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by Michael Penza

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Preemption and P.L. 86-272 as Interpreted by New York's Courts

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In this article, Penza sets forth the framework governing federal preemption of state law as established by federal courts, summarizes how the U.S. Supreme Court has applied it in interpreting P.L. 86-272, and argues that New York's appellate courts have improperly deviated from the Court's precedent.

In the world of state and local tax, the nuances of preemption seem to get little attention — perhaps too little. With states continuing to undermine P.L. 86-272 and impose taxes on digital commerce in potential conflict with the Internet Tax Freedom Act, preemption warrants close attention, now as much as ever.[1]

A federal law may *expressly* preempt state law or *impliedly* preempt state law. The courts evaluate express and implied preemption under different legal standards. P.L. 86-272 is an example of a federal law that expressly preempts state law: It explicitly prohibits a state from imposing income tax on an out-of-state seller of tangible personal property whose in-state activities do not exceed solicitation. Accordingly, when a state income tax is challenged under P.L. 86-272, the court should apply an *express*-preemption analysis. Yet too often in this context, courts improperly rely on *implied*-preemption principles.

Such has been the case in New York. Just last month, a New York appellate court botched a preemption analysis in *American Catalog Mailers Association* (*ACMA*).[2] Under review was a state regulation treating internet-based activity as in-state activity under P.L. 86-272.[3] The issue was whether the regulation improperly reduced P.L. 86-272's protections and was thus preempted by the federal statute. In affirming the regulation, the court performed an implied-preemption analysis when an express-preemption analysis was required. This was a critical error: Applying the wrong analysis, the court failed to examine the very statutory text that the regulation sought to interpret.

The concepts in this article apply to all federal statutes preempting state taxes (for example, the ITFA and the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act)); however, this article focuses on P.L. 86-272. It is organized in three parts: The first part provides an overview of the analytical framework governing preemption, the second discusses how the U.S. Supreme Court has applied this framework in interpreting P.L. 86-272, and the third explains how New York's appellate courts have failed to follow the Supreme Court's precedent in their own interpretations of P.L. 86-272.

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[1] *See, e.g.*, Jeffrey A. Friedman and Alla Raykin, "Congress's Preemption of State Tax Laws Is Not Commandeering," *Tax Notes State*, Sept. 6, 2021, p. 1085.

[2] *American Catalog Mailers Association v. Department of Taxation and Finance*, No. CV-25-0865 (N.Y. App. Div. May 7, 2026).

[3] N.Y. Comp. Codes R. & Regs. tit. 20, section 1-2.10.

Preemption: An Overview

The U.S. Constitution's supremacy clause says federal law is "the supreme law of the land; . . . any thing in the constitution or laws of any state to the contrary notwithstanding."[4] Thus, any state law that conflicts or interferes with a duly enacted federal law is invalid — a concept known as preemption.[5] There are two broad categories of preemption: express and implied.[6]

Express Preemption

Congress may expressly preempt state law by including an express-preemption clause in a federal statute. The following are examples:

- The Employee Retirement Income Security Act of 1974 "supersedes any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."[7]
- Under the Airline Deregulation Act of 1978, "a state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation."[8]

In these statutes, Congress explicitly stated its intent to supplant state law.

Implied Preemption

Even if a federal law includes no express-preemption clause, it may still preempt a state law by implication. There are two types of implied preemption: field and conflict.[9]

Field Preemption

Field preemption applies when federal law "so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it."[10] For example, the Supreme Court struck down an Arizona law that made an alien individual's failure to carry federally mandated registration documents a misdemeanor.[11] While no federal statute expressly prohibited this law, Congress had so thoroughly legislated the field of alien registration that the Arizona law, while complementary to federal law, was nevertheless preempted.[12]

Conflict Preemption

Conflict preemption applies when it is impossible for a regulated party to comply with both federal and state law.[13] For example, the Supreme Court held that a pharmaceutical manufacturer couldn't strengthen its warning labels as required under New Hampshire law because federal law prohibited the manufacturer from unilaterally altering them.[14] Thus, the New Hampshire law was preempted.

