IN THE SUPREME COURT OF FLORIDA

C. LEONARD IVEY, Director, DIVISION OF ALCOHOL AND TOBACCO OF THE DEPARTMENT OF BUSINESS REGULATION, JACQUIN-FLORIDA DISTILLING CO., INC., and TODHUNTER INTERNATIONAL, INC., Appellants, v. BACARDI IMPORTS CO., INC., N. GOLDRING CORP., THE CALIFORNIA WINE INSTITUTE, and TAMPA WHOLESALE LIQUORS CO., INC., Appellees.	CASE NO. 73,424

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

ANSWER BRIEF OF APPELLEES THE CALIFORNIA WINE INSTITUTE AND TAMPA WHOLESALE LIQUORS CO., INC.

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INTRODUCTION

This case involves the third attempt by the legislature of the State of Florida to subsidize the State's alcoholic beverage industry through a discriminatory, preferential tax exemption on the sale of locally-produced alcoholic beverages. Less than one year ago this Court struck down the previous, virtually identical version of Florida's discriminatory tax

scheme.[1/] The United States Supreme Court has also held that taxes such as the one at issue here are flatly unconstitutional.[2/] Those decisions control this case.

The court below provided appellants every opportunity to demonstrate that Florida's new discriminatory tax scheme is somehow different from the one struck down in McKesson. At appellants' insistence, the court deferred for three months ruling on plaintiffs' August 1988 motion for a preliminary injunction. During that period the court permitted appellants to conduct extensive pre-trial discovery, to present two full days of trial testimony, and to argue their case both orally and in writing. Having lost below, appellants now claim that the experienced and able trial judge ruled against them because he "was not interested in the evidence," or "did not hear the evidence," or "did not listen to the evidence," or substituted his "own personal value system" for the mandate of the law.[3/]

The plain fact is that the appellants lost below because their positions are manifestly wrong on both the facts and law. As the Circuit Court found, and as we show below, the

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1/ Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), cert. granted on other grounds, 57 U.S.L.W. 3343 (U.S. Nov. 15, 1988) (No. 88-192) ("McKesson").

2/ Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) ("Bacchus").

3/ Appellants' Br. at 38-39 (emphasis omitted).

statute at issue here is "but a warmed-over version, dressed up in different clothing" of the one struck down in McKesson.[4/] It should fail for the reasons already stated by this Court in McKesson. The undisputed evidence in this case shows that the sole purpose of Florida's tax statute was to provide an economic benefit to Florida's agriculture and alcoholic beverage industries; that the tax has a discriminatory effect on interstate commerce; and that the tax cannot be justified by any alleged concerns about the costs of enforcement, or health and safety.[5/]

STATEMENT OF THE CASE AND OF THE FACTS

A. Background Facts

Prior to 1984, the so-called "Florida Products Exemption" contained excise tax exemptions for alcoholic beverages manufactured or bottled in Florida from Florida-grown products. Following the United States Supreme Court's decision in

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4/ Trial Transcript, Nov. 29, 1988, at 433. References to the transcript of the trial below will be designated as "Tr. __." Due to the expedited nature of this appeal, the page numbers associated with those references refer to the actual transcript, not the pages of the official record, which we understand this Court has only just received. For the same reason, references to plaintiffs' trial exhibits will be designated as "Pl. Ex. __."

5/ Appellants' brief either does not discuss or only briefly mentions substantial, material portions of the record evidence. Because the record evidence is wholly inconsistent with the inferences drawn by appellants, we discuss it more fully herein.

Bacchus Imports, Ltd. v. Dias,[6] which struck down a similar Hawaii liquor tax exemption for certain locally-produced beverages, the legislature enacted the "Revised Florida Products Exemption." The new law provided tax preferences for beverages manufactured from specified agricultural products, all of which are commonly found in Florida. Holding that Bacchus was controlling, this Court concluded that the revised law was discriminatory, that it violated the Commerce Clause, and that it could not be justified by any Twenty-first Amendment concerns. The Court struck the law down on February 18, 1988, and denied rehearing on May 2, 1988, at which time the decision became final.[7]

Only 17 days later, on May 19, 1988, Senator Crawford offered an almost identical tax -- the one at issue in this case -- as an amendment to alcoholic beverage legislation then pending in the Senate Finance, Taxation and Claims Committee. The amendment provided for two taxes on specified alcoholic beverages: (1) an excise tax applicable to all such beverages, and (2) an additional tax applicable to imported beverages. The law exempted from the import tax all beverages manufactured within Florida, as long as they were made "of produce from land

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6/ 468 U.S. 263 (1984).

7/ Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), cert. granted on other grounds, 57 U.S.L.W. 3343 (U.S. Nov. 15, 1988) (No. 88-192).

inspected by Florida agricultural inspectors," and, if distilled, were distilled above 185 proof.[8/] The following table demonstrates the disparate tax rates under Senator Crawford's amendment:

Type of Beverage	Tax on Domestic Beverage (per gallon)	Tax on Imported Beverage (per gallon)
Beverages containing .5% or more alcohol by volume and less than 17.259% alcohol by volume	$ .25	$ 2.25
Wines containing 17.259% or more alcohol by volume	.50	3.00
Sparkling wines	1.50	3.50
Wine coolers	.75	2.25
Beverages containing 17.259% or more alcohol by volume and not more than 55.780% alcohol by volume	4.75	6.50
Beverages containing more than 55.780% alcohol by volume	5.95	9.53

From the outset Senator Crawford acknowledged that the purpose of his amendment was to provide a "tax incentive" to Florida distillers and thereby to protect "300 jobs in

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8/ Ch. 88-308, §§ 10(7), 11(4), Laws of Fla.

Polk County."[9] The Senator expressly recognized that his earlier efforts to achieve that goal had been thwarted by this Court's decision in McKesson. Thus, he said: "[W]e think we have now the right way of delivering this tax and this bill would then rewrite that tax so that distilleries in Florida do have a small preference over out-of-state and this is an attempt to make that law constitutional."[10]

Senator Crawford's "right way" of rewriting the tax was to add the following language:

> [T]he Legislature finds and determines that the authorized transportation and importation into the state of alcoholic beverages . . . require[s] strict enforcement of state statutes regulating and administering the manufacture, distribution and sale of alcoholic beverages; the costs of regulating and administering such imported alcoholic beverages are greater than for those alcoholic beverages not imported; the production of lower quality alcoholic beverages should be discouraged; and in order to protect the health, safety, welfare and economic integrity of the state, the costs of ensuring compliance with relevant state laws should be included in the taxes imposed upon said alcoholic beverages.[11]

The legislation was passed on June 7, 1988, the last day of the session. The bill became law on July 6, 1988, without the Governor's signature, and took effect on August 7, 1988.

9/ Pl. Ex. 15 at 73 (excerpt from Senate Finance, Tax and Claims Committee Hearing (May 19, 1988)).

10/ Pl. Ex. 15 at 73-74.

11/ Ch. 88-308, § 9, Laws of Fla.

B. The Proceedings Below

Two days before the effective date of the tax, appellees Bacardi Imports Co., Inc. and N. Goldring Corp. filed a Complaint for Declaratory Judgment and Temporary and Preliminary Injunctions in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida. The complaint alleged that the tax statute was unconstitutional because it violates the Commerce Clause, the Import-Export Clause, and the Equal Protection Clause.

