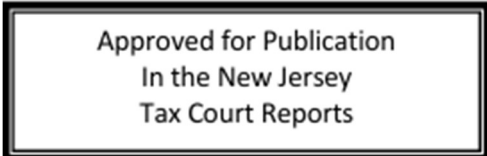


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THE TAX COURT COMMITTEE ON OPINIONS

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AMERICAN CATALOG MAILERS	:	
ASSOCIATION,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NO: 010021-2025
Plaintiff,	:	
	:	
v.	:	
	:	
DIRECTOR, DIVISION OF TAXATION,	:	
	:	
Defendant.	:	
	:	
-----X		



Decided October 1, 2026.

Jamie M. Zug, and David Swetnam-Burland (Brann & Isaacson) of the Maine bar, admitted pro hac vice, argued the cause for plaintiff (Law Office of Jamie M. Zug, David Swetnam-Burland, Nathaniel A. Bessey (Brann & Isaacson) of the Maine bar, admitted pro hac vice, and Martin I. Eisenstein (Brann & Isaacson) of the Maine bar, admitted pro hac vice, attorneys; Jamie M. Zug, Nathaniel A. Bessey, David Swetnam-Burland and Martin I. Eisenstein, on the brief).

Anthony D. Tancini, Deputy Attorney General, argued the cause for defendant (Jennifer Davenport, Attorney General, attorney; Anthony D. Tancini, on the brief).

CIMINO, J.T.C.

I. INTRODUCTION

The American Catalog Mailers Association (ACMA) contends that federal law preempts the Director, Division of Taxation’s regulations concerning interstate internet sales. ACMA is a trade group whose members include out-of-state internet

sellers of tangible goods such as home audio and video products. Through the internet, the sellers provide interactive technical support for the goods. The sellers also place internet tracking cookies on potential and actual buyers' computers. The Director adopted regulations deeming interactive technical support and placing internet cookies as in-state business activities. In-state business activities subject a seller to state income taxation.

Under federal law, the Interstate Income Act, Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified at 15 U.S.C. §§ 381 to 384) [hereinafter P.L. 86-272], out-of-state sellers are not subject to state income taxation if the "business activities within such State" are limited to the solicitation of tangible goods. P.L. 86-272 codifies the common law drummer exception. A drummer is a specific type of itinerant salesperson. The ACMA argues its members' internet activities are analogous to those performed by drummers. Thus, the ACMA asserts P.L. 86-272 preempts the Director's regulations.

The Director contends interactive technical support constitutes an in-state business activity because the buyers receiving support are in-state. The ACMA counters it constitutes an out-of-state business activity because the sellers providing the support are located out-of-state. The court finds it is both. Since there is an in-state component, taxation is permissible.

The Director also asserts placing internet cookies is an activity which takes place in-state. Internet cookies are small packets of data placed on actual or potential buyer's computers to track certain activities including on-line shopping cart contents and websites visited. The ACMA's factual description of cookie implementation is vague. The Director's regulatory description of cookie implementation is not congruent with the factual recitations in a multitude of judicial decisions. The court is hesitant to rule upon the validity of the regulation without a showing of impact upon anyone.

II. PROCEDURAL HISTORY

The Director promulgated regulations addressing certain internet transactions. 57 N.J.R. 1303(b) (June 16, 2025). The ACMA, on behalf of its members, filed a declaratory judgment action challenging the regulations. The judicial branch can review legislative or executive acts through a declaratory judgment action.¹ See N.J.S.A. 2A:16-50 to -62.

¹ As to tax matters, declaratory judgment actions have considered statutes, regulations and even letter rulings. American Trucking Ass'ns, Inc. v. Kline, 8 N.J. Tax 181, 190-191 (Tax 1986) (constitutionality of statute), aff'd, 9 N.J. Tax 631 (App. Div. 1987); Exxon Corp. v. Hunt, 475 U.S. 355, 361 (1986), aff'g in part, rev'g in part, 97 N.J. 526 (1984) (preemption of statute); Exxon Corp. v. Township of East Brunswick, 192 N.J. Super. 329, 337 (App. Div. 1983) (challenge of regulation); Labor Ready Northeast, Inc. v. Dir., Div. of Tax'n, 25 N.J. Tax 607, 612-13 (Tax 2011) (challenge to letter ruling); Rutgers Univ. Legis. Affairs Council, Inc. v. Thompson, 12 N.J. Tax 642, 647 (Tax 1992) (challenge to letter ruling).

The ACMA asserts that P.L. 86-272 preempts the regulations. When Congress has spoken, and there is tension with a state enactment, the Supremacy Clause of the United States Constitution provides the vehicle for resolving this tension. The Supremacy Clause provides “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”² U.S. Const., art. VI, cl. 2. The Supremacy Clause is not a source of rights. Instead, it simply provides a rule of decision for courts to follow when federal and state law are in conflict. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324-25 (2015).

Both parties have moved for summary judgment. Our Supreme Court has indicated that summary judgment provides a prompt business-like and appropriate method of disposing of litigation where material facts are not in dispute. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995). In most instances, the filing of cross-motions signals the matter is appropriate for summary judgment. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 177 (App. Div. 2008).

² In addition, “all . . . judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution.” U.S. Const. art. VI, cl. 3.

III. LEGAL ANALYSIS

A. Introduction

The starting point for evaluating the interplay between P.L. 86-272 and the Director's regulations is the Commerce Clause of the United States Constitution. The Commerce Clause gives Congress broad powers to regulate interstate commerce. The clause provides "[t]he Congress shall have the Power . . . To regulate Commerce . . . among the several States" U.S. Const. art. I, § 8, cl. 3.

