IN THE SUPREME COURT OF THE STATE OF OREGON

MICROSOFT CORPORATION, Plaintiff-Respondent, Cross-Appellant, v. DEPARTMENT OF REVENUE, STATE OF OREGON, Defendant-Appellant, Cross-Respondent.	)	Tax Court No. 5413 Supreme Court No. S072126

AMICUS BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT

Appeal from the Judgment of the Tax Court
Honorable ROBERT T. MANICKE, Judge

ERIC J. KODESCH # 032508
kodesche@ballardspahr.com
BRIAN T. KIOLBASA # 112890
kiolbasab@ballardspahr.com
Ballard Spahr LLP
601 S.W. Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2100

Attorneys for Amicus Curiae
The National Foreign Trade Council

NATHANIEL S. POLLOCK*
npollock@southbank.legal
SouthBank Legal, LLC
700 12th Street, NW, Suite 700
Washington, DC 20005
Telephone: 202.904.2410

TIERNAN B. KANE*
tkane@southbank.legal
SouthBank Legal
100 E Wayne Street, Suite 300
South Bend, IN 46601
Telephone: 574.968.0760

**Pro hac vice* application pending

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ELIZABETH H. WHITE #204729
elizabeth.white@klgates.com
K&L Gates LLP
One SW Columbia Street, Suite 1900
Portland, OR 97204
Telephone: 503.228.3200

ROBERT B. MITCHELL
rob.mitchell@klgates.com
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Telephone: 206.370.7640

Attorneys for Plaintiff Respondent Cross-Appellant

JEFFREY A. FRIEDMAN
jefffriedman@eversheds-sutherland.com
DANIEL H. SCHLUETER
danschlueter@eversheds-sutherland.com
Eversheds Sutherland LLP
700 Sixth Street NW, Suite 700
Washington, DC 20001
Telephone: 202.383.0100

TED W. FRIEDMAN
tedfriedman@eversheds-sutherland.com
Eversheds Sutherland LLP
The Grace Building, 40th Floor
1114 Avenue of the Americas
New York, NY 10036
Telephone: 212.389.5000

Attorneys for Plaintiff-Respondent Cross-Appellant

DAN RAYFIELD #064790
Attorney General
PAUL L. SMITH #001870
Solicitor General
PEENESH H. SHAH #112131
peenesh.h.shah@doj.oregon.gov
Assistant Attorney General
DARREN WEIRNICK #014516
darren.weirnick@doj.oregon.gov
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301-4096
Telephone: 503.378.4402

Attorneys for Defendant-Appellant Cross-Respondent

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I. INTEREST OF *AMICUS CURIAE* AND ASSISTANCE PROVIDED BY *AMICUS* BRIEF

The National Foreign Trade Council, Inc. ("NFTC") is the premier business association advancing trade, tax, national security, and supply chain policies that support access to the global marketplace. Founded in 1914, NFTC promotes an open, rules-based global economy on behalf of a diverse membership of U.S.-based businesses, who account for over $6 trillion in revenue and employ nearly 6 million people in the United States.

The NFTC respectfully submits this brief to address the fair apportionment issue. Oregon's inclusion of a portion of accumulated foreign-entity income taxed on a pass-through basis in 2018 is grossly unfair to Microsoft and to many other U.S.-based multinational businesses.

II. INTRODUCTION

Oregon spiked Microsoft's 2018 tax liability. To do that, Oregon unfairly apportioned Microsoft's income. And it wasn't just Microsoft whose Oregon tax 12-tupled. Other multinational businesses suffered similar fates. When the federal government levied a one-time pass-through tax on U.S. corporations based on the accumulated income of their foreign affiliates, Oregon took the opportunity to tax that foreign entity income.

The problem is this: Oregon chose a Water's-Edge tax system. That system just taxes a multinational business's *domestic* entities (the Water's-Edge Group). Oregon cannot maintain that system *and* tax foreign entities' accumulated income. That is a contradiction. Oregon excludes those foreign entities from the Water's-Edge Groups it chooses to tax.

Fairness demands a logical correlation between the apportionment factor and the taxed income. Oregon's apportionment factor measures Oregon's share of the sales of *domestic* entities. That makes sense under Oregon's Water's-Edge system that only taxes domestic entities. But Oregon cannot turn around and use its domestic-entity apportionment factor to apportion income earned by foreign companies. That's what Oregon has done. And the correlation problem highlights the error in the notion that taxing 20 percent (rather than 100 percent) of the accumulated foreign entity income fixes the issue and counts as a form of factor representation. The problem is not fixed unless the apportionment factor is altered to match the entity group being taxed.

