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IN THE SUPREME COURT,
STATE OF FLORIDA

RANDY MILLER, *et al.*, Appellants, vs. PUBLICKER INDUSTRIES, INC., *et al.*, Appellees.	)	Case No. 65,839

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ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

BRIEF OF AMICUS CURIAE
NATIONAL CORN GROWERS ASSOCIATION
IN SUPPORT OF REVERSAL

WILLIAMS & CONNOLLY
Aubrey M. Daniel, III
John K. Villa
Stephen L. Urbanczyk
839 17th Street, N.W.
Washington, D. C. 20006
(202) 331-5000

and

AUSLEY, McMULLEN, McGEHEE,
CAROTHERS & PROCTOR
Kenneth R. Hart
Steven J. Uhlfelder
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

Counsel for Amicus Curiae
National Corn Growers
Association

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STATEMENT OF THE CASE AND FACTS

The National Corn Growers Association ("NCGA") submits this brief as *amicus curiae* in support of appellant's claim that the judgment of the Circuit Court of the Second Judicial District for Leon County, entered on August 22, 1984, should be reversed. NCGA participated in the proceedings before the trial court as *amicus curiae* and on September 12, 1984, filed a motion for leave to participate as *amicus curiae* on this appeal. This motion was granted on September 17, 1984.

A. Legal And Factual Background

This case concerns the constitutionality of Florida's tax exemption for gasohol blended with ethyl alcohol which is distilled from United States agricultural products or by-products. The Florida legislature has provided that each gallon of such gasohol sold in Florida is exempt from four cents of the tax of five cents per gallon generally imposed on the sale of motor fuel in Florida. Fla. Stat. § 212.62 (1984 Supp.); Ch. 84-353, Laws of Fla.

Gasohol is made by blending fuel-grade ethyl alcohol with unleaded gasoline, ordinarily in proportions of one part ethyl alcohol to nine parts unleaded gasoline. (R509.)[1/]

1/ Citations to the record on appeal will designated by the letter "R" followed by the appropriate page number or numbers.

Although gasohol has historically been more expensive than gasoline, the federal government and numerous states have since the latter 1970's adopted various incentives to encourage its production and use. Gasohol has a number of attributes that make it preferable to gasoline. First, it burns relatively cleanly, causing less air pollution through automobile emissions than gasoline. (R509.) Second, the ethyl alcohol used to make gasohol can be distilled from agricultural products and byproducts, which constitute a renewable resource. (R509.) Third, and perhaps most importantly, ethyl alcohol can be readily produced in United States, thereby reducing American dependence on foreign oil. Most of the ethyl alcohol produced in the United States is distilled from corn.

Florida is one of the states that has sought to encourage production and use of gasohol. To achieve this end, the Florida Legislature in 1980 enacted a general tax exemption for gasohol. Fla. Stat. § 206.415 (1981). The statute exempted each gallon of gasohol from the entire 4-cent tax on motor fuel. The full exemption was to remain in effect through June 30, 1985. Beginning on July 1, 1985, each gallon of gasohol was to be exempt from two cents of the four-cent tax; and on July 1, 1987, the exemption was to be removed. When the tax on motor fuel and special fuel was increased in 1983, the Florida legislature retained the exemption for gasohol of four cents per gallon, to be reduced to two cents per gallon on July 1, 1985. Fla. Stat. § 212.63 (1984 Supp.).

The purpose of the tax exemption was to reduce dependence on foreign sources of fuel which had been cut off at the time of the Arab oil embargo and which it was feared might be cut off again. As an analysis prepared by the staff of the House Select Committee on Energy explained, "[a] predicted tightening of non-renewable fuel supplies and unpredictable geo-political events makes imperative the encouragement of alternative fuel sources." Staff Analysis, House Select Committee on Energy, Feb. 8, 1980. <u>See</u> footnote 2, <u>infra</u>. The legislature contemplated that the exemption would encourage use of gasohol and that reliance on imported fuels would thereby be reduced, since ethyl alcohol can readily be produced in the United States.

On June 1, 1984, the Florida Legislature enacted Ch. 84-353, Laws of Fla. (hereafter "Chapter 84-353"), limiting the tax exemption for gasohol to "motor fuel which contains a minimum of 10 percent blend by volume of ethyl alcohol which is distilled from U.S. agricultural products or byproducts with a purity of 99 percent, commonly known as 'gasohol.'" Although the legislative history of the amendment is obscure, it is reasonably clear that the amendment was designed to ensure that the tax exemption served its original purpose: to reduce dependence on foreign sources of fuel that experience had shown to be unreliable.

The original tax exemption enacted in 1980 had failed to lessen dependence on foreign fuel sources. Prior to the enactment of Chapter 84-353, more than ninety percent of the gasohol consumed in Florida contained imported ethyl alcohol. (R329.)

Most of this foreign-source ethyl alcohol was imported from Brazil. The domination of Florida's ethyl alcohol market by Brazilian imports reflects the ability of Brazil to reduce the landed price of its ethyl alcohol (i.e., the price exclusive of transportation and marketing costs and the federal tariff) below the price charged by domestic producers of ethyl alcohol. By selling ethyl alcohol at relatively low prices, Brazil has been able to increase its exportation of ethyl alcohol despite a rapidly increasing federal tariff on ethyl alcohol imported for use in fuel. (R478-79.)