Conflict preemption also applies when state law poses an "obstacle" to the purpose of a federal law.[15] For example, Massachusetts enacted a law precluding its state agencies from contracting with vendors that sold goods or services to Myanmar.[16] The Supreme Court held that the Massachusetts law was preempted because it imposed economic pressure on Myanmar beyond that which Congress intended, thereby creating an obstacle to a federal objective.[17]

The Presumption Against Preemption

The touchstone of any preemption analysis, express or implied, is congressional intent.[18] When a court analyzes whether a federal statute *impliedly* preempts state law, the court presumes that Congress did *not* intend to supersede state law, especially in areas the states have traditionally occupied.[19] This is referred to as the

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[4] U.S. Const. Art. VI, cl. 2.

[5] *Hughes v. Talen Energy Marketing LLC*, 578 U.S. 150 (2016).

[6] *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 95 (1983).

[7] 29 U.S.C. section 1144(a), identified as expressly preemptive in *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. 312, 319 (2016).

[8] 49 U.S.C. section 41713(b)(1), identified as expressly preemptive in *EagleMed LLC v. Cox*, 868 F.3d 893, 899 (10th Cir. 2017).

[9] *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 516 (1992).

[10] *Id.*

[11] *Arizona v. United States*, 567 U.S. 387 (2012).

[12] *Id.* at 401.

[13] *Mutual Pharmaceutical Co. Inc. v. Bartlett*, 570 U.S. 472, 480 (2013).

[14] *Id.*

[15] *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861, 873 (2000).

[16] *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

[17] *Id.* at 373.

[18] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

[19] *Id.*

"presumption against preemption," which limits the reach of implied preemption.[20]

For years, the Supreme Court's justices debated whether and to what extent the presumption against preemption applied in the express-preemption analysis. For example, in *Cipollone* (1992), Justice John Paul Stevens, writing for the majority, said two federal statutes expressly preempting state tobacco laws must be given the narrowest possible construction, relying on the presumption against preemption.[21] In a concurrence, Justice Antonin Scalia voiced his disagreement:

> It seems to me that [the presumption against preemption] dissolves once there is conclusive evidence of intent to pre-empt in the express words of the [federal] statute itself, and the only remaining question is what the scope of that pre-emption is meant to be. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction.[22]

Ultimately, Scalia's position won out. In *Franklin* (2016), the Court analyzed whether a Puerto Rico municipal bankruptcy law was preempted by a federal statute that expressly limited a state's ability to pass municipal bankruptcy laws. The issue was whether Puerto Rico was a "state" under the federal statute.[23] Writing for the majority, Justice Clarence Thomas, long aligned with the then-recently deceased Scalia, said the presumption against preemption was inapplicable:

> The plain text of the [federal] Bankruptcy Code begins and ends our analysis. Resolving whether Puerto Rico is a "State" for purposes of the pre-emption provision begins with the language of the statute itself, and that is also where the inquiry should end, for the statute's language is plain. And because the statute "contains an express pre-emption clause," we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.[24]

None of the other justices disagreed with the foregoing statement, and several federal circuit courts of appeal have acknowledged it as the prevailing law.[25]

Accordingly, an express-preemption analysis is an exercise in statutory interpretation. A court's analysis begins with the language of the statute itself, and that is where the analysis ends if the meaning of the statute's language is plain.[26] If the meaning is not plain, the court may resort to other canons of statutory construction.[27] In interpreting an expressly preemptive federal statute, no presumption against preemption applies.

Summary

There are two broad categories of preemption: express and implied. Within the category of implied preemption, there are two subcategories: field and conflict. Finally, within the subcategory of conflict preemption, there exist two types: conflict based on the impossibility of compliance, and conflict based on an obstacle to congressional intent. This framework is illustrated in Figure 1.

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[20] *Arizona*, 567 U.S. at 448 (Alito, J., concurring).

[21] *Cipollone*, 505 U.S. at 523.

[22] *Id.* at 545 (Scalia, J., concurring).

[23] *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115 (2016).