Nor does adherence to federal taxable income excuse this unfairness. In 2018, the federal government supercharged pass-through taxation of foreign entities excluded from Oregon's Water's-Edge Group. Oregon's apportionment system is premised on *not* taxing foreign affiliates. So it cannot just follow the federal government's taxation of foreign affiliates' income unless it also adjusts its

apportionment formula to include a representation of that foreign income in the apportionment formula.

III. STATEMENT OF THE CASE

NFTC defers to and adopts the Statement of the Case in Microsoft's opening brief.

IV. ASSIGNMENT OF ERROR

The Tax Court erred in determining that the tax at issue was fairly apportioned and thus did not violate the Commerce Clause of the United States Constitution.

A. Preservation of Error and Standard of Review

NFTC defers to and adopts the relevant Preservation of Error and Standard of Review in Microsoft's opening brief.

B. Argument on Assignment of Error

1. The Tax Court's Decision Should be Reversed Because Oregon's Tax on Amounts Subject to the Federal 2018 Transition Tax is Not Fairly Apportioned and Thus Violates the Commerce Clause of the U.S. Constitution.

This case is about Oregon's tax levied against Microsoft based on the income of foreign corporations Microsoft controls. The federal government imposed this pass-through tax in 2018. NFTC's argument here addresses the Oregon corporate excise tax and its relationship to federal taxation of controlled foreign corporation (CFC) earnings. These foreign corporations are often (as here) the foreign affiliates

of U.S. multinational companies. Some background on the Oregon tax and the relevant federal tax is a helpful starting point.

i. Oregon's Corporate Excise Tax.

Oregon imposes a corporate excise tax on corporations that do business in the state. ORS 317.070. The tax's attributes most relevant to the NFTC's argument here are: (1) how Oregon defines the corporate income to be apportioned and (2) how Oregon apportions the income.

Oregon defines the corporate income subject to apportionment using a "Water's-Edge" approach that taxes only domestic entities. Oregon requires an "affiliated group" of corporations to file a consolidated excise tax return. ORS 317.715. Oregon defines the "affiliated group" by reference to federal tax law, 26 USC (IRC) § 1504. In the federal system, an "affiliated group" of corporations may choose to file a consolidated corporate income tax return rather than filing separate returns for each corporation. IRC § 1501. Federal law, IRC § 1504(b)(3), excludes foreign corporations from the affiliated group. Thus, the "Water's-Edge Group" that files a consolidated corporate excise tax return in Oregon likewise excludes any affiliated foreign corporations and includes only affiliated domestic corporations. That is, the income that Oregon apportions and then taxes is just the income of affiliated *U.S.* corporations.

Now let's discuss how Oregon apportions the Water's-Edge Group's income. Oregon starts with the Water's-Edge Group's federal taxable income. ORS 317.715(1). This makes sense because, generally speaking, the Oregon Water's-Edge Group is the same as the "affiliated group" that files a consolidated federal corporate income tax return. The Water's-Edge Group then removes income or losses of nonunitary members of the Water's-Edge Group and makes the additions, subtractions, adjustments, and modification required by Oregon tax law. ORS 317.715(2) and (3). Oregon then apportions this resulting apportionable income of the Water's-Edge group using a formula. The formula is meant as an approximation of the part of the Water's-Edge Group's apportionable income attributable to the Water's-Edge Group's business activity in Oregon.

Oregon uses a single factor, the sales factor, to apportion the income of the Water's-Edge Group. ORS 314.650. The sales factor is a fraction. The numerator of the fraction is the sales of the Water's-Edge Group in Oregon; the denominator is all sales of the Water's-Edge Group. ORS 314.665(1). Because Microsoft's Water's-Edge Group makes about one-half of one percent of its sales in Oregon, Oregon taxes half a percent of the apportionable income (federal taxable income with some adjustments) of the Water's-Edge Group. (ER-2 ¶ 6; ER-7 ¶ 25.)

ii. The Expansion of Subpart F.

