IN THE SUPREME COURT
STATE OF FLORIDA

RANDY MILLER, etc., et al.,

Appellants,

vs.

CASE NO. 65,839

PUBLICKER INDUSTRIES, INC., et al.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT

BRIEF OF APPELLEE JUAN GRANADOS

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INTRODUCTION AND STATEMENT OF FACTS

Appellee Juan Granados is referred to as "Granados". Appellant State of Florida, Department of Revenue is referred to as "Florida". Citations to the record refer to the appropriate page number of the record on appeal, e.g. (R100).

Granados is a United States citizen, a resident of Broward County, Florida, and a taxpayer in the State of Florida. (R272,280) As a broker of imported ethyl alcohol distilled from non-United States agricultural products, Granados arranges for the sale and purchase of large shipments of foreign source ethyl alcohol to be used in the blending of gasohol for later sale to consumers. (R272, 273, 275, 277, 279, 289). Granados also uses gasohol as fuel for his automobile. (R287, 514)

Gasohol is a mixture of gasoline and ethyl alcohol in a 9 to 1 ratio which both extends the gasoline and increases its octane rating. Since 1980, gasohol has enjoyed a 4 cents per gallon exemption from the tax imposed on other motor fuels. The elimination of the exemption by Chapter 84-353, Laws of Florida, for gasohol blended from foreign source ethyl alcohol creates a price differential of 40 cents per gallon in favor of domestic gasohol. (One gallon of ethyl alcohol yields 10 gallons of gasohol, each of which is entitled to a 4 cents per gallon tax exemption.)

Granados has suffered and will continue to suffer irreparable injury in his business since there is no market for gasohol blended using foreign source ethyl alcohol until the constitutionality of Chapter 84-353 is finally resolved by the courts. (R280-281, 283-286) Gasohol blended using foreign source ethyl alcohol is no longer in demand because it is more commercially feasible to purchase domestic source gasohol that has no chance of being subjected to an additional $.04 per gallon tax. (R280) Potential purchasers do not wish to incur the possible additional cost that would be associated with foreign source gasohol if the statute is found constitutional. (R286-287) Granados has been advised by his former clients that until the constitutionality of the tax has been judicially determined, shipments to Florida of this imported product at an increased price are not desired. (R285-287)

ARGUMENT

I. GRANADOS HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF CHAPTER 84-353, LAWS OF FLORIDA

As a taxpayer in the State of Florida (R280), Granados need not show special injury to challenge Chapter 84-353 as an unconstitutional exercise of the taxing power of the State. The court in Paul v. Blake, 376 So.2d 256 (Fla. 3d DCA 1979) stated:

> 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.

Id. at 259, citing Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972) (emphasis added).

Even if Florida is correct in its assertion that a direct or special injury must be shown by Appellees to obtain standing to challenge Chapter 84-353, Granados has met that burden. Granados testified at the Final Hearing:

> Q. What is the status of your relationship with the customers that you have served in the past, both as sellers and buyers?
>
> A. Well, I have no active commercial relationship at the present time because I am unable to offer to them any ethyl alcohol at the prices which they require because of the existing conditions in the state of Florida.

Q. What is the present condition, then, of your brokerage business for imported ethyl alcohol?

A. I have no brokerage business for imported ethyl alcohol at the present time, nor do I forsee in the future, unless this Court resolves this issue, to do any imported business of ethyl alcohol in the state of Florida.

(R285)

Granados has suffered and will suffer injury by the enforcement of Chapter 84-353 and seeks to redress his own injuries, not those of others. Thus, the direct or special injury standard is met by Granados. Gaulden v. Kirk, 47 So.2d at 572; Lykes Bros., Inc. v. Board of Commissioners of Everglades Drainage District, 41 So.2d at 900; Hodges v. Buckeye Cellulose Corporation, 174 So.2d at 568; In re Estate of Humphreys, 229 So.2d at 597; Gladstone Realtors v. Village of Bellwood, 99 S.Ct. at 1607-08.

