NO. 10-1289

IN THE SUPREME COURT OF THE UNITED STATES

LAMTEC CORPORATION,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Lamtec Corporation, located in New Jersey, annually sold more than a million dollars of its products at wholesale to a handful of customers in the State of Washington. To maintain its Washington market, it regularly sent sales employees to meet in person with those customers. Under the facts of this case, did Lamtec's physical presence and activities within Washington provide a sufficient nexus for purposes of the dormant Commerce Clause for the State to apply its excise tax on the activity of making sales at wholesale in the State?

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INTRODUCTION

Washington State imposes a business and occupation tax (B&O tax) on persons that engage in the business of wholesaling in Washington. The Washington Supreme Court held that petitioner Lamtec Corporation's physical presence in Washington provided a substantial nexus for purposes of imposing this B&O tax on Lamtec's Washington wholesaling activity. Pet. App. at 9a, 15a. Contrary to the claims of petitioner and amici, the decision of the Washington Supreme Court presents no conflict with this Court's rulings or those of other state courts.

In particular, this case does not present the broadly-stated first question raised by petitioner and supported by amici—whether the physical presence requirement of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), for out-of-state businesses to collect sales and use tax, applies to other state taxes such as an excise tax on conducting business activities within the state. This is because the Washington court did not find it necessary to reach that question. Instead, the court held that Lamtec's physical presence and activities in Washington provided the substantial nexus required under the Commerce Clause to tax an out-of-state business. Pet. App. at 9a, 15a. Stripped of the first question presented, all that remains is a fact-bound application of this Court's cases concerning the nexus requirement of the Commerce Clause. As a result, the decision below presents no questions that warrant certiorari.

STATEMENT OF THE CASE

1. Washington State Business and Occupation Taxes

Washington's B&O taxes are imposed on every person "for the act or privilege of engaging in business activities" in Washington. Wash. Rev. Code § 82.04.220(1). There is a specific B&O tax "[u]pon every person engaging within this state in the business of making sales at wholesale[.]" Wash. Rev. Code § 82.04.270.

Under the above statute and regulations applicable during the relevant period, the wholesaling B&O tax was imposed if "the goods [were] received by the purchaser in this state and the seller ha[d] nexus." Wash. Admin. Code § 458-20--193(7). The Department's administrative rules defined nexus as "the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington." Wash. Admin. Code § 458-20-193(2)(f).

2. Lamtec Corporation's Wholesale Business Activities In Washington

Lamtec manufactured products such as vapor barriers and insulation materials in New Jersey and sold its products at wholesale. Pet. App. at 2a, 20a. To support the sales of its products to customers in Washington, Lamtec sent its "sales manager," its "vice president of sales and marketing," and its "sales representative" to Washington to visit Lamtec's handful of longstanding Washington customers. Pet. App. at 20a-21a. Over the seven-

year period at issue in this case, Lamtec had at most twelve long-term customers in Washington, and received over one million dollars each year from its Washington customers.

Although Lamtec did not have permanent employees, property, or inventory stored in Washington, its sales employees traveled regularly to Washington to meet in person with its customers during the tax period at issue, 1997-2003.[1] Pet. App. at 2a, 20a-21a (describing approximately fifty to seventy visits during the seven-year tax period). While visiting the Washington customers, Lamtec's sales employees provided samples and information about its products, participated in phone calls with the customers to Lamtec's technical and customer service departments in New Jersey, and addressed price and product questions. Pet. App. at 21a.[2]

Lamtec's management admitted that the purpose of sending its sales representatives to Washington was to maintain its wholesale business with its customers in Washington. Pet. App. at

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[1] Lamtec mistakenly describes the tax period at issue as including the first two quarters of 2004. Pet. at 2, 3. While Lamtec paid taxes for those two quarters, the refund claim it filed included only taxes paid through December 31, 2003. Pet. App. at 2a n.1.

[2] Throughout its petition, Lamtec refers to an average of seven or eight days a year that Lamtec employees spent in Washington. *E.g.*, Pet. at 2, 25. Given the nature and significance of the visits, the precise number of days spent in Washington does not determine the outcome. The record, however, shows that Lamtec estimated seven to eleven days of visits each year, and documentation provided by Lamtec for a sample year showed eleven days of visits.