To a limited extent before 2018, and to a much greater extent in 2018 and since, the federal government taxes a corporate "affiliated group" on earnings and profits of foreign affiliates that fall outside the "affiliated group." This was and is a form of pass-through taxation. In most respects, corporations are taxed directly on their incomes, and corporate shareholders are not taxed on corporate income unless it is distributed to them as a dividend. *See Moore v. United States*, 602 US 572, 578 (2024). On the other hand, partnerships and S corporations are taxed on a pass-through basis, meaning the income of the entity is attributed to the entity's owners and those owners (rather than entity itself) pay tax on the entity's income. *Id.* This pass-through tax is levied regardless of whether the partnership's or S corporation's income is distributed to the owners.

Before 2018, the federal government imposed a limited tax on U.S. multinational businesses based on income of their foreign affiliates. This tax, known as subpart F (because of its placement in the federal tax code) "applies only to a small portion of the foreign corporation's income, mostly passive income." *Moore*, 602 US at 579. The U.S. Supreme Court explained that this is a tax imposed on U.S. taxpayers (as relevant here, the affiliated group) "on a pass-through basis." *Id.*

The Tax Cuts and Jobs Act (TCJA) added to this pass-through taxation. Broadly speaking (and as relevant here), the TCJA shifts the United States away

from a system that taxes the income of foreign affiliates of a U.S. corporate affiliated group only when it comes into the hands of the U.S. corporate affiliated group. *See Id.* at 579–80 (explaining that the TCJA was enacted "[a]s part of the complicated transition to a more territorial system," moving away from the prior regime where foreign earnings were fully taxed upon distribution to the U.S. shareholder). Going forward, the TCJA taxes the income of foreign affiliates of a U.S. corporate affiliated group via a pass-through tax initially known as Global Intangible Low-Taxed Income (GILTI) regime (described below). *Id.* at 580 n.1. This pass-through tax doesn't wait for the income to be transferred or distributed to a U.S. entity; it taxes the U.S. entity on the foreign income when the foreign affiliate earns it. *Id.*[1]

The old system created a disincentive for U.S. corporate affiliated groups to transfer earnings and profits of foreign affiliates (controlled foreign corporations

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[1] *See* IRC § 951A. As the United States Tax Court has explained, "despite its name," the GILTI regime "generally taxes U.S. shareholders of a [controlled foreign corporation] on *all* income of the CFC that exceeds a certain deemed threshold return on the CFC's tangible assets." *Siemens Med. Sols. USA, Inc. v. Commissioner*, 167 TC No 5, 2026 WL 2040641, at *5 (2026). This is accomplished by adding amounts subject to the GILTI tax to federal taxable income in a manner similar to the addition of subpart F income and taxing those amounts (along with the passive income previously included in subpart F income) on a pass-through basis. *See* IRC § 951A; *see also Moore*, 602 US at 580 n.1 (describing the GILTI regime as the imposition of "a similar pass-through tax going forward" – that is, a tax similar to the original subpart F tax and the transition tax). The One Big Beautiful Bill (OBBBA) Act made certain changes to GILTI, including to its name (it's now "net CFC tested income" or NCTI), which are not material here. *See* OBBBA, Pub L No 119-21 § 70323(a)(1), 139 Stat 72 (July 4, 2025) (amending IRC § 951A).

outside the affiliated group) into the U.S. affiliated group. *See id.* The new system eliminated the adverse federal tax consequences of such repatriation and thus removed that disincentive (as far as federal taxes are concerned). It largely exempts foreign-entity income from U.S. taxation using a 100-percent dividend-received deduction provided certain requirements are met. *See* IRC § 245A.

But Congress decided not to simply wipe out the tax liability that would have attached to foreign affiliate earnings transferred to U.S. corporate affiliated groups under the old system. Instead, the TCJA imposed a one-time transition tax. This was a pass-through tax on the accumulated earnings of (as relevant here) CFC foreign affiliates of U.S. corporate affiliated groups. The mechanism for this transition tax was a one-time expansion of subpart F to increase the pass-through tax assessed to the U.S. parent (shareholder) on CFC foreign-affiliate income earned over a period of many years and not previously subject to subpart F. In 2018 (the transition year), rather than applying to a small part of a foreign affiliate's income, subpart F applied to most of the foreign affiliate's income earned and accumulated over many years. *See* IRC § 965.

