O/A 10-2-84

IN THE SUPREME COURT
STATE OF FLORIDA

RANDY MILLER, et al.,

Appellants,

vs.

PUBLICKER INDUSTRIES, INC., et al.,

Appellees.

CASE NO. 65,839

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

REPLY BRIEF OF AMICUS CURIAE NATIONAL CORN GROWERS ASSOCIATION

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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The National Corn Growers Association, as amicus curiae, submits this brief in reply to appellees' briefs and in further support of its position that the judgment at issue in this case should be reversed.

A. Standing.

1. Appellees place great reliance on a portion of a footnote in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 320-21 n.3 (1977). There, noting that plaintiffs were seeking to be "free of discriminatory taxes on their business," the U.S. Supreme Court stated that non-New York stock exchanges had standing to challenge a New York transfer tax on non-New York securities transactions. In context, however, this footnote gives no comfort to appellees' contention.

The issue of standing was not raised, briefed or argued by either party before the Court 1/-- a fact that undoubtedly explains why the Court did not discuss, mention, or even cite the relevant case law on the question of direct versus indirect injury. In other cases, where standing was directly at issue and the Court addresses the relevant case law and policy considerations, the Court has consistently required that the plaintiff "be able to show . . . some direct injury, as the result of a statute's enforcement." Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (emphasis in original). See City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). Moreover, the

1/ See Brief for the Appellants, Boston Stock Exchange at 5 n.5 ("The Court of Appeals did not question plaintiffs' standing nor did defendants in their Motion to Dismiss this appeal. Accordingly, the issue of standing is not addressed in this brief.").

suggestion in the Boston Stock Exchange footnote that the injury suffered by the exchanges would support standing is only one of two alternative grounds for standing offered in the footnote. The Court also noted that the plaintiff stock exchanges brought the action on behalf of their members, who were required to pay the tax at issue. Citing well established authority for the proposition that an association may have standing solely as the representative of its members, the Court concluded that the exchanges had standing as the representatives of parties who had suffered actual injury, i.e., payment of the tax. This alternative ground for standing means that the discussion of the exchanges' standing in their own right may properly be regarded as dicta.

In any event, the nexus between appellees and the tax at issue in this case is more remote that the nexus between the plaintiffs and the tax at issue in Boston Stock Exchange. The tax in Boston Stock Exchange was levied on a transaction in which plaintiffs took part as stock exchanges; as the Court stated, plaintiffs were challenging "discriminatory taxes on their business" (emphasis added). Here in contrast, not only do appellees not pay the tax they challenge, they also do not in any way take part in the transaction being taxed. Accordingly, whereas plaintiffs in Boston Stock Exchange may be said to have had standing both because of their status as representatives of the taxpayers and because of their intimate relationship with the transaction being taxed, no such statements can be made with respect to plaintiffs (appellees) in this case.

2. Contrary to appellees' assertions, courts have not abandoned the requirement that there be direct injury in order to sustain standing. Indeed, the very case appellees cite for this proposition, Wimberly v. Ettenberg, 570 P.2d 535 (Colo. 1977) (see Publicker brief, p. 13, note), unequivocally reaffirmed the requirement of direct injury as a prerequisite to standing. Wimberly involved a challenge by local bail bondsmen to a county court pretrial release program that allowed defendants to deposit only 10% of their bail as a condition for pretrial release. The bail bondsmen alleged that this program had driven them to the brink of bankruptcy. Citing Ex-Cell-O Corp. v. City of Chicago, 115 F.2d 127 (7th Cir. 1940), which is relied on in our opening brief, the Colorado Supreme Court held that the plaintiffs were not directly injured by the program and thus did not have standing:

> "First, there is no injury in fact, since the injury allegedly suffered by the bail bondsmen is indirect and incidental. Although the pre-trial release program may affect the business of the bail bondsman as a practical matter, it does so only indirectly by permitting criminal defendants to choose amongst an increased number of bail alternatives. The bail bondsmen are not prohibited by the new program from serving as sureties for any defendant who may choose to seek their services. Indirect and incidental pecuniary injury of this sort is insufficient to confer standing."