The federal tariff on each gallon of imported ethyl alcohol rose from 10 cents in 1981 to 20 cents in 1982, to 40 cents on January 1, 1983, and to 50 cents on April 1, 1983. See Omnibus Reconciliation Act of 1980, § 1161, 94 Stat. 2599, Pub. L. No. 96-499; Surface Transportation Act of 1982, § 511(d)(5), 96 Stat. 2197, Pub. L. No. 97-424. Under ordinary circumstances, the rapidly increasing federal tariff on imported ethyl alcohol would have given domestic ethyl alcohol a decisive price advantage over imported ethyl alcohol. The 50-cent tariff now in effect constitutes more than a third of the price paid for imported ethyl alcohol by plaintiffs Publicker Industries, Inc. and its wholly-owned subsidiary Publicker Chemical Corp. (collectively "Publicker"), and by the purchasers involved in sales of Brazilian ethyl alcohol brokered by plaintiff Juan Granados. (R286-87, 314.)

Despite the substantial handicap imposed by the rising federal tariff, Brazil increased its exportation of ethyl alcohol to the United States by reducing its price enough to make the total price paid by importers as low as, or lower than, the price those importers would have to pay to obtain ethyl alcohol from domestic producers. (R479.) At least two factors may explain Brazil's ability and willingness to cut its prices in this fashion. First, it has excess production capacity. (R359.) Second, because of rapid inflation in Brazil and the consequent weakening of the Brazilian cruzeiro vis-a-vis the dollar, Brazil has been able to obtain an increasing price in terms of cruzeiros for sales to American importers even though the price of its ethyl alcohol in terms of dollars has declined. (R358-59.)

B. Proceedings Below

Plaintiffs Publicker, Granados, and Internor Trade, Inc. ("Internoor") brought these actions challenging Chapter 84-353 under the Import-Export Clause and the Commerce Clause of the United States Constitution. Art. I, § 10, cl. 2; Art. I, § 8, cl. 3. Publicker and Internoor have imported ethyl alcohol from Brazil; Granados is a broker who has arranged the sale of Brazilian ethyl alcohol to in-state and out-of-state businesses for use in the blending process. (514.) Plaintiffs sought a declaratory judgment that Ch. 84-353 is unconstitutional and an injunction barring the Florida Department of Revenue from applying the full state sales tax on motor fuel to gasohol blended with ethyl alcohol which is not distilled from United States agricultural products or byproducts.

The Department of Revenue contested the standing of plaintiffs to challenge Chapter 84-353, asserting that a tax may be challenged only by those who are required to pay it and that plaintiffs' alleged injuries were indirect and speculative. On the merits, the Department of Revenue contended that Chapter 84-353 did not violate either the Import-Export Clause or the Commerce Clause. NCGA filed a brief as amicus curiae in support of the State's positions on both standing and the merits.

At the final hearing held in the trial court on July 30, 1984, the trial court permitted the plaintiffs to present evidence purporting to establish their standing despite the fact that they are not required to pay the challenged tax. Gerald M. Tierney, Jr., a Publicker executive, testified that Publicker imports ethyl alcohol from Brazil, denatures the ethyl alcohol at its facility in Tampa, and sells the denatured ethyl alcohol to firms that blend it with unleaded gasoline to make gasohol, which is eventually sold to consumers. (R302.)

Paul C. McDaniel, vice president of Publicker's petroleum products division, testified that, prior to the enactment of Chapter 84-353, Publicker had purchased ethyl alcohol from Brazil for appoximately $1.42 per gallon, including the federal tariff of 50 cents per gallon, and after denaturing the ethyl alcohol, had sold it to blenders for $1.56 per gallon. (R308.) McDaniels testified that, after Chapter 84-353 went into effect on July 1, 1984, blenders who had previously purchased ethyl alcohol from Publicker called him to inquire as to whether gasohol blended from Publicker's ethyl alcohol would continue to qualify for the state tax exemption for gasohol. (R309.) These individuals told McDaniels that if gasohol blended with Publicker's ethyl alcohol did not qualify for the tax exemption, they would only be willing to pay Publicker $1.16 per gallon, rather than $1.56 per gallon. (R314-15.)

McDaniels testified that Publicker had consequently stopped purchasing ethyl alcohol from Brazil. (R320.) He explained that he had "not made an attempt to purchase imported [ethyl alcohol] because of the current standing of the Florida law," which he believed would have prevented Publicker from selling imported ethyl alcohol at the price that it would have had to pay for it. (R320.)

Plaintiff Granados testified that he is a broker who has arranged sales between Brazilian exporters of ethyl alcohol and American importers such as Publicker. (R279, 281.) Prior to the enactment of Chapter 84-353 he had arranged for the sale of Brazilian ethyl alcohol at the price of 92 cents per gallon, exclusive of the federal tariff of 50 cents per gallon. (R287.) To continue to offer Brazilian ethyl alcohol to prospective purchasers in Florida after the enactment of Chapter 84-353, he said he would have to find a Brazilian exporter willing to compensate for the additional 40 cents per gallon that a prospective purchaser would have to pay in state sales tax upon selling gasohol made from the ethyl alcohol. (R286-87.) Granados testified that he had been unable to find a Brazilian exporter willing to sell ethyl alcohol at that price. (R287.)

The Department of Revenue sought dismissal of plaintiffs' actions for lack of standing, stressing that plaintiffs are not required to pay the tax at issue. The Department urged that the tax can only be challenged by those parties required to pay it. The Department also presented evidence illustrating the indirect and speculative nature of the injuries alleged by plaintiffs. Frederick L. Potter, the President of Information Resources Incorporated and an expert in the marketing of fuel-grade ethyl alcohol, testified that during the period from 1980 to 1984, the quantity of ethyl alcohol imported from Brazil had increased even though the federal tariffs on imported ethyl alcohol had jumped from $.10 to $.50 during that period. (R343-48, 477-79.) Mr. Potter explained that the volume of ethyl alcohol imported from Brazil had increased because Brazilian exporters had reduced their prices, thereby offsetting the sharp increases in the federal tariff. (R347-48, 479.) The Department of Revenue argued that the plaintiffs would suffer no injury if Brazilian exporters again reduced their prices.