Because of this pass-through transition tax imposed on the income of its foreign affiliates (not part of the U.S. corporate affiliated group that the federal corporate income tax directly taxes), Microsoft's 2018 federal taxable income skyrocketed. This happened because the federal government treated $157 billion in

accumulated earnings of Microsoft's foreign affiliates as pass-through income to Microsoft in 2018. (ER-7 ¶ 24.) And many other U.S. multinational companies also had huge increases in pass-through income from foreign affiliates. Ameliorating the burden to a degree, federal law allowed U.S. corporate affiliated groups to spread the transition tax payment over eight years. IRC § 965(h). The TCJA also modified federal law by significantly decreasing tax rates on this income.[2]

In sum, the TCJA retains direct taxation on domestic U.S. corporate income but moves to pass-through taxation on foreign corporate income (that is, the income of the CFC foreign affiliates of a U.S. corporate affiliated group). The new system effectively treats a CFC foreign affiliate as a partnership or disregarded entity. Adding to the much more limited prior pass-through taxation on passive foreign income (subpart F), the TCJA imposed pass-through taxation on "foreign earnings accumulated before the TCJA was enacted" (the transition tax) and on "post-TCJA foreign earnings" (GILTI). *Siemens*, 2026 WL 2040641, at *5.

iii. Oregon's Taxation of Amounts Subject to the Transition Tax.

Most states did not tax foreign entity income subject to the 2018 transition tax as part of their corporate excise or income tax on multinationals doing business in the state. Oregon did. After taking into account the dividends-received deduction

[2] The tax rate dropped to 15.5 percent or all the way to 8 percent, depending on whether the amount deemed repatriated was a cash position. IRC § 965(c).

under ORS 317.267(2)(b), Oregon included 20 percent of the amount subject to the federal transition tax in a corporate Water's-Edge Group's apportionable income. Oregon included this amount in the pre-apportioned taxable business income of a corporate Water's-Edge Group without altering the sales factor that determined the portion of that business income that qualifies as Oregon taxable income. The sales factor remained a fraction: the numerator of the fraction is the sales of the Water's-Edge Group in Oregon, and the denominator of the fraction is all sales of the Water's-Edge Group. ORS 314.665(1).[3]

iv. Microsoft Had Massive Oregon Tax Liability in 2018 Because of the Transition Tax.

In 2017, Microsoft's apportionable income (that is, the income of the Water's-Edge Group that is subject to apportionment) was about $2.7 billion. (ER-11 ¶ 28.) In 2018, Microsoft's apportionable income exceeded $42.3 billion. (ER-3–4 ¶ 13.) The large difference stems mainly from the 20 percent of accumulated income of Microsoft's foreign affiliates that Oregon included in Microsoft's 2018 Oregon

[3] The Oregon Tax Court ruled in favor of Microsoft that the 20 percent amount included in apportionable income also must, under applicable Oregon statutes, be included in the denominator of the sales factor. Oregon now appeals that ruling. This *amicus* brief doesn't address that issue. Addressing the constitutionality of the tax at issue, this *amicus* brief focuses first and primarily on the unfairness of Oregon's position. Certainly, the unfairness is lessened if the Oregon Tax Court's ruling on the statutory issue stands. But, as we explain in the last section of this brief, the less egregious unfairness that results from the Oregon Tax Court's decision remains very unfair and unfair enough to violate the constitutional standard.

income tax base. That is no surprise: Microsoft's foreign affiliates' accumulated income subject to the federal 2018 transition tax exceeded $157 billion. (ER-7 ¶ 24.)

While Microsoft's apportionable income rose dramatically in 2018, its Oregon sales were in line with its sales in prior years. In 2018, Microsoft's Water's-Edge Group had $465,896,671 in Oregon sales. (ER-3–4 ¶ 13.) In 2017, 2016, 2015, and 2014 the Oregon sales of Microsoft's Water's-Edge Group were $469,200,329, $461,761,292, $459,079,507, and $388,877,721. (ER-7–9 ¶ 26, ER-11 ¶ 28.)

Microsoft's Oregon tax liability jumped through the roof in 2018. In 2018, according to the State, Microsoft owed (and Microsoft has paid) $16,977,966 (ER-4 ¶ 13.). This was a more-than-twelve-fold increase from Microsoft's $1,373,830 Oregon tax liability in 2017. (ER-11 ¶ 28.) It was also 17.5 times the average Oregon tax Microsoft paid in the preceding two years and 8.26 times the average Oregon tax Microsoft paid in the preceding four years. (ER-7–9 ¶ 26, ER-11 ¶ 28.) *See also Microsoft Corp v. Dept of Revenue*, TC 5413, 25 OTR 699, 748–49, 2025 WL 1232828, at *27 (Or Tax, Apr. 29, 2025). All this the State accomplished by a sleight of hand: presumptively deeming many years of foreign entity earnings to be repatriated—but only to determine what income is taxed, not to consider how much (if any) was earned from Oregon activities and reflected in its apportionment formula.

v. The Commerce Clause's Fair Apportionment Mandate.