On August 10, 1988, the circuit judge held argument on Bacardi's motion for a temporary restraining order and preliminary injunction. Appellants repeatedly asserted that the instant tax was grounded in Twenty-First Amendment concerns and thus was distinguishable from its predecessor. The State's counsel, Mr. Brown, urged the court to defer ruling on the motion pending an evidentiary hearing, at which the State would

> present witnesses from the two bureaus of the Department of Business Regulation which directly administer these laws . . . [to] show that in their opinion it does cost them more to do what they do if it involves an out-of-state manufacturer.12/

Based on these representations, the court deferred ruling on the motion; instead, it ordered expedited discovery and set a trial date.

12/ Motion Hearing, Aug. 10, 1988, at 47; see id. at 48.

On September 30, 1988, the court held a full trial on the merits. The parties adduced live testimony from eleven witnesses, proffered the deposition testimony of four witnesses, and submitted numerous documentary exhibits. Nearly all of the evidence concerned the cost of regulating and enforcing Florida's alcoholic beverage laws.

Beginning shortly before the trial, and during the trial, appellants advanced yet another justification for the tax: they claimed that it was a health and safety measure designed to promote the consumption of spirits distilled at over 185 proof, and thereby to protect the public from the supposed dangers of consuming alcohol distilled at less than 185 proof. Over appellees' objections, the court again deferred ruling on the merits; instead, it acceded to appellants' request for an additional evidentiary hearing to explore the so-called "185 proof" issue.

On November 29, the court held a second day of trial, limited to the "185 proof" issue. Throughout this entire period -- from August 7 through November 29 -- the unconstitutional tax statute remained in effect. Thus, the private appellants, Jacquin and Todhunter, continued to enjoy the benefits of the lower, preferential tax rates.

On November 29, at the close of all evidence, the trial court ruled from the bench. The court held that the statute "is violative of the commerce clause of the Constitution of the

United States,"[13] and that the evidence disclosed no "21st Amendment purposes that would save that which is so clearly discriminatory."[14] The court also rejected appellants' argument that Section 9 of the bill (the so-called "purposes clause") expresses any "legitimate 21st Amendment concerns";[15] it concluded that the State had failed to establish any justification for the "cost differential" in the statute; and it dismissed as "just illusory" assertions that the statute furthers any legitimate health and safety objectives.[16]

C. Facts Establishing the Legislature's Discriminatory Purpose

The trial record is replete with uncontradicted evidence concerning the legislature's purpose in adopting the present tax. That evidence includes the contemporaneous record of Senate and House debates concerning the tax measure,[17]

13/ Tr. at 436.

14/ Tr. at 434.

15/ Tr. at 434.

16/ Tr. at 434.

17/ The evidence included verified copies of the tape recordings from those sessions (Pl. Ex. 18), as well as an authenticated transcription of those recordings. Pl. Ex. 15. Appellants are mistaken in asserting that the trial court found this evidence irrelevant. See Appellants' Br. at 12. To be sure, the record below does contain one such statement by the court (Tr. at 183); but that statement is clearly a typographical error. Shortly after the erroneous statement, the court admitted the legislative tapes, stating that "they certainly are relevant to this proceeding." Tr. at 187.

committee reports from both branches of the legislature, and contemporaneous memoranda from the Department of Business Regulation (the "Department") and the Division of Alcoholic Beverages and Tobacco (the "Division") explaining the legislation's purpose. As we show below, this uncontradicted evidence established that the legislature enacted the discriminatory tax for one and only one purpose -- to protect and develop a local alcoholic beverage industry.

1. The Legislative Debates

Appellees introduced into evidence the 92-page-long transcript of the legislative debate on the tax. That transcript is an exhaustive record of the legislature's contemporaneously-expressed understanding of the tax's intended purpose.

a. Senate Debate

The principal sponsor of the bill, Senator Crawford, made clear from the outset that its sole purpose was to protect local industry. Upon introducing the bill in the Senate Finance, Taxation and Claims Committee, he explained:

> What this bill does, for the last 27 years there has been an incentive that the State of Florida has had for companies to use certain agriculture products and for distilleries in Florida. As a result of that, we have about 300 jobs in Polk County that were produced by that tax incentive. A few years ago we had trouble in the courts with that incentive and so we rewrote it, had a big discussion about it, came back, thought we had it worked out with the courts, went back into the courts

> again, Supreme Court struck it, after actually we had come here to session so it kind of got thrown on us right in the middle of the session.[18]/

Later discussion in the Senate removed any doubt about the identity of the tax's intended beneficiary. When Senator Jennings introduced the Crawford amendment on the Senate floor, she described it as one of "a number of amendments dealing with the Jacquin issue"[19]/ -- an obvious reference to Florida's principal distiller, appellant Jacquin-Florida Distilling Co.

b. House Debate

On June 7, 1988, the Florida House of Representatives held extensive debate on the Crawford Amendment. Although there was considerable dispute over the wisdom and lawfulness of the measure, everyone agreed that the bill's sole purpose was simple economic protectionism. Thus, Representative Meffert introduced the amendment by stating that it

> provides excise tax relief for Florida producers of wine and liquor by eliminating a portion of the tax for all producers and reinstating the exact amount of the decrease in the form of an import tax.[20]/

Another proponent of the measure,

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[18]/ Pl. Ex. 15 at 73.

[19]/ Pl. Ex. 15 at 91.

[20]/ Pl. Ex. 15 at 2.

Representative Hargrett, explained that the tax was "designed to build an industry in Florida, to create job opportunities in areas where jobs are needed."[21/] Referring to the recent decline in Florida's citrus crop, Representative Hargrett argued that the bill would boost two local industries, farming and alcohol manufacturing:

> What this bill does is encourage new agricultural crops that can grow in these areas [where citrus has declined] and other crops that will withstand cold.
>
> In addition to the agricultural encouragement, what we are talking about is creating an industry in Florida that's one of the largest industries in the world, that is, producing wine and spirits . . . . And so, ladies and gentlemen, we have an opportunity here to foster good solid economic development not only in the manufacturing area, but in the agricultural area as well.[22/]

Virtually every other speaker to address the matter explained the bill's purpose in similar terms.[23/]

21/ Pl. Ex. 15 at 57.

22/ Pl. Ex. 15 at 58; see also id. at 21 (further remarks of Rep. Hargrett) ("[T]hese efforts to create [an] industry are all about creating jobs in Florida.").

