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IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES

OCTOBER TERM, 1978

No. 77-1780

COMMONWEALTH OF PENNSYLVANIA,  
*Petitioner,*

vs.

UNITED STATES TOBACCO COMPANY,  
*Respondent.*

ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF PENNSYLVANIA

**MOTION TO FILE AN AMICUS CURIAE BRIEF  
IN SUPPORT OF PETITIONER**

**BRIEF OF THE MULTISTATE TAX COMMISSION  
AS AMICUS CURIAE IN SUPPORT OF  
PETITIONER'S POSITION REGARDING  
JURISDICTION**

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(206) 943-8320

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The Multistate Tax Commission hereby requests permission to file the attached Amicus Curiae Brief in support of this Court noting probable jurisdiction in the captioned matter for the reasons stated therein.

WILLIAM D. DEXTER,  
*General Counsel*  
Multistate Tax Commission



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I

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered

into by 19 states as full members, and by 13 states as associate members.<sup>1</sup>

The purposes of the Compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicate taxation.

In fulfillment of these objectives, the Commission is making every effort to obtain a uniform interpretation and application of tax legislation affecting the several states, such as the Uniform Division of Income for Tax Purposes Act (UDITPA)<sup>2</sup> and PL 86-272.<sup>3</sup> To this end, the Commission filed an amicus brief in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972) and has participated in various state court cases involving the interpretation and application of UDITPA. The Commission is thus concerned with the conflicting inter-

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<sup>1</sup>The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington.

The current associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, and West Virginia.

<sup>2</sup>Uniform Laws Annotated, Vol. 9a, p. 448, promulgated by the Conference of Commissioners on Uniform State Laws in 1957.

<sup>3</sup>73 Stat. 555, 15 U.S.C. § 381 et seq.



pretations of PL 86-272 by the state courts which can only be resolved by this Court.

## II

### **ARGUMENT IN SUPPORT OF JURISDICTION THE COMMISSION SUBMITS THERE ARE FIVE PRINCIPLE REASONS WHY THIS COURT SHOULD NOTE PROBABLE JURISDICTION:**

#### **1. The Intent of Congress in Imposing a Uniform Jurisdictional Standard for the Imposition of State Taxes on or Measured by Net Income is Thwarted Unless This Court Interprets the Scope of the Term "Solicitation" as Used in PL 86-272.**

PL 86-272 is a federal statute, resulting from this Court's decision in the companion cases of *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450 (1959) and its refusal to review *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), cert. den'd 359 U.S. 28 (1959).<sup>4</sup>

As indicated by the Court below, this statute has been a subject of conflicting interpretation and application by various appellate state courts, particularly as to what Congress intended to embrace within the scope of the term "solicitation" as used therein.<sup>5</sup>

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<sup>4</sup>U.S. Code Cong. & Ad. News, Vol. 2, 86th Cong., 1st Sess. 1959, p. 2549; *Heublein, Inc. v. South Carolina Tax Commission*, *supra*, 409 U.S. 275 (1972).

<sup>5</sup>For an analysis of cases dealing with this question, see Hartman, "Solicitation and Delivery Under Public Law 86-272: An Uncharted Course," 29 Vand. L. Rev. 353 at 363-387 and Lohr-Schmidt, "Developing Jurisdictional Standards for State Taxation of Multistate Corporate Net Income," 22 Hastings L. J. 1035 at 1057-1088.

The basic issue is whether or not "solicitation" of sales of tangible personal property is to be given a broad interpretation or a narrow interpretation.

