Supreme Court, U.S.
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No.

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

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
INDRANEEL SUR
MISHA TSEYTLIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

QUESTION PRESENTED

In *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), and *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), this Court held that the Commerce Clause does not permit a State to impose a sales or use tax on out-of-state corporations that have no physical presence in the State, because such corporations necessarily lack the "substantial nexus" with the taxing State that is a constitutional prerequisite to the exercise of the State's power to tax the business activities of such out-of-state corporations. The question presented is:

> Whether the Supreme Judicial Court of Massachusetts erred in holding that a State may evade the "substantial nexus" requirement as explicated in *Quill* and *Bellas Hess* by imposing an income or excise tax on the very same out-of-state corporations that are constitutionally immune from sales and use taxes because they lack a physical presence in the taxing State.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parent company of petitioner Capital One Bank (USA), N.A. (formerly known as Capital One Bank) and petitioner Capital One, N.A. (the successor by merger to Capital One F.S.B.) is Capital One Financial Corporation, a publicly-traded corporation. There is no other publicly-held corporation that owns 10 percent or more of the stock of either petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Capital One Bank (USA), N.A., formerly known as Capital One Bank, and Capital One, N.A., as successor to Capital One F.S.B., respectfully petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (App. 1a-22a) is reported at 899 N.E.2d 76. The opinion of the Appellate Tax Board (App. 23a-53a) is not published but is electronically reported at 2007 WL 1810723.

JURISDICTION

The judgment of the court below was entered on January 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. I, § 8. The pertinent Massachusetts statutory provisions are reprinted in an appendix to this petition. App. 54a-69a.

STATEMENT

This case presents a recurring question of extraordinary significance to the Nation's economy. Notwithstanding this Court's holdings in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), and *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992)—namely, that the "substantial

nexus" required by the Commerce Clause is absent when a State attempts to impose sales or use taxes on out-of-state corporations that have no physical presence in the State—a number of state appellate courts (including the Supreme Judicial Court of Massachusetts (SJC) below) have now held that States may easily evade that constitutional prohibition through the simple artifice of taxing the same economic activities by means of income or excise taxes instead of sales or use taxes. Growing numbers of state legislatures and tax collectors have chosen to follow that same course. The resulting heavy burdens on interstate commerce and disincentives for economic activity that reaches across state lines will continue to worsen absent this Court's intervention. Certiorari is warranted to ensure that the principles enunciated in this Court's decisions are not flouted by revenue-greedy States to the detriment of interstate business activities and, ultimately, the Nation's economy as a whole.

Further review is necessary in this case, for three reasons. First, the decision below is fundamentally inconsistent with this Court's explication of the "substantial nexus" requirement in *Quill*. That case reaffirmed the physical-presence requirement and held that a business "whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." 504 U.S. at 311. To be sure, *Quill* construed the "substantial nexus" requirement in the context of a use tax, but there is no principled basis for applying a different constitutional rule to other types of taxes so far as "substantial nexus" is concerned. The physical-presence requirement should govern the income tax at issue here, and there is no warrant for the SJC's contrary conclusion.

Second, the decision below sharpens a conflict among state appellate courts over state authority to tax out-of-state corporations with no in-state physical presence. While the SJC joins state courts that have artificially constricted *Quill* to the sales-and-use-tax context and adopted a vague economic-nexus approach for income taxes, other appellate courts have correctly understood *Quill* as a binding interpretation of the "substantial nexus" requirement that is fully applicable to income and excise taxes. The unacceptable result of that growing discord is that the meaning of the Federal Constitution shifts as business activity crosses borders, from States that respect physical presence to those that do not. This Court's review is necessary to resolve that conflict.

Finally, the decision below intensifies the already enormous practical difficulties that multistate businesses confront in ascertaining and satisfying their tax obligations to States with which they have no tangible connection. The problems posed by state departures from the physical-presence requirement have grown more severe since the last time this Court considered the issue two years ago, and indeed have been exacerbated by this Court's denial of review at that time. The time to decide the scope of *Quill* is now.

A. Commerce Clause Principles

This Court has repeatedly held that the Commerce Clause prohibits the States from unduly burdening interstate commerce. "The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Bal-

kanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979).

One burden that States are strongly tempted to impose is taxation that "imped[es] free private trade in the national marketplace." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 437 (1980). In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), this Court articulated the standard for evaluating when such state taxes violate the Commerce Clause. Under that test, a state tax is permissible only if the "tax [1] is 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." *Id.* at 279 (emphasis added).

This case concerns the application of *Complete Auto*'s "substantial nexus" requirement to state taxation of businesses that have no in-state physical presence. Before *Complete Auto*, this Court confronted such a tax in *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967), holding that a State could not impose a use tax on a mail-order company with no in-state physical presence. The Court explained that imposing sales and use taxes on out-of-state firms would place "unjustifiable local entanglements" on interstate commerce." *Id.* at 759-760.

In *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), this Court eliminated any doubt that *Bellas Hess* retained its vitality when analyzed using *Complete Auto*'s "substantial nexus" terminology. The North Dakota Supreme Court had held that the State could impose a use tax on a mail-order office

supply retailer with no in-state outlets or personnel because, in its view, *Bellas Hess*'s bright-line requirement had been rendered "obsole[te]" by *Complete Auto* and "the tremendous social, economic, commercial, and legal innovations" that had taken place since *Bellas Hess*. *State* v. *Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991). This Court reversed, reaffirming the physical-presence requirement. The Court held that the Commerce Clause's "substantial nexus" prerequisite is not satisfied when the non-domiciliary taxpayer has no property or personnel within the State, even though it may transact business with state residents through the channels of interstate commerce. 504 U.S. at 314-318.

