IN THE OREGON TAX COURT
REGULAR DIVISION
Corporation Excise Tax

SANTA FE NATURAL TOBACCO COMPANY, Plaintiff, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant.	Case No. 5372 BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT

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INTEREST OF THE *AMICUS CURIAE*

The Multistate Tax Commission ("MTC") comprises the tax agency heads of the sixteen states that have adopted the Multistate Tax Compact by statute, including Oregon; all other states, except Nevada, participate as members on some level.[1] Our mission is to promote uniform and consistent tax policy and administration among the states, assist taxpayers in achieving compliance with existing tax laws, and advocate for state and local sovereignty in the development of tax policy.

The MTC has focused particularly on state taxation of multistate businesses and the proper application of the constitutional and statutory limitations on such taxation. The MTC's expertise in this area has been developed over more than fifty years through assisting states in applying income, franchise, sales, and use taxes to interstate businesses. We regularly work with both states and taxpayers on complex tax issues and disputes, conduct joint state audits of large multistate businesses, and draft uniform and model tax laws and regulations.

Since its founding, the MTC has given substantial attention to P.L. 86-272.[2] In 1972, the Commission filed an amicus brief on behalf of South Carolina in the first U.S. Supreme Court case addressing the application of the statute, *Heublein, Inc., v. S. C. Tax Comm'n*, 409 U.S. 275 (1972). In 1986, the Commission adopted the "Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272 ("MTC Statement of Information" or "Statement"). The Statement provides notice to taxpayers as to how signatory states interpret P.L. 86-272 and identifies business activities that are protected by the statute and business activities that are unprotected. The Commission has updated the Statement on four

[1] Additional information about the MTC, its member states, and its programs is available at www.mtc.gov.

[2] P.L. 86-272 is codified at 15 U.S.C. §§ 381-384.

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occasions, most recently on August 4, 2021, after an extensive review conducted over the course of more than two years.[3]

Because of our unique multistate role, the MTC has assisted states with questions and issues and has filed numerous amicus briefs concerning the application and proper interpretation of P.L. 86-272 with both the U.S. Supreme Court and state courts. In *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992)—the landmark case interpreting P.L. 86-272—the MTC filed an amicus brief that advocated for a ruling that closely resembled what the Supreme Court ultimately adopted:

> The appropriate gloss to place on solicitation in Pub. L. No. 86-272 is suggested not only by its limited scope but also by the need to promote certainty, if possible. Your Amicus believes that the standard utilized by the Multistate Tax Commission to develop the Guidelines is the appropriate standard. The Guidelines achieve as much clarity as possible without expansively defining solicitation in violation of the clearly stated intent of Congress. Your Amicus suggests the following: Solicitation constitutes activities that directly seek the placement of an order and such collateral activities that are a necessary part of that effort. If an activity serves the out-of-state seller beyond the direct attempt to secure the placement of an order, the dual purpose prevents the activity from constituting only solicitation. Solicitation with respect to indirect accounts (so-called missionary activities) is similarly limited with the adjustment being that the test is applied with respect to the seeking of the placement of an order for a customer of the out-of-state seller.[4]

We have also filed briefs relating to the preservation of the states' sovereign ability to set their own tax policies in the absence of explicit federal preemption of that authority. *See, e.g., Dep't of Revenue of Or. v. ACF Indus., Inc.,* 510 U.S. 332, 345 (1994) (addressing the proper application of federal statutes preempting state tax authority).

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[3] The revised Statement is posted at www.mtc.gov/Uniformity/Project-Teams/Statement-on-PL-86-272-Adopted.aspx, together with background materials and the report issued by Professor Robert J. Desiderio following a public hearing he conducted on the revisions.

[4] The MTC's brief is posted at www.mtc.gov/getattachment/Uniformity/Amicus-Briefs/Wisconsin-v-Wrigley.pdf.aspx.

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This current case raises important questions about the application of P.L. 86-272 when an out-of-state business selling into a state contracts with in-state businesses to perform activities on its behalf and for its benefit. To address these questions and share our knowledge about the history and proper application of the statute, we respectfully submit this brief.