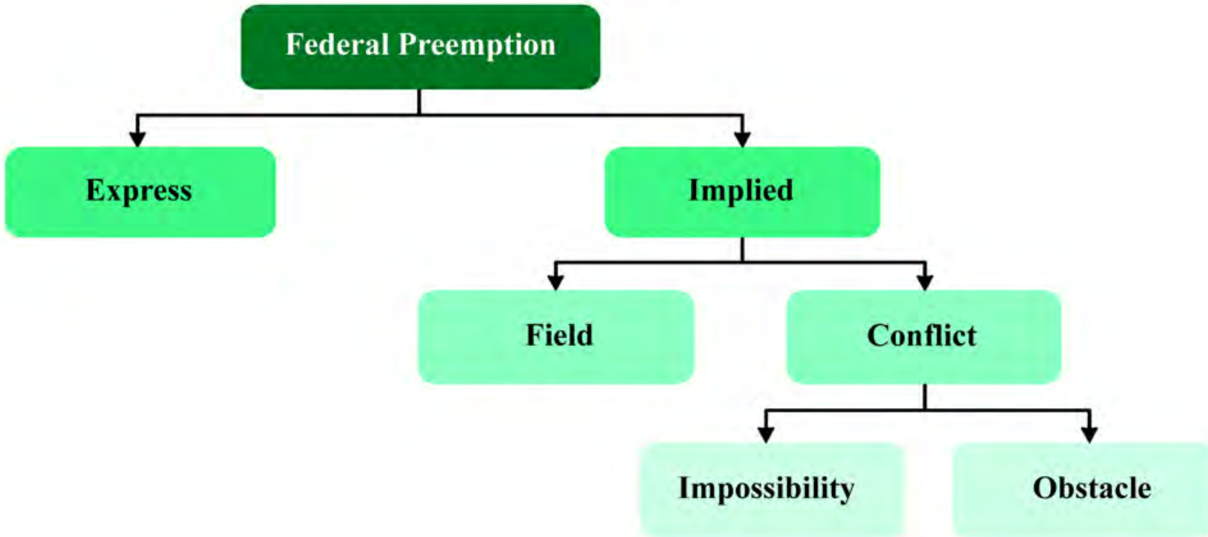
[24] *Id.* at 125 (internal quotations and citations omitted).

[25] *See, e.g., Dialysis Newco Inc. v. Community Health Systems Group Health Plan*, 938 F.3d 246, 259 (5th Cir. 2019); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017); *EagleMed*, 868 F.3d 893, 903; *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016). The Third Circuit, however, continues to apply the presumption against preemption in express-preemption analyses when a traditional state power is implicated, because *Franklin* "did not address claims involving areas historically regulated by the states." *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018). Whether the Third Circuit's reasoning would apply to P.L. 86-272 may be a matter of debate. In my opinion it would not; however, delving into this question is beyond the scope of this article.

[26] *Franklin California Tax-Free Trust*, 579 U.S. at 125.

[27] *Voter Reference Foundation LLC v. Torrez*, 160 F.4th 1068, 1081 (10th Cir. 2025); *Northwestern Selecta Inc. v. Gonzalez-Beiro*, 145 F.4th 9, 15 (1st Cir. 2025).

Figure 1. Federal Preemption Framework



In implied-preemption cases, the presumption against preemption applies. In express-preemption cases, it does not.

Preemption and P.L. 86-272

Under P.L. 86-272, a person is immune from a state's income tax if "the only business activities within such State by . . . such person" are "solicitation" of orders for sales of tangible personal property.[28] P.L. 86-272 preempts a state's power to impose an income tax *expressly*:

> No state, or political subdivision thereof, shall have power to impose . . . a net income tax on the income derived within such State.[29]

Accordingly, if a court must determine whether a state income tax is preempted by P.L. 86-272, it should apply an express-preemption analysis. This analysis is a straightforward exercise in statutory construction, which begins with the plain meaning of P.L. 86-272's text. Only if the text's meaning is unclear should the court turn to other canons of construction or legislative materials; the presumption against preemption does not apply.

But if a court must determine whether a state law *unrelated* to income tax is preempted by P.L. 86-272, it should apply an implied-preemption analysis. In those cases, the presumption against preemption applies.

The Supreme Court Precedent: *Heublein* and *Wrigley*

The foregoing framework is illustrated by the two Supreme Court cases analyzing P.L. 86-272: *Heublein* and *Wrigley*.

Heublein Inc. v. South Carolina Tax Commission

In *Heublein* (1972),[30] the Court analyzed whether South Carolina's laws regulating the sale of alcohol were preempted by P.L. 86-272. The taxpayer, an alcohol manufacturer based in Connecticut, conducted activities in South Carolina that clearly exceeded the scope of solicitation; however, these activities were performed solely to comply with South Carolina's

[28] 15 U.S.C. section 381. Any reference in this article to "income tax" means "net income tax."