B. Factual Background

1. At all times relevant here, petitioner Capital One Bank (now Capital One Bank (USA), N.A.) was a bank chartered and domiciled in Virginia that offered credit cards to its customers. App. 1a-3a. Petitioner Capital One F.S.B. (now Capital One, N.A.) was a federally-chartered savings bank that offered secured and unsecured credit cards and unsecured installment and consumer home loans. App. 3a. Petitioners issued general-purpose credit cards to Massachusetts residents as part of national marketing efforts. App. 3a-4a. Petitioners did not own or lease any real property in Massachusetts, nor did they own any other in-state property. App. 3a. Moreover, petitioners had no employees, agents, or independent contractors in Massachusetts. *Id.*

As members of Visa and MasterCard, two associations of banks, petitioners were "issuing banks" that issued credit cards bearing the "Capital One" name and branded with a Visa or MasterCard logo as appropriate. App. 4a-5a. Other members of the

associations served as "acquiring banks" that entered into contractual arrangements with merchants that accepted Visa or MasterCard. App. 6a-7a. Credit card transactions were enabled by the transmission of customer and bank information over electronic computer and telephone networks that cross state lines—that is, by the transmission of information through channels of interstate commerce. *Id.*

When their customers paid for goods or services with their credit cards, petitioners effectively guaranteed payment to the merchants and thus bore the risk of non-payment by the customers. App. 7a. Petitioners' primary assets consisted of unsecured consumer loans arising from customer use of Capital One credit cards. App. 25a. Petitioners generated interest and other income through finance charges on outstanding loan receivables, fees from credit card transactions, and interest on investments. *Id.*

Petitioners worked with collection agencies and attorneys to collect delinquent customer accounts. App. 7a & n.10. Capital One Services, Inc., an affiliate of petitioners' parent, occasionally engaged attorneys in Massachusetts to bring actions against defaulting customers. App. 29a.

2. The Massachusetts financial institution excise tax (FIET) statute provides: "[E]very financial institution engaged in business in the commonwealth shall pay, on account of each taxable year, an excise measured by its net income determined to be taxable . . . ." MASS. GEN. LAWS ch. 63, § 2 (App. 66a-69a). FIET liability is based on a percentage of a financial institution's net income. *Id.*[1]

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[1] Respondent agreed with petitioners' characterization of the FIET as a "tax" on petitioners' income, even though in Massa-

The FIET applies to any financial institution that "regularly engag[es] in transactions with customers in the commonwealth that involve intangible property and result in income flowing to the taxpayer from residents of the commonwealth," even if the taxpayer has no physical presence in Massachusetts. MASS. GEN. LAWS ch. 63, § 1 (App. 56a). A financial institution is presumed to be taxable if it engages in transactions with 100 residents or has $10 million in assets or $500,000 in receipts attributable to Massachusetts. *Id.*

C. Procedural Background

1. Respondent, the Commissioner of Revenue of Massachusetts, sought to impose the FIET on Capital One Bank for the years 1995 through 1998, and on Capital One F.S.B. for the years 1996 through 1998. App. 1a-2a. After respondent assessed FIET liability of $1,758,454 against Capital One Bank and $159,075.25 against Capital One F.S.B., petitioners applied for abatement, arguing that the Commerce Clause prohibited the assessments. App. 8a-9a. Respondent denied petitioners' applications. App. 9a.

[Footnote continued from previous page]

chusetts there are "historical differences between a tax and an excise." App. 1a-2a n.2. In any event, where, as here, a state tax is measured by a share of a taxpayer's net income, the statutory designation of that tax is irrelevant for purposes of the "substantial nexus" inquiry—regardless of whether the tax is called an excise, franchise tax, business-license tax, gross-receipts tax, value-added tax, or capital-stock tax. *Cf. Hunt-Wesson, Inc.* v. *Franchise Tax Bd. of Cal.*, 528 U.S. 458, 464 (2000) (a "tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes") (internal quotation marks omitted).

2. The Appellate Tax Board upheld respondent's denial of abatement. App. 23a-53a. The Board rejected petitioners' claim that Massachusetts could not, consistent with the Commerce Clause, impose the FIET on petitioners' income because they had no in-state physical presence and therefore lacked a "substantial nexus" with Massachusetts. App. 30a-32a.

3. The SJC affirmed. App. 1a-22a. Petitioners' core argument, the SJC stated, "is that the board erroneously limited to the sales and use tax context the United States Supreme Court's holding in *Quill* . . . that the Federal commerce clause precludes a State from imposing tax obligations on an out-of-State corporation that has no physical presence in the taxing State." App. 11a.

The SJC disagreed, holding instead that *Quill* had a "narrow focus on sales and use taxes for the physical presence requirement," a requirement that "did not apply to the imposition of other types of State taxes." App. 17a. The SJC relied heavily on dicta in *Quill*, in which this Court remarked that "it had not, 'in [its] review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes,'" and that "'concerning other types of taxes, [it had] not adopted a similar bright-line, physical-presence requirement.'" App. 16a-17a (quoting 504 U.S. at 314, 317 (alterations in original)). In addition, the SJC reasoned that for "substantial nexus" purposes, state income taxes on non-domiciliary corporations are constitutionally distinguishable from sales and use taxes because the former are *per se* less burdensome than the latter: "An income-based excise," the SJC opined, "typically is paid only once a year . . . to one taxing jurisdiction at the State level, and the

payment of such an excise does not entail collection obligations vis-à-vis consumers." *Id.* at 20a n.17.

Although it rejected physical presence as a prerequisite, the SJC identified no method for determining what degree of connection short of physical presence counts as a "substantial nexus." Instead, the SJC expressed agreement with another court's conclusion that a mere "significant economic presence" within the state was sufficient to justify income taxation. App. 20a.

The SJC then announced that the "substantial nexus" requirement was satisfied in this case, because petitioners "were providing valuable financial services to Massachusetts consumers" by "using Massachusetts banking and credit facilities"; petitioners "addressed customer complaints with the assistance of the Massachusetts Attorney General's office"; and petitioners "used the Massachusetts court system to recover payment for delinquent accounts." App. 22a. The SJC thus upheld taxation of petitioners' income under the Commerce Clause (*id.*), based in part on the view that the entire "'notion of physical presence'" was "'anachronistic'"—"even more" so "today than it was in 1992," when *Quill* was decided (*id.* at 21a n.18 (quoting 504 U.S. at 327-328 (White, J., dissenting in part)).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

The Supreme Judicial Court's resolution of the important constitutional question presented is irreconcilable with the reasoning employed by this Court in *Quill* and other cases. In particular, the SJC (1) artificially constricted the physical-presence rule

to the sales-and-use-tax context, overlooking *Quill's* significance as an authoritative construction of *Complete Auto's* universal "substantial nexus" requirement; (2) improperly ignored the heavy burdens on interstate commerce imposed by state income taxes, in an attempt to justify preferential treatment of such taxes; (3) impermissibly elevated form over substance in treating sales and use taxes as entirely distinct from income taxes for purposes of assessing "substantial nexus"; (4) failed to consider the practical benefits for interstate commerce of adherence to a clear physical-presence standard rather than the SJC's vague economic-nexus approach; and (5) conflated the "substantial nexus" inquiry under the Commerce Clause with the "minimum contacts" inquiry under the Due Process Clause. This Court's review is necessary to address the SJC's profound misinterpretation of the "substantial nexus" prong, and to clarify that *Quill's* physical-presence requirement extends beyond the narrow corner into which the SJC confined it.

