ORIGINAL

SUPREME COURT OF THE STATE OF FLORIDA

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF BUSINESS
REGULATION, AND OFFICE OF THE
COMPTROLLER, STATE OF FLORIDA,

Defendants/Appellants/
Cross-Appellees,

v.

CASE NO.: 70,368

McKESSON CORPORATION,

Plaintiff/Appellee/
Cross-Appellant.

_____/

On Appeal from the District Court of Appeal, First District,
State of Florida, Case No. BS-402

APPELLEE AND CROSS-APPELLANT MCKESSON CORPORATION'S ANSWER BRIEF

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TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Appellants filed an Appendix to their Brief in light of the inability of the Clerk of Court for the Circuit Court of the Second Judicial Circuit, In and For Leon County, Florida, to prepare a timely Record on Appeal, and cited to that Appendix in lieu of a Record. Appellee McKesson Corporation has also filed an Appendix for the same reason. McKesson's Appendix incorporates Appellants' Appendix and supplements their Appendix with additional documents. Thus, Appellee's Appendix, which retains Appellants' initial numbering, includes all Appellants' and Appellee's references. Appellee will cite in its Brief to documents in the Appendix: (A. ___.).

STATEMENT OF THE CASE AND OF THE FACTS

Introduction

Plaintiff-Appellee-Cross-Appellant McKesson Corporation ("McKesson"), which is a distributor of alcoholic beverages in Florida, challenges the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985), which impose taxes on the distribution of alcoholic beverages.

McKesson maintains that the Florida statutes discriminate against interstate and foreign commerce in violation of the federal Constitution's Commerce Clause and Import-Export Clause and also encroach upon the federal government's exclusive power over foreign affairs.

McKesson submits this statement of the case and the facts because appellants' statements are incomplete.

The Revised Florida Products Exemption

Before the United States Supreme Court's decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), which declared a Hawaii liquor tax exemption for local products unconstitutional under the Commerce Clause, Florida's alcoholic beverage laws granted an excise tax exemption to beverages manufactured and bottled in Florida from Florida products. (A. 1-3.) The similarity between the Florida law, sections 564.06 and 565.12, Florida Statutes (Supp. 1984) ("Florida Products Exemption"), and the unconstitutional Hawaii law prompted the Florida legislature to alter the language of the statute. (A. 386-485.)

During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). The legislature removed the word "Florida" from the sections and substituted language identifying certain agricultural products whose use would entitle the manufacturers and distributors to a tax break. The sections, one for wines, section 564.06, and one for distilled spirits, section 565.12, divide into three relevant parts. (A. 4-7A.)

First, the sections impose a per gallon tax on the alcoholic beverages that relates to the percentage of alcohol.

Second, the sections provide a tax exemption for wines and a tax preference for distilled spirits when the alcoholic content of the beverages is manufactured exclusively from certain designated products. The Florida statutes' designated products are all Florida products.

Florida, which cannot produce the grape species that grape producers generally produce for the manufacture of wine and wine coolers, Vitis Vinifera, has designated for preferential treatment the six grape species that Florida does produce for the manufacture of wine and wine coolers, Vitis Rotundifolia, Vitis Aestivalis ssp. Simpsoni, Vitis Aestivalis ssp. Smalliana, Vitis Shuttleworthii, Vitis Munsoniana, and Vitis Berlandieri). (A. 370-71.)

Florida, which is one of the few states to produce citrus and is the predominant producer of citrus, has designated for preferential treatment citrus fruits, citrus products, and citrus byproducts. (A. 375.) Florida, which is also one of the few states to produce sugarcane and is the leader in the production of sugarcane, has designated for preferential treatment sugarcane and sugarcane byproducts. (A. 375.)

Third, the sections authorize the Division of Alcoholic Beverages and Tobacco to review the laws and programs of the applicant's home state or country to determine whether the state or country grants the applicant any economic advantage and to apply a set of provisions to take back the tax exemption or tax reduction ("Take Back Provisions"). §§ 564.06 and 565.12, Fla. Stat. (1985).

McKesson's Action

McKesson does business in Florida as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors. (A. 365-66.) McKesson, which is licensed under section 561.14, Florida Statutes (1985), has distributed domestic and imported alcoholic beverages at wholesale and has paid excise taxes on alcoholic beverages under sections 564.06 and 565.12, Florida Statutes (1985). (A. 365-66.)

On September 3, 1986, McKesson filed a Complaint in the Circuit Court, Second Judicial Circuit, Leon County, against the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and the Office of the

Comptroller (together, "the State"), challenging Florida's alcoholic beverage tax as unconstitutional under the federal and state constitutions. (A. 30-60.) Jacquin-Florida Distilling Co., Inc. ("Jacquin") and Todhunter International, Inc. ("Todhunter"), two Florida manufacturers who profit from the Florida statutes' protectionist effect, intervened as defendants. (A. 302-04.)

McKesson in its Complaint prays that the Court declare that the Florida statutes violate the United States and Florida Constitutions and, accordingly, are void and unenforceable. McKesson also prays for a refund of taxes. (A. 30-40.)

On October 17, 1986, McKesson filed motions for partial summary judgment and for a preliminary injunction. (A. 306-492.) McKesson argued that: sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against interstate and foreign commerce in violation of the Commerce Clause; impermissibly involve Florida in foreign affairs and international relations; and the sections impermissibly discriminate against foreign imports in violation of the Import-Export Clause. (A. 306-492.)

On November 12 and 26, 1986, Judge Charles E. Miner, Jr. of the Circuit Court heard arguments. On March 20, 1987, the Court entered an Order that found that McKesson has standing to challenge the constitutionality of the tax statutes and that declared unconstitutional those portions of the statutes that grant tax exemptions or preferences. The Court's Order included a preliminary injunction that enjoined the State

from enforcing the unconstitutional statutory provisions. The Court stated that its declaration of unconstitutionality would operate only prospectively. (A. 278-80.)

On the same day, March 20, 1987, the State filed a Notice of Appeal, which automatically caused a stay of the Circuit Court's Order under Fla. R. App. P. 9.310(b)(2). (A. 285.) On April 15, 1987, McKesson filed its notice of cross appeal. (A. 561-62.) McKesson in its cross appeal challenges the Circuit Court's decision to restrict its declaration of unconstitutionality and thereby bar retroactive relief to McKesson.

On April 13, 1987, the District Court of Appeal, First District, certified that the case on appeal is of great public importance requiring immediate resolution by the Florida Supreme Court. On April 22, 1987, this Court accepted jurisdiction.

QUESTIONS PRESENTED

I. WHETHER MCKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

II. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

III. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

IV. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

V. WHETHER THE CIRCUIT COURT PROPERLY ENTERTAINED MCKESSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

VI. WHETHER, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, AS WELL AS FLORIDA LAW, MCKESSON IS ENTITLED TO A REFUND OF THE DIFFERENCE BETWEEN THE TAXES ON MCKESSON'S DISFAVORED PRODUCTS AND THE TAXES ON OTHERS' UNCONSTITUTIONALLY FAVORED PRODUCTS.

SUMMARY OF ARGUMENT

Under the United States Supreme Court's decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), McKesson has standing to challenge the constitutionality of the Revised Florida Products Exemption. McKesson, as an alcoholic beverage distributor, has paid excise taxes on its products to the State under the challenged statutes. Further, Florida's enforcement of the tax has adversely affected McKesson's property rights.

McKesson maintains that the Circuit Court correctly determined that the Revised Florida Products Exemption violates the United States Constitution's Commerce Clause.

The United States Supreme Court has declared that state statutes that either reveal a discriminatory purpose or cause a discriminatory effect are virtually per se invalid under the Commerce Clause. The Court has squarely established that the Commerce Clause forbids discrimination, whether forthright or ingenious. Therefore, this Court has a federal constitutional obligation to determine the legislature's true purpose in enacting the Revised Florida Products Exemption and, also, to determine whether the statutes, in their practical effect, discriminate against interstate commerce.

The Revised Florida Products Exemption's protectionist purpose makes the statutes unconstitutional. This Court's analysis of the statutes and their history will reveal that the Florida legislature intentionally designed the statutes to continue Florida's historic alcoholic beverage tax policies of protecting Florida products and industry. Appellants cannot

contradict the evidence from the legislative history that the legislature sought to circumvent the holding in Bacchus and preserve the former Florida Products Exemption's protectionist effect.

The Revised Florida Products Exemption's practical effect -- a discrimination against interstate commerce -- also makes the statutes unconstitutional. The Florida statutes effectively tax the alcoholic beverage products from Florida and a few other states and countries at one rate and tax the products from the remaining states and countries at a higher rate. Although Florida may enact laws to encourage local industry, Florida may not protect local industry by imposing a discriminatory burden upon other states' and countries' industry. The Revised Florida Products Exemption imposes a discriminatory burden upon all other states and countries whose geography and climate do not permit them to produce the favored agricultural products. Moreover, the statutes' Take Back Provisions permit the State to discriminate further against interstate commerce by preventing out-of-state manufacturers and distributors who use the Florida agricultural products from receiving the tax breaks.