23/ See, e.g., Pl. Ex. 15 at 22 (remarks of Rep. Meffert) (law intended to "promot[e] our own Florida products and those people who locate and furnish jobs in this state and who are very important and furnish these economic benefits"); id. at 30 (remarks of Rep. Jones) (bill intended to protect "300 jobs in Polk County" that "have been there for 27 years"); id. at 50-51 (remarks of Rep. Silver) (bill provides a "tax break of $3.4 million dollars . . . to Florida producers of alcoholic beverages" to "save [a] substantial amount of jobs"); id. at 55

[Footnote continued next page]

The most insightful analysis of the bill came from Representative King. Noting that its purpose was to give a $4 million annual "tax advantage for one particular distiller, in one particular county . . . ,"[24/] Representative King observed that the tax had "already been proven unconstitutional."[25/] He then argued that the new bill was a cynical effort to perpetuate the unconstitutional tax during another lengthy cycle of judicial review:

> We are now being asked to pass a bill that favors one distillery in the state, gives them another opportunity to go through the constitutionality process again, they've just done it. In February, the Supreme Court ruled against this very same piece of legislation. Why, you say, are we now considering [it] again if the Supreme Court ruled? I'll tell you why, because it takes four years to come back through it and in those four years, this one distiller, in this one county, will have over $12 million of Florida's general revenue money, your general revenue money.[26/]

[Footnote continued from preceding page]

(remarks of Rep. Simon) (bill's purpose was "to give an economic advantage to some industries that we have, agricultural industries in the state"); id. at 56 (remarks of Rep. Langton) (purpose of bill is "economic development for the wine industry").

24/ Pl. Ex. 15 at 17.

25/ Pl. Ex. 15 at 19.

26/ Pl. Ex. 15 at 18-19.

2. Senate and House Reports

The record below also included the written reports of the two Florida legislative bodies that reviewed and analyzed the bill prior to its passage. The Senate report, dated May 28, 1988, states that the Crawford Amendment was intended to provide an annual "tax break of $3.4 million . . . to Florida producers of alcoholic beverages from General Revenue Funds."[27/] The House Report reached the same conclusion, expressly stating that the tax's purpose was to provide "benefits to the private sector" by "increas[ing] production and sales of Florida produced agricultural and alcoholic products . . . ."[28/] Neither of the reports mentioned any cost-based justification for the discriminatory tax. Nor was there any discussion of any health and safety objectives furthered by the legislation.

27/ Senate Staff Analysis and Economic Impact Statement, McDowell Deposition Ex. 2 at 3. Following trial, appellants moved without opposition to have McDowell's deposition included in the record.

28/ See Final Staff Analysis & Economic Impact Statement, Committee on Regulated Industries and Licensing, House of Representatives, Pl. Ex. 8 (Ivey Deposition, Ex. 10 at 214, 215). According to Mr. Cochran, a representative of the Department of Business Regulation, the $3.4 million tax break was slightly larger than the one provided by the earlier law which this Court declared unconstitutional. See Pl. Ex. 15 at 75 (Cochran testimony at Hearing before Senate Finance, Tax and Claims Committee (May 19, 1988)). See also Pl. Ex. 5 at 7 (as compared with the predecessor tax, the new tax "may result in a slight reduction in the amount of revenues collected").

3. Other Evidence Concerning Legislative Purpose

The record included additional evidence concerning the tax statute's purpose. Both the Division of Alcoholic Beverages and Tobacco (the "Division") and the Department of Business Regulation (the "Department") prepared written analyses of the bill shortly after its passage and before it had become law. The analyses demonstrate that those who were to enforce and implement the bill understood that its sole purpose was to confer a private economic benefit on local industry.

By memorandum dated June 14, 1988, appellant C. Leonard Ivey, the Division's Director, concluded that if Senator Crawford's amendment became law, it would "allow a $3.2 million exemption in taxes for all products manufactured or distilled in Florida from Florida grown products when compared to current tax rates."[29/] Based on this analysis, Mr. Poole, the Department Secretary, explained that the amendment's purpose was to

> grant three alcohol beverage producers located in Florida a 3.2 million dollar tax exemption on their products sold in Florida which are manufactured and/or distilled from state grown produce.[30/]

He concluded: "From a legal point of view, it is our opinion that the import tax formula contained within the bill runs afoul

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29/ Pl. Ex. 2 at 4.

30/ Pl. Ex. 3 at 1.

of the Commerce Clause of the United States Constitution and is not salvaged by the Twenty-First Amendment." 31/ Consequently, he recommended that the Governor veto the bill.

There was no evidence to suggest that anyone in the Department held a contrary view about either the purpose of the amendment or its lawfulness.

D. Evidence Concerning the Tax's Discriminatory Effect

The record also includes uncontradicted evidence that Florida's tax has a discriminatory effect which inhibits interstate commerce. Of course, the tax on its face is plainly discriminatory: each gallon of wine produced outside Florida, for example, is taxed at a rate that is nine times higher than the comparable tax for a gallon of Florida wine.

The evidence at trial confirmed that this disparate taxing scheme inhibits interstate commerce. William Tovell, Vice President and General Sales Manager of Bacardi Imports Company, testified that the tax creates a wide disparity between the price of Bacardi products, which are subject to the full import tax, and domestic products, which are not.32/ He testified that that

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31/ Pl. Ex. 3 at 2. The Department's General Counsel, Mr. Sole, made the same point in a memorandum to Lieutenant Governor Brantley, dated June 30, 1988. Commenting on the Crawford Amendment, Mr. Sole stated: "It is the Department's position that this is a wholly unconstitutional act, that it will be attacked in court, and that it will be declared unconstitutional." Pl. Ex. 5 at 7.

32/ Tr. at 87 (Tovell).

competitive disadvantage injures non-Florida producers in two ways. First, it causes direct economic injury, by forcing the manufacturer either to forego sales or to lose revenues in order to compete.[33/] Second, it causes a more subtle and lasting injury by eroding consumer loyalty to out-of-state brands.[34/] There was no contrary evidence.

E. Evidence Concerning the Relative Cost of Regulating Domestic and Imported Beverages

The evidence at trial also concerned whether there was any cost-based justification for the disproportionate tax imposed on imported beverages. Virtually every witness with relevant knowledge was asked whether it costs Florida more per gallon to regulate imported beverages than domestic beverages. Not one witness stated that it does; and all but one of the witnesses admitted that the State does not even regularly keep such cost data.

At trial, appellees presented testimony from the Division's four top officers. They included Director Ivey and the Division's three Bureau Chiefs: John Harris (Law Enforcement), Barrett Schoenfeld (Licensing and Records), and Pedro Gonzalez (Audit Operations). Messrs. Ivey, Harris, and Schoenfeld all testified that they had no basis for believing that the relative

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33/ Tr. at 95 (Tovell).

34/ Tr. at 87 (Tovell).

cost of regulating and enforcing Florida's alcoholic beverage laws is greater for imported products. Indeed, both Messrs. Harris and Schoenfeld testified that their Bureaus did not even keep data apportioning the cost of their activities between imported and domestic products.[35/]

The head of the Division's third Bureau, Mr. Gonzalez, did keep such data. One week after Senator Crawford introduced his amendment, Mr. Gonzalez wrote a memorandum to Mr. Ivey analyzing the relative costs of regulating imported and domestic alcoholic beverages. Mr. Gonzalez concluded that, gallon for gallon, it actually costs Florida six times more to regulate domestic beverages than imported ones:

> [T]he cost to regulate the imported products on a per gallon basis will be lower than the cost to regulate non-imported products. During FY 86/87 we spent 5.69 hours per 10,000 gallons on non-special (imported) products and 34.48 hours per 10,000 gallons for special products (non-imported products) regulation.[36/]

Mr. Ivey accepted these conclusions and advised his superior, Mr. Poole, by memorandum dated June 14, 1988: "[W]e estimate that the cost to regulate the imported products on a per gallon

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35/ Tr. at 115 (Harris); Tr. at 131-32 (Schoenfeld); Pl. Ex. 8 at 173-76, 195-96 (Ivey Deposition).