A. *Quill's* Explication Of "Substantial Nexus" Cannot Be Confined To The Sales-And-Use-Tax Context

Quill held that the physical-presence requirement for state taxation of non-domiciliaries, as articulated in *Bellas Hess*, correctly implements the constitutional mandate that the taxpayer must have a "substantial nexus" with the taxing State. *Quill* did not explicitly resolve the question whether the physical-presence requirement extends to taxes other than sales and use taxes, instead leaving that question for later consideration (504 U.S. at 314, 317), but the Court's reasoning points inexorably to an affirmative answer to that question. *Quill* reaffirmed

that "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. Indeed, this Court has *never* construed the Constitution to authorize a State to impose *any* tax on an out-of-state entity that neither owns any property within the State nor maintains any representatives (whether employees or independent contractors) within the State.

The logic of *Quill* is clear: The Commerce Clause requires a "substantial nexus" for *all* state taxation, and a "substantial nexus" requires that a non-domiciliary corporation have a physical presence in the State before it may be taxed. Mere contact with residents of the State through the channels of interstate commerce, such as "by mail or common carrier," will not suffice. *Id.* Connections between a taxpayer and a State that are equivalent to those present in *Bellas Hess* or *Quill* do not constitute "substantial nexus," a principle that logically applies with equal force to all state taxation of interstate transactions, whether denominated sales, use, income, or excise taxes. Accordingly, while *Quill* applied Commerce-Clause principles to a use tax, lower courts are not free to confine the physical-presence requirement to that context alone.

Defying those principles, the SJC held that *Bellas Hess* and *Quill* are limited to their facts and that the physical-presence requirement has a "narrow focus on sales and use taxes." App. 17a. No precedent, however, justifies subjecting sales and use taxes to *sui generis* constitutional analysis. Instead, this Court has regularly cited *Bellas Hess* when examining taxes outside the sales-and-use class under *Complete Auto*, indicating that the physical-presence rule applies more broadly. *See Tyler Pipe Indus., Inc.* v.

Wash. State Dep't of Revenue, 483 U.S. 232 (1987) (business and occupation taxes); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981) (severance taxes); *Goldberg* v. *Sweet*, 488 U.S. 252 (1989) (excise taxes). That is, *Bellas Hess* and *Quill* addressed use taxes, but announced a rule applicable to state taxation generally. *See Commonwealth Edison*, 453 U.S. at 626 (citing *Bellas Hess* in severance-tax case to support statement that "the interstate business must have a substantial nexus with the State before *any* tax may be levied on it") (emphasis in original). In that respect, *Bellas Hess* and *Quill* resemble *Complete Auto*, which addressed sales taxes but also established a rule applicable to income taxes. *See, e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298, 310-311 (1994).

This Court itself, even before *Bellas Hess*, applied the physical-presence requirement to taxes analogous to the income tax at issue here. In *Norton Company* v. *Department of Revenue of Illinois*, 340 U.S. 534 (1951), Illinois imposed a gross-receipts tax (a tax on a firm's total revenues) on an out-of-state corporation. This Court explained that "[w]here a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer *has no local grip on the seller*." *Id.* at 537 (emphasis added). Because the corporation had a Chicago branch, however, the Court held that Illinois could tax earnings produced through that branch, but not earnings produced through direct-mail orders to the firm's out-of-state headquarters. *Id.* at 537-539. As in *Bellas Hess* and its progeny, the dispositive question for Commerce-Clause purposes in *Norton* was whether

the taxpayer had a physical presence in the taxing state.[2]

The SJC thus had no principled basis for cabining *Quill* to the sales-and-use context. The logic of *Quill* applies to income taxation as well. This Court's review is required to ensure that state courts give full effect to the necessary implications of the "substantial nexus" principles enunciated in *Quill*.

B. The SJC Contradicted This Court's Assessment Of The Economic Burdens Imposed By Income Taxes

The SJC also disregarded this Court's mandate that proper analysis of a Commerce-Clause challenge to a state tax requires consideration of the true burdens imposed by the tax on firms engaged in interstate commerce. As this Court explained, the purpose of the "substantial nexus" requirement is to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313.

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2 *Accord Standard Pressed Steel Co.* v. *Wash. Revenue Dep't*, 419 U.S. 560, 562 (1975) (holding that imposition of gross-receipts tax on out-of-state corporation was justified, not by substantial sales in State, but because the corporation had an "employee . . . with a full-time job within the State"); *see also Nat'l Geographic Soc'y* v. *Cal. Bd. of Equalization*, 430 U.S. 551, 557 (1977) ("*Standard Pressed Steel* held that maintenance in the taxing State of a single employee . . . whose primary responsibility was to consult with the Washington-based customer regarding its anticipated needs for the out-of-state supplier's product[] established a sufficient relation to activities within the State producing the gross receipts as to support imposition of the tax.").

The *Quill* Court recognized that when sales and use taxes are concerned, the obligations imposed on out-of-state firms would be "unduly burden[some]" in the absence of a physical-presence rule. *Id.* at 313-316 & n.6. The SJC gave short shrift to those concerns in this case, blithely opining that income taxes impose less substantial burdens on out-of-state corporations than do sales and use taxes. App. 19a-21a & n.17. That conclusion conflicts directly with this Court's precedents, which make clear that state income taxes place a significantly *greater* burden on firms engaged in interstate commerce than do the sales and use taxes at issue in *Quill* and *Bellas Hess*.