Even if the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not per se unconstitutional, the statutes still would violate the Commerce Clause because they impose an excessive burden on interstate commerce. The United States Supreme Court has noted that the Commerce Clause does not bar state legislation that

affects interstate commerce only incidentally, that advances legitimate local interests, and employs the least burdensome alternative. However, the Revised Florida Products Exemption does not survive scrutiny under this standard. First, the statutes do not directly affect only local commerce and, thus, only incidentally affect interstate commerce. Rather, the tax scheme directly burdens out-of-state producers who do not grow the Florida products. Second, the statutes advance the illegitimate purpose of encouraging the sale of Florida products at the expense of non-Florida products. Third, the statutes do not employ the least burdensome alternative. Florida can effectively promote its industry without violating the Commerce Clause.

McKesson also maintains that the Revised Florida Products Exemption impermissibly involves Florida in foreign affairs and international relations. The Florida statutes' Take Back Provisions disrupt the federal government's exclusive jurisdiction over foreign affairs by requiring Florida to make determinations concerning other countries' activities. The statutes permit Florida to obstruct various federal trade programs. The Florida statutes interfere with the federal government's resolution of delicate international trade issues.

McKesson also maintains that the Revised Florida Products Exemption impermissibly discriminates against foreign imports and, thus, violates the United States Constitution's Import-Export Clause. The Florida statutes effectively impose a duty upon imports by discriminating against other countries'

products and, under the Take Back Provisions, by authorizing the denial of tax preferences to foreign products based on their place of origin.

The Circuit Court properly entertained McKesson's motion for partial summary judgment. The Circuit Court realized that although the State suggested the existence of factual controversies, McKesson and the State did not disagree on the fundamental constitutional facts concerning the Revised Florida Products Exemption. The Circuit Court properly concluded that the State had not, and could not, present a controversy on any genuine issue of material fact.

McKesson is entitled to an appropriate tax refund as a remedy for its constitutional injury as a result of Florida's discrimination. Florida law authorizes McKesson's recovery of taxes. The Circuit Court improperly barred retroactive relief to McKesson, which has timely pursued its challenge to the statutes.

ARGUMENT

I. McKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

McKesson has standing to challenge the constitutionality of the Revised Florida Products Exemption under the federal Constitution.

The United States Supreme Court, in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), established that a liquor wholesaler has standing to challenge the constitutionality of a state liquor excise tax upon the wholesaler's products. The

Court in Bacchus held that when a wholesaler must pay the tax on its products to the state, the wholesaler has standing to challenge the tax. Id. at 267.

This Court, in Miller v. Publicker Industries, Inc., 457 So.2d 1374 (Fla. 1984), adopted a similar expansive view of standing in a case challenging the constitutionality of a Florida gasohol tax scheme. This Court held that a plaintiff has standing to challenge the constitutionality of a tax statute if enforcement of the statute adversely affects the plaintiff's personal or property rights, even if the plaintiff is not liable for the tax. Id. at 1375-76.

Under Bacchus and Publicker, McKesson plainly has standing to challenge the constitutionality of the Florida statutes. McKesson, as a distributor of alcoholic beverages, is liable for the tax. (A. 356-66.) Under sections 564.06 and 565.12, Florida Statutes (1985), McKesson, as a distributor, has paid the excise taxes on its products to the State whether its customers have paid for products or not. (A. 366.) Moreover, McKesson's products, which did not receive the tax exemptions and preferences, have competed with other distributors' products, which did receive the tax exemptions and preferences. (A. 366-68.) As a result, McKesson has suffered economic losses. (A. 368.) Consequently, Florida's enforcement of the tax has adversely affected McKesson's property rights.

Appellants' attempts to question McKesson's standing in this case ignore the Supreme Court's decision in Bacchus.

Appellants argue that McKesson does not have standing to challenge the tax statutes either because McKesson is not a producer of agricultural products or because McKesson is not a manufacturer of alchoholic beverages. However, in Bacchus, in which McKesson was a plaintiff, the Supreme Court acknowledged McKesson's standing to challenge suspect tax statutes even though the company did not claim to be either a producer or a manufacturer. Bacchus Imports, Ltd. v. Diaz, 468 U.S. 263, 266-67 (1984). A distributor who pays the unconstitutional taxes may attack the constitutionality of a state's attempt to favor its own parochial interests. Id. at 267.

Appellants also contend that McKesson does not have standing to challenge the tax statute because it could receive the tax exemptions and preferences by selling the favored products. The majority in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), rejected a similar argument suggested by the dissent. The Supreme Court ruled that the taxpayer who sells disfavored products has the financial interest to litigate the constitutionality of a state's statutes.[1]

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1 Even if appellants' argument that McKesson must establish that its distribution of products implicates the Take Back Provisions were accurate, McKesson, in fact, does distribute products that would qualify for the Revised Florida Products Exemption's tax preference but for its Take Back Provisions. McKesson distributes Mt. Gay Rum from Barbados. (A. 367-68.) Mt. Gay Rum, a sugarcane product, would qualify for the tax preference under section 565.12(1)(b), Florida Statutes (1985), but for the Take Back Provisions.

Barbados, as a beneficiary country under the terms of the Caribbean Basin Economic Recovery Act, 19 U.S.C.A. § 2702 (West Supp. 1986), and Presidential Proclamation 5133 of November 30, 1983, receives trade benefits from the United States for its alcoholic beverages. Under the Act, Barbados cooperates with the United States in administering the trade

FOOTNOTE 1 CONTINUED ON NEXT PAGE

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

The Commerce Clause enforces our overriding national interest in free, unrestricted trade among the states through a national common market. See Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). The Commerce Clause federalizes regulation of foreign and interstate commerce and restricts internecine actions among the states. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-34, 69 S.Ct. 657, 93 L.Ed. 865 (1949). Thus, each state cannot "'legislate according to its estimate of its own interests [and] the importance of its own products.'" Id. at 533 (quoting Story, The Constitution, §§ 259, 260).

The United States Supreme Court has adopted a two-tiered approach in reviewing Commerce Clause cases. Where state legislation effects economic protectionism, the Court has declared a "virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Where state legislation advancing legitimate local interests affects interstate commerce only incidentally, and employs the least burdensome alternative, the Court will permit the law. Id.

FOOTNOTE 1 CONTINUED FROM PREVIOUS PAGE
benefits. See 19 U.S.C.A. § 2702(c)(11). In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers. Therefore, under the Take Back Provisions, McKesson's Mt. Gay Rum from Barbados, which would otherwise qualify for a tax preference, is ineligible to receive Florida's unconstitutional tax break.

The Revised Florida Products Exemption's scheme of tax exemptions and preferences fails on both levels of analysis.[2] Florida's attempt to protect its local commerce at the expense of interstate competition offends the cardinal rule of Commerce Clause jurisprudence that no state may erect a tax scheme that provides a direct commercial advantage to local business by discriminating against interstate commerce. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984). The Commerce Clause does not allow Florida to advance its parochial interests at our national economy's expense.

A. The Revised Florida Products Exemption Constitutes Economic Protectionism and, Therefore, Is Unconstitutional.

This Court may find economic protectionism either in discriminatory purpose or in discriminatory effect. Either condition is sufficient to condemn a statute. Bacchus Imports, Ltd. v. Dias, 468 U.S. at 270. The "evil of protectionism can reside in legislative means as well as legislative ends." Philadelphia v. New Jersey, 437 U.S. at 626. The Florida legislation is demonstrably protectionist and discriminatory in both its purpose and its effect.

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2 Appellants' suggestion that the Constitution's Twenty-first Amendment, which allows Florida to regulate the consumption of alcoholic beverages within the state, is a "factor" in this case is frivolous. Appellants acknowledge repeatedly that the Florida legislature passed the Revised Florida Products Exemption in order to increase the consumption of alcoholic beverages that use Florida's products. The Supreme Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984), concluding that the Amendment did not save Hawaii's discriminatory tax scheme, noted that the "central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." See also Brown-Forman Distillers Corp. v. New York State Liquor

FOOTNOTE 2 CONTINUED ON NEXT PAGE

1. The Florida Legislature Designed the Florida Law to Protect Florida Commerce from Interstate Competition.

This Court must examine the Florida statutes for discriminatory purpose. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984); Philadelphia v. New Jersey, 437 U.S. at 626. Thus, as a matter of federal constitutional law, this Court must consider not only the Florida statutes' language but also their legislative history to determine the Florida legislature's true purpose in enacting the statutes.[3]

The United States Supreme Court, in reviewing challenges to state statutes on Commerce Clause grounds, has focused on legislative history to identify the state legislature's intent. See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 141-42, n.8, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (state Senate committee testimony supported the inference that the legislature had passed a challenged provision in response to the pleas of local businesses seeking protection from competition); Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law in Commerce Clause challenge).

FOOTNOTE 2 CONTINUED FROM PREVIOUS PAGE
Authority, 476 U.S. ___, 106 S.Ct. 2080, 90 L.Ed.2d 552, 563-64 (1986).

3 Contrary to Appellants' suggestion, McKesson is not invoking legislative history to illuminate the statutes' construction, but rather to reveal the legislature's purpose in enacting the challenged statutes. Compare Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882 (Fla. 1983).

Moreover, the Supreme Court in Commerce Clause cases has indicated that courts cannot restrict their review of state statutes to the language of the statute. As the Court stated in Best & Co. v. Maxwell, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed. 275 (1940), "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." Thus, even if the Florida statutes' language appeared non-discriminatory, this Court would need to explore the legislative history to determine the legislature's true purpose. See Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 325-328 (1977) (legislative history, including a governor's statements, may establish legislative purpose); cf. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (legislative history is a source for determining whether an ostensibly neutral statute is racially discriminatory).

