IN THE SUPREME COURT OF FLORIDA

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA; JACQUIN-FLORIDA DISTILLING CO., INC.; and TODHUNTER INTERNATIONAL, INC.,

Appellants,

vs.

NO. 70,368

BROWN-FORMAN CORPORATION d/b/a CALIFORNIA COOLER COMPANY and d/b/a JOSEPH GARNEAU COMPANY,

Appellees.
_____/

On Appeal from the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida.

ANSWER BRIEF OF APPELLEE BROWN-FORMAN CORPORATION

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STATEMENT OF THE CASE

This cause is before the Court for review of a decision declaring that the excise tax provisions of Florida's alcoholic beverage laws are unconstitutional. After extensive briefing and oral argument in three separate cases, the Circuit Court of the Second Judicial Circuit in and for Leon County held that Florida Statutes §§ 564.06 and 565.12 (1985) violate the Commerce Clause of the United States Constitution.[1/] (App. at 281-83)[2/] This ruling was appealed to the First District Court of Appeal, which certified the three cases to this Court as ones involving issues of great public importance. This Court has jurisdiction pursuant to Art. V, § 3(b)(5) of the Florida Constitution.

A. THE CHALLENGED STATUTE

The excise tax legislation which is the subject of this appeal is a revised version of the former "Florida Products Exemption." The former statute, which was in effect prior to

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1/ The precise holding of the trial court was that this legislation "failed to address the constitutional violations addressed in Bacchus." (App. at 281-83). As noted earlier in the trial court's decision, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) held a similar alcoholic beverage taxing scheme invalid as a violation of the Commerce Clause.

2/ The Record on Appeal has not been compiled and indexed, see Initial Brief of Appellants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, at iv. Appellees therefore make citations throughout this brief to the Appendix submitted by the Appellants.

July 1, 1985, accorded preferential tax treatment to Florida manufacturers and distributors of alcoholic beverages by exempting from taxation all wines and certain distilled spirits only if manufactured and bottled in Florida from Florida grown products.

The United States Supreme Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) held a virtually identical Hawaiian statute unconstitutional because it discriminated against out-of-state producers in favor of Hawaiian manufacturers of alcoholic beverages made from Hawaiian products.

Prompted by the Bacchus decision, the 1985 session of the Florida Legislature repealed the Florida Products Exemption and enacted the taxing scheme embodied in Florida Statutes § 564.06 (1985). See Chapter 85-204, Laws of Florida. Sponsors of the new legislation testified before the Florida Legislature and several of its committees that the new law would alter the language of the Florida Products Exemption, but would not change its historic protectionist effects. Consistent with this declared purpose, the revised statute continues to provide a direct commercial advantage to Florida manufacturers and distributors of alcoholic beverages that are manufactured and bottled in Florida from Florida grown products.

Florida Statutes § 546.01(1) (1985) imposes a tax of $2.25 per gallon on wine and wine cooler products.

Florida Statutes § 546.06(2) (1985) provides an exemption from this tax for products with an alcoholic content

made from citrus fruits or from certain enumerated grape species.[3/] These grape species are indigenous to Florida, and were the only ones grown in Florida and used for wine production at the time the new taxing scheme was enacted.

The wine and wine cooler products exempted from the $2.25 per gallon tax by Florida Statutes § 546.06(2) (1985) are instead subject to taxes provided by Florida Statutes §§ 546.06(10)(a) and (10)(b) (1985). These alternative taxes are computed on a sliding scale based on prior monthly sales and provide a substantial tax differential in favor of the exempted wine and wine coolers.

In addition to limiting the tax exemption to wine and wine coolers made from products indigenous to Florida, the new legislation ensures that out-of-state manufacturers and distributors will not receive the exemption by denying preferential tax treatment:

> (a) To alcoholic beverages manufactured in states, territories or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;
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> (b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

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3/ These species are Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana, and Vitis berlandieri.

(c) To alcoholic beverages manufactured or bottled in states, territories or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

See Fla. Stat. § 546.06(9) (1985) (hereinafter "exemption denying provisions").

B. PROCEEDINGS BELOW

This action by Brown-Forman, filed on October 8, 1986, was the last of three actions initiated to challenge the constitutionality of the revised taxation scheme.[4/] Brown-Forman sought declaratory and permanent injunctive relief against the enforcement of Florida Statutes § 564.06 (1985) on several constitutional grounds, including the Commerce Clause, the Import-Export Clause and the Equal Protection Clause of the United States Constitution.

Brown-Forman filed a motion for summary judgment, together with documentary evidence and affidavits in support thereof, asserting that the statute was unconstitutional on its face. The Division filed a brief in opposition to the motion for summary judgment. Both parties filed a joint stipulation of facts. After reviewing the briefs and the evidence submitted, and hearing oral argument from counsel for both sides, the trial

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4/ Plaintiffs in the related cases, Tampa Crown Distributors, Inc., Florida Beverage Corporation and McKesson Corporation, are licensed wholesale distributors of alcoholic beverages in Florida.

court concluded that no genuine dispute existed as to any material fact and that the facial validity of the challenged statute presented a question of law. Accordingly, on March 20, 1987, the Court entered summary judgment in favor of Appellees, holding that the revised statute failed to cure the constitutional infirmities of the prior law and violated the Commerce Clause of the United States Constitution.

STATEMENT OF THE FACTS

The record on appeal reveals that no genuine dispute exits as to the following material facts, and that the trial court properly entered judgment for Appellees as a matter of law.