[29] *Id.*

[30] *Heublein Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972).

alcohol laws. The Court held that the alcohol laws were valid despite causing the Connecticut-based manufacturer to lose P.L. 86-272 protection.[31] The Court examined P.L. 86-272's legislative history and concluded that Congress was primarily concerned with establishing a clearly defined limit on a state's ability to tax out-of-state businesses. The fact that South Carolina's alcohol laws forced the alcohol manufacturer to perform in-state activities beyond solicitation did not necessarily frustrate Congress's objective.[32]

The *Heublein* Court never used the term "preemption," but its approach tracked an implied-conflict-preemption analysis. The Court essentially concluded that South Carolina's alcohol laws created no obstacle to the congressional objectives underlying P.L. 86-272. It noted that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance," implicitly invoking the presumption against preemption.[33]

Wisconsin Department of Revenue v. William Wrigley Jr. Co.

In *Heublein*, the Court analyzed whether South Carolina's alcohol laws were preempted by P.L. 86-272. P.L. 86-272 did not expressly prohibit laws related to alcohol; therefore, preemption could only have been implied. But in *Wrigley*, the Court analyzed whether Wisconsin's taxation of income was preempted by P.L. 86-272. P.L. 86-272 expressly preempts state taxation of income, so *Wrigley* required an express-preemption analysis — and that is the approach the Court took.[34]

The *Wrigley* Court had to determine whether the activities of a gum manufacturer's salesmen in Wisconsin were "business activities" that exceeded "the solicitation of orders" under P.L. 86-272. To resolve this issue, Scalia, writing for the majority, relied on the dictionary definitions of solicitation and activities — that is, relied on the plain meaning of P.L. 86-272's text — to conclude that activities that are "entirely ancillary" to solicitation are also protected under P.L. 86-272.[35] Relying on this standard, the Court determined that the gum manufacturer's salesmen engaged in activities that were not entirely ancillary to solicitation in Wisconsin, and thus the gum manufacturer was unprotected from Wisconsin's income tax.[36]

Although the Court ruled in Wisconsin's favor, it rejected the state's argument that P.L. 86-272's use of the term "solicitation of orders" must be construed narrowly under the presumption that Congress does not intend to disrupt the federal-state balance.[37] Scalia, adopting the same stance he later adopted in *Cipollone* (discussed above), said this presumption was unwarranted because P.L. 86-272 "unquestionably *does* limit the power of States to tax companies whose only in-state activity is 'the solicitation of orders.'"[38] Thus the Court's only task was to "simply ascertain the fair meaning" of P.L. 86-272's text.[39]

As in *Heublein*, the *Wrigley* Court never used the word "preemption." Nevertheless, one can see clearly that the Court applied an express-preemption analysis and did not apply the presumption against preemption.

New York Cases Addressing P.L. 86-272: *Disney* and *ACMA*

As the foregoing demonstrates, the analytical framework governing the interpretation of P.L. 86-272 is rather straightforward. Yet in New York, the Court of Appeals failed to apply it properly in *Disney*, and most recently the New York Supreme Court, Appellate Division, Third Judicial Department failed to apply it properly in *ACMA*.[40]

[31] *Id.* at 279.

[32] *Id.* at 280.

[33] The manufacturer appeared to request that the Court extend the protection of P.L. 86-272 to counteract the alcohol laws, rather than declare the laws invalid. Thus, the taxpayer was not necessarily arguing for preemption. But because the taxpayer exceeded the activities authorized under P.L. 86-272, and because the alcohol laws were not preempted, the Court concluded that the manufacturer was not entitled to relief.

[34] *Wisconsin Department of Revenue v. William Wrigley Jr. Co.*, 505 U.S. 214 (1992).

[35] *Id.* at 223-229.

[36] *Id.* at 233.

[37] *Id.* at 224.

[38] *Id.* (emphasis in original).

[39] *Id.*

[40] The Court of Appeals is the highest court of New York; the Third Department is an intermediate appellate court.

