

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1963 & 85-2006

TITLE TYLER PIPE INDUSTRIES, INC., Appellant V. WASHINGTON  
DEPARTMENT OF REVENUE; and NATIONAL CAN CORPORATION,  
ET AL., Appellants V. WASHINGTON DEPARTMENT OF REVENUE

PLACE Washington, D. C.

DATE March 2, 1987

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   TYLER PIPE INDUSTRIES, INC.                   :

4                           Appellant                   :

5                   v.   :   No. 85-1963

6   WASHINGTON DEPARTMENT OF REVENUE                   :

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8   NATIONAL CAN CORPORATION, ET AL.,                   :

9                           Appellants                   :

10                   v.   :   No. 85-2006

11   WASHINGTON DEPARTMENT OF REVENUE                   :

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13   Washington, D.C.

14   Monday, March 2, 1987

15                   The above-entitled matter came on for oral  
16   argument before the Supreme Court of the United States  
17   at 1:40 o'clock p.m.

18

19   APPEARANCES:

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21                           on behalf of Appellants in No. 85-2006

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23                           on behalf of Appellant in No. 85-1963

24                   WILLIAM BERGGREN COLLINS, ESQ., Olympia, Wash.;

25                           on behalf of Appellants

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1 argument, Tyler's counsel will address the issues that  
2 are peculiar to that case, which include two commerce  
3 clause issues similar to those raised by the National  
4 Can Appellants and several other issues that aren't  
5 involved in the National Can appeal at all.

6 The guts or perhaps I should say heart of this  
7 case are the taxpayers' activities, the way the  
8 Washington taxes are imposed on those activities, and  
9 the constitutional problems that they create.

10 A very graphic picture of the hard facts are  
11 provided in the chart that was prepared by the state of  
12 Washington, the Appellee here. And to make the most  
13 efficient use of the limited time, I'm going to ask the  
14 Court's indulgence in referring with me to the chart  
15 that the state prepared.

16 You'll find it in the jurisdictional statement  
17 submitted by National Can Corporation, and in particular  
18 it's appendix K to the jurisdictional statement. So  
19 that's on the very last page of the National Can  
20 jurisdictional statement, appendix K.

21 Now, I want to emphasize, this was prepared by  
22 the state and not by us. It was prepared in a context  
23 very much like the one that we're in here. As you may  
24 know, the state participated as an amicus in the Armco  
25 versus Hardesty case that was before the Court a couple

1 of years ago. The state of Washington was trying to  
2 help the state of West Virginia defend its taxes, much  
3 like these here, against a challenge of  
4 unconstitutionality.

5 But this Court held, after listening to the  
6 arguments that the states raised, that the West Virginia  
7 taxes were unconstitutional. And so then the Department  
8 of Revenue of Washington had the task of coming back and  
9 explaining to the executives of the state and the  
10 legislature of the state why this Court reached that  
11 conclusion with respect to West Virginia's taxes and why  
12 Washington's taxes had the same kinds of problems.

13 Now, the state in this chart put itself, put  
14 the state of Washington, at the top in the large  
15 rectangle at the top, and it put the state of West  
16 Virginia at the bottom. I would like to start in the  
17 other order because I think it makes sense to start with  
18 your decision in the Armco case.

19 Okay, how does it depict the taxpayers here?  
20 All of the taxpayers in National Can's appeal, like  
21 Armco, are manufacturers. They're producing something.  
22 Almost all of them are manufacturing, a few of them are  
23 doing some extracting.

24 The second thing is that they, like Armco, are  
25 selling across state lines. Now, in each case we're

1 talking about a manufacturer selling. In this chart the  
2 state has chosen to illustrate each activity by one of  
3 these small boxes.

4 So you can see Armco down at the very bottom  
5 of the West Virginia chart, manufacturing and  
6 wholesaling. And they're connected with an arrow to  
7 indicate that both boxes go together, they're one  
8 taxpayer doing these two different activities.

9 Now, you'll notice running down the center of  
10 that chart is kind of a dashed line. That represents  
11 the boundary of the state of West Virginia. And in  
12 Armco's case there, looking at the very bottom set of  
13 boxes, you can see that the manufacturing was going on  
14 out of state, the wholesaling was going on in West  
15 Virginia, and that arrow is crossing the state line.

16 This Court looked at the fact that Armco was  
17 paying West Virginia's wholesaling tax and it compared  
18 that situation with a like company doing business  
19 entirely within West Virginia. And that like company in  
20 the state's chart here is the top set of boxes in the  
21 West Virginia part of the chart there.

22 You can see that both the manufacturing and  
23 wholesaling was going on in West Virginia. No state  
24 boundary is crossed. The important thing you can see  
25 there is that box for wholesaling, if you're an in-state

1 taxpayer, is not cross-hatched, and the fact that it's  
2 not cross-hatched, according to the state's symbolism,  
3 means it doesn't get taxed.

4 So the Court looked at a tax on the interstate  
5 company wholesaling, no tax on the local company  
6 wholesaling, and concluded that there was facial  
7 discrimination there.

8 I'd like to move now to the top of the chart,  
9 because that's what really tells us about Washington's  
10 taxes. Up there you'll see a striking similarity. That  
11 shouldn't be very surprising. In Washington's amicus  
12 brief to the Court in Armco, the state represented  
13 that its taxes were very similar to those of West  
14 Virginia.

15 You'll see at the very top pair of boxes there  
16 local commerce in Washington; again two activities, the  
17 same company is manufacturing and it's selling. But  
18 again, only one of those two activities is taxed. The  
19 only difference, really, between the top of the chart  
20 and the bottom of the chart is that Washington has  
21 reversed its exemption, so in Washington it's the  
22 selling that gets taxed, the manufacturing is exempt.  
23 In West Virginia it was the opposite.

24 Now, I'd invite the Court to compare the  
25 situation for that local company with our taxpayers who



1 are before you today. About a third of those taxpayers  
2 are like Kalama Chemical Company, and it's represented  
3 by the middle set of boxes there. It's manufacturing in  
4 Washington, it ships what it manufactures across state  
5 lines and sells it in other states.

6 As you can see, Washington imposes on that  
7 interstate company the manufacturing tax because it has  
8 chosen, instead of refraining from interstate commerce,  
9 to sell across state lines.

10 Another group of our clients are represented  
11 by the bottom set of boxes there. They're in a  
12 situation like Xerox Corporation. They do their  
13 manufacturing in some other state, ship the goods across  
14 state lines into Washington, and sell them there.

15 Now, when we looked at the local company, when  
16 that local company -- when any company manufactures in  
17 Washington, it incurs a liability for the tax on  
18 manufacturing. But if it refrains from engaging in  
19 interstate commerce, if it will sell the goods in  
20 Washington and pay that Washington tax on the selling  
21 activity, that company will get a significant tax  
22 benefit, an exemption.