In particular, this Court has recognized that the burden on out-of-state firms is greater from income-based taxes than from sales and use taxes because the latter require only that firms *collect* the levies from purchasers, whereas income taxes require businesses to *pay* the tax out of their own earnings and also to comply with far more complicated and detailed administrative and computational rules. *See Nat'l Geographic*, 430 U.S. at 557-558 (concluding that "[t]he case for the validity of" a "use tax" is "stronger" than that for a tax on an out-of-state corporation's revenues, because "[t]he out-of-state seller" bears only "the administrative [burden] of collecting" the use tax); *Norton*, 340 U.S. at 537 (concluding that "a state imposing a sales or use tax can more easily meet this burden" of establishing the requisite nexus "because the impact of those taxes is on the local buyer or user," unlike a gross-receipts tax).

The financial obligation imposed by income taxes is thus far more onerous than that imposed by sales taxes, not only because income taxes fall directly on and must be paid by the out-of-state business out of

its own earnings, but also because income taxation by multiple jurisdictions can lead to double taxation. *See Nat'l Geographic*, 430 U.S. at 557-558 (describing the "risk of double taxation" as one reason why income taxes are more constitutionally problematic than sales taxes).[3] The economic-nexus approach adopted by the court below would greatly exacerbate the risk of double taxation by making it far more likely for businesses—even relatively small businesses doing interstate business—to be subjected to taxation in multiple States.

The *administrative* burdens of complying with numerous and disparate income taxation regimes are also onerous. Each jurisdiction can have its own apportionment formulae, sourcing definitions, income classification, depreciation, disclosure requirements, deductions and various other statutory requirements—and these requirements can vary widely among jurisdictions. For example, the tax at issue in this case requires compliance with pages of statutory apportionment rules alone. *See* Mass. Gen. Laws, ch. 63, § 2 (App. 66a-69a); *see generally* Marjorie Gell, *Broken Silence: Congressional Inaction, Judicial Reaction, and the Need For a Federally Man-*

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[3] Because of differences in state apportionment rules, a taxpayer physically located in one State that becomes subject to another State's taxing power on an "economic nexus" theory may be taxed on income that is already being taxed by its domiciliary State. Indeed, Capital One, N.A., faced that situation here, because the income that Massachusetts seeks to tax was already taxed by Virginia. Although this Court has kept substantial-nexus analysis distinct from fair-apportionment analysis, the enhanced risk of double taxation posed by the "economic nexus" theory confirms the need for a physical-presence requirement in order to avoid unduly burdening interstate commerce.

dated Physical Presence Standard For State Business Activity Taxes, 6 PITT. TAX REV. __, __ (manuscript at 22) (forthcoming Spring 2009) (requiring physical presence is even more appropriate for business-activity taxes than for sales and use taxes "because of the sheer number and complexity of different types of business activity taxes as compared to sales and use taxes"). In addition to States, various municipalities—including localities of very different sizes, ranging from New York City (N.Y.C. ADMIN. CODE § 11-603 (2008)) to Hamilton, Ohio (Ordinance 191.03(b) (2001))—have their own corporate income taxes.

Consequently, the burden of complying with the various requirements of the numerous income-taxing jurisdictions, each with its own unique and often contradictory requirements, can become a crushing one for multi-state corporations or small businesses selling products or services nationwide (for example, through the Internet). *See* Megan A. Stombock, *Economic Nexus and Nonresident Corporate Taxpayers: How Far Will It Go?*, 61 TAX LAW. 1225, 1241 (2008). Indeed, abandoning the physical-presence requirement "would require taxpayers to analyze their activities on a jurisdiction-by-jurisdiction, entity-by-entity, year-by-year, and issue-by-issue basis through extensive record maintenance, timely filings in support of returns, potential simultaneous audits, and negotiations and litigations in multiple jurisdictions." *Id.* Adhering to *Quill* would eliminate the burdens and uncertainty fostered by the SJC's approach.

C. The Decision Below Conflicts With This Court's Rejection Of Formalism In Commerce-Clause Analysis

The upshot of the SJC's artificial constriction of *Quill* is that States, by designating a tax as an income tax rather than a sales and use tax, will be able to evade the Constitution's physical-presence requirement for taxation of out-of-state businesses. Under the SJC's view, the very same activities that are constitutionally insufficient to establish "substantial nexus" for purposes of the sales tax *do* suffice to create such a nexus when the State chooses to impose an income tax instead.

If the SJC's understanding of *Quill* were correct, North Dakota could have responded to invalidation of its use tax on non-domiciliary catalog retailers by simply imposing an excise or other tax on the revenues those same retailers earned on sales to North Dakotans. By simple labeling, the State could freely manipulate application of the physical-presence requirement affirmed in *Quill.*

This Court has refused to give States such an "on-off" switch. "*Complete Auto* emphasized the importance of looking past 'the formal language of the tax statute [to] its practical effect,'" because "differently denominated tax[es] with the same economic effect" must be treated similarly. *Quill*, 504 U.S. at 310 (quoting 430 U.S. at 279) (alteration in original). The decision below thus conflicts with *Quill* and *Complete Auto* by resurrecting a thoughtless formalism that applies one method of constitutional analysis to sales and use taxes, while refusing to apply that same methodology to other taxes, even those (like income taxes) that impose greater burdens on

interstate commerce. This Court's precedents reject that misguided approach.

D. The SJC Disregarded *Quill* By Ignoring The Constitutionally-Significant Benefits Of A Bright-Line Rule

Equally inconsistent with *Quill* is the SJC's disregard for the benefits of a clear and consistent bright-line physical-presence rule. This Court emphasized that a bright-line rule "firmly establishes the boundaries of legitimate state authority to impose" tax obligations, "reduces litigation concerning those taxes," "encourages settled expectations," and "fosters investment by businesses and individuals." *Quill*, 504 U.S. at 315-316. Accordingly, the Court concluded that "the bright-line [physical-presence] rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause" through "the demarcation of a discrete realm of commercial activity that is free from interstate taxation." *Id.* at 314-315.

The Court acknowledged that this rule, "[l]ike other bright-line tests," may "appear[] artificial at its edges," but any "artificiality" is "more than offset by the benefits of a clear rule." *Id.* at 315. Clarity is particularly important in this context because "[the] law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" *Id.* at 315-316 (quoting *Nw. States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457-458 (1959)).