While the legislative history of PL 86-272 indicates that the immunity provided by subsection (a) of section 1 of the bill (solicitation of orders):

"\* \* \* will not be available to a person \* \* \* if the business activities by salesmen within the State on behalf of such person are not limited to the solicitation of orders."<sup>6</sup>

the decision below construes subsection (a) of section 1 otherwise. Other state decisions support the decision of the court below.<sup>7</sup> Others, including *Clairol, Inc. v. Kingsley*, 109 N.J. Super 22, 62 A.2d 213 (1970), aff'd by New Jersey S. Ct., 270 A.2d 702, 57 N.J. 199 (1970), appeal dismissed for want of a substantial federal question, 402 U.S. 902 (1971), construe "solicitation of orders" to mean just that and conflict with the decision below.<sup>8</sup>

It is therefore of vital concern to the states and multistate taxpayers that this Court note probable jurisdiction in order to resolve existing and future conflicting state interpretations of PL 86-272. Its failure to do so will result in the whipsawing of the states and taxpayers alike between conflicting inter-

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<sup>6</sup>U.S. Code Cong. & Ad. News, Vol. 2, 86th Cong. 1st Sess. 1959, S. Report No. 658, Aug. 18, 1959, p. 2553.

<sup>7</sup>*Gillette Co. v. State Tax Commission*, 393 N.Y.S. 2d 186 (1977) (appeal pending, N.Y. Ct. of Appeals), *State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Commission*, *supra*; *Coors Porcelain Co. v. State*, 83 Colo. 325, 517 P.2d 838 (1973).

<sup>8</sup>*Hervey v. AMF Beird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971); *Miles Laboratories, Inc. v. Dept. of Rev.*, 274 Or. 395, 546 P.2d 1081 (1976) and cases cited therein; *Appeal of Knoll Pharmaceutical Co., Inc.*, CCH State Tax Rep. Cal. Para. 205-714 (Bd. of Equal. 1977).

pretations of PL 86-272 and will defeat Congress' purpose in the furtherance of interstate commerce by enactment of PL 86-272.

## **2. Until This Court Passes on the Constitutionality of PL 86-272, There Will Continue to be Some Doubt and Controversy in Regard to This Question.**

Although the constitutionality of PL 86-272 has been upheld by three state appellate courts as a valid exercise of congressional power in the area of interstate commerce and although this Court has previously denied review of one of these cases,<sup>9</sup> there still remains the question of whether or not the preferential treatment accorded selected businesses by the arbitrary jurisdictional restrictions of PL 86-272 constitute a legitimate regulation of interstate commerce by the Congress.<sup>10</sup> Coupled with the validity of a single-sales-factor apportionment formula upheld in *Moorman Mfg. Co. v. Bair*, ..... U.S. ...., 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978), PL 86-272 could completely exempt some multistate businesses from

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<sup>9</sup>*Smith Kline & French Laboratories v. State Tax Commission*, 241 Or. 50, 403 P.2d (1965); *State ex rel. CIBA Pharmaceutical Products Inc. v. State Tax Commission*, 382 S.W. 645 (1964); *International Shoe Company v. Cocreham*, 246 La. 244, 164 So. 2d 314 (1964); cert. den'd; *Mouton v. International Shoe Co.*, 379 U.S. 902 (1965).

<sup>10</sup>It is interesting to note that PL 86-272 is an expansion of due process restrictions on state taxing power and places under the umbrella of the commerce clause the subject matter of a nondiscriminatory properly apportioned state income tax which this Court held in *Northwestern Portland Cement Co. v. Minnesota*, *supra*, did not constitute a regulation of interstate commerce within the purview of the commerce clause. For a discussion of the constitutional issues posed by PL 86-272, see the Brief Amicus Curiae of the States in *International Shoe Company v. Louisiana Collector of Revenue*, Supreme Court No. 46-943, cert. den'd 379 U.S. 902 (1965).

any state and local taxes on or measured by net income.

Furthermore, if PL 86-272 is construed, as did the lower court, to exempt from state and local income taxes the purely intrastate institutional and promotional activities of detail or missionary employees, there is posed a serious constitutional issue as to whether congressional power to regulate interstate commerce can be so extended and applied.