23 It gets a forgiveness of the liability it had  
24 already incurred for doing the manufacturing in the  
25 state.

1 QUESTION: Mr. Young --

2 MR. YOUNG: Yes, Justice O'Connor.

3 QUESTION: -- the companies like Xerox argue  
4 that the Washington tax discriminates against them under  
5 this scheme.

6 MR. YOUNG: Yes, Your Honor.

7 QUESTION: And discourages -- or encourages,  
8 rather, their manufacturing within the state of  
9 Washington and discourages them from manufacturing  
10 outside the state of Washington.

11 MR. YOUNG: Yes, Your Honor.

12 QUESTION: Well, what if Washington simply  
13 repealed its manufacturing tax. I mean, presumably that  
14 would be an incentive to move to Washington, too,  
15 wouldn't it?

16 MR. YOUNG: Yes, Your Honor, I think if  
17 Washington --

18 QUESTION: Isn't that perfectly all right,  
19 though?

20 MR. YOUNG: Under the discrimination prong of  
21 the commerce clause, I think that would be perfectly all  
22 right for the future, Justice O'Connor. It wouldn't --

23 QUESTION: It would have the same effect, and  
24 you argue --

25 MR. YOUNG: Excuse me?

1 QUESTION: It would have exactly the same  
2 effect.

3 MR. YOUNG: Well, it wouldn't have the same  
4 effect, Your Honor, because there would no longer be a  
5 benefit to the in-state manufacturers that wasn't given  
6 to out of state people. It would put them on a level  
7 playing field.

8 The in-state people there would only be paying  
9 a selling tax, but they wouldn't be getting to carry on  
10 an additional --

11 QUESTION: Well, companies like the Xerox  
12 company want us to make out their claim to treat the  
13 wholesale tax and the manufacturing tax together and  
14 look at how it operates as a unit, right?

15 MR. YOUNG: The companies really don't care  
16 which way it's treated as long as it's treated  
17 consistently.

18 QUESTION: Well, it seems to me that's the  
19 theory, and yet the Appellants like Kalama Appellants  
20 want us to look at the taxes as separate activities and  
21 consider them separately. And I have trouble seeing  
22 which way we ought to approach it.

23 MR. YOUNG: Your Honor, I think from all of  
24 these Appellants' standpoint the Court could go which --  
25 approach it either way, as long as it does so

1 consistently.

2           The situation of Xerox is just like the  
3 situation in Maryland versus Louisiana. You there had  
4 local people who paid one local tax -- excuse me, who  
5 paid one tax that was common to interstate commerce and  
6 thereby got a credit against local commerce. The giving  
7 of that credit that was not available to interstate  
8 commerce precisely because they weren't doing business  
9 there was --

10           QUESTION: Let me try to explain my dilemma a  
11 different way. If we look at these as two separate  
12 taxes, a tax on manufacturing and a tax on wholesaling,  
13 then the tax on the wholesale activity considered as a  
14 separate activity entirely doesn't appear to either  
15 discriminate against or burden interstate commerce. It  
16 is simply imposed whenever something is sold in the  
17 state of Washington.

18           The one on manufacturing, however, if you look  
19 at that as a separate activity and a separate tax,  
20 applies to manufacturers who export, in effect.  
21 Otherwise it doesn't apply. So you might say that that  
22 one was discriminatory.

23           But it's hard for me to see how, if you treat  
24 the taxes as separate entirely, that you would say the  
25 wholesaling tax is discriminatory.



1 MR. YOUNG: Your Honor, I guess the way I'd  
2 put it is that, without regard to the exact nature of  
3 the benefit, whether it's the forgiveness of a liability  
4 for something entirely different from taxes or whatever,  
5 if the state gives a benefit of any kind to local  
6 commerce that it's not giving to interstate commerce and  
7 that's based on some interstate element, it is  
8 discrimination.

9 And we really needn't look at what the kind of  
10 manufacturing tax is or that kind of thing. It's the  
11 fact that there is a benefit.

12 QUESTION: I presume at least some of your  
13 clients wouldn't mind the approach that Justice O'Connor  
14 just expressed. You have some clients who are  
15 manufacturing in the state and are subject to the state  
16 manufacturing tax, don't you?

17 MR. YOUNG: Justice Scalia, actually none of  
18 our clients would mind having all of the taxes viewed  
19 together, because if they're viewed together the  
20 apportionment problem is so blatant that I think that  
21 some kind of relief would be required for everybody.

22 QUESTION: How does this case differ from the  
23 Boston Stock Exchange case? Why can't you say that the  
24 state here is simply placing a tax on one of -- either  
25 one of two activities in the state, either manufacturing

1 or sale, or wholesale, either one? We'll tax one or the  
2 other.

3 Now, why is that any different from what New  
4 York in the Boston Stock Exchange case?

5 MR. YOUNG: The New York tax, that the state  
6 of Washington has urged is similar to this, was a tax  
7 that wasn't before the Court. It was a prior tax that  
8 ostensibly or nominally had several different possible  
9 subjects or incidents of the tax.

10 The Court was focusing on the current tax,  
11 that had a clear rate differential, and in the context  
12 of that focus it didn't see any problem with  
13 neutrality.

14 And it may be in fact that if you knew lots  
15 more about the old tax and how it was imposed that there  
16 wouldn't have been a problem. But the case itself just  
17 doesn't give us enough information to know that.

18 QUESTION: But you would say then that, as a  
19 general rule, if a state wants to tax one of several  
20 incidents, that that's unlawful?

21 MR. YOUNG: It does expose interstate commerce  
22 to multiple burdens that local commerce isn't exposed  
23 to, and if that happens in fact it would be unlawful,  
24 yes, Your Honor.

25 QUESTION: Then why wasn't Armco decided the

1 other way, because couldn't you view Armco as that, as  
2 essentially the same thing, taxing either the  
3 manufacture or the sale? We're only going to impose one  
4 tax.

5 MR. YOUNG: I suspect the reason that Armco  
6 wasn't decided that way was that the Court focused on  
7 the two activities that were claimed to be essentially  
8 the same and looked at them and realized that they  
9 weren't quite the same, whereas in Boston Stock Exchange  
10 you were looking at all things that were part and parcel  
11 of a transfer of stock and they were quite closely  
12 related, would typically occur in one state.

13 The National Can situation is seen if we look  
14 at the last two sets of boxes on the chart there, and I  
15 think it kind of pulls all of this together, in that you  
16 can see someone who is both manufacturing and selling  
17 out of the state and manufacturing outside the state and  
18 selling in.

19 And you see there that we've got a taxpayer  
20 now --

21 QUESTION: Mr. Young, your time has expired.  
22 We'll hear next from you, Mr. O'Brien.

23 ORAL ARGUMENT OF

24 NEIL J. O'BRIEN, ESQ.,

25 ON BEHALF OF APPELLANT IN NO. 85-1963

1 MR. O'BRIEN: Mr. Chief Justice, may it please  
2 the Court:

3 The state of Washington is using the same set  
4 of facts to impose a tax both on Tyler Pipe, who is  
5 before the Court, and on its independent representative,  
6 Ashe & Jones, who is not before the Court, and I want to  
7 show you how.