21a. For example, Lamtec's chief financial officer agreed that the employees who visited Washington acted as "sales representatives." Clerk's Papers (CP) at 297. The vice president described the employees visiting Washington as Lamtec's "salesmen." CP at 336. A Lamtec salesperson explained that the visits to Washington were to "meet with our existing customer base, basically maintain our relationship with that customer . . . ." CP at 371. In Lamtec's own words, it would be a "poor business practice" not to visit their wholesale customers in Washington (CP at 345-46), and the visits to Washington customers were important to Lamtec's business model. CP at 339-40 ("We have long established customers [in Washington] and long established relationships."). Lamtec's vice president of sales and marketing admitted that Lamtec would not consider abandoning the visits, given their importance to the business. CP at 345-46.

3. Proceedings Below

a. Proceedings Before The Department Of Revenue

In 2004, the Department requested information from Lamtec regarding its Washington business activities. Based on the information Lamtec provided, the Department required Lamtec to register as a business in Washington. Pet. App. at 2a. Lamtec submitted a master business license application and "listed its estimated gross annual income in [Washington] as '$100,001 and above.'" Pet. App. at 2a (quoting CP at 427). The Department assessed the wholesaling B&O tax, plus penalties and interest. Pet. App. at 2a. Lamtec petitioned the

Department for relief, which it denied. Lamtec then paid the tax under protest and challenged it in superior court.

b. State Court Proceedings

The superior court granted summary judgment to the Department, concluding that the dormant Commerce Clause did not prevent Washington from imposing the wholesaling B&O tax. Pet. App. at 41a. On appeal by Lamtec, the Washington Court of Appeals affirmed. Pet. App. at 28a-38a. The Washington Supreme Court granted review to address Lamtec's Commerce Clause challenge. Pet. App. at 3a.[3]

The Washington Supreme Court recognized that, consistent with the dormant Commerce Clause, a state may tax an out-of-state corporation when the tax is "(1) 'applied to an activity with a substantial nexus with the taxing State,' (2) 'fairly apportioned,'

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[3] At the Washington Court of Appeals, Lamtec also argued that its customers did not receive the purchased goods in Washington, an argument that relied on the form of its shipping contracts. The intermediate appellate court held that for purposes of Washington's wholesaling B&O tax, the goods are received in Washington and, therefore, Lamtec engages in the business of making sales at wholesale in Washington. Pet. App. at 27a-28a. At the Washington Supreme Court, Lamtec abandoned this argument, arguing only that applying the B&O tax violated the Commerce Clause. *See* Pet. App. at 3a n.3. *See generally Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 251 (1987) (describing the difference between a B&O tax on manufacturing and Washington's B&O tax on wholesaling; Tyler Pipe's wholesaling "must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax").

(3) nondiscriminatory with respect to interstate commerce, and (4) 'fairly related to the services provided by the State.'" Pet. App. at 6a (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Lamtec argued only that Washington's B&O tax was not being applied to an activity with a "substantial nexus" with Washington State because, in Lamtec's view, its activities in Washington did not satisfy the physical presence requirement described in *Quill*. Pet. App. at 6a. Based on its claim that it lacked physical presence in Washington, Lamtec argued that the court should decide whether physical presence is required for the B&O tax.

The Department, in contrast, argued that "this case is not a good vehicle for considering whether physical presence is required because, in its view, Lamtec clearly maintains such a presence" in Washington. Pet. App. at 6a. The Department argued that Lamtec's regular, in-person visits to its customers in Washington constituted physical presence, satisfying the substantial nexus requirement of the dormant Commerce Clause, because the visits were "significantly associated with [Lamtec's] ability to establish and maintain a market in [Washington] for the sales." Pet. App. at 6a. After arguing that the court did not need to reach the issue, as a secondary and alternative argument the Department also pointed out that the weight of authority limited the holding in *Quill* regarding physical presence to sales and use taxes.

The Washington Supreme Court agreed that it was unnecessary to decide whether the physical presence requirement of *Quill* applies to taxes other than sales and use taxes. Pet. App. at 14a. The

court held: "We conclude that to the extent there is a physical presence requirement, it can be satisfied by the presence of activities within the state." Pet. App. at 14a. Thus, to decide the case, the court focused on the nature of the presence that would suffice, and assumed that a physical presence may be required for a substantial nexus with the taxing state.

