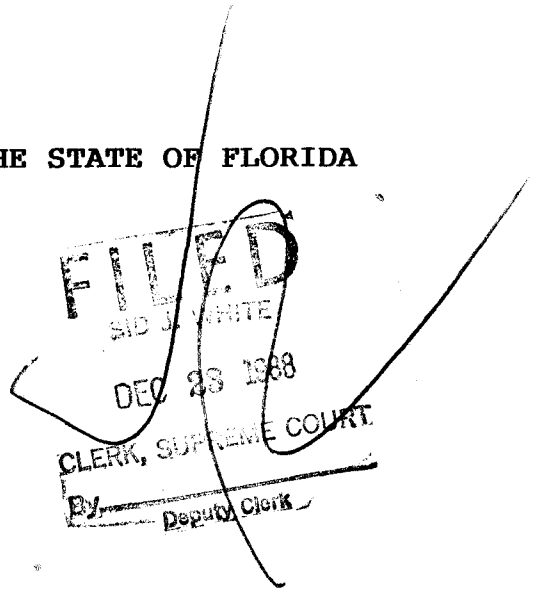
IN THE SUPREME COURT OF THE STATE OF FLORIDA




C. L. IVEY, DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, JACQUIN-FLORIDA DISTILLING CO., INC., and TODHUNTER INTERNATIONAL, INC.,

Appellants,

CASE NO. 73,424

vs.

BACARDI IMPORTS, COMPANY,INC., N. GOLDRING CORP., CALIFORNIA WINE INSTITUTE and TAMPA WHOLESALERS, INC.

Appellees.
_____/

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA, CASE NO. 88-2881

# APPELLANT IVEY'S INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DANIEL C. BROWN
ASSISTANT ATTORNEY GENERAL
TAX SECTION, CAPITOL BLDG.
TALLAHASSEE, FL 32399-1050
904/487-2142

COUNSEL FOR APPELLANT
C. LEONARD IVEY

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES CONT'D.

## TABLE OF AUTHORITIES CONT'D.

## PRELIMINARY STATEMENT

Since the record on appeal will not be completed by the time when Appellant Ivey's Initial Brief is due to be filed, Appellant Ivey has prepared and filed an Appendix. Cites in this Brief are to the Appendix, thusly: "App. Vol. ___, p. ___

The parties are referred to thusly:

Bacardi Imports Co., Inc. - "Bacardi" or "Plaintiffs."

N. Goldring Corporation - "N. Goldring" or "Plaintiffs."

California Wine Institute - "California Wine" or "Plaintiffs."

Tampa Wholesale Distributing Co., Inc. - "Tampa Wholesale" or "Plaintiffs."

C. Leonard Ivey - "Appellant Ivey" or "Ivey."

## QUESTIONS PRESENTED FOR REVIEW

1. DID THE TRIAL COURT ERR IN JUDGING THE CONSTITUTIONALITY OF §§10 AND 11, CH. 88-308, LAWS OF FLORIDA ACCORDING TO A STRICT SCRUTINY ANALYSIS WHEN THE STATUTE IS AN EXERCISE OF FLORIDA'S POLICE POWERS UNDER THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

2. WHEN JUDGED BY THE CONSTITUTIONAL STANDARD APPROPRIATE TO A STATE'S EXERCISE OF ITS TWENTY-FIRST AMENDMENT AUTHORITY, ARE §§10 AND 11 OF CH. 88-308, LAWS OF FLORIDA, CONSTITUTIONAL?

## STATEMENT OF THE CASE AND THE FACTS

During the 1988 Legislative session, the Florida Legislature enacted §§9-11, Ch. 88-308, Laws of Fla. Section 9 set out statements of legislative policy in regard to the importation of wines and liquors into Florida.[1] Prior to the passage of §§9-11, Ch. 88-308, this Court held that the provisions of §§564.06 and 565.12, Fla. Stat. (1985), which for only economic reasons granted exemptions from the then-extant alcoholic beverage excise tax, were invalid under the Commerce Clause of Art. I, §8, Constitution of the United States. Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988).