Appellee, Brown-Forman Corporation ("Brown-Forman") is an importer and manufacturer of wine and wine coolers.[5/] California Cooler Company ("California Cooler") is a division of Brown-Forman which manufacturers and bottles wine coolers in California and sells them to wholesale distributors for resale in Florida.[6/] Joseph Garneau Company ("Garneau") is another division of Brown-Forman which imports Italian wine under the brand names "Bolla" and "Cella" and sells them to wholesale distributors for resale in Florida.

5/ A "wine cooler" is a beverage made of a mixture of wine with fruit juices, carbonated water, and fruit flavors.

6/ The excise tax is assessed at both the manufacturer/importation level and the wholesale/distribution level. It is collected at the wholesale level.

Appellant, the Division of Alcoholic Beverages and Tobacco, State of Florida, Department of Business Regulation, regulates Brown-Forman's sale of wine and wine coolers in Florida and is empowered to collect and enforce the alcoholic beverage taxes imposed by Florida law. Appellants Todhunter International, Inc. and Jacquin-Florida Distilling Company, Inc. are intervenors who have an interest in this litigation as Florida manufacturers and bottlers who benefit from the challenged taxation scheme.

The wine coolers manufactured by California Cooler and the wines imported by Garneau are subject to the tax of $2.25 per gallon imposed by Florida Statutes § 564.06(1) (1985).

The wine content of the wine coolers manufactured by California Cooler is California wine made predominately with grapes from the species Vitis vinifera. This grape species is not among those entitled to the preferential tax rate provided by Florida Statutes §§ 564.06(2) and (10)(b) (1985). Similarly, the wines imported by Garneau are also produced from the species Vitis vinifera and are not entitled to the preferential tax rates set forth in Florida Statutes §§ 564.06(3) and 10(c) (1985).

The only grape species which are entitled to the preferential tax rates are indigenous to Florida and are used by Florida manufacturers for wine production in Florida. None of these species are grown in commercial quantities in California or in any state west of Texas. (App. at 136 & 207). Moreover, if these species were planted in California today, commercial

quantities of the grapes could not be produced for 3 to 5 years. (App. at 136).

The parties agree that wine manufactured from vinifera grapes enjoys a superior reputation and is more favorably regarded by consumers than wines manufactured from the statutory grape species.[7/] California Cooler has consequently earned a competitive advantage by advertising California wine as one of its ingredients, and Garneau has gained a similar advantage by importing wines manufactured from vinifera grapes for distribution in the United States. (App. at 205-06).

The statutory scheme imposes higher taxes and thereby increases the costs of doing business for those such as Brown-Forman who manufacture and market wines made from vinifera grapes. The wine and wine cooler products imported and manufactured by Brown-Forman directly compete in the Florida marketplace with similar products made from grapes indigenous to Florida and entitled to the tax exemption. To compensate in part for the higher taxes imposed upon its products, Brown-Forman must lower the price of its wine products to distributors who pay the extra taxes. Even with this reduction, the retailers must pay the distributors higher prices for Brown-Forman's alcoholic beverages than are charged by competing Florida distributors. Consequently, the retail prices of

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7/ See Initial Brief of Appellants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, at 3 & 13.

Brown-Forman's products are higher than those of competing wine products made from Florida grapes.

ARGUMENT

This Court should affirm the trial court's ruling that Florida Statutes §564.06 (1985) violates the Commerce Clause. This legislation has the impermissible purpose and effect of providing the direct economic advantage of lower tax rates to Florida industry. Although it is theoretically possible for an out-of-state manufacturer to obtain the lower tax rates, the out-of-state manufacturer would have to suffer increased costs and decreased market receptivity in order to obtain these rates.

Other constitutional grounds exist to support the trial court's conclusion of invalidity. The discriminatory tax classifications and exemption denying provisions violate the Import-Export and Equal Protection Clauses of the United States Constitution and constitute an invalid delegation of legislative authority to the Division.

The final sections of this brief address several ancillary arguments set forth by Appellants. First, Appellees point out that summary judgment was not prematurely entered. Second, Appellees assert that they clearly possess a sufficient interest in the constitutionality of this legislation to confer standing. Finally, Appellees refute the claim that Brown-Forman is barred from challenging the facial validity of the statute

simply because it filed an administrative appeal from the Division's adverse ruling.

A. THE STATUTE IS UNCONSTITUTIONAL

1. The statute violates the Commerce Clause

The trial court properly concluded that Florida Statutes § 564.06 (1985) violates the Commerce Clause of the United States Constitution because it discriminates against out-of-state manufacturers and bestows significant commercial advantages only upon manufacturers and importers whose products are made from citrus or grapes indigenous to Florida.

The essence of Commerce Clause jurisprudence is that no state may "impose a tax which discriminates against interstate commerce...by providing a direct commercial advantage to local business." Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984), quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)). In analyzing whether a state statute violates the Commerce Clause, courts apply either a strict rule of invalidity or a more flexible rule that takes into account the local benefits and the burden on interstate commerce. Id. at 270.[8/]

8/ Appellant's suggestion that the Twenty-First Amendment somehow alters this analysis has been squarely rejected by the United States Supreme Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). This Amendment allows Florida to regulate and control the consumption of alcoholic beverages within the state, but it has no effect on the issue of whether the revised Florida Products Exemption violates the Commerce Clause.

