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

BRIEF OF *AMICI CURIAE* OF COUNCIL ON STATE TAXATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of the Petitioner ("Lamtec") is filed on behalf of two trade associations representing the largest businesses in our nation's state and local economies.[1] Unless this Court clari-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amici's* intent to file this brief. Petitioner and Respondent have consented to the

fies whether in-state physical presence remains the standard by which a business becomes subject to a state's taxing jurisdiction, the thousands of members of *amici's* associations face substantial costs in determining their tax liabilities and in some instances are not able to ascertain those liabilities accurately at all.

The Council On State Taxation ("COST") is a nonprofit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

As *amici*, COST or the NAM have participated in many of this Court's significant state tax cases over the past 40 years, including *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S. 425 (1980); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U. S. 768 (1992); *Hunt-Wesson, Inc. v.*

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filing of this brief and their letters have been filed with the Clerk of this Court.

Franchise Tax Bd. of Cal., 528 U. S. 458 (2000); and *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16 (2008).

The case below represents the latest in a long string of state court cases upholding the ability of a state to impose tax based upon the "economic presence" of a taxpayer. *Amici* members are fretful that if this Court does not clarify that the "physical presence" standard applies to all state taxation, the growing uncertainty as to when a jurisdiction's tax applies will soon adversely affect all taxpayers—large and small.

SUMMARY OF THE ARGUMENT

Historically, a corporation's physical presence in a state served as the prerequisite for any type of tax, including income taxes and taxes like the Washington State's Business and Occupation ("B&O") tax. In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 754 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court reaffirmed the physical presence rule in the context of sales and use taxes. However, most states continue to expand aggressively their own tax revenues by asserting the power to tax the corporate activities of out-of-state businesses that have no physical presence in the taxing state. States have adopted a variety of expanded "nexus" standards through judicial, legislative, and administrative action. These standards—which are often ambiguous and vary widely from state to state—are highly burdensome for taxpayers doing business in multiple jurisdictions and thus place an enormous burden on interstate commerce. Yet the highest courts of several states, including Massachusetts, West Virginia, New Jersey and South Carolina have held that the Commerce Clause does

not prevent the imposition of non-sales taxes upon out-of-state corporations with no physical presence in the state. While some state appellate courts have issued similar decisions, others have held the opposite.

The importance of the Court's review of the Washington decision extends well beyond the direct conflict among state courts regarding the meaning of the Commerce Clause. To be sure, this Court's review is urgently needed because accelerating departures from the physical presence rule and the resulting uncertainty over the jurisdictional grounds of state taxation create a new level of an impermissible burden on interstate commerce. States are increasingly asserting that they have the unfettered right to impose a business tax on an out-of-state business that merely makes sales into the state, with no related or independent agents assisting the out-of-state business to establish or maintain its market in the taxing state.[2]

The uncertainty in calculating a multistate business's state tax liability stems both from the divergent approaches taken by different states and the nebulous and unpredictable nature of alternatives to the physical presence rule. The uncertainty gene-

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[2] The Multistate Tax Commission in October 2002 approved a model statute that suggests an out-of-state business merely having $500,000 or more in sales to customers in a state is sufficient threshold for a state to impose one of its business taxes. At least seven states have adopted some form of this model statute. Cal. Rev. & Tax. Code § 21101; Colo. Code Regs. § 39-22-301; Conn. Informational Pub. 2010(29) (Conn. Dept. Rev. 2010); Mich. Comp. Laws § 208.1200; Ohio Rev. Code § 5757.01; Okla. Stat. tit. 68, § 1218; & Wash. Rev. Code §§ 82.04.066 & 82.04.067.

rates a considerable increase in compliance costs and administrative burdens, as well as problems in determining and reporting the business's tax liability for required financial statements. A business that cannot accurately ascertain its tax liability, even internally, can hardly be expected to make meaningful disclosures to investors. As a result, there are real economic losses when a company decides not to undertake an otherwise profitable opportunity (such as expanding its business into a new state) because of the expense and uncertainty inherent in state tax jurisdiction rules. The same reasons that animated this Court's grant of review in *Quill* militate even more strongly in favor of *certiorari* in this case.

ARGUMENT

I. UNCERTAINTY AND THE STATE-LED EVOLUTION OF STATE AND LOCAL TAX COMPLIANCE OBLIGATIONS CREATES AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

Physical presence has traditionally served as the basis for the imposition of corporate income and franchise taxes. In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), this Court held that a systematic program of direct mail advertising was not sufficient to justify imposition of use tax on an out-of-state seller. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court reaffirmed the physical presence rule in the sales and use tax context as a limit "firmly establish[ing] the boundaries of legitimate state power." *Id*. at 315.

The physical presence rule is a bright-line rule that provides a business with an adequate understanding of when and where it will be subject to tax. As a

leading constitutional scholar has observed, the rule "provides some measure of stability to parties engaged in commercial interchange and provides a more hospitable environment for the flourishing of nascent modes of free-floating interstate commerce, which might otherwise perish on the rocky shoals of overmuch state taxation." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1125 (3d ed. 2000).