In addition, the Department of Revenue introduced evidence that fears expressed by Granados in the past had proved groundless. In testimony given before Congress in 1981, Granados stated that the federal tariff on imported fuel alcohol had "totally eliminated [his] livelihood." (R466.) As his testimony in this case indicates, Granados has in fact remained in the business of brokering sales of imported ethyl alcohol. (R279.)

The trial court rendered its decision on August 22, 1984. The court began by holding that plaintiffs have standing to challenge the constitutionality of Chapter 84-353 even though they are not required to pay the tax at issue. (R515.) The court found that the adoption of Chapter 84-353 would adversely affect plaintiffs and that this was sufficient to establish their standing. (R515.)

On the merits, the court concluded that Chapter 84-353 violates both the Import-Export Clause and the Commerce Clause of the United States Constitution. Although the court recognized that Florida's fuel tax is not assessed against imported ethyl alcohol (R518), it concluded that the tax nevertheless constitutes an impost upon imported ethyl alcohol because of the indirect impact of the tax on importers of ethyl alcohol. (R519.) In reaching this conclusion, the trial court relied chiefly on <u>Michelin Tire Corp</u>. v. <u>Wages</u>, 423 U.S. 276 (1976), which it interpreted to shift "analysis away from the question of whether an item is an import to the question of whether the tax imposed is an 'impost or duty.'" (R519.) The trial court also ruled that Chapter 84-353 violates the Commerce Clause, rejecting the contention of the Department of Revenue and NCGA that the disparate treatment of imported and domestically produced ethyl alcohol is justified by the particular susceptibility of the supply of imported ethyl alcohol to interruptions caused by unpredictable political events. The court stressed that "economic protectionism is just that whether the tourist industry or the local ethyl alcohol production industry is sought to be protected." (R523.) The court also found that the Department of Revenue had failed to show that non-discriminatory alternative means of achieving the State's objectives were unavailable. (R524.)

The trial court declared Chapter 84-353 unconstitutional, ordered the words "which is distilled from U.S. agricultural products or byproducts" stricken from Florida's exemption for gasohol, and permanently enjoined the Department of Revenue from collecting four cents per gallon of the state fuel tax with respect to sales of gasohol blended with ethyl alcohol not distilled from United States agricultural products or byproducts. (R524, 528-29.)

On August 31, 1984, the Department of Revenue filed a notice of appeal to the District Court of Appeal for the First District. (R530-31). On September 13, 1984, the District Court of Appeal certified the case to this Court.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATE FUEL TAX.

This Court need not and should not reach the merits of the constitutional issues decided below, for the fundamental reason that none of the plaintiffs has standing. Plaintiffs are not required to pay the tax in question, and the indirect harm that they fear will result from collection of the tax is insufficient to give them standing. The constitutionality of a statute may be challenged only by a party directly injured by its enforcement. Because plaintiffs will not be directly harmed by the collection of a tax from other persons, the trial court should have dismissed these cases for lack of standing.

A. Plaintiffs Are Not The Taxpayers Obligated To Pay The Tax At Issue.

The tax challenged by plaintiffs falls on other parties, not on them. The tax at issue is "imposed for the privilege of the sale at retail in this state of motor fuel and special fuel." Fla. Stat. § 212.62(1) (Supp. 1984). See Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1st DCA 1969) ("It is the exercise of the privilege of engaging in such business activity that is made the subject of the tax in question."), cert. denied, 237 So.2d 177 (1970). The tax must be paid by the party who first sells the fuel within the state, whether he is a distributor, dealer, or retail dealer. Fla. Stat. § 212.62(2)(a) (Supp. 1984).

None of the plaintiffs is a distributor, dealer, or retailer, and none is required to collect or remit any sales tax on motor fuel to the state. (R514.) Publicker and Internoor are engaged in the business of importing and selling ethyl alcohol. (R514.) Granados is a broker in the business of arranging transactions between foreign sellers and domestic buyers of ethyl alcohol. (R514.) Neither of these activities is subject to the tax being challenged. The tax must be paid upon the first sale of motor fuel and special fuel, including gasohol, provided that the fuel will ultimately be sold at retail in Florida. The sale of fuel ingredients such as ethyl alcohol is not subject to the tax.

B. Plaintiffs Have No Standing To Challenge A Tax That They Are Not Required To Pay.

The trial court erred in holding that plaintiffs have standing because collection of the tax may have an indirect effect upon their businesses. The constitutionality of a statute may be challenged only by a party who has suffered or will suffer injury resulting directly from the enforcement of the statute.

In concluding that plaintiffs have standing, the trial court apparently assumed that collection of the tax would trigger a chain of events that would ultimately cause harm to plaintiffs' businesses. For such harm to occur, plaintiffs' purchasers of imported ethyl alcohol would have to insist upon reducing the price that they are willing to pay plaintiffs for such ethyl alcohol. Furthermore, the Brazilians from whom plaintiffs obtain ethyl alcohol would have to refuse to lower their prices far enough to offset any reduction in the prices offered by plaintiffs' purchasers. If either of these events did not occur, plaintiffs would not suffer the harm that they fear.

However likely or unlikely these intervening events may be, they cannot establish plaintiffs' standing. Any harm that plaintiffs might suffer would only be an indirect consequence of the collection of the state fuel tax, contingent upon the intervening decisions of parties independent of the State. Such harm does not constitute the sort of direct injury necessary to afford standing. Standing must be based upon "injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976).