Disney Enterprises Inc. v. New York Tax Appeals Tribunal

In *Disney* (2008), the issue was whether a combined group, for purposes of computing its net income tax, must include in its sales factor numerator the receipts of a combined affiliate that, when viewed in isolation, is tax protected under P.L. 86-272 (commonly referred to as the *Joyce/Finnigan* issue).[41] The court of appeals answered in the affirmative, concluding that for purposes of P.L. 86-272, a combined group should be treated as a single "person."[42] Because the collective activities of Disney's combined group exceeded solicitation in New York, the entire combined group lost its immunity under P.L. 86-272, and all its combined sales to New York customers had to be sourced to New York.

In reaching this conclusion, the court determined that the word "person," as used in P.L. 86-272, could be construed to include a combined group.[43] The court stated that this was a reasonable construction and consistent with P.L. 86-272's legislative history, which showed that Congress was especially concerned with protecting small and medium-size businesses, not a "corporate giant" like Disney.[44]

At the outset of its analysis, the court of appeals declared that it must interpret P.L. 86-272 "with the presumption that Congress does not intend to supplant state law."[45] The reader will immediately recognize that this statement is inconsistent with the express-preemption analysis employed in *Wrigley* — the court of appeals should *not* have applied the presumption against preemption. It also quoted *Heublein*'s description of P.L. 86-272 as having a "rather limited" purpose. This, too, was improper, as *Heublein* dealt with implied preemption, whereas *Disney* dealt with express preemption.

Admittedly, even had the court of appeals not applied the presumption against preemption, it very likely would have reached the same result. But the presumption against preemption played a key role in the analysis, and because of the precedential effect of the decision, this error should not be overlooked. The court ruled for the state because it advanced a "reasonable" argument against preemption, and this was sufficient to win the case with the presumption against preemption in its favor. But absent the presumption, the question would have been whether the state's position was *more* reasonable than Disney's, or put more precisely, whether the state's position more closely aligned with congressional intent. By applying the presumption against preemption, the court lightened its task: Rather than having to decide which of two competing, reasonable positions was correct, the court had to decide only if the state's position was reasonable.

The court of appeals might, at least to some extent, be forgiven for its reliance on the presumption against preemption. First, as noted above, the *Wrigley* Court addressed the issue of preemption obliquely, without ever using the term, making its approach easy to miss. Second, *Disney* was decided before *Franklin* (discussed above); therefore, when the court of appeals decided *Disney*, whether an express-preemption analysis included the presumption against preemption remained a matter of debate. Nevertheless, while the holding in *Disney* remains valid, its analysis does not accurately reflect current law governing preemption.

ACMA v. Department of Taxation and Finance

The court of appeals' preemption analysis in *Disney* was flawed, but the court at least applied familiar principles of statutory construction. The third department's recent preemption analysis in *ACMA*, however, completely missed the mark.

Background

As explained above, under P.L. 86-272, a person is immune from a state's income tax if the business activities within the state are limited to solicitation of orders for sales of tangible personal property. In 2021 the Multistate Tax Commission revised its "Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272," adopting the view that a seller loses P.L. 86-272

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[41] *Disney Enterprises Inc. v. Tax Appeals Tribunal of State of New York*, 888 N.E.2d 1029, 1037-1038 (N.Y. 2008).

[42] *Id.* at 1036.

[43] *Id.*

[44] *Id.* at 1037-1038.

[45] *Id.* at 1036-1037.

immunity based on routine interactions with customers through the internet:

> As a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state.[46]

This general rule, referred to herein as the internet rule, equates virtual presence with physical presence. Under the rule, if a seller located exclusively in State X interacts with customers in State Y through the internet, the seller is treated as though it had physically interacted with those customers in State Y under P.L. 86-272.

In 2023 the New York State Department of Taxation and Finance followed the MTC's lead and adopted the internet rule by amending N.Y. Comp. Codes R. & Regs. tit. 20, section 1-2.10 (regulation 1-2.10). Post-amendment, regulation 1-2.10 identifies the following activities, among others, as unprotected under P.L. 86-272:

- The seller assists customers after its products have been delivered, either by email or electronic chat, through the seller's website.
- The seller solicits and receives online applications for its branded credit card via its website.
- The seller invites its website's users to apply for nonsales positions with the seller.
- The seller places cookies on the computers and electronic devices of its customers.
- The seller offers and sells extended warranty plans through its website.[47]

In response to the department's adoption of the internet rule, the American Catalog Mailers Association sued the department, asserting that the amended regulations were preempted by P.L. 86-272. The trial court ruled against the association,[48] which appealed to the third department.