As discussed in more detail below, however, some states have departed from the physical presence rule in the imposition of corporate income and other business activity taxes. As states adopt their own versions of a "nexus" test, multistate taxpayers face a variety of different standards and vague guidelines. Taxpayers are denied a clear understanding of their tax liabilities, and even whether they are required to pay tax in a jurisdiction at all. As commentators recently noted:

> [W]e are now in a world in which a business, remotely present in multiple states, is faced with a wide range of nexus standards regarding the complex commercial transactions. The convergence of these trends, the blurring of nexus standards, and the increasing complex global economy call into question the ability to fairly administer the current state and local taxing system.

Giles Sutton, Eric de Moya, and Chuck Jones, *Attributional Nexus, Flash Title, And the Chaos in Nexus Standards*, 2008 State Tax Today 74-2 (Apr. 21, 2008).

The current confusion surrounding income tax nexus is not that different from the situation this Court faced in *Quill* when addressing sales and use

taxes. The Court acknowledged then that "our 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 indispensible power of taxation.'" *Quill*, citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959). Such uncertainty, which has rapidly proliferated in recent years, offends the core values protected by the Commerce Clause and amply warrants this Court's review.

In *Quill*, this Court recognized that anything but a physical presence rule would be an undue burden on interstate commerce because of the significant cost of compliance with sales and use tax laws in a multistate environment. The same conclusion applies here because compliance with other taxes is often substantially more complex and burdensome than the sales and use tax compliance analyzed in *Quill*. In the sales and use tax context, only two broad questions must be asked and answered: Is the item taxable or non-taxable? If the item is taxable, what is the applicable tax rate? The burdens uniquely associated with uncertainty are few with respect to sales and use taxes, because compliance is straightforward.

In contrast, other taxes that are based on business activities are demonstrably more complex because there are dozens of independent questions and judgments that must be made in calculating tax liability. Without a physical presence rule, companies would need to examine these questions jurisdiction-by-jurisdiction, corporate-entity by entity, and year-by-year. Record-keeping in that context is also signifi-

cantly more elaborate than in the area of sales and use, where only the records of sales need be retained.

Additionally, the number of potential taxing jurisdictions at the state and local level that can impose a business activity tax is dramatically higher than the number of jurisdictions imposing a sales and use tax. *See Quill*, 504 U.S. at 313 n.6. Multistate businesses face the prospect of taxation not only in 50 states, but also in thousands of localities authorized to impose corporate income, franchise and other business activity taxes. In the absence of a physical presence rule, multistate businesses will face significant costs in trying to determine the jurisdictions in which they face potential tax liabilities and the applicable rules of those jurisdictions. Some may be unable to ascertain accurately their tax liabilities at all. Each multistate business—large and small—must analyze a long list of issues for every jurisdiction where it has a commercial profile.

The current environment creates a nonsensical situation when you compare the income tax and use tax collection obligations arising from a particular transaction. Under the positions taken by many states, a taxpayer with no physical presence in the jurisdiction can be subject to taxation on income earned from a sale into a jurisdiction—which is increasingly apportioned to a state using only a receipts factor. The taxpayer would have no use tax collection obligation, yet the transaction would be the basis of single factor apportionment to the jurisdiction—which essentially sources the entire income from the transaction to the jurisdiction. Such a conclusion makes no sense economically or from a compliance standpoint.

II. UNCERTAINTY AND CONFUSION ABOUT THE APPROPRIATE NEXUS STANDARD IS A RAPIDLY GROWING PROBLEM

Over the last 20 years, numerous taxpayers and at least one tax administrator have asked this Court to address the exact issue in this case, which is whether the physical presence standard enunciated in *Quill* is limited to sales and use tax collection responsibility. In fact, this very term five other taxpayers have asked the Court to review whether the "physical presence" standard applies to non-sales and use taxes imposed by Oklahoma, Texas, Kentucky, and Iowa.[3] While the certiorari petitions over the last two decades have covered a broad spectrum of different state and local taxes, the core requests have been the same—there must be clarification on the scope of the application of the physical presence rule.[4] It's time for the Court to resolve this long-festering issue.

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[3] *Peoples Gas, Light, and Coke Co. v. Harrison Cent. Appraisal Dist*., 270 S.W.3d 208 (Tex. App. 2008), *cert. denied*, 79 U.S.L.W. 3435, 79 U.S.L.W. 3589, 79 U.S.L.W. 3591 (U.S. Apr 18, 2011); *Midland Cent. Appraisal Dist. v. BP America Production Co*., 282 S.W.3d 215 (Tex. App 2009), *cert. denied*, 79 U.S.L.W. 3422, 79 U.S.L.W. 3589, 79 U.S.L.W. 3591 (U.S. Apr 18, 2011); *Asworth et al. v. Dep't of Revenue*, Nos. 2007-CA-00259 & 2008-CA-000023 (Ky. App. Nov. 20, 2009), *cert. denied*, 131 S. Ct. 1046 (2011), *rehearing denied*, 131 S. Ct. 1720 (2011); *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, *Missouri Gas Energy v. Schmid*t, 130 S. Ct. 1685 (U.S. 2010), *rehearing denied*, 130 S. Ct. 2141 (2010); *KFC Corp. v. Iowa Dept. of Revenue*, 792 N.W.2d 308 (Iowa 2010) *petition for certiorari filed*, 79 U.S.L.W. 3648 (Apr 28, 2011) (No. 10-1340).