The adoption of the Commerce Clause marked a sharp turnaround from the sentiments expressed in the Declaration of Independence (U.S. 1776). ¶ 18. The Declaration expressed disgust with Great Britain's handling of trade with the colonies.³ Ibid. Consequently, the states had little appetite for a strong central government controlling commerce. "[A]s Free and Independent States, they [each] ha[d] full Power to . . . establish Commerce . . ." Id. at ¶ 32. Ratified in 1781, the Articles of Confederation gave the federal government very little control over commerce. 1 The Documentary History of the Ratification of the Constitution 136 (Merrill Jensen ed., 1976) (ratification date).

Trade disputes soon arose between the states. Tariffs levied for commerce through the ports of New York City and Philadelphia rendered New Jersey a "[c]ask

³ In fact, this grievance was listed before taxation without representation. Id. at ¶ 19.

tapped at both ends.”⁴ James Madison, in his Preface to Debates in the Convention of 1787, 3 The Records of the Federal Convention of 1787 542 (Max Farrand ed., 1911). New Jersey convention commissioners attended a 1786 convention in Annapolis, Maryland limited to resolving trade disputes. Jensen at 181. While the convention was not a success, the New Jersey commissioners urged an expanded follow-up convention to include other topics. Id. at 183-84.

A 1787 convention convened in Philadelphia with commissioners having an expanded mandate beyond commerce. Having everything on the table facilitated negotiations for a strong central government with extensive powers over trade and commerce. See Ibid. As succinctly explained by the United States Supreme Court:

These “few simple words [of the Commerce Clause] . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”

[Comptroller v. Wynne, 575 U.S. 542, 548 (2015) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).]

⁴ While some sources attribute a similar sentiment to Benjamin Franklin, no evidence of Franklin uttering such a statement exists. Miriam V. Studley, 18 New Jersey Historical Series 1 (1964).

In summary, a major impetus for adopting our constitutional system was commerce and trade.

The Commerce Clause contains both a power and a prohibition. The explicit words confer upon Congress the power to affirmatively regulate interstate commerce. The clause does not mandate Congress to act. When Congress does not act, the negative or dormant Commerce Clause prohibits states from “discriminating between transactions on the basis of some interstate element.” Wynne, 575 U.S. at 549 (quoting Bos. Stock Exch. v. State Tax Comm’n, 429 U.S. 318, 332 n.12 (1977)).

The dormant clause is not explicitly written into the Constitution. Rather, the dormant clause reflects a judicial concept found in interpreting the actual words of the Commerce Clause.⁵ Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179-80 (1995). It is essential to the overall interpretation of the Commerce Clause. Ibid. The concept dates back to 1824. See Gibbons v. Ogden, 22 U.S. 1, 209 (1824).

Congress has been slow to exercise its affirmative powers under the Commerce Clause, especially regarding taxation. It did not explicitly restrict state

⁵ The existence of the dormant Commerce Clause has not gone unquestioned by some members of the Court. Wynne, 575 U.S. at 549.

taxation until enacting P.L. 86-272 in 1959.⁶ Yet, inaction by Congress has not sapped the Commerce Clause of vitality. Over some two hundred years, the United States Supreme Court has not hesitated to find the dormant clause precludes discrimination between intra- and inter-state transactions.

Initially, the Court espoused a “free trade” view of the dormant Commerce Clause. The Court declared “[i]nterstate commerce cannot be taxed at all” Robbins v. Taxing Dist., 120 U.S. 489, 497 (1887). See also Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977). This is a physical presence standard. The Court prohibited states from taxing goods in interstate commerce (i.e., from out-of-state) unless the seller was physically present in the state in some way.⁷

Over the years, the Court’s standard to establish substantial nexus to impose taxation has varied. The standard has oscillated between physical presence and

⁶ Previously the Supreme Court held regulations authorized under the Tariff Act of 1930 which restricted state taxation were a valid exercise under the Foreign Commerce Clause. McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940). Also, the McCarran-Ferguson Act allowed per the Commerce Clause, expanded state taxation powers. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

⁷ While grounded in physical presence, the early tests look to the direct and indirect burden upon commerce. This approach is regarded as “a conceptual and unrealistic mode of judicial thought [giving] very little consideration to the practical question of economic burden of the tax.” Paul J. Hartman, State Taxation of Interstate Commerce 31-32 (1953). The test was seen as “a judicial passport to the privileged sanctuary of tax immunity.” Paul J. Hartman, State Taxation of Interstate Commerce: A Survey and an Appraisal, 46 Va. L. Rev. 1051, 1073 (1960). “This arid distinction between direct and indirect burdens allowed very little coherent, trustworthy guidance as to tax validity.” Wynne, 575 U.S. at 552.

economic activity standards. Under a physical presence standard, the seller either had to be located in the taxing state or have some sort of physical presence in the state. Under the economic activity standard, physical presence did not matter so long as the seller derived an economic benefit from the state. The current standard is economic activity.

B. The rise of the peddler/drummer distinction.

The physical presence standard worked well when transportation and communications were slow. The post-Civil War period saw a rapid expansion of railroad transportation and telegraph communications. Walter A. Friedman, Birth of a Salesman: the Transformation of Selling in America 56-57 (2004). Traveling to visit customers and placing orders back to the home office, now took hours instead of days. Id. at 59. These advances fostered a proliferation of interstate traveling solicitors. Ibid. Local merchants and wholesalers soon complained that these solicitors paid no taxes. Robbins, 120 U.S. at 498. Local and state governments imposed taxes, and the Commerce Clause was raised as a defense. Id. at 492. Arising from challenges of these taxes were a series of cases commonly referred to as the drummer cases. Bonnier Corp. v. Jersey Cape Yacht Sales, Inc., 416 N.J. Super. 436, 441 (App. Div. 2010).