36/ Pl. Ex. 6; see Pl. Ex. 2 at 4; Pl. Ex. 3 at 2. In deposition testimony offered at trial, Mr. Gonzalez confirmed the conclusions he had reached in his June memorandum. See Pl. Ex. 9 at 46, 119-20, 138-40, 142 (Gonzalez Deposition).

basis will be lower than the cost to regulate Florida products."[37/] There was no contrary evidence.

On the cost issue, the State's evidence showed that Florida expends significant resources on policing alcohol-related crime.[38/] For this purpose, the State offered the testimony of six law enforcement officers, each of whom stated that at least half of all crime in Florida involves alcohol abuse. The State also offered various budget and financial records which established the total cost of law enforcement in Florida.

On cross-examination, each of the State's law enforcement witnesses admitted that in the vast majority of investigations, they cannot distinguish between the use of drugs and alcohol, and that they can never discern which alcoholic beverage was consumed, much less whether the alcohol was domestic or imported.[39/] Thus, there was no evidence that the cost of Florida's law enforcement efforts attributable to alcohol-related crime is disproportionately caused by imported beverages.

37/ Pl. Ex. 2 at 4; see also Pl. Ex. 3 at 2 (memorandum of June 20, 1988 from Poole to Spicola, General Counsel, Office of the Governor) ("Under the proposed tax structure the cost to regulate domestic products will be greater than the cost to regulate imported products on a per gallon basis.").

38/ As the court below noted, this proposition is "pretty much well-known by anybody . . . I could almost accept that and take judicial notice of that fact." Tr. at 36.

39/ Tr. at 26 (Coe), 31-33 (Watson), 40-41 (Ball), 48-50 (Cassady), 57 (Nofallah), 103-04 (Somberg). A seventh law enforcement officer testified to the salaries of Florida troopers. Tr. at 60 (McCaskill).

F. Evidence Concerning State Enforcement Efforts

John J. Harris, Jr., Chief of the Bureau of Law Enforcement, testified concerning the State's efforts to regulate and enforce its alcoholic beverage laws against out-of-state manufacturers selling their beverages in Florida. Mr. Harris testified that he had participated in numerous investigations requiring information from out-of-state.[40/] But to his knowledge, in the past twenty years his Bureau had not incurred any additional expenses in connection with those investigations, since officials of the Bureau had not left the State to conduct them.[41/] With respect to quality control within the state, Mr. Harris testified that his Bureau does not distinguish between domestic and imported products, and that the Bureau performs the same tests on each.[42/] Mr. Harris also admitted that since passage of the new statute, the Bureau has not altered or increased its enforcement efforts, including those directed at quality control.[43/]

40/ Tr. at 110-11 (Harris).

41/ Tr. at 114-15 (Harris).

42/ In either case, the Bureau's quality control efforts are limited to investigating complaints concerning brand mislabelling or bottle refilling. Tr. at 126 (Harris).

43/ Tr. at 117, 126 (Harris). At the request of the State's counsel, Mr. Harris offered an opinion that his Bureau has more "regulatory clout" over domestic manufacturers of alcoholic beverages than over their out-of-state competitors, since the Bureau has the power to put domestic producers "out of busi-

[Footnote continued next page]

G. Evidence Concerning the State's Health and Safety Claims

To qualify for the preferential tax exemption, Florida manufacturers of distilled spirits must distill their products at proof levels higher than 185 proof. Appellants contended that this requirement is a health and safety measure enacted to promote a Twenty-first Amendment purpose. The court held a full day of testimony to explore these assertions.

The State's own evidence indicates that the majority (by volume) of alcoholic beverages sold in Florida are wines, not distilled spirits. 44/ It is undisputed that wines are fermented, not distilled; and that the tax statute contains no regulatory requirements governing fermentation. Accordingly, there was no evidence to support a health and safety concern with respect to wines and other fermented beverages.

As to distilled spirits, the parties offered conflicting expert testimony concerning the relative safety of consuming various beverages. That testimony focused exclusively on

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[Footnote continued from preceding page]

ness" by revoking their licenses. Tr. at 123-24 (Harris). On cross-examination, however, Mr. Harris admitted that Florida also has the power to enforce its alcoholic beverage laws against out-of-state manufacturers that violate state laws: although Florida may not be able to close their plants, it can prohibit them from selling their products in the State. Tr. at 119 (Harris).

44/ Pl. Ex. 1 (Gonzalez spread sheet).

distilled spirits and contained no suggestion that consumption of non-distilled alcoholic beverages (such as table or sparkling wines) causes any health or safety problems.[45/] The State's own witness, Mr. Gonzalez, acknowledged that manufacturers of distilled spirits located outside Florida must pay the higher tax regardless of how pure their distillation process is, or what proof they distill at.[46/] Conversely, the evidence is undisputed that the State has made no effort to prohibit the sale within Florida of alcoholic beverages distilled at less than 185 proof.

Appellants have also claimed that the statute protects health and safety by requiring exempted products to be manufactured from "produce from land inspected by Florida agricultural inspectors." On that issue, appellees presented the testimony of Dale Dubberly, Chief of the Department of Agriculture's Inspection Bureau. He testified that the Department does not have and has never had a program to inspect agricultural lands, and that it has no plans to begin such an inspection program.[47/] There was no contrary evidence.

45/ During cross-examination by counsel for Bacardi, one of appellants' witnesses, Mr. Hammond, gratuitously asserted that better fermentation produces purer wine. Tr. at 287. Mr. Hammond was a long-time former employee of appellant Jacquin, whose principal testimony concerned the distillation process, not fermentation. Mr. Hammond was offered as a fact witness, and not as a health and safety expert; indeed, the State's own counsel repeatedly objected to Bacardi's efforts to question Mr. Hammond on health and safety issues. See Tr. at 283-85.

46/ Tr. at 315-17 (Gonzalez).

47/ Tr. at 328-29 (Dubberly).

SUMMARY OF ARGUMENT

This case presents a simple and straightforward question that this Court answered in the negative less than a year ago in McKesson: May Florida impose a discriminatory tax on imported alcoholic beverages in order to promote local business interests? The Supreme Court of the United States and this Court have consistently held that taxes that are discriminatory in purpose or effect are per se violations of the Commerce Clause. As the legislative history of Florida's tax statute makes clear, the tax was enacted for a discriminatory purpose, and it clearly has such an effect.

Appellants concede that the tax violates the Commerce Clause, but they argue that the tax is nevertheless justified by the Twenty-first Amendment. There are three reasons why that position is completely untenable. First, as Bacchus and McKesson plainly hold, the Twenty-first Amendment can never save a statute like this one, whose manifest purpose is economic protectionism. Second, the justifications advanced by appellants to save the statute are wholly unrelated to the Twenty-first Amendment's core purpose of promoting temperance. Indeed, appellants' asserted objective of promoting the sale and consumption of domestically-produced alcoholic beverages is antithetical to the central concerns of that Amendment. Third, even if appellants' asserted justifications stated valid concerns under the Twenty-first Amendment, the record facts demonstrate that Florida's tax does

not rationally promote any of those concerns. And certainly none of them is sufficiently compelling to outweigh the significant injury inflicted by Florida's tax on the federal interest in promoting interstate commerce.