A party has standing to challenge governmental action only if he has suffered or will suffer some injury directly attributable to the challenged action. As the Supreme Court explained in Linda R.S. v. Richard D., 410 U.S. 614 (1973), "the bare existence of an abstract injury meets only the first half of the standing requirement." Id. at 618. To demonstrate standing to challenge a statute, "'[t]he party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury, as the result of [a statute's] enforcement.'" Id. (emphasis and brackets supplied by the Court) (citation omitted). See City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1665 (1983) (plaintiff must show that he has suffered or will suffer "some direct injury as the result of the challenged official conduct") (citation omitted). As this Court has observed, "[i]t is basic that the constitutionality of a statute may be challenged only by one whose rights are, or will be, adversely affected by it." Acme

Moving & Storage Co. of Jacksonville v. Mason, 167 So.2d 555, 557 (Fla. 1964). The courts will not "declare any provision of an act unconstitutional at the behest of a party whose rights or duties are not affected by it." Henderson v. Antonacci, 62 So.2d 5, 8 (1952).

Florida's fuel tax has no direct effect upon the plaintiffs. The tax imposes no obligations on them, nor does it abrogate or in any way limit their right to continue to conduct their businesses in this state. Plaintiff will suffer no injury directly attributable to the collection of the tax.

In Meyer Const. Co. v. Corbett, 7 F. Supp. 616 (N.D. Cal. 1934), the court rejected a similar effort by parties to challenge a tax that they were not required to pay. There consumers sought to challenge a tax levied upon retail sales even though the duty to pay the tax was imposed by law upon the retailer. Id. at 618. The court held that the plaintiffs had no standing, ruling that "the proper parties to raise the constitutional question are the parties upon whom the tax is levied." Id.

In Simon v. Eastern Kentucky Welfare Rights Organization, supra, Justice Stewart stated that he could not "imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." 426 U.S. at 46 (concurring opinion). Here, plaintiffs not only seek to challenge a tax levied upon other parties; they seek to challenge a tax levied on a transaction -- the first sale of gasohol within the State of Florida -- in which they are in no way involved.

Courts faced with comparable claims of indirect injury have likewise found them insufficient to establish standing. One of the leading cases is Ex-Cell-O Corp. v. City of Chicago, 115 F.2d 627 (7th Cir. 1940), where a manufacturer of paper milk bottles challenged the validity of a city milk ordinance that ostensibly prohibited the use of paper milk containers in Chicago. The Seventh Circuit held that the plaintiff lacked standing since the ordinance did not directly restrict its business:

> "Here plaintiff is not using milk bottles in the distribution of milk in Chicago. It is manufacturing and selling them. Its market in Chicago, by the actions complained of, may be removed and destroyed. Yet it may proceed to manufacture and sell wherever it desires including Chicago. It is only indirectly and remotely interested and the damage accruing to it is only remotely consequential and incidental." Id. at 631 (emphasis supplied).

The court explained that "inevitable financial pecuniary damage" does not establish standing, for "[o]therwise the right to sue might be extended indefinitely to parties far removed, such as workmen in plaintiff's factories whose wages are reduced or lost because of lack of realization of profits by their employer." Id. at 629. The court emphasized that standing depends upon "whether the damage claimed springs directly to plaintiff from defendants." Id.

If the plaintiff in Ex-Cell-O had no standing, a fortiori the plaintiffs here have no standing. In Ex-Cell-O Chicago's ban on the use of paper milk bottles was virtually certain to eliminate the plaintiff's ability to market its products in the city. Id. at 629. The Seventh Circuit nevertheless dismissed the challenge on the ground that the alleged injury was only "incidental, consequential and indirect." Id. at 629. Here, gasohol is merely taxed, not banned, and it is entirely possible that Brazilian producers of ethyl alcohol may cut their prices enough to prevent any harm to plaintiffs. Any injury plaintiffs may suffer from collection of the full fuel tax would be "incidental, consequential and indirect" and is thus inadequate to confer standing.

The courts have applied the same principle when state highway requirements have been challenged by parties not subject to the requirements. In Connelly v. Department of Agriculture and Markets, 162 Misc. 73, 293 N.Y.S. 711 (1937), a licensed weighmaster was denied standing to challenge a statute requiring trucks bringing coal into New York to proceed directly to the closest weigh station. Although the "business of the plaintiff ha[d] been diverted" by the statute, 293 N.Y.S. at 717, this loss of patronage was held to be insufficient to confer standing, since the plaintiff was "not directly affected by the provisions of the section." Id. Similarly, in Sproles v. Binford, 52 F.2d 730 (S.D. Tex. 1931) (three-judge district court), a manufacturer of large motor vehicles was denied standing to challenge a statute prohibiting the use of such vehicles on Texas highways, even though the manufacturer alleged that the statute threatened to destroy his market in Texas and potentially his entire business. The court concluded that the manufacturer's alleged injury was "too remote." Id. at 733.

The instant case is fully analogous to Ex-Cell-O Corp., Connelly, and Sproles. In each of those cases, the plaintiff alleged that the challenged governmental action had reduced or would reduce the demand for the product or service that the plaintiff provided. In each case, the plaintiff's challenge was dismissed for lack of standing on the ground that the injury claimed was not directly attributable to the challenged governmental action. Here, plaintiffs similarly predicate their standing on allegations that Florida's fuel tax will reduce the demand for their product. Because any such injury would not be the direct result of the collection of the fuel tax, plaintiffs have no standing.