570 P.2d at 539 (emphasis added).[2/] Thus, far from representing

2/ It was a second prerequisite to standing -- that the direct injury be to a "legally protected interest" -- that the Wimberly court noted is no longer employed in the federal courts. The court noted that the U.S. Supreme Court had replaced the "legal interest" test with the "zone of interest" test articulated in Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970). (The Wimberly

a departure from Ex-Cell-O and the requirement of direct injury, Wimberly is a recent reaffirmation of this well-established rule.3/

3. Appellee Plaintiff Publicker's contention that the Florida Declaratory Judgment Statute, Section 86.021, Florida Statutes (1983), provides an independent source of standing to bring this action is incorrect. The purpose of a declaratory judgment is to allow individuals who otherwise have standing (i.e., direct injury) to bring a claim even if it otherwise might not be ripe. The availability of a declaratory judgment procedure does not diminish or in any way alter the requirements relating to standing normally imposed on parties seeking judicial review.

(Footnote continued)
court expressly declined to abandon the "legal interest" test, and held that plaintiffs also failed to meet this requirement.) This Court need not address the question of "legal right" or "zone of interest" since under either approach a plaintiff must first demonstrate "some direct injury as the result of the challenged official conduct." City of Los Angeles v. Lyons, 461 U.S. 95, ___ (emphasis added).

3/ Appellee Publicker also relies on McCoy-Elkhorn Coal Corp. v. EPA, 622 F.2d 260 (6th Cir. 1980) (Publicker brief, p. 12). But in holding that plaintiff there had standing to challenge a statute applied to its customers because it suffered harm from the "constriction of its market," 622 F.2d at 263, the court improperly relied on Craig v. Boren, 429 U.S. 190 (1976), as its only authority. Boren involved the entirely different and wholly inapplicable situation of a party directly injured by the enforcement of a statute (statute prohibited plaintiff from selling beer to 18-20 year old males) who sought to raise the rights of third parties (the rights of 18-20 year old males) as part of its challenge to the statute. The Court in Boren allowed plaintiff to raise the claim since its rights were interdependent with the rights of the third parties. Compare Eastern Air Lines, Inc. v. Dept. of Revenue, 9 F.L.W. 230 (Fla. June 14, 1984). Boren in no way alters the standard requirement that a party challenging a statute be directly affected by its enforcement. Accordingly, we respectfully submit that McCoy-Elkhorn was erroneously decided on the basis of inapplicable authority and therefore should not be relied upon this Court.

See Williams v. Howard, 329 So.2d 277 (Fla. 1976); Robinson v. Town of Palm Beach Shores, 388 So.2d 314 (Fla. 4th DCA 1980).4/

4. Appellees attempt to obscure the simple standing issue in this case by citing this Court's decisions in Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972) and Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982), and the Third District Court of Appeal's decision in Paul v. Blake, 376 So.2d (Fla. 3d DCA 1979). These cases involve suits by citizen taxpayers who challenged the manner in which the money they paid to the state was either collected (Blake) or appropriated (Horne and Lewis). Rather than dealing with the issue important in this case -- whether injury must be direct to support standing -- these cases deal with the different, analytically distinct issue whether, in cases where taxpayers are challenging a taxing or spending statute, the taxpayer should be required to show "special," in addition to "direct," injury. See Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1917). Rickman and related cases, including Horne, Lewis, and Blake, are wholly consistent

4/ The sole case cited by appellee in connection with its argument, Archer Daniels Midland v. McNamara, 544 F. Supp. 99 (M.D. La. 1982), is not authority for the position asserted. In McNamara, the trial court held that a nontaxpaying plaintiff indirectly affected by a state tax could not challenge the tax in federal court, under 28 U.S.C. §1341, because an adequate remedy existed in state court, namely, a declaratory judgment action. The court did not decide, however, that the declaratory judgment statute independently conferred standing on a plaintiff that otherwise failed to satisfy normal standing requirements. Rather, the court assumed, without expressly considering the issue, that plaintiff would have standing to challenge the tax in state court. McNamara was thus only indirectly concerned with Louisiana's declaratory judgment statute and rests on the unexplored assumption that plaintiff would have had standing in state court. Such a decision hardly gives helpful guidance to this Court on the very question left unexplored.

with the simple but cogent rule that only a party required to pay the tax suffers direct injury and thus has standing to challenge the constitutionality of that tax. Appellees here are challenging the constitutionality, not of any tax that they pay to the state, but of a tax that someone else pays to the state.