---

[1] Section 9, Ch.88-308, Laws of Fla., provides:

> Effective July 1, 1988, the Legislature finds and determines that the authorized transportation and importation into the state of alcoholic beverages described in chapters 564 and 565, Florida Statutes, require 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.

Chapter 88-308 completely repealed the 1985 economic based excise tax - exemption structure. In its place, Ch. 88-308 enacted a beverage excise tax with rates higher than the exemption rates for favored products under the 1985 Statutes. Compare §§564.06, 565.12, Fla. Stat. (1985) with §§10,11, Ch. 88-308, Laws of Fla. Chapter 88-308, in furtherance of the police power objectives set forth in §9 thereof, enacted an import tax on all wines and distilled spirits imported into Florida for use and consumption in Florida. §§10 and 11, Ch. 88-308, Laws of Fla. The legislature also imposed the following regulatory requirement: "All beverages distilled in this state for sale in this state shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors." §565.12(4), Fla. Stat., as amended by §11, Ch. 88-308, Laws of Fla. See also §564.06(7), Fla. Stat., as amended by §10, Ch. 88-308, Laws of Fla.

Suit was instituted by Bacardi and N. Goldring, as distributors of imported alcoholic beverages, who contended that the importation tax violated the dormant Commerce Clause, the Export-Import Clause and the Equal Protection Clause of the Constitution of the United States, as well as Florida's constitutional guarantee of equal protection. (App. Vol.I, p.8). California Wine and Tampa Wholesale intervened as plaintiffs. (App. Vol. I., p. 35,38). Jacquin-Florida Distilling Co., Inc., and Todhunter International, Inc., intervened as parties defendant. (App. Vol.I, p. 23,26).

At trial, Plaintiffs abandoned all challenges to Ch.88-308 other than the Commerce Clause argument. (App. Vol. I, p. 313-364).

Plaintiffs moved for preliminary injunctive relief, which the trial court declined to grant after hearing on August 10, 1988. The trial court at that time indicated its view that the instant case was different from the case of Division of Alcoholic Beverages & Tobacco v.McKesson, supra, over which the trial judge had presided at the trial level, since the provisions of Ch. 88-308 involved the Twenty-first Amendment. (App. Vol. II, p. 15-18).

After extensive discovery, the trial court, on motion of Appellant Ivey, held a pretrial conference on September 26, 1988. At pretrial Ivey reminded the trial court that this case was, unlike McKesson, a true Twenty-first Amendment case, and urged the court to apply the correct standard of review in judging the constitutionality of Ch. 88-308, the standard traditionally accorded in cases where a state's Twenty-first Amendment action is challenged on dormant Commerce Clause grounds: Does Ch. 88-308 rationally advance legitimate concerns of the Twenty-first Amendment? (App. Vol. I, p. 39-14, Vol. II, p. 22-36). Despite the court's earlier conclusion that Ch. 88-308 implicated the Twenty-first Amendment, (App. Vol. II, p. 15-18), the trial court ruled at pretrial that Ch. 88-308 was to be judged, not under traditional Twenty-first Amendment analysis and not even by Commerce Clause standards, but instead under a strict scrutiny standard. The court required the State to demonstrate

that §9-11, Ch. 88-308 were necessary to promote compelling state interests. It also placed on the State the burden of proof as to the constitutionality of Ch. 88-308. (App. Vol. II, p. 53-54).

At trial, the State introduced both documentary and testimonial evidence that police power objectives under the Twenty-first Amendment were advanced by §§9-11 of Ch. 88-308. That evidence is categorized and summarized below.

## THE STATE'S EVIDENCE PERTAINING TO ENHANCING REGULATORY POWER OVER THE DISTRIBUTION CHAIN OF WINES AND DISTILLED SPIRITS.