Even if it were certain that plaintiffs would suffer harm if the full fuel tax were collected, their injury would be too indirect to establish standing. In fact, however, it is unclear, as it often is when only indirect injury is alleged, whether enforcement of the statute would ultimately cause plaintiffs any harm. The evidence presented by the Department of Revenue indicates that it is entirely possible that Brazilian exporters of ethyl alcohol may cut their prices enough to permit plaintiffs to maintain their existing profit margins. An examination of Brazil's response to a series of increases in the federal tariff on imported ethyl alcohol reveals that Brazil has historically taken measures to ensure that its products remain competitive in the United States. Evidence introduced by the Department of Revenue at trial indicated that while the federal tariff on imported ethyl alcohol was increased from $.10 to $.50 per gallon from 1981 to 1983, the actual sales price for Brazilian ethyl alcohol remained roughly the same, a result due entirely to Brazil's reduction of its price to offset the $.40 increase in the federal tariff. (R344, 347-48, 478-79.)

Of course, it is impossible to predict what Brazilian exporters would do if Chapter 84-353 actually went into effect. Their actions would ultimately depend upon a variety of factors, including their costs, the rate of exchange between the cruzeiro and the dollar, and the availability of alternative markets. The critical point, however, is that if plaintiffs were to suffer any harm as a result of the collection of the tax, as the trial court predicted they would (R514), the infliction of such harm would depend upon the independent actions of third parties and would not be the direct result of collection of the tax.

II. THE STATE FUEL TAX DOES NOT VIOLATE THE IMPORT-EXPORT CLAUSE.

On the merits, the trial court erred in holding that Florida's sales tax on motor fuel and special fuel violates the Import-Export Clause. That Clause prohibits only the imposition of "Imposts or Duties" on "Imports or Exports," and the State sales tax at issue here is not levied upon imports or exports. The tax is levied upon the retail sale of motor fuel and special fuel, including gasohol, not upon the importation of ethyl alcohol or any other ingredient used in blending fuel. Once imported ethyl alcohol is blended with unleaded gasoline to make gasohol, the resulting product is a good manufactured in this country, not an import, and therefore is no longer within the ambit of the Import-Export Clause.

A. The Import-Export Clause Applies Only To Imposts And Duties On Imports and Exports.

The Import-Export Clause is among the relatively specific provisions of the Constitution. See generally United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring). Whereas the Commerce Clause "touches all state taxation and regulation of interstate and foreign commerce," Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734, 751 (1978), the Import-Export Clause is much more limited in scope. "The prohibition is only against States laying 'Imposts or Duties' on 'Imports' [or "Exports']." Michelin Tire Corp. v. Wages, 423 U.S. 276, 290 (1976).

Two limitations on the scope of the Import-Export Clause are clear from the wording of the Clause. First, the Clause proscribes only "Imposts or Duties." As the Supreme Court noted in Michelin Tire Corp. v. Wages, supra, "the Clause is not written in terms of a broad prohibition of every 'tax.'" 423

U.S. at 290. That the framers understood the phrase "Imposts or Duties" to apply only to certain state levies is suggested by a comparison of the Import-Export Clause with Article 1, § 8, cl. 1 of the Constitution, which empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises." The omission of the words "Taxes" and "Excises" from the Import-Export Clause "plainly lends support to a reading of the Import-Export Clause as not prohibiting every exaction or 'tax' which falls in some measure on imported [or exported] goods." Michelin Tire Corp. v. Wages, supra, 423 U.S. at 290.

Second, and critically important here, the Import-Export Clause applies only to exactions falling upon "Imports or Exports." In the case of imported goods, the Import-Export Clause ceases to apply once the goods have lost their distinctive status as imports. This limitation on the Clause was recognized as early as Brown v. Maryland, 25 U.S. 419 (1827), in which Chief Justice Marshall stated that "when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State." Id. at 441-42.

This second limitation on the Clause has been consistently applied since Brown v. Maryland. In Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928), for example, the Court rejected an Import-Export Clause challenge to a Texas statute requiring wholesale dealers in fish to be licensed by the State and to pay a tax on the fish they handled. In his opinion for the Court, Justice Brandeis assumed that the fish were imports at some point, but held the Import-Export Clause inapplicable on the ground that "the tax is not laid until the fish have lost their alleged distinctive character as imports and have become, through processing, handling and sale, a part of the mass of property subject to taxation by the State." Id. at 126.

In Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), the Supreme Court reaffirmed this limitation on the reach of the Import-Export Clause. The Court explained that

> "[t]he constitutional design . . . is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the materials have been 'put to the use for which they [were] imported,' for in such a case they have lost their distinctive character as imports and are subject to taxation." Id. at 545. (Emphasis added.) (Citation omitted.)

Because the goods involved in Youngstown were no longer "Imports" when the taxes were assessed, the Import-Export Clause was no longer applicable. Id. at 545-48. See also, e.g., New Mexico ex rel. McLean & Co. v. Denver & Rio Grande R.R. Co., 203 U.S. 38, 49 (1906).

B. The State Fuel Tax Does Not Lay An Impost Or Duty On Imports.

The trial court's ruling concerning the Import-Export Clause must be reversed for the fundamental reason that Florida's sales tax on motor fuel and special fuel is not assessed against imports or exports.

Florida does not tax the importation of ethyl alcohol or any other ingredient used in blending fuel. What the State taxes is the retail sale of motor fuel and special fuel, including gasohol made by blending unleaded gasoline with ethyl alcohol distilled from non-United States agricultural products or byproducts. Plaintiffs import ethyl alcohol and sell it to firms that blend the ethyl alcohol with unleaded gasoline to make gasohol. It is the gasohol made from ethyl alcohol distilled from non-United States agricultural products or byproducts which, if sold at retail in Florida, is subject to the general tax on motor fuel and special fuel.