**3. As indicated in the Dissenting Opinion in the Lower Court, the Decision of the Lower Court is in Apparent Conflict With this Court's Disposition of *Clairol, Inc. v. Kingsley*, 402 U.S. 902 (1971).**

This Court dismissed for want of a substantial federal question (402 U.S. 902 (1971)) a per curiam affirmance by the New Jersey Supreme Court of *Clairol, Inc. v. Kingsley*, 109 N.J. Super 22, 62 A.2d 213 (1970) (aff'd per curiam 270 A.2d 702, 57 N.J. 199). In *Clairol*, the Superior Court of New Jersey held that the activities of Clairol's detailmen in New Jersey were not "mere solicitation of orders" and therefore were not protected by PL 86-272. *Clairol* stands in sharp contrast to the decision below. Although it is realized that the dismissal of *Clairol* by this Court for lack of a substantial federal question is not an affirmance of the decision below, it would indicate that this Court did not have any sharp disagreement with the interpretation of PL 86-272 by the lower court in *Clairol* in light of the importance of a proper interpretation of PL 86-272.

**4. The Decision Below Introduces Uncertainty and Confusion in the Interpretation of PL 86-272 and Attempts to Construe PL 86-272 in a Manner Inconsistent With Its Language.**

The Court below recognized that the promotional and institutional activities of a major company in Pennsylvania embraced more than the solicitation of orders by salesmen for delivery and it thus recognized that the activities of the United States Tobacco Company in Pennsylvania required it to pay the Pennsylvania income tax under a literal construction of PL 86-272. The Court below assumed, however, that the in-state activities in *Brown-Forman, supra*, were incorporated by reference into section 1(a) of PL 86-272 because the case was referred to in the legislative history. It then concluded that various in-state activities other than "solicitation" are embraced within the term "solicitation" and that "each claimed § 381 exemption from a state income tax must be judged on its individual facts."

It is submitted that such a freewheeling approach to congressional restrictions on state taxing power is not justified by either the history or language of PL 86-272. It will lead to endless uncertainty and controversy over the scope and application of PL 86-272. Further, it will grant tax exemptions far beyond the mere solicitation of orders restriction contemplated by the Congress<sup>11</sup> and contained in PL

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<sup>11</sup>Carried to its extreme, any activities in a state, short of manufacturing, can be characterized as incidental to a furtherance of the solicitation of sales, including the utilization of sales offices, inven-

86-272. In contrast, a strict construction of the exemption granted by PL 86-272 in accordance with its express terms, which construction is supported by well recognized rules of statutory construction, will avoid the foregoing problems. This Court should thus note probable jurisdiction because the decision of the lower court is wrong as a matter of law and introduces unwarranted uncertainty in the otherwise reasonably certain statutory language of PL 86-272.

**5. Uncertainty and Conflict Over the Scope and Operative Effect of PL 86-272 Thwarts Any Effort to Uniformly Apply the Provisions of UDITPA.**

In order to determine whether a taxpayer is taxable in more than one state and thus entitled to apportion income under the UDITPA three-factor apportionment formula, it is necessary to resolve the question of whether more than one state has jurisdiction to impose a tax on or measured by net income. Also, in order to determine the sales attributable to a state of origin for UDITPA sales factor purposes, it is necessary to determine whether the taxpayer is subject to a tax on or measured by net income in all the states into which it delivers its products. Resolution of these issues, in turn, depends on a construction of PL 86-272.<sup>12</sup>

Thus, until the jurisdictional restrictions im-

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tories and other properties and nonsales personnel for this purpose. Any broad construction of PL 86-272 will undermine state tax sovereignty and fiscal integrity.

<sup>12</sup>Cases illustrative of these issues are *Coors Porcelain Company v. State, supra*, and *Iron Fireman Co. v. Tax Com.*, 274 Or. 404, 430 P.2d 998 (1967).

posed by PL 86-272 are clarified by this Court, it is not possible to consistently, and in most states knowingly, apply the provisions of UDITPA in a uniform manner.

### III

### CONCLUSION

For the foregoing reasons, the Commission respectfully submits that this Court should note probable jurisdiction in this cause in conformity with considerations governing review on certiorari as set forth in Rule 19.

Respectfully submitted,

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