ARGUMENT

The Department's post-trial brief explains in detail why, under the plain language of P.L. 86-272, both the acceptance of returns by Oregon wholesalers pursuant to a contract with Santa Fe Natural Tobacco Company ("SFNTC") and the actions of SFNTC's Oregon-based employees relating to pre-book orders negated SFNTC's immunity from Oregon income tax. We agree with the Department's brief. Our brief explains why a decision in favor of SFNTC would (i) contravene the intent of Congress, (ii) undermine principles of federalism that the U.S. Supreme Court has long sought to protect, and (iii) provide a roadmap to out-of-state businesses seeking to avoid state income tax, thereby giving those businesses an unfair competitive advantage over local businesses.

A. A Determination that P.L. 86-272 Immunizes SFNTC from State Tax Would Be Contrary to Congress's Intent When Enacting the Statute.

Congress enacted P.L. 86-272 in response to a series of court decisions in 1959 that addressed the extent to which the U.S. Constitution permits states to tax interstate commerce. What is clear from the statute's legislative history is that Congress intended the statute to be narrow in scope: shielding out-of-state businesses from income tax in certain limited circumstances but denying those businesses broad tax immunity that would have given them an advantage over local businesses. This history (just like P.L. 86-272's plain language) provides compelling evidence that the activities of Oregon wholesalers and SFNTC's in-state representatives fell outside of the statute's zone of protection. *See generally Etter v. Dep't of Revenue,* 360 Or. 46, 52, 377 P.3d 561,

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565 (Or. 2016) ("In construing and applying a federal tax statute, federal law, rather than state law, governs. . . . In interpreting a statute, the federal courts may examine the statute's text, its structure, and its legislative history.") (internal quotation marks and citation omitted).

The first court decision giving rise to P.L. 86-272 was *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), which considered two consolidated cases. In the first case, Minnesota assessed tax on an Iowa manufacturer that sold cement to customers in Minnesota. All orders were approved in Iowa and shipped from the company's plant there. The business employed four salespersons and a secretary and leased a small office in Minnesota. In the second case, Georgia assessed tax on a Delaware corporation that sold valves and pipe fittings to wholesalers and jobbers in Georgia. The company's principal office and plant were in Birmingham, Alabama. Orders were approved in and shipped from Birmingham. The company employed one salesperson and a secretary in Georgia and maintained a small office in Atlanta for their use.

The Court began its opinion by characterizing the question before it: whether a state may tax income earned from "business activities within the taxing State when those activities are exclusively in furtherance of interstate commerce." *Id.* at 452. Noting that in both cases the income subject to tax was fairly apportioned, the Court held that it was permissible under both the due process clause and the commerce clause for the state to impose tax, regardless of the fact that the activities were in interstate commerce. Employing broad language, the Court explained its decision as follows: "[I]t is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State." *Id.* at 461-62.

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Just prior to the U.S. Supreme Court's *Northwestern States* ruling, the Louisiana Supreme Court had considered two cases involving issues similar to *Northwestern States* but presenting a key factual difference. In *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 So.2d 70 (La. 1958), *appeal dismissed and cert. denied*, 359 U.S. 28 (1959), Louisiana assessed income tax on a Kentucky distiller "engaged exclusively in interstate commerce." *Id.* at 71. The company employed "missionary men" who called on wholesale dealers and occasionally accompanied wholesalers' sales staff when they visited retailers in Louisiana. All orders received by the missionary men were approved in and shipped from Kentucky. But unlike the companies in *Northwestern States*, the distiller did not maintain an in-state office (and did not have an in-state warehouse or any in-state inventory). In *International Shoe Co. v. Fontenot*, 107 So.2d 640 (La. 1958), *cert. denied*, 359 U.S. 984 (1959), Louisiana assessed income tax on a manufacturer that was incorporated in Delaware. Similar to *Brown-Forman Distillers*, the company maintained no office or warehouse in Louisiana; its only Louisiana activity consisted of the solicitation of orders by its sales staff. In both cases, the Louisiana court rejected the taxpayer's claim that imposing Louisiana income tax violated the Constitution.

