IN THE SUPREME COURT OF FLORIDA

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RANDY MILLER, EXECUTIVE DIRECTOR
OF THE DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,

Appellant,

v.

PUBLICKER INDUSTRIES INC., and
PUBLICKER CHEMICAL CORPORATION,

Appellees,

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellant,

v. CASE NO. 65,839

JUAN GRANADOS,

Appellee,

RANDY MILLER, EXECUTIVE DIRECTOR,
DEPARTMENT OF REVENUE, STATE OF FLORIDA

Appellant,

v.

INTERNOOR TRADE, INC.,

Appellee.

BRIEF OF APPELLEES PUBLICKER INDUSTRIES INC. AND PUBLICKER CHEMICAL CORPORATION

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PRELIMINARY STATEMENT

Appellees, Publicker Industries Inc. and Publicker Chemical Corporation (collectively "Publicker") submit this brief in support of the affirmance of an August 22, 1984 Final Judgment of the Circuit Court of the Second Judicial Circuit, Leon County (Charles E. Miner, Jr., J.), which struck down as unconstitutional a recent amendment to Florida tax laws. That amendment eliminated the tax exemption for motor fuels containing ethyl alcohol distilled from non-United States agricultural products, while at the same time maintaining an exemption for motor fuels containing ethyl alcohol produced from domestic agricultural products. Fla. Stat. Ann. § 212.63 (West 1984); Ch. 84-353, Laws of Florida (the "foreign-source ethyl alcohol tax"). The court below concluded that the foreign-source ethyl alcohol tax (1) unlawfully imposes an impost or duty on foreign imports in violation of the Import-Export Clause of the United States Constitution and (2) impermissibly burdens commerce between Florida and foreign nations in violation of the Commerce Clause of the United States Constitution.

As a result of the discriminatory tax scheme created by the foreign-source ethyl alcohol tax, Publicker has been eliminated from its business of importing foreign-source ethyl alcohol into the State of Florida. As discussed below, until such time as this Court grants final judgment, Publicker will continue to be unable to conduct its business in Florida and

its customer base will evaporate. To prevent the total and irreparable collapse of Publicker's importation business, the decision of the trial court should be promptly affirmed.

LEGAL AND FACTUAL BACKGROUND

1. Legislative History and Purpose

The essential facts in this case have never been in dispute. In 1980, the Florida Legislature exempted gasohol from four of the five cents per gallon Florida motor fuel tax. Fla. Stat. Ann. § 212 (West 1984). This exemption was applicable to all gasohol, regardless of the source of the ethyl alcohol component.

On June 1, 1984, in the final hours of the 1984 Regular Legislative Session, the Florida Legislature amended the 1980 exemption by passing the foreign-source ethyl alcohol tax. This amendment provides that the 1980 tax exemption for gasohol shall be confined solely to gasohol containing ethyl alcohol "which is distilled from U.S. agricultural products or byproducts" (emphasis added).

2. Proceedings Before The Circuit Court

Faced with the imminent destruction of its business, on July 5, 1984 Publicker commenced the instant litigation and obtained immediate injunctive relief. Briefing on the motion for permanent injunctive relief took place on an expedited basis and on July 30, 1984 the trial court held a trial and heard argument.

Appellees Publicker, Juan Granados and Internoor Trade, Inc. brought three separate actions which were subsequently consolidated challenging the foreign-source ethyl alcohol tax.* Appellees alleged that because the foreign-source ethyl alcohol tax discriminatorily taxes a product on account of its foreign origins, it violates the Import-Export Clause of the United States Constitution which prohibits the states from imposing imposts on imports. Appellees also alleged that the statute violates the Commerce Clause of the United States Constitution by placing a discriminatory burden on foreign commerce. Appellees sought both declaratory and injunctive relief barring the Florida Department of Revenue from collecting the full state motor fuel sales tax on gasohol blended with ethyl alcohol which is not distilled from United States agricultural products or byproducts. (R. 504-505)** The State denied that the statute was unconstitutional and, at the hearing, contested the standing of all appellees to challenge the foreign-source ethyl alcohol tax, contending that "a tax may be challenged

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* Granados v. State, Case No. 84-1895 (filed July 6, 1984), was consolidated with Publicker v. Miller, Case No. 84-1882 (filed July 5, 1984), on July 13, 1984. (R. 631) Internoor Trade, Inc. v. Miller, Case No. 84-2054 (filed July 20, 1984), was consolidated on July 30, 1984 during the course of the final hearing. (R. 249)

** The Record on Appeal, Appellants' Initial Brief and the Brief of Amicus Curiae National Corn Growers Association In Support of Reversal are referred to herein, respectively, as "R.", "State Br." and "Corn Growers Br.", followed by a page reference.

only by those who are required to pay it" and that plaintiffs' alleged injuries were "indirect and speculative." (State Br. 7)

Appellees produced three witnesses to testify. Gerald M. Tierney, Jr., an officer of Publicker, testified that Publicker is a Florida taxpayer and rents licensed distilled spirits plant facilities in Tampa. "The rental is approximately $10,000 per month, and the lease will expire [in] December of this year." (R. 302-03) Publicker uses the facilities to denature and then to sell the ethyl alcohol it imports. (R. 302) Publicker is obligated to pay the rent regardless of whether it uses the facilities. (R. 303) In the event Publicker does not renew the lease and then leases different facilities upon resumption of its business, it will have to apply for a new license which will result in a "lag time" of approximately 30 days during which it will be unable to sell ethyl alcohol. (R. 305) Mr. Tierney was not cross-examined.