The application of Florida's sales tax on fuel to gasohol blended with imported ethyl alcohol does not constitute taxation of imports, for the gasohol is blended in this country. Once imported ethyl alcohol is blended with unleaded gasoline to make gasohol, the product of this manufacturing process is a good made in this country, not an import. A product manufactured in this country does not constitute an import simply because one of its ingredients was imported. Since Florida's tax is not levied upon imports, the Import-Export Clause is inapplicable.

Youngstown Sheet & Tube Co. v. Bowers, supra, is dispositive. There the Supreme Court held that once imported iron ores were received by a steel and iron plant and placed in piles to meet the daily needs of the plant, the ores were no longer "Imports." 358 U.S. at 545-46. The Court concluded that the ores had "lost their distinctive character as 'imports' and all tax immunity as such." Id. at 546. The Court also ruled that once imported lumber and veneers had reached a manufacturing plant where they were stored for use in making veneered wood products, they likewise lost their immunity from state taxation. Id. at 547-48. See Gulf Fisheries Co. v. MacInerney, supra, 276 U.S. at 126.

If, as Youngstown establishes, the Import-Export Clause in inapplicable once imported goods have reached their destination in the United States and have been stored for their intended use in domestic manufacturing, a fortiori the clause is inapplicable where, as here, the imported goods have actually been used by a domestic manufacturer to make a new product. Whereas the iron ores, lumber, and veneers involved in Youngstown had only been stored for use in domestic manufacturing when they were taxed, the tax here is levied upon gasohol blended, distributed, and sold in this country. Florida's sales tax on motor fuel and special fuel clearly does not tax imports.

C. The Trial Court Erred In Interpreting The Import-Export Clause To Apply To Taxes On Domestic Products That May Have An Indirect Impact Upon Imports.

Although the trial court gave lip service to the principle that the Import-Export Clause applies only to levies on imports and exports (519), it proceeded to disregard that principle. In doing so, the trial court relied on Michelin Tire Corp. v. Wages, supra, which it interpreted to "initiate[] a new approach to Export-Import Clause cases by focusing . . . analysis away from the question of whether an item is an import to the question of whether the tax imposed is an 'impost or duty.'" (519.) (Emphasis supplied.) For the reasons elaborated below, the trial court misinterpreted Michelin, improperly disregarded other Supreme Court decisions establishing that the Import-Export Clause encompasses only taxes levied upon imports and exports, and erroneously characterized the Florida tax on motor fuel and special fuel as an impost upon a foreign import.

In Michelin the Supreme Court reexamined the decision handed down a century earlier in Low v. Austin, 13 Wall. 29 (1871). That decision had interpreted the Import-Export Clause to prohibit all taxes on imports. Low v. Austin held that so long as imports "retain[ed] their character as imports, a tax upon them, in any shape, is within the constitutional prohibition." 13 Wall. at 34 (emphasis supplied). Relying on this interpretation of the Impost-Export Clause, the Supreme Court in Low v. Austin struck down an ad valorem tax levied upon imported goods.

In Michelin the Supreme Court overruled Low v. Austin, holding that the Import-Export Clause does not prohibit the assessment of a non-discriminatory ad valorem property tax on imported goods. The court concluded that such a tax "is not the type of state exaction which the Framers of the Constitution or the Court in Brown [v. Maryland] had in mind as being an 'impost' or 'duty.'" 423 U.S. at 283 (emphasis supplied). In his opinion for the Court, Justice Brennan stressed that the use of the phrase "Imposts or Duties" in the Import-Export Clause, in contrast to the broader phrase "Taxes, Duties, Imposts and Excises" in Article I, § 8, cl. 1 of the Constitution, suggested that the former provision did not prohibit "every exaction or 'tax' which falls in some measure on imported goods." 423 U.S. at 290.

Michelin is significant because it establishes that not all taxes on imported goods constitute "Imposts or Duties." Michelin establishes that the words "Imposts" or "Duties" are words of limitation, confining the application of the Import-Export Clause to certain types of exactions on imports or exports. No longer can all taxes levied upon imports or exports be struck down under the Import-Export Clause.

Contrary to what the trial court assumed, however, Michelin does not substitute the question whether an exaction constitutes an impost or duty for the question whether the goods taxed are imports or exports. Michelin overruled only Low v. Austin; the Supreme Court did not discard its prior decisions establishing that once goods have lost their distinctive character as imports, they are no longer protected from taxation by the Import-Export Clause. The Court had no occasion in Michelin to consider this second limitation on the scope of the Import-Export Clause, since it assumed for purposes of decision that the goods taxed by the statute at issue were still imports when they were taxed. 423 U.S. at 279. Since cases such as Gulf Fisheries Co. v. MacInerney, supra, and Youngstown Sheet & Tube Co. v. Bowers, supra, were in no way questioned in Michelin, it must be assumed that they are still good law. And because the three policies relied upon by the trial court (520-22) were considered in Michelin only in deciding whether the tax constituted an impost or duty, there is no need to address those policies here. Ad hoc consideration of the policies underlying the Import-Export Clause cannot justify extending the Clause to goods that are neither imports nor exports.

The trial court's expansive interpretation of the Import-Export Clause likewise finds no support in the other decisions it cited. The trial court's reliance on Brown v. Maryland, supra, is misplaced, since, as the Supreme Court noted in Michelin, Chief Justice Marshall's opinion in Brown expressly recognized that imported goods lose the protection of the Import-Export Clause once they lose their distinctive character as imports. See 25 U.S. at 441-42; 423 U.S. at 296-97.