Just seven days after issuing its decision in *Northwestern States*, the U.S. Supreme Court declined to hear an appeal of the *Brown-Forman Distillers* case. Two months later, it denied *certiorari* in *International Shoe Co.*

As the Court itself later chronicled in *Wrigley*, the Court's actions in these cases caused much uncertainty within the business community about the scope of state power to tax out-of-state businesses, and more specifically, concern that the "broad language" contained in *Northwestern States* would be read to suggest that a state could impose income tax on a company whose only in-state activities consisted of drummers or salesmen soliciting sales. 505 U.S. at 221-22. As a result,

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business representatives appealed to Congress to enact legislation imposing restrictions on state taxing authority.

Congress reacted quickly. Before the end of August 1959, both the House and Senate passed preemption bills. The House bill, H.J. Res. 450, was broad in scope. It preempted states from taxing the income of out-of-state businesses engaged in interstate commerce unless the business maintained a place of business in the state or had an officer, agent, or representative maintaining a place of business in the state. The Senate bill, S. 2524, was much narrower in scope. It preempted states from taxing the income of an out-of-state business if the business's only in-state activity was the solicitation of orders for tangible personal property, and then only if the orders were sent outside the state for approval and the items were shipped to customers from a point outside the state.[5] The two versions were referred to a conference committee, which agreed to the Senate's narrow preemption language with only one significant change.[6] *See* H.R. REP. NO. 86-1103, at 4 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548, 2560 ("The House conferees believe it is more appropriate to accept the language of . . . the Senate bill."). Both houses of Congress then approved the modified Senate bill, which was signed by President Eisenhower on September 14, 1959 — less than seven months after *Northwestern States* was decided.

The floor debates and legislative reports leading to the passage of P.L. 86-272 describe Congress's objective—to address the uncertainty that had been created by the Supreme Court and in particular to ensure that in-state solicitation of orders alone would not cause a business to become subject to a state's income tax. The Senate Finance Committee report accompanying S.

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[5] The Senate bill also provided that the solicitation of orders of tangible personal property by independent contractors, or their making sales, on behalf of the out-of-state business in a state could not be a basis for imposing tax on the out-of-state business.

[6] The conference committee added language providing that an independent contractor could maintain a sales office in the taxing state without negating the out-of-state business's tax immunity.

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2524 stated that *Northwestern States* "has created considerable concern and uncertainty" within the business community, and that the committee itself was concerned that:

> businesses, particularly small- and medium-sized businesses, may be hesitant to develop new markets in some States by extending their solicitation activities to such States . . . should *mere solicitation of orders* be regarded as a local activity, forming sufficient 'nexus' with the State. . . .

S. REP. NO. 86-658, at 2, 4 (1959) (emphasis added), *reprinted in* 1959 U.S.C.C.A.N. 2548, 2549, 2550-51.

This narrow focus on solicitation was neatly summarized by Rep. William Miller, one of the House-Senate conferees who advocated for the conference bill on the floor of the House of Representatives. He expressed that the bill "is very narrow, indeed. It covers only the single and simple area where a corporation does nothing more within a State than solicit orders." 105 CONG. REC. at 17,771 (Sept. 2, 1959). Sen. Harry Byrd, the House-Senate conferee who presented the conference report to the Senate, made a similar point during the Senate floor debate:

> Title I of the Senate bill granted immunity to an out-of-state company *only* if the business activities of the out-of-state company within the State were limited to specific activities described under that title. These activities were, first, the solicitation of orders by such person or his representative for sales of tangible personal property; and second, sales, or the solicitation of orders for sales, of tangible personal property on behalf of the out-of-State company by one or more independent contractors.
> . . . .
>
> It is the intention of the bill to grant immunity to the out-of-State company where salesmen only solicit orders within the State.