Florida's arguments concerning the standing of Granados and the other Appellees are inconsistent and circuitous. Florida argues that the Appellees are not the taxpayers obligated to pay the tax imposed by Chapter 84-353. Brief of Appellant at 12. Florida also argues that the Appellees are not dealers or distributors who collect and remit taxes. Brief of Appellant at 13. Accordingly, Florida argues that the Appellees do not have standing to challenge the statute. Brief of Appellant at 14. Further, at the final hearing on this matter, counsel for Florida indicated that the proper persons to challenge Chapter 84-353 are the gasohol distributors. (R385)

Presumably, these arguments are grounded on the administrative duty placed on dealers and distributors, i.e., they are liable for the collection and remittance of the tax to the State of Florida. The tax is levied on consumers. Section 212.62(2)(c), Florida Statutes, clearly states that no dealer or distributor:

> may advertise or claim to the public in any manner whatsoever that he will absorb all or any part of the tax, that he will relieve the purchaser or ultimate consumer of any portion of the tax, or that a portion of the tax will be refunded.

The ultimate consumer has the ultimate obligation to pay the tax, and dealers and distributors may not eliminate that obligation in any manner. Thus, it is clear that dealers and distributors have the same economic interest at stake in this litigation as do the Appellees, i.e., the impact of the statute on their commercial activity.

The tax imposed is characterized by Florida as "for the privilege of engaging in the business of selling tangible personal property at retail in the State of Florida." Brief of Appellant at 15. Granados submits, however, that a proper reading of the statute shows that the tax is not on the business of selling, i.e., on the seller, but rather "for the privilege of the sale at retail," i.e., on the purchaser. Purchasers are taxed on the privilege of the retail sale of motor and special fuels. Indeed, the tax is levied "upon the ultimate retail consumer." Section 212.62(2)(a), Florida Statutes. As stated by Florida, the activities of dealers and

distributors are merely for administrative convenience. Brief of Appellant at 12.

Florida further argues that "[i]n the case of a taxing statute, only those persons required to pay the tax have standing to challenge the tax." Brief of Appellant at 16, citing State, Department of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979). The Swinscoe Court, however, did not make such a finding. In Swinscoe, this Court held that a taxing statute, by operating prospectively, could not be applicable to the plaintiffs' purchase transaction. Accordingly, the plaintiffs were not subject to the tax imposed and had no standing to challenge the statute.

Under Florida's argument, since dealers and distributors collect taxes levied upon the ultimate retail consumer, any challenge by dealers and distributors to the tax would be on behalf of such consumers. Indeed, because dealers and distributors cannot legally absorb the tax, if they assert standing as taxpayers, they would be asserting the rights of others. In its brief at page 15, Florida states:

> This Court in Szabo noted that the sales tax imposed by Chapter 212, F.S., requires that the tax be collected by the dealer from the purchaser or consumer and thus denied the dealer standing to seek a refund of the sales tax monies collected and remitted to the State.

By its own statement, Florida contradicts its argument that dealers and distributors are the proper parties in the instant proceeding.

Granados submits that as a party adversely affected by Chapter 84-353 as well as a consumer, he has standing to challenge the statute at issue.

II. THE DIFFERENTIAL TAX TREATMENT OF UNITED STATES AND FOREIGN SOURCE GASOHOL IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION

The Import-Export Clause, U.S. Const., Art. I, §10, cl. 2, 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: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

The discriminatory taxation against gasohol containing imported ethyl alcohol affects the federal government's exclusive regulation of foreign commerce and may not properly create a preference for gasohol containing United States alochol. In Michelin Tire Corp. v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), the Supreme Court upheld an assessment of an ad valorem property tax on tires imported by Michelin. Emphasizing the nondiscriminatory nature of the tax in issue, the Michelin Court stated that:

> 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 [Import-Export] 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. . . .

96 S.Ct. at 541 (emphasis added).

The Court stated:

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods. . . .

Id.

A tax such as the one imposed by Chapter 84-353, which selectively imposes tax on imported goods, was anticipated by the Michelin Court in footnote 7 at page 542 (emphasis added):

> 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. Nothing in Brown v. Maryland should suggest otherwise. The Court in Brown merely presumed that at these later stages of commercial activity, state impositions would not be discriminatory. . . .

The scenario envisioned by the Court, in which the tax should be invalidated as a matter of course, is precisely the factual situation presented to this Court by Chapter 84-353. The retail sale of gasohol containing domestic alcohol is free of tax, but the retail sale of gasohol containing imported alcohol is taxed.