The more demanding scrutiny is appropriate when simple economic protectionism is effected by state legislation. Id., citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981);

(continuation of footnote from previous page)

The Bacchus Court considered whether the state's interest in providing a tax exemption for favored alcoholic beverage products sufficiently implicated the principles underlying the Twenty-First Amendment to outweigh the Commerce Clause principles that otherwise were offended. Id. at 275-76. The Court, concluding that Hawaii's discriminatory tax could not survive under this analysis, stated:

> Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: the central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization.

Id. at 276 (citations omitted).

As in Bacchus, the state's interest in encouraging consumption of alcoholic beverages that use the favored products simply does not implicate the principles underlying the Twenty-First Amendment. The Amendment allows Florida, if it chooses, to promote temperance in the state or otherwise "to combat the perceived evils of an unrestricted traffic in liquor." Bacchus Imports, Ltd. v. Dias, supra, at 276. See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 112-114 (1980). It does not, however, allow Florida to discriminate against interstate commerce in order to help the local alcoholic beverage industry sell more products.

Appellant's speculation regarding whether Bacchus would be decided differently today, given the different composition of the Supreme Court, is clearly irrelevant in terms of the present precedential effect of this decision.

Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27, 36-37 (1980). Under these circumstances, the state bears the burden of proving that the statute serves a legitimate local purpose and that this purpose could not be served as well by available, non-discriminatory means. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 136 (1978); Hughes v. Oklahoma, 441 U.S. 322, 335 (1976). See also Maine v. Taylor, 54 U.S.L.W. 4724, 4726 (1986), citing Sporhase v. Nebraska, 458 U.S. 941, 957 (1982); Hunt v. Washington State Apple Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). The proffered justification for the discriminatory state law must be subjected to the "strictest scrutiny." Hughes v. Oklahoma, supra, at 337, and cannot merely be a sham or a post hoc rationalization, id. at 338 n.20.

The less exacting scrutiny is appropriate when the state legislature does not affirmatively discriminate against interstate commerce but merely incidentally affects interstate trade while advancing legitimate state objectives. Under these circumstances, the court adopts a flexible approach, balancing the local benefits of the state law against the burdens it imposes on interstate commerce. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

a. The statute is per se invalid because it constitutes economic protectionism.

The United States Supreme Court has consistently held that "where simple economic protectionism is effected by state

legislation, a virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). State legislation constitutes "economic protectionism" even if it is facially neutral, if it is enacted for a discriminatory purpose or if it has a discriminatory effect. See, e.g., Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984), citing Hunt v. Washington Apple Advertising Comm'n, 432, U.S. 333, 352-53 and Philadelphia v. New Jersey, supra. See also Minnesota Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981).

(i) Discriminatory Purpose

The undisputed purpose of Florida's wine taxing statute is to aid Florida industry.[9/] Indeed, Appellants' briefs not only concede the point, they repeatedly emphasize that the

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9/ Because Appellants acknowledge that this is the purpose of the challenged legislation, the admissibility of the legislative history to establish this purpose is purely an academic issue. Nevertheless, because Appellant Todhunter International, Inc. raises the point, Appellees respond below.

To ascertain whether the purpose of a taxing statute is discriminatory, the Supreme Court has typically examined the legislative history. See, e.g., Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Western and Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648 (1981); Exxon Corp v. Governor of Maryland, 437 U.S. 117 (1978). Official actions of the state legislature may be judicially noticed upon motion of a party pursuant to Fla.Stat. §§90.202(5) and 90.203 or upon the Court's own motion pursuant to Fla.Stat. §90.204. Journals of the House and Senate unquestionably qualify for a judicial notice. See Jacksonville Electric Authority v. Department of Revenue, 486 So.2d 1350, 1354 (Fla. 1st DCA 1986); Amos v. Mosley, 77 So. 619 (Fla. 1917). Additionally, transcripts of the House and Senate hearings are public records and reports that are admissible under an exception to the hearsay rule contained in Fla.Stat. §90.803(8).

legislation is "aimed at bolstering the position of its local industry" by "encouraging" the use of Florida products in manufacturing alcoholic beverages and "enhancing the flagging receptivity of consumers to alcoholic beverages made from crops which Florida is adapted to growing."[10/] Over and over again, Appellants argue that this objective is permissible because the police powers grant states the authority to enact laws that encourage domestic industry and the mere fact that such laws burden interstate companies does not alone establish a Commerce Clause violation.[11/]

This identical argument was advanced and rejected by the United States Supreme Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). In that case, the Court invalidated a Hawaiian liquor tax exemption for alcoholic beverages made from products grown in Hawaii. Like the instant case, Bacchus did not require the Court to guess at the legislature's motivation in enacting the law, "for it is undisputed that the

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10/ See Initial Brief of Appellants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, at 2, 3, 4, 23, 26, 27-28 & 29; Initial Brief of Appellant Todhunter International, Inc., at 1, 3, 7, 12, 13, 14 & 15-16; and Initial Brief of Appellant Jacquin-Florida Distilling Co., Inc., at 2, 5 & 7.

11/ See Initial Brief of Appellants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, at 18, 23, 26 and 27-28; Initial Brief of Appellant Todhunter International, Inc., at 6, 13, 14 & 16; Initial Brief of Appellant Jacquin-Florida Distilling Co., Inc., at 4, 8, 9 & 11.

purpose of the exemption was to aid Hawaiian industry." Id. at 271. This purpose is clearly discriminatory. As the Court noted:

> No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. One of the fundamental purposes of the clause "was to insure... against discriminating State Legislation." Welton v. Missouri, 91 U.S. 275, 280 (1876).