Because of its discriminatory effects, the tax also violates the Import-Export and Equal Protection Clauses of the United States Constitution and the Equal Protection Clause of the Florida Constitution.

ARGUMENT

I. THE FLORIDA IMPORT TAX VIOLATES THE COMMERCE CLAUSE BECAUSE IT DISCRIMINATES AGAINST ALCOHOLIC BEVERAGES PRODUCED AND MANUFACTURED OUTSIDE THE STATE.

The Circuit Court correctly concluded that Florida's import tax is "so clearly discriminatory"[48/] that it violates the Commerce Clause.[49/] It is well settled that taxes which discriminate against out-of-state goods in order to promote local business interests are flatly inconsistent with the Commerce Clause of the United States Constitution.[50/] At the pre-trial hearing in this case, the State's counsel appeared to concede that

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48/ Tr. at 434.

49/ U.S. Const. art. I, § 8, cl. 2.

50/ See, e.g., New Energy Co. v. Limbach, 108 S. Ct. 1803 (1988); Boston Stock Exch. v. State Tax Commission, 429 U.S. 318 (1977); Guy v. Baltimore, 100 U.S. 434 (1879).

Florida's tax violates the Commerce Clause, and that the tax could survive only if it promoted some legitimate concern protected by the Twenty-First Amendment.[51/] At the close of the trial, counsel for the private appellants made that concession explicit:

> I don't think the issue in this case is one of evenhandedness, I don't think the issue is one of discrimination. I think the statute discriminates. I think the statute on its face violates the Commerce Clause under the traditional view of the Commerce Clause . . . .[52/]

Counsel's concession is a recognition that the applicable law in this area is already well settled. The leading case, Bacchus Imports, Ltd. v. Dias,[53/] involved an alcoholic beverage tax virtually identical to the one at issue here. In that case, Hawaii subjected alcoholic beverages sold or used within the state to a 20% tax based on the wholesale price of the alcohol. In order to promote the state's alcohol industry, however, the legislature specifically exempted Hawaiian-made pineapple wine and okolehao (a type of brandy) from the tax. After reviewing the legislative history of Hawaii's preferential tax, the Court concluded that it violated the Commerce Clause because the

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51/ Motion Hearing, Sept. 26, 1988, at 33-35 (argument of Mr. Brown, counsel for appellant Ivey).

52/ Tr. at 420 (closing argument of Mr. Rogow, counsel for appellants Jacquin and Todhunter).

53/ 468 U.S. 263 (1984).

undisputed "purpose of the exemption was to aid Hawaiian industry [and] the effect of the exemption is clearly discriminatory in that it applies only to locally produced beverages . . . ."[54/] Indeed, the Court characterized the tax as "'economic protectionism' in every sense of the phrase."[55/]

In reaching this conclusion, the Bacchus Court reiterated two well-established principles that are particularly relevant here. First, the Court made clear that a state statute amounts to economic protectionism, and therefore violates the Commerce Clause, if either its purpose or its effect is discriminatory.[56/] Second, the Court explicitly recognized the importance of a statute's legislative history in determining its purpose, and thus, its constitutionality.

Shortly after Bacchus, this Court applied those same principles to strike down Florida's "Revised Products Exemption." That case, Division of Alcoholic Beverages and Tobacco v. McKesson Corp.,[57/] involved the predecessor to the tax at issue here; instead of imposing a surcharge on all imports, that

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54/ Id. at 271.

55/ Id. at 272.

56/ Id. at 270 (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352-53 (1977), and City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

57/ 524 So.2d 1000 (Fla. 1988), cert. granted on other grounds, 57 U.S.L.W. 3343 (U.S. Nov. 15, 1988) (No. 88-192).

statute granted tax exemptions to wines and distilled spirits manufactured from citrus, sugar cane, and certain grapes, all of which are "adapted to growing in Florida."[58/] This Court found that the tax had a discriminatory effect on out-of-state alcoholic beverages because, inter alia, it was "quite apparent" that the tax "clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages not made from [those] base crops."[59/] Further, the Court found that the sole purpose of the tax -- "promoting use of Florida products" -- was impermissible and could not justify the discriminatory burden which the tax placed on interstate commerce.[60/]

In reaching these conclusions, the Court placed the burden of justifying such a facially discriminatory tax on the State. Because the State failed to carry its burden by demonstrating that the tax promoted "legitimate local benefits other than the admitted benefits to local industry flowing from the statute,"[61/] the Court struck it down.

All the evidence of record here demonstrates that this case is simply McKesson revisited. Indeed, as the Circuit Court aptly stated, Florida's new tax is "but a warmed-over version,

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58/ Id. at 1008.

59/ Id.

60/ Id.

61/ Id. at 1005.

dressed up in different clothing," of the one struck down in McKesson.[62/] Certainly the legislative history discussed above leaves no doubt that the sole purpose of the new tax statute is to promote local industry. Furthermore, the effect of Florida's two-tiered scheme is the same here as it was in McKesson: by directly favoring Florida interests over out-of-state interests, the tax scheme encourages Florida consumers to purchase and consume Florida's alcoholic beverage products. Conversely, by making out-of-state products more costly, the statute ensures that fewer of them will be purchased. This, of course, is precisely what the legislature intended when it passed the statute. The tax has another impermissible effect: it causes direct and continuing injury to Florida consumers by depriving them of the choice and competitive benefits of a free marketplace. Because both the intent and the effect of the statute are the paradigm of protectionism, the tax violates the Commerce Clause.

62/ Tr. at 433. If anything, the tax at issue here is even more discriminatory and restrictive than its predecessor. The earlier statute at least had the appearance of evenhandedness. In theory, it accorded a preferential tax benefit to any producer or manufacturer, regardless of its location, so long as its products were made from the specified crops. Under the present tax, however, no producer or manufacturer located outside Florida can ever qualify for the exemption.

II. THE TAX DOES NOT PROMOTE ANY LEGITIMATE STATE INTERESTS RECOGNIZED BY THE TWENTY-FIRST AMENDMENT.

The crux of appellants' argument is that "[u]nlike McKesson and Bacchus, this is a bona fide Twenty-first Amendment case,"[63/] and that the Twenty-first Amendment therefore saves Florida's tax from invalidation. To reach that conclusion, appellants are forced to construe the Twenty-first Amendment as carte blanche authority for the states to impose any scheme of discriminatory taxation they wish on out-of-state producers, as long as the asserted justification for the tax bears a rational relationship to the State's police power.

That broad view of the Twenty-first Amendment is simply not the law today. Nor has it been the law for at least the last quarter century. More than two decades ago the United States Supreme Court made clear that to qualify for any protection under the Twenty-first Amendment, the State must first demonstrate that its statute promotes the Amendment's core objective of temperance, and that it does so in a rational and evenhanded way. Furthermore, if the statute implicates any other federal constitutional right, its validity must be measured through a balancing process: the challenged statute cannot survive unless the Twenty-first Amendment purpose it advances is compelling enough to outweigh the conflicting federal interest. In this case, the State has not even come close to meeting that heavy burden.