105 CONG. REC. at 17,833-34 (Sept. 3, 1959) (emphasis added).

See also H.R. REP. NO. 86-1103, at 4 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548, 2560 ("It was the purpose of both Houses to specifically exempt, from State taxation, income derived from interstate commerce where the only business activity within the State by the out-of-State company was solicitation."). *Accord Heublein, Inc. v. S. C. Tax Comm'n*, 409 U.S. 275, 280 (1972) ("In

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[P.L. 86-272], Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation.").

In the wake of *Northwestern States*, Congress could certainly have adopted a broader preemption of state taxing authority. Notably, P.L. 86-272 did not reverse the result in *Northwestern States* (since the businesses in those two consolidated cases each maintained an office in the taxing state, thus exceeding the protection of the act). But Congress in the end rejected the broad preemption contained in H.J. Res. 450 (and in the other preemption bills introduced that session[7]), refusing to grant out-of-state businesses a broad zone of protection that would have given them a potential competitive advantage over local businesses engaging in similar in-state activities.

In this case, as the Department has explained in its post-trial brief, P.L. 86-272's plain language indicates that neither of the activities at issue is protected. The statute's legislative history provides strong, further support for this conclusion. First, the wholesalers' acceptance of returns pursuant to the DIP agreements did not constitute the "mere solicitation of orders" on behalf of SFNTC. *See* S. REP. NO. 86-658, at 4 (1959), *reprinted* in 1959 U.S.C.C.A.N. 2548, 2551. Second, the actions of SFNTC's employees to obtain so-called pre-book orders from retailers and thereby (under the terms of the DIP Agreements) effectuate wholesaler sales of SFNTC-brand cigarettes did not constitute the "mere solicitation of orders" by SFNTC. *Id.* Any conclusion to the contrary,

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[7] The other broad preemption bills rejected by the 86th Congress were S.J. Res. 113, S. 2213, and S. 2281. S.J. Res. 113 would have prohibited a state from imposing a tax on any business engaged in interstate commerce unless "such business has maintained a stock of goods, an office, warehouse, or other place of business in such State or has had an officer, agent, or representative who has maintained an office or other place of business in such State." S. 2213 would have prohibited a state from imposing tax on a person "solely by reason of the solicitation of orders in the State" if the person "maintains no stock of goods, plant, office, warehouse, or other place of business within the State." S. 2281 would have shielded sellers from taxation if they did not maintain "an office, warehouse, or other place of business in the State" and did not have "an officer, agent, or representative in the State who has an office or other place of business in the State."

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moreover, would contravene the drafters' intent to enact a "very narrow" preemption of state taxing powers. *See* 105 CONG. REC. at 17,771 (Sept. 2, 1959) (remarks of Rep. Miller).

Perhaps even more compelling, a determination that these activities were protected would produce the very outcome that Congress sought to avoid by enacting a narrow preemption. Under P.L. 86-272, when an out-of-state manufacturer accepts product returns or effectuates actual sales of its products within a taxing state, the manufacturer subjects itself to the same income tax obligations that apply to in-state manufacturers. *See, e.g., Cal-Roof Wholesale, Inc. v. State Tax Comm'n,* 242 Or. 435, 410 P.2d 233, 234 and 239 (Or. 1966) (en banc) (picking up returns and other non-solicitation activity "clearly encompassed more than 'solicitation' only"); *Miles Labs, Inc. v. Dep't of Revenue,* 546 P.2d 1081, 1083 (1976) (where the court explained that accepting orders is an unprotected, "non-solicitous" activity). *See also Wrigley,* 505 U.S. at 233 (in order for an activity to be protected under the statute, "it is not enough that the activity facilitate sales"); MTC Statement of Information, Art. IV.A ("Picking up or replacing damaged or returned property" and "Approving or accepting orders" are unprotected activities).