The courts separated the solicitors into two categories – peddlers and drummers. A peddler is one who carries goods for immediate delivery. Comment,

Taxation of Itinerant Salesmen, 40 Yale L.J. 1094 (1931). Sales from a peddler are “essentially [an] intrastate process whether a retailer operates from a fixed location or from a wagon.” Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 394 (1952) (emphasis added). Peddler sales have long been considered taxable. Howe Mach. Co. v. Gage, 100 U.S. 676 (1879).

On the other hand, a drummer is one who sells with or without samples of goods for future delivery via interstate commerce. 40 Yale L.J. at 1094-95. Drummers sold retail goods door-to-door to households or travelled a circuit selling wholesale to stores and shops. Brennan v. City of Titusville, 153 U.S. 289, 290 (1894); Friedman at 95. Obviously, drummers were physically present in the taxing state. Nevertheless, the Supreme Court carved out a drummer exception to the physical presence standard. The exception applied if the only in-state activity consisted of solicitation or advertising, and the orders were sent to an out-of-state home office for out-of-state acceptance, filling and delivery back to the buyer. Norton Co. v. Dep’t of Rev., 340 U.S. 534, 537 (1951).

The 1920s saw the rise of national magazines followed by the 1930s rise of nationwide radio networks. Nat’l Broad. Co. v. United States, 319 U.S. 190, 197 (1943). Roland Marchand, Advertising the American Dream 7 (1985). Also, the federal government enacted nationwide New Deal programs and policies in the 1930s to alleviate the effects of the Great Depression. With this increasingly

integrated national economy, the United States Supreme Court in 1938 recognized the need for interstate commerce to “pay its way.”⁸ Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). In a decision involving the taxation of an interstate magazine, the Court held out-of-state sellers gaining economic advantage in a state must pay their just share of the state tax burden. Ibid. Physical presence was no longer needed to establish taxation. Economic activity in the state would be the standard.

The Supreme Court soon retreated from economic nexus starting in 1944 when it declared “[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.” McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944). The Court held “[u]nless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.” Norton, 340 U.S. at 537. In other words, physical presence.⁹ See Hartman at 99.

With physical presence once again the standard, the drummer exception continued to have vitality in the late 1940s through the 1950s. Norton, 340 U.S. at

⁸ This echoed Justice Holmes comments from earlier in the decade that “[e]ven interstate commerce must pay its way.” N.J. Bell Tel. Co. v. State Board, 280 U.S. 338, 351 (1930) (Holmes, J., dissenting).

⁹ “[T]he distinction between taxable and non-taxable activities or events for commerce clause purposes, often ha[d] been made to depend upon whether the activity or event taxed had some physical connection with interstate movement” Hartman at 99.

537 (citing McLeod, 322 U.S. 327); West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390, 391 (1957); Nippert v. City of Richmond, 327 U.S. 416, 417-18 (1946); Memphis Steam, 342 U.S. at 392-93. In 1951, the Supreme Court plainly recognized “[w]here a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.”¹⁰ Norton, 340 U.S. at 537 (citing McLeod, 322 U.S. 327).

C. The reascendancy of the economic activity standard.

Like the internet of today, the rise of television had a profound impact upon our culture including how goods were marketed and sold. Courts and commentators recognized that:

Several hundred travelling salesmen, no matter how avidly they hawk their wares, are not nearly as effective a “nexus” for an exploitation or invasion of a consumer market as a Dinah Shore or a Pat Boone as they croon their sponsor’s products into the hands of thousands of purchasers on interstate television and radio. Is the state of market to be denied a tax from either the out-of-state seller or the broadcasting company because the contacts of

¹⁰ The use of the term “grip” may be a pun by the Court. A grip commonly referred to the suitcase a drummer carried. Timothy B. Spears, 100 Years on the Road: The Traveling Salesman in American Culture 12, 88, 135 (1995); Friedman at 80.

such out-of-state sellers and broadcasters are ethereal only?^{11, 12}

[Paul J. Hartman, State Taxation of Corporate Income from a Multistate Business, 13 Vand. L. Rev. 21, 43 (1959) (quoted in Am. Refrigerator Transit Co. v. State Tax Comm’n, 395 P.2d 127, 131 n.2 (Oregon 1964)).]

By 1959, over eighty-five percent of households had a television. Broad. Publ’ns, Inc., 1959 Broadcasting Yearbook Issue A-21 (1959). Viewing time averaged five and one-half hours per day. Ibid. Against this backdrop, Northwestern States Portland Cement Co. v. Minnesota, came before the Supreme Court in 1959.¹³ 358 U.S. 450 (1959). The Court undertook the opportunity to “clear[] up the tangled underbrush of past cases”¹⁴ Id. at 457. Past decisions

¹¹ Dinah Shore hosted The Dinah Shore Chevy Show, a variety program on the National Broadcasting Company (NBC) network from 1956-1963. Vincent Terrace, 1950s Television Advertising: The Sponsors and Programs 25 (2025). Pat Boone hosted The Pat Boone Chevy Show, a variety program on the American Broadcasting Company (ABC) network from 1957-1960. Ibid.

¹² An FCC Commissioner from the era described television programming as a “vast wasteland” with “endless[] commercials - - many screaming, cajoling, and offending.” Excerpts from Speech by Minow, N.Y. Times, May 10, 1961, at 91.

¹³ Shortly before, in 1958, the New Jersey Legislature approved a net income tax on interstate corporate businesses. L. 1958, c. 63, § 2 (codified as amended at N.J.S.A. 54:10A-5(c)).

¹⁴ Northwestern “concern[ed] the constitutionality of state net income tax laws levying taxes on that portion of a foreign corporation’s net income earned from and fairly apportioned to business activities within the taxing State when those activities

“ha[d] ‘not always been clear[,] consistent or reconcilable.’” Id. at 458 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954)).

