

SUPREME COURT OF THE UNITED STATES

No. 91-119

WISCONSIN DEPARTMENT OF REVENUE, PETITIONER
v. WILLIAM WRIGLEY,
JR., CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WISCONSIN
[June 19, 1992]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

Congress prohibits the States from imposing taxes on income derived from “business activities” in interstate commerce and limited to the “solicitation of orders” under certain conditions. 15 U. S. C. §381(a). The question we face is whether Wrigley has this important tax immunity for its business activities in the State of Wisconsin. I agree with the Court that the statutory phrase “solicitation of orders” is but a subset of the phrase “business activities.” *Ibid.*; *ante*, at 10-11. I submit with all respect, though, that the Court does not allow its own analysis to take the proper course. The Court instead devises a test that excludes business activities with a close relation to the solicitation of orders, activities that advance the purpose of the statute and its immunity.

The Court is correct, in my view, to reject the two polar arguments urged upon us: one, that ordinary and necessary business activities surrounding the solicitation of orders are part of the exempt solicitation itself; and the other, that the only exempt activities are those essential to the sale. *Id.*, at 8, 12. Having done so, however, the Court exits a promising avenue of analysis and adopts a test with little relation to the practicalities of solicitation. The

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Court's rule will yield results most difficult to justify or explain. My submission is that the two polarities suggest the proper analysis and that the controlling standard lies between. It is difficult to formulate a complete test in one case, but the general rule ought to be that the statute exempts business activities performed in connection with solicitation if reasonable buyers would consider them to be a part of the solicitation itself and not a significant and independent service or component of value.

I begin with the statute. Section 381(a) provides as follows:

“No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 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 solicitation are orders described in paragraph (1).”

15 U. S. C. §381(a).

The key phrases, as recognized by the Court, are “business activities” and “solicitation of orders.” *Ante*, at 10-11. By using “solicitation of orders” to define a subset of “business activities,” the text suggests that the immunity to be conferred

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encompasses more than a specific request for a purchase; it includes the process of solicitation, as distinguished from manufacturing, warehousing, or distribution. Congress could have written §381(a) to exempt “acts” of “solicitation” or “solicitation of orders,” but it did not. The decision to use the phrase “business activities,” while not unambiguous, suggests that the statute must be read to accord with the practical realities of interstate sales solicitations, which, after all, Congress acted to protect.

The textual implication I find draws support from legal and historical context. Even those who approach legislative history with much trepidation must acknowledge that the statute was a response to three specific court decisions: *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959), *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So. 2d 640 (1958), cert. denied, 359 U. S. 984 (1959), and *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), appeal dism'd, cert. denied, 359 U. S. 28 (1959). S. Rep. No. 658, 86th Cong., 1st Sess., 2-3 (1959) (hereinafter S. Rep.); H. R. Rep. No. 936, 86th Cong., 1st Sess., 1-2 (1959) (hereinafter H. R. Rep.). See *ante*, at 4-8 & n. 1. These decisions departed from what had been perceived as a well-settled rule, stated in *Norton Co. v. Illinois Dept. of Revenue*, 340 U. S. 534 (1951), that solicitation in interstate commerce was protected from taxation in the State where the solicitation took place.

“Where 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

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power, the vendor is not taxable.” *Id.*, at 537.

Firm expectations within the business community were built upon the rule as restated in *Norton*. Companies engaging in interstate commerce conformed their activities to the limits our cases seemed to have endorsed. To be sure, the decision to stay at home might have derived in some respects from independent business concerns. The expense and commitment of an in-state sales office, for example, might have informed a decision to send salesmen into a State without further staff support. Some interstate operations, though, carried the unmistakable mark of a legal rather than business justification. The technical requirement that orders be approved at the home office, unless approval required judgment or expertise (for example, if the order depended on an ancillary decision to give credit or to name an official retailer), was no doubt the product of the legal rule.