If an out-of-state manufacturer like SFNTC could avoid paying income tax simply by (i) contracting out the in-state acceptance of returns to third parties or (ii) causing its in-state employees to effectuate sales of its own products by wholesalers, the manufacturer would accomplish the same end *and* obtain a competitive advantage over in-state competitors, resulting in the unlevel playing field that Congress chose to avoid by enacting a narrow preemption. At the same time, such an outcome could affect state revenues far more than Congress anticipated or intended.[8]

[8] When crafting their respective income tax preemption bills, both houses of Congress decided that a more in-depth study of state taxation of interstate commerce was needed. *See, e.g.,* S. REP. NO. 86-658, at 4-5 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2448, 2551 (characterizing S. 2524 as a "stopgap or temporary

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It also is important to note that P.L. 86-272's legislative history nowhere indicates an intention by Congress to expand the zone of protection that was generally understood to apply to businesses prior to *Northwestern States*. In fact, numerous comments expressed on the Senate floor indicated just the opposite. For example, Senators Byrd and Saltonstall had the following colloquy shortly before Senate passage of S. 2524:

> Mr. SALTONSTALL. Primarily what the Senate committee bill does is to put the matter in status quo prior to the decision of the Supreme Court on the case in Georgia, and on another case.
>
> Mr. BYRD of Virginia. That is correct.
>
> Mr. SALTONSTALL. So that we can go forward with business as we have proceeded in the past, until and unless Congress should further amend the law.

105 CONG. REC. at 16,353 (Aug. 19, 1959).

See also id. at 16,377 (remarks of Sen. Javits) ("In short, if there are other business activities [*i.e.,* activities other than the solicitation of orders for tangible personal property], they are still left within the realm of *decided cases* under State and Federal law, so far as the taxing power of the State is concerned.") (emphasis added); 105 CONG. REC. at 17,837 (Sep. 3, 1959) (remarks of Sen. Sparkman) ("[S. 2524 as modified by the House-Senate conference committee] seeks to remove

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measure"). As a result, Congress included a requirement in the final version of the legislation that House and Senate committees, acting separately or jointly, study "all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce" for the purpose of recommending further legislation. P.L. 86-272, title II., 73 Stat. 555.

In response, Congress created a special committee, known informally as the Willis Committee, to engage in an in-depth study of state taxation and to evaluate the impact of P.L. 86-272. This committee ultimately issued a four-volume report. *See* Report of the House Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, H.R. REP. NO. 88-1480, (1964) (Conf. Rep.); H.R. REP. NOS. 89-565 & 89-952, (1965) (Conf. Rep.). However, Congress has never amended P.L. 86-272 nor expanded its narrow preemption.

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the fear of further expansion by the various States into the taxing field, beyond what the Supreme Court has ruled as being allowable.").

These statements are particularly relevant to this case because the Supreme Court had previously ruled that a state could lawfully impose income tax on an out-of-state business whose employees engaged in activities strikingly similar to the activities performed by SFNTC's employees with respect to pre-book orders. In *Cheney Bros. v. Massachusetts*, 246 U.S. 147, 155 (1918), the Court held that Massachusetts could tax a Minnesota flour producer whose Massachusetts-based salesmen would "solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer" who would then fill the orders and receive payment from the retailers. The Court explained:

> Thus the salesman, although not in the employ of the wholesaler, *is selling flour for him*. Of course this is a domestic business—inducing one local merchant to buy a particular class of goods from another—and may be taxed by the State regardless of the motive with which it is conducted.
>
> *Id*. (emphasis added.)[9]

B. The Supreme Court's Longstanding Preemption Jurisprudence Indicates That P.L. 86-272 Should Not Be Construed to Shield SFNTC from Income Tax.

Both the plain language and legislative history of P.L. 86-272 indicate that it does not immunize SFNTC from Oregon income tax. But even if P.L. 86-272's language or Congress' intent were deemed to be ambiguous, or P.L. 86-272's application to the facts of this case were

[9] In *Cal-Roof Wholesale*, the Oregon Supreme Court stated in dicta that §381(a)(2) in effect reversed the result in *Cheney Bros*. *See* 410 P.2d at 239. Subsection (a)(2), however, addresses "the solicitation of orders" by missionary men while *Cheney Bros.* addressed conduct "which amounted to engaging in the local business of selling products" for wholesale dealers. *Northwestern States*, 358 U.S. at 483 (Whittaker, J. dissenting). SFNTC's employees, like the employees in *Cheney Bros.* did more than solicit orders, they effectuated sales.