Those benefits of the bright-line physical-presence requirement apply *a fortiori* to income

taxes. But the vague economic-nexus approach adopted by the court below flies directly in the face of the *Quill* Court's emphasis on clarity and ease of application. Asserting that the "concept of 'substantial nexus' is more elastic than 'physical presence'" (App. 22a), the SJC announced that petitioners had a substantial nexus with Massachusetts without setting forth *any* standard that would enable out-of-state firms to determine what general conduct suffices to enable the State to tax income. The SJC suggested, for example, that "us[e]" of "Massachusetts banking and credit facilities" in the course of "provid[ing] . . . services" to Massachusetts customers alone might be justification enough (*id.*), which invites a host of questions—and raises the prospect that, for example, the SJC would uphold under the Commerce Clause a tax imposed on a non-domiciliary firm that merely cashed checks drawn on a Massachusetts bank. Thus, the decision below clarifies nothing. Instead it sows confusion about the taxing power and increases the compliance burdens imposed on interstate businesses. *Quill*'s bright-line rule avoids exactly that outcome, and the SJC erred in departing from it.

E. The SJC Contradicted *Quill* By Conflating The Separate Analyses Under The Due Process And Commerce Clauses

The SJC's "elastic" standard conflicts with *Quill* in yet another respect. In concluding that petitioners had a "substantial nexus" sufficient to justify Massachusetts' income taxation, the SJC essentially dismantled the fence erected by this Court to separate the Due Process and Commerce Clause inquiries.

The Court in *Bellas Hess* held that a use tax on firms with no in-state physical presence violated both the Due Process and Commerce Clauses, with-

out drawing a clear distinction between the inquiries under those distinct provisions. 386 U.S. at 756-760. *Quill* reaffirmed *Bellas Hess's* Commerce Clause holding, but not its Due Process holding. In so doing, this Court explained that "the 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." 504 U.S. at 313. In other words, the question under the Commerce Clause is not whether it is "fair" to subject a company to taxation in a particular State, but whether a state tax will place an undue burden on interstate commerce. *Id.*

Although the SJC purported to acknowledge the difference between the Due Process and Commerce Clause analyses, its truncated nexus discussion amounted merely to the "fairness" inquiry, looking exclusively to the benefits that petitioners received from engaging in business transactions with Massachusetts customers and using state-based services. App. 22a. The SJC's reliance, for example, on petitioners' "soliciting and conducting significant credit card business" with Massachusetts residents (*id.*) essentially mimicked the analysis that would have been appropriate under the Due Process Clause to determine whether petitioners could be sued in Massachusetts courts. *See, e.g., Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985). The SJC thereby collapsed the Due Process and Commerce Clause inquiries in exactly the way *Quill* forbids.

II. THE DECISION BELOW EXACERBATES A GROWING CONFLICT AMONG STATE APPELLATE COURTS OVER APPLICATION OF *QUILL* TO INCOME TAXATION

The decision below expands the preexisting conflict among state appellate courts over the question whether *Quill's* interpretation of the substantial-nexus prong can be confined to sales and use taxes. That conflict is now both clear and mature. Indeed, it has become more pronounced since this Court last considered the question, and only review by this Court will resolve the conflict.

In holding that *Quill's* interpretation of "substantial nexus" was dependent on and strictly limited to the particular tax at issue in that case, the court below followed the West Virginia Supreme Court of Appeals, which reached the same conclusion in *Tax Commissioner* v. *MBNA America Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006) ("*MBNA*"), *cert. denied sub nom. FIA Card Servs., N.A.* v. *Tax Comm'r of W. Va.*, 127 S. Ct. 2997 (2007). Volunteering that the physical-presence test reaffirmed by this Court in *Quill* "makes little sense in today's world," the West Virginia court announced that *Quill* "applies only to sales and use taxes" and not to other state taxes. *Id.* at 234. In lieu of the *Quill* test, the court selected an amorphous "economic presence" standard for assessing "substantial nexus." *Id.* The dissent vigorously criticized the majority's "strained and inaccurate reading" of *Quill* and its reliance on "legal commentaries with thinly veiled state-favoring taxing agendas," observing that "[i]t would be a strange constitutional doctrine that would countenance one nexus standard for sales and use taxes under the Commerce Clause, and a more relaxed nexus standard for

corporate net income and other state taxes." *Id.* at 236, 239-240 (Benjamin, J., dissenting).

The Indiana Tax Court also recently and explicitly sided with West Virginia. *See MBNA Am. Bank, N.A.* v. *Ind. Dep't of State Revenue*, 895 N.E.2d 140 (2008). Relying on the West Virginia *MBNA* decision, the Indiana court upheld the challenged tax because it viewed "economic presence" as establishing substantial nexus. *Id.* at 144.[4]

Other state appellate courts have reached the opposite conclusion, recognizing that the *Quill* Court's rationale cannot arbitrarily be limited to the particular tax at issue there because the Court was construing the meaning of the "substantial nexus" requirement, which applies to *all* state taxes. Most saliently, in *J.C. Penney National Bank* v. *Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), the Tennessee Court of Appeals rejected the State's bid to cabin *Quill* to sales and use taxes, seeing "no basis for concluding that the analysis should be different in the present case." *Id.* at 839. As the court observed, none of this Court's precedents has "upheld a state tax where the out-of-state taxpayer had absolutely no physical presence in the taxing state." *Id.* at 842. The court concluded that the taxpayer—like petitioners here, a non-domiciliary credit card issuer with no in-state personnel or property—lacked the substantial nexus required to sustain the franchise and excise taxes imposed. *Id.* The Tennessee Supreme Court denied review, and permitted publication of the Court of Appeals' decision. *J.C. Penney*, No. M1998-00497-SC-R11-CV (Tenn. May 8, 2000)

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[4] Indiana Tax Court decisions are directly appealable to the Indiana Supreme Court. *See* IND. APP. P. R. 63(A).

(per curiam). That order gave the appellate court's decision binding statewide precedential effect. *See Meadows* v. *State*, 849 S.W.2d 748, 752 (Tenn. 1993) (published opinions of Tennessee Court of Appeals may be relied on with same "confidence and reliability" as those of Tennessee Supreme Court).[5]

The direct conflict between the decision below and *J.C. Penney*—the functional equivalent of a judgment by the highest court of Tennessee—makes this Court's intervention necessary.[6] In addition, however, appellate courts in other States have also rejected the view, adopted below, that *Quill*'s reasoning is limited to the sales-and-use-tax context.

