No. 88-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE JIMMY SWAGGART MINISTRIES,
Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal of the State of California, Fourth Appellate District, Division One

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION; JOINED BY THE MULTISTATE TAX COMMISSION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the court of appeal's rejection of appellant's Due Process and Commerce Clause arguments rests on an independent and adequate state ground.

2. Whether appellant's systematic and purposeful exploitation of the California market in its mail order business provides an adequate "nexus" to support the imposition of the State's use tax.

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INTEREST OF *AMICI CURIAE*

Amici National Conference of State Legislatures, National League of Cities, U.S. Conference of Mayors, National Association of Counties, and International City Management Association are organizations whose members include state, county, and municipal governments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission is the official administrative agency of the Multistate

Tax Compact. The Compact has been entered into by 18 States and the District of Columbia as full members; 11 additional States have joined the Commission as associate members.[1] The Commission has a vital and continuing interest in tax disputes that may affect the administration of state tax systems.

This case presents a recurring problem: appellant, an out-of-state entity that derives profits from its systematic and purposeful exploitation of an in-state market, is attempting to avoid state taxation by asserting that it lacks a sufficient "nexus" with the taxing State. This issue is of enormous fiscal importance to state and local governments. Entities like appellant draw substantial benefits from the services and infrastructure provided by individual States; unless those entities are made to pay their own way, in-state taxpayers will be forced to shoulder a disproportionate share of the state tax burden. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[2]

STATEMENT

This brief addresses only the first question presented in appellant's brief on the merits (corresponding to the fifth question presented in the jurisdictional statement), which concerns the "nexus" requirement that the Court has derived from the Due Process and Commerce Clauses. The statement of the case therefore is limited to a de-

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[1] The current full members are Alaska, Arkansas, California, Colorado, the District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are Alabama, Arizona, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Jersey, Ohio, Pennsylvania, and Tennessee. This brief should not be read to reflect the views of any member State that files a separate brief in this case.

[2] The parties' letters of consent pursuant to Rule 36 of the Rules of this Court have been filed with the Clerk of the Court.

scription of evidence and procedural developments that are relevant to the nexus issue. The limited scope of this brief, however, does not reflect disagreement with appellee's position on the merits of the First Amendment question in this case; to the contrary, we associate ourselves with appellee's First Amendment arguments.

1. Appellant is a nonprofit religious organization.[3] During 1974-1981, the tax years at issue here, appellant operated a mail order business from its headquarters in Baton Rouge, mailing religious items—principally books, tapes, and records—to purchasers in (among other places) California. J.S. App. A2-A4. These products were offered for sale through magazines, product catalogs, and special flyers that were sent to individuals in California whose names appeared on appellant's mailing list. J.A. 21, 49-50, 62. The parties stipulated below that appellant's California mail order sales during the period at issue amounted to $1,702,942. J.S. App. 45.

Appellant also had other contacts with California during 1974-1981, although the extent of those contacts is somewhat uncertain because the issue was not the subject of discovery below. It nonetheless is clear that appellant conducted 23 evangelistic "crusades" in California during that period, at which appellant held religious services that involved preaching and singing, and sold various religious and nonreligious items. J.S. App. A3.[4] The "crusades" typically lasted from one to three days,

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[3] During most of the period at issue here appellant was a nonprofit religious corporation. In 1982 the Internal Revenue Service changed appellant's income tax status to that of a church, making the change retroactive to 1980. J.S. App. A2 n.1.

[4] The parties stipulated below that appellant sold $240,560 worth of merchandise at the California crusades. J.S. App. A5. For purposes of its nexus argument appellant does not contest the validity of the imposition of California's sales tax on these transactions (Br. 16), and we therefore confine our discussion to the validity of the use tax associated with appellant's mail order sales.

with one "crusade" lasting six days; over the seven-year period at issue here, appellant conducted 52 days of "crusades" in California. *Ibid.* The crusade activity in California was recorded for later sale or broadcast. *Id.* at A3, A37; J.A. 20. In addition to the actual crusade dates, there was evidence below that appellant's staff spent time in California, where they "made hotel reservations, negotiated and secured leases for crusade meeting places, secured publicity for the meetings, etc." J.A. 20. Similarly, "[s]ome of the time between crusade meeting dates in California included visits with local followers, removal of equipment and facilities, travel to the next location and setting up for the next meeting." *Ibid.*

Appellant also had contacts with California that were unrelated to the "crusades." From 1978 through 1984, a period that includes the last three of the tax years at issue here, appellant maintained a full-time representative in California who counseled adherents and solicited donations. J.S. App. A36; App. Br. 6; J.A. 21, 208. In addition, appellant sold its religious programs to California radio stations and cable television companies for broadcast within the State. J.S. App. A37. Both the "crusades" and appellant's broadcasts were used to further its mail order sales; appellant stipulated below that the availability of mail order products was made known "at evangelistic crusades and over the radio and television in connection with [appellant's] religious broadcasts." J.A. 62. See *id.* at 49-50.