The Court “conclude[d] that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.” Id. at 452. This harkened back to the 1938 Western Live Stock decision in which the court declared that interstate commerce “must pay its way.” 303 U.S. at 254. The Court reinvigorated economic activity as the standard. See CIT Fin. Servs. Consumer Disc. Co. v. Dir., Div. of Tax’n, 4 N.J. Tax 568, 577 (Tax 1982).

Northwestern consisted of two cases.¹⁵ Both taxpayers maintained sales offices in the taxing states. 358 U.S. at 454, 455-56. With sales offices as a local incident in the taxing state, the Court could have reached the same decision without abandoning the physical presence test. Compare Norton, 340 U.S. at 538-39 (1951 – taxable, branch office and warehouse in state), with West Point, 354 U.S. at 391

are exclusively in furtherance of interstate commerce.” Id. at 452. There was not any question as to the fairness of any apportionment. Id. at 453-54.

¹⁵ Northwestern is a consolidated appeal of two decisions. The Minnesota Supreme Court’s decision in State v. Northwestern States Portland Cement Co., 84 N.W.2d 373 (Minn. 1957) and the Georgia Supreme Court’s decision in Stockham Valves & Fittings, Inc. v. Williams, 101 S.E.2d 197 (Ga. 1957).

(1957 – not taxable, no place of business, office or inventory in state). Instead, the Court decided to discard the tangled underbrush of past decisions and reembraced an economic activity standard.

D. Congress reacts to the Court.

With the “broad scope” of the Northwestern ruling in hand, three states amended their laws within six months to implement the economic activity standard. S. Rep. 86-658, at 4 (1959). Businesses complained of the perceived tremendous difficulty of complying with a multitude of existing state and local tax laws. Id. at 3. The business community complained of uncertainty. H.R. Rep. 86-936, at 2 (1959). The mail-order, radio and television industries were unsure how they would be affected. S. Rep. 86-453, at 4 (1959).

Multiple bills were introduced to roll back the Supreme Court’s renewed embrace of economic nexus. A House bill, H.R. Res. 450 (1959), would have precluded taxation unless the business maintained an office, warehouse or other facility in the state. In other words, the bill was rooted firmly in physical presence.

The Senate was more circumspect. One senator recognized that the traditional yardstick for taxation was a place of business. 86 Cong. Rec. 16359 (1959). Another felt physical presence simplified administration of any tax. 86 Cong. Rec. 16362, (1959). Still, some senators were reluctant to abrogate Northwestern. 86 Cong. Rec. 16386, 16387 (1959). The debate revealed strong pushback from state tax

administrators. 86 Cong. Rec. 16356-57, 16377, 16378, 16380, 16382 (1959). During the debate there was extensive and repeated discussion of drummers and drummer-type activity. 86 Cong. Rec. 16361-62, 16385, 16474, 16475, 16476, 16493, 16493-94 (1959). The Senate was hesitant to wholeheartedly endorse a physical presence test.

The leading Senate bill, S. 2524 (1959), initially limited taxation in three drummer-type situations despite economic activity in a state. The bill was designed to take the drummer exception from the physical presence standard and apply it to the economic activity standard.

Subsection (a)(3) of S. 2524 precluded taxation under the facts in Northwestern. That is, when an in-state sales office is maintained with only in-state solicitation taking place. The Senate struck subsection (a)(3) in an effort to make the bill more palatable to pass. 86 Cong. Rec. 16477 (1959). In other words, the Senate chose not to abrogate Northwestern.

What remained were subsections (a)(1) and (a)(2) which mirrored two pending appeals to the Supreme Court, Brown-Forman Distillers Corp. v. Collector of Revenue, 101 So.2d 70 (La. 1958) and International Shoe Co. v. Fontenot, 107 So.2d 640 (La. 1958). In both appeals, the Louisiana Supreme Court allowed taxation despite no activity beyond solicitation occurring in-state. The Supreme

Court declined to hear the appeals in the immediate wake of the Northwestern decision.

Subsection (a)(2) excepts taxation under the fact pattern of Brown-Forman where a product manufacturer sends “missionary men” into a state. 101 So.2d at 70. The missionary men (now commonly known as manufacturer’s representatives) traveled along with wholesalers’ sales personnel to visit retailers. Ibid. The missionary men did not maintain offices in the state. Ibid. Nonetheless, the Louisiana Supreme Court held the activity opens the door to taxation. Id. at 72. Two weeks after Northwestern, the United States Supreme Court dismissed the appeal. 359 U.S. 28 (1959).

Subsection a(1) precludes taxation based upon the facts of International Shoe where out-of-state personnel travel throughout the state. 107 So.2d at 640. The sellers did not maintain sales offices in the state. Ibid. The Louisiana Supreme Court declared the sellers were subject to taxation. Id. at 641. Two months after Northwestern, the United States Supreme court denied certiorari seeking reversal. 359 U.S. 984 (1959).

While Brown-Forman and International Shoe were not dispositive of whether the Court had fully abandoned the drummer exception, Congress cited Brown-

Forman while expressing “general apprehension” as to where the law was heading.¹⁶

S. Rep. 86-658, at 3. Only seven months after the Northwestern decision, the President signed S. 2524 into law as P.L. 86-272.¹⁷

¹⁶ The Senate Committee comments appear prescient when a year later in a sales tax case and after the enactment of P.L. 86-272, the Supreme Court determined that an out-of-state seller who did not maintain any offices but merely had sales personnel working on its behalf in the taxing state had sufficient nexus. Scripto, Inc. v. Carson, 362 U.S. 207, 211-12 (1960).