The Commerce Clause empowers Congress "To regulate Commerce with foreign Nations, and among the several States . . . ." US CONST art I, § 8, cl 3. To be constitutional under the Commerce Clause, a state tax must (1) be "applied to an activity with a substantial nexus with the taxing state," (2) be "fairly apportioned," (3) "not discriminate against interstate commerce," and (4) be "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 279 (1977). Where, as here, the state taxes foreign commerce, the tax must also (5) avoid "substantial risk of international multiple taxation," and (6) not prevent "the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd. v. Los Angeles Cnty.*, 441 US 434, 451 (1979).

This brief focuses on the fair apportionment requirement. To be fairly apportioned, a state tax must "actually reflect a reasonable sense of how income is generated." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 US 159, 169 (1983). A State violates this fairness standard where the income attributed to the State "is in fact 'out of all appropriate proportions to the business transacted in that State . . . or has 'led to a grossly distorted result.'" *Id.* at 170.

vi. Oregon's Tax on Microsoft Was Not Fairly Apportioned Under This Standard.

The Oregon Tax Court brushed off the undisputed evidence that Oregon's 2018 tax increased Microsoft's Oregon tax liability by well over 1,000 percent from the prior year, was 17.5 times Microsoft's average tax liability for the two preceding years and was 8.26 times Microsoft's average tax liability for the four preceding years. According to the court, and the State, these huge tax increases are "superficial and unpersuasive" on the fairness issue. *Microsoft Corp.*, 25 OTR at 749, 2025 WL 1232828, at *27.

The Oregon Tax Court credited the State's argument that "'[o]ne must do more than simply point to an increase in tax if large items of income are included in the tax base.'" *Microsoft Corp.*, 25 Or. Tax at 748, 2025 WL 1232828, at *27 (quoting Def's Cross-Mot Summ J & Resp at 44). This misses the fundamental point. Here the large increase in Microsoft's apportionable income has nothing to do with Microsoft's Oregon activities. The Court did not determine (and the State does not argue) that Microsoft's Oregon operations or Oregon employees were integral to the earnings and profits that Microsoft's foreign affiliates (controlled foreign corporations) accumulated over many years preceding the federal transition tax. If, for example, the dramatic year-over-year increase in Microsoft's apportionable income had resulted from a merger with another high-revenue company that also does business in Oregon, it would make sense for Oregon to share in that revenue

increase. Indeed, there would be no reason for Oregon to tax the revenue newly added to Microsoft's apportionable income differently than the revenue of the operations already part of Microsoft's apportionable income prior to the merger.

But here the "new revenue" included in Microsoft's 2018 apportionable income is in fact old revenue earned by Microsoft's foreign affiliates that the Oregon legislature determined that Oregon would not tax when it adopted a Water's-Edge system. Again, the earnings and profits of Microsoft's foreign subsidiaries were not generated by Microsoft's Oregon operations. *See Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 US 768, 777 (1992) ("[A] State may not tax value earned outside its borders."). And the huge jump in Oregon tax, accompanied by no jump at all in Oregon sales or Oregon activity, should be self-evidently "'out of all appropriate proportion[] to the business'" Microsoft transacted in Oregon. *See Container Corp.*, 463 US at 170; *see also Hans Rees' Sons v. N. Carolina ex rel. Maxwell,* 283 US 123 (1931) (rejecting North Carolina's apportionment of a business's income because it far exceeded the income that had its source within the state).

Oregon overreached. The State saw in the federal transition tax an opportunity to boost its tax revenue and took it.

The situation here is starkly different than that in *Pennzoil Co. v. Dep't of Revenue*, 33 P3d 314 (Or 2001). In *Pennzoil*, this Court determined that income from a large settlement agreement could be fairly included in Pennzoil's income that was

subject to apportionment. *Id.* at 319. But this Court focused its constitutional analysis on the income's connection with Oregon. First, the settlement payment to Pennzoil was "paid in lieu of Pennzoil's right to acquire an interest in Getty's oil reserves" and "acquisition of oil reserves is related—indeed is vitally important—to the continued blending and distribution of motor oil in Oregon." *Id.* at 318. This Court also determined that "Pennzoil's unitary business succeeded in [the year at issue] largely because of the settlement proceeds received from Texaco." *Id.* at 319. Nothing similar is present here. The earnings of Microsoft's foreign affiliates in prior years were *not* reflected in the domestic-only apportionment factor.

vii. Fairness Requires the Apportionment Factor to Correlate with the Amount Being Apportioned.