2. California requires retailers to pay a sales tax "[f]or the privilege of selling tangible personal property at retail" within the State. Cal. Rev. & Tax Code § 6051 (1975 & Supp. 1989). California also imposes a complementary use tax "on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer * * * for storage, use, or other consumption." Cal. Rev. & Tax Code § 6201. The use tax typically is applied in cases where the retail sale took place outside

California and therefore was not itself taxable; while the incidence of the use tax falls on the purchaser (see Cal. Rev. & Tax Code § 6201), the seller in most cases must collect the use tax from the purchaser at the time of sale. Cal. Rev. & Tax Code § 6202, 6203.

During the tax years at issue here appellant neither collected nor paid the use tax on its mail order sales of religious property in California; appellant also failed to pay sales tax on the sale of goods at its California "crusades." In 1981 the California Board of Equalization (the "Board") began an audit of appellant, and the parties eventually stipulated that appellant "'sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [appellant] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California.'" J.S. App. A5. The Board accordingly informed appellant that it owed use and sales taxes of $118,294.54 (of which approximately $104,000 represented use tax on the mail order sales), in addition to interest and penalties. *Ibid.*

After receiving this notification, appellant filed a petition for redetermination, contesting its liability for the use and sales taxes. The petition rested exclusively on First Amendment grounds, contending that imposition of the taxes would "constitute an interference with the 'free exercise' of religion by the Swaggart organization" (J.A. 12; see *id.* at 11-16); appellant's counsel specifically did "not argue nexus" before the Board. J.A. 22. After a hearing, the Board remitted the penalty but otherwise reaffirmed appellant's liability for the tax. J.A. 32-33. Appellant paid the tax and filed a claim for a refund before the Board; the refund claim incorporated by reference appellant's previously filed petition for redetermination and therefore rested entirely on the Free Exercise Clauses of the federal and state Constitutions. J.A. 34. The Board subsequently denied the refund claim. J.A. 35-36.

3. Appellant then brought this action in California superior court. Like its petition for redetermination and claim for refund, appellant's complaint was grounded on the First Amendment and made no mention of nexus (see J.A. 37-41); the parties stipulated before the trial court that the case involved only free exercise issues. J.A. 59. Appellant first raised a Due Process and Commerce Clause nexus claim immediately prior to trial. Supp. C.T. 1-9. The trial court responded with an order *in limine* excluding evidence unrelated to the First Amendment issue (R.T. 12-14), and at the close of trial rejected appellant's request that it reconsider its exclusion of the nexus question. R.T. 229-231. The court ultimately ruled for the Board on the merits of the free exercise claim, noting that it "made its finding solely upon the issue framed by the pleadings as it relates to first amendment grounds." J.A. 213.

The court of appeal affirmed. J.S. App. A1-A40. The court rejected appellant's free exercise arguments (*id.* at A7-A29), as well as state law, Ninth and Tenth Amendment, and evidentiary contentions (*id.* at A33-A35, A37-A40) that are not repeated here. The court also found that its consideration of appellant's Commerce Clause and due process nexus arguments was precluded by appellant's failure to advance those arguments before the Board. Pointing to provisions of state law limiting refund suits to those issues that were first advanced in an administrative claim for refund, the court observed that "[t]he only constitutional ground [appellant] specified [in its refund claim] was the First Amendment; no other constitutional grounds were stated." J.S. App. A32; see *id.* at A30-A31. The court went on to hold alternatively that "[t]he record contains evidence supporting a finding [appellant] had a sufficient nexus to California to justify imposing the use tax" (*id.* at A35; see *id.* at A35-A37), but on rehearing deleted the portion of its opinion addressing the merits of the nexus issue. J.S. App. A41.

The California Supreme Court denied review. J.S. App. A42.

SUMMARY OF ARGUMENT

A. The court of appeal's decision on nexus rests on an independent and adequate state ground. Under California law, taxpayers bringing refund actions in court may advance only those claims that were first specifically presented to the Board. Appellant failed to comply with this requirement. Its administrative refund claim—the document that fixed the scope of its argument—advanced only free exercise contentions. The trial court therefore refused to address appellant's nexus arguments, and the court of appeal expressly grounded its rejection of the those arguments on appellant's procedural default. Because "[f]ailure to present a federal question in conformance with state procedures constitutes an adequate and independent ground of decision barring review in this Court" (*Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978))—and because the procedural rule involved here serves important state interests—this Court should dismiss for want of jurisdiction the portion of the appeal that advances Commerce Clause and due process arguments.