Upon review, the Revised Florida Products Exemption's history reveals the Florida legislature's protectionist purpose for the tax scheme and is, therefore, critically relevant to this Court's determination of the constitutionality of the challenged law. The Florida legislature, intending to protect certain Florida agricultural products, and to protect the manufacturers using those products, enacted the Revised Florida Products Exemption. From among the legion of agricultural products used for the making of wines and distilled spirits, the legislature decided to favor citrus, sugarcane, and certain species of grapes by granting these products a commercial

advantage in the market. In its selectivity, the legislature knew that only Florida and a few other states produce the favored agricultural products in commercial quantities.

Thus, this Court's review of the Florida statutes' legislative history will reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism.[4] Two dominant themes emerge.

First, the Florida legislature intended the new statutory scheme to retain the protectionist character of the former Florida Products Exemption, which unconstitutionally discriminated in favor of Florida manufacturers and distributors and Florida products.

Representative Jones, a sponsor of the new legislation, explained the purpose of the Revised Florida Products Exemption to three Florida House of Representatives Committees. On April 23, 1985, before the House Committee on Regulated Industries and Licensing, Mr. Jones stated:

> The legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country. . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

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4 McKesson asked the Circuit Court to take judicial notice of the legislative history. (A. 381-492.) This Court, of course, may also take judicial notice. Section 90.202 of the Florida Evidence Code does not limit judicial notice to trial courts. See also Fla. Evid. Code § 90.207 (1986) (Sponsors' note, citing cases).

(A. 387.) Before the House Committee on Appropriations, Mr. Jones stated: "What we're doing here is to retain those 300 jobs that have been developed in Florida as a result of our policies towards Florida products." (A. 423.) Representative Hargrett, a co-sponsor of the legislation, testified before the same Committee:

> Chairman, ladies and gentlemen of the Committee, I just wanted to say this bill is necessary in order to preserve the home state wine industry that we've begin [sic.] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill.

(A. 426-27.) During Mr. Jones' testimony before the Appropriations Committee, the Chairman commented that representatives from the grape industry had contacted him. Mr. Jones assured him that the legislation would in fact "take care of them." (A. 428.) Before the House Committee on Finance and Taxation, Mr. Jones stated:

> I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. . . .
>
> With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits.

(A. 415-18.)

Before the Florida Senate Commerce Committee on May 9, 1985, Senator Crawford, the Senate sponsor, reiterated the same theme:

> Frankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. . . .
>
> It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State.

(A. 433.) Before the Florida Senate Finance and Taxation Committee on May 14, 1985, Senator Crawford stated that the bill "maintains the status quo on the current exemption that we have." (A. 449.)

On the House floor, during the May 28, 1985 debate of the Revised Florida Products Exemption bills, Mr. Jones noted that Florida had "granted a benefit to the distillers in Florida using Florida products for many years." (A. 461.) Mr. Jones explained that while the United States Supreme Court's decision in Bacchus had disturbed the status quo, the sponsors did not intend to abandon the tax exemption. "We're simply trying to protect what was in place prior to this Supreme Court decision." (A. 461-62.) During the House floor debates on May 28, 1985 and May 31, 1985, Mr. Jones referred to the legislation as "Florida Products bills." (A. 460-69.)

Second, the Florida legislators hoped to circumvent the Commerce Clause holding in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), by continuing to favor Florida commerce.

During the the Senate Commerce Committee deliberations, the Chairman responded to another senator's concern that, while encouraging the use of Florida products, the tax exemptions might also encourage the use of out-of-state citrus, grapes, and sugarcane:

> [t]he reality is we have a way constitutionally of giving support to industry that would locate in this state, would give jobs to this state and would pay taxes in the state and the way we're doing it it would meet the criteria established by the Supreme Court and all the practical effects in reality is going to accomplish exactly what we want. We could argue theory but I think reality is much more important.

(A. 443-44.) Senator McPherson added --

> [w]hat Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that.

(A. 444-45.) Immediately before the Senate Committee voted to adopt the bill, Senator McPherson concluded:

> [t]he way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida.

(A. 446.)

During the Florida Senate Finance and Taxation Committee meeting on May 14, 1985, Senator Grant objected that the sponsors of the Revised Florida Products Exemption intended

to maintain the protection of the Florida alcoholic beverage industry but would not continue to protect the Florida gasohol industry, and argued for the protection of both industries:

> Senator, I thought that one bill addressed, that both bills in fact address the same point. I thought it was the production of jobs, the continuation of use of Florida products without saying so because that was a constitutional issue . . . I wonder why we want to continue one exemption and remove another.

(A. 450-51.) Senator Crawford, in response, explained that the sponsors had found disagreement among Florida producers regarding how the legislature should proceed with gasohol legislation, but no such disagreement among Florida producers regarding how the legislature should proceed with alcoholic beverage legislation. (A. 451.) Senator McPherson then added this candid observation:

> I think the difference is that by exercising your good bill here will help Florida people, Florida businesses and the exemption of the gasohol the way it was so written was allowing foreign people to take advantage of it. It's the philosophy as far as exemptions is probably the same, but it's who gains is what's important.

(A. 452.)

Thus, in essence, the legislature altered the former Florida Products Exemption but maintained the protectionist purpose and effect in the new law.[5]

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5 Appellants cannot refute this legislative history. Only Todhunter suggests that the legislative history offers a competing legislative purpose for the statutes, and Todhunter does not offer a statement from one of the legislative sponsors or even from one of the legislators. Rather, Todhunter relies
FOOTNOTE 5 CONTINUED ON NEXT PAGE

2. The Florida Law Effectively Protects Florida Commerce from Interstate and Foreign Competition.

Florida's producers and other states' and countries' producers compete for sales to manufacturers of alcoholic beverages. With respect to wine and wine coolers, Florida's producers cannot grow the species that most consumers prefer, Vinifera, but can grow the Florida species. They compete with other states' and countries' producers, who can grow the Vinifera species. (A. 369-72.) With respect to liquor, Florida's producers of citrus and sugarcane compete with other states' and countries' producers, who frequently cannot grow citrus or sugarcane but can grow alternative crops. (A. 374-80.)

The Revised Florida Products Exemption favors Florida's producers in the competition in interstate and foreign markets and prevents other states' and countries' producers from competing on equal terms. With respect to wine and wine coolers, the Florida statute counters Florida's inability to produce the preferred Vinifera species and other states' and countries' ability to produce the preferred species by providing tax exemptions only for species which Florida can produce. (A. 369-72.) With respect to liquor, the Florida statute builds on Florida's historic preeminence in the production of citrus and sugarcane and many other states' and countries' inability to produce citrus and sugarcane by

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FOOTNOTE 5 CONTINUED FROM PREVIOUS PAGE
on a quote from a lobbyist representing the Wine and Spirits Distributors of Florida. (Todhunter's Brief at 11.)

providing tax preferences only for citrus and sugarcane. (A. 374-80.)

In other words, Florida has decreed that its grape, citrus, and sugarcane producers shall have a commercial advantage over certain other states' and countries' producers in the competition for sales to the manufacturers of alcoholic beverages. Thus, the manufacturers who use the Florida law's favored products obtain a commercial advantage from their lowered cost as a result of the tax breaks. (A. 374-80.) Such anticompetitive protectionism clashes with "the common market created by the Framers of the Constitution." Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, Inc. 424 U.S. 366, 380, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976).

The Supreme Court has invoked the Commerce Clause to restrict the means by which a state may constitutionally seek to promote its own industry. The Court has repeatedly applied Justice Cardozo's formulation of the rule:

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527, 55 S.Ct. 497, 79 L.Ed. 1032 (1935).

In reviewing a state's restrictions on interstate commerce, the Supreme Court looks to the restrictions' practical effect. For example, in Dean Milk Co. v. Madison, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), the Court found that a city regulation, which on its face purported to

advance health and safety, had the practical effect of discriminating against interstate commerce, rendering the regulation unconstitutional. The Court in Best & Co. v. Maxwell, 311 U.S. 454 (1940), stated:

> The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Id. at 455-56. See also Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (Court must focus on state tax provisions' "practical effect"); Maryland v. Louisiana, 451 U.S. 725, 756, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (Court must assess state tax "in light of its actual effect"); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 37, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) (the Court's "principal focus of inquiry must be the practical operation of the statute").

The Florida Supreme Court has recognized the United States Supreme Court's approach. For example, in Delta Air Lines, Inc. v. Department of Revenue, 455 So. 2d 317 (Fla. 1984), the Florida Supreme Court held unconstitutional a statute that discriminated against interstate commerce by providing a commercial advantage to local commerce. The Court recognized that the statute's practical effect was the focus of inquiry. Id. at 320.

The Revised Florida Products Exemption, which establishes a preferential trade area for the designated products, offends the Commerce Clause through its practical

effect. For example, the winemaker who uses a grape species that does not grow in Florida incurs higher taxes than a winemaker who uses Florida grapes. As another example, the vodka manufacturer who uses Maine potatoes incurs higher taxes than the vodka manufacturer who uses Florida citrus. As another example, the brandy distiller who utilizes Barbados beet sugar rather than a prime Florida agricultural product, sugarcane, does not qualify its product for an economic advantage. Thus, the Florida act disrupts the interstate movement of other states' and countries' products that do not receive the Florida tax break and that compete in the Florida market with Florida's products. (A. 374-80.)