The court rejected Lamtec's argument that "physical presence" requires a small sales force, plant, or office to be permanently located in the taxing state. The court reasoned that *Quill* held that whether "a State may compel a vendor to collect a sales or use tax *may* turn on the presence in the taxing State of a small sales force, plant, or office," but did not hold that type of presence is required. Pet. App. at 7a (quoting *Quill*, 504 U.S. at 315) (emphasis supplied by the Washington Supreme Court). However, "[t]he [in-state] activities must be substantial and must be associated with the company's ability to establish and maintain the company's market within the state." Pet. App. at 15a. The court held that there was a sufficient physical presence because "[t]he contacts by Lamtec's sales representatives were designed to maintain its relationships with its customers and to maintain its market within Washington State." Pet. App. at 15a. Lamtec's activities in Washington were not "slight or incidental to some other purpose or activity." Pet. App. at 15a.

In reaching this holding regarding Lamtec's activities in the state, the Washington court relied on this Court's rulings in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 249-51 (1987), finding a substantial nexus

where a wholesaler's "solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle." *Tyler Pipe*, 483 U.S. at 249. In doing so, it cited this Court's approval of the Washington Supreme Court's opinion in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 105 Wash. 2d 318, 715 P.2d 123 (1986), *rev'd on other grounds*, 483 U.S. 232 (1987). Tyler Pipe did not have a business location or permanent employees in Washington; it used independent contractors to act as sales representatives to maintain Tyler Pipe's wholesale market. This was a sufficiently substantial activity within the state to satisfy the nexus requirement, despite the fact that it had "no personnel designated as employees residing in Washington." *Tyler Pipe*, 105 Wash. 2d at 321; *see Tyler Pipe*, 483 U.S. at 251 (approving Washington court's statement that the crucial factor governing nexus is whether the in-state activities were significantly associated with establishing and maintaining a market in the state).

The Washington Supreme Court also relied on *Standard Pressed Steel Co. v. Washington State Department of Revenue*, 419 U.S. 560, 562 (1975), where this Court concluded that a taxpayer's argument that it had no substantial nexus "verges on the frivolous" where its presence in the state was one employee who did not solicit or accept orders. Finally, the court below looked to *Orvis Co. v. Tax Appeals Tribunal of New York*, 86 N.Y.2d 165, 180-81, 654 N.E.2d 954, 630 N.Y.S.2d 680, *cert. denied sub nom. Vermont Information Processing, Inc. v. New York State Department of Taxation & Finance*,

516 U.S. 989 (1995), where New York's highest court found a sufficient physical presence based on forty-one visits over three years. Pet. App. at 9a. The Washington court concluded that there was no reason to distinguish between the activities and physical presence of Lamtec's sales employees in Washington, and the activities of a taxpayer with staff permanently employed within a state, or a taxpayer with agents contracted to perform the activity as in *Tyler Pipe*. Pet. App. at 15a.

REASONS WHY THIS COURT SHOULD DENY REVIEW

This Court should deny review because the issue of whether the *Quill* physical presence requirement applies to taxes other than sales and use taxes was not decided by the Washington Supreme Court and, therefore, is not presented in this case. Even if the issue were presented in this case, there is no significant split among state court decisions to justify this Court's consideration of the issue.

Similarly, the petition shows no real conflict among the states with respect to the second question identified in the petition—application of the *Quill* physical presence requirement. Rather, the Washington Supreme Court applied well-established Commerce Clause standards in holding that physical, in-person visits by employees of an out-of-state corporation, which are significantly associated with establishing and maintaining the corporation's market in Washington, establish sufficient nexus to apply Washington's tax.

1. Whether The *Quill* Physical Presence Requirement Applies To Taxes Other Than Sales And Use Taxes Would Not Be Reached If Certiorari Were Granted

Under the dormant Commerce Clause, a state tax on interstate commerce is valid if it: (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. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Lamtec seeks certiorari to address only the substantial nexus element, thus conceding as it did below that Washington's tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.

The primary reason advanced by Lamtec and amici for a writ of certiorari is to address an alleged conflict as to whether the physical presence requirement for Commerce Clause nexus described in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), for sales and use taxes, also applies to other taxes, such as net income, franchise, and other business activity taxes. Pet. at 9. Lamtec and amici fail to acknowledge that the Washington Supreme Court declined to decide this question. The decision expressly rested its finding of sufficient nexus on the physical presence of Lamtec employees in Washington and the significance of that physical presence to maintaining Lamtec's sales to Washington customers.