Paul C. McDaniel, vice president of Publicker's Petroleum Products Division, testified that prior to enactment of the foreign-source ethyl alcohol tax Publicker paid $1.42 per gallon of ethyl alcohol and had sold it to blender-distributors for $1.56 per gallon. (R. 308) Mr. McDaniel also stated that Publicker had sold "approximately 336,000 gallons a month" prior to enactment of the foreign-source ethyl alcohol tax. (R. 309) He stated that after passage of the statute, each of the blender distributors with whom Publicker deals called and:

> They said they would not purchase [ethyl alcohol] from me if it did not qualify [for the tax exemption], or that they would purchase from me at a price of 40 cents a gallon less than my current sales price if it did not qualify. (R. 310-11)*

Mr. McDaniel related how he had sought to purchase domestic ethyl alcohol but could not find a domestic supplier who was willing to sell to him. (R. 313-14, 316-17) As Mr. McDaniel noted, there were no plans to import or sell any additional imported ethyl alcohol. (R. 321) Mr. McDaniel concluded that under those circumstances he would be unable to service his customers, (R. 321) and that it would be difficult to get them back after a long delay. (R. 322)

> Q. What are you going to do as a former importer -- distributor of ethyl alcohol?
>
> A. I will spend my time in other areas that would seem productive for the company.
>
> Q. But you will close down this [Tampa] facility?
>
> A. Yes.

(R. 321)

Publicker is thus out of business.

Plaintiff, Juan Granados, a broker who locates ethyl alcohol in Brazil available for import to the United States, testified that he had buyers who were "willing, ready and able to buy" before the legislation went into effect. Now, however,

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* Since gasohol is made with 10 percent ethyl alcohol and 90 percent unleaded gasoline, the four cents per gallon tax exemption on gasohol amounts to a 40 cents per gallon exemption on ethyl alcohol.

because of the legislation, they were only willing to buy at a lower price offsetting their increased tax liability. (R. 280) Mr. Granados reported that he had just spent two weeks in Brazil -- contacting "everybody that you can imagine who is in the business, producers, trading companies, people I've dealt with before, the Brazilian Oil Company, Brazilian government authorities, everybody that you could think of who could put together a deal" -- attempting to locate suppliers willing to reduce their price commensurately, but that, at that price, "[t]here aren't any sellers." (R. 280) In addition, he explained -- without contradiction by the State -- that it would be "ridiculous" for the Brazilians to sell at that price. (R. 280-81)

The State presented only one witness, Frederick L. Potter, President of a firm called Information Resources Incorporated. He testified that from 1981 to 1984 the volume of ethyl alcohol imported to the United States from Brazil had increased. (R. 342, 477) In addition, he conceded that imported ethyl alcohol would have to be sold at a 40 cents per gallon reduction in price in light of the new Florida tax in order to be competitive:

> The new imported ethanol [ethyl alcohol] would sell for approximately 40 cents less than imported ethanol qualifying under the previous laws for domestic production to be sold in the State of Florida. (R. 369)*

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* The State also sought to introduce an analysis purportedly (Footnote continued)

3. Circuit Court's Final Judgment

The Circuit Court issued its Final Judgment on August 22, 1984, three weeks after the hearing and only six weeks after the case was initially filed. The Circuit Court concluded that appellees had standing to challenge the foreign-source ethyl alcohol statute because "[t]hey have demonstrated that they will be adversely affected, to say the least, by this statutory change." (R. 514) Indeed, the Court concluded that "it would be difficult to imagine plaintiffs who would have greater standing to challenge the constitutionality of the [foreign-source ethyl alcohol tax]." (R. 514)

On the substantive claim, the court held the foreign-source ethyl alcohol tax violated the Import-Export Clause of the United States Constitution because "the legislature has used the taxing power to apply a hammerlock to importers of foreign source ethyl alcohol by making economic hostages of their purchasers/blenders/distributors." (R. 518)

The court also found that the foreign-source ethyl alcohol tax violated the Commerce Clause because "[s]tripped to its essentials, . . . [the tax] places [foreign-source ethyl

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(Footnote * continued from previous page)
prepared by the Staff of the State Legislature in 1980 concerning the 1980 exemption. The trial court, however, properly refused to consider the staff analysis because it held the documents to be irrelevant to determine the purpose for the passage four years later of the bill removing the exemption from foreign-source ethyl alcohol. (R. 375)

alcohol] at a direct and distinct competitive disadvantage with domestic source alcohol." (R. 522). The court also concluded that the State had failed to demonstrate that such disparate treatment was justified in terms of benefits flowing to the State, the availability of nondiscriminatory alternatives, or any relationship between the tax and services provided by the state with respect to imported ethyl alcohol. (R. 523)*

Having determined that the foreign-source ethyl alcohol tax violates two separate provisions of the United States Constitution, the court issued a declaratory judgment in favor of appellees, struck the foreign-source ethyl alcohol tax from the statute, and enjoined the state from collecting the tax. (R. 523) On August 31, 1984, the State filed its Notice of Appeal. (R. 530-31) On September 6, 1984, the District Court of Appeal, First District, certified the Circuit Court's Final Judgment to this Court. (R. 536A) On September 17, 1984, this Court accepted jurisdiction and granted appellees' motion to expedite.**

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* The court rejected Internoor Trade, Inc.'s challenge to the statute on the grounds that the foreign-source ethyl alcohol tax violates the title requirements of Article 11, § 6, of the Florida Constitution.

** The injunction issued by the Circuit Court was stayed by the Notice of Appeal. Rule 9.310, Florida Rules of Appellate Procedure. Publicker did not attempt to have the injunction reinstated. Publicker's blender-distributors would not resume purchasing imported ethyl alcohol at market prices since they feared that they would be liable for the tax retroactively in the event that Publicker did not ultimately prevail in this litigation. (<u>See</u> R.426-29) Thus, Publicker will continue to suffer irreparable harm until final adjudication by this Court.

