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 Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Corporate Disclosure Statement

Petitioner Lamtec Corporation set forth its Rule 29.6 Statement at page ii of its petition for a writ of certiorari, and there are no amendments to that Statement.

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THE WRIT SHOULD BE GRANTED

The Washington Supreme Court subjected Lamtec, an out-of-state corporation, to its "Business and Occupation" ("B&O") tax. It is undisputed that Lamtec had no "physical presence" in Washington in the "brick and mortar" sense and that Lamtec had no permanent employees in Washington. The sole asserted constitutional basis for the imposition of the in-state business tax on the out-of-state company is sporadic, infrequent, brief visits to the State by Lamtec sales representatives, totaling a handful of visits per year. The Washington Supreme Court's decision subjecting Lamtec to B&O tax therefore conflicts with this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and with the decisions of other state courts. The reach of *Quill* and the application of its "physical presence" test were presented to, and decided by, the Washington Supreme Court. These issues are the subject of continuing litigation in States throughout the country, at great expense to taxpayers and States alike. The time is ripe for this Court to intervene and clarify the limits on state taxing authority under the Commerce Clause.

None of the four reasons the State proffers for denying review of its assertion of taxing jurisdiction over Lamtec withstands scrutiny. First, contrary to the argument in the State's Brief in Opposition ("BIO"), the decision below explicitly considered and rejected Lamtec's argument that *Quill* prevents imposition of business activity taxes unless the taxpayer has "a 'brick and mortar' presence or at least an established sales force within the taxing state." Pet. App. A, at 7a. The decision thus squarely presents the issue whether a State may im-

pose an excise tax or business activity tax on a company lacking a significant physical presence in the State.

Second, the State erroneously dismisses the conflict between state courts as insignificant. As evidenced by the recurring litigation over the issue and by the briefs of the amici curiae in this case, the conflict is certainly significant to those faced with the obligations to comply with a complex patchwork of state and local tax laws and to steward corporate resources by resisting unconstitutional exactions.

Third, the fact that this case does not involve complex questions regarding intellectual property or electronic commerce counsels in favor of, rather than against, review. The straightforward facts offer the Court an opportunity to elucidate clear Commerce Clause principles in a manner that provides guidance for application of those principles to other sets of facts.

Fourth, the State is wrong in suggesting that the Washington Supreme Court's approval of its extraterritorial authority is an unremarkable application of settled principle. State courts starkly disagree over whether occasional visits to a State constitute a cognizable physical presence. Resolution of the conflict regarding the nature of contacts sufficient to establish physical presence would provide important guidance to companies structuring their operations. The State's repeated contention that a few sporadic, infrequent, brief visits satisfy this Court's "physical presence" requirement serves to highlight the need for this Court's review.

1. In the petition, the first question presented is whether this Court's holding in *Quill*—that the Commerce Clause prevents a State from imposing a sales or use tax on a company lacking physical presence in the State—applies to other types of taxes, such as the business activity tax at issue here.

The State's contention that "the record and arguments were not developed with that issue in mind" is plainly incorrect. BIO at 13. The Washington Court of Appeals decision included a lengthy discussion and resolution of the issue. Pet. App. B, at 29a-32a. That decision quoted *Quill*, listed its facts, described "Lamtec's *primary* argument . . . that it does not have a substantial nexus with Washington because it does not maintain a physical presence in the state," considered the cases on both sides of what it characterized as a split, and then resolved the issue. *Id.* at 29a-31a (emphasis added). If the State did not develop its arguments below with Lamtec's "primary argument" in mind, it was not because it lacked notice of Lamtec's position.

The State's argument that the Washington Supreme Court did not rule on the question presented is similarly unpersuasive. The Washington Supreme Court explicitly stated its understanding that (1) Lamtec urged applicability of *Quill* and (2) the State argued that the stringent physical presence test announced by this Court in *National Bellas Hess, Inc. v. Department of Revenue*, 368 U.S. 753 (1967), and reaffirmed in *Quill* need not be satisfied. In the words of the court:

> Lamtec effectively urges us to adopt the 'bright-line' physical presence test required for sales and use taxes established by *Bellas Hess*, 386

> U.S. at 758, in the mail order context. The Department concedes the company does not have a brick and mortar presence but argues that under *Tyler Pipe* [*Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987)], *significantly less activity within a state is sufficient to establish a nexus for B&O taxes*.

Pet. App. A, at 7a (emphasis added).

The majority below resolved this dispute by applying a standard from *Tyler Pipe*—a decision outside the *Quill* context—that, as the State argued, permits a finding of nexus based on "significantly less activity within a state." *Id.* *See* BIO at 7 ("[T]he 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)."); *see also id.* at 22-23 ("Moreover, the Washington Supreme Court decision is solidly grounded in this Court's precedent, *Tyler Pipe* . . . ."). The majority also explicitly rejected (or misinterpreted) the *Quill* physical presence standard: "The United States Supreme Court . . . has not held that an established sales force (**or a physical presence**) is a *requirement* to establish the requisite nexus." Pet. App. A, at 7a (underscored emphasis added).