These settled expectations were upset in 1959, their continuing vitality put in doubt by *Northwestern States*, *International Shoe*, and *Brown-Forman*. In *Northwestern States*, the Court upheld state income taxation against two companies whose in-state operations included a sales staff and sales office. 358 U. S., at 454-455. Our disposition was consistent with prior law, since both companies maintained offices within the taxing State. *Ibid.* But the Court's opinion was broader than the holding itself and marked a departure from prior law.

“We conclude that net income from the interstate operations of a foreign corporation may be subject 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.

In the absence of case law giving meaning to “sufficient nexus,” the Court's use of this

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indeterminate phrase created concern and apprehension in the business community. S. Rep., at 2-4; H. R. Rep., at 1. Apprehension increased after our denial of certiorari in *International Shoe* and *Brown-Forman*, where the Louisiana Supreme Court upheld the taxation of companies whose business activities within the State were limited to solicitation by salespeople. S. Rep., at 3; H. R. Rep., at 2. The concern stemmed not only from the prospect for tax liability in an increasing number of States but also from the uncertainty of its amount and apportionment, the burdens of compliance, a lack of uniformity under state law, the withdrawal of small businesses from States where the cost and complexity of compliance would be great, and the extent of liability for back taxes. S. Rep., at 2-4.

As first drafted by the Senate Finance Committee, §381(a) would have addressed the decisions in *Northwestern States*, *International Shoe*, and *Brown-Forman*. S. Rep., at 2-3; H. R. Rep., at 3; 105 Cong. Rec. 16378, 16934 (1959). The Committee recommended a bill defining “business activities” in three subsections, with one subsection corresponding to the facts in each of the three cases. S. 2524, 86th Cong., 1st Sess. (1959). Before the bill was enacted, however, the Senate rejected the third of these subsections, corresponding to *Northwestern States*, which would have extended protection to companies with in-state sales offices. 105 Cong. Rec. 16469-16477 (1959) (Senate debate on an amendment proposed by Sen. Talmadge (Ga.)). But the other two subsections, those dealing with the state-court decisions in *International Shoe* and *Brown-Forman*, were retained. *Id.*, at 16367, 16376, 16471, 16934; H. R. Rep. No., at 3. Thus, while *Northwestern States* provided the first impetus for the enactment of §381(a), it does not explain the statute in its final form. By contrast, the history of enactment makes clear that §381(a) exempts from state income

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taxation at least those business activities at issue in *International Shoe* and *Brown-Forman*. These cases must inform any attempt to give meaning to §381(a).

International Shoe manufactured shoes in St. Louis, Missouri. Its only activity within the State of Louisiana consisted of regular and systematic solicitation by 15 salespeople. No office or warehouse was maintained inside Louisiana, and orders were accepted and shipped from outside the State. The salespeople carried product samples, drove in company-owned automobiles, and rented hotel rooms or rooms of public buildings in order to make displays. *International Shoe*, 236 La., at 280, 107 So. 2d, at 640; Hartman, "Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course, 29 Vand. L. Rev. 353, 358 (1976).

Brown-Forman distilled and packaged whiskey in Louisville, Kentucky, for sale in Louisiana and elsewhere. It solicited orders in Louisiana with the assistance of an in-state sales staff. All orders were approved and shipped from outside the State. There was no in-state office of any kind. *Brown-Forman* salespeople performed two functions: they solicited orders from wholesalers, who were direct customers of *Brown-Forman*; and they accompanied the wholesalers' own sales force on visits to retailers, who were solicited by the wholesalers. The *Brown-Forman* salespeople did not solicit orders at all when visiting retailers, nor could they sell direct to them. They did assist in arranging suitable displays of the distiller's merchandise in the retail establishments. *Brown-Forman*, 234 La., at 653-654, 101 So.2d, at 70.