Far from supporting the trial court's novel interpretation, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946), highlights the long-established principle that the Import-Export Clause applies only to imports and exports. In Richfield the Supreme Court struck down a state statute on the ground that it constituted an impost on an export and was therefore prohibited by the Clause. The Court stated the questions to be "whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it." Id. at 78 (emphasis suppled). The Court held that the tax was levied upon exports because the tax was levied after the process of exportation had commenced. Id. at 83. The Court clearly recognized that, insofar as exports are concerned, the Import-Export Clause applies only after the process of exportation begins. Id. at 75, 79-82. The Court stated the "correct principle" to be the following: "'goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon transportation in a continuous route or journey.'" Id. at 79 (citation omitted). Richfield is entirely consistent with cases recognizing that, insofar as imports are concerned, the Import-Export Clause ceases to apply once the process of importation ends.

Western Oil and Gas Association v. Cory, 726 F.2d 1340 (9th Cir. 1984), is clearly distinguishable since the statute at issue there had the effect of imposing "a transit fee" on imported crude oil transported by pipeline to oil refineries. Id. at 1346. The exaction applied to the transportation of the oil to the oil refineries. Here the trial court invalidated an exaction that comes into play only when imported ethyl alcohol is blended with unleaded gasoline to make gasohol, distributed, and sold at the pump.

Finally, the trial court erred in suggesting that Florida has done "by indirection what the Export-Import Clause forbids it to do directly," and that the state tax on motor fuel and special fuel "does, in reality, amount to an impost upon a foreign import." (R519, 522.) The court incorrectly assumed that the Florida tax has the effect of assessing an impost upon the importation of ethyl alcohol into Florida. Florida's tax on motor fuel and special fuel plainly does not have the same effect as an impost.

An impost is a tax imposed on goods merely because they have been imported; it is a fee levied on the act of importation. See Michelin Tire Corp. v. Wages, supra, 423 U.S. at 287 ("imposts and duties . . . are essentially taxes on the commercial privilege of bringing goods into a country"). By contrast, Florida's tax on motor fuel and special fuel is not triggered by the importation of ethyl alcohol. Unless ethyl alcohol distilled from non-United States agricultural products or byproducts is used to blend gasohol for retail sale in Florida, it is not subject to any tax. If an importer of ethyl alochol uses the ethyl alcohol for any other purpose -- such as sale to a blender in another state -- Florida's sales tax on motor fuel and special fuel will never come into play. Florida taxes the retail sale of motor fuel and special fuel; it does not tax the importation of ethyl alcohol.

III. THE STATE FUEL TAX DOES NOT VIOLATE THE COMMERCE CLAUSE.

Although Chapter 84-353 concededly presents a closer question under the Commerce Clause than under the Import-Export Clause, NCGA submits that the statute does not impose an impermissible burden on foreign commerce. The trial court correctly recognized the governing legal principle: disparate treatment of foreign or interstate commerce "must be justified 'both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interest at stake.'" (R525, quoting Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 353 (1977).) A state may not discriminate against foreign or out-of-state products unless "there is some reason, apart from their origin, to treat them differently" from domestic products. City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978). As demonstrated below, however, the court went astray in assessing the local benefit that Chapter 84-353 is intended to provide and the availability of non-discriminatory alternatives.

A. The Tax Is Designed To Provide A Legitimate Local Benefit.

The local benefit that Chapter 84-353 is intended to provide is a reliable supply of fuel for both citizens of Florida and visitors to the State. The original tax exemption for gasohol was enacted in 1980 in the wake of serious concern about a further international oil shortage. The available evidence indicates that the exemption was designed to reduce the dislocations that Florida would suffer in the event of another cutoff of foreign fuel supplies. A staff report of the Select Committee on Energy of the Florida House of Representatives concluded that the "predicted tightening of non-renewable fuel supplies and unpredictable geo-political events makes imperative the encouragement of alternative fuel sources." Staff Analysis, House Select Committee on Energy, Feb. 8, 1980.[2/] The legislature doubtless recognized that dependence on foreign fuel would be particularly dangerous for Florida, since the State's tourism industry -- a critical part of the State's economy -- depends heavily on the ready availability of motor fuel and thus would be seriously damaged by a fuel shortage.

It is well recognized that in times of international crises, some countries may choose to curtail the flow of fossil fuels for political reasons. Such actions cause dislocations not only because they directly reduce the supply of fuel on the world market, but also because other countries not participating in the

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2/ The Staff Analysis was profferred as an exhibit by the Department of Revenue (R480), but was excluded by the trial court on the grounds that the validity of the 1980 statute was not at issue and that it was unclear who prepared the Staff Analysis. (R375.) NCGA submits that this ruling was erroneous and should be reversed. The purposes of the 1980 statute shed light on the purposes of the 1984 amendment challenged by plaintiffs. Furthermore, the Staff Analysis was clearly prepared by the staff of the House Select Committee on Energy and therefore provides evidence, albeit indirect evidence, of the intent of the Florida Legislature.

boycott may respond by consuming for domestic needs a greater portion of the fuel they produce, thereby reducing their exports.

It was contemplated that the tax exemption for gasohol would encourage use of gasohol, thereby reducing reliance on foreign fuel supplies. Since ethyl alcohol can be distilled from agricultural products, it can readily be produced in the United States. Even if the unleaded gasoline blended with ethyl alcohol is obtained from foreign sources, ethyl alcohol can reduce reliance on such foreign sources by serving as a fuel extender. (R509.) And the supply of domestically produced ethyl alcohol is not subject to interruptions caused by world political tensions.