The United States district court in Mapco, Inc. v. Grunder, 470 F. Supp. 401 (N.D. Ohio 1979), declared unconstitutional an Ohio statute imposing taxes on coal whose practical effect resembled the Florida law's effect. The Ohio legislature did not expressly restrict tax advantages to Ohio coal, but subjected high-sulfur coal to a lower tax rate than low-sulfur coal. The vast bulk of Ohio's coal production was of high-sulfur. The court found that the tax disadvantaged the interstate movement of low-sulfur coal and thereby constituted a prima facie violation of the Commerce Clause. The court noted: "[s]urely a competent purchasing agent of a steam-electricity generating utility would consider this . . . price differential when deciding whether to purchase Ohio high-sulfur coal or Kentucky low-sulfur coal." Id. at 408.

Moreover, the discriminatory Florida tax statutes divest the out-of-state growers of any competitive advantages and confer advantages on local growers. Florida, which cannot grow Vitis Vinifera, the grape species that consumers usually prefer, has decided to discriminate against Vinifera and subsidize the grape species it can produce. (A. 369-72.) Florida, whose predominant products face competition for markets from other states' products, has attempted to affect many other states' ability to compete. (A. 375-77.)

The Supreme Court in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), found unconstitutional a North Carolina statute that had a similar practical effect. The North Carolina statute interfered with the prevailing free market forces by boosting the competitive advantage of local growers and dealers at the expense of out-of-state growers and dealers. Id. at 350-52. The statute offered the North Carolina apple industry "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." Id. at 352. The Florida tax scheme exhibits the same defect.

Under the Commerce Clause, Florida cannot pass a law decreeing that products from Florida and a few other states will be taxed at one rate and products from the remaining states will be taxed at a higher rate.[6] The Revised Florida

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6 In CTS Corp. v. Dynamics Corp. of America, 55 U.S.L.W. 4478 (April 21, 1987) (Nos. 86-71, 86-97), the Supreme Court upheld an Indiana law concerning corporate takeover attempts. The
FOOTNOTE 6 CONTINUED ON NEXT PAGE

Products Exemption has the same practical effect. As the court stated in Mapco, Inc. v. Grunder, where in practical operation a state's statute favors its own products, it "is no less invalid because it is not cast in terms of location. The commerce clause forbids both forthright and insidious discrimination." 470 F. Supp. at 410 n.14.

Appellants repeatedly invoke Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), for the proposition that a state may enact laws that have the purpose and effect of encouraging local commerce, but ignored that the Commerce Clause circumscribes the means by which a state constitutionally may seek to promote its own commerce. The Supreme Court in Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 877 n.6, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), summarized the Bacchus holding:

> Thus, in Bacchus, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry" [468 U.S. 263, 271 (1984)], we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business [id. at 278].

FOOTNOTE 6 CONTINUED FROM PREVIOUS PAGE
Indiana law, which applies only to Indiana corporations, affects out-of-state offerors, seeking to acquire an Indiana corporation, and local offerors equally. The Revised Florida Products Exemption does not affect out-of-state producers and local producers equally, but rather discriminates against a majority of out-of-state producers in order to promote the producers of Florida's products.

Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. The tax statutes' purpose is illegitimate, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. See Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." Guy v. Baltimore, 100 U.S. 434, 443, 25 L.Ed.743 (1880).

The State admits that the Florida legislature sought to increase the market share of Florida's products, while it sought to maintain Florida's excise tax base. (State's Brief at 2, 27-28.) Florida has accomplished its objectives by disproportionately imposing its alcoholic beverage excise tax burden on out-of-state commerce, while granting tax breaks to local commerce. In other words, Florida's tax scheme requires interstate commerce to fund Florida's protectionism.

Appellants argue that the Florida statutes do not offend the federal Constitution because the statutes do not discriminate against producers in some states and countries that are able to produce the Florida products. In effect, appellants ignore that the constitutional issue is not whether the Florida statutes effectively discriminate against commerce from every other state and country, but whether it effectively discriminates against commerce from any other state or country.

When the United States Supreme Court, in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), reviewed a North Carolina statute that discriminated against states that used more rigorous grading standards for apples than North Carolina used, the Supreme Court specifically noted that the statute did not discriminate against all states that exported apples to North Carolina but only against seven other states that had their own grading systems. The Supreme Court rejected North Carolina's argument that its statute did not distinguish states by name and ruled that the statute, which primarily imposed a barrier against Washington's apples, violated the Commerce Clause.

When the United States Supreme Court, in Sporhase v. Nebraska ex. rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982), reviewed a Nebraska statute that discriminated against states that did not grant reciprocal rights to transport ground water, the Supreme Court determined that the statute, which did not discriminate against all states, operated as a barrier to commerce between Nebraska and Colorado. The Supreme Court declared the Nebraska statute unconstitutional under the Commerce Clause. See also Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980).

When this Court, in Miller v. Publicker Industries, Inc., 457 So.2d 1374 (Fla. 1984), reviewed the finding that a Florida statute discriminated against other countries (but not other states) that produced alcohol for gasohol, this Court found that the fact that the statute did not discriminate

against other states did not save the law from constitutional attack. This Court declared unconstitutional the Florida statute, which imposed a barrier against only foreign countries' products, under the Commerce Clause and the Import-Export Clause.

When the Supreme Judicial Court of Maine, in Private Truck Council of America v. Secretary of State, 503 A.2d 214, 218 (Me. 1986), cert. denied, 106 S.Ct. 1997, 90 L.Ed.2d 677 (1986) reviewed a Maine statute that discriminated against states that imposed certain taxes on Maine trucks, the Court specifically rejected Maine's argument that the statute's discriminating "against only some, not all, foreign-registered trucks" made the statute constitutional. The Court noted that "Balkanization, even through only partial, is still Balkanization" and declared the statute unconstitutional under the federal Commerce Clause. Id.

Thus, in considering McKesson's challenge, this Court cannot sustain the Florida statutes simply because the Florida legislature permitted a few other states, whose geography and climates allow them to produce the favored products, to petition Florida to participate in the discrimination against the disfavored products. Rather, this Court must declare the Florida statutes unconstitutional because the statutes discriminate against commerce from the majority of states whose geography and climate do not permit them to produce the favored agricultural products. As federal and state courts consistently have decided in similar cases, the Florida

statutes' not discriminating against every other state and country simply does not redeem the statutes' unconstitutional discrimination against some states and countries.

The Florida law's Take Back Provisions further the discrimination against interstate commerce. The provisions prevent out-of-state manufacturers and distributors who do in fact use the favored products from receiving the tax breaks. The law grants the Florida Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, the discretion to determine whether the state, territory, or country in which the alcoholic beverage is manufactured or bottled: (1) "discriminates" against alcoholic beverages manufactured or bottled outside of its boundaries; (2) provides "economic incentives or advantages" exclusively for alcoholic beverages produced within its boundaries; or (3) provides "export subsidies" for agricultural products used in making the alcoholic beverages. Upon an affirmative finding by the Florida agency with respect to any of the above conditions, Florida withholds the tax breaks.[7]

The Florida legislature may have been too clever in designing the Take Back Provisions to prevent out-of-state producers from competing on even terms in Florida. Predictably, Florida has not turned the Florida statutes against local interests by ruling that the law, itself,

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7 The Supreme Court has stated that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080, 2086 n.5 (1986).

constitutes Florida discrimination and, therefore, that Florida firms do not qualify for the tax exemption. But, certainly, New York might construe the Florida law as discriminatory, warranting reciprocal discrimination against Florida firms. Expanding the scenario, each state might allow its agencies to scrutinize other states' laws and, upon a finding of discrimination, authorize discrimination in turn against the offending state. The Commerce Clause was designed to prevent this very kind of commercial warfare. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-34 (1949).

Florida cannot save its discriminatory law with the assertion that the law actually promotes free interstate commerce. Florida stands the Commerce Clause on its head by assuming that it authorizes a state to erect trade barriers in response to trade barriers.

In Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976), in which a Louisiana milk producer challenged a Mississippi regulation requiring certain trade reciprocity, the Supreme Court rejected Mississippi's argument that its reciprocity requirement encouraged free trade among states by forcing a state that had been protecting its own producers to eliminate trade barriers. Where a state unconstitutionally burdens interstate commerce by protecting its own producers from competition, "the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause." Id. at 380.

Similarly in Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982), a challenge to Nebraska's reciprocity requirement for the interstate transportation of ground water, the Court held that the reciprocity provision erected an impermissible barrier to interstate commerce and could not survive the "strictest scrutiny" reserved for discriminatory legislation. Id. at 957-58. "The reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce." Id. at 958 n.18. Thus, in the words of the Supreme Judicial Court of Maine, a "state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation." Private Truck Council of America, Inc. v. Secretary of State, 503 A.2d 214, 218 (Me. 1986).