8 Tyler Pipe manufactures pipe in Texas. It  
9 ships pipe throughout the United States, to all the  
10 states. It advertises nationally and uses regional  
11 shows to do the advertising. It sells through the use  
12 of catalogues. Catalogues are distributed to all its  
13 customers.

14 Its customers are plumbing suppliers. That's  
15 like a lumber yard except it's for the plumbing business  
16 instead of the lumber business.

17 In the state of Washington, Tyler has an  
18 independent representative. All of the orders that  
19 Tyler Pipe receives and that are processed in the state  
20 of Texas come either from its plumbing supply customers  
21 -- 45 percent of them come directly from the customers  
22 -- or through Ashe & Jones, the manufacturer's  
23 representative. 55 percent of them come through Ashe &  
24 Jones.

25 Ashe & Jones has no inventory. It simply has



1 employees who represent out of state manufacturers.  
2 Tyler Pipe is one of six or seven such out of state  
3 manufacturers.

4 Ashe & Jones has three and a half employees.  
5 That's what the record shows. Tyler Pipe's share would  
6 be about a half of a person, except that Ashe & Jones  
7 also represents Tyler Pipe in Idaho, Montana, the  
8 western provinces of Canada, and Alaska. So as a  
9 practical matter, Ashe & Jones has less than a half a  
10 person available to represent Tyler Pipe in the state of  
11 Washington.

12 QUESTION: Is this a due process argument?

13 MR. O'BRIEN: Both, due process and commerce  
14 clause.

15 QUESTION: All the other companies that Ashe &  
16 Jones represents it only represents in Washington and  
17 not elsewhere as well?

18 MR. O'BRIEN: I can't say about the others.

19 QUESTION: Well, then you can't say that it's  
20 any less than half a person, really, if you don't really  
21 know.

22 MR. O'BRIEN: Okay, I agree, Your Honor. In  
23 any event, it's not very much.

24 Ashe & Jones is paid a commission on all sales  
25 by Tyler Pipe into the state of Washington. The

1 testimony in the case is that Tyler Pipe operated  
2 through an independent representative because it did not  
3 believe it had sufficient business in Washington to  
4 justify having an employee in that state.

5 The state of Washington taxes the gross  
6 receipts of all sales that go into the state of  
7 Washington. It also taxes the commissions that are paid  
8 to Ashe & Jones. Now, it just doesn't tax them; it  
9 taxes them under the same statute, the B&O tax.

10 The state of Washington makes a distinction  
11 between independent contractors like Ashe & Jones and  
12 employees. The state of Washington is using the same  
13 set of facts to establish nexus for Ashe & Jones to tax  
14 the commissions it receives on the Tyler Pipe sales in  
15 Washington as it uses to establish nexus for Tyler Pipe  
16 in the state of Washington. Indeed, the state of  
17 Washington concedes that, absent the Ashe & Jones  
18 activities, there would be no Tyler Pipe nexus in the  
19 state of Washington.

20 Now, let me turn for a minute to  
21 apportionment. Substantially all of the activities that  
22 are incurred -- a large percentage, more than half of  
23 the activities that are incurred in the wholesaling  
24 activities of Your Honor that are being taxed by the  
25 state of Washington occur outside of the state. I have

1 listed on pages 2 to 4 of the reply brief the activities  
2 that occur, and only two, one and only part of the  
3 second, occur in Washington, and most of the others  
4 occur in Texas.

5 Yet, the state of Washington would tax the  
6 wholesaling activities of Tyler Pipe 100 percent,  
7 without any apportionment for the activities, commercial  
8 activities that take place out of the state.

9 QUESTION: Well, Mr. O'Brien, in a couple of  
10 past cases, particularly I think one of the last ones  
11 from Washington, the Standard Steel case, we have said  
12 that the burden of proof is on the taxpayer to show  
13 multiple taxation. The possibility of it in some  
14 abstract way isn't enough.

15 MR. O'BRIEN: Your Honor, the state of Texas  
16 uses gross receipts in its formula for taxing the  
17 franchise tax, but the state does not have an  
18 independent gross receipts tax, although it is in the  
19 process right now -- one has been proposed for this  
20 congressional enactment. If it's enacted, I presume we  
21 no longer will have to pay the state of Washington tax.

22 In any event, most of the activities take  
23 place out of the state.

24 QUESTION: Well, is one of your grounds here  
25 the danger of multiple taxation?

1 MR. O'BRIEN: Yes, Your Honor, because --

2 QUESTION: Well, where else are you being  
3 taxed on these activities besides Washington, and in  
4 what manner?

5 MR. O'BRIEN: We are being taxed in the state  
6 of Texas on these activities, because the receipts from  
7 -- well, we are not -- in the state of Texas, the  
8 franchise tax is determined by a ratio between the gross  
9 receipts in Texas and the gross receipts outside the  
10 state of Texas.

11 In fact, Your Honor, I don't believe -- and I  
12 will concede that we were not during the taxing period  
13 taxed on these sales, simply because the comptroller at  
14 that time did not examine these facts.

15 QUESTION: So there was no multiple taxation  
16 in fact in your case?

17 MR. O'BRIEN: There was none in fact during  
18 the period, that's correct, Your Honor.

19 One of the elements of the commerce clause is  
20 that the Court will look at the services rendered by the  
21 state to determine whether the tax is fairly applied to  
22 the taxpayer. In this instance, the state says that it  
23 is providing four services.

24 The state says that it is providing police  
25 protection, but Tyler Pipe has no employees in the



1 state. The state of Washington says that it is  
2 providing fire protection, but Tyler Pipe has no  
3 property within the state of Washington. The state of  
4 Washington says that it is providing other services of a  
5 civilized society, but Tyler Pipe has nobody there to  
6 benefit from them.

7 The one benefit which the state of Washington  
8 has provided to Tyler Pipe is access to the court, and  
9 Tyler Pipe has used the court on one occasion and that  
10 is to bring this case to avoid an oppressive tax.

11 QUESTION: And have paid for it.

12 MR. O'BRIEN: Yes, Your Honor, have paid for  
13 it dearly. Thank you.

14 Tyler Pipe's products -- Your Honor, I'd like  
15 to reserve the rest of my time for rebuttal if I may.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 O'Brien.

18 We'll hear now from you, Mr. Collins.

19 ORAL ARGUMENT OF  
20 WILLIAM BERGGREN COLLINS, ESQ.

21 ON BEHALF OF APPELLEES

22 MR. COLLINS: Mr. Chief Justice and may it  
23 please the Court:

24 I want to begin by discussing the issues  
25 common to both National Can and Tyler Pipe,

1 discrimination and apportionment, and then I will turn  
2 to the issue of nexus, which concerns Tyler Pipe alone.