63/ Appellants' Br. at 21.

A. The Twenty-First Amendment Does Not Protect State Statutes Unless They Promote the Core Purpose of Temperance in a Rational and Evenhanded Way.

Section 2 of the Twenty-first Amendment provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."64/ The United States Supreme Court has held that Section 2 confers power on the states to regulate the importation and sale of liquor within their own borders.65/ However, it is well settled that this power is not unlimited. In contrast to Section 1 of the Twenty-first Amendment, which repealed Prohibition,66/ the Supreme Court has made clear that Section 2 does not repeal any other provision of the Constitution.

Moreover, the powers conferred by Section 2 of the Twenty-first Amendment are limited to those core purposes that the Amendment was designed to achieve. As both the legislative history of the Amendment and the case law make clear, the core objective of Section 2 was to permit states to promote temperance among their citizenry.

64/ U.S. Const. amend. XXI, § 2.

65/ See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

66/ Section 1 provides: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. Const. amend. XXI, § 1.

Section 2 incorporated into the Constitution the provisions of two pre-Prohibition statutes, the Wilson Act of 1890[67/] and the Webb-Kenyon Act of 1913.[68/] Those statutes had allowed "dry" states to promote temperance by either prohibiting or otherwise reasonably regulating the importation, sale, or use of liquor within their borders. In exchange for agreeing to the repeal of Prohibition, these "dry" states were once again empowered to foster temperance within their borders either by restricting the sale of alcohol or by prohibiting its sale altogether. Nothing in the legislative history of the Twenty-first Amendment suggests that the states were given authority beyond what was necessary to achieve those purposes; and certainly there is nothing that even remotely implies that the states were allowed, under the banner of the Amendment, to encourage the production, sale, and consumption of domestic alcohol.[69/]

Even when a state statute on its face articulates an objective within the core purposes of the Amendment, that fact alone does not validate the statute. It is not enough for a state simply to assert, for example, that an otherwise

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67/ 27 U.S.C. § 121 (1982).

68/ 27 U.S.C. § 122 (1982).

69/ See Bacchus, 468 U.S. at 274-75; see also Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 584 (1986); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

unconstitutional tax promotes temperance; the state must demonstrate that its tax actually advances that objective, or some other core purpose, in a rational way. And even if the state makes that showing, it cannot automatically take refuge in the Twenty-first Amendment: when a state alcoholic beverage regulation conflicts with a federal constitutional provision, such as the Commerce Clause, the courts are required to scrutinize the statute's purpose and balance the Twenty-first Amendment interests it advances against the detriment visited upon the competing federal interest. Thus, appellants are simply wrong in asserting that Florida's powers under the Twenty-first Amendment are plenary and that they override powers existing under every other provision of the Constitution.

The Supreme Court of the United States spoke explicitly to this point in Hostetter v. Idlewild Bon Voyage Liquor Corp.,[70/] decided in 1964. In Idlewild, the Court struck down New York's attempt to regulate a retail liquor business located at John F. Kennedy Airport and operated under the supervision of the Federal Bureau of Customs. After reviewing its earlier decisions, the Supreme Court rejected as "an absurd oversimplification" the notion that the Twenty-first Amendment had "operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned . . . ."[71/] Instead, the

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70/ 377 U.S. 324 (1964) ("Idlewild").

71/ Id. at 331-32.

Court made clear that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[72/]

Since Idlewild, the Supreme Court has reaffirmed these fundamental principles numerous times. In cases involving assertions that the Twenty-first Amendment justified state regulations prohibited by the Commerce Clause, the Court has repeatedly held that the federal interest in the free flow of interstate commerce must prevail.[73/]

Bacchus is a case in point. Although appellants claim that that decision was a "pure Commerce Clause" case,[74/] the facts are otherwise.[75/] The Court even framed the issue for decision in Twenty-first Amendment terms: "whether the principles underlying the Twenty-first Amendment are sufficiently

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72/ Id. at 332.

73/ See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1960); Bacchus, 468 U.S. at 275-76; see also California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 113-14 (1980).

74/ Appellants' Br. at 15, 22.

75/ It is irrelevant that Hawaii waited until the case had reached the Supreme Court before asserting a Twenty-first Amendment justification for the tax. Although that justification was belatedly asserted, the Court plainly considered and rejected it. See Bacchus, 468 U.S. at 274 n.12.

implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended."[76/] The Court reiterated that the purpose of the Twenty-first Amendment was to promote temperance, and it made clear that under that Amendment "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[77/] Because Hawaii's tax was "mere economic protectionism," the Court held that the Twenty-first Amendment could not save it.[78/]

Likewise, in McKesson, this Court considered and rejected out of hand the argument that the State's supposed authority under the Twenty-first Amendment should override the federal interest in the free flow of commerce.[79/] It concluded

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76/ 468 U.S. at 275.

77/ Id. at 276.

78/ Appellants rely on Heublein, Inc. v. State, 256 Ga. 578, 351 S.E.2d 190, appeal dismissed, 107 S. Ct. 3253 (1987). There the Georgia Supreme Court stated, without explanation, "defraying the increased costs of regulating the importation into this state of intoxicating liquors" is a valid concern under the Twenty-first Amendment, id. at 196, but rested its decision on the fact that the statute's asserted purpose was never challenged by the taxpayer. Whether or not the United States Supreme Court would view covering the costs of alcohol regulation as within the core purposes of the Twenty-first Amendment, Bacchus makes clear that Heublein is inapposite here, where the legislative history of the challenged statute shows a per se violation of the Commerce Clause.

79/ Appellants make much of the fact that the State did not argue the Twenty-first Amendment in McKesson. That fact is

[Footnote continued next page]

that "[n]o clear concern of the twenty-first amendment has been shown to be furthered by this tax preference scheme which places an otherwise unjustified and therefore excessive burden on interstate commerce."[80/]

In the face of this clear line of authority, appellants invoke cases decided over fifty years ago for the untenable proposition that the Twenty-first Amendment confers plenary police power on the states to enact any alcoholic beverage regulation they wish.[81/] Principal among these is State Board of Equalization v. Young's Market Co.[82/] Whatever may be said about the wisdom of that case when it was decided, plainly it is no longer good law. The broad reading in Young's of the State's powers under the Twenty-first Amendment is wholly inconsistent with the case law of the last twenty-five years.[83/] The Court in

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[Footnote continued from preceding page]

irrelevant. Another appellant, Jacquin-Florida, squarely presented the Twenty-first Amendment issue in its opening brief to this Court in McKesson. Initial Brief of Appellant Jacquin-Florida Distilling Co., at 13-14, Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988) (No. 70,268). Furthermore, this Court explicitly rejected Jacquin's argument in its opinion.

80/ 524 So.2d at 1009.

81/ See, e.g., Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936) ("Young's").

82/ 299 U.S. 59 (1936).

83/ Appellants are, of course, correct in noting (Appellants' Br. at 27) that the Court in Capital Cities Cable, Inc. v.