The State called John Harris, Chief of the Bureau of Law Enforcement, Division of Alcoholic Beverages and Tobacco (DABT). Mr. Harris is a sworn law enforcement officer with twenty years experience in enforcing the alcoholic beverage laws of Florida (App. Vol. II, p. 118). It is his responsibility to conduct criminal and administrative investigations into violations of Florida's beverage laws and to conduct background investigations of persons seeking licenses to manufacture and sell beverages in Florida. (App. Vol. II, p. 118-119). His duties include investigations of Florida's Tied House Evil Act, which is designed to prevent improper interests of alcoholic beverage manufactures in licensed Florida distributors and retailers of alcoholic beverages, and investigations under Florida's laws designed to keep criminal elements from gaining a foothold in Florida's alcoholic beverage distribution system. (App. Vol. II, p. 120-122). Mr. Harris has conducted numerous

investigations where an out-of-state manufacturer of beverages was either the target of an investigation or may have had information pertinent to an investigation of a Florida licensee, as well as numerous investigations where all persons involved were located in Florida. (App. Vol. II, p. 122-123). He testified without dispute from his informed experience that DABT has greater regulatory authority and control in cases where an alcoholic beverage manufacturer is located in Florida than in the case where the manufacturer is out-of-state. He testified to that effect because the licensure provisions applicable to an in-state manufacturer give DABT substantially more legal and practical control over an in-state alcoholic beverage manufacturer than DABT has over a manufacturer located outside of Florida. (App. Vol. II, p. 123-125, 135-136). Plaintiffs presented no rebuttal to that testimony.

## THE STATE'S EVIDENCE PERTAINING TO HEALTH RISKS ASSOCIATED WITH CONSUMPTION OF ALCOHOLIC BEVERAGES DISTILLED AT LESS THAN 185 PROOF.

The State also presented evidence showing that the requirement in Ch. 88-308 that alcoholic beverages distilled in this State for sale in Florida be distilled above 185 proof, coupled with a tax encouragement to consume such beverages, rationally relates to health objectives of the State under the Twenty-first Amendment.

Dr. Teaf, a toxicologist, tesified for the State as an expert. Dr. Teaf testified that certain chemicals, which by stipulation of the parties were conceded to be present in

alcoholic beverages distilled below 185 proof (App. Vol. I, p. 121-125), have the demonstrated capacity to produce deleterious effects in scientific tests, effects including birth defects, changes in chromosome structure and increases in the rate of malignant tumors. (App. Vol. II, p. 228-244, Vol. I, p. 212-217). He further testified that those substances when administered in combination with ethanol - the intoxicating ingredient in all alcoholic beverages - are significantly more potent than when administered alone, because ethanol is considered by the scientific community to increase the toxic potency of such chemicals (App. Vol. II, p. 238-242, 255-256). Further, the evidence showed that the chemicals in question - n-butyl alcohol, isoamyl alcohol, n-butyric acid and urethane - are included on Florida's hazardous substance list. (App. Vol. II, p. 241-242; Vol. I, p. 45-120; Vol. II, p. 211-216).

On cross examination Dr. Teaf testified that some of those substances are generally regarded by the federal Food & Drug Administration (FDA) as safe for their intended use when occuring in foodstuffs. However, he noted that FDA regulations do not address the safety of those substances in alcoholic beverages. (App. Vol. II, p. 245-249).

The importance of that health-risk evidence is made apparent by the stipulation entered into by the parties (App. I, p. 121-125) and accepted by the Court (App. Vol. II, p. 210-211) and by the materials judicially noticed by the Court. The Stipulation shows that the chemicals in question are removed when subjected to carefully controlled distillation above the 185 proof level.

The evidence showed that urethane is commonly found in significant amounts in beverages such as bourbons, scotches, blended whiskeys, brandies and the like which are distilled below 185 proof. (App. Vol. I, p. 45-120). Further, the testimony of James Hammond established that unless one inspects the distilled product at the point that it is removed from the distillation column and before it is diluted and bottled, it is impossible to tell whether the bottled product was made from ethanol distilled above 185 proof. One cannot make that determination from examining the bottled product. That determination must be made on site at the distillery. (App. Vol. II, p. 257-261). The record also shows that a significant amount of imported beverages sold in Florida consist of products such as bourbon, which which cannot be distilled above 185 proof, and therefore contain significant amounts of those genotoxic chemicals. (App. Vol. I, p. 45-120,230; Vol. II, p. 273-275).