As the court explained, "to the extent there is a physical presence requirement, it can be satisfied by the *presence of activities within the state*. . . . The activities must be substantial and must be associated with the company's ability to establish and maintain the company's market within the state." Pet. App. at 14a-15a (emphasis added). Further removing any doubt that the activities that established nexus involved the physical presence of Lamtec, the court concluded: "Although Lamtec did not have a permanent presence within the state, by regularly sending sales representatives into the state to maintain its market, Lamtec satisfied the nexus requirement." Pet. App. at 15a.[4]

It is, therefore, uncertain whether this Court would even reach the first question presented because the case may be resolved based on the facts showing physical presence, as held by the Washington Supreme Court. The Court's rules counsel against taking certiorari on an issue that was not decided below, because the rules contemplate a decision by a "state court of last resort [that] has decided an important federal question in a way that conflicts with the decision of another state court[.]" Rule 10(b). The Washington court

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[4] Although Lamtec glosses over the fact that the court below did not decide whether the physical presence requirement applies to Washington's wholesaling B&O tax, its alternative argument that the decision below improperly applied the physical presence rule acknowledges that the court ultimately applied the rule to decide the case. Thus, Lamtec implicitly admits that the court did not rest its holding on a conclusion that physical presence was not necessary, but rather that Lamtec met the physical presence requirement.

pointedly did not decide the broad question raised by Lamtec and emphasized by amici.

In a similar vein, this Court has long recognized that, even if there is conflict among decisions, it should deny certiorari when the decision below does not fairly present the legal question over which there is a conflict. *See Rogers v. United States*, 522 U.S. 252 (1988) (dismissing writ as improvidently granted after concluding that jury instructions given in the case included a supposedly omitted element that created conflict). This consideration applies here, where the lower court resolved the case without addressing the general question of whether the physical presence rule of *Quill* should be applied outside the context of sales and use taxes.

Thus, when viewed in light of the Washington Supreme Court's conclusion that Lamtec has a physical presence sufficient to establish the requisite nexus under the dormant Commerce Clause, the first question raised by the petition essentially urges this Court to issue an advisory opinion regarding the reach of the *Quill* physical presence requirement. This is further revealed when Lamtec includes not only Washington's wholesaling B&O tax within the ambit of its arguments, but business activity taxes of all kinds, including net income and franchise taxes. Pet. at 18-19. Similarly, amici focus their complaints seemingly on every conceivable tax except the one at issue in the present case. *E.g.*, Brief Of Amici Curiae Of Council On State Taxation And The National Association Of Manufacturers In Support Of Petitioner at 5-6 (arguing that physical presence should be required for net income and franchise

taxes); Brief Of The Tax Foundation As Amicus Curiae In Support Of Petitioner at 8-9 (discussing economic nexus standards of other Washington B&O tax statutes that were not in effect during the tax period at issue). These broader issues, however, are not presented by the fact-bound decision that Lamtec's physical presence in Washington constituted sufficient nexus for it to be subject to Washington's excise tax on wholesaling.

Further, the decision of the Washington Supreme Court declining to decide whether a physical presence requirement applied to Washington's B&O tax was not an unexpected or unreasoned avoidance of the issue. Rather, the court's approach reflected the manner in which the case was litigated at the trial court and throughout the appellate process. The Washington Department of Revenue consistently argued that Lamtec had a physical presence in Washington, that Lamtec could not take advantage of the *Quill* safe harbor, and that the courts did not need to address whether Washington could constitutionally tax companies with no physical presence in Washington. Thus, the record and arguments were not developed with that issue in mind.[5]

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[5] As the Washington Supreme Court stated, the Department addressed whether the physical presence required in *Quill* should be required outside the sales and use tax context. Pet. App. at 6a. It was not, however, the focus of the Department's briefing. At the trial court and state court of appeals, the Department addressed the issue in a footnote, pointing out that courts have limited the physical presence requirement to sales and use taxes, but arguing that the court need not address the issue. At the Washington Supreme Court,

Subsequent changes to Washington law also counsel against granting certiorari. After the tax periods in question, Washington enacted legislation that specifically requires a physical presence of the taxpayer to impose the tax at issue, i.e., the wholesaling B&O tax. Wash. Rev. Code §§ 82.04.067(6), .460. The Washington Supreme Court expressly stated that it did not consider whether the revision to the statutes would affect its analysis of the dormant Commerce Clause challenge. Pet. App. at 5a n.4 (citing Laws of 2010, 1st Spec. Sess., ch. 23, § 102, i.e., 2010 Wash. Sess. Laws page no. 2575); *see also* Pet. App. at 13a n.7. Thus, the first question framed by Lamtec—whether physical presence of an out-of-state wholesale seller of goods is required by the dormant Commerce Clause before Washington can impose its B&O tax on such selling activities—is not an ongoing issue in Washington.[6]

For the above reasons, the Court should deny certiorari. The primary issue presented by the petition and argued by amici is not an issue decided below. Therefore, the decision below presents no conflict on the first question presented. Further, this

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the Department again argued that the court need not reach the issue, but summarized how the language of the *Quill* opinion and the great weight of authority have limited the physical presence requirement to sales and use taxes.