It is reasonably clear that the 1984 amendment to the tax exemption for gasohol was designed to ensure that the tax exemption served its original purpose: to reduce dependence on foreign sources of fuel that experience had shown to be unreliable.[3/] Experience with the original statute had demonstrated that it had failed to eliminate Florida's dependence on unreliable foreign fuel supplies. Nearly all of the gasohol sold in Florida contained foreign ethyl alcohol. (R329.) Further legislative action was necessary to encourage use of

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3/ Since very little ethyl alcohol is distilled in Florida (R328-29) and the amended exemption does not turn on whether the ethyl alcohol contained in gasohol is distilled in Florida, it is implausible to suppose that the amendment was intended to protect local producers of ethyl alcohol. The legislature rejected a proposal to limit the exemption to gasohol blended with ethyl alcohol distilled from Florida agricultural products or byproducts. (R331.)

domestic-source ethyl alcohol. The tax exemption was limited to gasohol blended with ethyl alcohol distilled from American agricultural products and byproducts, since the supply of such products and byproducts is not subject to cutoffs as a result of political events.

The trial court did not reject this view of the purposes of the Florida Legislature, which was presented by both the Department of Revenue and NCGA below. Rather, the court stressed that "economic protectionism is just that whether the tourist industry or the local ethyl alcohol production industry is sought to be protected." (R523.)

The trial court erred in characterizing Chapter 84-353 as an exercise in economic protectionism. First, as the trial court implicitly recognized, Chapter 84-353 cannot plausibly be explained as an attempt to protect local producers of ethyl alcohol, since only an inconsequential quantity of ethyl alcohol is distilled in Florida and the legislature rejected a proposal to limit the exemption to gasohol containing ethyl alcohol distilled from Florida agricultural products and byproducts. (R328-29, 331.) Second, while the amendment may improve the competitive position of domestic producers of ethyl alcohol vis-a-vis foreign producers -- since it will generally be impractical for foreign producers to use American agricultural products or byproducts -- it is unlikely that the Florida Legislature was concerned about protecting producers of ethyl alcohol in other states.

Third, the protection of the citizens of Florida and the State's tourist industry from reliance on undependable foreign sources of fuel is not what the United States Supreme Court has condemned as economic protectionism in its Commerce Clause decisions. See, e.g., Westinghouse Electric Corp. v. Tully, 104 S. Ct. 1856, 1866 (1984); South-Central Timber Devel., Inc. v. Wunnicke, 104 S. Ct. 2237, 2247 (1984); Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3055-56 (1984). The Supreme Court has used that term to refer to measures designed to shield local producers from competition in the marketplace. Chapter 84-353 may be intended to protect Florida's tourist industry, but only by encouraging use of a dependable source of fuel, not by shielding that industry from competition with the tourist industries of other states or countries. The type of protection that Chapter 84-353 is intended to provide is not the type of protection that the Supreme Court has interpreted the Commerce Clause to preclude.

B. Non-Discriminatory Alternatives Are Unavailable.

The trial court also erred in holding that the Department of Revenue had failed to show that non-discriminatory alternatives to Chapter 84-353 are unavailable. (R523.) The very history of the tax exemption for gasohol demonstrates "the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington State Apple Advertising Commission, supra, 432 U.S. at 353. The

Florida Legislature enacted Chapter 84-353 only after a non-discriminatory tax exemption for all gasohol had failed to reduce reliance on undependable foreign fuel supplies.

The original exemption adopted in 1980 exempted all gasohol, regardless of the source of the agricultural products or byproducts used in distilling the ethyl alcohol contained in the gasohol. The Florida Legislature plainly hoped that this tax exemption would be adequate to bring about greater reliance on ethyl alcohol distilled from American agricultural products and byproducts. Experience demonstrated, however, that as a result of foreign subsidies and other factors, foreign-source ethyl alcohol constituted nearly all of the ethyl alcohol used to manufacture gasohol for sale in Florida. (R329.) The legislature therefore had no choice but to take further measures to encourage reliance on ethyl alcohol made from American agricultural products and byproducts.

Because there is no adequate means of preventing reliance on unreliable sources of fuel that will not have a discriminatory effect upon foreign commerce, the statute satisfies the requirement that nondiscriminatory alternatives be unavailable. The Commerce Clause does not leave a state powerless to take reasonable measures to protect itself against a dangerous dependence on fuel supplies that experience has shown to be unreliable.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of the Second Judicial District for Leon County should be reversed.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: Stephen Urbanczyk KRH

Aubrey M. Daniel, III
John K. Villa
Stephen L. Urbanczyk

839 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

And

AUSLEY, MCMULLEN, MCGEHEE
CAROTHERS & PROCTOR

By: Kenneth Hart

Kenneth R. Hart
Steven J. Uhlfelder

Post Office Box 391
227 South Calhoun
Tallahassee, Florida 32302
(904) 224-9115

Counsel for Amicus Curiae
National Corn Growers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Brief of Amicus Curiae National Corn Growers Association In Support Of Reversal has been furnished by HAND DELIVERY this 20th day of September, 1984, to:

DOUGLAS L. STOWELL
MARY K. KRAEMER
Mang & Stowell, P.A.
Post Office Box 1019
Tallahassee, Florida 32302

LARY E. LEVY
STEVE KELLER
Florida Department of Revenue
Room 203, Carlton Building
Tallahassee, Florida 32301

JOSEPH C. MELLICHAMP
LINDA LETTERA
Assistant Attorneys General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

ROBERT M. ERVIN
MELISSA F. ALLAMAN
Ervin, Varn, Jacobs, Odom & Kitchen
Post Office Box 1170
Tallahassee, Florida 32302

STEPHEN C. O'CONNELL
Cason & Henderson
320 Lewis State Bank Building
Tallahassee, Florida 32301

Kenneth Hart
Attorney