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considered uncertain, longstanding Supreme Court preemption jurisprudence indicates that the statute should not be construed to shield SFNTC from tax.

The Court has repeatedly expressed that "principles of federalism" require federal statutes preempting state authority to be construed narrowly. *Dep't of Revenue of Or. v. ACF Industries, Inc.,* 510 U.S. 332, 345 (1994). *See, e.g., Cipollone v. Liggett Group, Inc.,*505 U.S. 504, 523 (1992) (expressing "the strong presumption against pre-emption") (opinion of Stevens, J.); *id.*, at 533 ("We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.") (Blackmun, J., concurring). *See also Rice v. Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947) (stating that a federal statute will not be interpreted to preempt the states' historic police powers unless that is the "clear and manifest purpose of Congress").

In *ACF Industries*, the Court applied these principles to a federal statute preempting state taxing authority, a power that the Court noted was "central to state sovereignty." *Id*. at 345. In that case, the Court rejected a claim that the tax preemption contained in the Railroad Revitalization and Regulatory Reform Act of 1976 prevented Oregon from imposing property tax on railroad property while exempting certain non-railroad property. "When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers," the Court stated, "we are hesitant to extend the statute beyond its evident scope." *Id*.

The Court applied these principles specifically to the application of P.L. 86-272 in *Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275 (1972). In that case, South Carolina revenue officials had assessed income tax on an out-of-state seller of alcoholic beverages after concluding that the presence of a company representative in South Carolina negated the seller's P.L. 86-272 immunity. The seller argued that the representative did not defeat its statutory immunity because

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South Carolina law required liquor sellers to utilize a representative in the state. The Court rejected the seller's argument, effectively holding that P.L. 86-272 contained no implied preemption. "Unless Congress conveys its purpose clearly," the Court stated, "it will not be deemed to have significantly changed the Federal-State balance." *Id.* at 281-82 (internal quotation marks and citation omitted).

State courts have applied these principles to the interpretation of P.L. 86-272. as well. For example, in *Matter of Disney Enter., Inc. v. Tax Appeals Trib.*, 888 N.E.2d 1029 (N.Y. 2008), the taxpayer challenged a New York State income tax assessment, arguing in part that inclusion of an out-of-state subsidiary's sales in the combined group's sales factor numerator violated P.L. 86-272 because the subsidiary's only activities in the state constituted solicitation of orders for tangible personal property. Examining P.L. 86-272's language and legislative history, the Court of Appeals rejected the taxpayer's reading of the statute. It also declined to find that P.L. 86-272 contained any type of implicit preemption. Quoting the Supreme Court's decision in *Rice v. Santa Fe Elevator Corp.*, the Court stated:

> We begin our reading of Public Law 86-272 with the presumption that Congress does not intend to supplant state law. Where a federal law treads on a traditional state power, this presumption is especially strong, and is overcome only where the statute evidences that preemption is the clear and manifest purpose of Congress.
>
> *Id*. at 1036 (internal quotation marks and citations omitted).

This body of caselaw should lay to rest any doubt that P.L. 86-272 does not shield SFNTC from Oregon income tax. SFNTC has provided absolutely no basis for concluding that it was the "clear and manifest purpose of Congress" to immunize businesses that engage in nonsolicitation activities like those present in this case—or that the statute's language "clearly" preempted Oregon's power to tax those activities. In fact, both the language of the statute and its legislative

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history indicate just the opposite. Finding that P.L. 86-272 prevented Oregon from taxing SFNTC would undermine the principles of federalism that the Supreme Court has sought to protect.

C. Because P.L. 86-272 Relies on the Courts for Interpretation and Guidance, this Court Should Consider the Broader Implications of its Ruling.