3 With regard to discrimination, the commerce  
4 clause provides that a state cannot provide through its  
5 taxes a direct commercial advantage to local business.  
6 On the other hand, the commerce clause does not prohibit  
7 a state from encouraging intrastate commerce, for  
8 competing for interstate commerce, so long as it does  
9 not discriminatorily tax the products or services of  
10 other states.

11 And the key is, how do you tell discrimination  
12 from fair encouragement? This Court, beginning in  
13 Boston Stock Exchange, laid down a bright line test to  
14 distinguish discrimination from fair encouragement, and  
15 that test is simply this: A tax discriminates if it  
16 affects the direction of commerce, either by erecting a  
17 barrier against interstate commerce or by telling an  
18 interstate business that's already present in the state  
19 that it can reduce its level of taxes in the state if it  
20 increases its business activity in that state.

21 On the other hand, a tax does not discriminate  
22 if it treats intrastate commerce and local business  
23 equally, allowing for tax neutral decisionmaking.

24 And the Boston Stock Exchange case,  
25 Westinghouse, Maryland v. Louisiana that came after it,

1 all adhere to this principle. And Justice Scalia, with  
2 regard to your question, I think Boston Stock Exchange  
3 is really a key point. My opponent Mr. Young said that  
4 the pre-1968 case was not before the Court, which is of  
5 course true.

6 On the other hand, the Court went out of its  
7 way to contrast the two tax systems: one  
8 discriminatory, the later system; and the other, neutral  
9 system, as being not discriminatory. And we think that  
10 that's highly significant.

11 In addressing the rest of my remarks on  
12 discrimination, I want to just briefly talk about the  
13 tax system and then in turn discuss the selling tax and  
14 the manufacturing tax. Washington imposes its tax on  
15 the privilege of selling in Washington and on the  
16 privilege of manufacturing in Washington, and the rate  
17 and measure of these taxes are essentially identical.

18 QUESTION: Are the taxes, though, imposed on  
19 different activities? Are they separately taxable  
20 activities?

21 MR. COLLINS: Yes, Justice O'Connor, they are  
22 separately taxable activities. But the same business  
23 does not pay both taxes on the same product. That's  
24 because of the so-called multiple activities exemption,  
25 which basically says if you pay a selling tax with

1 regard to a product you are not liable to pay  
2 manufacturing tax on making that product.

3 So in other words, in Washington you'll always  
4 pay one tax on the product, but you won't pay two.

5 QUESTION: Well, if they are on separate  
6 activities, a manufacturer within the state of  
7 Washington who then exports the product for sale in  
8 another state is taxed?

9 MR. COLLINS: That's correct.

10 QUESTION: On the manufacture?

11 MR. COLLINS: That's correct.

12 QUESTION: But a manufacturer in Washington  
13 who also sells the product in Washington is excused from  
14 paying the manufacturing tax?

15 MR. COLLINS: If he has paid the selling tax,  
16 that's correct, Your Honor.

17 QUESTION: Why doesn't that amount in effect  
18 to a tax on exports?

19 MR. COLLINS: The reason it doesn't --

20 QUESTION: Just if you view them as taxes on  
21 separate activities, it looks pretty clear.

22 MR. COLLINS: Well, I don't think that --  
23 that's not correct, Justice O'Connor, and the reason is  
24 because the manufacturing tax is a compensating tax,  
25 just like the use tax is a compensating tax. The



1 example which you gave me would also apply exactly to a  
2 general use tax primarily imposed on interstate  
3 commerce.

4 QUESTION: But you have a decision in the  
5 state of Washington in the Fibreboard case that makes it  
6 look very much like those two taxes are not compensating  
7 taxes.

8 MR. COLLINS: Well, Your Honor, the Fibreboard  
9 case is a situation, of course, which isn't before this  
10 Court, because in that case a manufacturer partially  
11 manufactured in Washington, partially finished the  
12 manufacturing out of the state, and then sold the  
13 product back in Washington, and paid two taxes, both a  
14 selling tax and a manufacturing tax.

15 That system would fail our bright line test,  
16 and if any of the taxpayers here were doing business in  
17 that way we would lose. But the reason that it's  
18 discriminatory is because the multiple activities  
19 exemption would not operate.

20 The normal rule in Washington is you only pay  
21 one tax with regard to the sale of the product, just as  
22 in a sales and use tax situation you only pay one tax  
23 with regard to the same product. If the multiple  
24 activities exemption had operated, then you would have  
25 had that single tax and it would have been neutral. I

1 mean, it's a completely different situation.

2 QUESTION: What does it take to make something  
3 a compensating tax? I mean, suppose you get an  
4 exemption from the state income tax if you ship it out  
5 of state -- or, I'm sorry. Which way does it go? If  
6 you sell it in-state?

7 MR. COLLINS: Justice Scalia --

8 QUESTION: Would that be a compensating tax?  
9 All of my income comes only from this product, so if I'm  
10 paying income tax I'm ultimately paying it because of  
11 the sale of this product.

12 Could the state just say, if you sell the  
13 product in-state you're exempt from the state income  
14 tax?

15 MR. COLLINS: No.

16 QUESTION: Why not?

17 MR. COLLINS: One of the fights between the  
18 parties in this case is over compensating tax criteria,  
19 and the criteria that we have urged and is supported by  
20 this Court's decisions is kind of a two-pronged  
21 criteria. You've got to look at the two taxes you're  
22 comparing, an income tax and some other tax or in this  
23 particular case a selling tax and a manufacturing tax.

24 QUESTION: Sure.

25 MR. COLLINS: And ask two questions: Are the

1 taxes designed to achieve equality, and do they actually  
2 result in equal treatment of in-state and out of state  
3 taxpayers similarly situated?

4 Now, with your example, an income tax has been  
5 found to be a compensating type tax with a corporate  
6 franchise tax. Let me give you a citation, Justice  
7 Scalia. West Publishing Company versus McGoldman. It's  
8 166 Pacific 2nd 551, and it was affirmed in a per curiam  
9 decision by this Court in 328 U.S. 823.

10 In that case, California had a corporate  
11 franchise tax imposed only on local business and it had  
12 an income tax that was imposed on interstate commerce,  
13 and there was a multiple activities exemption that  
14 basically said if you pay the corporate franchise tax  
15 you don't have to pay the income tax.

16 And the California court and this Court had no  
17 difficulty in saying that that was not discriminatory  
18 because the burdens were equal in those two taxes. So  
19 in this situation, for example, in the case before the  
20 Court here, Washington's selling and manufacturing taxes  
21 are compensating taxes. They're designed to achieve  
22 equality because they have the same rate and measure  
23 with regard to the same --

24 QUESTION: That's all it takes? So long as  
25 the burdens are the same, they're compensating taxes?

1 MR. COLLINS: That's right. But you have to  
2 -- that's the key to the decision and the key to  
3 essentially tax-neutral decisionmaking. I mean, the  
4 reason that a compensating tax works, the engine that  
5 drives it, is it passes the bright line test. That is  
6 to say, a compensating tax is neutral with regard to the  
7 direction of commerce.