B. 1. If the Court reaches the merits of the nexus issue, it should reject appellant's arguments. The nexus requirement, which the Court has found in both the Due Process and Commerce Clauses, assures that state taxes bear some relation to the "protection, opportunities and benefits given by the State" (*Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)), while guaranteeing that States tax only those transactions with which they have a connection. The Court repeatedly has made clear, however, that there need not be a dollar-for-dollar correspondence between the benefits conferred by the State and the tax imposed on out-of-state commercial entities, and that those benefits need not be directly conferred.

Against this background, appellant is incorrect in asserting that state taxes may be imposed only upon entities that maintain a continuous physical presence in-state. It is sufficient that the taxpayer has projected a substantial economic presence into the State, marked by the purposeful cultivation and exploitation of an in-state market. Whether or not such a taxpayer physically enters the State, its earnings are made possible by the in-state infrastructure and workforce that facilitate advertising, permit the distribution of goods, and allow for the development of a group of willing consumers—all "benefits which [the State] has conferred by the fact of being an orderly, civilized society." *J.C. Penney*, 311 U.S. at 444.

This conclusion draws substantial support from the Court's recent decisions in the closely related area of personal jurisdiction. In that setting, the Court has held that a State does not exceed its powers under the Due Process Clause when it asserts jurisdiction over firms that deliver products into the stream of commerce with the intention that they be purchased by consumers in the forum State. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). California courts thus could assert jurisdiction over appellant if, for example, an in-state purchaser brought suit because he was injured by one of the products that appellant shipped into the State. There is no reason to suppose that the State nevertheless lacks authority to impose a tax on appellant arising out of the same transaction. To the contrary, "[t]he activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945).

2. Viewed against these principles, the record here demonstrates an adequate nexus to support the imposition of California's use tax on appellant. Most obviously, this Court's decisions place it beyond dispute that appel-

lant is subject to tax for the three-year period during which it had a full-time representative in California. See *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). And for the entire period involved here, appellant's projection of its presence into the State by radio and television, by repeated personal visits during "crusades," and by magazine, catalog, and flyer, plainly manifested a purposeful exploitation of the California market. That exploitation was made possible by the infrastructure and services provided by the State. Indeed, even if only physical presence is taken into account, there is adequate nexus here: there is no reason why a tax should be permissible (as it surely is) when a firm maintains a single employee in-state year-round, but not when the firm—as did appellant—periodically sends many employees into the State.

The Court also should reject appellant's argument that the "crusades" cannot be used to support nexus because doing so will discourage protected religious activity. This argument is grounded on two propositions—that the "crusades" are the only element providing nexus here, and that the "crusades" did not generate mail order sales—that are not supported by the record. In any event, California's use tax is not like the flat license fee at issue in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), cited by appellant, which the Court found functioned as a prior restraint on the exercise of religious rights. It is, instead, quite similar to "a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." *Id.* at 112. Appellant is receiving benefits from the State; like everyone else in society, appellant is simply being asked to pay its own way.

ARGUMENT

APPELLANT'S ARGUMENTS ON "NEXUS" ARE WITHOUT MERIT

A. The State Court's Rejection Of Appellant's "Nexus" Claim Rests On An Independent And Adequate State Ground

It is, of course, black letter law that this Court lacks jurisdiction to "review judgments of state courts that rest on adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983). In particular, "[f]ailure to present a federal question in conformance with state procedures constitutes an adequate and independent decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). See, *e.g.*, *Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Wolfe v. North Carolina*, 364 U.S. 177, 195-196 (1960). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 181-183 (6th ed. 1986). That principle is dispositive here.

California law provides that an administrative claim for a tax refund must "state the specific grounds upon which the claim is founded," and refund suits will be entertained only if "a claim for refund or credit has been duly filed" with the Board. Cal. Rev. & Tax Code §§ 6904(a) (emphasis added), 6932 (1975 & Supp. 1989). Under these provisions, "[t]he claim for refund delineates and restricts the issues to be considered in a taxpayer's refund action. * * * The trial court and [appellate] court are without jurisdiction to consider grounds not set forth in the claim." *Atari, Inc. v. State Board of Equalization*, 170 Cal. App. 3d 665, 672 (1985). A taxpayer therefore may not obtain relief on a theory first propounded at trial. See *id.* at 671-672.