B. The Import-Export Clause.

1. Appellees rely on dicta in a footnote in Michelin Tire Corp. v. Wages, 423 U.S. 276, 288 n.7 (1976), indicating with respect to a hypothetical statute that a state tax discriminatorily imposed on the retail sale of an import would be prohibited by the Import-Export Clause. Even if it were not dicta, the footnote does not control this case. Significantly, the footnote does not suggest that discrimination ipso facto violates the Import-Export Clause. Instead, the footnote states that the discriminatory aspects of the hypothetical statute make the statute unconstitutional because it means that the statute is "in practical effect, an impost." The footnote thus merely reaffirms a number of decisions holding that a state cannot excape the proscription of the Import-Export Clause by indirectly taxing the importation process, whether it be by singling out such imports for taxation at the time of sale or by some other functional equivalent. See, e.g., Richfield Oil Corp. v. State Board, 329 U.S. 69, 84-85 (1946) (tax on sale of import is tax on import itself); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (license fee

charged to importers is tax on items imported); Western Oil and Gas Association v. Cory, 726 F.2d 1340, 1346 (9th Cir. 1984) (rent computed by volume of oil in interstate and foreign commerce passing over leased property is tax of oil). The premise of these decisions is that the "tax" or other charge being challenged had the identical effect on the importation process as a direct "impost" or "duty" would have had. In each case, the importer could not escape the burden of the tax without foregoing importation altogether. The "tax" was thus the functional equivalent of an impost on an import and therefore prohibited by the Import-Export Clause.

The state fuel tax at issue here, however, is not the functional equivalent of an impost or duty. Unlike the importers in the cases cited above, appellees in this case may import and sell ethyl alcohol without paying the state tax at issue. If ethyl alcohol is imported and sold for some use other than for the manufacture of gasohol, or if the gasohol made with imported ethyl alcohol is sold to dealers for use outside the state, the tax at issue here is not imposed. Because plaintiffs can thus engage in the importation of ethyl alcohol without ever triggering the imposition of the tax, Florida's tax on gasohol is not, "in practical effect, an impost."5/

5/ Appellees also argue that Michelin shifts the focus of analysis away from the issue whether the item being taxed is an "import." As indicated in our opening brief, however, because the items involved in Michelin were assumed to be "imports," the Court had no occasion to address this issue. Rather, the Court narrowed the definition of "impost or duty" and enabled states under some circumstances to tax an item

2. Contrary to appellees' assertions, Florida's tax on gasohol is not inconsistent with the policies embodied in the Import-Export Clause as they were articulated in Michelin. See 423 U.S. at 295. Florida is not "levying taxes on citizens of other states," because the gasohol tax is not imposed on such citizens. The tax is imposed on the sale of gasohol for use in Florida; gasohol sold to citizens in other states is not taxed under the statute.

Nor does Florida's tax impermissibly "divert[ ]" a "major source of [federal] revenue" to the state's treasury. It is important to remember that the tax on gasohol produced from foreign ethyl alcohol is part of a comprehensive state fuel tax. With the exception of gasohol produced from domestic ethyl alcohol, this tax generates revenue from the sale of fuel regardless of whether the fuel may have been derived from an imported good, such as gasoline refined from Middle Eastern crude oil or gasohol made with foreign ethyl alcohol. Any incidental effect this tax has on the demand for imported goods subject to a federal tariff is not the