As explained, Oregon chooses to use a Water's-Edge system that deliberately excludes earnings of the foreign affiliates of the Water's-Edge Group. Reflecting this choice, Oregon's sales factor is the Water's-Edge Group's Oregon sales divided by its total sales. The sales of the Water's-Edge Group's foreign affiliates don't come into play. And for good reason. The income that Oregon apportions is the business income of the Water's-Edge Group.

The correlation point is simple. The apportionment factor needs to match the income being apportioned. If it's just domestic entity income that is being apportioned then the apportionment factor should reflect that and should be determined in relation to domestic entity activity. Breaking that correlation prevents

"the factor or factors used in the apportionment formula" from "actually reflect[ing] a reasonable sense of how income is generated." *Container Corp.*, 463 US at 169.

Oregon's taxation of Microsoft's 2018 income breaks the required correlation. In 2018, Oregon did *not* tax the income of Microsoft's Water's-Edge Group. Instead, most of the income Oregon taxed was the accumulated earnings of foreign corporations that Oregon excludes from the Water's-Edge Group. But Oregon taxed this foreign entity income using a sales factor based only on domestic activities. That doesn't work. The denominator of the sales factor has to reflect the activities of the entity or entities being taxed. Oregon's sales factor denominator flunks this test. What Oregon is doing is taxing many years of earnings of Microsoft's foreign affiliates based on Oregon's share of the 2018 activities of Microsoft's domestic entities. In short, the factor doesn't correlate with the amount taxed.

Using Oregon's percentage of Microsoft's domestic sales to tax Microsoft's foreign income inflates the tax. Comparing Microsoft's Oregon sales to its total U.S. sales yields a sales factor percentage that is higher than the one that would result from comparing Microsoft's Oregon sales to its worldwide sales. So applying the domestic sales factor to the income of Microsoft's Water's-Edge Group *and* the accumulated income of its foreign affiliates (who are outside of that group) inflates the tax. Oregon apportions that income as if it were purely domestic income, and thus taxes more of the income than would be taxed if Microsoft's foreign sales were

accounted for in the sales factor and Oregon's portion of the total sales was thus lower.

The Oregon Tax Court failed to come to grips with this correlation issue. Its analysis of the "80 percent subtraction" highlights this failure. As explained above (pp. 10-11), Oregon included 20 percent of amounts subject to the transition tax in apportionable income—not 100 percent. The Oregon Tax Court believed that this "80 percent subtraction" was "a form of factor representation" and thus that its job was just to assess "whether the *degree* of factor representation that Oregon provides is sufficiently accurate or fair." *Microsoft Corp.*, 25 Or. Tax at 704, 2025 WL 1232828, at *3 (emphasis in original). What the court missed is that including any income of entities outside of the group being taxed breaks the logical correlation of the apportionment factor. It would make sense to count the 80 percent subtraction as a form of factor relief if it applied to an item of income *of the Water's-Edge Group*. But that's not what the amount subject to the transition tax is. That amount is the income of entities outside of the Water's-Edge Group.

Indeed, Oregon seems to recognize this correlation requirement in other pass-through income contexts. When it comes to partnership income, the sales factor denominator includes *all* of the allocable share of the partnership's gross sales. *See* OAR 150-314-0385(8) (including allocable share of partnership's sales in corporate partner's sales factor denominator). It makes no sense to conclude (as the Oregon

Tax Court did) that the 80 percent subtraction achieves fairness for one type of pass-through income (subpart F income) when Oregon does not impose such a subtraction for the most common type of pass-through income (partnership income).

Certainly, if Oregon had decided to tax Microsoft's Water's-Edge Group on 100 percent of the amount subject to the transition tax, the result would be even less fair. Recall that including 20 percent of the accumulated earnings of Microsoft's foreign affiliates in the apportionable income yielded a 1,200 percent increase in Microsoft's 2018 tax liability. Including 100 percent of those foreign earnings in the tax base would have yielded a far larger increase in Microsoft's 2018 tax liability. But the correlation problem is the same in both cases. Including income from outside of the Water's-Edge Group breaks logical correlation unless the apportionment factor is changed to match the new group being taxed (just as the apportionment factor is changed to include the allocable share of a partnership's gross receipts). That's true whether the income from outside the Water's-Edge Group is $1 million or $100 billion or any percentage of those amounts. Thus, taxing Microsoft on 20 percent of the accumulated income of entities outside its Water's-Edge Group is no more permissible under the Commerce Clause than taxing 100 percent of that income. If an apportionment formula is structurally flawed because it lacks correlative factor representation for foreign entity income, applying that

unconstitutional formula to less than 100 percent of the income of foreign entities outside the Water's-Edge Group does not cure the constitutional defect.

viii. Fair Apportionment Imposes Limits on Use of Federal Taxable Income as the State Corporate Tax Baseline.