8 In Washington, if you manufacture a product in  
9 this state and sell it here you'll pay selling tax. If  
10 you manufacture it in this state and sell it someplace  
11 else, you'll pay manufacturing tax, but the amount of  
12 those taxes will be the same.

13 So there's no incentive for you to say, I'm  
14 going to move my manufacturing operation out of the  
15 state and sell into Washington or I'm going to move my  
16 manufacturing operation into the state and sell in  
17 Washington. Your bottom line taxes will be the same.

18 QUESTION: There is an incentive, there is an  
19 incentive to you, isn't there, to sell in Washington  
20 rather than sell outside of Washington?

21 MR. COLLINS: No, I don't think so, Justice  
22 Scalia. On a \$1,000 -- if you manufacture a product  
23 worth \$1,000 in Washington and sell it in another state,  
24 you'll pay \$4.40 in manufacturing tax. If you  
25 manufacture it in Washington and sell it in Washington,



1 you'll pay \$4.40 of selling tax.

2 QUESTION: You're assuming, quite  
3 unrealistically, that there's no sales tax anywhere  
4 else, that there's no tax on your selling activity  
5 elsewhere, as there is in Washington.

6 MR. COLLINS: Two things about that --

7 QUESTION: Assume the state you're selling  
8 into has the same law that Washington has. If you sell  
9 interstate, you'll pay both a manufacturing tax and a  
10 selling tax. If you sell within your own state, you'll  
11 pay only the selling tax.

12 MR. COLLINS: That's right.

13 QUESTION: So doesn't that discriminate  
14 against interstate commerce?

15 MR. COLLINS: I don't think it does, Justice  
16 Scalia, but that's a question that this Court has yet to  
17 resolve. And it goes back to the Court's decision in  
18 Southern Pacific versus Gallagher.

19 QUESTION: Well, it has yet to resolve it  
20 unless it resolved it in the Armco case.

21 MR. COLLINS: Well --

22 QUESTION: And that's just exactly what that  
23 case involved, only it's the other side of the coin.

24 MR. COLLINS: Well, I don't think that's  
25 accurate, Justice Stevens. And the reason why is

1 because in Armco this Court --

2 QUESTION: The taxes were of differing  
3 amounts.

4 MR. COLLINS: This Court ruled that the  
5 manufacturing tax and the wholesaling tax weren't  
6 compensating taxes, because they didn't pass the  
7 criteria. They were not proxies for one another because  
8 of differences in the rate and differences in the  
9 measure. And the Court --

10 QUESTION: Mr. Collins, isn't -- I don't know  
11 where this Exhibit K came from that your opponent's  
12 entire argument was based on that. But if that's a  
13 valid portrayal of what would happen if Oregon had  
14 precisely the same scheme as Washington had, and that's  
15 the out of state system here, why isn't it blatant  
16 discrimination?

17 MR. COLLINS: Well, Your Honor, Exhibit K also  
18 perfectly describes the situation in Southern Pacific  
19 versus Gallagher, because in that case if you bought a  
20 product in another state and sold it -- I'm sorry,  
21 bought a product in another state, used it in  
22 California, you would pay hypothetically two taxes, a  
23 selling tax in the other state and a use tax in  
24 California.

25 A local business buying, a local person buying

1 --

2 QUESTION: What you're saying is that if we  
3 apply, if we follow these cases, we have to overrule  
4 that case. Is that what you're saying? How do you  
5 distinguish Armco and this case?

6 I mean, you distinguish on the amounts, but  
7 assuming -- do you think West Virginia could cure its  
8 problem by, you know, a look at the diagrams and just  
9 say, we'll now impose only a manufacturing tax, impose a  
10 manufacturing tax only when they sell out of state and  
11 impose a manufacturing tax -- excuse them from paying  
12 the manufacturing tax when they sell in-state?

13 MR. COLLINS: It's not the direction --

14 QUESTION: I'm sorry, it's the other way  
15 around.

16 MR. COLLINS: Yes.

17 QUESTION: You get excused from the wholesale  
18 tax.

19 MR. COLLINS: It's not the direction that  
20 determines whether it's constitutional or not. It's not  
21 that we give our exemption for manufacturers who sell in  
22 the state. That's not what drives it.

23 West Virginia could cure their problem if they  
24 did two things: One, if the rates of the selling and  
25 the manufacturing taxes were the same; and two, if the

1 measures of tax were the same, because it was those  
2 things that the Court looked at.

3 QUESTION: Well, I suppose that's the issue,  
4 because here we have -- but I know you cited a case to  
5 me, but why is it not true that if you had, if Oregon  
6 had the same scheme that you have and you have just the  
7 same tax, both have these taxes, why is it not true that  
8 the local commerce is taxed less, I believe, than the  
9 interstate commerce?

10 It's perfectly clear it is taxed less heavily,  
11 isn't it?

12 MR. COLLINS: This Court has never taken into  
13 account the taxes --

14 QUESTION: Well, I'm just asking you if.  
15 Maybe we should -- I know there's --

16 MR. COLLINS: They would pay more taxes.

17 QUESTION: Pardon me?

18 MR. COLLINS: They would pay more taxes.

19 QUESTION: And they pay more taxes on the  
20 interstate transactions than they would pay on the  
21 intrastate transactions?

22 MR. COLLINS: That's correct. But, Justice  
23 Stevens, that would be true in any event if you have  
24 different states that have different taxes. For  
25 example, at the end of the Armco opinion the Court



1 stated that there would be no difficulty if Ohio had a  
2 manufacturing tax and West Virginia had a selling tax.  
3 Clearly that would be doubling up, and at the same time  
4 an intrastate business that just did one thing would  
5 only pay one tax.

6 And that's why Southern Pacific versus  
7 Gallagher is really a key case, because in Southern  
8 Pacific versus Gallagher the Court was faced with  
9 exactly the same situation, the possibility of no  
10 doubling up in-state, sales and use tax, and a  
11 possibility of doubling up out of state if a tax had  
12 been paid in the other state.

13 And the taxpayer said: There's a possibility  
14 that we could be doubled up in this other state; give us  
15 some relief. And what the Court said is --

16 QUESTION: Yes, but the difference in your  
17 hypothetical is that if both states adopted the taxing  
18 scheme of the other, they would pay double taxes in both  
19 states.

20 MR. COLLINS: That's true.

21 QUESTION: There would be no discrimination  
22 between interstate and intrastate taxation.

23 MR. COLLINS: But the Court refused, though,  
24 in that case to speculate about what another state would  
25 do, and that's really, I think, a correct decision and

1 one that would be appropriate even if it was a question  
2 of first impression.

3 The reason for that is simply this. In  
4 California in Southern Pacific and in this case, the  
5 state of Washington relieves a business from the tax,  
6 manufacturing tax, only if the selling tax is paid.  
7 Those are the only circumstances in which we do it, only  
8 if the selling tax is paid.