ARGUMENT

I

THE CIRCUIT COURT CORRECTLY HELD THAT PUBLICKER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S FOREIGN-SOURCE ETHYL ALCOHOL TAX

Publicker has standing to challenge the foreign-source ethyl alcohol tax on three separate and independent grounds: (i) it has suffered injury in fact; (ii) under the Florida Declaratory Judgment Act its rights were affected by the statute; and (iii) it is a taxpayer challenging a tax under a specific state taxing limitation.

A. Publicker Has Standing Because It Has Suffered Injury In Fact

In Ass'n. of Data Processing Service Org's., Inc. v. Camp, 397 U.S. 150 (1970), the United States Supreme Court set forth a two-pronged approach to be used in determining the issue of standing. First, the plaintiff must allege "that the challenged action has caused him injury in fact, economic or otherwise." Id., at 153. Second, the interest sought to be protected by the plaintiff must "arguably [be] within the zone of interests to be protected or regulated by the . . . constitutional guarantee in question." Id., at 154.

In a recent case on facts almost identical to those at issue here, the United States Supreme Court held that plaintiffs situated similarly to Publicker unquestionably had standing to sue. In Boston Stock Exchange v. State Tax Commission,

429 U.S. 318 (1977), a New York stock transfer tax on non-New York securities transactions diverted business from plaintiffs, non-New York stock exchanges, to New York stock exchanges. The stock transfer tax was to be paid by the individual purchasers and sellers, not by the plaintiff exchanges. The plaintiffs' complaint was that since transactions were thereby diverted from them, their right to engage in interstate commerce free of unconstitutional discriminatory taxes was being interfered with by the tax on its members and customers. Dealing four square with the issue of standing, a unanimous United States Supreme Court held:

> This diversion was the express purpose of the challenged statute . . . . The allegation establishes that the statute has caused them "injury in fact" and that a case or controversy exists . . . . The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.'

429 U.S. at 320-21, n.3, quoting Ass'n. of Data Processing Service Org's., Inc. v. Camp, supra, 397 U.S. at 153 (citations omitted).

Like the plaintiffs in Boston Stock Exchange, Publicker's customers will buy ethyl alcohol elsewhere. It is uncontroverted that immediately after passage of the foreign-source ethyl alcohol tax, all 14 of the blender-distributors to whom Publicker sold in Florida either refused to purchase foreign-source ethyl alcohol from Publicker unless it qualified

for the state tax exemption (R. 310-11), or stated that they would only purchase at a price 40 cents per gallon less than the existing sales price. (R. 311) Publicker could continue to sell foreign-source ethyl alcohol only by offsetting the market price by the amount of the tax. However, if Publicker were to do so, it would lose 26 cents on every gallon of ethyl alcohol it sells. (R. 315)*

In addition, Publicker was forced to divert incoming ethyl alcohol to ports outside Florida because of uncertainty as to whether such product would qualify for the tax exemption. Thus, Publicker was unable to sell those products in the profitable Florida market and incurred the added cost of shipment to a more distant port. (R. 322)

Moreover, prior to passage of the statute, Publicker was negotiating to expand its operations into new facilities in Orlando, Jacksonville and Port Everglades, Florida. As a result of the passage of the tax, however, those negotiations have been terminated. (R. 323-24) In addition, Publicker must continue to pay rent on its facilities and may be required to undergo the time-consuming process of obtaining new licenses. (R. 302-05)**

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* This contrasts with the approximately $47,040 per month in profit Publicker was able to earn in the three months prior to enactment of the tax. (<u>See</u> R. 309).

** Both the State and Corn Growers argue that Publicker's injury is not real and direct but merely speculative and indirect because (i) Publicker's customers <u>might</u> not re-
(Footnote continued)

Accordingly, there can be no doubt that Publicker has been directly and severly injured by the tax amendment. Publicker -- like the Boston Stock Exchange plaintiffs -- thus has standing because it suffers injury in fact and is within the zone of interests which can challenge the unconstitutional state law. See also McCoy-Elkhorn Coal Corp. v. EPA, 622 F.2d 260 (6th Cir. 1980) (coal company has standing to challenge statute applied to customers which will cause a "constriction of [the company's] market").* The finding of the court below that Publicker has standing should be affirmed.**

(Footnote ** continued from previous page)
fuse to buy ethyl alcohol from Publicker and (ii) Publicker's suppliers might offset the new tax by reducing their prices. On the contrary, Publicker's customers have already refused to purchase Publicker's product (R. 311) and there has been no reduction in the price of Brazilian ethyl alcohol. (R. 280, 326-27) The record clearly establishes that Publicker has already been forced out of business by the operation of the foreign-source ethyl alcohol amendment.

* In this regard, Publicker is in much the same position as a party who, though liable for a tax, is able to pass the tax along to its customers. In Bacchus Imports, Ltd. v. Dias, ___ U.S. ___, 104 S. Ct. 3049, 3054 (1984), the United States Supreme Court upheld the standing of such a party, stating: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. The wholesalers plainly have standing to challenge the tax in this Court." (footnote omitted)

** Both the State and Corn Growers completely ignore Boston Stock Exchange despite its striking similarity to this case. Instead, they cite cases readily distinguishable on their facts. For example, in Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976), the plaintiffs were unable to demonstrate that their alleged injury in
(Footnote continued)

B. Publicker Has Standing To Challenge The Constitutionality of The Foreign-Source Ethyl Alcohol Tax Under The Florida Declaratory Judgment Statute

The Florida Declaratory Judgment Statute, Fla. Stat. Ann. § 86.021 (West 1984), provides Publicker a further basis on which to bring this action. It states:

> Any person . . . whose rights, status, or other equitable or legal relations are affected by a statute . . . may have determined any question of construction or validity arising under such statute

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(Footnote ** continued from previous page)

fact resulted from the challenged federal action since they could not establish that they were denied services by hospitals as a result of the challenged regulations. In contrast, there can be no question but that Publicker has demonstrated that it has been severely harmed by the direct operation of the Florida foreign-source ethyl alcohol tax.