The activities in *International Shoe* and *Brown-Forman* extended beyond specific acts of entreaty; they included merchandising and display, as well as other simple acts of courtesy from buyer to seller, such as arranging product displays and calling on the customer of a customer. The activities considered in *International Shoe* and *Brown-Forman* are by no

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means exceptional. Checking inventories, displaying products, replacing stale product, and verifying credit are all normal acts of courtesy from seller to buyer. J. Hellerstein, 1 *State Taxation: Corporate Income and Franchise Taxes* ¶6.11[2], p. 245 (1983). A salesperson cannot solicit orders with any degree of effectiveness if he is constrained from performing small acts of courtesy. Note, *State Taxation of Interstate Commerce: Public Law 86-272*, 46 *Va. L. Rev.* 297, 315 (1960).

The business activities of Wrigley within Wisconsin have substantial parallels to those considered in *International Shoe* and *Brown-Forman*. Wrigley has no manufacturing facility in the State. It maintains no offices or warehouses there. The only product it owns in the State is the small amount necessary for its salespeople to call upon their accounts. All orders solicited by its salespeople are approved or rejected outside of the State. All orders are shipped from outside of the State. Other activities, such as intervening in credit disputes, hiring salespeople, or holding sales meetings in hotel rooms, do not exceed the scope of §381(a); I agree with the Court that these too are the business activities of solicitation. *Ante*, at 19-20; App. 10-13.

The Department of Revenue, in an apparent concession of the point, does not contend that the business activities of Wrigley exceed the normal scope of solicitation; instead the Department relies on a distinction between business activities undertaken before and after the sale. Brief for Petitioner 18, 21. Under the Department's submission, acts leading to the sale are within the statutory safe-harbor, while any act following the sale is beyond it. *Ibid*. I agree with the Court, as well as with the Supreme Court of Wisconsin, that this distinction is unworkable in the context of a continuing business relation with many repeat sales. *Ante*, at 15-16; App. to Pet. for Cert. A-41.

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As the Court indicates, the case really turns upon our assessment of two practices: replacing stale product and providing gum in display racks. *Ante*, at 18. If the retailers relied on the Wrigley sales force to replace all stale product and that service was itself significant, say on the magnitude of routine deliveries of fresh bread, then a separate service would seem to be involved. But my understanding of the record is that replacement of stale gum took place only during the course of regular solicitation. App. 27-28, 41, 58, 117-118. There was no contract to perform this service. There is no indication in the record that this was the only method dealers relied upon to remove stale product. It is not plausible to believe that by enacting §381(a) Congress insisted that every sales representative in every industry would be prohibited from doing just what Wrigley did.

Acceptance of the stale gum replacement does not allow industry practices to replace objective statutory inquiry. The existence of a contract to perform this service, or an indication in the record that this service provided an independent component of significant value, would alter the case's disposition, regardless of the seller's intentions. The test I propose does not depend on the sellers' intentions or motives whatsoever; rather it requires an objective assessment from the vantage point of a reasonable buyer. If a reasonable buyer would consider the replacement of stale gum to provide significant independent value, then this service would subject Wrigley to taxation. The majority appears to concede the point in part when it observes Wrigley replaced stale gum free of charge, *ante*, at 19 n. 9, which provides a strong indication that the replacement of stale gum is valuable to Wrigley, not its customers, as an assurance of quality given in the course of an ongoing solicitation.

I agree with the Court's approach, which is to provide guidance by some general rule that is faithful

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to the precise language of the statute. But it ought not to do so without recognition of some of the most essential aspects of solicitation techniques. No responsible company would expect its sales force to decline giving minimal assistance to a retailer in replacing damaged or stale product. In enacting §381(a), Congress recognized the importance of interstate solicitation to the strength of our national economy. The statute must not be interpreted to repeal the rules of good sales techniques or to forbid common solicitation practices under the threat of forfeiting this important tax exemption. Congress acted to protect interstate solicitation, not to mandate inefficiency.