9 The taxpayers in Southern Pacific versus  
10 Gallagher and in this case say: We want to be relieved  
11 from Washington's tax even though we don't pay a tax to  
12 Washington and we don't pay a tax anyplace else either.  
13 The taxpayers here are not asking for equality. What  
14 they're really asking for is a preference.

15 QUESTION: When you say only if the selling  
16 tax is paid, I suppose that's the equivalent of saying  
17 only if the sales are made within the state.

18 MR. COLLINS: If the sales are made within the  
19 state.

20 QUESTION: They're the functional equivalent.

21 MR. COLLINS: Sure, that's right.

22 And it passes, compensating taxes like that  
23 pass the bright line test. What's really -- the  
24 question that's really open is this. Compensating taxes  
25 are justified because they pass the bright line test,

1 local commerce and interstate commerce within the state  
2 are treated equally.

3 And the question left open in Southern Pacific  
4 versus Gallagher is simply whether that equality has got  
5 to extend to the interstate taxpayer, in the words of  
6 Silas Mason, "the dweller" -- "the stranger from beyond  
7 the gates and the dweller within the gates."

8 In Southern Pacific versus Gallagher, the  
9 question left open is whether your compensating tax has  
10 not only got to ensure one tax, equal tax within the  
11 state, but whether that's got, that credit has got to go  
12 into the interstate area.

13 And I think the Court was correct in deciding  
14 not to address that question until a taxpayer came in  
15 who had actually paid that second tax, because one of  
16 two things would happen if you don't wait: A, you'll  
17 say you need to extend the benefit, but the taxpayer  
18 wouldn't receive any benefit. For example, these  
19 taxpayers don't pay the manufacturing tax or a selling  
20 tax to another state, so essentially it would be doing a  
21 useless act.

22 Or B, they would be getting a preference.  
23 That is, local business would have to pay one selling or  
24 manufacturing tax to escape a tax, but interstate  
25 commerce would have to pay no selling tax to escape the

1 manufacturing tax.

2 QUESTION: There certainly is language in  
3 Armco that indicates the Court was making some  
4 assumptions and not waiting for actual experience, isn't  
5 that true?

6 MR. COLLINS: Well, I don't think that that's  
7 what the language in Armco really says, Justice  
8 O'Connor. We're kind of talking about this internal  
9 consistency point, I think is how the taxpayers have  
10 discussed it in their brief and kind of what the Court  
11 mentioned in Armco.

12 And really, that point I think, when you read  
13 the language, was simply in response to West Virginia's  
14 allegation that, even though interstate commerce pays a  
15 selling tax and it's not a compensating tax, that the  
16 taxpayer should somehow be required to prove that they  
17 had actually been injured, even though that tax was  
18 facially discriminatory.

19 And the Court said, no, that's not the test,  
20 and talked about the internal consistency concept, but  
21 related it to situations where there is facial  
22 discrimination.

23 QUESTION: Well, if you view the manufacturing  
24 tax in Washington as not a compensating tax, it also is  
25 facially discriminatory.



1 MR. COLLINS: No question about it, no  
2 question about it. But as I've indicated, if you follow  
3 the Court's criteria in I think virtually all of its  
4 compensating tax decisions, you will find that the  
5 criteria is equality, which was not present in the West  
6 Virginia tax in Armco and is present in this case.

7 The bottom line is there's a bright line test  
8 that this Court has established for discrimination. The  
9 selling tax passes it because everybody pays the selling  
10 tax. Local manufacturers, interstate manufacturers,  
11 they pay precisely the same tax.

12 The manufacturing tax passes the bright line  
13 test because it's a compensating tax, like a use tax.  
14 It passes the test because interstate commerce and  
15 intrastate, local commerce, are treated the same and  
16 there's no discrimination.

17 And the taxpayers in this case have not shown  
18 that they pay another tax someplace else. What they  
19 really want is a preference.

20 I'd like to turn now to the apportionment  
21 point.

22 QUESTION: May I just ask one question?

23 MR. COLLINS: Yes.

24 QUESTION: Supposing they did prove that  
25 Oregon had the same kind of tax statute that you have?

1 Would it be a different case?

2 MR. COLLINS: Well, it's a different case  
3 because then they wouldn't then -- if the Court said  
4 that something was required, they would certainly be  
5 entitled to relief. And if you're asking me whether I  
6 think that the Court would ultimately say you've got to  
7 extend the credit --

8 QUESTION: Or put another way, assuming we  
9 agreed with your argument up to that point and say that  
10 the statute's fine today and then tomorrow Oregon passed  
11 such a statute, would that make your statute  
12 unconstitutional?

13 MR. COLLINS: Well, I don't think it would  
14 make our statute -- just the act of having the tax  
15 doesn't make the statute unconstitutional. But then the  
16 question would be directly put: Must a compensating tax  
17 extend equality to interstate commerce that it extends  
18 to intrastate commerce?

19 QUESTION: What do you think the answer is to  
20 that?

21 MR. COLLINS: Well --

22 QUESTION: I'm just wondering if the fate of  
23 your tax depends on what happens in the Oregon  
24 legislature.

25 MR. COLLINS: No, it doesn't depend on it.

1 But that would then -- the taxpayer would really be in a  
2 position to raise that question.

3 QUESTION: Oregon and Washington would be in  
4 the same boat, wouldn't they?

5 MR. COLLINS: Yes, that's correct.

6 QUESTION: I'm just curious which boat it is.

7 (Laughter.)

8 MR. COLLINS: With regard to the apportionment  
9 question, there's really no multiple tax. There's no  
10 multiple tax that's been established in this case, and  
11 the Court in a number of decisions has indicated that a  
12 tax like Washington's tax is fairly apportioned.

13 Remember, our tax is imposed on the privilege of selling  
14 within Washington state and it's also imposed on the  
15 privilege of manufacturing within Washington state.

16 And it's measured by, the selling tax is  
17 measured by, the gross proceeds of sales; and the  
18 manufacturing tax is measured by the value of the  
19 products.

20 QUESTION: The manufacturing tax seems to be a  
21 curious one, that's almost a form of substitute for  
22 income tax. It seems to be imposed at every level of  
23 activity during the course of manufacturing. Every  
24 separate part of that process is taxed, is it not?

25 MR. COLLINS: Well, it would just be taxed

1 once, on the final finished product that was subject to  
2 the tax. We don't tax it at all the little steps. The  
3 only reason --

4 QUESTION: You only tax the little steps if  
5 part of it were done out of state.

6 MR. COLLINS: Are you talking about the  
7 Fibreboard situation?

8 QUESTION: I'm talking about your  
9 manufacturing tax in the state of Washington.

10 MR. COLLINS: Well, if you manufacture  
11 something in the state of Washington and then it goes  
12 outside the state, partially manufactured, the tax is  
13 imposed on the value of that product. If it's completed  
14 within the state, it's imposed on the value of that  
15 product.