Id. Although competition among the states is a central element of our free trade society, the Commerce Clause prevents a state from favoring local business by placing a higher tax on products manufactured or business operations performed out of the state. Bacchus Imports, Ltd. v. Dias, supra, at 272, citing Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 337 (1977). See also Maine v. Taylor, 54 U.S.L.W. 4724, 4729 (1986) ("Shielding in-state industry from out-of-state competition is almost never a legitimate local purpose"); Walling v. Michigan, 116 U.S. 446, 455 (1886) ("A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first-mentioned State is, in effect, a regulation in restraint of commerce among the States....").

The Florida Legislature's intent in enacting the statutory scheme is discriminatory even if the exemptions were designed to promote a local industry, rather than to discriminate against foreign products. Bacchus Imports, Ltd. v.

Dias, supra, at 273. As the Bacchus Court noted, it could always be said that a discriminatory statute sought to confer a benefit on one party, not to impose a burden on the other. "Consequently, it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers." Id.[12/]

Thus, because the undisputed purpose of the legislation is to promote Florida industry, and because this objective is accomplished by imposing a lower tax on goods manufactured from products indigenous to Florida, the legislation is per se invalid. See id.

(ii) Discriminatory Effect

The wine taxing statute constitutes "economic protectionism" not only because of its clearly discriminatory purpose, but also because it discriminates in practical effect against interstate commerce.

12/ The Hunt Court also rejected the argument that this purpose does not offend the Commerce Clause when the law aims to subsidize a financially-troubled industry rather than to enhance a thriving industry. No principle of Commerce Clause jurisprudence supports such a distinction because "it has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.'" Bacchus Imports, Ltd., supra, at 272, quoting Guy v. Baltimore, 100 U.S. 434, 443 (1880).

Appellants argue that the taxing scheme does not affirmatively discriminate against out-of-state manufacturers because the statute does not expressly limit the preferential tax treatment to products manufactured in Florida. Appellees agree that, rather than mention the word "Florida," the revised statute identifies specific products--which are indigenous to Florida--as entitled to the tax exemption. However, "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." Best & Companies Co. v. Maxwell, 311 U.S. 454, 455 (1940).

Because some of the favored products are also grown in states other than Florida, Appellants maintain that the statutory classifications do not limit preferential tax treatment to Florida manufacturers using Florida crops. Appellants assert that Brown-Forman and other competitors of Florida manufacturers could secure the lower tax rates by altering the composition of their wine and wine coolers to include the favored products.

This argument reflects an overly simplistic understanding of the wine industry. First, it ignores the import of the exemption denying provisions contained in subsection (9) of Florida Statutes § 564.06 (1985). Although the classifications of subsection (2) do not expressly preclude out-of-state manufacturers from obtaining the benefit of the lower tax rates (assuming these manufacturers begin producing their wine from products which grow in Florida), the plain

language of the exemption denying provisions evinces an intent to disallow the preferential tax treatment to out-of-state manufacturers notwithstanding the ingredients of their wine products. Subsection (9) is phrased in extremely broad terms and, as a practical matter, will exclude virtually every out-of-state manufacturer from any tax break it may seek to acquire by bringing itself within the terms of subsection (2).

Second, even assuming that it is possible for an out-of-state manufacturer such as Brown-Forman to obtain the preferential tax treatment, the law discriminates against such manufacturers because it subjects them to economic burdens which need not be borne by Florida manufacturers of wine produced from Florida crops.

Hunt v. Washington State Apple Comm'n., 432 U.S. 333 (1977) is directly on point. In that case, the United States Supreme Court held that a facially neutral law prohibiting the marketing of apples with state grading systems discriminated in practical effect against interstate commerce. The law at issue in Hunt imposed the following burdens on interstate trade in apples:

1. Increased Costs--The law forced out-of-state apple growers to alter their marketing practices to avail themselves of the North Carolina market, thereby increasing the cost of business for out-of-state apple growers without affecting the costs of North Carolina apple growers.

2. Eliminated Competitive Advantages--The law stripped Washington state apple growers of the competitive and economic advantages it had earned by adopting an expensive inspection and grading system but did not have a similar effect on North Carolina apple growers.

3. Leveling Effect--The law protected local apple growers from competing out-of-state products by requiring a uniform grading system that did not reveal the superior quality of apples from Washington state.

All three of these burdens on interstate trade have been established in the instant case. Florida's wine taxing statute clearly imposes increased costs upon Brown-Forman and the overwhelming majority of out-of-state manufacturers who use the vinifera grape, which is not entitled to the lower tax rates, to make wine and wine products.[13/] These products directly compete in the Florida marketplace with similar products made from grapes indigenous to Florida and entitled to the tax exemption. (App. at 703-04). Thus, to compensate for the higher tax levied on these products, out-of-state manufacturers such as Brown-Forman must lower the prices of their wine products to distributors who pay the extra taxes, resulting in a direct loss of profits. Even with this reduction, the retailers must still pay the distributors higher prices for these alcoholic beverages than are charged by competing manufacturers, resulting in retail prices that are higher than those of competing products made from Florida grapes.

13/ California is by far the leading state in the United States for grape production, and California wine is made from the vinifera grape species. (App. at 207).

Moreover, increased costs for out-of-state manufacturers would exist even if they altered their products to obtain the same low tax tax rates accorded to Florida manufacturers. Most of the wine produced in the United States is made from the vinifera species of grapes. See supra note 13. The grape species enumerated in the Florida statute are not grown in commercial quantities in California or any other state west of Texas. (App. at 207). Thus, to obtain the statutorily favored grapes for wine production, out-of-state manufacturers would have to incur transportation costs not incurred by Florida manufacturers of wine made from Florida grapes. (App. at 205-06). Alternatively, these manufacturers would have to meet the expenses of opening additional plants in Florida, expenses which their Florida counterparts need not bear.