Appellees presented testimony in an attempt to rebut the State's evidence on the health-risk concerns addressed by Ch.88-308. They called John Doull, a toxocologist, who tesified on direct examination that in his opinion n-butyl alcohol, isoamyl alcohol and n-butyric alcohol are harmless to man when used at recommended levels as food additives. He also testified that urethane occurs naturally in some foods (App. Vol. II, p. 285-288) and he disagreed with the State's expert as to the significance of scientific evidence on the genotoxic potential of urethane. (App. Vol. II, p. 291).

On cross examination, however, Dr. Doull admitted that the basis for the majority of his testimony was "GRAS" (generally-regarded-as-safe) levels put out by FDA. He conceded that FDA "GRAS" pronouncements pertain only to the safety of chemicals as food additives and not to their safety in alcoholic beverages. (App. Vol. II, p. 296).

Dr. Doull also admitted that regulatory decisions must be made, and often are made, based on data which would not satisfy pure scientific inquiry. (App. Vol. II, p. 298). He agreed that there is scientific evidence that all the chemicals in question produce genotoxic effects in test systems routinely used by toxicologists (App. Vol. II, p. 298-299). He further testified that, where available data shows toxicity in a variety of tests, as these chemcials do, it is better to minimize exposures, if possible to do so. (App. Vol. II, p. 302). He admitted that urethane is in all likelihood a human carcinogen (App. Vol. II, p. 305) and that it is a reasonable regulatory decision to limit exposure to it (App. Vol. II, p. 306-307). He likewise so testified as to all chemicals shown to alter DNA in an irreversible way, as the chemicals in question do (App. Vol. II, p. 308-309). He also acknowledged that the chemicals in question in a mixture with ethanol - the intoxicant in alcoholic beverages - have added potency (App. Vol. II, p. 310-311).

The evidence thus demonstrated that, although there is a diversity of toxicological opinion as to the conclusiveness of scientific evidence on genotoxicity of the chemicals in question, there is significant scientific evidence of genotoxic effects

from each of them, general agreement that the risk of genotoxic effects is increased by imbibing them in alcoholic beverages, and general agreement that it is a prudent regulatory measure to reduce exposure to such chemicals. The evidence also showed that the mechanism chosen by the State to address the problem is rational. The undisputed evidence is that distillation at above 185 proof removes all but trace amounts of these chemicals from the alcohol.

THE STATE'S EVIDENCE PERTAINING TO COSTS OF REGULATION ASSOCIATED WITH IMPORTED WINES AND LIQUORS.

The State presented evidence at trial which showed tremendous societal costs to Florida and its political subdivisions associated with the consumption of alcoholic beverages. The State demonstrated that there were 57,075 convictions for driving under the influence of alcohol or drugs during 1987 (App. Vol. I, p. 126-128) and 50,464 such convictions in 1988 (App. Vol. I, p. 129). The State showed that the direct annual cost of police operations for the Board of Regents is $10,056,692 (App. Vol. I, p. 130-140) and that the cost to counties for Sheriffs' direct policing activities is in excess of $987 million annually. (App. Vol. I, p. 141-142). The State further showed that the Department of Health & Rehabilitive Services expends $16,212,000 annually on alcoholism treatment (App. Vol. I, p. 143-145), and that the budget of the Division of Alcoholic Beverages & Tobacco is $21,000,000 annually. The State thus showed that Florida and its subdivisions spend in excess of $1.2 billion a year on expenses of law enforcement activity, not

including operating capital outlay, not including municipal police operations and not including operations and capital outlays for the state prison system.

The State also proved that conservatively 50% of the costs associated with that police activity is attributable to the consumption of alcoholic beverages (App. Vol. II, p. 69-72, 73-76, 78-81, 82-88, 89-90). Of the alcoholic beverages consumed in Florida during fiscal year 1987-1988, 46.8% of the alcoholic content consumed came from wine and liquor, as opposed to alcohol consumed in beer (App. Vol. II, p. 276-280). Therefore, the evidence shows that approximately one quarter of the annual cost of general law enforcement activity in this state is attributable to behavior in which consumption of alcohol in wine and liquor is a contributing factor to the police response ($300,000,000).