State ex rel. Szabo Food Serv., Inc. of N.C. v. Dickinson, 286 So.2d 529 (Fla. 1973), holds merely that one who has not paid a wrongful tax does not have standing to demand a refund of tax payments made by others. Clearly, Publicker is not demanding any refunds of the foreign-source ethyl alcohol taxes paid by the distributors who purchase its ethyl alcohol. In State Department of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979), the Court determined that since the challenged tax statute could not be applied to plaintiffs, the plaintiffs suffered no injury whatsoever. Thus, the Court held, plaintiffs lacked standing to challenge a tax which did not affect them. Contrary to the State's assertion, none of the cases it cites stands for the proposition that the only party with standing to challenge a tax is the party obligated to pay the tax.

Finally, both the State and Corn Growers rely heavily upon Ex-Cell-O Corp. v. City of Chicago, 115 F.2d 627 (7th Cir. 1940). However, such reliance is misplaced because, as indicated by the more recent decisions of the United States Supreme Court, the standing test expressed in Ex-Cell-O Corp. is no longer employed by the courts. Wimberly v. Ettenberg, 570 P.2d 535, 537-38 (Colo. 1977) citing, e.g., Ass'n. of Data Processing Service Org's., Inc. v. Camp, supra.

> . . . or any part thereof, and obtain a declaration of rights, status or other equitable or legal relations thereunder.

Id. (emphasis added)

Publicker has been driven out of the importation business by the operation of the foreign-source ethyl alcohol tax. Thus, there can be no doubt that its 'rights, status, or other equitable or legal relations' have been affected by the tax amendement.

In Archer Daniels Midland v. McNamara, 544 F. Supp. 99 (M.D. La. 1982), the plaintiff, a producer of ethyl alcohol for use in gasohol, sought to challenge in federal court the constitutionality of a Louisiana statute that imposed a tax on the retail sale of gasohol and contained exemptions only for gasohol made with ethyl alcohol distilled in Louisiana from Louisiana grown agricultural products. The federal court ruled that the Tax Injunction Act, 28 U.S.C. § 1341, precluded the plaintiff producer, who did not have to pay the challenged tax, from maintaining the action in federal court "where a plain, speedy and efficient remedy may be had in the [State] courts." Id., at 101. The court found, however, that the Louisiana Declaratory Judgment Statute, which is virtually identical to the Florida Act,* afforded plaintiff a plain, speedy and effi-

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* The Louisiana Declaratory Judgment Statute provides:

> A person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or va-

(Footnote continued)

cient means to challenge the constitutionality of the tax in the state court.

Here, Publicker is in a position identical to the plaintiff in McNamara. The Florida Declaratory Judgment Statute clearly affords Publicker the requisite standing to challenge the constitutionality of the foreign-source ethyl alcohol tax in the courts of the State of Florida since Publicker has been affected thereby. Accordingly, for this additional reason, Publicker has standing to seek redress to invalidate the tax amendment which has caused it such grievous injury.

C. Injury In Fact Is Unnecessary For Standing Where There Is A Constitutional Challenge To A State Taxing Limitation

In any event, under well-established Florida law no showing of special injury is required at all where a taxpayer challenges the constitutionality of a state tax statute based upon constitutional limitations on the state's taxing power. Dep't. of Administration v. Horne, 269 So.2d 659, 662 (Fla. 1972) (taxpayers had standing to challenge state appropriations statute that contravened state constitutional restrictions on taxing and spending legislation). See also, Dep't. of Educa-

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> lidity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.

Louisiana Code of Civil Procedure, Article 1871.

tion v. Lewis, 416 So.2d 455, 459 (Fla. 1982) (notwithstanding failure to allege special injury, taxpayers had standing to attack state tax that allegedly violated United States Constitution).

Under Florida law, the taxpayer need only demonstrate that a specific constitutional limitation on the taxing or spending power has been violated:

> A taxpayer may institute such a suit without a showing of special injury if he attacks the exercise of the state or county's taxing or spending authority on the ground that it exceeds specific limitations imposed on the state or county's taxing or spending power by the United States Constitution or the Florida Constitution. Notwithstanding the danger of increased taxpayer suits, we perceive this exception to be based on our fundamental belief that such an unconstitutional exercise of the taxing and spending power is intolerable in our system of government and that the courts should be readily available to immediately restrain such excesses of authority.

Paul v. Blake, 376 So.2d 256, 259 (3d Fla. DCA 1979) (citations omitted) (taxpayers had standing to challenge tax exemptions given to certain leasehold interests as violative of specific limitations on county's taxing authority found in Florida Constitution).

* * *

In this case, Publicker seeks to enjoin the foreign-source ethyl alcohol tax as violative of the limitations on state taxing powers derived from the Import-Export and Commerce Clauses of the United States Constitution. The statute was intended to, and does, prevent the importation of foreign-

source ethyl alcohol and thus has driven Publicker out of business. For all of the foregoing reasons, Publicker has standing to challenge the constitutionality of Florida's foreign-source ethyl alcohol tax.

II

THE CIRCUIT COURT CORRECTLY RULED THAT FLORIDA'S FOREIGN-SOURCE ETHYL ALCOHOL TAX VIOLATES THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION

The Import-Export Clause, Article I, Section 10, clause 2, of the United States Constitution, provides:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws. . .

(emphasis added) The provision is fundamental to our federal system which confides in the federal government, and not the states, the power to determine foreign economic policy. Michelin Tire Corp. v. Wages, 423 U.S. 276, 283-285 (1976).