Thus, in *Rylander* v. *Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. App. 2000), a case involving a state franchise tax, the Texas Court of Appeals explicitly considered and rejected the State's assertion that

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[5] The West Virginia (640 S.E.2d at 235) and Indiana (895 N.E.2d at 143) courts acknowledged, but failed to grapple with, *J.C. Penney*. The SJC erroneously deemed *J.C. Penney* to have been undercut by a later unpublished decision. App. 18a n.16 (citing *Am. Online, Inc.* v. *Johnson*, No. M2001-00927COA-R3-CV, 2002 WL 1751434 at *2 (Tenn. Ct. App. July 30, 2002) ("*AOL*")). But *AOL* held merely that disputed fact issues foreclosed summary judgment, because it was unclear to what extent the taxpayer had personnel or leased components in the State. 2002 WL 1751434 at *1, *3. Moreover, the unpublished *AOL* decision could not have overruled the published *J.C. Penney* decision. *See Allstate Ins. Co.* v. *Watts*, 811 S.W.2d 883, 886 n.2 (Tenn. 1991) (unpublished decisions have only "persuasive force").

[6] This Court has often addressed Commerce-Clause issues in the state taxation context without waiting for the emergence of a split in authority as pronounced and mature as the one here. *See* Cert. Pet. in *Hunt-Wesson, Inc.* v. *Franchise Tax Bd. of Cal.*, No. 98-2043, at 15-27 (no conflict asserted); Cert. Pet. in *General Motors Corp.* v. *Tracy*, No. 95-1232, at 14 (same).

"*Quill Corp.* and *Bellas Hess* should be limited to the context of sales and use taxes." *Id.* at 299. The court explained that, "[w]hile the decisions in *Quill Corp.* and *Bellas Hess* involved sales and use taxes, we see no principled distinction when the basic issue remains whether the state can tax the corporation at all under the Commerce Clause." *Id.* at 300. "[W]hen the corporation conducts its activity solely through interstate commerce and lacks any physical presence in the state," the court concluded, "no sufficient nexus exists to permit the state to assess tax." *Id.*

Similarly, in *Guardian Industries Corp.* v. *Department of Treasury*, 499 N.W.2d 349 (Mich. Ct. App. 1993), an in-state taxpayer contended that "because it was subject to income taxation for sales in" other, "target" States in which it had solicited business, it was entitled under Michigan law to reduce the amount of its income taxable in Michigan by a corresponding amount. *Id.* at 352-353. The then-applicable statute exempted sales taxable in another State from Michigan tax if "that [other] state has jurisdiction" to impose the tax. *Id.* at 353 (quoting MICH. STAT. ANN. § 7.558(42)). The dispositive question, therefore, was whether income taxation by "target" States would violate the Commerce Clause. *Id.* at 356. The court held that the physical-presence test controlled the answer: "[A]fter *Quill*, it is abundantly clear that Guardian must show a physical presence within a target state to establish a substantial nexus to it." *Id.* Remanding for factual development, the court explained that "[a] target state that taxed Guardian's [sales] solicitation activities would be in violation of the [C]ommerce [C]lause if Guardian's employees were never present within the state." *Id.* at 357.

The decision below therefore is irreconcilable with the reasoning of appellate decisions in Tennessee, Texas, and Michigan, each of which holds that *Quill's* interpretation of "substantial nexus" cannot be confined to the sales-and-use-tax context. This conflict among state appellate courts is now substantial and mature. Resolution by this Court is necessary.[7]

Because the constitutional question presented arises from state taxation, this Court cannot await a federal circuit conflict before answering it. Taxpayers are barred from raising Commerce-Clause challenges to state taxes in the lower federal courts, because the Tax Injunction Act prohibits those courts from restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and

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[7] A distinct question is whether a State may tax non-domiciliaries (often called intangible holding companies) whose only assets are intellectual property rights that they license to corporations—typically commonly-owned—that use those rights within the State while selling goods or services, and pay royalties to the out-of-state licensor. Some courts addressing intangible holding companies have held that the out-of-state licensor's lack of physical presence does not bar taxation. *See Bridges* v. *Geoffrey, Inc.*, 984 So.2d 115 (La. Ct. App. 2008); *Lanco, Inc.* v. *Dir., Div. of Taxation*, 908 A.2d 176 (N.J. 2006); *A&F Trademark, Inc.* v. *Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004); *Kmart Props., Inc.* v. *Taxation & Revenue Dep't of N.M.*, 131 P.3d 27 (N.M. Ct. App. 2001); *Geoffrey, Inc.* v. *Okla. Tax Comm'n*, 132 P.3d 632 (Okla. Civ. App. 2005); *Geoffrey, Inc.* v. *S.C. State Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993). Those cases are not controlling here, as the SJC acknowledged; they "involved foreign corporations with intangible property . . . that was being used in the taxing State by a licensee." App. 21a n.19. By contrast, during the tax years at issue here, petitioners did not earn income through the in-state use of their intellectual or other property by a commonly-controlled affiliate.

efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Accordingly, this Court is the *only* federal court that can resolve the growing disagreement and confusion in the state appellate courts regarding the import of this Court's decision in *Quill*.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT TO INTERSTATE COMMERCE AND WARRANTS THIS COURT'S REVIEW AT THIS TIME

As *Bellas Hess* and *Quill* recognized, when a state abandons the physical-presence requirement, it adversely affects interstate commerce by creating confusion and placing onerous burdens on multistate firms. In recent years, those harms have multiplied, as a growing number of States has adopted amorphous and inconsistent economic-nexus tests for income and excise taxes. That trend accelerated after this Court's denial of certiorari in *MBNA*, and is growing increasingly out of control as ever-more States seek to increase their revenues at the expense of out-of-state businesses. Given the current economic crisis and Congress's consistent inaction, only a ruling from this Court can stop the flood of state efforts to impose unduly heavy burdens on interstate commerce.

A. State Abandonment Of The Physical-Presence Requirement Harms The Nation's Economy

The question presented is "one of the most important unanswered questions facing state taxpay-

ers,"[8] because it has major implications for every taxpayer whose business activities cross state lines. At present, the lack of sufficiently clear guidance from this Court regarding the constitutional limits on state income taxation of out-of-state corporations has led to a confusing patchwork of inconsistent state case law, legislation, and administrative determinations adopting widely varying standards for identifying those limits.[9] State approaches range from continued insistence on the physical-presence requirement to various versions of the economic-nexus approach, often with different standards applied to different types of entities.[10]

This wide variation among the States regarding what is fundamentally a question of federal constitutional law creates substantial burdens and uncertainty for businesses faced with deciding whether they are obligated to pay income taxes in multiple States. *See* Stombock, *supra*, at 1231. Particularly

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[8] Marianne Evans & Sarah McGahan, *Economic Nexus and the Uncertainty of* Quill's *Physical-Presence Test*, THE TAX ADVISER (June 2007).