Interestingly, Florida rejected Canandaigua Wine Company's application for the tax exemption after determining that New York, Canandaigua's home state, discriminated in favor of New York wine products. In re Canandaigua Wine Co. Inc., January 8, 1986, Final Order, (Fla. Div. of Alcoholic Beverages and Tobacco 1986). The particular New York legislation faced a challenge in court on constitutional grounds. In Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850 (S.D.N.Y. 1985), aff'd and modified, 761 F.2d 140 (2d Cir. 1985), the court applied the Commerce Clause to find that the New York Alcoholic Beverage Control Law intended to aid the New York grape industry and constituted unconstitutional economic protectionism. Loretto Winery underscores that the Commerce

Clause, in lieu of a retaliatory free-for-all among the states, provides the constitutional means for challenging protectionist state legislation.

Further, despite appellants' comments about the Florida Take Back Provisions' equalizing competition, the Take Back Provisions do not even attempt to achieve proportionality. Under the Florida provisions, the state agency makes no attempt to calibrate any manufacturer's perceived advantage before denying the substantial commercial advantage conferred by the Florida law. The most trivial "economic incentive" provided by an out-of-state firm's home state might preclude the firm's receipt of the Florida tax break, whether the particular firm ever benefited from the incentive or not.

The Revised Florida Products Exemption discriminates against interstate commerce. Florida has sought a shortsighted parochial advantage at the expense of the national common market. The law's protectionist purpose coincides with its practical effect. Both the purpose and the effect make the statutes unconstitutional.

B. The Revised Florida Products Exemption Imposes an Unconstitutional Burden on Interstate Commerce.

If the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not per se unconstitutional, Florida's alcoholic beverage tax scheme still would violate the Commerce Clause because it places an excessive burden on interstate commerce. The Commerce Clause requires this Court not only to determine whether the law is protectionist in purpose or effect, but also to inquire:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). See also Pike v. Bruce Church, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The Revised Florida Products Exemption fails to satisfy even one of these requirements for constitutionality.

1. The Florida Tax Neither Regulates Even-Handedly nor Creates only Incidental Effects on Interstate Commerce.

As discussed above, Florida's taxing scheme is not evenhanded. Florida grants a tax exemption or preference to certain agricultural products and selects the products for no reason other than the fact of their cultivation in Florida. In this way, the burden of the Florida tax -- far from being evenhanded -- falls on those distributors who, lacking tax advantages, must sell higher-priced, non-Florida goods and suffer a corresponding loss of sales. (A. 374-80.)

The Florida tax's effects on interstate commerce are not "incidental." Florida's tax law does not directly affect only local goods and, thus, only incidentally affect interstate commerce when those goods are sold. Rather, Florida's purposefully limited tax scheme seeks to favor Florida products and to disfavor foreign products in interstate commerce. (A. 378-80.) The direct result of Florida's alcoholic beverage tax

scheme is the prohibited effect on interstate commerce. (A. 378-80.)

Appellants' citing to Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), does not support their claim of "incidental" effects. In Exxon, the Supreme Court upheld a Maryland statute concerning gasoline dealers against a Commerce Clause challenge. The Court expressly distinguished the Maryland statute, which did not impose any additional costs upon the out-of-state dealers, from the discriminatory state statutes that impose additional costs. Id. at 126. The Revised Florida Products Exemption, of course, erects a competitive barrier against out-of-state producers by imposing additional taxes upon every producer who does not produce Florida's products.

Moreover, the Court in Exxon distinguished the Maryland statute, which did not discriminate against interstate commerce, from state statutes that effectively "cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . ." Id. at 126 n.16. In this case, the State admits that the Revised Florida Products Exemption effectively causes Florida products to gain market share by displacing out-of-state products. (State's Brief at 27-28.)

2. The Florida Tax Does Not Serve a Legitimate Local Purpose.

As discussed above, Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. This

purpose is illegitimate, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. See Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." Guy v. Baltimore, 100 U.S. 434, 443 (1880).

Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that -- whether the implementation is non-discriminatory or not -- is constitutionally suspect under the Commerce Clause. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 530-39 (1949). Accord L. Tribe, American Constitutional Law § 6-12, at 340-42 (1978) (contrasting health and safety laws with local economy laws). As the Supreme Court noted in Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43-44 (1980):

> In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

Appellants' citing Archer Daniels Midland Co. v. State of Colorado, 690 P.2d 177 (Colo. 1984), does not support their claim that the Florida statutes have a legitimate purpose. In Archer Daniels Midland, in upholding a Colorado statute against a Commerce Clause challenge, the Colorado Supreme Court found that the Colorado legislature

"intended to provide an incentive to entrepreneurs to enter the fuel-grade alcohol market without subsidizing larger, more established producers," rather than intending to protect Colorado industry. Id. at 184. The Court emphasized that the challenged statute's effect did not depend on where a producer was located but rather on the size of the producer's operation. Id. at 185-86.

In contrast, the Florida legislature intended the Revised Florida Products Exemption to "enhanc[e] the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing," thereby protecting Florida industry. (State's Brief at 27.) The Florida statutes' effect depends on the producer's geography. Agricultural producers cannot change the climatic conditions of their respective states and countries in order to qualify for Florida's favoritism for its local products. The Commerce Clause will not allow any state to hinder competition "with the products of another state or the labor of its residents." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935).

Moreover, the Florida tax cannot survive Commerce Clause scrutiny by attempting to compensate Florida products for any disadvantages other states may inflict. Even if Florida's compensating disadvantaged products were a legitimate state goal, the Florida tax irrationally relates its advantages for specific products under specific circumstances to the disadvantages the specific products

suffer under other states' statutes. Florida's identification of any home state advantage (no matter how small) results in the loss of all Florida benefits (no matter how large). For example, if a New York manufacturer received a New York state subsidy of ten cents a gallon on wine exports to Florida, the manufacturer would lose his entire Florida exemption of as much as $3.50 per gallon. The tax scheme's failure to calibrate its impact is a fatal constitutional defect. See Sporhase v. Nebraska, 458 U.S. 941, 958 (1982) (state must narrowly tailor any reciprocity requirement to the state's legitimate purposes).

3. The Florida Tax Imposes Excessive Burdens on Interstate Commerce.

Florida's tax scheme necessarily achieves its purposes by placing a disproportionate burden on interstate commerce. Therefore, Florida has the burden of demonstrating that the local benefits from its tax outweigh the burden on interstate commerce. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 353 (1977). Florida must justify its discriminating tax "both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake." Hughes v. Oklahoma, 441 U.S. at 336. See also Sporhase v. Nebraska, 458 U.S. 941, 954 (1982). Florida cannot possibly carry this burden of proof.

Florida could have nurtured its local industry using means less discriminatory than a disproportionate tax on non-

Florida alcohol. Indeed, several such alternatives have received express judicial approval under the Commerce Clause.

Among the many less discriminatory alternatives, Florida could have provided property tax relief to Florida's manufacturers or growers. The courts have approved this method of encouraging local industry. See, e.g., Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 864 (S.D.N.Y. 1985) This type of non-discriminatory tax reform, which relieves local competitors of a tax, does not isolate non-Florida competitors for unique tax burdens and thus does not violate the "cardinal rule of Commerce Clause jurisprudence" that a state may not "'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 Commission, 429 U.S. 318, 329 (1977)).

As another less discriminatory alternative, Florida could have stimulated its agricultural industry with direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for Florida products. See generally Loretto Winery Ltd. v. Gazzara, 601 F. Supp. at 864 (discussing several alternatives).

In other words, Florida can effectively promote its industry without violating the Commerce Clause precept that it not "discriminatorily tax the products manufactured or the business operations performed in any other State." Boston Stock Exchange v. State Tax Commission, 429 U.S. at 337.

III. THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

The Revised Florida Products Exemption is unconstitutional under the federal Constitution for another, independent reason.[8] The Florida statutes violate a fundamental premise of federal-state relations. By authorizing its courts to inquire into foreign governments' policies and by attempting to change those policies that Florida finds distasteful, Florida has intruded impermissibly into the exclusively federal area of foreign affairs. Accordingly, Florida's statutes are unconstitutional. See Zschernig v. Miller, 389 U.S. 429, 430-41, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); Tayyari v. New Mexico State University, 495 F. Supp. 1365, 1376-80 (D.N.M. 1980); Bethlehem Steel Corp. v. Board of Commissioners, 80 Cal. Rptr. 800 (Ct. App. 1969); L. Tribe, American Constitutional Law § 4-5, at 172 (1978); 2 C. Antieau, Modern Constitutional Law § 10:19, at 37-38 (1969). Cf. Hines v. Davidowitz, 312 U.S. 52, 62-64 (1941).

The framers of the federal Constitution feared that individual states might impair foreign relations by unilateral action in the international sphere. "The peace of the WHOLE ought not to be left at the disposal of a PART. The Union will

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8 Although the Circuit Court in its Order did not have to reach McKesson's arguments concerning the constitutionality of the Revised Florida Products Exemption in light of the federal government's power over foreign affairs, this Court may base its finding of unconstitutionality upon any reasonable basis for the finding in the record. In Re Estate of Yohn, 238 So. 2d 290, 295 (Fla. 1970); State Plant Board v. Smith, 110 So. 2d 401, 405 (Fla. 1959).

undoubtedly be answerable to foreign powers for the conduct of its members." The Federalist No. 80, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original). In accordance with the clear intentions of the framers, the Supreme Court has declared without ambiguity that the individual state "does not exist" in the realm of foreign affairs. United States v. Belmont, 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed.1134 (1937).