16 And the problem in the Fibreboard case was  
17 that -- our court ruled that when it came back in the  
18 state, the multiple activities exemption didn't operate  
19 because the product was not the product so sold.

20 For apportionment purposes, though, this Court  
21 ruled that if you've got the -- if the incidence of the  
22 tax is local and the measure is reasonable, that the tax  
23 is fairly apportioned. In Standard Pressed Steel, the  
24 Court ruled that the tax at issue in this case was  
25 apportioned exactly to the activities taxed. And in



1 American Manufacturing versus St. Louis, the Court  
2 reached the same conclusion with regard to a  
3 manufacturing tax.

4 Now, the taxpayers have argued in their brief  
5 and alluded to here that our tax must be malapportioned  
6 because we consider the taxes together for compensating  
7 tax purposes, but we separate them for purposes of our  
8 apportionment analysis.

9 And I submit to you that those are two  
10 different things. For example, sales and use taxes are  
11 considered together to be compensating taxes, but for  
12 apportionment purposes there's never been any suggestion  
13 from this Court or any other court that I'm aware of  
14 that has said a retail sales tax must be apportioned on  
15 the basis of three factors or any other number of  
16 factors.

17 The point is those decisions of this Court  
18 sustaining the manufacturing and selling taxes fairly  
19 apportioned are correct, and the taxpayer in this case  
20 has done nothing to advance the burden of showing that  
21 the taxes aren't correctly apportioned. The only thing  
22 they've done is said, well, there's a possibility of  
23 overlap with some other tax.

24 And in the Court's decisions in Moorman,  
25 Container, and even Armco, the possibility of some

1 overlap does not render a tax malapportioned.

2 Let me turn briefly to the nexus question  
3 raised by Tyler Pipe. Tyler Pipe basically argued --  
4 National Can agrees that there is enough nexus under the  
5 due process and commerce clause to impose our tax upon  
6 them.

7 Tyler Pipe contests the nexus. Now, Tyler  
8 Pipe sells products in Washington through the use of  
9 independent contractors who act as their sales  
10 representatives. And there's really two questions: Do  
11 the activities of the sales representatives give rise to  
12 nexus without regard to what their status is? And the  
13 second question is: If those representatives do enough  
14 to give rise to nexus, does it make any difference that  
15 they're independent contractors.

16 The lower court found that the activities were  
17 enough, and this Court has ruled in decisions such as  
18 Scripto versus Carson that the contractual tagging of a  
19 sales representative doesn't have any constitutional  
20 significance.

21 Now, counsel's argument with regard to nexus  
22 really broke down to this. He said: Our local sales  
23 representatives pay a tax and Tyler Pipe pays a tax, and  
24 that somehow means that we can't tax both of those. And  
25 I want to sort out any confusion in your mind. Ashe &

1 Jones pays tax under the service classification.

2 They're providing a service business of representing  
3 Tyler Pipe.

4 Tyler Pipe pays tax on its activity of making  
5 sales in the state of Washington. The fact that both  
6 Ashe & Jones and Tyler Pipe pay tax is irrelevant.  
7 Clearly, this Court would not have a rule that said that  
8 we could not impose this tax because of the independent  
9 contractor nexus and yet, if we went back to our state  
10 and repealed the tax on the independent contractors,  
11 that suddenly there would be enough nexus to tax them.

12 The purpose of the nexus requirement is to get  
13 a connection between the taxpayer and the state. The  
14 trial court in this case found that the activities of  
15 the representatives were significantly associated with  
16 the taxpayer's ability to establish and maintain the  
17 market.

18 The taxpayer does three kinds of things:  
19 first, they solicit sales; secondly, they gather  
20 virtually all of the market information from Washington  
21 state that's used by Tyler Pipe; and finally, they  
22 engage in various market maintenance kinds of  
23 activities. For example, they make secondary calls on  
24 architects and engineers trying to get them to specify  
25 Tyler Pipe products in their engineering

1 specifications.

2 They're available to help when there are  
3 shortages of shipments or there is breakage. They're  
4 the first line evaluators of credit. They perform  
5 significant activities.

6 Now, I don't think there's really any dispute,  
7 perhaps a bit of quibbling, about the fact that these  
8 activities are performed. What Tyler Pipe argues is:  
9 We do a lot of stuff in Texas, too. But that's not  
10 what's relevant for nexus, the fact that they do some  
11 activities in Texas.

12 What's relevant is the activities that they do  
13 in Washington. And the trial court found, and it is  
14 supported by substantial evidence, that they engage in  
15 these three kinds of activities.

16 Under your decision in Northwest Portland  
17 Cement, simply solicitation would be enough to impose  
18 the tax. Under the decision in Standard Pressed Steel,  
19 the market maintenance activities and the information  
20 gathering activities would be sufficient to support the  
21 tax.

22 In this case we have both. No question that  
23 the activities of these representatives give rise to  
24 nexus. And as I said before, there's no constitutional  
25 significance to the fact that they are independent



1 contractors as opposed to employees. They penetrate the  
2 market in exactly the same way, and what the Court needs  
3 to focus on are the activities. I think that's the  
4 learning of the Scripto case.

5 There's one last point I want to make before I  
6 take my seat, and that is to rule in favor of the  
7 taxpayers in this case it'll be necessary for this Court  
8 to overrule some of its prior decisions, in our  
9 judgment. And if the Court does that, we would urge it  
10 to make its decision prospective.

11 In that case, the state would meet the three  
12 criteria for prospective application in a civil case set  
13 out in the Chevron Oil decision. And of course, this  
14 matter is very significant to the state. 1980 through  
15 1984, the state estimates that it's worth about \$423  
16 million, which is about ten percent of our annual  
17 budget. And of course, three additional years have gone  
18 by since then.

19 However, we hope it will not be necessary to  
20 reach a prospective application issue, because the taxes  
21 in this case are constitutional under the decisions of  
22 this Court. Manufacturing and selling taxes pass the  
23 bright line test. Everybody pays the selling tax. The  
24 manufacturing tax is a valid compensating tax because it  
25 meets the criteria of equality. In-state and out of

1 state taxpayers are treated in the same fashion.

2 The tax is fairly apportioned under your  
3 decisions and there is sufficient nexus to impose the  
4 tax on Tyler Pipe.

5 Accordingly, we would request that this Court  
6 affirm the Washington Supreme Court in both causes.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
8 Collins.

9 Mr. O'Brien, you have eight minutes left.

10 REBUTTAL ARGUMENT OF  
11 NEIL J. O'BRIEN, ESQ.,

12 ON BEHALF OF APPELLANT IN NO. 85-1963

13 MR. O'BRIEN: Mr. Justice Rehnquist, you asked  
14 about the activities -- or whether the Tyler Pipe was  
15 taxed on its gross receipts, and I said no and that is  
16 correct, they are not.