[9] *See* Point II, *supra*; Arthur R. Rosen & Jeffrey S. Reed, *Stop the State Tax Grab*, LEGAL TIMES, April 14, 2008 at 28 (observing that "what constitutes 'substantial nexus' is unclear and has provoked a firestorm of fierce debate"); Gell, *supra*, (manuscript at 22); Joseph Henchman, *Why The* Quill *Physical Presence Rule Shouldn't Go The Way Of Personal Jurisdiction*, 46 STATE TAX NOTES 387 (Nov. 5, 2007); Julie Roman Lackner, Note, *The Evolution and Future of Substantial Nexus in State Taxation of Corporate Income*, 48 B.C. L. REV. 1387, 1408-1415 (2007).

[10] For example, some States have pursued non-domiciliary financial institutions with particular force. *See* Jerome R. Hellerstein & Walter Hellerstein, STATE TAXATION ¶ 6.30 (3d ed. 1998 & Supp. 2009).

problematic in this regard are those States, now including Massachusetts, that have rejected the traditional bright-line physical-presence standard in favor of some version of "economic nexus." That inherently vague approach maximizes discretion in the tax collector, provides little or no guidance to potentially liable multistate businesses, and greatly increases the risk of double taxation. *See* Point I.B., *supra*.

Even when two States both say they apply an "economic nexus" standard, that phrase is so malleable that they may mean very different things. States are thus sowing confusion even as they seriously undermine the Commerce Clause's restraint on state taxation. *See* n.9, *supra*; n.12, *infra*; *see also* Stombock, *supra*, at 1231. This growing uncertainty is exactly the sort of "controversy and confusion" that has previously been of concern to this Court, offering "little in the way of precise guides to the States in the exercise of their" taxation powers. *Quill*, 504 U.S. at 315 (internal quotation marks omitted).

The cost of complying with state income taxes is already double the cost of complying with the federal income tax, and such disproportionate compliance costs will only increase as firms are required to file in more and more jurisdictions under vague "economic nexus" tests. *See* Sanjay Gupta & Lillian Mills, *Does Disconformity in State Corporate Income Tax Systems Affect Compliance Cost Burdens?*, 56 NAT'L TAX J. 355, 357 (2003). This increased burden will hit small and medium-sized businesses especially hard, because those firms do not have the resources to comply with numerous different income taxation regimes or contest tax assessments in far-flung jurisdictions. Such businesses may well decide against expanding their operations to other States or the Internet, out of a justified fear that they may be

opening themselves up to onerous tax liabilities and compliance costs.[11]

Moreover, state abandonment of the physical-presence requirement threatens to disrupt this Nation's international tax policy. Pursuant to bilateral tax treaties, the United States has agreed not to impose national income taxes on foreign firms that do not have a "permanent establishment" in the United States, in exchange for reciprocal commitments from our treaty partners. *See* United States Model Income Tax Convention of November 15, 2006, art. 7, ¶ 1; *see also id.* art. 5. As States become more aggressive in enforcing income taxes against foreign-based corporations with no in-state physical-presence, that increasingly burdensome taxation will create tensions with our tax-treaty partners, potentially encouraging them to abandon their physical-presence commitments, thereby undermining the United States' efforts to promote foreign commerce and harming U.S.-based firms. As this Court has warned, "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." *Japan*

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[11] Moreover, state abandonment of the physical-presence requirement hampers business compliance with applicable accounting rules. Under Interpretation Number 48 issued by the Financial Accounting Standards Board—which sets standards for preparing audited financial statements in the United States—a corporation must record a liability for the full amount of an unpaid tax liability unless it is "more likely than not" that the corporation will prevail in contesting that liability. Uncertainty over the permissibility and meaning of the vague economic-nexus standard makes compliance with this requirement increasingly difficult and problematic. *See* Michael S. Schadewald, *FIN 48 Forces Companies to Wrestle with Uncertain State Nexus Standards*, THE CPA JOURNAL ONLINE (May 2008).

Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434, 448-449 (1979). The prospect of interference with tax treaties is an especially dangerous one given the pressures toward protectionism and economic balkanization during the current economic crisis. *See* Emma Vandore, *OECD Warns Against Protectionism*, ASSOCIATED PRESS, March 3, 2009.

B. The Problem Has Grown Dramatically Worse Since The Denial Of Certiorari In *MBNA*

The need for this Court's review is more urgent now than it was when this Court denied certiorari in *MBNA* in 2007. Academic commentators and practitioners alike have increasingly recognized the problems created by state adoption of the economic-nexus approach and the growing uncertainty and confusion in this area of the law.[12] In addition, the past two years have seen a headlong rush by revenue-greedy state legislatures and tax collectors to adopt amorphous economic-nexus standards as a means of increasing tax revenues without raising the ire of in-state taxpayers.

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[12] *See, e.g.*, Giles Sutton et al., *Attributional Nexus, Flash Title, and the Chaos in Nexus Standards*, 50 STATE TAX NOTES 491 (Nov. 24, 2008); Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 15-20 (2008); articles cited *supra* n.9; *see also* David E. Wildasin, *State Corporation Income Taxation: An Economic Perspective on Nexus*, IFIR Working Paper No. 2009-08, at 13 (Feb. 2009) (economic analysis concluding that corporate income taxes imposed on out-of-state corporations based on in-state sales "impose[] an implicit tariff o[n] imports from other states, distorting interstate trade and generating deadweight efficiency losses").