The Supreme Court applied these principles in Zschernig v. Miller, 389 U.S. 429 (1968), to invalidate an Oregon statute that conditioned the right of aliens to inherit property on the existence of reciprocal rights for United States citizens in foreign countries. The Oregon statute required state courts to inquire into the laws and policies of foreign governments and induced foreign nations to frame their inheritance laws so that Oregonians would have reciprocal inheritance rights. Id. at 433-41. The Supreme Court found that the Oregon statute "ha[d] a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." Id. at 441. Accordingly, the statute was unconstitutional as a form of "state involvement in foreign affairs and international relations -- matters which the Constitution entrusts solely to the Federal Government." Id. at 436.

Florida's intrusion into foreign affairs is even deeper than Oregon's. Unlike the reciprocal inheritance statute in Zschernig, Florida's statutes directly conflict with specific, definitive articulations of United States policy in

the sensitive area of international trade. Congress, to whom the Constitution exclusively entrusts the regulation of "Commerce with foreign Nations," has enacted laws that pervasively regulate the imposition of customs duties on foreign imports. Federal law preempts state tax laws that intrude into this exclusively federal field. U.S. Const., art. I, § 8, cl. 3 (Commerce Clause). See Xerox Corp. v. County of Harris, 459 U.S. 145, 159, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982); McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1941).

Florida's Take Back Provisions deny tax preferences and exemptions to the products of countries that provide certain economic advantages to their own producers. §§ 564.09 and 565.12, Fla. Stat. (1985). The State has candidly described the Take Back Provisions as an effort to "foster a 'level playing field'" in the alcoholic beverages trade. (A. 566.) Florida's statutes are designed to level the playing field in two ways: (1) by attacking "the granting of a compounded benefit to producers in jurisdictions which already allow an exclusive, parochial incentive for such products"; and (2) by "discourag[ing] the implementation or continuance of purely local favoritism in other jurisdictions." (A. 565.) Thus, Florida's retaliation against countries that favor their own products attempts to change the trade policies of the countries.

With these goals, Florida's statutes cannot pass muster under the Supremacy Clause. Federal legislation

preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1940). Florida's Take Back Provisions are an obstacle to the Congressional purposes expressed in specific laws that direct the United States' commerce with foreign nations. These laws include the Trade Act of 1974, as amended (19 U.S.C.A. §§ 2411 through 2415 (West Supp. 1986)); the Tariff Act of 1930, as amended (19 U.S.C.A. §§ 1301 through 1677h (West Supp. 1986)); the Caribbean Basin Economic Recovery Act (19 U.S.C. §§ 2701 through 2706 (West Supp. 1986)); and the Wine Equity and Export Expansion Act of 1984 (19 U.S.C.A. §§ 2801 through 2806 (West Supp. 1986)). Florida's statutes also violate the United States' international obligations under the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6) (1947). Each of these federal laws preempts Florida's.

A. The Trade Act of 1974.

Congress, in the Trade Act of 1974, gave the President broad authority to negotiate trade agreements and to respond to actions by foreign countries that disadvantage United States commerce. Congress saw the need "to prevent a serious deterioration in the spirit of economic cooperation that is essential for the preservation of economic and political stability in a rapidly changing world." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7188). Florida, by taking unilateral action

to level the international playing field, has unconstitutionally intruded into this exclusive federal area.

Section 301(a) of the Trade Act, as amended, authorizes the President to take "all appropriate and feasible action within his power" to "respond to any act, policy, or practice of a foreign country" that is "unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." 19 U.S.C.A. § 2411(a)(1)(B)(ii) (West Supp. 1986). Congress considered the President's retaliatory authority "a vital aspect of the trade negotiations" that the Trade Act authorized. S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7208-09). In the exercise of his broad statutory power, the President may selectively impose discriminatory tariffs and other restrictions against particular products and particular foreign countries. 19 U.S.C.A. § 2411(a)(2)(A) & (B) (West Supp. 1986). For example, the President recently authorized quantitative restrictions on certain European wine imports in response to European Economic Community restrictions on various United States products. 51 Federal Register 18,296 (May 16, 1986).

Congress purposefully has given the President central authority to direct the United States' response to burdens on its foreign commerce. The President must select the United States' retaliatory actions in light of international economics and politics. As Congress noted, "[t]rade policies cannot be divorced from other important contributions to, or influences

on, the U.S. and world economies." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7189). Florida's unsanctioned interference in this process can only hinder the federal government's efforts to achieve beneficial trade relations for the whole United States.

B. The Tariff Act of 1930.

Section 303 of the Tariff Act of 1930, as amended, protects United States commerce from foreign subsidization of exports. Under the Tariff Act, whenever the Secretary of the Treasury determines that a foreign export has received a subsidy, the Secretary must levy a countervailing duty in the amount of the subsidy. 19 U.S.C.A. § 1303(a)(1) (West 1980).

Similarly, Florida's Take Back Provisions impose discriminatory taxes on alcoholic beverages from countries "which provide export subsidies for agricultural products used in making said alcoholic beverages" or "other economic incentives or advantages." §§ 564.06(9)(b) & (c), 565.12(1)(c)(2) & (3), and 565.12(2)(c)(2) & (3), Fla. Stat. (1985). By thus intruding into the area of foreign export subsidies, Florida's statutes frustrate the goals of the federal countervailing duty statute.

The federal Act was carefully drafted to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies." See Zenith Radio Corp. v. United States, 437 U.S. 443, 456, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978). The Secretary of the Treasury is

empowered to establish regulations to "accurately carry out this purpose." Id. See also 19 U.S.C.A. §§ 1303(b) and 1677 (West 1980). In light of the federal policy of measured response, Florida cannot impose its own additional tax. Florida's discriminatory tax frustrates Congress' intention to offset accurately foreign trade advantages.

C. The Caribbean Basin Economic Recovery Act (CBERA).

Congress enacted the Caribbean Basin Economic Recovery Act (CBERA) in 1983. The purpose of CBERA is to address "deep-rooted structural problems" in the Caribbean Basin which have "caused serious inflation, high unemployment, declining gross domestic product growth, enormous balance-of-payments deficits, and a pressing liquidity crisis." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 644). The legislative history demonstrates Congress' concern that "this economic crisis threatens political and social stability throughout the region and creates conditions which Cuba and others seek to exploit through terrorism and subversion." Id.

Through CBERA, Congress has addressed Caribbean Basin problems by authorizing the President to offer trade benefits to Caribbean nations that satisfy certain political, economic, and social criteria. 19 U.S.C.A. § 2702 (West Supp. 1986). "The centerpiece of the U.S. program is the offer of one-way free trade." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (reprinted in 1983 U.S. Code Cong. & Admin. News at 643, 644) (emphasis added). See also Message to the Congress

Transmitting the Proposed Caribbean Basin Economic Recovery Act, 18 Weekly Comp. Pres. Doc. 323 (Mar. 17, 1982). CBERA authorizes a complete exemption from United States customs duties for most products, including sugarcane rum, from qualified Caribbean nations. Congress intended to increase sales of Caribbean rum by reducing the price to U.S. consumers. CBERA eliminates the usual $10.50 per proof gallon excise tax on imported distilled spirits. H. Rep. No. 98-26, 98th Cong., 1st sess., at 26 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 667).

Florida, a major producer of sugarcane, competes in the market for alcoholic beverages with several Caribbean nations. (A. 367-68.) The Revised Florida Products Exemption affects, for example, the rum market by granting preferential tax rates to alcoholic beverages made from Florida sugarcane. Florida's potential denial of these preferences to Caribbean rum would frustrate the federal policies expressed in CBERA. At the same time the United States seeks to decrease the price of Caribbean rum through an exemption from customs duties, Florida threatens to increase the price through its Take Back Provisions. The federal purposes expressed in CBERA will fail if Florida is free to impose a tax that offsets the competitive advantages that Congress has conferred. Cf. Xerox Corp. v. County of Harris, 459 U.S. 145, 152 (1982).

Further, Florida's administration of the Take Back Provisions directly involves Florida courts in impermissible foreign policy judgments. The factors that the Florida

legislature has directed its courts to consider in applying the Take Back Provisions overlap with the factors that the President considers in determining whether to grant a particular Caribbean nation beneficiary status under CBERA. For example, a Florida court applying the Take Back Provisions considers whether a foreign country "impose[s] discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries," "provide[s] agricultural price supports or other economic incentives or advantages," or "provide[s] export subsidies." §§ 564.06 and 565.12, Fla. Stat. (1985). Under CBERA, the President considers:

> (3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country; [and]
>
> . . .
>
> (5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade . . . .

19 U.S.C.A. §§ 2702(c)(3), 2702(c)(5) (West Supp. 1986). In essence, Florida law directs Florida courts to make unauthorized foreign policy judgments that may subvert the President's and Congress' legitimate foreign policy judgments.