[6] The new legislation requires physical presence for some taxes, but not those taxes designated by statute as "apportionable." Wash. Rev. Code § 82.04.460(4). The aspects of the new legislation discussed by the Amicus Tax Foundation, therefore, do not apply to the tax at issue because the wholesaling tax is not among the taxes considered "apportionable" under the legislation. Br. Of Amicus Tax Found. at 9-11.

case is, at best, a risky vehicle for addressing the issue because it is unlikely to be reached in light of the finding that Lamtec had a physical presence in Washington.

2. There Is No Significant Conflict Among State Courts Regarding Whether The *Quill* Physical Presence Requirement Applies To Taxes Other Than Sales And Use Taxes

Even if the Washington Supreme Court had held that the physical presence requirement did not apply to Washington's B&O tax, such a holding would not create a conflict among state courts warranting certiorari. Instead, it would add Washington to the growing majority of state courts that recognize the *Quill* court's use of a physical presence requirement to create a "safe harbor" from state taxation only in the area of sales and use taxes.

In *Quill*, the Court affirmed the dormant Commerce Clause nexus requirement that prevented States from imposing a duty to collect a use tax on companies whose only contact with the taxing state was through the mail or common carrier. *Quill*, 504 U.S. at 311. The decision rested heavily on principles of *stare decisis* and the reliance that the mail-order industry placed on earlier decisions of the Court. *Id.* at 311, 317-18 (noting that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today"). Consistent with these concerns, the Court specifically stated the rule it was reaffirming in narrow terms, repeatedly declaring the rule to

apply "in the area of sales and use taxes." *Quill*, 504 U.S. at 311, 315, 316, 317.

Since *Quill*, the vast majority of courts that have addressed the issue have recognized that the *Quill* physical presence requirement provides a safe harbor from taxation of interstate commerce, but that the ruling is limited to sales and use taxes. Every state supreme court that has addressed the issue has so held. Moreover, this Court has denied certiorari in cases addressing the reach of the *Quill* physical presence requirement at least nine times, including most recently in the 2010 term.[7] Nothing has occurred since to warrant this Court's reconsideration of those denials, and Lamtec does not even argue that such a change has occurred. Rather, the convergence of state court decisions has accelerated. Since 2001, courts in nine states have addressed the issue. In each of those decisions, five

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[7] *Asworth, LLC v. Kentucky Dep't of Revenue, Fin. & Admin. Cabinet* (unreported Ky. Ct. App.), *cert. denied*, 131 S. Ct. 1046 (2011); *Capitol One Bank v. Comm'r of Revenue*, 899 N.E.2d 76 (Mass.), *cert. denied*, 129 S. Ct. 2827 (2009); *Geoffrey, Inc. v. Massachusetts Comm'r of Revenue*, 899 N.E.2d 87 (Mass.), *cert. denied*, 129 S. Ct. 2853 (2009); *Lanco, Inc. v. Div. of Taxation*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006), *cert. denied*, 551 U.S. 1141 (2007); *A&F Trademark, Inc. v. Sec'y of Revenue*, 605 S.E.2d 187 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005); *General Motors Corp. v. City of Seattle*, 25 P.3d 1022 (Wash. Ct. App.), *review denied*, 84 P.3d 1230 (Wash. 2001), *cert. denied*, 535 U.S. 1056 (2002); *J.C. Penney Nat'l Bank v. Comm'r of Revenue*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000); *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C.), *cert. denied*, 510 U.S. 992 (1993).

of which were from the state's highest court, the court held that the *Quill* physical presence requirement did not apply outside of sales and use taxes.[8]

In contrast to the growing consensus among recent state court decisions, the vitality of the intermediate court decisions cited by Lamtec continues to decline. First, Lamtec relies on *J.C. Penney National Bank v. Commissioner of Revenue*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000). The court there rejected Tennessee's attempt to impose a franchise tax on a national bank based on the court's conclusion that the bank had no physical presence. The court, however, denied that it was deciding whether physical presence is required under the dormant Commerce Clause and appeared to base its decision primarily on the failure of the state to provide