The language of the Import-Export Clause is absolute and unequivocal. It leaves no room for exceptions save those enumerated. By selectively eliminating the tax exemption for gasohol containing foreign-source -- but not domestic-source -- ethyl alcohol, Florida has imposed a tax on foreign-source ethyl alcohol solely because of its foreign origins. That is precisely what the Import-Export Clause prohibits.

As the Circuit Court held, the Florida foreign-source ethyl alcohol tax "presents a hornbook example of a state doing

by indirection what the Export-Import Clause forbids it to do directly." (R. 518)*

The State and the Corn Growers assert that merely because Florida structured the tax so that it falls on gasohol containing foreign-source ethyl alcohol rather than on the imported ethyl alcohol itself, the Import-Export Clause has no application. They argue that the imported ethyl alcohol is no longer an import, but has become a part of the general mass of property in the state and thus is beyond the reach of the Import-Export Clause. (State Br. 25-6; Corn Growers Br. 20-1) This analysis, however, is based on a theory which has recently been specifically rejected by the United States Supreme Court.

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* That the tax is not on the act of importation, but rather on the sale in Florida of gasohol containing foreign-source ethyl alcohol, does not alter the fact that Florida's tax is in reality a tax on foreign-source ethyl alcohol itself. A tax on a good solely because of its foreign component is in reality a tax on that component, just as a tax on the sale of an import is a tax on the import itself, Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946), a license fee charged only to importers is a tax on the articles imported, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), and "rent" charged for the leasing of state-owned tidelands but computed by the volume of oil in interstate and foreign commerce passing over the leased property is in reality a tax on the oil, Western Oil and Gas Ass'n. v. Cory, 726 F.2d 1340, 1346 (9th Cir. 1984). States cannot be allowed to do by indirection what the Constitution prohibits them from doing directly. Western Oil and Gas Ass'n., supra, at 1346. The State's characterization of the tax as a 'privilege' tax is irrelevant. The practical effects of the tax determine whether it passes constitutional scrutiny. See, e.g., Richfield Oil Corp. v. State Board, 329 U.S. 69, 84 (1946).

Prior to 1976, the test for determining the applicability of the Import-Export Clause focused on what point in the process of importation the tax was imposed and determined whether the good had lost its distinctive character as an import. Until the imported good became a part of the general mass of property within the state, no state taxes could be levied at all under the Import-Export Clause.

The classic formulation of the old test for determining compliance with the Import-Export Clause was enunciated in the seminal case of Low v. Austin, 13 Wall. (80 U.S.) 29 (1872). In Low, the Supreme Court relied on dictum in Brown v. Maryland, 12 Wheat. (25 U.S.) 419 (1827) to hold that a state could not levy nondiscriminatory ad valorem property taxes on imported goods until they lose their character as imports and "become incorporated into the mass of property of the State." Id., at 34.

As the cases cited by the State and Corn Growers indicate, the Low test's erroneous reading of Brown stood for many years. Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946) (state tax on oil sale for export not prohibited because oil had not been separated from general mass of property within the state); Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) (imported steel put to use had lost distinctive character of an import and been incorporated into general mass of property within the state); Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928) (upholding state tax because product taxed

had already become part of general mass of property within the state and lost status as import).

Contrary to the assertion of the State and Corn Growers, this mechanical approach, which focused on whether the goods have lost their character as imports, was expressly overruled by the decision of the United States Supreme Court in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

In Michelin, the Supreme Court examined a nondiscriminatory state ad valorem property tax levied on Michelin's inventory of imported tires stored in a warehouse pending distribution. At the outset of its opinion the Court discussed the Low test of whether a good had lost its distinctive character as an import and become incorporated into the mass of property within the state. The Court concluded that the holding of that case should be overruled since it was a misinterpretation of Brown and, in any event, inconsistent with the purposes of the Import-Export Clause. Id., at 282-283.*

The Court analyzed the policies underlying the Import-Export Clause and concluded that the state ad valorem property tax at issue there was permissible because it fell in

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* It must be emphasized that the dictum in Brown -- which the State and Corn Growers cite as the governing law -- was precisely the language adopted in Low and which the Supreme Court rejected in Michelin. Each of the cases relied upon by the State and Corn Growers, therefore, was based on a theory the Supreme Court has now rejected.

a nondiscriminatory fashion on all goods, imported or otherwise.*

> It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation.

Id., at 286 (emphasis added).

The Supreme Court went on to point out that, like nondiscriminatory *ad valorem* taxes, taxes imposed after the initial sale, after an import has been removed from its original shipping packages, or after the goods have been put to use

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* In formulating its new test, the Court identified three policy considerations with which the Framers of the Constitution were concerned in restricting the power of the states to impose imposts or duties on foreign imports:

> [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power;
>
> [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and
>
> [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other states. . . .

Id., at 295 (footnotes omitted).

are permissible under the Import-Export Clause because as a general rule such taxes cannot be selectively imposed. Id., at 287-88. However, the Court, with uncanny foresight, went on to consider and reject a tax precisely such as Florida's foreign-source ethyl alcohol tax, which is selectively imposed on imported goods after the initial sale.

> Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though operating after an "initial sale" of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost. . . .

Id., at 288, n.7 (emphasis supplied).*

Corn Growers' (and the State's) entire argument is premised on the view that the court below misinterpreted Michelin.

> [T]he 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. . . .

(Corn Growers Br. 24)

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* It is the discriminatory imposition of this tax on gasohol containing foreign-source ethyl alcohol only that is complained of and that was found invalid by the Circuit Court. Thus, the State's assertion that "[t]o follow the logic of the trial court to its ultimate conclusion would be to hold that all imported fuel sold for use in this state cannot be taxed by the state becuase it is an impost" (State Br. 27) is absolutely wrong. At the trial, counsel for Publicker stressed that Publicker was not asserting that imports are wholly exempt from taxation. (R. 265)

This argument totally ignores the fact that the language quoted from the Circuit Court opinion is virtually identical to that used by the United States Supreme Court itself in discussing its holding in Michelin.

