they should be allowed to proceed through the state courts, where records could be developed to allow for full consideration of the alleged burdens of compliance. It is premature, however, to conclude that recent state actions will produce a conflict of authority requiring intervention by this Court.

Finally, petitioners' claims about burdens on commerce ignore the other restraints imposed by the Commerce Clause, *viz.*, the requirements that any tax be fairly apportioned, non-discriminatory, and fairly related to a State's services. These other tests under *Complete Auto* address many specters conjured by petitioners and *amici curiae* in arguing for a physical presence requirement for nexus. The petition and the briefs of the *amici curiae* ignore the fact that issues regarding discrimination and multiple taxation are separate and distinct from nexus. These separate claims against state taxation do not support review of the nexus question presented in this case.[4]

B. The Alleged Impact on Foreign Commerce Was Not Raised Below and In Any Event Does Not Support Review by this Court.

Petitioners also argue that "state abandonment of the physical presence requirement threatens to disrupt the Nation's international tax policy." Pet. 29-30. Petitioners made no claim under the Foreign Commerce Clause in the SJC. *See Brief*

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[4] Petitioners argue that a "physical presence" rule is preferable to the rule applied by the SJC because the physical presence test alone is a "bright line" rule. But decisions of state courts demonstrate that the physical presence test has its own ambiguities. *See, e.g., Dell Catalog Sales*, 199 P.3d 8863 (N.M. Ct. App. 2008), *cert. denied*, 129 S.Ct. 1616 (2009).

for Capital One Bank, Appellant, 2008 WL 4359871 (February 1, 2008). "In cases coming [to the Court] from state courts, there are reasons of peculiar force which should lead [the Court] to refrain from deciding questions not presented or decided in the highest court of the state . . . ." *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940). Even if petitioners have preserved the issue, or merely cite the alleged impact on foreign commerce as evidence of the importance of the question presented, their argument does not support plenary review. Such arguments by petitioners and *amici curiae* have not been documented or examined in these proceedings. If a foreign corporation later challenges a tax on such grounds, it may create a full record and seek review by this Court at that time. Meanwhile, as explained below, the policy arguments made by the petition should be addressed by Congress, not the Court.

IV. THE COURT SHOULD DENY THE PETITION IN DEFERENCE TO THE CONSTITUTIONAL ROLE OF CONGRESS IN WEIGHING BURDENS ON INTERSTATE COMMERCE.

Petitioners argue that "only a ruling from this Court can stop the flood of state efforts to impose unduly heavy burdens on interstate commerce." Pet. 26. To the contrary, the Court should deny the petition because the issue presented is better decided by Congress, which this Court has said has power under the Commerce Clause to "evaluate the burdens that taxes impose on interstate commerce."

Quill, 504 U.S. at 36. Whatever ruling that this Court might make on the merits of the issue presented here, "Congress remains free to disagree with [the Court's] conclusions." *Id.* Congress has enacted several limitations on state taxation. *See, e.g.*, 15 U.S.C. § 381; 15 U.S.C. § 391; 49 U.S.C. § 11501. It has specifically addressed the issue of state taxation of out-of-state banks, albeit in now-repealed acts.[5] Regarding the issue presented here, petitioners concede that Congress has for at least eight years considered bills directly addressing the issue. *See* Pet. 34 & n.14. Indeed, a bill addressing the issue is pending in the current session of Congress. *Id.*

Despite these legislative vehicles for action, petitioners insist that the Court must step in because "there is no realistic prospect that Congress will act on the issue in this case." Pet. 34. But this point ignores the most important inference from the fact of the bills: they show that the issue presented is by its nature one that Congress is "better qualified to resolve." *Quill*, 504 U.S. at 318 and n.11. Thus, in *Quill* the Court cited unenacted bills in its discussion of Congress's relative competence regarding the same issues. The Court recognized that Congress is "better qualified" to conduct a full study of the relevant factors, including alleged burdens on business and likely fiscal impacts on the States. These issues are ones involving legislative

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5 *See* 2008 WL 4359874 *26-36 (*Brief Amicus Curiae of Multistate Tax Comm'n* in *Capital One Bank v. Commissioner of Revenue*, 899 N.E.2d 76 (2009)).

fact. They are better weighed by Congress in hearings, reports, and debates. *See, e.g., Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. On State Taxation of Interstate Commerce of the House Comm. on the Judiciary,* 89th Cong., 2d Sess. (1966). Where, as here, taxpayers seek a broad exemption from tax, Congress is better qualified to judge the impact of the exemption on other commerce and other types of state taxation.

Petitioners and several *amici curiae* argue that new technologies will expand the types of interstate commerce that does not require a "physical presence" in a State in order to earn millions of dollars doing business there. Petitioners are surely right in this prediction. But the very facts that they cite as proof of an "unconstitutional" burden on commerce are by their nature legislative facts that Congress is institutionally well qualified to weigh. Judicial review of the same questions, in contrast, is necessarily limited by the four-corners of a judicial record and the retrospective cast of a lawsuit. Judicial conclusions about respective burdens will necessarily be both limited and speculative. The Court has warned that the judiciary "must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940). For these reasons, the Court should defer to the legislative role expressly conferred on Congress by the Commerce Clause.

CONCLUSION

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

Respectfully submitted,

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