The Michelin Court focused not on the question of whether the tires to be taxed were imports, but on whether the tax was a prohibited duty. The Court analyzed whether the tax interfered

with three policy considerations with which the Framers of the Constitution were concerned. These considerations are that:

> [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 540-541 (footnotes omitted).

The Supreme Court reiterated its analysis in relation to the Import-Export Clause in Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734, 98 S.Ct. 1388 1388, 55 L.Ed.2d 682 (1978). The tax at issue in that case was a business and occupation tax on stevedoring. In upholding the tax, the Court found that the first policy consideration, the ability of the federal government to conduct foreign policy and regulate foreign trade, was not threatened:

> As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff.

98 S.Ct. 1401.

In connection with the second policy, the Court determined that the tax compensated the state for services afforded to the stevedoring business and did not affect federal import revenues.

The Court stated that the third policy requiring harmony among the states:

> is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State.

Id. (emphasis added).

The first policy consideration, concerning the effect of state-imposed tariffs on the ability of the federal government to speak with one voice, is pertinent to the tax imposed by Chapter 84-353. Certainly, Florida's disparate taxation of foreign source gasohol impacts detrimentally upon the federal government's exclusive authority in the area of foreign relations. Likewise, the third policy concerning harmony among the states is violated by the tax imposed by Chapter 84-353. The tax results in discriminatory treatment for foreign source gasohol which would otherwise move freely in interstate commerce. Further, there is no evidence that Florida provides differing levels of service related to foreign source and domestic gasohol which justify a heavier tax burden on foreign source gasohol.

Florida attempts to remove Chapter 84-353 from the scope of the prohibition of the Import-Export Clause by contending that at the time of the taxable event, i.e., the first sale, foreign source ethyl alcohol has been blended with gasoline and has thus ceased to be an "import" within the protection of the Import-Export Clause. Brief of Appellant at 25. The Michelin

decision signaled a marked departure from then-existing law with regard to Import-Export Clause cases. Contrary to established precedent, the Court held that states may impose non-discriminatory taxes upon imported goods and changed the focus in such cases from whether the goods in question have lost their status as imports to whether the tax constitutes an "impost or duty." The Court's altered approach recognizes that the purpose of the Import-Export Clause is not to exempt imported goods from all state taxation but to eliminate the harm caused by discriminatory state taxation of such goods.

Florida's argument that because foreign produced gasohol has been blended with domestic gasoline, it has lost its status as an "import," is the type of traditional, formalistic analysis rejected by the Michelin Court. In Washington Stevedoring Companies, the Court underscored its abandonment of the type of reasoning espoused by Florida when it stated:

> Rather than examining whether the taxes are "Imposts or Duties" that offend constitutional policies, the contention [by Appellants] would have the Court explore when goods lose their status as imports and exports. This is precisely the inquiry the Court abandoned in Michelin . . . .

98 S.Ct. at 1404 (citation omitted).

Florida relies upon the pre-Michelin case of Youngstown Sheet and Tube Company v. Bowers, 358 U.S. 534, 79 S.Ct. 383, 3 L.Ed.2d 490 (1959) which focused upon the status of goods as "imports" to justify its imposition of the discriminatory tax

in question. As evidenced by the discussion above, such an approach is no longer valid subsequent to Michelin. The Court made it clear that where taxes imposed at a later stage of commercial activity resulted in a discriminatory effect upon importation, such taxes would nevertheless be invalid as an unconstitutional impost. 96 S.Ct. at 542, note 7. The tax in issue in Youngstown did not result in a discriminatory effect, because it applied to all personal property used in business, not just to imported iron ore. It is clear that subsequent to Michelin, the only proper inquiry in an Import-Export Clause case is whether the tax in issue is a duty that offends constitutional policies.

III. DISCRIMINATORY TAXATION OF FOREIGN COMMERCE BY STATES VIOLATES THE COMMERCE CLAUSE

The elimination of the tax exemption for foreign source gasohol results in the taxation of such gasohol merely on the basis of its origin in violation of the Commerce Clause. The Commerce Clause, U.S. Const. Art. I, §8, cl. 3, provides that Congress has the power:

> To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.

In Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct 1813, 60 L.Ed. 336 (1979), the Supreme Court stated:

> Foreign commerce is presumably a matter of national concern. . . . In approving state taxes on the instrumentalities of interstate commerce, the Court consistently has distinguished oceangoing traffic, supra, at 1818; these cases reflect an awareness that the taxation of foreign commerce may necessitate a uniform national rule.