17 However, we had viewed and do view the law of  
18 this Court that we do not have to establish that the tax  
19 is in fact paid in another state, and I refer to the  
20 Adams Manufacturing case and then specifically the Gwin,  
21 White case, which involved the state of Washington tax,  
22 where this Court said unlawfulness of the burden depends  
23 upon its nature, measured in terms of its capacity to  
24 obstruct interstate commerce and not on the contingency  
25 that some other state may first have subjected the

1 commerce to a like burden.

2 And that was an apportionment case in which  
3 this Court held that the tax on Gwin, White, who would  
4 have been equivalent to Ashe & Jones in our case, was  
5 not permissible on sales going outside the state.

6 Now, counsel -- I thought it was clear, but  
7 now I think it may be confused, as to what I was trying  
8 to do about showing you that the same activities were  
9 used for nexus for two different taxpayers. We're using  
10 the actions of Ashe & Jones, or at least the state of  
11 Washington is, to find nexus for Ashe & Jones and to  
12 find nexus for Tyler Pipe.

13 You've never done that before.

14 QUESTION: What is the matter with that if  
15 someone is an agent for a principal? Couldn't the state  
16 levy a tax both on the agent for the activities as an  
17 agent and on the principal by reason of the activities  
18 of the agent?

19 MR. C'BRIEN: I think not. You're using --  
20 it's never been done before, and in this instance you're  
21 using the same acts to establish presence for two  
22 different people.

23 QUESTION: Well, but certainly if the agent is  
24 obviously present in the state of Washington for its own  
25 activities, and if it's in fact the agent of your

1 client, I just don't see what in our cases prevents  
2 that.

3 MR. O'BRIEN: Well, it is there for its own  
4 activities, but its own activities are Tyler Pipe's  
5 activities. In fact, it may be using -- the state may  
6 be using nexus for eight different taxes, because there  
7 are six or seven other manufacturers for whom Ashe &  
8 Jones also serves.

9 QUESTION: Well, it doesn't strike me as  
10 contrary to any principles of agency law I ever knew  
11 about.

12 MR. O'BRIEN: No, it's not contrary to agency  
13 law. I say it's contrary to nexus law.

14 QUESTION: Well, but why should nexus law be  
15 any different than agency law in this respect, when  
16 you're trying to see whether your company had a presence  
17 within the state? You can certainly have a presence  
18 within the state through agents, can't you?

19 MR. O'BRIEN: Yes, yes, you can have  
20 presence. We are not suggesting that an independent  
21 contractor establishes some kind of wall. Yes, I do not  
22 say that.

23 But you should not be able to count them  
24 twice, that's all I'm saying. And this Court has never  
25 before done that.



1 Counsel also says that -- lines up two or  
2 three items that counsel says Tyler Pipe -- Ashe & Jones  
3 did for Tyler Pipe in the state of Washington. I refer  
4 you to pages 2 to 4 of Tyler Pipe's reply brief, where I  
5 have listed the activities that were done by the state  
6 of -- by Ashe & Jones in Washington and the activities  
7 that occurred outside the state.

8 That list is there for two or three reasons.  
9 One, to show that what Ashe & Jones is doing is nothing  
10 more than selling. They can call it selling or  
11 marketing or whatever else. They are solicitors, they  
12 are sellers, and that's all they do.

13 They can use all the facts they want to  
14 describe that, but it still comes out selling. I could  
15 probably spend ten minutes this afternoon telling you  
16 how I shaved this morning and with all the details, but  
17 it's still just shaving. And that's all that Ashe &  
18 Jones was doing, selling.

19 We operated, Tyler Pipe operated, through  
20 catalogues. It was a catalogue operation in the state  
21 of Washington.

22 The list is also there because I think it  
23 demonstrates that the tax is improperly apportioned as  
24 to the wholesaling activity. Most of these activities  
25 were outside the state and therefore -- and the state of

1 Washington taxes the sales in Washington 100 percent,  
2 without giving any credit for activities outside the  
3 state.

4 In the Standard Pressed Steel case, the Court  
5 was very careful to point out that all of the activities  
6 occurred within the state.

7 It is also there to demonstrate that -- well,  
8 that isn't demonstrated, but in addition the fact that  
9 the state of Washington provides no services to Tyler  
10 Pipe is indicative of the fact that Tyler Pipe has no  
11 nexus in Washington.

12 Now, I did say as to Tyler Pipe that Tyler  
13 Pipe did not pay a tax on its gross receipts outside the  
14 state of Washington. 71 other taxpayers before you, I  
15 believe it is stipulated that they did do manufacturing  
16 outside the state or they were taxed on gross receipts  
17 or other activities outside the state. I think that's a  
18 stipulated record.

19 One reason the records may be a little  
20 different is that we, that Tyler Pipe tried its case  
21 before the Armco case and the 71 other cases were  
22 stipulated following the Armco decision.

23 Tyler Pipe believes that it does not have  
24 nexus, not only because of the double counting. That's  
25 just one incident. There are many other reasons.

1 There's your case of Norton. The Norton case is right  
2 on point.

3 In Norton, Norton had a manufacturing facility  
4 in the state of Massachusetts near Worcester. It was  
5 selling into the state of Indiana. Norton had a store,  
6 an actual store with inventory. The customers came to  
7 the store and bought inventory. If some of the items  
8 were not there, the customer would then order them.  
9 Some of the customers ordered directly from the  
10 manufacturer in Massachusetts.

11 The Court held that all shipments directly  
12 from the state of Massachusetts to the customer in  
13 Indiana were not subject to the gross receipts tax in  
14 Indiana because there was no nexus as to those sales.

15 All of Tyler Pipe products were shipped  
16 directly from Tyler Pipe to the customer. Ashe & Jones  
17 never saw a piece of pipe. They were loaded on an  
18 interstate commerce, interstate truck in Tyler, Texas,  
19 and were shipped at the risk of the buyer. Therefore,  
20 the Tyler Pipe has no connection with the state except  
21 for its solicitors.

22 I don't think this Court has found or held to  
23 date that solicitation alone does justify establishing  
24 nexus. If it has held that, then there is very little  
25 left to nexus. But I do not think there are any cases

1 that hold that.

2 As far as the 71 other cases are concerned, in  
3 those cases there was either manufacturing in the state  
4 and wholesaling outside or manufacturing outside the  
5 state and wholesaling within.

6 CHIEF JUSTICE REHNQUIST: Mr. O'Brien, your  
7 time has expired.

8 MR. O'BRIEN: Thank you.

9 CHIEF JUSTICE REHNQUIST: The case is  
10 submitted.

11 (Whereupon, at 2:39 p.m., oral argument in the  
12 above-entitled case was submitted.)

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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1963 - TYPER PIPE INDUSTRIES, INC., Appellant V. WASHINGTON DEPARTMENT OF REVENUE; and

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#85-2006 - NATIONAL CAN CORPORATION, ET AL., Appellants V. WASHINGTON DEPARTMENT OF REVENUE

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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