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[8] *Asworth, LLC v. Kentucky Dep't of Revenue, Fin. & Admin. Cabinet* (unreported Ky. Ct. App.), *cert. denied*, 131 S. Ct. 1046 (2011); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 324 (Iowa 2010), *petition for cert. filed*, No. 10-1340, 10A918 (Apr. 28, 2011); *Capitol One Bank v. Comm'r of Revenue*, 899 N.E.2d 76, 84 (Mass.), *cert. denied*, 129 S. Ct. 2827 (2009); *Sec'y of the Dep't of Revenue v. Geoffrey, Inc.*, 984 So. 2d 115, 128 (La. Ct. App.) (rejecting "physical presence" rule for corporate income tax), *writ denied*, 978 So. 2d 370 (La. 2008); *Lanco, Inc. v. Div. of Taxation*, 908 A.2d 176, 177 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 235 (W. Va. 2006), *cert. denied*, 551 U.S. 1141 (2007); *Geoffrey, Inc. v. Oklahoma Tax Comm'n*, 132 P.3d 632, 635 (Okla. Civ. App. 2005); *A&F Trademark, Inc. v. Sec'y of Revenue*, 605 S.E.2d 187, 195 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005); *MBNA Am. Bank, N.A. & Affiliates v. Indiana Dep't of Revenue*, 895 N.E.2d 140, 144 (Ind. T.C. 2008).

authority or a rationale for its argument that *Quill* was limited to sales and use taxes. *J.C. Penney*, 19 S.W.3d at 839, 842. No subsequent Tennessee decisions affirm or apply *J.C. Penney*, and at least one other state court has expressed "considerable doubt" whether the *J.C. Penney* court actually imposed the bright-line, physical presence rule outside of sales and use taxes. *A&F Trademark, Inc. v. Sec'y of Revenue*, 605 S.E.2d 187, 196 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005).

The second decision Lamtec relies on is of limited value in assessing state court authority on the physical presence requirement because of the unique facts considered by the court. In *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. App. 2000), the court held that Texas could not impose a franchise tax on an out-of-state company whose sole activity in Texas, according to the court, was possession of a license to do business in Texas. *Id.* at 299. The court did not consider the state's argument that royalties received from intangible properties in the state established nexus, concluding that the state had failed to preserve that argument for appeal. *Id.* at 301-02. As recognized by other courts, the persuasive force of *Rylander* is also minimized because its analysis relied in part on a portion of this Court's *Allied-Signal* opinion that appeared to discuss the Due Process Clause rather than the Commerce Clause. *See Geoffrey, Inc. v. Oklahoma Tax Comm'n*, 132 P.3d 632 (Okla. Civ. App. 2005); *Rylander*, 18 S.W.3d at 299 n.2 (quoting *Allied-Signal, Inc. v. Div. of Taxation*, 504 U.S. 768, 778 (1992)).

The third state court decision Lamtec cites is *Guardian Industries Corp. v. Department of Treasury*, 499 N.W.2d 349 (Mich. Ct. App. 1993), *appeal denied sub nom. Cargill, Inc. v. Revenue Division, Department of Treasury*, 512 N.W.2d 846 (Mich. 1994), but again that case presents no conflict. While the court concluded that a physical presence requirement would apply to income taxes, there is no discussion in the opinion of whether *Quill* applies to taxes other than sales and use taxes. Instead of confronting the *Quill* issue, the primary issue seems to have been a factual dispute regarding whether the taxpayer had any physical presence in the purchasers' states. *Guardian Indus.*, 499 N.W.2d at 356-57.

Finally, Lamtec relies on an administrative decision issued by the Alabama Department of Revenue, mistakenly referring to the decision as issued by a state court. Pet. at 15 (citing *Cerro Copper Prods., Inc. v. Alabama Dep't of Revenue*, No. F.94-444, 1995 WL 800114, at *6 (Admin. Law. Div. Dec. 11, 1995)). That decision presents no conflict because it has been repudiated in a later administrative decision. *Joe E. Lanzi, III v. Alabama Dep't of Revenue*, No. INC-2002-721, 2003 WL 22535609, at *3 (Admin. Law Div. Sept. 26, 2003). Thus, if an administrative decision by a state revenue department should be considered by this Court in determining whether to accept certiorari, then Alabama has joined the growing majority of States recognizing that the *Quill* physical presence requirement is limited to sales and use taxes.