Appellant plainly failed to comply with the requirements of California law in advancing its nexus conten-

tions. The document that fixed the scope of appellant's argument, its administrative refund claim, simply incorporated by reference appellant's previously filed petition for redetermination of tax. J.A. 34. The petition for redetermination, in turn, was grounded exclusively on the proposition that taxation would "constitute an interference with the 'free exercise' of religion by the Swaggart organization." J.A. 12; see *id.* at 1-16. The Board's hearing officer thus specifically noted, in forwarding his decision and recommendation to the Board, that appellant's "[c]ounsel does not argue nexus." J.A. 22.[5] Indeed, even after the Board's rejection of the refund claim, appellant's trial court complaint made no mention of nexus in general or of the Commerce or Due Process Clauses in particular (except insofar as the First Amendment is made applicable to the States through the Fourteenth). J.A. 37-41. To the contrary, the parties

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[5] Appellant now asserts that "the State Board of Equalization considered and ruled on the Commerce and Due Process Clause issue." Br. 17 n.12. This is a significant misstatement of the record. The two documents appellant cites in support of its assertion—a letter to appellant from a Board auditor (J.S. App. F3-F4) and the recommendation of a Board hearing officer (J.A. 21)—simply recited a Board counsel's conclusion that there was sufficient nexus to support the imposition of California's use tax. As the court of appeal explained, however, "[t]hese statements say nothing as to whether the issues [of nexus] were disputed; whether [appellant] made any claims on these bases before the Board." J.S. App. A32. In fact, as the court went on to note (*ibid.*), the record makes clear that appellant "d[id] *not* argue nexus" before the Board (J.A. 22 (emphasis added)), and neither the hearing officer's conclusion (see J.A. 22-29) nor the Board's order (J.A. 32-33) addressed the issue. In any event, California law provides that the refund claim is the dispositive document; a taxpayer who fails to advance an issue in its refund claim cannot later rely on materials relating to that issue prepared by the Board for its use in resolving a petition for redetermination. See *Atari*, 170 Cal. 3d at 671-672. And, as we note above, the fact that appellant belatedly attempted to raise the nexus issue at trial and on appeal (see App. Br. 17 n.12) does not excuse its procedural default.

stipulated before the trial court that the claim for a refund was grounded exclusively on the Free Exercise Clauses of the federal and state Constitutions. J.A. 59.

Appellant first raised its nexus claim immediately prior to trial. Supp. C.T. 1-9. The trial court responded with an order *in limine* excluding evidence unrelated to the First Amendment issue, although the court permitted appellant to make offers of proof bearing on the nexus claim. R.T. 12-14. At the close of trial the court rejected appellant's request that it reconsider its exclusion of the nexus issue, noting that appellant's failure to raise the issue until trial deprived the Board of an opportunity to engage in discovery. R.T. 229-231. In ruling for appellee on the merits, the court stated that it "made its finding solely upon the issue framed by the pleadings as it relates to first amendment grounds." J.A. 213.

In affirming, the court of appeal expressly grounded its rejection of the nexus claim on appellant's procedural default, finding it dispositive that the nexus argument was "not raised [by appellant] in its claim for a refund from the Board." J.S. App. A30. Noting the strict procedural requirements of California law (J.S. App. A30-A31, A32), the court held that "[t]he only constitutional ground [appellant] specified [in its refund claim] was the First Amendment; no other constitutional grounds were stated. To adopt [appellant's] position [that its nexus claim was preserved] would require us to rewrite section 6904, replacing its requirement of 'specific grounds,' with a general denial of tax liability standard." J.S. App. A32. This the court "decline[d] to do." *Ibid.* The court went on to find alternatively that there was in fact a sufficient nexus to support the tax (J.S. App. A33, A35-A37), but on rehearing deleted the portion of its opinion addressing the merits of the nexus issue (J.S. App. A41)—making it absolutely clear that its holding involved only state rules of procedure. See *Long*, 463 U.S. at 1041-1042.

Because both decisions below were grounded on state law, the nexus issue is properly before this Court only if the state procedural rule that barred appellant's claim was applied for the purpose of evading resolution of a federal issue, or otherwise fails to advance legitimate state interests. See *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982). But appellant does not (and could not) argue that to be the case. The requirement that taxpayers first present their claims to the Board—which is, after all, an ordinary exhaustion of remedies requirement—is routinely enforced by the California courts. See, *e.g.*, *Atari, Inc. v. Board of Equalization*, *supra*; *Barnes v. Board of Equalization*, 118 Cal. App. 3d 994, 1001 (1981); *American Alliance Insurance Co. v. Board of Equalization*, 134 Cal. App. 3d 601, 609 (1982); *King v. Board of Equalization*, 22 Cal. App. 3d 1006, 1015 (1972). And the rule serves important state concerns. "Prior to seeking relief from the superior court, a taxpayer must present matters of law and fact to the State Board of Equalization so that the Board may be afforded the opportunity to rectify any mistake in tax collection. * * * Such a rule prevents having an overworked court consider issues and remedies available through administrative channels." *Atari*, 170 Cal. App. 3d at 673. It also, as this case itself makes clear, facilitates a fuller development of the factual record.