[46] MTC, "Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272," at 8 (rev. Aug. 4, 2021).

[47] N.Y. Comp. Codes R. & Regs. tit. 20, section 1-2.10(i). For the sake of brevity, this list is not exhaustive.

[48] *American Catalog Mailers Association v. Department of Taxation and Finance*, No. 903320-24 (N.Y. Sup. Ct. Apr. 28, 2025).

The Third Department's Decision

The third department affirmed the trial court's decision.[49] In doing so, the court bungled its preemption analysis and consequently failed to squarely address the issue before it.

P.L. 86-272 expressly limits a state's power to impose an income tax. The internet rule interprets the extent of that limitation. Accordingly, the third department should have applied an express-preemption analysis. This analysis is a straightforward exercise in statutory construction: The third department needed to determine whether Congress's use of the phrase "business activities within such State by . . . such person [i.e., the seller]" includes internet-based interactions between in-state individuals and out-of-state sellers. This analysis should have begun with the plain meaning of the phrase "business activities within such state by . . . such person."

But the third department performed no express-preemption analysis. In affirming the internet rule, the court instead applied an implied-conflict-preemption analysis:

> As relevant here, conflict preemption has been found . . . where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, . . . which is referred to as obstacle preemption. We may only conclude that [regulation 1-2.10] is preempted under an obstacle theory if the regulation would frustrate a significant objective of P.L. 86-272.
>
> It is never assumed lightly that Congress has derogated state regulation, but instead courts have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Where a federal law treads on a traditional state power (such as the power to tax), this presumption is especially strong, and is overcome only where the statute evidences that preemption is the clear and manifest purpose of Congress.
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> * * *

[49] *ACMA*, No. CV-25-0865, 2026 WL 1250610.

> The narrow issue before us now is whether the regulation, as written, stands as an obstacle to the accomplishment and execution of Congress' objectives in enacting Public Law 86-272.[50]

The court did not explain why it applied an implied-conflict-preemption analysis instead of an express-preemption analysis.[51] Figure 2 illustrates the court's error.

Applying an implied-conflict-preemption analysis, the third department found that "clarity" was a "significant objective" of Congress in enacting P.L. 86-272, and it held that because the internet rule also provided clarity, the rule "promote[s] rather than inhibit[s]" Congress's objective.[52] Thus, there was no conflict.

Putting aside the court's failure to apply the proper analysis, its reasoning was facile at best. Congress sought to provide more than just "clarity"; it sought to define the level of in-state activity that a seller could perform without incurring income tax. If the internet rule improperly lowered the level of permissible in-state activity, or improperly treated out-of-state activity as instate activity (as I argue below), then the internet rule was preempted. The court failed to meaningfully address this issue.