In addition to these increased costs, Florida's wine taxing legislation imposes the impermissible burden identified in Hunt of eliminating competitive advantages earned by out-of-state manufacturers. Just as the Washington state apple growers had obtained competitive advantages by adopting an expensive inspection and grading system, Brown-Forman has obtained competitive advantages by advertising California wine as one of its ingredients. The California image has been vitally important in the marketing of Brown-Forman's wine coolers. Sales increased significantly after the name was changed to "California Cooler" and the current advertising campaign specifically emphasizes that California wine is one of the ingredients. (App. at 205-06). These advantages would

obviously be eliminated if Brown-Forman were forced to use wine other than California wine made from the vinifera grape to obtain equal tax treatment in the Florida marketplace.

Finally, as in Hunt, Florida's wine taxing statute has a leveling effect that impermissibly burdens interstate commerce. Just as apples from Washington state were recognized to be of superior quality, California wine indisputably enjoys a reputation superior to that of the wine manufactured from the products entitled to preferential tax treatment in Florida. All three Appellants point out that alcoholic beverages made from the statutorily designated products are presently unpreferred by consumers.[14/] Thus, with free market forces at work, importers and manufacturers of wine produced from the vinifera grape species normally enjoy a distinct market advantage over Florida manufacturers of wine from Florida agricultural products.[15/] However, because of Florida's taxation scheme, out-of-state manufacturers must use the inferior grape species in order to obtain equal tax treatment. As the Supreme Court held in Hunt:

> Such "downgrading" offers the North Carolina apple industry the very sort of protection

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14/ See Initial Brief of Appellants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, at 3; Initial Brief of Appellant Todhunter International, Inc., at 1; and Initial Brief of Appellant Jacquin-Florida Distilling Co., Inc., at 7.

15/ The United States Supreme Court has repeatedly emphasized that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." See, e.g., Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328 (1977); Great A&P Tea Co. v. Cottrell, 424 U.S. 366 (1976) quoting McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944).

> against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium such apples would otherwise command.

Id. at 352.

Thus, in addition to its discriminatory purpose, Florida's wine taxing statute discriminates in practical effect against interstate commerce. It therefore "constitutes 'economic protectionism' in every sense of the phrase." Bacchus Imports, Ltd. v. Dias, supra, at 272.

b. The State has not satisfied its burden of proving that the statute is necessary to serve a legitimate local purpose.

As previously noted, when a state law discriminates on its face or in practical effect against interstate commerce, it is per se invalid. Such a law will only be upheld if the state proves both that the law serves a legitimate local purpose and that this purpose could not be served as well by available, non-discriminatory means. See, e.g., Hughes v. Oklahoma, 441 U.S. 322, 335 (1976). Neither of these propositions has been established in the instant case.

(i) The avowed purpose of the statute is not a legitimate one.

Although the state bears the burden of proving a legitimate local purpose for the legislation, it did not submit

evidence of any particular legislative purpose in the proceedings below.[16/] Nevertheless, the legislative history and the Appellants' briefs assert that the goal of this legislation was to impose taxes in a manner that would promote the use of products indigenous to Florida for the manufacture of alcoholic beverages. As previously discussed at length, this objective is not a "legitimate" one. See supra at 12-15.

(ii) The avowed purpose is not narrowly served by the statute.

Even assuming the legitimacy of a purpose to encourage use of locally grown products, this purpose is not narrowly served by Florida's taxation scheme. Subsection (9) of Florida Statutes § 564.06 (1985) denies the exemption to out-of-state manufacturers and importers even when their products are manufactured with the statutorily favored products. Appellants assert that this subsection is nevertheless consistent with the avowed purpose of encouraging the use of these products. Their theory is that those who are excluded by subsection (9) do not need any incentive to use the favored products because they already receive such incentives from their home states. Again, this theory collapses under practical analysis.

The exemption denying provisions of subsection (9) apply regardless of whether a particular manufacturer or bottler

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16/ Interestingly, Appellant's argument that the legislative history is inadmissible as evidence, see supra note 9, suggests that the record contains no evidence from which the state can meet this burden of proof.

actually benefits from the "economic incentives or advantages" provided by the alcoholic beverage laws of its home state. For example, if California accords favorable tax treatment or otherwise subsidizes beer that is produced within its boundaries, the Florida legislation will deny favorable tax treatment to a California-based manufacturer of wine, even one who uses the statutorily enumerated grape species. Such a result obviously does nothing to further the goal of promoting the use of locally grown products.

In addition, the exemption denying provisions of subsection (9) apply regardless of how de minimus the advantages supplied by the foreign laws are. For example, if California provided only a slight economic advantage to California manufacturers, these manufacturers would not qualify for the more substantial tax break received by Florida manufacturers. Thus, the provisions of subsection (9) do not in any way assure that all manufacturers, regardless of their state of origin, will receive sufficient encouragement to use products indigenous to Florida.

In sum, because the Florida legislation does not narrowly serve a legitimate state interest, the state has not satisfied its heavy burden of establishing a justification for the discriminatory taxation scheme. This Court should accordingly affirm the trial court's holding that Florida Statutes § 564.06 (1985) violates the Commerce Clause of the United States Constitution.