Against this background, it is plain that the courts below properly disposed of appellant's nexus contentions on state law grounds. This Court accordingly should dismiss the portion of the appeal advancing Commerce Clause and due process arguments for want of jurisdiction. See, *e.g.*, *Wolfe*, 364 U.S. at 196.

B. There Was Adequate "Nexus" To Support Imposition Of California's Use Tax On Property Sold By Appellant

If the Court nevertheless chooses to reach the Commerce and Due Process Clause issues here, we note, as a preliminary matter, that appellant has framed the

nexus question in a highly misleading manner. Appellant asserts that imposition of the use tax may be grounded, if at all, solely "on the basis of 23 evangelistic crusades appellant conducted in the State during 1974-81." Br. 16 (footnote omitted). In fact, while appellant's failure to raise the nexus issue until trial has left the record in a somewhat murky state—a fact that cuts powerfully against reaching the question now—the record evidence does make clear that appellant's presence in California during the relevant period was considerably more substantial than it now lets on. Any decision on nexus should, of course, take account of the record as a whole. Having said that, however, in our view imposition of the use tax was supportable even on the facts as stated by appellant; in either case, "[t]here is 'nexus' aplenty here." *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619, 1624 (1988).

1. This Court has held that States may tax out-of-state entities when there is a "sufficient nexus" between the two—a requirement that assures a fair relationship between "the services provided the out-of-state seller and the taxing State." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555, 558 (1977). The Court has found this requirement in both the Due Process and Commerce Clauses.

The due process nexus requirement, as the Court has explained in describing the closely related due process limit on the assertion of personal jurisdiction, is grounded on the principle that States may not assert authority over out-of-state entities in a manner that "offend[s] 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted). See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). In the tax setting, this due process "fair play" principle assures that "the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given

by the State." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). See *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 219-220 (1980); *Mobil Oil Corp. v. Commissioner*, 445 U.S. 426, 436-437 (1980); *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964); *Central R. Co. v. Pennsylvania*, 370 U.S. 607, 612 (1962); *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). The parallel Commerce Clause nexus requirement—the initial prong of the four-part Commerce Clause test first set out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977)—is similar to (and in part derived from) the due process nexus limitation[6]; it prevents a multitude of States from impeding interstate commerce by taxing transactions with which they have no substantial connection. See generally *Goldberg v. Sweet*, 109 S.Ct. 582, 589-590 (1989); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 631 (1973).[7]

While a State thus must provide opportunities or benefits to the out-of-state taxpayer, those benefits need not be directly conferred. It is enough that a State "runs mass transit and maintains public roads which benefit

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[6] The *Complete Auto* test evidently was inspired by Justice Rutledge's concurring opinion in *Memphis Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1948), which found no threshold impediment to the application of a state tax that was "clearly within the State's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned." See *Complete Auto*, 430 U.S. at 282.

[7] The nexus requirement also is "closely connected" (*Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981)) to the fourth prong of *Complete Auto*, which assures that the tax is "fairly apportioned" to the taxpayer's in-state activity. 430 U.S. at 287. While the nexus requirement guarantees that the taxpayer has a connection to the taxing State, the fair relation test "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact." *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original). See *Goldberg*, 109 S.Ct. at 592.

[the taxpayer's] customers, and supplies a number of other civic services" (*D.H. Holmes*, 108 S.Ct. at 1624), or makes possible " 'the benefit of a trained work force' " (*Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 (1981) (citation omitted)), or offers the taxpayer the "other advantages of civilized society" (*Goldberg*, 109 S.Ct. at 592); in such cases the tax is adequately "tied to the earnings which the State * * * has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes." *J.C. Penney*, 311 U.S. at 446. See *Cotton Petroleum Corp. v. New Mexico*, 109 S.Ct. 1698, 1714-1715 (1989); *Commonwealth Edison*, 453 U.S. at 626.

Indeed, the Court has repeatedly held that there need not be a dollar-for-dollar correspondence between the benefits conferred by the State and the tax imposed on an out-of-state commercial entity:

> [t]he tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. * * * On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit.' "

Goldberg, 109 S.Ct. at 592 (emphasis in original), quoting *Commonwealth Edison*, 453 U.S. at 627 n.16. See *Cotton Petroleum*, 109 S.Ct. at 1714-1715; *Commonwealth Edison*, 453 U.S. at 623-624, 628-629; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937). By the same token, the Court has rejected the notion "that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State." *National Geographic*, 430 U.S. at 560.