The dissenting opinion likewise understood the majority to have refused to apply the *Quill* standard to its B&O tax: "[U]nlike the majority here, I am more persuaded by the line of decisions from state courts that have extended the bright line rule of *Quill* to other types of state taxes." *Id.* at 16a. Because "[o]ccasional visits to the state by employees of Lamtec do not . . . meet the physical presence test,"

the dissent concluded that the State lacked the requisite nexus to tax Lamtec. *Id.* at 17a.

There should thus be no doubt that the Washington Supreme Court squarely rejected Lamtec's argument that its nexus with Washington should be evaluated under the stringent *Quill/Bellas Hess* standard, and that this issue is properly presented to this Court.[1]

2. As the State implicitly concedes when it urges that the split regarding the reach of *Quill*'s physical presence standard is not "significant" (BIO at 15), there is an ongoing dispute over this issue in the state courts. There are several reasons why the Court should grant certiorari and resolve the split now.

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[1] The State also claims that amendments to its tax code should prevent review of the decision below. Most fundamentally, this case squarely presents recurring issues throughout the country—*i.e.*, whether *Quill/Bellas Hess* applies outside the sales and use tax context, and the threshold of presence required for a state's extraterritorial taxing authority—the prevalence and importance of which are not affected by the new statute. Moreover, as the State admits, the amended statute continues to assert taxing jurisdiction absent physical presence in some instances (BIO at 14 n.6); as the Washington Supreme Court determined (Pet. App. A, at 13 n.7), the statutory change is not relevant to the issues squarely presented here and has not been construed or interpreted. Whether physical presence is constitutionally required to establish nexus, and the nature of such presence, remain important issues in Washington and throughout the nation. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (deciding constitutional issue while acknowledging statutory change subsequent to conduct at issue).

First, the split is longstanding and real, as recognized in both the majority and the dissent in the Washington Supreme Court, as well as in the Washington Court of Appeals. *See* Pet. App. A, at 12a (stating that the "authorities are not unanimous"); *id.* at 16a (describing the authorities as "split"); App. B, at 31a ("[C]ourts have developed a split in authority as to whether the Supreme Court's holding was limited to sales and use taxes."). The State repeatedly emphasizes the fact that a majority of the courts to address the issue have agreed with its position, *see, e.g.*, BIO at 16, but this is neither surprising nor dispositive. States seeking to assert taxing jurisdiction over out-of-state businesses are litigating in their own courts; as they litigate, States are well aware that, if their own courts adopt Lamtec's position, they will be put at a disadvantage in raising revenue, particularly at a time of budget difficulties and evermore aggressive efforts to raise funds for the public fisc. The Commerce Clause is a bulwark against precisely such parochial concerns, and this Court is the only court that can address the issue from other than a home-state perspective.

The State's attempts to undermine the cases that have adopted Lamtec's position do not reconcile the split. *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), rejected Tennessee's attempt to impose franchise and excise taxes on a company lacking physical presence in the State because "physical presence is required in order to satisfy the substantial nexus requirement of *Complete Auto*." 19 S.W.3d at 840. The State does not and cannot contend that the case has been overruled. Similarly, what the State deems the "unique facts," BIO at 18, of *Rylander v. Bandag Licensing Corp.*, 18

S.W.3d 296 (Tex. Ct. App. 2000), do not undermine its legal holding 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.

Second, the briefs of the amici curiae supporting the petition confirm the importance of this issue. The amici explain that the uncertainty encouraged by this Court's decision not to resolve the issue has proved a costly burden on interstate commerce. Businesses have an obligation to comply with the law, but they also have a corporate obligation not to waste resources by paying unlawful taxes. As long as reasonable jurists, like those in the majority and dissent in this case, disagree about the applicability and scope of the physical presence requirement, businesses facing large tax liabilities will be compelled to litigate the issue. The Court should put an end to the continued uncertainty and to this needless expenditure of resources.

Third, there are several reasons why the Court should clarify the reach of *Quill* notwithstanding the fact that it has not done so in the past. The decision below proves that the issue is not, as the State suggests, going away. BIO at 16. Since the Court's most recent denial of certiorari on a *Quill*-related petition, the state supreme court in this case unanimously recognized the split and divided over the proper resolution of it. Moreover, since this petition was filed, this Court has decided two cases clarifying longstanding precedent to place limits on a State's ability to assert its authority over those located outside its borders. *See Goodyear Dunlop Tires Operations, S.A.*

v. Brown, 2011 WL 2518815 (June 27, 2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 2011 WL 2518811 (June 27, 2011). Although these cases involved application of the Due Process Clause rather than the Commerce Clause, they both recognize the threat to commerce posed by state jurisdictional overreaching.

For years, the state courts have disagreed whether *Quill*'s physical presence requirement applies to taxes other than sales and use taxes. They continue to do so. Numerous parties, as well as amici representing large and small businesses across the country, have asked the Court to resolve the issue. This petition presents an ideal opportunity for the Court to do so.