> Michelin changed the focus of the Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead on whether the tax sought to be imposed is an 'Impost or Duty'.

Limbach v. Hooven & Allison Co., ___ U.S. ___, 104 S. Ct. 1837, 1842 (1984) (emphasis added). The invalid central premise of the State's and Corn Grower's elaborate argument, having been considered and rejected by the United States Supreme Court, renders their entire position frivolous.

In direct contrast to the nondiscriminatory tax addressed in Michelin, the Florida foreign-source ethyl alcohol tax is an unabashed attempt to discriminate against foreign imports and is clearly designed to protect domestic production by erecting trade barriers against foreign products.* The

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* This Court's recent decision in Dep't. of Revenue v. Air Jamaica Ltd., ___ So.2d ___, No. 64,035 (Fla., order filed June 14, 1984) is not to the contrary. In that case, this Court held that Florida's tax on the sale of fuel to interstate and foreign airlines did not violate the Import-Export Clause, principally because the tax was not on an "export" since it was being consumed in flight and not being transported for sale abroad. The tax did not specifically discriminate against foreign carriers since it applied to fuel sold to interstate carriers as well. Here, in contrast, the Florida tax singles out foreign-source ethyl alcohol which has been brought into the United States for sale and thus the Florida tax constitutes an impost on an import.

federal government has already determined its policy with respect to the importation of foreign-source ethyl alcohol. The State of Florida cannot be permitted to have its own foreign economic policy.*

Florida's foreign-source ethyl alcohol tax clearly and flagrantly violates the Import-Export Clause of the United States Constitution. The decision of the Circuit Court should be upheld.

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* Specifically, the requirement that the federal government speak with one voice is violated by Florida's special protective tariff. Noting the position of the federal government as expressed in the letter of Ambassador William E. Brock, the United States Trade Representative, opposing the Florida tax, the Circuit Court concluded "that Florida's voice confuses rather than complements." (R. 520)

The second policy consideration set forth in Michelin -- that federal import revenues not be diverted to the States -- is also violated. As the Circuit Court noted, there currently is a 50 cent per gallon federal impost on imported foreign-source ethyl alcohol which will be lost when the importation of foreign-source ethyl alcohol is discouraged. (R. 520)

Finally, the Circuit Court also found the Florida foreign-source ethyl alcohol tax contains the very germ of disharmony among the States sought to be avoided by the Framers when they included the Import-Export Clause in the Constitution. (R. 520-21)

III

THE CIRCUIT COURT CORRECTLY HELD THAT FLORIDA'S FOREIGN-SOURCE ETHYL ALCOHOL TAX VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The Commerce Clause, Article I, Section 8, clause 2, of the United States Constitution states:

> Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes. (emphasis added)

This fundamental principle of our Constitution restricts the power of the states to interfere with the free flow of commerce between the states or between the United States and foreign nations. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). The foreign-source ethyl alcohol tax is offensive to this provision.

Under the Commerce Clause, the constitutionality of a tax or regulation hinges upon its practical effect upon interstate or foreign commerce. See, e.g., Dep't. of Revenue of Washington v. Ass'n. of Washington Stevedoring Cos., 435 U.S. 734, 750 (1978). The standards set forth by the Supreme Court for measuring a state tax statute under the Commerce Clause are:

- the tax must be applied to activity with a substantial nexus with the state;
- the tax must be fairly apportioned;
- the tax must be nondiscriminatory;
- the tax must be fairly related to the services provided by the state.

Id., at 750; Japan Line, Ltd. v. County of Los Angeles, supra, 441 U.S. at 444-45.*

The Circuit Court correctly recognized that the Florida foreign-source ethyl alcohol tax does not measure up since it is a discriminatory tax on its face. The Court also concluded that the amendment fails because there had been no showing that it was fairly related to the services provided by the State. (R. 523) Neither the State nor Corn Growers disputes these findings.

Both the State and Corn Growers seek to salvage the statute by contending that the foreign-source ethyl alcohol tax was designed to encourage a reliable supply of fuel for the protection of citizens and the tourist industry of Florida. (State Br. 31-33; Corn Growers Br. 29)** However, there is

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* As a state cannot discriminate against interstate commerce, so it cannot discriminate against foreign commerce. If anything, the standards under the Commerce Clause used to measure state statutes which affect foreign commerce are even stricter than those affecting interstate commerce. See, e.g., Japan Line, Ltd. v. County of Los Angeles, supra, 441 U.S. at 451. Indeed, as the Court recently stated in South-Central Timber Dev. Inc. v. Wunnicke, ___ U.S. ___ 104 S. Ct. 2237, 2247 (1984), under the Commerce Clause "[i]t is a well-accepted rule that state restrictions burdening foreign commerce are subject to a more rigorous and searching scrutiny," since it is crucial that the federal government speak with one voice when regulating commercial relations with foreign nations. Id. (citing Michelin and Japan Line, Ltd.)

** Both the State and Corn Growers steadfastly deny that the foreign-source ethyl alcohol tax was intended to favor domestic producers of ethyl alcohol at the expense of foreign producers. In this connection it is interesting to note that Corn Growers is the only organization that (Footnote continued)

absolutely no basis -- either in the record or the legislative history of the foreign-source ethyl alcohol tax -- for this contention.