[Footnote continued next page]

Bacchus made that precise point in dismissing the holding in Young's as needlessly "broad language."[84/] Only the dissent in Bacchus -- not the majority -- relied on Young's in any event.[85/]

Appellants' effort to reargue this matter is, in short, wholly without merit and should be rejected. Indeed, if appellants were correct, Bacchus, McKesson, and every other modern Twenty-first Amendment case would be wrong. As this Court made clear in McKesson, appellants' assertion of plenary power over the sale of alcoholic beverages "is at odds with the 'general

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[Footnote continued from preceding page]

Crisp cited Young's for the proposition that "§ 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." 467 U.S. 691, 712. But appellants neglect to note that, after citing Young's, the Court immediately cautioned again, as it did in Bacchus, that "[t]o draw a conclusion . . . that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." Id. at 712-13 (quoting Idlewild, 377 U.S. at 331-32).

84/ 468 U.S. at 274 (footnote omitted).

85/ See, e.g., 468 U.S. at 282. Appellants also cite Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) ("Seagram"), a case in which the Supreme Court upheld New York's liquor price affirmation law in the face of a Commerce Clause challenge. Appellants' Br. at 16, 24. However, the Court in Seagram made clear that, because the law at issue had not yet taken effect, any finding of discriminatory effect would be premature. Seagram, 384 U.S. at 41. When the successor to New York's affirmation law was later reviewed in Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986), the Court had no trouble finding a discriminatory effect. In doing so, moreover, the Court specifically cast doubt on the "continuing validity" of its earlier decision in Seagram. Id. at 584 n.6.

principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.'"[86/] Were the law otherwise, states could erect Balkan-like barriers to interstate commerce by creating their own cottage industry in alcoholic beverages, a result which could not possibly be reconciled with the Twenty-first Amendment's core purpose of promoting temperance.

B. Florida's Statute Does Not Promote Any Valid Twenty-First Amendment Concern.

Appellants advance three justifications for Florida's discriminatory tax: (1) recovering the costs of regulating imported alcoholic beverages; (2) enhancing regulatory power over the distribution of alcoholic beverages; and (3) eliminating the health and safety risks associated with consuming alcoholic beverages. Although these may be valid state objectives for some purposes, none of them involves a core purpose recognized by the Twenty-first Amendment. But even if they did, there is no evidence that Florida's discriminatory tax is a rational means to advance these objectives. Certainly the tax does not promote any interest that is sufficiently compelling to outweigh the obvious injury to interstate commerce.

86/ 524 So.2d at 1008 (quoting Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980)).

1. Recovering the Costs of Regulating Imported Beverages

The Circuit Court correctly rejected appellants' contention that the discriminatory tax can be justified on the ground that it costs more overall to regulate imported than domestic beverages.[87/] Apportioning the cost of state enforcement activities between local and interstate commerce of course has nothing to do with the concerns recognized in the Twenty-first Amendment. But, in any event, the cost issue is irrelevant to the tax it purports to justify. The statute at issue here imposes a tax on beverages that is disproportionately higher on a per gallon basis for beverages manufactured outside the State of Florida. Such a tax could be justified, if at all, only by evidence that, gallon for gallon, it costs the State more to regulate imported beverages.

All of the record evidence refutes that notion. Not one witness with relevant knowledge -- including the State's own witnesses -- testified that it costs more for the State to regulate imported than domestic beverages on a per gallon basis.[88/] In fact, the State's own employee, Mr. Gonzalez, testified that,

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87/ Final Judgment, Nov. 29, 1988, at 4-6. Page references to the Final Judgment refer to the court's bench ruling that is incorporated into the Judgment.

88/ See, e.g., Tr. at 26-27 (Coe), 31-33 (Watson), 40-41 (Ball), 48-50 (Cassady), 57 (Nofallah), 103-04 (Somberg), 114-15 (Harris), 131-32 (Schoenfeld); Pl. Ex. 9 at 46, 119-20, 142 (Gonzalez Deposition).

on a per gallon basis, it actually costs the State six times more to regulate Florida products than imported products.[89/] Moreover, as the court below noted, the uncontested trial evidence from the State's own witnesses was that Florida does not have, and has never had, a quality control program authorizing the inspection of either domestic or imported alcoholic beverages.[90/] Thus, the higher tax burden imposed on non-Florida producers and manufacturers is not used to defray any costs attributable to regulating imported beverages. In short, appellants' "cost" arguments are unrelated to the Twenty-first Amendment concern of temperance, are unsupported by the record evidence, and offer no counterbalance to the invidious discrimination that the statute inflicts.

2. Enhancing Regulatory Power Over the Distribution Chain

Appellants' second justification -- that the tax enhances the State's regulatory power over the distribution chain -- is economic protectionism carried to the farthest extreme. The crux of this argument is that Florida is entitled to use any economic weapons at its disposal to coax (or, if need be, coerce) foreign manufacturers to relocate to Florida, where they will be subject to the stricter control of the State's

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89/ Pl. Ex. 6; see Pl. Ex. 9 at 46, 119-20, 138-40, 142 (Gonzalez Deposition); see also Pl. Ex. 2 at 4; Pl. Ex. 3 at 2.

90/ Final Judgment at 5.

regulatory authorities.[91/] This objective is not only repugnant to the Commerce Clause; it undercuts the Twenty-first Amendment's temperance concerns. Far from promoting temperance, the State here seeks to use its taxing authority to increase the manufacture, sale, and consumption of alcoholic beverages -- so long as the beverages are manufactured by local producers from local agricultural products.

Furthermore, if appellants' argument were valid, states would have carte blanche authority to impose any discriminatory measures they wished on imported alcoholic beverages. It will of course always be true that states have greater ability to regulate industries located within their borders. If a state's interest in enhancing its regulatory powers were sufficient to justify any discriminatory efforts to force foreign businesses to relocate, the balancing test mandated by the Supreme Court would become meaningless: the state's regulatory interest would always prevail over the federal interest in protecting interstate commerce. To accept that reasoning is effectively to overrule both Bacchus and McKesson -- a plainly untenable result.

In any event, the record evidence makes clear that "enhancing regulatory power over the distribution chain" is a euphemism for protectionism. Even if such a purpose had some legitimacy, it would still have to be balanced against the

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91/ Appellants' Br. at 31-35.

concerns of the Commerce Clause. Here it is undisputed that the State has not sought in any way to enhance its regulatory power over alcoholic beverages. Since the tax was enacted, the State has not changed its enforcement efforts or procedures in any respect;[92/] nor does it have any plans to do so in the future.[93/] Thus, even if the Twenty-first Amendment protected states' efforts to enhance their regulatory authority, the statute here does not further that purpose and must be rejected.

3. Promoting Health and Safety

Appellants' final justification for the tax is also without merit. The trial court exhaustively examined appellants' argument that the preferential tax somehow promotes health and safety concerns, and properly rejected it as "just illusory."[94/]

Appellants argue that the tax promotes temperance.[95/] This is plainly frivolous. Even in their brief appellants concede that, far from encouraging temperance, the tax is an "encouragement to consume [local] beverages"[96/] and "a carrot to encourage their use."[97/] Promoting the consumption of alcoholic

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92/ Tr. at 117, 126 (Harris).

93/ Tr. at 126 (Harris).

94/ Final Judgment at 5.