D. The Wine Equity and Export Expansion Act of 1984.

The Wine Equity and Export Expansion Act of 1984 is Congress' effort to remedy "a substantial imbalance in international wine trade." 19 U.S.C.A. § 2801(a)(1) (West Supp. 1986). Like Florida, Congress was concerned that "the

United States wine industry faces restrictive tariff and nontariff barriers in virtually every existing or potential foreign market." Id. The Act requires the President to "direct the [United States] Trade Representative to enter into consultations with each major wine trading country to seek a reduction or elimination of that country's tariff barriers and nontariff barriers to (or other distortions of) trade in United States wine." 19 U.S.C.A. § 2804(a) (West Supp. 1986). The Act also authorizes the President to take action under the Trade Act of 1974 to respond to foreign trade barriers. 19 U.S.C.A. § 2804(c) (West Supp. 1986).

Florida's Take Back Provisions directly intrude into the federal government's diplomatic and regulatory activities in this area. Florida imposes its own discriminatory tax on "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries." §§ 564.06(9)(a), 565.12(1)(c)(1), and 565.12(2)(c)(1), Fla. Stat. (1985). Florida's sharing some of the federal government's goals in this area does not provide a legitimate occasion for Florida to make foreign policy. "Only the federal government can fix the rules of fair competition when such competition is on an international basis." Bethlehem Steel Corp. v. Board of Commissioners, 80 Cal. Rptr. 800, 803 (Ct. App. 1969). "[T]he existence of [a] federal Act cannot serve as a justification for state legislation since . . . it is the sole province of the federal government to act in this sphere." Id. at 804 n.8.

E. The General Agreement on Tariffs and Trade (GATT).

In the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6), the United States and its major trading partners have pledged to refrain from specific discriminatory trade practices. The Take Back Provisions of the Revised Florida Products Exemption directly conflict with the United States' obligations under GATT.

GATT prohibits discriminatory taxes such as Florida's with the following provision:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin.

GATT, pt. II, art. III, § 1, 61 Stat. (part 5) A18 (1947) (first sentence). By definition, any application of Florida's Take Back Provisions to the products of a foreign country would violate GATT. Whenever a Florida court applies a Take Back to a foreign product -- thus withholding the tax exemption or preference afforded to Florida products -- that product is burdened with "internal taxes . . . in excess of those applied directly or indirectly to like products of national origin."

GATT, as an international agreement, supersedes Florida law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. See generally United States v. Belmont, 301 U.S. 324, 331-32 (1937). Indeed, one court has held unconstitutional a state statute that contravened GATT by placing restrictions on the sale of foreign imports.

Territory v. Ho, 41 Haw. 565, 567-71 (1957). However, regardless whether GATT directly preempts inconsistent state legislation, GATT is also an authoritative articulation of United States foreign policy with which Florida may not interfere. Thus, Florida's interference with foreign policy is invalid under Zschernig v. Miller, 389 U.S. 429 (1968).

Florida's attempt at the regulation of foreign trade is, in a word, unconstitutional.

IV. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

The Import-Export Clause's purpose is to insure that, in regulating commercial relations with foreign governments, the United States is able to "speak with one voice." Michelin Tire Corp. v. Wages Tax Commissioner, 423 U.S. 276, 285, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976). Thus, the clause prohibits any discriminatory tax by a state on imported goods and not merely direct taxes on importation. Id. at 288 n.7. See also Cook v. Pennsylvania, 97 U.S. 566, 24 L.Ed. 1015 (1878).

The Revised Florida Products Exemption, by authorizing the denial of tax exemptions to foreign alcohol, effectively imposes a duty upon imports. As a result, Florida's statutes violate the Import-Export Clause of the United States Constitution. U.S. Const., art. I, § 10, cl. 2; Michelin Tire Corp. v. Wages Tax Commissioner, 423 U.S. 276 (1976); Miller v. Publicker Industries, Inc., 457 So.2d 1374, 1376 (Fla. 1984).

As discussed above, Florida's Take Back Provisions expressly authorize discrimination based on national origin. The Take Back Provisions empower Florida courts and officials to examine and judge the agricultural and trade policies of foreign governments. This examination presupposes calculated discrimination. In effect, Florida's statutes require Florida to impose different taxes on the products of different countries solely on the basis of the place of origin.

The Import-Export Clause, as the Supreme Court interprets it, leaves no room for the Revised Florida Products Exemption. In Michelin Tire Corp. v. Wages Tax Commissioner, 423 U.S. 276 (1976), the Court made clear that a state tax may not constitutionally "fall on imports as such because of their place of origin." Id. at 286. Although the Import-Export Clause does not accord imported goods preferential treatment, it "clearly prohibits state taxation based on the foreign origin of the imported goods." Id. at 287. The Court in Michelin Tire Corp. approved a nondiscriminatory state property tax because, unlike Florida's statutes, "it [could not] be used to create special protective tariffs or particular preferences for certain domestic goods, and it [could not] be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." Id. at 286.

For over a century, the Supreme Court has not hesitated to invalidate discriminatory state taxes on imports. In Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964), for

example, the Court held unconstitutional a ten-cent-a-gallon tax imposed by Kentucky on all persons bringing distilled spirits into the state. Kentucky's law, like Florida's, discriminatorily taxed liquor from other states and countries. When challenged under the Import-Export Clause by an importer of Scottish whiskey, the Kentucky law succumbed. See also Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448, 6 L.Ed. 678 (1827) (invalidating discriminatory tax on imports); Cook v. Pennsylvania, 97 U.S. 566, 569 (1878) (invalidating taxes at retail level that favored certain specified domestic goods).

In addition, this Court's own analysis of the Import-Export Clause agrees with the United States Supreme Court's. In the recent case of Miller v. Publicker Industries, Inc., 457 So. 2d 1374 (Fla. 1984), this Court held unconstitutional a Florida tax that exempted motor fuels containing a stated percentage of alcohol. The exemption applied, however, only to alcohol distilled from United States agricultural products. This Court held the tax exemption unconstitutional because it "constitute[d] discriminatory taxation based upon the foreign origin of a product in violation of the import-export clause." Id. at 1376.

This Court's analysis in Publicker applies here. The tax in Publicker expressly favored goods of "U.S. origin." The Revised Florida Products Exemption's discrimination is less obvious in its effect on foreign goods because the legislature drafted the statute using generic descriptions of Florida products. Nevertheless, in this case, as in Publicker, the

Florida legislature has authorized discrimination based on national origin. As in Publicker, Florida can discourage the consumption of foreign products by applying the Revised Florida Products Exemption's Take Back Provisions.

Florida's tax scheme is unconstitutional under the Import-Export Clause.

V. THE CIRCUIT COURT PROPERLY ENTERTAINED McKESSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

The Circuit Court recognized that McKesson's motion for partial summary judgment and the State's opposition to the motion did not raise a controversy concerning any genuine issue of material fact. McKesson and the State did not disagree on the authenticity of McKesson's submission of the legislative history. (The parties only disagreed on the legal significance of the Florida legislators' statements.) McKesson and the State did not disagree that the Florida statutes effect what appellants describe in their briefs as a "restructuring" of the Florida alcoholic beverage market by "encouraging" the sales of local products. (The parties only disagreed on the legal significance of indisputable agricultural economics.)

Accordingly, the Circuit Court determined that summary judgment was appropriate. No controversy concerning a genuine issue of material fact existed, Fla. R. Civ. P. 1.510(c), and any disputes as to matters of law did not prevent entry of summary judgment. Armstrong v. Southern Bell Telephone & Telegraph Co., 366 So. 2d 88, 90 (Fla. 1st DCA 1979). As the United States Supreme Court recently decided in Anderson v.

Liberty Lobby, Inc., ___ U.S. ___, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986), under an identical standard --

> [T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

After McKesson filed its motion, the State did not suggest to the Circuit Court, through the filing of an affidavit or otherwise, that the Court should delay its consideration of the constitutionality of the Florida statutes. Florida law, of course, provides that a party may request a continuance of a hearing on a motion for summary judgment only by the filing of an affidavit, showing that the party cannot present facts essential to justify his opposition. Fla. R. Civ. P. 1.510(f). Continuance of a summary judgment hearing to permit additional discovery to prepare an opposition is at the discretion of the trial court. Rosen v. Parkway General Hospital, Inc., 265 So. 2d 93, 95 (Fla. 3d DCA 1972).

On appeal, the State now suggests that the Circuit Court did not allow the State to complete its discovery concerning McKesson's standing. The State apparently wanted to discover facts that would establish that McKesson is not a producer of agricultural products or manufacturer of alcoholic beverages. Any discovery, however, about McKesson's production of the favored agricultural products or qualification of alcoholic beverages for preferential treatment was irrelevant to

McKesson's challenge to the Florida statutes. McKesson indisputably established the factual basis for standing by demonstrating that it has been a distributor of alcoholic beverages and has paid the challenged taxes.

The Circuit Court did not abuse its discretion in entertaining McKesson's motion for partial summary judgment.

VI. McKESSON IS ENTITLED TO A REFUND OF THE TAXES IT HAS PAID WHICH FLORIDA HAS COLLECTED UNDER THE UNCONSTITUTIONAL STATUTES.

As a matter of federal Constitutional law, as well as Florida law, McKesson is entitled not only to a declaration that the Revised Florida Products Exemption is unconstitutional but also to the constitutional remedy for Florida's discrimination. In its prayer for relief in this action, McKesson has asked for an order directing the Florida Comptroller to grant a refund to McKesson of taxes Florida has collected from McKesson under the unconstitutional statutes. Pursuant to section 215.26, Florida Statutes (1985), McKesson, which has paid these taxes under protest, is entitled to an appropriate refund of discriminatory taxes. For each of the Florida statutes' classifications for wine and liquor, McKesson must receive the difference between what it has paid and what a distributor who sold favored products paid.