In the absence of <u>any</u> citation to legislative documents, reports or committee hearings or other sources of the legislative history of the foreign-source ethyl alcohol tax, and in the face of its own admission that "the legislative history of the amendment is obscure" (Corn Growers Br. 3), Corn Growers nevertheless concludes, <u>ipse</u> <u>dixit</u>, that "[i]t is reasonably clear that the [foreign-source ethyl alcohol tax] was designed to . . . reduce dependence on foreign sources of fuel that experience had shown to be unreliable." (Corn Growers Br. at 31)*

(Footnote ** continued from previous page)
requested leave to participate as amicus curiae in this action.

There has been no request for leave to participate from the Chamber of Commerce or any organization representing the motoring public or the tourist industry of the State of Florida for whose benefit the statute was supposedly enacted.

* The only legislative history cited by either the State or Corn Growers concerned the original 1980 tax exemption for all gasohol, not the 1984 foreign-source ethyl alcohol tax. Corn Growers concedes that the 1980 exemption for gasohol was motivated by the Florida Legislature's concern about the supply of foreign <u>oil</u>. (Corn Growers Br. 29-30) Corn Growers fails to explain how this concern about the supply of foreign oil translates into a concern about the supply of foreign <u>ethyl</u> <u>alcohol</u>. Nor has any evidence been presented to the effect that the supply of foreign ethyl alcohol is not reliable or that the Florida Legislature thought that it is not reliable. Ethyl alcohol is a renewable fuel extender produced in several countries in
(Footnote continued)

In any event, the proferred justification of the Florida tax is irrelevant because the statute is facially discriminatory. It treats gasohol made from foreign-source ethyl alcohol differently from gasohol made from domestic-source ethyl alcohol solely on the basis of its foreign origins. It is only where a state statute regulates in a nondiscriminatory fashion that its incidental detrimental effects upon interstate or foreign commerce may be offset by its effectuation of a legitimate state interest. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In contrast, where, as here, a tax patently discriminates against a good in foreign or interstate commerce, the ultimate legislative purpose is of no moment. Philadelphia v. New Jersey, 437 U.S. 617, 625-627 (1978). Whatever Florida's ultimate purpose,

> it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-627 (emphasis added).*

(Footnote * continued from previous page)
the Western hemisphere. It is not a "scarce" nonrenewable fossil fuel imported from the Middle East. Corn Growers' conclusion as to the purpose of the foreign-source ethyl alcohol tax is constructed from whole cloth.

* The State's reliance on Japan Line Ltd. v. County of Los Angeles, 442 U.S. 434 (1979), and Washington Revenue Department v. Stevedoring Association, 435 U.S. 734 (1978), for the proposition that a discriminatory tax may be justified by a showing of a legitimate state purpose is erroneous. The taxes in both cases were nondiscriminatory and the Supreme Court made no suggestion that discriminatory taxation based on the out-of-state origin of the product
(Footnote continued)

The attempted justification of the statute by the State and Corn Growers itself demonstrates that the statute discriminates precisely because of the foreign origin of ethyl alcohol. That is exactly what the Commerce Clause prohibits.

Furthermore, where, as here, simple economic protectionism is effected by state legislation, a virtual per se rule of invalidity has been erected by the United States Supreme Court. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). As this Court has itself recently observed, "[t]he test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by applying a direct commercial advantage to local commerce." Delta Air Lines, Inc. v. Dep't of Revenue, ____ So.2d ____ No. 63,915 (Fla., opinion filed June 14, 1984), accord, Boston Stock Exchange v. State Tax Commission, supra, 429 U.S. at 329 (1977).

(Footnote * continued from previous page)
is permissable. Nor does Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) stand for that proposition. The tax in that case was facially discriminatory and struck down for that reason, regardless of the state interest asserted. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1976), also relied upon by the State, holds that when a facially neutral state statute has a disproportionate impact on interstate commerce the state must demonstrate local benefits and the lack of nondiscriminatory alternatives. Id. at 352-353. Such justification is not available where, as here, the statute singles out products for discriminatory treatment based solely on their foreign origin. Furthermore, the record in this case is barren of any evidence on either point.

In Boston Stock Exchange v. State Tax Commission, supra, for example, the Supreme Court invalidated New York State's imposition of a greater tax liability on stock sales effected on out-of-state exchanges than on those effected on in-state exchanges. The Supreme Court struck down the statute.

> No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects.

Id. at 329 (citations omitted).*

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* The State contends that the Commerce Clause is inapplicable because "[t]he entire imposition of the tax takes place wholly in the State of Florida." (State Br. 28) Corn Growers, however, concedes the applicability of the Commerce Clause. (Corn Growers Br. 29) In any event, in Boston Stock Exchange, the United States Supreme Court explicitly rejected an argument that a tax should be sustained because it was imposed on a local event at the end of interstate commerce:

> [T]he tax may not discriminate between transactions on the basis of some interstate element. [citations omitted] '[T]he commercial power [of the Federal government] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.

429 U.S. at 332-333, n.12 (quoting Welton v. Missouri, 91 U.S. 275, 282 (1876)). The State's reliance on Monamotor Oil Co. v. Johnson, 272 U.S. 86 (1934) is thus misplaced. The tax in Monamotor was uniformly applied to all gasoline used or disposed of within the state and did not discriminate on the basis of foreign origin. Id., at 88, 89.

Conspicuously absent from the briefs submitted by both the State and Corn Growers is any discussion of Delta Air Lines, Inc. v. Dep't of Revenue, ____ So.2d ____, No. 63,915 (Fla., opinion filed June 14, 1984), a recent case in which this Court held similar tax legislation which was intended to promote local economic interests to be invalid under the Commerce Clause. There, the Florida Legislature had enacted a corporate income tax credit only for Florida-based airlines. This Court struck down the statute stating that "the basic purpose of the Commerce Clause . . . is to prohibit preferential trade areas destructive of free commerce anticipated by the United States Constitution." This Court observed that no state, "consistent with the Commerce Clause, [could] 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" Id., at ___ quoting Boston Stock Exchange v. State Tax Commission, supra, 429 U.S. at 329. Such a provision "clearly discriminates against interstate commerce because the corporate tax credit provides a direct commercial advantage to Florida-based air common carriers over non-Florida-based carriers." Delta Air Lines, Inc. v. Dep't. of Revenue, supra at ___ (emphasis added).