¹⁷ The relevant text of P.L. 86-272 follows:

Minimum standards. No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act [enacted Sept. 14, 1959], a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such

P.L. 86-272 does not abrogate the economic activity standard. In fact, it generally allows taxation based upon “income derived within such State.” 15 U.S.C. § 381(a). However, P.L. 86-272 creates an exception for the “sales of tangible personal property.” Ibid. When “business activities within [a] [s]tate” are limited to “solicitation” along with approvals obtained and shipments made from “outside the state,” a state cannot pursue an income tax. Ibid. P.L. 86-272 takes the drummer exception from the physical presence standard described by the Court’s 1951 Norton decision and applies it to the economic activities standard announced by the Court’s 1959 Northwestern decision.

To summarize, there are three key takeaways. First, Congress did not abrogate the economic activities standard. Second, Congress did not impose a physical presence test such as that proposed by H.R. Res. 450. Third, Congress engrafted a drummer exception onto the economic activities standard.

Only intended to be a temporary measure, P.L. 86-272 also authorized what came to be known as the Willis Committee to study the issue to come up with a more

solicitation are orders described in
paragraph (1).

[15 U.S.C. § 381(a).]

permanent and comprehensive solution.¹⁸ U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 486-87 (1978). A 1963 survey conducted and reported upon by the Willis Committee reveals that despite fears to the contrary, most states still relied upon physical presence as a standard for taxation. H.R. Rep. 88-1480, at 147-51 (1964). With many states using physical presence, there were few decisions dealing with economic nexus.

E. Uncertainty after the Court again considers physical presence.

A few years after the Willis Committee report, the Supreme Court reinvigorated the physical presence standard in 1967. The Court held that out-of-state sellers could not be responsible for sales tax collections. National Bellas Hess, Inc. v. Dep’t of Revenue, 386 U.S. 754, 759-60 (1967). The decision breathed new life into the physical presence standard. In 1992, the Supreme Court in Quill Corp. v. North Dakota reaffirmed the holding of Bellas Hess. 504 U.S. 298, 317-18 (1992). The physical presence standard remained viable until 2018 when the Supreme Court decided South Dakota v. Wayfair, Inc. expressly overruling Bellas Hess and Quill and firmly setting economic activity as the standard. 585 U.S. 162, 188 (2018).

The years between Bellas Hess and Wayfair, 1967 to 2018, marked a period of uncertainty. AccuZIP v. Dir., Div. of Tax’n, 25 N.J. Tax 158, 169 (Tax 2009)

¹⁸ The Willis Commission held extensive hearings and issued a multivolume report of hundreds of pages in 1964 exhaustively covering all forms of interstate taxation. See H.R. Rep. 88-1480 (1964).

(“[s]tate courts . . . split as to . . . physical presence”). There was some disagreement as to whether the physical presence standard of Bellas Hess and Quill only applied to sales tax. Lanco, Inc. v. Dir., Div. of Tax’n, 188 N.J. 380, 383 (2006) (no “universal physical presence requirement” for state taxation). See also J.C. Penney Nat. Bank v. Johnson, 19 S.W.3d 831, 839 (Tenn. Ct. App. 1999) (physical presence standard beyond sales tax); Tax Comm’r v. MBNA America Bank, N.A., 640 S.E.2d 226, 234 (W. Va. 2006) (economic presence test); Galland Henning Nopak, Inc. v. Combs, 317 S.W.3d 841, 844-45 (Tex. App. 2010) (bright-line physical presence requirement beyond sales tax). There was further disagreement whether Bellas Hess and Quill applied to intangible sales. Geoffrey, Inc. v. S.C. Tax Comm’n, 437 S.E.2d 13, 18 (S.C. 1993) (physical presence not applicable for intangibles); Lanco, Inc. v. Dir., Div. of Tax’n, 379 N.J. Super. 562, 568 (App. Div. 2005) (agreeing with Geoffrey), aff’d, 188 N.J. 380 (2006).

Amidst this uncertainty, no New Jersey court decision squarely and definitively addressed whether P.L. 86-272 “business activities within such State” only includes activities which physically occur in-state.¹⁹ The New Jersey decisions, save one, addressed whether business activities physically occurring in-state were beyond P.L. 86-272 solicitation. See, e.g., Clairol, Inc. v. Kingsley, 109 N.J. Super. 22, 30 (App. Div. 1970) (technical support), aff’d o.b., 57 N.J. 199; Mark Andy, Inc.

¹⁹ The court is also not aware of any out-of-state decisions.

v. Dir., Div. of Tax'n, 8 N.J. Tax 593, 598-99 (Tax 1986); (installation and maintenance of equipment); Chester A. Asher, Inc. v. Dir., Div. of Tax'n, 22 N.J. Tax 582, 595-98 (Tax 2006) (pick up of collections and stale candy). A close reading of the only United States Supreme Court decision to squarely address P.L. 86-272 during this period, Wisconsin Department of Revenue v. William Wrigley, Jr., Co., only considered whether business activities physically performed in-state constituted solicitation.²⁰ 505 U.S. 214, 232-235 (1992).

However, in one New Jersey decision, AccuZIP, seller's personnel, physically located out-of-state, provided technical support for software to in-state New Jersey buyers. 25 N.J. Tax at 163. The court was cognizant of an Appellate Division determination that the Bellas Hess physical presence standard did not apply to intangible property. Id. at 170. However, the court determined the software to be tangible property. Id. at 172. The court noted that AccuZIP never had an employee present in New Jersey soliciting. Id. at 181. And, if it did, the protections of P.L. 86-272 would apply. Ibid. By inference, the court looked to physical presence as the standard for "business activities within such State." 15 U.S.C. § 381(a).

²⁰ Heublein, Inc. v. S.C. Tax Comm'n, 409 U.S. 275, 281-84 (1972), considered the interplay between P.L. 86-272 and the Twenty-first Amendment.