3. The State's argument that this case is a poor vehicle for clarification of the limits on state taxing authority actually counsels in favor of granting certiorari. The State concedes that there are "prevalent issues in other state courts" regarding "the economic nexus sufficient to allow taxation of out-of-state companies." BIO at 21. The persistence of these "prevalent issues," which the State concedes have been raised "numerous" times, buttresses Lamtec's and its amici's arguments that the reach of *Quill* and its application are unsettled. *Id.*

The State nonetheless contends that this case is a poor vehicle for resolution of the debate regarding *Quill* because it does not involve "the presence of intangible property, affiliated companies within in the taxing state, [ ] technological issues of e-commerce . . . [or] other factors such as the provision of services or extension of credit within the state." BIO at 21. The State's list serves only to highlight the broad range of contexts in which the dispute arises regarding a

State's authority to tax those beyond its borders. Contrary to the State's view, there is much to recommend clarifying the application of *Quill* on simple facts and in the absence of these difficult complicating factors in order to avoid the possibility that any holding could be limited to its facts. Straightforward facts permit the clear articulation of principles that can be applied across a range of other contexts.[2]

4. The State's attempts to explain away the conflict among the state courts regarding whether occasional visits to a state can constitute physical presence are similarly unconvincing.

The State first incorrectly contends that "the Washington Supreme Court is solidly grounded" in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987). BIO at 22-

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[2] Lamtec notes, as it did in the petition (Pet. at 15 n.1), and as observed by the State (BIO at 17 n.8, 22), that there is another pending petition that raises the issue whether *Quill*'s physical presence standard applies to taxes other than sales and use taxes. In that case, the State found nexus based on income earned from transactions with third-party franchisees. *See KFC Corp. v. Iowa Dep't of Revenue*, No. 10-1340. The Court could grant both Lamtec's and KFC's petitions to allow for full consideration of the constitutional issues on multiple sets of facts, as it has done in other cases challenging the constitutionality of government action. *See, e.g., Goodyear Luxembourg Tires Operations, S.A. v. Brown*, 131 S. Ct. 63 (2010) (granting certiorari and ordering argument in tandem with *J. McIntyre Machinery, Ltd. v. Nicastro*, where both petitions raised personal jurisdiction issues); *United States v. Booker*, 543 U.S. 220 (2005) (considering Sixth Amendment challenge to Sentencing Guidelines in two cases consolidated upon grant of certiorari).

23. There, however, the taxpayer Tyler had an "in-state sales representative engaged in substantial activities that helped Tyler to establish and maintain its market in Washington." *Id.* at 249. The Court explained the substantial activities that the sales representative undertook on Tyler's behalf: "The sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders." *Id.* (quoting *Tyler Pipe Indus., Inc. v. State Dep't of Revenue*, 715 P.2d 123, 127 (Wash. 1986)).

By contrast, there is no dispute in this case that Lamtec has no sales representatives in Washington, nor does it have anyone acting daily on its behalf in the State. *Tyler Pipe* had no occasion to consider, and thus did not address, whether infrequent, sporadic, brief visits could constitute nexus in the absence of any other asserted physical presence in the State.

The State's attempts to rationalize the splits between the cases cited by Lamtec fail. As the State points out, in *In re Appeal of Intercard, Inc.*, 14 P.3d 1111 (Kan. 2000), the visits by Intercard employees "were not in any way used to promote the sales of its products." BIO at 25. But that fact does not account for the divergence in results between the cases; as explained by the Washington Supreme Court, the Lamtec employees who occasionally visited customers did not solicit sales. Pet. App. A, at 2a, 17a-18a.

The employees who made regular visits to Florida in *Florida Dep't of Revenue v. Share Int'l Inc.*, 676 So.2d 1362 (Fla. 1996), "promoted Share's products and received some orders for sales." BIO at 25. According to the trial court, "16% of the attendees at its Florida seminar were residents of Florida," and

Share promoted its products while its employees were at the seminar. *Florida Dep't of Revenue v. Share Int'l Inc.*, 667 So.2d 226, 230 (Fla. Dist. Ct. App. 1996). Unlike Lamtec, Share clearly engaged in sales activities in the taxing jurisdiction, and yet was held beyond the reach of the state under the Commerce Clause.

The State points out that Share paid and remitted sales tax for sales it made and delivered in Florida. BIO at 26. The State does not, however, offer any explanation why that fact should affect the constitutional analysis, and there is none. Share either had sufficient nexus with Florida to be taxed there, or it did not. The Florida Supreme Court's decision is entirely consistent with Lamtec's contention that the physical presence required by *Quill* is more substantial than occasional visits to the taxing State to meet with existing customers.

The State's selective parsing of the facts in *Tyler Pipe*, *Intercard*, and *Share* cannot obscure the fact that the state courts are in conflict regarding the nature and duration of contacts with the taxing State sufficient to constitute a physical presence. This case presents a compelling need for the Court to resolve the conflict and provide clarity on this important constitutional issue, which goes to the heart of a State's ability to extend its taxing authority to out-of-state businesses.

CONCLUSION

For these reasons and for those set forth in the petition and the briefs of the amici curiae, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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