To minimize the impact of the growing consensus among state courts, Lamtec claims the

Washington court recognized a split. But Lamtec is citing to the dissenting opinion below, which describes a "split." Pet. at 18 n.2 (citing Pet. App. at 16a). The court's opinion, however, accurately stated that authority on the reach of the *Quill* physical presence requirement was "not unanimous," but that "the great weight of authority" concurred that the physical presence requirement is confined to sales and use taxes. Pet. App. at 12a. The Washington court's recognition that intermediate court decisions disagree with the great weight of state court authority does not show "a real and embarrassing conflict of opinion and authority" that would justify the Court's review. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955).

Lamtec and amici also cite commentators, but commentators cannot create a conflict where the courts do not. While some tax practitioners undoubtedly publish articles referring to a significant split among state courts, other commentators recognize the heavy weight of authority disagreeing with Lamtec. *E.g.*, Walter Hellerstein & John Swain, *Classifying State and Local Taxes: Current Controversies*, 54 State Tax Notes 35, 36-39 (Oct. 5, 2009) (noting that case law "strongly supports" limiting the physical presence rule to sales and use taxes).

Therefore, even if the Court could reach the first question presented by Lamtec, there is no meaningful conflict among state courts that requires resolution by this Court. Instead, there are a few intermediate court decisions over a decade old that have not been further extended or relied upon by later appellate courts, and a substantial and growing

majority of state court decisions agreeing that the *Quill* physical presence requirement is based on the particular context of sales and use taxes. Moreover, it is apparent that amici are not concerned with growing uncertainty or conflict among the states, but rather the opposite. The Commerce Clause, however, does not "relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business." *Quill*, 504 U.S. at 310 n.5 (quotations marks omitted). The conflict described in Lamtec's petition is not significant; the cases show that there is no conflict among decisions of state courts of last resort that requires resolution by this Court.

3. Reviewing The Washington Wholesaling B&O Tax Would Not Clarify The Alleged Uncertainty Concerning "Economic Nexus" And Other Taxes

Lamtec argues that this Court should grant certiorari notwithstanding its previous denials of such petitions in part because, unlike the previous cases, this case does not involve what Lamtec terms the "complicating factors" of the presence of intangible property, affiliated companies within the taxing state, or technological issues of e-commerce. Pet. at 18-19. As the numerous other petitions for certiorari considered and rejected by this Court and amici's arguments make clear, the more prevalent issues in other state courts involve the economic nexus sufficient to allow taxation of out-of-state companies where those complicating factors exist, or where there are other factors such as the provision of services or extension of credit within the state. The

courts addressing economic nexus issues have, understandably, focused on those factors in analyzing the dormant Commerce Clause nexus requirements. *E.g., KFC Corp.*, 792 N.W.2d at 323-24 (analyzing whether presence of valuable intangible property used in the state satisfies Commerce Clause nexus).

Deciding this case is not likely to resolve the questions that arise in these other contexts, because this case involves a company that maintains a significant physical presence in Washington that goes beyond contacting the state through the mail or common carrier. A decision on these particular facts would not likely provide useful guidance with respect to whether intangible property, affiliated companies, provision of services, or extension of credit within a state could satisfy the dormant Commerce Clause nexus. Therefore, the absence of such factors in this case argues against granting certiorari, not in its favor.

4. The Washington Court's Application Of A Physical Presence Standard Does Not Justify Review In This Case

In the final four pages of the petition, Lamtec addresses the Washington Supreme Court's actual decision and argues that the Court should grant certiorari to decide if the regular sales visits by Lamtec's employees for its wholesaling business are sufficient to provide a substantial nexus for purposes of the Commerce Clause. This Court should deny the petition with regard to the second question presented because the decision below does not conflict with other state court decisions. Moreover, the

Washington Supreme Court decision is solidly grounded in this Court's precedent, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987).

Lamtec argues, incorrectly, that state courts are divided over application of the physical presence standard, and proposes that this Court announce a rule that requires a business's "continuous or permanent" presence in a state before being subject to taxation by that state. Pet. at 25. Lamtec's formulation of a "continuous or permanent" physical presence in a state has never been adopted by this Court or other courts. Lamtec, therefore, shows no conflict created by the Washington Supreme Court's rejection of Lamtec's formulation of a narrow physical presence test for the dormant Commerce Clause.