F. The Court considers interstate taxation of internet sales.

The Supreme Court's decision in Wayfair opens the door to resolving whether there can be P.L. 86-272 business activities within a state without in-state physical presence. Wayfair, 585 U.S. at 178. Wayfair, a sales tax case, unequivocally abandoned the physical presence test. Ibid. The decision arose out of internet sales. Id. at 170.

The Wayfair Court recognized “[e]ach year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States.” Id. at 176. “Physical presence is not necessary to create a substantial nexus.” Id. at 178. “[I]t is not clear why a single employee or a single warehouse should create a substantial nexus while ‘physical’ aspects of pervasive modern technology should not. For example, a company with a website accessible in [New Jersey] may be said to have a physical presence in the State via the customers’ computers.” Id. at 181. “The ‘dramatic technological and social changes’ of our ‘increasingly interconnected economy’ mean that buyers are ‘closer to most major retailers’ than ever before -- ‘regardless of how close or far the nearest storefront.’” Ibid. (quoting Direct Mktg. Ass’n v. Brohl, 575 U.S. 1,17 (2015) (Kennedy, J., concurring)).

“This Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building

in the State.” Wayfair, 585 U.S. at 179. The old physical presence rule had “come to serve as a judicially created tax shelter for businesses” Ibid. Echoing earlier Supreme Court decisions of Western Live Stock and Northwestern, the Wayfair court declared “it is ‘not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden.’” Id. at 178 (quoting Complete Auto, 430 U.S. at 288). “[T]here is nothing unfair about requiring companies that avail themselves of the States’ benefits to bear an equal share of the burden” Wayfair, 585 U.S. at 182-83. “State taxes fund the police and fire departments that protect the homes containing their customer’s [goods] and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the ‘sound local banking institutions to support credit transactions and courts to ensure collection of the purchase price.’”²¹ Id. at 182 (quoting Quill, 504 U.S. at 328).

²¹ The Court was also concerned about courts unduly interfering in the marketplace. “[I]t is certainly not the purpose of the Commerce Clause to permit the Judiciary to create market distortions. ‘If the Commerce Clause was intended to put businesses on an even playing field, the physical presence rule is hardly a way to achieve that goal.’” Id. at 178-79 (quoting Quill, 504 U.S. at 329 (opinion of White, J., dissenting)). “Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable.” Wayfair, 585 U.S. at 179.

G. The Director's regulations

In the wake of Wayfair, the Director now adopts regulations addressing internet sales. Unfortunately, until Wayfair, many courts clung to the old paradigm of physical presence after the Court announced Bellas Hess. Wayfair cut away the tangled underbrush of past decisions. However, courts must still respect the Congressional mandate of P.L. 86-272 which engrafted the drummer exception onto the economic activity standard. If a seller of tangible goods limits “business activities within such State” to “solicitation” and the sales are approved and fulfilled from “outside the state,” a state cannot impose an income tax on the seller. 15 U.S.C. § 381(a). Despite P.L. 86-272, the economic activity standard remains for tangible goods. It is merely limited by the P.L. 86-272 drummer exception.

While couched as something new, the internet is just the latest technological iteration of past practices. Just as today, it was recognized at the time P.L. 86-272 was enacted in 1959 that buyers can be effectively reached without the seller ever stepping foot in the state. Instantaneous two-way communications including telephones, teletype and telex machines existed in 1959. See Stockham Valves, 101 S.E.2d at 199. Television advertising and solicitation reached most Americans. Broadcasting at A-21. The internet has only made all this more efficient and pervasive.

ACMA members sell tangible goods in New Jersey which they approve and fulfill from outside New Jersey. The question is whether they engage in “business activities within [New Jersey]” in addition to “solicitation.” 15 U.S.C. § 381(a). The parties do not dispute that business activities include providing interactive technical support or placing internet cookies. Neither party claims technical support is solicitation. See Wrigley, 505 U.S. at 233-34 (determining if certain functions are ancillary to solicitation). The true focus is whether the activities occur within New Jersey.²² P.L. 86-272 does not require physical presence within New Jersey to establish a business activity within the state. Nevertheless, for taxation to apply, a modicum of business activity besides solicitation is necessary.

1. Interactive Technical Support

A preliminary task is to define technical support. Technical support is the seller’s education of the buyer of how to effectively use the product. Relevant parallels can be drawn between technical support and academic classroom education. Nowadays, academic learning is commonly divided into synchronous and asynchronous methods. See, e.g., N.J.A.C. 13:30-5.2(a), 13:31-1.7(e)(1)(ii), 13:44E-4.9(h). The most common example of synchronous learning is an in-person or live remote class where questions can be asked of the instructor. In other words,

²² Moreover, the ACMA does not mount a challenge based upon the dormant Commerce Clause.

an interactive process. On the other hand, asynchronous learning is a recorded class session that can be viewed later thereby depriving the learner of asking questions and engaging in an interactive process.

As applied here, the question is whether the technical support communications are attributable to the seller's out-of-state location or the buyer's in-state location. For asynchronous communications such as frequently asked questions posted on a website, the Director's regulations indicate it is not a business activity conducted within the state.²³ N.J.A.C. 18:7-1.9A(b)(1). The ACMA agrees. The court finds this to be a correct conclusion.

For synchronous communications such as "electronic chat" and "an internet help desk for technical support, whereby the customer can talk to a service representative who then may conduct repair services through the internet," the seller is reaching into New Jersey and interacting with the buyer of the goods. See N.J.A.C. 18:7-1.9A(a)(4). Thus, the Director's regulations correctly frame this type

²³ The asynchronous regulation reads in pertinent part:

Posting frequently asked questions (FAQ) on a webpage
to assist customers or potential customers;

[N.J.A.C. 18:7-1.9A(b)(1).]

of interactive technical support as a business activity taking place in New Jersey.²⁴
N.J.A.C. 18:7-1.9A(a)(4).