A. Under Both Federal Constitutional Law and State Law, McKesson Is Entitled to a Tax Refund.

Under federal constitutional law, the taxpayer's remedy for an unconstitutional state tax statute is an action

to recover the taxes. In Atchison, Topeka & Santa Fe Railway Co. v. O'Connor, 223 U.S. 280, 285, 32 S.Ct. 216, 56 L.Ed. 436 (1912) (finding a tax an unconstitutional burden upon interstate commerce), Justice Holmes stated:

> It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

The United States Supreme Court has not permitted a state to collect or retain taxes assessed under an unconstitutional statute. See, e.g., Dept. of Revenue v. James Beam Co., 377 U.S. 341 (1964) (affirming Kentucky Court of Appeals judgment granting refund of alcoholic beverage taxes collected under a state statute that violated the Import-Export Clause); Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436 (1952) (reversing, without remand, state court's reversal of trial court's granting a refund of tax violating Commerce Clause); Best & Co. v. Maxwell, 311 U.S. 454 (1940); Iowa-Des Moines Bank v. Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931) (holding that a taxpayer may recover the excess taxes paid); I. M. Darnell & Sons Co. v. City of Memphis, 208 U.S. 113, 120, 28 S.Ct. 247, 52 L.Ed. 413 (1908) (finding tax that violated Commerce Clause a "nullity"); Tierman v. Rinker, 102 U.S. 123, 127, 26 L.Ed. 103 (1880) (ruling statute "inoperative" so far as it discriminates).

Thus, federal courts in this century have required states to refund unconstitutional taxes to taxpayers. In

Carpenter v. Shaw, 280 U.S. 363, 369, 50 S.Ct. 121, 74 L.Ed. 478 (1930), the Court determined that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." Accord Gallagher v. Evans, 536 F.2d 899, 900-01 (10th Cir. 1976). In United States v. State Tax Commission, 645 F.2d 4 (5th Cir. 1981), cert. denied, 454 U.S. 896, 102 S.Ct. 394 (1981), a state refused to refund an unconstitutional tax imposed on instrumentalities of the federal government on the ground that the federal government had failed to comply with a state statute. The Court rejected the state's argument:

> The retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of the tax in the first instance.

645 F.2d at 5.

The Supreme Court and other federal courts appreciate that when a tax is unconstitutional, only the remedy of a refund will cure the constitutional injury. A taxpayer suffers the constitutional injury when it pays a discriminatory tax that provides "a direct commercial advantage to local business." Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984). The taxpayer, therefore, has a federal right to a remedy -- a right to a refund of the difference between the disfavored products' rate and the favored products' rate. Permitting the State to avoid that remedy through a declaration of prospective relief would provide an incentive to continue to

enact and collect illegal taxes. The State would enjoy the benefit of its unconstitutional acts without remedying its violation of the federal Constitution. Indeed, by rearranging the language of its statutes, the State could repeatedly attempt to continue to collect unconstitutional taxes. The federal constitutional system could not tolerate this situation.

Of course, under Florida law, as under federal constitutional law, the taxpayer's remedy for an unconstitutional tax scheme is an action to recover the taxes paid. See, e.g., Osterndorf v. Turner, 426 So. 2d 539, 545 (Fla. 1982); City of Miami v. Florida Retail Federation, Inc., 423 So. 2d 991, 993 (Fla. 3d DCA 1982); Coe v. Broward County, 358 So. 2d 214, 216 (Fla. 4th DCA 1978). This Court, echoing Justice Holmes' statement in Atchison, has stated: "In this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover. . . ." State of Florida ex rel. Palmer-Florida Corp. v. Green, 88 So. 2d 493, 495 (Fla. 1956) (ordering recovery of documentary tax).

The Supreme Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), after holding that the Hawaii statute unconstitutionally discriminated against interstate commerce, did not resolve the question of a refund. The alcoholic beverage distributors challenging the statute had sought a total refund of approximately $45 million. Id. at 266. The

Court directed the Hawaii court to address the refund issues, reasoning that application of state law might obviate consideration of federal constitutional law. "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." Id. at 277 n.14.

In this case, since Florida law does mandate a full refund of taxes under a discriminatory tax scheme, this Court does not need to look any further than Florida law to provide a remedy for McKesson's constitutional injury.

B. The Circuit Court's Declaration of Unconstitutionality Warrants the Remedy of a Refund.

The Circuit Court erred in declaring that its holding, striking the unconstitutional portions of the statutes, would operate only prospectively in this case. The Circuit Court may not deny relief to McKesson, which has timely pursued its challenge to the statutes. Florida may not, consistent with state law, retain the benefits of its unconstitutional tax scheme.

In State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924), this Court articulated the traditional rule regarding the effect of a court's holding a statute unconstitutional:

> [W]hen an act of the Legislature is duly held to be invalid because in conflict with express or implied provisions of the Constitution, it is invalid from its enactment, and not from the date of the decision adjudging its invalidity. . . .

Id. at 744. The Court noted that once a court determines that a statute is invalid, "the Constitution then operates to make

the statute void from its enactment," and the court cannot restrain the Constitution's operation. Id. at 745.

The Nuveen Court, however, recognized that there may be an exception to the traditional rule where an appellate court had, at one point, declared a statute valid under the Constitution and, after persons had acquired rights in reliance on the court's opinion, a later court overruled the former opinion and declared the statute unconstitutional. The Court noted that the law may protect rights acquired under such circumstances. Id. See also Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251, 253 (1944).

This Court later recognized a further exception to the traditional rule in Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973). In Gulesian, the Circuit Court had declared invalid under the Florida Constitution a particular tax collection levied for Dade County schools. However, the Court denied a tax refund to the plaintiff class, which included more than 350,000 persons. The Court noted that the school board had adopted the particular tax levy in good faith reliance on a presumtively valid state statute and that requiring a refund in small amounts to over 350,000 Dade County taxpayers, who had paid the tax without protest, would impose an intolerable burden on the school board. The Supreme Court, agreeing with the trial court's reasoning, affirmed.

Appellants, cannot benefit from the two exceptions.

First, in contrast to Nuveen, the State cannot assert that, at an earlier date, a court had declared the Revised

Florida Products Exemption valid under either the United States Constitution or the Florida Constitution. Therefore, the State cannot argue that any person has acquired property or contract rights by relying on a prior authoritative judicial declaration of constitutionality, before a later finding of unconstitutionality.

Second, in contrast to Gulesian,[9] McKesson's constitutional injury warrants a monetary remedy. Unlike the Dade County School Board, which relied, as it must, on legislative authorization, the State in this case did not rely on invalid statutes but rather enacted the unconstitutional statutes. Further, the State acted after the United States Supreme Court's holding in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), as well as this Court's holding in Delta Air Lines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984), plainly circumscribed the State's ability constitutionally to promote local industry. Indeed, the Florida Department of Business Regulation warned in a memorandum that the Revised Florida Products Exemption continued the unconstitutional discriminatory effect of the Florida Products Exemption, which the revised scheme replaced. (A. 479-85.) Unlike the 350,000 taxpayers in Gulesian whose school taxes were only slightly higher than they should have been, McKesson, which paid the taxes under protest, has

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9 In Coe v. Broward County, 358 So. 2d 214, 216 (Fla. 4th DCA 1978), the Court of Appeal, stating that a taxpayer normally is entitled to a refund of taxes paid pursuant to an unlawful assessment, suggested that the holding in Gulesian represents a narrow exception.

incurred a substantial constitutional injury under the discriminatory tax scheme.

Thus, this Court should apply the retroactive-prospective doctrine that this Court has structured in a series of cases and provide a refund remedy for the constitutional injury to those taxpayers who actually filed the suit challenging the validity of the tax scheme. See City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 7 (Fla. 1972), Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993, 995 (Fla. 1976), Osterndorf v. Turner, 426 So.2d 539, 541, 545 (Fla. 1982), City of Tampa v. Thatcher Glass Corp., 445 So.2d 578, 580 (Fla. 1984), and Colding v. Herzog, 467 So.2d 980, 983 (Fla. 1985). In Osterndorf v. Turner, 426 So.2d 539, 545 (Fla. 1982), this Court held unconstitutional a statute granting an enhanced homestead exemption to long-term Florida residents but not to others. This Court made its ruling prospective, but added --

> The petitioners in this case, however, are entitled to a refund of the amount of additional taxes they paid by reason of the denial of the enhanced exemption, as are any other litigants who have timely judicially challenged the statute.

McKesson, which has timely judicially challenged the Revised Florida Products Exemption, is entitled under Florida law to receive an appropriate refund.

CONCLUSION

McKesson respecfully asks this Court to end Florida's violation of the federal Constitution's proscriptions by,

first, affirming the Circuit Court's declaration of unconstitutionality and, second, directing the Circuit Court to award McKesson a tax refund of the difference between what McKesson paid in taxes and what McKesson would have paid if its products had received the same treatment as the favored products.

Dated: May 14, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused true and correct copies hereof to be furnished as indicated this 6 day of May, 1987, to the attorneys listed on the attached schedule.

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