As one major accounting firm recently observed: "The 'rash' of economic nexus decisions and legislation . . . really kicked off with the 2007 cert[iorari] denial[]" in *MBNA* and "spread like poison ivy in 2008." KPMG LLP, *2008: Year in Review: The "Economics" of 2008, in* TWIST-Q: A Quarterly Roundup of This Week in State Tax (Dec. 2008); *see also* Gell, *supra,* (manuscript at 24). Thus, numerous States have adopted economic-nexus approaches in the past two years. *See, e.g.*, Karen J. Boucher & Shona Ponda, *Current Corporate Income Tax Developments (Part I),* THE TAX ADVISER 166, 166-168 (March 2009). The proliferation of economic-nexus theories since review was denied in *MBNA* has occurred notwithstanding this Court's reminders that denial of certiorari "imports no expression of opinion upon the merits of a case." *House* v. *Mayo,* 324 U.S. 42, 48 (1945). These state actions in disregard of *Quill* indicate that unless this Court intervenes, the burdens inflicted on interstate commerce by amorphous economic nexus standards will only continue to grow.

Just weeks after this Court denied review in *MBNA*, for example, the New Hampshire legislature amended the statutory definition of taxable "business activity" to include "a substantial economic presence evidenced by a *purposeful direction* of business toward the state examined in light of the frequency, quantity, and *systematic* nature of a business organization's economic *contacts* with the state" (emphases added). That amendment took effect July 1, 2007. Ch. 263 (H.B. 2), Laws 2007, amending N.H. REV. STAT. ANN. § 77-A:1, XII; *see* Chris Sullivan, *New Hampshire Adopts Economic Nexus Standard,* 45 STATE TAX NOTES 213 (July 23, 2007) (noting that the legislature "deferred consideration of the

provision while the economic nexus question was pending before the Supreme Court" and then acted promptly upon denial of certiorari).

Similarly, Michigan has embraced "a broadly expanded economic presence nexus standard that will increase the number of businesses subject to . . . tax" in the wake of the denial of review in *MBNA*. June Summers Haas, *The Michigan Business Tax Taxpayer: Jurisdiction to Tax and the Unitary Business Group*, 53 WAYNE L. REV. 1351, 1351 (2007). In particular, under the Michigan Business Tax (MBT), enacted in July 2007 (just weeks after the denial of certiorari) and effective January 1, 2008, a person is considered to have a nexus with Michigan sufficient to require payment of the MBT if the person "actively solicits" sales within the State, and has in-state gross receipts of or exceeding a specified dollar threshold. MICH. COMP. LAWS § 208.1200(1). Michigan has opined that "[w]hether substantial economic presence is established depends on the quality and quantity of the taxpayer's contacts with the taxing state and the degree to which the taxpayer exploits the market." Mich. Revenue Admin. Bulletin 2007-6, at 4 (Dec. 28, 2007). That highly malleable formulation "is more of a Due Process nexus standard" than a test under the Commerce Clause. Haas, *supra*, at 1359.[13]

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[13] California made a similar change recently in enacting its 2009-10 budget. Effective January 1, 2011, the State amended the statutory definition of "doing business" for tax purposes to cover any taxpayers whose in-state sales exceed the lesser of $500,000 or 25% of total sales. Senate Bill No. X3 15, § 7 (amending CAL. REV. & TAX. CODE § 23101(b)(2)) (enrolled Feb. 19, 2009); *see* Deloitte Development LLC, *California Budget Legislation Contains Significant Tax Law Changes* 4 (Feb. 27, 2009) ("The adoption of a doing business standard that relies

Other States likewise have seized upon denial of review in *MBNA* as an occasion for issuing regulatory guidance asserting authority to tax non-domiciliary corporations with no in-state physical presence. Florida, for example, found *MBNA* "persuasive, especially given the fact that the U.S. Supreme Court declined to hear the case[]." Fla. Dep't of Revenue, Advisement 07C1-007, 2007 WL 4577924, at *6 (Oct. 17, 2007); *see also* Me. Revenue Servs., Maine Tax Alert (Feb. 2008), 2008 WL 2764732, at **2-3 (noting denial of review in *MBNA*, and stating that Maine "considers taxpayers with economic nexus alone to be subject to Maine's income tax laws"); Or. Dep't of Revenue Substantial Nexus Guidelines, OR. ADMIN. R. 150-713.010 (rev. May 2008) ("[s]ubstantial nexus" "does not require a taxpayer to have a physical presence in Oregon" and "exists where a taxpayer regularly takes advantage of Oregon's economy to produce income for the taxpayer and may be established through the significant economic presence of a taxpayer in the state.").

C. Awaiting Congressional Action Would Be Futile

Review by this Court should not be further delayed based on a speculative hope that Congress might at some point decide to address the problem posed by the economic-nexus theory. Questions about the scope of state taxing powers under the Commerce Clause are ones "that Congress has the ultimate power to resolve" (*Quill*, 504 U.S. at 318),

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[Footnote continued from previous page]

solely on having sales in California would appear to effectively adopt an 'economic nexus' standard for California.").

but Congress has shown no inclination to address the issue. Accordingly, this Court has both the authority and the responsibility to ensure compliance with its precedents, and it is not for the States to legislate away the bright-line physical-presence requirement. Rather, if States conclude that the physical-presence requirement should be abandoned (or limited only to certain taxes), they are free to present that argument to Congress through the ordinary political process.

In *MBNA*, the State argued that the Court should deny review in order to give Congress a chance to act. *See* Br. in Opp., No. 06-1228, at 17-18. But Congress still has not acted in the two years since denial of review in *MBNA*, while the States have increasingly violated the principles enunciated in *Quill*, exacerbating the problems created by the economic-nexus approach. In fact, in the 17 years since *Quill* invited congressional resolution of the scope of state taxing power over non-domiciliaries, Congress has not addressed the issue, indicating that there is no realistic prospect that Congress will do so in the foreseeable future.[14] This Court should take this opportunity to ensure that States, in their insatiable demand for more sources of revenue (particularly from politically disenfranchised out-of-state businesses), do not continue to defy the principles enunciated in *Quill* and *Bellas Hess*.

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[14] For example, although business-activity-tax simplification bills have been introduced in recent Congresses, no votes have ever been cast on the portions of such legislation addressing the scope of the physical-presence requirement. Business Activity Tax Simplification Act of 2009, H.R. 1083, 111th Cong. (2009); Business Activity Tax Simplification Act of 2007, S. 1726, 110th Cong. (2007); Internet Tax Fairness Act of 2001, H.R. 2526, 107th Cong. (2001); New Economy Tax Fairness Act, S. 664, 107th Cong. (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
INDRANEEL SUR
MISHA TSEYTLIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

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