2. **The statute violates the Import-Export Clause**

In addition to violating the Commerce Clause, the challenged tax preference provisions violate the Import-Export Clause of the United States Constitution. Article I, Section 10, clause 2 provides:

> No State shall, without the consent of Congress, lay any imposts or duties on any imports or exports, except where it may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, layed by any State on imports or exports, shall be for the use of the Treasury of the United States....

A tax on imports which is based on the place of origin constitutes an impermissible "impost". See, e.g., Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964); House of Seagrams, Inc. v. State Liquor Authority, 292 N.Y.S. 2d 183 (N.Y.S. Ct. 1968). Such a tax is illegal when it is used to create special protective tariffs or other particular preferences for certain domestic goods. See Michelin Tire Corp. v. Wages, 423 U.S. 276, 286 (1976).

Florida Statutes § 564.06 (1985) does not apply uniformly to all imported goods, but instead is based on the foreign origin of the products. In particular, the exemption denying provisions directly link the availability of the tax preference to the laws, rules or practices of the foreign jurisdictions in which the alcoholic beverages are manufactured or bottled.

3. The statute constitutes an invalid delegation of legislative authority

Aside from violating the Commerce Clause and the Import-Export Clause, the exemption denying provisions unlawfully delegate legislative power to the executive branch. The Legislature may not confer upon an agency the power "to enact a law, or to declare what the law shall be, or to exercise unrestricted discretion in applying a law." State v. Atlantic Coast Line Ry., 47 So. 969, 976 (Fla. 1908). The Legislature may, of course, transfer some authority to designated agencies, but the transfer must be accompanied by definite guidelines to limit the exercise of delegated power. See, e.g., Department of Insurance v. Southeast Volusia Hosp. Dist., 438 So.2d 815, 819 (Fla. 1983); Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978).

The exemption denying provisions lack intelligible standards to guide the Division in exercising the delegated powers. The tax exemption is not available to products manufactured or bottled in states or countries that "impose discriminatory taxes or requirements" or "provide agricultural prices supports or other economic incentives or advantages." The statute does not define these key phrases.

The exemption denying provisions reveal a general purpose to disallow the exemption for manufacturers and bottlers whose home states enact protectionist legislation, but they do not specify which factors must be present in the legislation to render it protectionist. Because the statute is couched in

vague and undefined terms, no one can say with certainty which manufacturers are not entitled to the exemption. As the instant litigation reveals, determining whether a taxation scheme is discriminatory or affords an economic advantage to local manufacturers is a complicated legal and factual inquiry, and not merely a ministerial or administrative task appropriate for an executive agency.

The need for precise guidelines and definitions of key terms is particularly great when the legislation concerns taxes. "Taxes cannot be imposed except in clear and unequivocal language. Taxation by implication is not permitted." Florida S&L Serv. Inc. v. Department of Revenue, 443 So.2d 120, 122 (Fla. 1st DCA 1983). Appropriate limitations must therefore accompany any authority that is given to levy a tax and where such limitations are lacking, an unconstitutional delegation of the taxing power results. See, e.g., Stewart v. Daytona New Smyrna Inlet Dist., 114 So. 545 (Fla. 1927).

Accordingly, because the exemption denying provisions delegate power to the Division without adequate protection against unfairness or unfavoritism, this legislation is an unconstitutional delegation of legislative authority. See High Ridge Management Corp. v. State, 354 So.2d 377, 380 (Fla. 1978); Dickinson v. State, 227, So.2d 36, 37 (Fla. 1969).

4. **The statute violates the Equal Protection Clause**

The exemption denying provisions deny equal protection of the law to out-of-state and foreign alcoholic beverage manu-

facturers. While absolute equality and uniformity are not required in the imposition of excise taxes, any legislative taxing classification must rest on a difference that has a fair and substantial relation to a legitimate object of the legislation so that all persons similarly situated will be treated alike. See Eastern Air Lines v. Department of Revenue, 455 So.2d 311 (Fla. 1984). Thus, to comport with the Equal Protection Clause, a classification must 1) have a legitimate purpose, and 2) be rationally related to achievement of that purpose. See, e.g., Western and Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 668 (1981). As discussed previously, neither of these requirements is satisfied by Florida's excise tax legislation.

Florida taxes alcoholic beverages at substantially different rates depending upon the point of origin of the products. Both the United States and Florida Supreme Courts have expressly condemned this type of classification. See WHYY, Inc. v. Bureau of Glassboro, 393 U.S. 117 (1968); Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978).

B. SUMMARY JUDGMENT WAS PROCEDURALLY APPROPRIATE

In a belated effort to create a disputed fact on appeal, Appellants assert that Brown-Forman could avoid the higher taxes by altering the composition of its wine coolers to include the agricultural products favored by Florida's taxation scheme. Appellants state that Brown-Forman could use wine produced from citrus and the statutorily enumerated grapes

species to manufacture its wine coolers. In support of these assertions, Appellants point out that citrus is grown in California and, although the flavored grape species are not grown in California, these species could perhaps be transported in concentrated form from Florida for manufacture of wine coolers at Brown-Forman's California plant.

Appellants have not introduced any evidence to support their suggestion that altering the composition of Brown-Forman's wine and wine products is an economically viable alternative. Indeed, the affidavits filed in support of the motion for summary judgment clearly establish to the contrary that, because all California Cooler products which are packaged in glass bottles or kegs are packaged in Stockton, California, and because California does not produce the favored grape species, it would be prohibitively expensive to manufacture wine coolers with wine produced from the favored grape species. (App. at 208).