Against this background, appellant plainly is incorrect in asserting (Br. 17) that state taxes may be imposed only upon entities that maintain a continuous physical presence in-state (although such a presence is, of course, enough to establish nexus); the nexus test "cannot be simply mechanical or quantitative." *International Shoe*, 326 U.S. at 319. To the contrary, it is sufficient to create nexus that the taxpayer has projected a substantial economic presence into the State, marked by the purposeful cultivation and exploitation of an in-state market. Whether or not such a taxpayer is physically present in the State for all (or, for that matter, for any) of the relevant period, its earnings are made possible by the in-state infrastructure and work force that facilitate advertising, permit the distribution of goods, and allow for the development of a group of willing consumers—all "benefits which [the State] has conferred by the fact of being an orderly, civilized society." *J.C. Penney*, 311 U.S. at 444. At the same time, of course, an entity that "has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part and concurring in the judgment).

Nothing in the policies underlying the Commerce or Due Process Clause nexus requirements suggests that such an entity should be exempt from state taxation. And that is particularly the case when the levy involved is a use tax, for which "[t]he out-of-state seller becomes liable * * * only by failing or refusing to collect the tax from that resident consumer"; "the sole burden imposed upon the out-of-state seller by [a use tax statute] is the administrative one of collecting it." *National Geographic*, 430 U.S. at 558. Such a tax poses "no risk of double

taxation" of the sort that may offend the Commerce Clause, since "[t]he consumer's identification as a resident of the taxing State is self-evident." *Ibid.* And it hardly offends traditional due process notions of fair play to "make the distributor the tax collector for the State" (*General Trading Co. v. Tax Comm'n*, 322 U.S. 335, 338 (1944)) when the seller's intentional projection of its economic presence into the State has given rise to the taxed activity. Indeed, in an electronic age—when radio and television make it possible for an out-of-state entity to maintain a ubiquitous presence in-state, and when sophisticated computer marketing and mailing list techniques allow for systematic exploitation of distant markets—it would be anomalous to hold that commercial entities may escape all taxation by the States from which they draw substantial benefits simply because they do not maintain a continuous physical presence there. Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957).

This conclusion draws significant support from the Court's decisions in the closely related area of personal jurisdiction. There, the Court has held that a " 'forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers." *Burger King*, 471 U.S. at 473, quoting *World-Wide Volkswagen*, 444 U.S. at 297-298. Thus,

> [j]urisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an in-

> escapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476 (emphasis in original). See *Asahi Metal Industry*, 480 U.S. at 109-110 (plurality opinion); *id.* at 117-120 (Brennan, J., concurring in part and concurring in the judgment).[8]

Under these precedents, California courts plainly could assert jurisdiction over appellant if, for example, an in-state purchaser brought suit because he was injured by one of the products that appellant had shipped into California. See *Burger King*, 471 U.S. at 473; *World-Wide Volkswagen*, 444 U.S. at 297-298; *McGee*, 355 U.S. at 223. There is no reason to suppose that the State nevertheless lacks authority to impose a duty to collect a tax on appellant arising out of the same transaction. To the contrary, the Court held in the leading case of *International Shoe*—which was both a personal jurisdiction and a jurisdiction to tax case (see *Shaffer v. Heitner*, 433 U.S. 186, 203 (1977))—that due process objections to personal jurisdiction and to state taxing authority must be judged by the same standard: "The

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[8] The Court in *Asahi Metal Industry* was divided on whether States may assert personal jurisdiction whenever out-of-state sellers are "aware that the final product is being marketed in the forum State" (480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment)), or whether out-of-state sellers must have "an intent or purpose to serve the market in the forum State" (*id.* at 112 (plurality opinion)). There is no need to resolve that issue here, since appellant plainly acted with the purpose of exploiting the California market.

activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 321. And that is hardly surprising, since the same "minimum contacts" formula is the touchstone in each setting. Compare, *e.g.*, *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen*, 444 U.S. at 291; *International Shoe*, 326 U.S. at 316, with *National Geographic*, 430 U.S. at 561; *Miller Brothers*, 347 U.S. at 345.[9]

2. The principles set out above must be applied to the record here—a record that contains considerably more than the episodic "crusades" discussed by appellant. Not surprisingly, appellant's staff spent more time in California than the actual "crusade" dates: the Board's hearing examiner noted evidence that "an advance promotion staff * * * made hotel reservations, secured publicity for the meetings, etc." J.A. 20. Similarly, "some

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[9] We recognize that the suggestion that nexus may be found in the absence of *any* physical presence by the taxpayer in the taxing State is in some tension with *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967), which found no nexus when the seller's "only connection with customers in the State is by common carrier or the United States mail" (386 U.S. at 758); the Court there observed that the seller had no property within the State. *Id.* at 754-755. But in *National Bellas Hess*, the seller (unlike appellant) did not advertise locally or project its presence into the State through radio or television, conduct that benefits from services provided in-state and that manifests a direct intent to develop a local market. Cf. *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 376 (1941) (imposition of tax on out-of-state taxpayer in part justified by "solicitation through local advertising"). And the Court nowhere suggested in *National Bellas Hess* that *continuous* physical presence was needed in the State to provide nexus; here, appellant was present in California at least episodically, and it generated sales through local television and radio broadcasts. In any event, the decision in *National Bellas Hess* predated the Court's reformulation of Commerce Clause doctrine in *Complete Auto*, as well as its recent elaboration of personal jurisdiction doctrine, and we have some doubt that the specific factual holding of *National Bellas Hess* should survive those decisions.