(Footnote continued)
even though it retained its status as an import. The effect of the decision in Michelin, then, is to enlarge the taxing power of the state, not to restrict it as appellees suggest. A state taxing statute is constitutional under the Import-Export Clause either if it is not an "impost" or a "duty" or if it is not imposed on an "import" or an "export." See Opinion of the Justices, 379 A.2d 782, 789 (N.H. 1977) ("the tax will be constitutional [under the Import-Export Clause] if either an item has lost its character as an import or the state exaction is not an 'impost' or 'duty.' Michelin Tire Corp. v. Wages, [423 U.S. at 296-97]" (emphasis added)). As we have demonstrated here and in our main brief, the Florida taxing statute does not run afoul of either limitation.

concern of the Import-Export Clause. As the Court said in Michelin, 423 U.S. at 287, "It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition."

In any event, it seems apparent that neither the federal tariff on ethyl alcohol nor Florida's tax exemption for gasohol made with domestic ethyl alcohol were intended as revenue measures. Both were implemented for the purpose of encouraging domestic production of ethyl alcohol and thereby reducing dependence on an unstable and dangerous supply of energy. According to the record in this case, the federal tariff on imported ethyl alcohol has assisted in this regard by helping to make domestic-based gasohol cost competitive in much of the country. However, because of Florida's unique geographical position and the high cost of ground transportation (R 298, 326), imported ethyl alcohol accounted for approximately 95% of the Florida gasohol market (R 329). Consequently, additional tax incentives for domestic-based gasohol are necessary in Florida to obtain a level of cost-competitiveness similar to that already obtained in most other states because of the federal tariff. The Florida gasohol tax is therefore consistent with the federal policy towards foreign and domestic fuel supplies. 6/

6/ The trial court referred in its opinion to a letter dated June 8, 1984, purportedly from U.S. Trade Representative William E. Brock to Governor Robert Graham urging veto of the 1984 amendment to the gasohol exemption. This letter was attached to and referred to in Publicker's complaint, but the State's answer contained the appropriate denials with respect to the letter and the letter was not otherwise proferred or referred to as evidence in the record of this case. It thus should not be considered by this Court. In any event, the interests expressed in Mr. Brock's letter,

C. The Foreign Commerce Clause

1. The Florida gasohol tax does not violate the Commerce Clause because the exemption afforded gasohol made with domestic ethyl alchol is justified by Florida's need for a stable and secure supply of fuel. Appellees contend that "the proferred justification of the Florida tax is irrelevant because the statute is facially discriminatory" (Publicker brief, p.28). But the case cited by appellees for this proposition, City of Philadelphia v. New Jersey, 437 U.S. 617, 625-27 (1978), expressly acknowledges that a legitimate legislative purpose may be accomplished "by discriminating against articles of commerce coming from outside the State" as long as "there is some reason, apart from their origin, to treat them differently." 437 U.S. at 626-27. The susceptability of foreign-source fuel to supply disruptions because of world events beyond the control of

(Footnote continued)
which appears to state the writer's own beliefs and does not by its terms purport to be a statement of U.S. policy, is contrary to the federal policy that underlies the stiff tariff currently imposed on the importation of ethyl alcohol -- a tariff that is scheduled to increase again next year. As the record in this case shows, this tariff, together with an exemption of gasohol from the federal gasoline tax, is intended by the federal government to promote the domestic production of ethyl alcohol by handicapping foreign sources. This is a policy that is entirely consistent with the policy underlying the Florida statute.

It is worth noting that appellee Granados, using many of the same arguments he has used in this case, opposed the federal tax treatment of foreign ethyl alcohol in correspondence to Mr. Brock's office in 1981 and was agreed that his "views will be taken into consideration by the Administration in the development of its position . . ." (R 202). The federal position with respect to foreign ethyl alcohol, as expressed by the federal tariff and exemption, constitutes a rejection of appellees' position and is in harmony with the position adopted by the Florida legislature.

our government, a susceptability unique to fuel imported from outside the United States, justifies treating such fuel differently from fuel derived from raw materials produced in this country.