99 S.Ct. at 1821-22 (footnotes and citation omitted).

The Court also stated that the policies animating the Import-Export Clause, as enunciated in Michelin, are similar to those of the Commerce Clause. 99 S.Ct. 1822, footnote 14. The first policy - the need to speak with one voice when regulating commercial regulations with foreign governments - requires the same inquiry about a state tax's effect that a Foreign Commerce Clause analysis requires. Id. Similarly, the third policy - preserving interstate harmony - requires the same inquiry about the effect of a state tax that an analysis under the Interstate Commerce Clause requires. Id.

If a state tax "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments,'" the tax is unconstitutional under the Commerce Clause. Id. at 1823. Thus, the tax imposed by Chapter 84-353 violates the Foreign Commerce Clause, because it affects the ability of the federal government to regulate foreign trade.

In Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977), the State of New York sought to impose a greater tax liability on out-of-state stock transfer sales than on in-state sales. The Court held that no

state "may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." 97 S.Ct. at 607 (citations omitted). The Court stated:

> 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. (citation omitted) (emphasis added).

A state may not benefit its domestic commerce by imposing unequal burdens upon the business of other states. The rationale of the Boston Stock Exchange decision was cited by this Court in Delta Air Lines, Inc. v. Department of Revenue, No. 63,915 (Fla. June 14, 1984), in support of its holding that a corporate income tax credit provided a direct commercial advantage to select Florida-based air carriers in violation of the Commerce Clause. See also, Archer Daniels Midland Co. v. State, 315 N.W.2d 597 (Minn. 1982), (statute providing tax exemption for gasohol blended with alcohol distilled in Minnesota from Minnesota farm products to the exclusion of all other gasohol, held violative of the commerce clause).

While the Boston Stock Exchange case addresses the issues in terms of interstate commerce between states, it is clear that the principles enunciated therein apply equally to issues of foreign commerce. In Nevada v. Hall, 440 U.S. 410, S.Ct. 1182,

59 L.Ed. 2d 416 (1979), the Supreme Court cited the Commerce Clause as support for its statement that:

> While sovereign nations are free to levy discriminatory taxes on the goods of other nations or to bar their entry altogether, the States of the Unions are not.

99 S.Ct. at 1190 (emphasis added).

In addition, the Court in South-Central Timber Development Inc. v. Wunnicke, 52 U.S.L.W. 4631 (U.S. May 22, 1984) (No. 82-1608), examined whether a local processing requirement favoring Alaska industry substantially burdened interstate or foreign commerce under the Commerce Clause. Because of the burden on commerce resulting from the requirement, the Court concluded that the requirement was per se invalid. The Court then noted:

> We are buttressed in our conclusion that the restriction is invalid by the fact that foreign commerce is burdened by the restriction. It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny.

52 U.S.L.W. at 4635 (emphasis added)

In Bacchus Imports, Ltd. v. Dias, 52 U.S.L.W. 4979 (U.S. June 19, 1984) (No. 82-1565), the Court examined the State of Hawaii's excise tax exemptions for a local brandy called "okolehao" and fruit wines. Liquor wholesalers challenged the tax, alleging its unconstitutionality on Import-Export and Commerce Clause grounds. The Court did not reach the Import-Export Clause issue, but decided the case on Commerce Clause principles.

The Court quoted from Welton v. Missouri, 91 U.S. 275, 277 (1876), in which it had struck down a statute that discriminated in favor of local goods "and against those which are the growth, product, or manufacture of other states or countries. . . ." Id. (emphasis added). The Hawaii tax exemption had a discriminatory effect because it applied "only to locally produced beverages." Id. at 4981. Here the tax has a discriminatory effect because it applies to goods produced in foreign countries. The taxation on foreign source gasohol clearly burdens both interstate and foreign commerce and is applied in a discriminatory fashion. Clearly, Chapter 84-353 violates the Commerce Clause and is unconstitutional.