Determining the location of interactive technical support is not a binary choice. Interactive technical support occurs both out-of-state where the seller is providing the support as well as in New Jersey where the buyer is receiving the support. A concurrent business activity is not a foreign concept when considering state income taxation. In other contexts where taxability is not at issue, but the quantum of taxation is, both the Director and the courts have apportioned the tax between in-state and out-of-state activities. See Bank of Am. Consumer Card Holdings v. Dir., Div. of Tax'n, 29 N.J. Tax 427, 471-72 (Tax 2016). Even with interactive technical support deemed to occur concurrently in-state and out-of-state,

²⁴ The synchronous regulation reads in pertinent part:

Providing post sales assistance to an electronic chat, email, or application that the taxpayer's customers access. Some examples include, but are not limited to: chat rooms for troubleshooting problems, . . . complaint resolution, or an internet help desk for technical support, whereby the customer can talk to a service representative who then may conduct repair services through the internet;

[N.J.A.C. 18:7-1.9A(a)(4).]

Notably, as discussed below, the court does not find that e-mails are always synchronous.

the protections of P.L. 86-272 would not apply since some quantum of the support constitutes in-state activity beyond solicitation.

Somewhere in-between the synchronous communications of internet chat and the asynchronous communications of frequently asked questions posted on a website, there is e-mail and regular mail technical support. The Director asserts e-mail technical support is a business activity in New Jersey. N.J.A.C. 18:7-1.9A(a)(4). E-mail can have an interactive quality like other synchronous communications. But, e-mail can also lack the immediacy of synchronous communication. An e-mail with an auto-response that someone may respond within seventy-two hours is no more responsive than a letter sent by regular mail. The question becomes difficult when the e-mail response rate is quicker.

As to delayed response e-mail, or regular mail for that matter, the question is whether the seller is actively interacting with the buyer in the taxing jurisdiction or merely assembling information out-of-state for delivery to the buyer. A frequently asked question website is a compilation of questions assembled out-of-state which the in-state buyer can access. Likewise, delayed response e-mail or regular mail is an out-of-state assemblage of information which is then sent to the in-state buyer. The Director's regulations provide that the asynchronous communications of a frequently asked questions technical support website are not business activities in New Jersey. N.J.A.C. 18:7-1.9A(b). Likewise, responding to an e-mail or regular

mail days later is not synchronous, but rather more akin to the asynchronous frequently asked questions.

On the other hand, if the seller responds to e-mails in near real time, this would evince interactive synchronous communications. The regulations do not delimit e-mail response times. The ACMA does not factually address e-mail technical support. The court is reluctant to preempt a regulation on declaratory judgment without a firm factual record.

Machine generated responses are another area the court does not have a sufficient factual record to address at this time. On a basic level, a web-based pre-programmed decision tree can respond to a buyer's query. For example, the first question may be is the device switched on. If no, instruct the user to switch on the device. If yes, the user is then asked if the device is plugged in, and so on until reaching a possible resolution. In many ways this may be no different than the information provided by a frequently asked question page providing a step-by-step troubleshooting guide.

The question becomes more difficult when what is colloquially referred to as artificial intelligence is involved. Computers utilizing natural language processing, sometimes referred to as chatbots, are trained to provide responses to queries submitted by users. See Garner v. Kadince, Inc., 571 P.3d 812, 814 n.1 (Utah Ct. App. 2025); Wash. Rev. Code § 19.440.010(3). Is the computer interacting with the

user like a human would or is it merely regurgitating a rote decision tree? The answer in part depends upon the sophistication of the chatbot. In any event, neither the regulations nor ACMA's factual recitation addresses the issue. The court declines to rule on this issue.

Certain business activities which arguably constitute interactive technical support are de minimis activities in the state. The United States Supreme Court has determined that de minimis in-state business activities do not give rise to taxation. Wrigley, 505 U.S. at 231. For example, sellers of certain household chemicals are certainly wise to have emergency telephone number for buyers to call in the event of ingestion or other poisoning. From a public policy perspective, the court and inferably the Director does not want to discourage sellers from providing such support for fear of establishing nexus. Taxation is an important tool of social policy. A responsible seller should not be punished with taxation because it merely provides an emergency contact to address safety issues such as poisoning.

The ACMA also infers that P.L. 86-272 establishes a physical presence standard for the sale of tangible goods. That is not so for three reasons.

First, at the time the bill which became P.L. 86-272 was being considered, Congress also considered a bill reestablishing the physical presence standard. See H.R. Res. 450. Instead, Congress opted for the drummer sales exception embodied in P.L. 86-272.

Second, P.L. 86-272 condones the economic activity standard. But for the drummer exception, the statute allows taxation under the economic activity standard “on the income derived within such State.” 15 U.S.C. § 381(a).

Third, P.L. 86-272’s basis for differentiating taxability is not the seller’s physical location, but rather the location of the business activity. P.L. 86-272 identifies solicitation as a business activity that can occur “within such State” whereas approval and fulfillment must occur “outside the state.” Certainly, a seller can perform a business activity within a state without being physically present. “Between targeted advertising and instant access to most consumers via any internet-enabled device, ‘a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.’ A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores.” Wayfair, 585 U.S. at 181 (quoting Direct Mktg., 575 U.S. at 18 (Kennedy, J., concurring)). This observation harkens back to earlier comments at the time P.L. 86-272 was adopted, when television was more effective than scores of sales personnel coming into the State. Hartman, 13 Vand. L. Rev. at 43; Am. Refrigerator, 395 P.2d at 131 n.2.

Long before the days of the internet, the United States Supreme Court noted drumming instead of peddling gives rise to tax advantages. Norton, 340 U.S. at 537.