In Delta, moreover, this Court cited with approval a case, Archer Daniels Midland Co. v. State, 315 N.W. 2d 597 (Minn. 1982), which addresses almost exactly the facts in the instant case. In Archer Daniels, the Supreme Court of Minneso-

ta struck down a tax credit statute which provided a four cents per gallon partial exemption for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident producer challenged the constitutionality of this statute, alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The Minnesota court held that the statute violated the Commerce Clause under the United States Supreme Court's virtually _per se_ rule of invalidity due to the statute's "facial discrimination which openly places a more onerous tax burden upon out-of-state gasohol simply 'because of its origin in another state.'" _Id._, at 599 (citation omitted).

The Circuit Court correctly noted that even the proffered justification -- protection of the Florida tourist industry -- would constitute forbidden economic protectionism. (R. 522) The Circuit Court's conclusion is clearly correct. Even if the State could demonstrate that the foreign-source ethyl alcohol tax was designed somehow to protect the Florida tourist industry, the tax still could not be upheld. Discriminatory state regulation is not sustainable under the Commerce Clause where its purpose is solely the "protection of local economic interests, _such as supply for local consumption_ and limitation of competition." _Hood & Sons v. DuMond_, 336 U.S. 525, 531 (1949) (emphasis added) (state statute designed to increase

milk supplies to the state unconstitutional).* For the purposes of Commerce Clause analysis, it was irrelevant whether the legislation was designed to benefit local industry or to burden foreign products -- for all practical purposes the legislation is discriminatory and thus invalid. Bacchus Imports, Ltd. v. Dias, ___ U.S. ___, 104 S. Ct. 3049 (1984) (Hawaii sales tax exempting sales of two alcoholic beverages produced only in Hawaii violates Commerce Clause); See South-Central Timber Dev., Inc. v. Wunnicke, ___ U.S. ___, 104 S. Ct. 2237, 2247 (1984) (holding Alaskan law requiring timber sold from state lands to be partially processed in Alaska for benefit of Alaskan economy invalid under Commerce Clause).

Here, the Circuit Court found that the Florida tax on foreign-source ethyl alcohol "places that commodity at a direct and distinct competitive disadvantage with domestic source alcohol." (R. 522) The record overwhelmingly supports the finding of the Court below.

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* The State's and Corn Growers' argument that the term "economic protectionism" refers only to the limitation of competition with local industry is without merit. The United States Supreme Court has consistently held unconstitutional discriminatory legislation designed to protect the state's environment, Philadelphia v. New Jersey, 437 U.S. 617 (1978), to protect in-state milk supply, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) to protect local jobs, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), or to protect the state's financial resources, Edwards v. California, 314 U.S. 160 (1941).

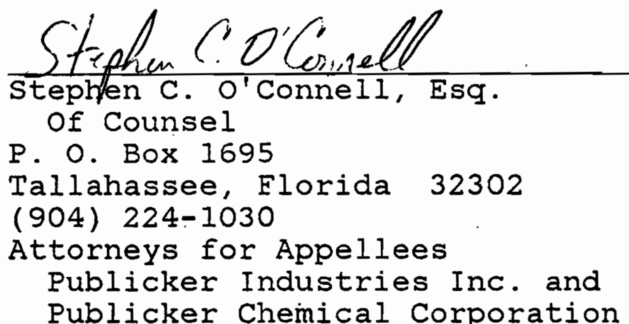
The Florida foreign-source ethyl alcohol tax discriminates on its face against a product based upon the foreign origin of an ingredient. Thus, the tax constitutes an impermissible burden on foreign commerce which is prohibited by the Commerce Clause regardless of the purpose of the taxation. This tax does not withstand scrutiny under the Commerce Clause of the United States Constitution and the Circuit Court's decision should be affirmed.

CONCLUSION

For all of the foregoing reasons, appellee Publicker respectfully requests that this Court affirm the Circuit Court's judgment that Ch. 84-353, Laws of Florida, the Florida foreign-source ethyl alcohol tax, violates both the Import-Export and the Commerce Clauses of the United States Constitution and should be stricken as invalid and unconstitutional.

Tallahassee, Florida
September 26, 1984

CASON & HENDERSON



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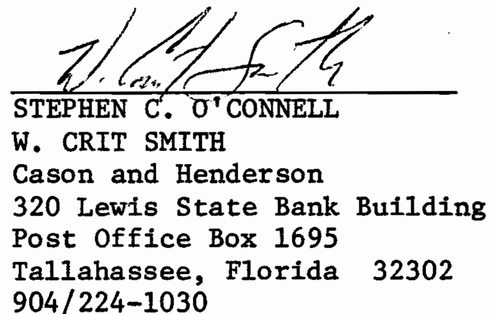
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by hand to Kenneth R. Hart, Esquire and Steven J. Uhlfelder, Esquire, Ausley, McMullen, McGehee, Carothers & Proctor, Post Office Box 391, Tallahassee, Florida 32302; Douglas L. Stowell, Esquire, and Mary K. Kraemer, Esquire, Mang & Stowell, Post Office Box 1019, Tallahassee, Florida 32302; Robert M. Ervin, Esquire, and Melissa F. Allaman, Esquire, Ervin, Varn, Jacobs, Odom & Kitchen, Post Office Box 1170, Tallahassee, Florida 32302; and Joseph C. Mellichamp, III, Assistant Attorney General and Linda Lettera, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 this 26th day of September, 1984.



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