Even accepting the majority's test on its own terms, the business activities which the Court finds to be within the safe harbor of the federal statute are less ancillary to a real sales solicitation than are the activities it condemns. The credit adjustment techniques and the training sessions the Court approves are not related to a particular sales call or to a particular sales solicitation, but the condemned display and replacement practices are. I do not understand why the Court thinks that a credit dispute over an old transaction, handled by telephone weeks or months later is exempt because it "ingratiate[s] the salesman with the customer, thereby facilitating requests for purchases," *ante*, at 20, but that this same process of ingratiation does not occur when a salesman who is on the spot to solicit an order refuses to harm the company by leaving the customer with bad product on the shelf. If there were any distinction between the two, I should think we would approve the replacement and condemn the credit adjustment. The majority fails to address this anomaly under its test, responding instead that my observation of it suggests ambiguity in my own. *Id.*, at 14 n. 5. In my view, both the gum replacement and credit adjustment are within the scope of sollicita-

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tion.

I would agree with the Court that the furnishing of racks with gum that is sold to the customer presents a problem of a different order, *id.*, at 18, but here too I think it adds no independent value apart from the solicitation itself. To begin with, I think it rather well accepted that the setting up of display racks and the giving of advice on sales presentation is central to the salesperson's role in cultivating customers. There are dangers for the manufacturer, however, if the salesperson spends the time to set up a display and then stocks it with free goods, because this could create either the fact or the perception that retailers were not receiving the same price. Free goods lower the per unit cost of all goods purchased. The simplest policy to avoid this problem is to charge for the goods displayed, and that is what occurred here. Moreover, I cannot ignore, as the Court appears to do, that a minuscule amount of gum, no more than 0.00007% (seven one-hundred thousands of one percent) of Wrigley's in-state sales, was stocked into display racks in this fashion. Brief for Respondent 5; App. to Pet. for Cert. A-43. Indeed, the testimony is that Wrigley salespeople would stock these display racks out of their own supply of samples only as a matter of last resort, in instances where the retailer possessed an inadequate supply of gum and could not await delivery in the normal course.

``Q Well, I take it that if you put in the stand and it was a new stand, you took the gum out of your vehicle and transferred it to him there; is that correct?

``A No, I would not say that's correct.

``Q Well, did you ever stock new stands from your vehicle?

``A I would say possibly on some—on a few occasions.

``Q And how many few occasions were there during your tenure as a field representative in

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1978?

``A Boy. I would just be guessing. Maybe a dozen times.

``Q And just what would—what all happened in that circumstance that you wound up putting in a new stand and taking the gum out of your vehicle and transferring it to the retailer?

``A Well, like I said, primarily I wanted to get a stand in and then he wanted to get that order through his wholesaler; but if he couldn't wait, if he said my wholesaler was just in yesterday or something or he was not going to be in for a week, he didn't want a stand sitting around, so we would then fill it and then bill the wholesaler. . . ." App. 37-38.

Under the circumstances described here, I fail to see why the stocking of a gum display does not "ingratiate the salesman with the customer, thereby facilitating requests for purchases," *ante*, at 20, as is required under the rule formulated by the Court. The small amount of gum involved in stocking a display rack, no more than \$15-20 worth, belies any speculation, *id.*, at 19 n. 9, that Wrigley was driven by a profit motive in charging customers for this gum. App. 38.

The Court pursues a laudable effort to state a workable rule, but in the attempt condemns business activities that are bound to solicitation and do not possess independent value to the customer apart from what often accompanies a successful solicitation. The business activities of Wrigley in Wisconsin, just as those considered in *International Shoe* and *Brown-Forman*, are the solicitation of orders. The swapping of stale gum and the infrequent stocking of fresh gum into new displays are not services that Wrigley was under contract to perform; they are not activities that can be said to have provided their own component of significant value; rather they are activities conducted in the

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course of solicitation and whose legal effect should be the same. My examination of the language of the statute, considered in the context of its enactment, demonstrates that the concerns to which §381(a) was directed, and for which its language was drafted, are misapprehended by the Court's decision today.

I would affirm the judgment of the Wisconsin Supreme Court.