The statute at issue in City of Philadelphia v. New Jersey itself illustrates this point. Philadelphia involved a New Jersey statute that prohibited the importation of most "solid or liquid waste which originated or was collected outside" the state. The Court held that the statute was invalid because waste, whatever its origin, was equally harmful, and there was no reason to treat out-of-state waste differently from domestic waste. In contrast, there is a difference between gasohol made with domestic ethyl alcohol and gasohol made with foreign ethyl alcohol. Whereas the former is desirable because domestic ethyl alcohol is a stable and plentiful fuel extender, the latter is (at least) less desirable (if not outright dangerous) because it is subject to supply disruptions. It is precisely the origin of the ethyl alcohol which, unlike the waste in Philadelphia, makes these gasohols different and justifies the disparate treatment at issue in this case.7/

7/ It should be remembered that the Interstate Commerce Clause guarantees continued access to products and markets among the states and thus there is no need for a state to anticipate a disruption in the supply of a valuable product coming from a sister state. No such assurance exists, of course, with respect to supplies from foreign countries; there is no inherent reciprocity in the Foreign Commerce Clause, with which this case is concerned. Thus, where measures taken by a state to protect against disruption of supply from another state are considered unjustifiable, the same conclusion should not automatically pertain to the foreign context, where the danger of the disruption of supply of a valuable product is real and justifiably to be guarded against.

2. Appellees cite cases, most notably Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), which rejected attempts by states to justify economic protection of local business from outside competition by linking such protection to the health or security of its citizens. But Baldwin and such cases are distinguishable.

Baldwin involved an attempt by New York to protect its local milk producers from out-of-state (Vermont) competitors by placing certain conditions on the local sale of out-of-state milk, designed in practical effect to exclude such milk from the New York market. New York attempted to justify its action by asserting that its "primary" purpose was to prevent the supply of milk from "being put in jeopardy when the farmers of the state are unable to earn a living income." 294 U.S. at 523. The Court rejected this argument, emphasizing that the state was attempting to protect its supplies of milk through direct economic protection of its local business from outside competition.8/

Florida, on the other hand, is not protecting local producers of ethyl alcohol from outside competition. As discussed in our main brief, the tax exemption is not limited to Florida-made ethyl alcohol nor is there any significant production of ethyl alcohol in the state (R 328-29, 331). The ecomonic benefits of the tax exemption, therefore, are

8/ The Court was obviously skeptical of the state's claim that it was attempting "to make its inhabitants healthy, and not to make them rich." 294 U.S. at 523.

not conferred upon Florida businesses or consumers and are thus inherently incidental to the intended operation of the statute. Put simply, unlike New York in Baldwin, Florida is not attempting to preserve its supply of fuel through parochial economic protectionism. The Florida statute instead is designed to provide a legitimate local benefit -- a reliable supply of fuel for both citizens of Florida and visitors of the State -- and should be upheld.

* * * * *

The theme of appellees' briefs in this Court is that the statute at issue is unique among the States and that it is unconstitutional under well-established precedents. Neither aspect of this theme is correct.

In a letter to the trial court dated August 16, 1984, supplementing the record in this case, counsel for the State of Florida advised that "[t]hirty-three states (including Florida) provide a tax exemption or other tax benefit for the sale of gasohol. The relevant state statutes take a variety of forms, but the great majority do not provide an exemption for gasohol blended with imported ethyl alcohol made from foreign agricultural products." Thus, Florida's statute is not unique; it is in harmony with a number of other states and the federal government in its effort to encourage a stable and safe (domestic) supply of fuel.

Moreover, as we have endeavored to demonstrate in our main brief and in this reply brief, the precedents and principles relied on by appelles (and the trial court) do

not support the result they urge. Appellees do not have standing to challenge the statute at issue. The statute, in any event, is a legitimate and constitutional exercise of the State of Florida's legislative prerogative.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: _____
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 R. Hart
Steven J. Uhlfelder

Post Office Box 391
277 South Calhoun
Tallahassee, Florida 32302

Counsel for Amicus Curiae
National Corn Growers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Brief has been furnished by HAND DELIVERY this 1st day of October, 1984, to:

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

LARRY 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, FL 32302

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

Kennett Hunt
ATTORNEY