95/ Appellants' Br. at 32.

96/ Appellants' Br. at 5.

97/ Appellants' Br. at 35.

beverages surely has no rational connection to temperance.

Furthermore, the extensive legislative history admitted at trial contains not a word to suggest that the State intended the tax to promote temperance or health and safety objectives of any other kind. Instead, the Circuit Court correctly found that the only purpose of the tax was to encourage the consumption of cheap alcoholic beverages and promote the local alcohol industry. The tax has precisely that effect: it shelters Florida's domestic industry from competition, allowing it to sell more alcoholic beverages to Florida consumers at lower prices than those of the out-of-state competition.

Appellants' remaining argument -- that the tax promotes the health and safety of Florida's citizens by protecting them from alcoholic beverages distilled at less than 185 proof -- is equally unavailing. As an initial matter, there is no record evidence to indicate that the State had any health and safety objective in mind when it enacted this particular provision. But even if it did, and even if it could be demonstrated that beverages distilled at over 185 proof are safer than those distilled at less than 185 proof -- a dubious proposition at best -- that fact would be irrelevant here. The statute's requirement that domestic manufacturers distill at 185 proof to qualify for the tax exemption is simply not a rational means to advance any health and safety objective, for several reasons.

First, the majority of the beverages sold in Florida and subject to the tax are wines, which are fermented, not distilled.[98/] The tax subjects them to discriminatory treatment without even purporting to regulate their quality. Moreover, as to distilled beverages, only distilleries within Florida can benefit from the 185 proof requirement; a distillery in Atlanta may distill liquor at 199 proof, but it will still be subject to the higher tax. Furthermore, the statute still permits the sale in Florida of liquor distilled at less than 185 proof. In short, the determinative factor governing the tax exemption is not the purity of the product sold, but the geographic location of the manufacturer.

For these reasons, the Circuit Court correctly ruled that appellants failed to proffer any valid Twenty-first Amendment justification for the tax. The only purpose of Florida's tax is to protect local industry, and that purpose is squarely prohibited by both Bacchus and McKesson.

98/ Appellants argue that the State is permitted to "limit[] the fermentation base for wine made in Florida for sale in Florida to inspected crops." Appellants' Br. at 34. That argument is wrong for several reasons. The statute of course never mentions fermentation, nor sets any standards governing it. The undisputed evidence also showed that Florida does not inspect agricultural crops in the field. Moreover, there is no evidence that inspecting crops improves the fermentation process, which takes place entirely after the crops are harvested. Furthermore, even if Florida had set standards to govern the fermentation process, its tax exemption would not be available to any producer outside the state who met those standards.

III. THE FLORIDA TAX VIOLATES THE IMPORT-EXPORT CLAUSE.

Florida's tax also violates the Import-Export Clause.[99/] That Clause provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws."[100/]

In Michelin Tire Corp. v. Wages,[101/] the most recent case in the area, the United States Supreme Court held that the Clause's ban on "imposts" or "duties" on imports proscribed levies that discriminated against imported goods. In that case, the Court upheld the application of Georgia's nondiscriminatory ad valorem property tax to Michelin's inventory of imported tires. But it repeated the settled rule that if a state passed a law taxing the retail sale of imported but not domestic goods, the tax "would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost."[102/]

99/ Appellants err in claiming that "Plaintiffs abandoned all challenges to Ch. 88-308 other than the Commerce Clause argument." Appellants' Br. at 3. The complaint in this case plainly alleges violations of the Import-Export and Equal Protection Clauses. Although those claims were not specifically addressed in closing arguments below, they certainly were never "abandoned."

100/ U.S. Const. art. I, § 10.

101/ 423 U.S. 276 (1976).

102/ Id. at 288 n.7.

In the past, the Supreme Court has applied this rule to strike down discriminatory taxes on imported alcoholic beverages. In Department of Revenue v. James B. Beam Distilling Co.,[103] a whiskey manufacturer from Scotland challenged a ten-cent-per-gallon tax imposed by Kentucky on all persons bringing liquor into the State. In invalidating that tax, the Court made clear that it "has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids."[104]

This Court has also invalidated discriminatory taxes under the Import-Export Clause. In Miller v. Publicker Industries, Inc.,[105] the Court invalidated a four-cent-per-gallon tax exemption for gasohol made from United States products. The Court distinguished that tax from the one upheld in Michelin on the ground that the former "constitutes discriminatory taxation based upon the foreign origin of a product in violation of the import-export clause."[106]

In the case at bar, some of the beverages subject to Florida's import tax and sold by appellees are manufactured outside the United States.[107] As to those beverages, Florida has

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103/ 377 U.S. 341 (1964).

104/ Id. at 344.

105/ 457 So.2d 1374 (Fla. 1984).

106/ Id. at 1376.

107/ Tr. at 87-88 (Tovell).

imposed an additional discriminatory tax based solely on their origin. Consequently, to compensate for the tax they must pay, distributors in Florida will not purchase those beverages or will, at a minimum, require a substantial reduction in price before purchasing them. Thus, the tax is a discriminatory tax that violates the Import-Export Clause.

IV. THE FLORIDA TAX VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

By limiting tax exemptions to locally-produced liquor, Florida does not treat out-of-state manufacturers and the Florida wholesalers that distribute their products in the same manner as it treats businesses operating entirely within Florida. Since appellants' justification for the import tax is really the protection of local industry, the tax cannot survive scrutiny under the Equal Protection Clauses of the United States and Florida Constitutions.[108/]

In Metropolitan Life Insurance Co. v. Ward,[109/] the United States Supreme Court invalidated an Alabama tax that taxed premiums of out-of-state insurance companies at a higher rate than premiums of Alabama insurance companies. To defend its tax, the state had asserted that the "promotion of domestic industry, in and of itself, is a legitimate state purpose that will survive

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108/ U.S. Const. amend. XIV, § 1; Art. I, § 2, Fla. Const.

109/ 470 U.S. 869 (1985) ("Metropolitan").

equal protection scrutiny."[110/] The Court rejected the state's argument, holding that the state's goal "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."[111/]

While this Court did not specifically reach the claim in McKesson, it did rely on Metropolitan in noting that the "promotion of domestic business or industry, when accomplished by imposing a discriminatory tax against out-of-state competitors, is not a legitimate state purpose under the Equal Protection Clause of the United States Constitution."[112/] Elsewhere this Court has made clear that a discriminatory tax on nonresidents, such as the one at issue here, violates the Equal Protection Clauses of both the United States and Florida Constitutions.[113/]

Because the State's justification for the import tax is actually the protection of local industry at the expense of out-of-state competitors, the tax bears no rational relation to any legitimate state purpose. It therefore violates the Equal Protection Clauses of both the United States and Florida Constitutions.

110/ Id. at 876.

111/ Id. at 878.

112/ 524 So.2d at 1009 n.2.

113/ See, e.g., Department of Revenue v. Amrep Corp., 358 So.2d 1343, 1353 (Fla. 1978).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Circuit Court.

Respectfully submitted,

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December 30, 1988

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1988, I have caused copies of the foregoing "Answer Brief of Appellees The California Wine Institute and Tampa Wholesale Liquors Co., Inc." to be hand-delivered to the following:

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