For the first time on appeal, Appellants challenge these affidavits, asserting that "several lines of inquiry remained open" as to whether it would be prohibitively expensive for Brown-Forman to use wine made from grapes indigenous to Florida. Consequently, Appellants argue that summary judgment was prematurely entered.

This argument is unpersuasive for two reasons. First, Appellants had ample opportunity during the several months that discovery was taken and the motion for summary judgment was pending to obtain evidence to refute the affidavits, if such evidence

existed. The "multiplicity of issues" about which Appellants now complain could not have caused them to overlook this issue, since all three of the brief affidavits filed by Brown-Forman specifically attested to the competitive disadvantage suffered by it as a result of the challenged legislation.

Second, and more importantly, even assuming that the Appellants could have created a genuine dispute concerning Brown-Forman's ability to alter the composition of its products, this issue is beside the point. Only a dispute regarding a "material" issue will preclude summary judgment. The material issue is whether Brown-Forman is competitively disadvantaged by the higher tax. This issue must be resolved in the affirmative even if Appellants could somehow establish the dubious proposition that Brown-Forman could alter the wine content of its beverages without incurring increased production or transportation costs. If Brown-Forman altered its wine products to include Florida grapes, it would lose the competitive advantage it has earned by advertising California wine as one of its ingredients.

In sum, the undisputed evidence of record establishes that it would be prohibitively expensive for Brown-Forman to change the wine component of its products and Appellants have had a fully adequate opportunity to refute the evidence. However, this fact, even if it were disputed, is not material to the summary judgment entered herein. As both parties agree, Brown-Forman has earned a competitive advantage by importing and manufacturing wine products made from the vinifera species,

which are subject to the higher tax rates. This advantage will be lost if Brown-Forman is forced to use wine products made from the less desirable Florida grape. Thus, Brown-Forman suffers a direct economic injury from the challenged legislation regardless of whether it continues to import and manufacture the same products, taxed at the higher rate, or whether it alters its products to receive the lower tax rates accorded to wines made from Florida grapes. This injury is sufficient to confer standing upon Brown-Forman. See, e.g., Miller v. Publicker Indus., Inc., 457 So.2d 1374, 1375 (Fla. 1984). Accordingly, the issue for which Appellant claims it needed additional time for discovery is not relevant to this appeal.

C. BROWN-FORMAN HAS STANDING TO CHALLENGE THE STATUTE

1. **Brown-Forman is injured by the statute.**

To have standing to challenge the constitutionality of a statute, a party must show that enforcement of the statute will injuriously affect its personal or property rights. See, e.g., Miller v. Publicker Indus., Inc., supra, at 1375. Brown-Forman is subject to the higher tax rates imposed by Florida Statutes §564.06 (1985). Because Florida's wine taxing statute has a direct, adverse effect on Brown-Forman's ability to sell its wine and wine products in Florida on an equal footing with Florida manufacturers, Brown-Forman plainly has standing to challenge this legislation.

Appellants do not contest Brown-Forman's standing to challenge the constitutionality of the classification provisions

found in subsection (2) of Florida Statutes §564.06 (1985).[17/] Indeed, the Division has expressly ruled that Brown-Forman's products do not qualify for the preferential tax treatment because they do not contain the grape species enumerated in subsection (2). (App. at 257-59).

Appellants do, however, contest Brown-Forman's standing to challenge the constitutionality of the exemption denying provisions found in subsection (9) of Florida Statutes §564.06 (1985). Because the Division denied the exemption to Brown-Forman on the basis of subsection (2) and accordingly did not reach the question of whether Brown-Forman would be disqualified under subsection (9), Appellants argue that Brown-Forman lacks standing to challenge this latter provision.

This argument misconstrues the law of standing. Brown-Forman is asserting its right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on its business. The provisions of Florida Statutes §564.06 (1985) operate together to deprive Brown-Forman of that right. See Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311, 317 (Fla. 1984) (standing to challenge the constitutionality of a statutory provision exists if that provision renders invalid

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17/ Appellant's passing suggestion that Appellees lack standing because they are not in the business of farming vinifera grapes is patently absurd. The challenged legislation subjects Brown-Forman to higher tax rates because its products are manufactured from vinifera grapes. The increased taxes indisputably have a substantial impact on the profits and revenues Brown-Forman obtains in the Florida marketplace. This direct, adverse effect is wholly sufficient to confer standing. See, e.g., Miller v. Publicker Indus., Inc., 457 So.2d 1374 (Fla. 1984).

another provision that directly affects the party's rights or duties). Subsection (2) limits preferential tax treatment to alcoholic beverages manufactured from products indigenous to Florida. Although these products are also grown in states other than Florida, as a practical matter, subsection (9) ensures that out-of-state manufacturers will not qualify for the exemption even if they use the favored products.

As a manufacturer and importer of alcoholic beverages made from the vinifera grape species, Brown-Forman is a member of the class directly addressed and affected by subsection (2). As a manufacturer and bottler of alcoholic beverages in a state other than Florida, Brown-Forman is a member of the class directly addressed and affected by subsection (9). Merely that the Division determined it unnecessary to decide whether subsection (9) would also preclude Brown-Forman's eligibility for the tax exemption does not protect this subsection from constitutional review.