of the time between crusade meeting dates in California included visits with local followers, removal of equipment and facilities, travel to the next location and setting up for the next meeting." *Ibid.* And the "crusades" themselves were of continuing value to appellant, since California crusade activity was recorded for later broadcast and sale. J.S. App. A37; J.A. 20.

Indeed, even apart from the "crusades," appellant maintained a full-time representative in California to counsel adherents and solicit donations from 1978 through 1984, a period that includes three of the seven tax years at issue here. J.S. App. A36; App. Br. 6; J.A. 21, 208. Appellant also sold religious programs (which advertised the availability of its mail order items) that were broadcast by California radio and television stations. J.S. App. A37; J.A. 49-50, 62. And appellant of course used its mailing list to solicit purchases through magazines, product catalogs, and special flyers. J.A. 21, 49-50, 62.

This is a record that is replete with nexus. Perhaps most obviously, this Court's decisions place it beyond dispute that appellant is subject to tax for the three-year period during which its full-time representative was present in California. It is irrelevant (even if true) that the representative's activities were unrelated to the sale of mail order items. See *National Geographic*, 430 U.S. at 560-561. So long as he enjoyed the benefit of the State's services, as appellant's California representative plainly did, the presence of even a single employee establishes nexus. See *id.* at 557-558; *Standard Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 562 (1975).[10]

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[10] Appellant acknowledges the existence of this full-time employee in California (Br. 6-7 & n.4) but entirely fails to discuss the employee's significance; instead, appellant simply asserts that "[a]t no time did the Board rely on the activities of this religious counselor as a nexus for taxation." Br. 7. Like appellant's assertion that the Board addressed and resolved the nexus issue (see note 5,

And for the entire tax period involved here, petitioner's other contacts with California establish nexus. Appellant's projection of its presence into the State by radio and television (accompanied by solicitations for purchases), along with its solicitations by magazine, catalog, and flyer, plainly manifested a purposeful development and exploitation of the California market. That exploitation was made possible by the infrastructure and services provided by the State: the power system, trained workforce, and police and fire protection necessary for the broadcast of appellant's programs into California homes, as well as the "civilized society" that made possible the distribution of goods to affluent consumers. Against this, appellant's insistence that physical presence is the only relevant criterion relies on an archaic and excessively formal conception of the power to tax. Cf. *International Shoe*, 326 U.S. at 316.

We nevertheless add that, in our view, there is adequate nexus here even if physical presence in the State is the only factor that may be taken into account. While many of this Court's decisions have involved taxpayers with a continuous in-state presence, nothing in those decisions suggests that an uninterrupted presence is a necessary prerequisite for taxation. Surely, for example, an

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supra), this is a substantial misstatement of the record. Again, appellant relies on a letter to appellant from a Board auditor (J.S. App. F3-F4) and the decision and recommendation of the Board hearing officer (J.S. App. 21-22). And again, since nexus was not contested before the Board, neither document purported to settle the relevance of the employee for nexus purposes. Indeed, when appellant finally raised the nexus issue before the state courts, the Board (while insisting that the issue had not been preserved) in fact noted that the employee's presence in California established nexus. See, *e.g.*, Board C.A. Br. 42 n.28. In any event, the issue now, if the Court reaches it, is simply whether the State has the constitutional authority to impose a tax on appellant, which turns on the facts as they actually existed; there is no principle of preclusion that prevents this Court from considering the entire record in addressing the scope of state taxing authority.

adequate nexus exists for the imposition of a use tax when a firm sends into the State a salesperson who, while there, solicits all of the firm's orders from that State—even if the salesperson spends only one day a month (or one day a year) in-state. And, as we note above, the level of state services provided need not precisely match the tax; there is thus no reason why a tax should be permissible (as it surely is) when a firm maintains a single employee in-state year-round, but not when the firm periodically sends many employees into the State—certainly so long as there is a pattern of purposeful, continuing entry into the State. In this case, where appellant conducted 23 "crusades" in California over a seven-year period (along with associated in-state activity), the record plainly "demonstrate[s] 'some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax.'" *National Geographic*, 430 U.S. at 561, quoting *Miller Brothers*, 347 U.S. at 344-345 (emphasis added by the Court).