[4] *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E. 2d 13 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993); *Koch Fuels, Inc. v. Clark*, 676 A.2d 330 (R.I. 1996), *cert. denied*, 519 U.S. 930 (1996); *Couchot v. State Lottery Comm'n*, 659 N.E.2d 1225

While the systematic appellate litigation over the physical presence standard underscores the need for guidance from the Court, disputes over the appropriate standard occurs at all levels of tax administration. The physical presence standard is the basis for dispute in tax audits and assessments across the

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(Ohio), *cert. denied*, 519 U.S. 810 (1996); *J.C. Penney Nat. Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *appeal denied* (Tenn. May 08, 2000), *certiorari denied*, 531 U.S. 927 (2000); *Gen. Motors Corp. v. City of Seattle*, 25 P.3d 1022, 1029 (Wash. App.), *pet. rev. denied en banc*, 84 P.3d 1230 (Wash. 2001), *cert. denied*, 535 U.S. 1056 (2002); *Comptroller of the Treasury v. Syl, Inc*., 825 A.2d 399 (Md. 2003), *cert. denied* 540 U.S. 984 (2003); *Crown Cork & Seal Co. (Delaware), Inc. v. Comptroller of the Treasury of Maryland*, 825 A.2d 399 (Md. 2003), *cert. denied*, 540 U.S. 1090 (2003); *A&F Trademark, Inc. v. Tolson*, 605 S.E.2d 187 (N.C. 2004), *certif. denied*, 611 S.E.2d 168 (N.C.), *cert. denied*, 126 S. Ct. 353 (2005); *Tax Com'r of State v. MBNA America Bank, N.A*., 640 S.E.2d 226 (W.Va. 2006) *cert. denied by FIA Card Services, N.A. v. Tax Com'r of West Virginia,* 551 U.S. 1141 (2007); *Lanco, Inc. v. Director, Div. of Taxation*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007); *Capital One Bank v. Commissioner of Rev*., 899 N.E.2d 76 (Mass. 2009), *cert. denied*, 129 S. Ct. 2827 (2009); *Geoffrey, Inc. v. Commissioner of Revenue*, 899 N.E.2d 87 (Mass. 2009), *cert. denied*, 129 S. Ct. 2853 (2009); *Peoples Gas, Light, and Coke Co. v. Harrison Cent. Appraisal Dist*., 270 S.W.3d 208 (Tex. App. 2008), *cert. denied*, 79 U.S.L.W. 3435, 79 U.S.L.W. 3589, 79 U.S.L.W. 3591 (U.S. Apr 18, 2011); *Midland Cent. Appraisal Dist. v. BP America Production Co*., 282 S.W.3d 215 (Tex. App 2009), *cert. denied*, 79 U.S.L.W. 3422, 79 U.S.L.W. 3589, 79 U.S.L.W. 3591 (U.S. Apr 18, 2011); *Asworth et al. v. Dep't of Revenue*, Nos. 2007-CA-00259 & 2008-CA-000023 (Ky. App. Nov. 20, 2009), *cert. denied*, 131 S. Ct. 1046 (2011), *rehearing denied*, 131 S. Ct. 1720 (2011); *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, *Missouri Gas Energy v. Schmidt*, 130 S. Ct. 1685 (U.S. 2010), *rehearing denied*, 130 S. Ct. 2141 (2010); & *KFC Corp. v. Iowa Dept. of Revenue*, 792 N.W.2d 308 (Iowa 2010) *petition for certiorari filed*, 79 U.S.L.W. 3648 (Apr 28, 2011) (No. 10-1340).

nation. At the same time, a number of states have made statutory or administrative changes asserting authority to tax corporations with no physical presence, which will undoubtedly lead to more litigation.[5] As a result of this confluence, taxpayers, tax administrators, and state legislators need guidance on the scope of the Commerce Clause limitation on state taxation.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[5] *See*, *e.g.*, Ark. Reg. 1996-3; Fla. Admin. Code Ann. r. 12C-1.011 (p)1 (2009); Iowa Admin. Code r. 701.52.1(422), 52.1(1)d (2009); Minn. Stat. § 290.015(1)(c)(3) (2009); Okla. Admin. Code § 710:50-17-3(a)(9) (2009); Wis. Admin. Code Tax § 2.82(4)9 (2007).