As discussed above, the Washington court applied the same standard for Commerce Clause nexus that this Court approved when it reviewed Washington's wholesaling B&O tax. The court explained that Commerce Clause nexus depended on "whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." Pet. App. at 14a (quoting *Tyler Pipe*, 483 U.S. at 250).[9] The court below then concluded that Lamtec's Washington activities satisfied this standard because Lamtec

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[9] Given the Washington Supreme Court's heavy reliance on the *Tyler Pipe* standard, amici's claim that allowing the decision below to stand would make *Tyler Pipe* an "orphan" is misplaced. *See* Br. Of Amicus Tax Found. at 19.

regularly sent employee sales representatives into the state to meet in person with its customers and specifically for the purpose of maintaining its customers in Washington. Pet. App. at 2a, 15a. The record solidly supports this conclusion. Lamtec considered these visits significant to its business model and marketing, and would not even consider abandoning the visits because that would be "a poor business practice." CP at 345-46; *see also* CP at 295-96. The in-person visits to customers were particularly significant to maintaining Lamtec's wholesale market in Washington in light of its business model of cultivating a small number of high-volume and long-term customers.

Lamtec does not challenge the *Tyler Pipe* standard applied by the Washington Supreme Court. Instead, Lamtec argues that the decision below conflicts with several state court decisions that did not find nexus where an out-of-state corporation made a small number of visits to the taxing state. Those decisions are factually distinguishable from the decision below. Read fairly, the decisions do not conflict with the reasoning of the decision below, but rather reinforce that decision.[10]

The Kansas Supreme Court held that eleven visits over a four-year period in order to install a

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[10] Furthermore, Lamtec's presentation of its case in the Washington courts suggests that Lamtec itself concluded that these cases are distinguishable from its case. Lamtec did not cite these decisions in its briefing to the Washington Supreme Court or the Washington Court of Appeals, despite being made aware of them through the Department's briefing to the trial court.

component of its product was insufficient to establish nexus. *See In re Appeal of Intercard, Inc.*, 14 P.3d 1111, 1122-23 (Kan. 2000). In reaching that conclusion, the Kansas court relied on the facts that the visits were "sporadic" and "isolated." *Id.* at 1122. The court reasoned that the visits were very minor activities, were solely at the customer's request, and that the visits were not used in any way to promote the sales of its products. *Id.* at 1114.

Similarly, the Florida appellate courts found no substantial nexus from the presence of a company's two employees for three days each year, where the presence was not for the purpose of developing a market in Florida. *Florida Dep't of Revenue v. Share Int'l, Inc.*, 667 So. 2d 226 (Fla. Dist. Ct. App. 1995), *aff'd*, 676 So. 2d 1362 (Fla. 1996), *cert. denied*, 519 U.S. 1056 (1997). Share International was a Texas mail-order vendor with no permanent presence in Florida. Two Share employees attended a seminar in Florida for three days out of the year, during which they promoted Share's products and received some orders for sales. *Share Int'l, Inc.*, 667 So. 2d at 230. The seminar included mostly out-of-state participants, was held in winter months specifically to encourage out-of-state participants, and the trial court found that Share "did not create a customer base in Florida during its presence at the seminars and did not exploit the consumer market in Florida." *Id.* Share collected and remitted sales tax on sales it made to customers during the seminars, but not on the mail order sales it sent to purchasers in Florida at other times. *Id.*

Neither decision purports to establish a standard by which to determine whether non-permanent physical presence provides sufficient Commerce Clause nexus. But both decisions are consistent with the decision below because the courts either explicitly or implicitly found that the activities were not associated with establishing or maintaining a market in the state.

More importantly, neither decision provides support for Lamtec's far narrower rule requiring continuous or permanent physical presence.[11] Indeed, Lamtec's rule would not have allowed Florida to require Share to collect sales tax on the sales solicited, negotiated, paid for, and delivered within Florida. Not even Share sought such an extreme outcome; instead, the company paid and remitted sales tax for sales made and delivered in Florida. *Florida Dep't of Revenue*, 667 So. 2d at 230.

For these reasons, the decision of the Washington Supreme Court with regard to Lamtec's physical presence does not present a conflict with other state courts and is well grounded in this Court's precedent. The fact-specific application of

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[11] Likewise, neither of these two decisions nor any reported decision of which the Department is aware supports the rule proposed by amicus Tax Foundation involving shifting presumptions and burdens of persuasion. Brief of the Tax Foundation as Amicus Curiae at 21. The Tax Foundation cites no authority for the proposed rule, and appears to simply advocate it as good policy, an argument more appropriately directed to Congress than to this Court.

the physical presence requirement to Lamtec does not warrant this Court's review.

CONCLUSION

The petition for certiorari should be denied.

RESPECTFULLY SUBMITTED.

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