3. Appellant also makes the additional argument (Br. 18-20) that religious activities—in particular, the "crusades"—cannot supply the nexus that justifies the imposition of California's use tax. This contention is in part identical to appellant's general First Amendment argument, which is beyond the scope of this brief. But insofar as appellant's argument is directed specifically at nexus, it seems to have three parts: (1) that appellant would not be liable for any use tax in the absence of the "crusades"; (2) that the volume of appellant's mail order sales (and thus its use tax liability) is entirely unrelated to the conduct of the "crusades"; and (3) that using the "crusades" as the nexus supporting imposition of use tax liability therefore will discourage the conduct of the "crusades," an effect that is precluded by the First Amendment. In our view, all of these propositions are insupportable.

At the outset, for the reasons set out above, there is nexus aplenty here even apart from the "crusades"; if

the Court accepts our submission on that point, appellant's First Amendment/nexus submission necessarily must fail. As for appellant's second proposition, there is in fact reason to believe that the "crusades" were used to—and did—generate mail order sales. Appellant stipulated below that "[o]ral announcements were * * * made at evangelistic crusades and over the radio and television in connection with [appellant's] religious broadcasts describing the 'tangible personal property' offered for 'sale' by [appellant], the 'prices' or 'donations' required to secure such items and the manner in which they could be obtained." J.A. 62. And while appellant's failure to raise the nexus issue in a timely manner precluded development of an adequate record (by disclosing, for example, whether mail order sales increased during or after "crusades"), appellant's mail order business surely benefitted from the radio, television, and newspaper publicity that accompanied the "crusades." Appellant is thus incorrect in asserting that "the use tax bears no relation whatsoever to the size or frequency of appellant's crusades in California" (Br. 19).

Finally, even if the first two prongs of appellant's argument had substance, the third would be without merit on its own terms. California's use tax plainly is not the equivalent of a fine on the expression of particular religious beliefs, as appellant asserts (Br. 18). And it is not "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights" of the sort at issue in *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). As the Court recently explained, "a flat license or occupation tax poses a greater threat to the free exercise of religion than do [income or property] taxes, because it is 'levied and collected as a condition to the pursuit of activities whose encouragement is guaranteed by the First Amendment' and thus 'restrains in advance those constitutional liberties.'" *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 903 (1989) (plurality opinion), quoting *Murdock*, 319 U.S. at 114. Here, by definition,

the existence of nexus means that the State is providing benefits to appellant; like everyone else in society, appellant is simply being asked to pay its own way.

The tax here thus is quite similar to "a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." *Murdock*, 319 U.S. at 112. Such taxes, of course, may discourage religious activity; it is possible, for example, that a church might be forced to refuse the gift of a piece of property on which it could have offered religious services so as not to become liable for continuing property tax liability. That prospect, however, does not exempt churches from nondiscriminatory property taxes. The same principle applies here.

Appellant nevertheless argues that applying a tax here would be anomalous because (by appellant's hypothesis) its relatively brief forays into California will subject it to a relatively large use tax liability. The fact remains, however, that the tax here is imposed, not on the "crusades," but on the use of mail order property by California purchasers; appellant must pay the use tax with its own funds only if it refuses to collect the tax from its customers. See *National Geographic*, 430 U.S. at 558. And appellant's sale of property to those purchasers will remain profitable whether or not appellant is liable for the use tax.[11] The use tax is thus not at all

[11] Appellant observes (Br. 19) that the use tax liability amounts to almost one half the value of the materials sold at the "crusades." That comparison, however, has no significance; the use tax is imposed, of course, not on the "crusade" sales, but on the more than $1.7 million worth of property sold by mail order. Appellant is thus incorrect in suggesting (Br. 19 n.14) that the figures here have any relationship to those in *Murdock*. In that case, as the Court recently noted, the monthly licensing fees at issue likely exceeded the taxpayer's entire monthly income from the distribution of religious material—meaning that the taxpayer there "could not even afford the necessary licenses, let alone support himself once he had met his legal obligation." *Texas Monthly*, 109 S.Ct. at 904

"functionally identical to the flat license fee struck down in *Murdock*," as appellant asserts (Br. 19). See note 11, *supra*. And appellant's suggestion (Br. 20) that California supplied no services that benefitted the "crusades" simply disregards the costs of maintaining roads and providing the general public services that made the "crusades," as well as all of appellant's other in-state activities, possible. In these circumstances, the imposition of use tax liability on appellant was entirely proper.

CONCLUSION

The appeal on the nexus issue should be dismissed. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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n.10 (plurality opinion). There is no danger that the use tax—by definition, a small percentage of the value of the property sold—will impose such a burden on appellant. Indeed, had appellant collected the use tax from its customers, the levy would have imposed *no* direct financial burden on appellant.