Unlike the Internal Revenue Code or state income tax laws, P.L. 86-272 does not assign to any administrative body responsibility for issuing guidance as to its meaning and application. It is therefore particularly important for state courts, when construing the statute's language and parsing Congress's intent, to consider not only the facts before it but also the broader implications of any decision. State court decisions essentially fill in the considerable gap that administrative guidance would normally address, and therefore constitute an important part of the national jurisprudence relating to P.L. 86-272. In this case, a finding that P.L. 86-272 protects either the acceptance of returns by wholesalers pursuant to the DIP Agreements or the effectuation of wholesaler sales by SFNTC Oregon-based employees could create a blueprint for tax avoidance.

Manufacturers often engage in in-state activities that extend beyond the solicitation of orders. For example, they may provide training or educational courses to assist consumers who purchase their products. They may repair defective or broken products pursuant to a manufacturer's warranty. They may accept product returns directly or through an in-state representative. These activities inure not only to the manufacturers' benefit but also to the benefit of in-state wholesalers that sell their products. Because these activities do not constitute solicitation, they fall outside of P.L. 86-272's zone of protection. Consequently, manufacturers that engage in these activities within a taxing state must pay the state's income tax. *See, e.g., Kennametal, Inc. v. Comm'r of Revenue*, 686 N.E. 2d 436 (Mass.1997) (making presentations and providing technical advice): *Wrigley,* 505 U.S. at 229 ("Repair and servicing may help to increase

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purchases; but it is not ancillary to requesting purchases.") (italics deleted); *Cal-Roof Wholesale,* 242 Or. 435, 410 P.2d 233 (Or. 1966) (picking up returns).

Under SFNTC's legal theory, an out-of-state manufacturer could avoid a state's income tax by contracting with wholesalers or other independent contractors to perform these activities, even though (i) the manufacturer would continue to benefit from the activities, (ii) the independent contractors would perform the activities at the manufacturer's direction, and (iii) the independent contractors would receive compensation from the manufacturer for taking on those duties. Particularly troubling, this outcome would potentially give out-of-state businesses seeking to exploit a state's market an unfair advantage over in-state businesses, since local businesses offering the same services would of course be subject to the state's tax.

Similarly, under SFNTC's legal theory, out-of-state manufacturers would avoid a state's income tax when sending employees into a state and tasking them with effectuating binding sales agreements between in-state middlemen and retailers—even though such an arrangement would be intended to bolster sales of the manufacturers' products. Here, too, the outcome would give out-of-state businesses an unfair tax advantage over local competitors seeking to sell their own products.

This court should consider these potential outcomes before ruling in this case, since a finding that P.L. 86-272 shields SFNTC from state income tax will inevitably encourage other out-of-state businesses to enter into similar, easily devised arrangements to avoid tax in Oregon and elsewhere. This result would substantially undermine the level playing field Congress intended to preserve.

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CONCLUSION

Ruling for the Department will give effect to Congress's intent, preserve federalism principles, and avoid sanctioning a means of tax avoidance that would give out-of-state businesses an unfair advantage over in-state competitors.

DATED this 15th day of September 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th day of September, 2021, I directed the foregoing BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT to be served upon the parties hereto by the method indicated below, and addressed to the following:

Carol Lavine Carol Vogt Lavine LLC PO Box 22701 Milwaukie, OR 97269 Mitchell A. Newmark (admitted *pro hac vice*) Eugene J. Gibilaro (admitted *pro hac vice*) Blank Rome LLP 1271 Avenue of the Americas New York, NY 10020 *Of Attorneys for Plaintiff*	☒ **Electronic service -** UTCR 21.100 (1)(a) **Odyssey File and Serve** ☐ **Mail** in a sealed envelope, with postage paid, and deposited with the U.S. Postal Service. ☐ **Hand delivery** ☐ **Facsimile transmission** ☒ Courtesy copy via **Email**
Darren Weirnick James C. Strong Oregon Department of Justice General Counsel Division, Tax & Finance Section 1162 Court St NE Salem, OR 97301-4096 *Of Attorneys for Defendant*	☒ **Electronic service -** UTCR 21.100 (1)(a) **Odyssey File and Serve** ☐ **Mail** in a sealed envelope, with postage paid, and deposited with the U.S. Postal Service. ☐ **Hand delivery** ☐ **Facsimile transmission** ☒ Courtesy copy via **Email**

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