Florida contends that Chapter 84-353 is not unconstitutional because state taxation of foreign or interstate commerce is permitted so long as it only places upon such commerce its "fair share of the state tax burden." Brief of Appellant at 30. In its Brief at page 33, Florida states that Chapter 83-353 "was designed to ensure that the tax exemption served its original purpose, i.e., to reduce dependence on foreign sources of fuel that experience had shown to be unreliable." Thus, the purpose and effect of Chapter 84-353 is not merely to impose on foreign source gasohol its "fair share" of the state tax burden, but instead to place foreign source gasohol at a direct competitive disadvantage with domestic source gasohol in order to reduce the demand for it.

The discrimination against foreign source gasohol imposed by Chapter 84-353 is the sort of "economic protectionism" which

the Supreme Court has consistently held to be insufficient justification for discrimination against foreign goods. In City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), the Court pointed out that it had rejected such reasoning in a litany of prior cases:

> The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. at 522-524, 55 S.Ct. at 500, or to create jobs by keeping industry within the State, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10, 49 S.Ct. 1, 3, 73 L.Ed. 147; Johnson v. Haydel, 278 U.S. 16, 49 S.Ct. 6, 73 L.Ed. 155; Toomer v. Witsell, 334 U.S., at 403-404, 68 S.Ct. at 1166 . . . .

98 S.Ct. at 2537.

Protection of the local tourism industry brings forth the identical constitutional issues that would be raised by protection of the local gasohol industry. Florida's justification for the discriminatory taxation created by Chapter 84-353 is not validated by the fact that the local tourism industry rather than the local gasohol industry is sought to be protected. It is protection of local interests to the detriment of interstate and foreign commerce that the Commerce Clause is designed to prevent. In Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 55 S.Ct. 497 (1935) the attempt "to assure a steady

supply of milk by erecting barriers to allegedly ruinous outside competition" was struck down by the Supreme Court. Like Florida, the State of New York claimed that while local milk producers might benefit economically by the law in issue, its primary purpose was the "maintenance of a regular and adequate supply of milk" for its residents. 55 S.Ct. at 500. The attempt to "encourage the use of reliable domestically produced ethyl alcohol" and deter "reliance on undependable foreign sources of fuel" (Brief of Appellant at 32-33) should similarly be struck down. It is irrelevant whether Chapter 84-353 was designed to protect the local tourism industry rather than the local ethyl alcohol industry. As found by the trial court, Chapter 84-353 has the <u>effect</u> of shielding domestic producers from competition in the marketplace, by placing foreign ethyl alcohol "at a direct and distinct competitive disadvantage with domestic source alcohol." (R522) Such protection is exactly the type of protection precluded by the Commerce Clause.

Florida contends that because the original exemption adopted in 1980 "failed to achieve a reduction in a Florida's dependence on foreign fuel supplies", the legislature had to take additional measures to encourage reliance on domestic fuel products. Brief of Appellant at 34. Florida then states that there is no means accomplishing this objective without discriminating against foreign commerce.

Granados suggests to this Court that actions by state legislatures having a discriminatory effect on foreign commerce are violative of the Commerce Clause. Clearly, the action of the Florida legislature in enacting Chapter 84-353 interferes with the ability of the federal government to regulate foreign trade.

CONCLUSION

Appellee Granados, as a party affected by the provisions of Chapter 84-353, Laws of Florida, and as a consumer of gasohol, has standing to challenge the statute. Chapter 84-353 is unconstitutional in that it violates the Import-Export Clause and the Commerce Clause of the United States Constitution.

Chapter 84-353 amended Section 212.63, Florida Statutes, a pre-existing statutory section providing an exemption to all gasohol sold or distributed in Florida. Upon a finding that Chapter 84-353 is unconstitutional, the statutory section as originally enacted remains controlling. Thus, Section 212.63, Florida Statutes, (1983) remains effective, and the tax exemption remains available to all gasohol.

This result is supported by State ex rel. Atlantic Greyhound Lines v. Mizell, 174 So. 216 (Fla. 1937). In Mizell, this Court found that an amendatory act was an unconstitutional burden on interstate commerce. The Court declared that the amendment was void and that the statute as originally enacted remained effective. Id. at 221. See also, Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952).

Therefore, the attempted amendment to Section 212.62, Florida Statutes, (1983) by the enactment of Chapter 84-353 fails, and that statutory section remains effective as it existed prior to the 1984 Legislative Session.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been hand delivered upon the following this 26th day of September, 1984.

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