Nevertheless, the Court wisely observed “from a competitive point of view, that system has disadvantages. The trade may view the seller as remote and inaccessible. He cannot be reached with process of local courts for breach of contract, or for service if the goods are defective or in need of replacement.” Id. at 538. With the internet, ACMA sellers now want to have it both ways. They want the tax advantages of the P.L. 86-272 drummer exception, yet at the same time not be remote and inaccessible. As observed in Wayfair, the internet allows out-of-state sellers to meaningfully engage in “business activities within such State” as defined by P.L. 86-272 without ever stepping foot in the jurisdiction. Wayfair, 585 U.S. at 181. The Director’s regulations allowing state income taxation because of synchronous technical support facilitated by the internet is a proper exercise of the Director’s powers.

2. Cookies

The Director describes an internet cookie as “small blocks of data created by a webserver while a user is browsing a website, which is placed on the user’s computer or other device by the web browser.” N.J.A.C. 18:7-1.9A(a)(2).²⁵ Per the Director’s regulations, whether cookie deployment is taxable turns upon how a seller uses cookies. The Director has determined that deploying cookies facilitating the

²⁵ While technically the web browser places the cookie, the web server instructs the web browser to place the cookie on the user’s computer. Unless the user configures the web browser to reject cookies, the web browser does indeed place the cookie.

tracking of buyers’ virtual internet shopping baskets would not subject the seller to taxation. N.J.A.C. 18:7-1.9A(b)(2). While seemingly a New Jersey business activity, it constitutes part of the solicitation process. Wrigley, 505 U.S. 228-29. On the other hand, cookies which “gather market or product research whereby the taxpayer gathers and assembles the data for sale as a package of customer/marketing information to data-brokers or other third parties” expose a seller to taxation. N.J.A.C. 18:7-1.9A(a)(2).

It is important to understand how cookies are deployed in the marketplace. Over the past decades, there have been thousands of lawsuits alleging privacy violations from the use of cookies and other tracking tools. Cal. Assemb., Floor Analysis of S.B. No. 690 1 (July 2, 2026). These suits provide insight into the implementation of internet tracking. See, e.g., In re Meta Pixel Healthcare Litig., 647 F. Supp.3d 778, 784-86 (N.D. Cal. 2022); Adair v. Cigna Corp. Servs., 818 F. Supp.3d 641, 652-53 (E.D. Pa. 2026); In re Meta Android Privacy Litig., 833 F. Supp.3d 1010, 1019-21 (N.D. Cal. 2026). See also Cong. Rsch. Serv. R47298, Online Consumer Data Collection and Data Privacy 6 (Oct. 31, 2022).

Sellers are offered free analytic tools by companies such as Google and Meta Facebook. Healthcare, 647 F. Supp.3d at 784. These tools have two components. First, a user interface allows a seller to view data collected by the analytic company as to the performance and effectiveness of the seller’s website. Ibid.; Adair, 818 F.

Supp.3d at 653. Second, the data for the user interface is obtained by the analytic company's computer code, sometimes called a pixel, which must be embedded by the seller into the computer code that makes a seller's website function. Healthcare, 647 F. Supp.3d at 784, Adair, 818 F. Supp.3d at 652, Android, 833 F. Supp.3d at 1020.

When a potential or actual buyer views a website, computer code instructs the buyer's computer on how to display the website. Healthcare, 647 F. Supp.3d at 785, Adair, 818 F. Supp.3d at 652, Android, 833 F. Supp.3d at 1020. The embedded computer code from the analytic company places cookies onto buyers' computers and reads cookies that were previously placed. Android, 833 F. Supp.3d at 1020. The cookies contain an identification code of the buyer or data about buyer behavior. Ibid. Tracking data as to a buyer's behavior is sent directly from the buyer's computer to the analytic company. Ibid.; Healthcare, 647 F. Supp.3d at 785. The collected data powers the analytic tools provided by the analytic companies. Healthcare, 647 F. Supp.3d at 785.

In addition to powering the analytic tools, the analytic companies aggregate data from many websites. Android, 833 F. Supp.3d at 1020. Using this data, the analytic companies provide targeted advertisements over the internet and social media applications. Healthcare, 647 F. Supp.3d at 785, Adair, 818 F. Supp.3d at 653. Litigation does not reveal that the analytic companies are paying the sellers.

There is not any dispute about whether the analytic companies profit from gathering data. Healthcare, 647 F. Supp.3d at 785, Adair, 818 F. Supp.3d at 653.

The regulation specifies that taxation is imposed if “the taxpayer gathers and assembles the data for sale” N.J.A.C. 18:7-1.9A(a)(2). The factual description of what constitutes taxable activity embedded in the regulation does not technically square with the prevailing understanding as expressed in scores of reported judicial decisions of how cookies are deployed on the internet. Moreover, the ACMA description of how sellers use cookies is technically vague. Neither party has presented any evidence of sellers assembling data for sale. The court, especially in a declaratory judgment action, is not going to rule upon whether a regulation properly imposes taxation based upon a certain factual pattern that does not seem to be tethered to actual practice in the industry. In re N.J. Firemen’s Ass’n, 230 N.J. 258, 275 (2017).

Sellers allow third parties to deploy cookies and gather data. Third parties provide analytic information to sellers. If the Director believes the current prevailing arrangement is a quid pro quo that rises to the level of a New Jersey business activity, the regulation needs to spell this out. The court is not going to rewrite the regulation to capture the prevailing technical usage and then consider whether it properly

constitutes a business activity.²⁶ The court declines to pass upon the validity of this regulation without evidence of sales of cookie data by tangible goods sellers.

IV. CONCLUSION

For the foregoing reasons, the court denies ACMA's motion for summary judgment and grants the Director's motion for summary judgment dismissing the complaint.

²⁶ Certainly, the activities of third-party analytic companies are New Jersey business activities. However, that issue is not before the court.