Oregon's corporate excise tax uses federal taxable income as a starting point. No problem there. It's convenient for the state and for taxpayers not to start from scratch. But administrative convenience is no excuse for violating the Commerce Clause. In *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue*, 505 US 71 (1992), Iowa used federal taxable income as its base, taxing foreign subsidiary dividends while exempting domestic ones. Iowa defended the practice as a necessary byproduct of conforming to the federal code. That defense failed. A state may use the federal baseline, but it must make the "adjustments that avoid the discriminatory treatment of foreign subsidiary dividends." *Id.* at 81. Conformity "cannot shield a state tax statute from Commerce Clause scrutiny." *Id.* at 82. *See also ASARCO Inc. v. Idaho State Tax Comm'n*, 458 US 307, 327–29 (1982) (federal tax inclusion does not permit a state to tax foreign affiliate dividends absent a unitary business); *F.W. Woolworth Co. v. Taxation & Revenue Dep't of N.M.*, 458 US 354, 372 (1982) (federal tax classification does not dictate state constitutional reach).

The problem with Oregon adopting federal taxable income here is that the federal corporate tax is not just a tax on the income earned by Water's-Edge Group. It is also a tax on income earned outside of that group. *See Moore*, 602 U.S. at 584

(describing the income subject to the transition tax as "income realized by the [CFC]"). To be sure, Oregon's Water's-Edge Group generally corresponds to the domestic affiliated group that files a consolidated federal return. *See* ORS 317.715 and IRC § 1504. But the federal corporate tax doesn't match Oregon's. It taxes the income of the domestic group, *and* it taxes—on a pass-through basis—the income of controlled foreign corporations that are outside of that group.

To avoid the constitutional mandate to either exclude this extraterritorial income or provide factor representation, the Department of Revenue characterizes the transition tax inclusion as a traditional foreign source "dividend." The Oregon Tax Court accepted this characterization. *See Microsoft Corp.*, 25 OTR at 746–47, 2025 WL 1233256, at *26 (relying on *E.I. Du Pont de Nemours & Co. v. State Tax Assessor*, 675 A2d 82 (Me 1996)). Indeed, the court accused Microsoft of ignoring the difference between taxing a dividend paid to a domestic parent from a foreign affiliate's income and taxing the foreign income itself. *Id.* But it is the Oregon Tax Court, not Microsoft, that misunderstands how the transition tax works. *Moore* makes clear that the transition tax taxes income realized by controlled foreign corporations on a pass-through basis and thereby attributes CFCs' income to their U.S. parents. 602 U.S. at 580 (upholding the transition tax against constitutional challenge by determining that it works as a pass-through mechanism that "attribute[d] an entity's realized and undistributed income to the entity's

shareholders or partners, and then tax[ed] the shareholders or partners on their portions of that income"). The crux of the Court's reasoning in *Moore* was that the transition tax need not tax amounts that were realized income to the U.S. taxpayer (as relevant here, the affiliated group). Instead, the Court ruled that the transition tax was a tax on income because it taxed the realized income of the controlled foreign corporation. *Id.* at 584–85. So the Oregon Tax Court's conclusion that Oregon "does not tax the CFCs" is wrong. *See Microsoft Corp.*, 25 OTR at 746, 2025 WL 1233256, at *26. By incorporating the federal corporate income tax's pass-through taxation of CFCs' income, Oregon in fact *does* "include their income in the measurement of the tax base." *See id.*

In short, federal pass-through taxation of Microsoft's foreign affiliates collides with Oregon's chosen tax system. Oregon decided to tax a Water's-Edge Group that excludes foreign affiliates, apportioning that group's income based purely on sales of the domestic Water's-Edge Group. Under *Kraft*, *ASARCO*, and *F.W. Woolworth*, Oregon cannot hide behind its federal conformity to justify taxing foreign-entity income without foreign-factor representation.

ix. In All Events, the State's Interpretation of Oregon Tax Law is Grossly Distortive.