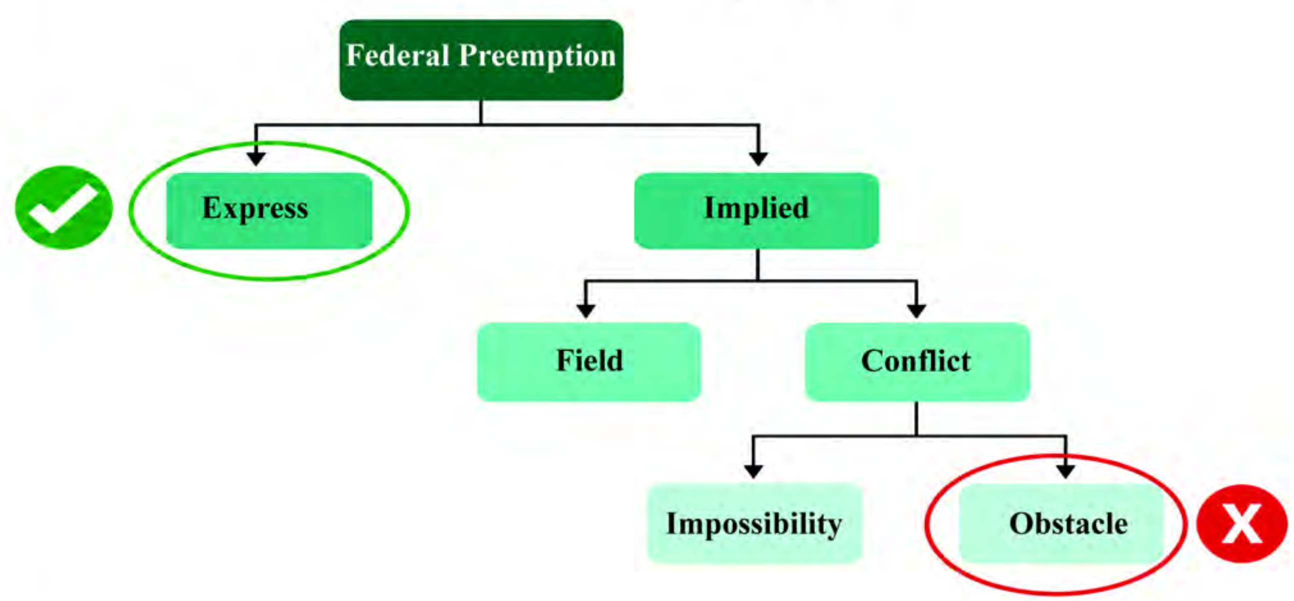
Remarkably, the court *never even addressed* the meaning of the key phrase "business activities within such state by . . . such person." In fact, the court devoted just one sentence of its analysis to the text of P.L. 86-272: "The text of the statute . . . is framed in functional terms, requiring consideration of the nature or purpose of the business activity, not the means through which that activity is conducted." The meaning and import of this observation are anyone's guess, but it fails to answer the question the court was supposed to resolve: Are an out-of-state seller's internet-based interactions with individuals in New York "business activities within" New York "by" the seller under P.L. 86-272? When a court fails to conduct its analysis under the proper framework, these are the unfortunate results.

[50] *Id.* at *1 (first two paragraphs of excerpt) and *4 (third paragraph of excerpt) (internal quotations and citations omitted).

[51] The court made much of the fact that the ACMA challenged the internet rule on its face, and thus the court had to determine whether the rule was preempted "as written." *Id.* at *4. But this does not explain the court's reliance on an implied-preemption analysis; a court may conclude that a state law, on its face, is expressly preempted by federal law. *National Meat Association v. Harris*, 565 U.S. 452 (2012).

[52] *ACMA*, No. CV-25-0865, 2026 WL 1250610, at *5.

Figure 2. ACMA Preemption Error



Conclusion

In challenging New York's internet rule, let's hope the third department's decision in *ACMA* is not the end of the road. As I have previously argued in *Tax Notes State*, the plain meaning of P.L. 86-272 excludes those activities captured by the internet rule.[53] When Person X in State A uses the internet to communicate with Person Y in State B, no one using common and ordinary language would say Person X is performing an activity in State B. To illustrate, if you are in California and you send an email to a friend in New York, would you say you sent an email within the state of New York? Of course not. The internet rule is not anchored in P.L. 86-272's text; it reflects the policy judgments of tax administrators.

This article focuses on P.L. 86-272 as interpreted by the New York courts; however, the issues discussed herein have broad application and are critically important. Several states other than New York have adopted the MTC's internet rule, and thus its validity will likely continue to be litigated throughout the country.[54] These cases should be decided using the correct analytical framework — that is, an express-preemption analysis, which does *not* give the states the benefit of any presumption and forces the courts to analyze the plain meaning of P.L. 86-272's text. Further, the issue of preemption applies not only to P.L. 86-272, but to all federal laws preempting state taxation — for example, the 4-R Act, which prohibits states from imposing taxes that discriminate against rail carriers,[55] and the ITFA, which prohibits states from imposing taxes on internet access and discriminatory or multiple taxes on electronic commerce.[56] When state taxes are challenged under these federal statutes, the express-preemption analysis should be applied. ■

[53] Marty Dakessian and Michael Penza, "A Failure in Statutory Interpretation: The MTC and P.L. 86-272," *Tax Notes State*, Apr. 12, 2021, p. 175.

[54] *See, e.g.*, N.J. Admin. Code section 18:7-1.9A; 830 Mass. Code Regs. 63.39.1(4)(e).

[55] 49 U.S.C. section 11501(b)(4).

[56] 47 U.S.C. section 151 note.