The inability to predict whether subsection (9) applies to Brown-Forman is itself an injury sufficient to confer standing. California has enacted the California Wine and Winegrape Improvement Program, which could well bring Brown-Forman within the terms of subsection (9). However, as discussed supra at 25-26, the exemption-denying provisions are so vague that Brown-Forman cannot be certain whether this law constitutes an "economic advantage or incentive" sufficient to disqualify Brown-Forman from exemptions to which it might otherwise be entitled. Thus, due to the provisions of

subsection (9), Brown-Forman cannot assess whether it would qualify for the exemption even if it altered the composition of its wine products. Brown-Forman can only be certain of its eligibility for the lower tax rate by manufacturing and bottling its alcoholic beverages in Florida and by making those beverages from Florida-grown products. Clearly, Brown-Forman has a sufficiently direct and personal stake in the constitutionality of this statute to confer standing.

2. Brown-Forman has not elected an alternative remedy.

Appellants' final point on appeal is that the trial court erred in refusing to dismiss Brown-Forman's Complaint. The sole basis for this argument is the conclusory assertion that the failure to dismiss contravenes this Court's decision in Key Haven Associated Enterprises, Inc. v. Board of Trustees, 427 So.2d 153 (Fla. 1982).

The procedural background relevant to this argument is as follows. On July 17, 1986, California Cooler filed an application with the Division for an exemption from the tax imposed under Florida Statutes § 564.06(1) (1985) (App. at 261). The Division summarily denied the application without a hearing on August 27, 1986. (App. at 257-59). The basis for this denial was that the species Vitis vinifera, from which California Cooler's products are manufactured, is not one of the enumerated grape species entitled to the lower tax rate. The Division further held that the facial insufficiency of

California Cooler's application obviated the need for a hearing on the issue of whether certain California Statutes are disqualifying pursuant to Florida Statutes § 564.09 (1985).

Pursuant to the Division's Final Order and Rule 9.110(d) of the Florida Rules of Appellate Procedure, California Cooler had 30 days within which to file a Notice of Appeal. (App. at 259). In an abundance of caution, to ensure that its rights were protected, California Cooler filed the Notice of Appeal in the First District Court of Appeal on September 24, 1986. (App. at 256).

Nevertheless, because it had been denied a hearing and an opportunity to properly frame at the administrative level the constitutional challenge to Florida Statutes § 564.06 (1985), California Cooler brought this declaratory action in the Second Judicial Circuit in and for Leon County, Florida.

To promote judicial economy and prevent a duplicity of proceedings, California Cooler immediately filed a motion to hold the administrative appeal in abeyance until the Circuit Court rendered a determination as to the constitutionality of the wine taxing legislation. No briefs were filed, and the administrative appeal was voluntarily dismissed on April 1, 1987, after the Circuit Court entered the summary judgment which is the subject of the instant appeal.

Appellants now argue that the trial court erred in allowing Brown-Forman to proceed with this action challenging the constitutionality of the statute because Brown-Forman had already elected its remedy by filing an administrative appeal

from the Division's denial of California Cooler's application. This argument is based on an erroneous construction of this Court's decision in Key Haven Associated Enterprises, Inc. v. Board of Trustees, 427 So. 2d 153 (Fla. 1982).

Key Haven held that, when an aggrieved party seeks to challenge the facial constitutionality of a statute authorizing agency action, that party may either appeal the administrative action to the District Court of Appeal or it may file a separate action in Circuit Court to challenge the facial validity of the statute. Both of these avenues were approved in order to allow for the least expensive and time-consuming determination of all issues. Id. at 157. See also State Dep't of Transportation v. Hendry Corp., 500 So.2d 218 (Fla. 1st DCA 1986).

California Cooler filed its administrative appeal within the allotted 30 days to preserve its right to challenge the constitutionality of Florida Statutes § 564.06 (1985). It quickly became apparent, however, that this course of action ultimately would be inefficient. Because the Division had summarily denied California Cooler the opportunity to create a sufficient record upon which to base a constitutional challenge on appeal, a favorable decision from the District Court of Appeal would simply have resulted in a remand to the administrative level for the presentation of evidence. See, e.g., Hays v. Department of Business Regulation, 418 So.2d 331 (Fla. 3d DCA 1982). Consequently, California Cooler immediately filed a declaratory action in Circuit Court and a motion to stay the administrative appeal. California Cooler thereafter filed a

motion to extend the time for filing briefs until after the Circuit Court determined the constitutional validity of the challenged statute.

The Circuit Court action resulted in a just and efficient determination of this controversy. Because neither the parties nor the Court expended any time or effort in the administrative appeal, which was ultimately dismissed, the policies underlying the Key Haven decision were advanced.

Moreover, the Circuit Court clearly had jurisdiction to decide this action. As this Court noted in Key Haven, "the determination of whether a particular controversy may be taken out of the administrative process and into a circuit court is a question of judicial policy and not a matter of judicial jurisdiction." Key Haven Associated Enterprises, Inc. v. Board of Trustees, supra, at 157. Accordingly, the Key Haven case affords no basis for disturbing the trial court's considered decision regarding the facial validity of Florida Statutes § 564.06 (1985).

CONCLUSION

The acknowledged purpose and the obvious effect of the revised Florida Products Exemption is to favor in-state economic interests over out-of-state and foreign interests. Such discrimination is flatly prohibited by the Commerce Clause, the Import-Export Clause, and the Equal Protection Clause of the United States Constitution. Additionally, the terms of the exemption denying provisions are so vague and ill-defined as to

constitute an invalid delegation of legislative authority to the Division. Accordingly, for all of the foregoing reasons, this Court should affirm the trial court's ruling that Florida Statutes § 564.06 (1985) is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true correct copy of the foregoing Answer Brief of Appellee Brown-Forman Corporation was served by mail this 15th day of May, 1987, to the attorneys listed below.

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