Suppose for argument's sake that a Water's-Edge state has some constitutional leeway to assess foreign income without correlative factor representation. Even if

so, that leeway is not a blank check. An apportionment formula cannot yield a "grossly distorted result." *See Container Corp.*, 463 U.S. at 170.

Microsoft got a grossly distorted result here. Its Oregon tax liability skyrocketed. Yet its Oregon activities remained level. A tax that taxes the same Oregon activity but produces a more-than-twelve-fold tax increase is grossly distortive.

True, the Oregon Tax Court's determination that the 20 percent taxable repatriation amount must (under a correct interpretation of Oregon law) be included in sales factor denominator is not as egregious as the Defendant's zero inclusion. But it's insufficient. The re-inclusion does not measure the billions of dollars of foreign sales over many years of Microsoft's foreign affiliates' operations that generated the earnings taxed by the transition tax. Fair apportionment needs to fairly reflect the activities that gave rise to the amount subject to tax. Even with the re-inclusion, Oregon's apportionment formula fails to clear that bar.

The result also remains distortive. Re-inclusion of the 20 percent taxable repatriation amount reduces Microsoft's 2018 Oregon tax liability by $5.4 million or $4.6 million (depending on whose calculations are right). That's real money. But a $5.4 million reduction would leave Microsoft's Oregon 2018 tax burden well over eight times heavier than it was in the prior year ($16,977,966 Oregon tax paid in 2018 minus the $5.4 million reduction divided by the $1,373,830 in Oregon tax

Microsoft paid in 2017). That's still a huge increase based on taxing an amount that has no connection to Oregon.

V. CONCLUSION

For the foregoing reasons, Amicus NFTC respectfully submits that the judgment of the Tax Court should be reversed and judgment should be entered in favor of Microsoft.

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Respectfully submitted:

s/ Eric J. Kodesch
ERIC J. KODESCH # 032508
kodesche@ballardspahr.com
BRIAN T. KIOLBASA # 112890
kiolbasab@ballardspahr.com
Ballard Spahr LLP
601 S.W. Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2100

Attorneys for Amicus Curiae
The National Foreign Trade Council

s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK*
npollock@southbank.legal
SouthBank Legal, LLC
700 12th Street, NW, Suite 700
Washington, DC 20005
Telephone: 202.904.2410

TIERNAN B. KANE*
tkane@southbank.legal
SouthBank Legal
100 E Wayne Street, Suite 300
South Bend, IN 46601
Telephone: 574.968.0760

**Pro hac vice* application pending

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word count limitation in ORAP 5.05(1)(b), with a count of 5,323 words.

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DATED: November 9, 2026

s/ Brian T. Kiolbasa

BRIAN T. KIOLBASA # 112890

Attorneys for Amicus Curiae
The National Foreign Trade Council

CERTIFICATE OF FILING AND SERVICE

I certify that on the 9th day of November 2026, I directed the foregoing ***AMICUS*** **BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT** to be filed with the Appellate Court Administrator through the appellate eFiling system. I certify that service of a copy of this foregoing ***AMICUS*** **BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT** will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participants' email address as recorded this date in the appellate eFiling system and by electronic mail at the participants' email address below:

Elizabeth H. White
K&L Gates
One S.W. Columbia Street, Suite 1900
Portland, OR 97204
Email: elizabeth.white@klgates.com

Robert B. Mitchell
K&L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Email: rob.mitchell@klgates.com

Jeffrey A. Friedman
Daniel H. Schlueter
Eversheds Sutherland
700 Sixth Street, N.W., Suite 700
Washington, DC 20001-3980
Email: jefffriedman@eversheds-sutherland.com
danschlueter@eversheds-sutherland.com

Ted W. Friedman
Eversheds Sutherland
The Grace Building, 40th Floor
1114 Avenue of the Americas
New York, NY 10036-7703
Email: tedfriedman@eversheds-sutherland.com

Attorneys for Plaintiff-Respondent, Cross-Appellant

Darren Weirnick
Peenesh H. Shah
Oregon Department of Justice
1162 Court Street, N.E.
Salem, OR 97301
Email: darren.weirnick@doj.oregon.gov
peenesh.h.shah@doj.oregon.gov

Attorneys for Defendant-Appellant, Cross-Respondent

s/ Brian T. Kiolbasa
BRIAN T. KIOLBASA # 112890

Attorneys for Amicus Curiae The National Foreign Trade Council