The State also showed that 97.54% of the wine and liquor to be consumed during the current fiscal year would be wine and liquor imported into Florida, while only 2.46% would be domestically produced (App. Vol. II, p. 104-108). The State further showed that under the provisions of §§9-11, Ch. 88-308, imported wines and liquors would pay 98.06% of the total alcoholic beverage taxes on wines and liquors and that domestically produced wines and liquors would pay 1.94% of the total beverage taxes on such products (App. Vol. II, p. 104-108).

The evidence thus showed that the tax distribution formula of Ch. 88-308 fairly apportions the total tax burden on imported and domestic products in relation to their contributions to the problems of alcohol in this State.

Finally, the State showed that the State annually passes in excess of $800 million in general revenue funds down to the counties and municipalities to support county-wide and city-wide programs, such as law enforcement. (App. Vol. I, p. 146-181). Thus, the costs of alcohol to the state are shown by the evidence not to be limited to expenditures for the Division of Alocholic Beverages & Tobacco, as Appellees contended at trial. Instead the evidence shows that the costs to this state associated with imported wine and liquor are tremendous, and are experienced at all levels of government.

THE PLAINTIFFS' EVIDENCE.

The Plaintiffs' evidence on the health-risk issue is summarized above.

Plaintiffs did not offer any evidence at trial to refute the testimony of John Harris that Florida has better regulatory control over Florida manufacturers of alcoholic beverages than over manufacturers located outside of Florida. Nor did plaintiffs offer any evidence at trial to rebut the State's evidence summarized above as to the overall costs to the State associated with the consumption of imported wines and liquors.

Instead, the thrust of plaintiffs' evidence was that the Division of Alcoholic Beverages & Tobacco, when viewed alone, experienced no greater costs in its operations to regulate imported beverages on a per-gallon basis (and in regard to some functions experienced less cost on a per-gallon measure) and that the Division did not itself have any evidence to support the

legislative findings in §9, Ch. 88-308, relating to the costs of regulation (App. Vol. I, p. 182-211; Vol. II, p. 127-128, 143-144). The plaintiffs also introduced, over objection, evidence that the legislature was not heard to discuss the policy reasons stated in §9 in committee meetings or in floor debate (App. Vol. I, p. 231; Vol. II, p. 174-177) 169-172). (As to the floor debates and committee hearings the trial court agreed with the State's objection on relevancy grounds, but admitted them into evidence anyway.) (App. Vol. II, p. 180-184). The floor debates showed that the House sponsor of the amendment to Ch. 88-308 which inserted §§9-11 argued for the amendment on the grounds that it would protect jobs in his district. Plaintiffs also introduced evidence, over the State's objections, that the executive branch viewed the bill as having a protectionist motive and lobbied the Governor to veto the bill. (App. Vol. I, p. 182-211). Plaintiffs introduced evidence to show that at the time of trial the Florida Department of Agriculture had not yet implemented an inspection program for agricultural lands (App. Vol. II, p. 280(a)-280(b)).

THE TRIAL COURT'S RULING.

At the close of the evidence, the trial court ruled orally from the bench that §§9-11 of Ch. 88-308 violated the Commerce Clause (App. Vol. I, p. 357-363). The court's oral ruling was incorporated into a final judgment entered on November 30, 1988. (App. Vol. I, p. 218-229). The trial court based its ruling in part on the purported motivations of legislators ("This

statute is but a warmed-over version, dressed up in different clothing, perhaps, of that which has previously been, at least on one occasion, struck down as violative of the Commerce Clause"). It also held that the State had not borne its burden of justifying the statute under his strict scrutiny standard. It addressed only the lack of an in-place agricultural inspection program and the lack of an inspection program aimed at randomly inspecting bottled products for health risks as grounds for finding the evidence of bona fide Twenty-first Amendment purposes to be "illusory". The court ignored all evidence that, in lieu of such an unworkable end-product inspection program, the requirement of distillation above 185 proof provided a more effective and more easily policed means of addressing the health risk problem. The court ignored the undisputed evidence that Florida has better regulatory control over the distribution chain of alcoholic beverages if the manufacturing facilities are located in Florida and subject to licensure and inspection here and that Ch. 88-308 promotes that objective by encouraging the location of manufacturing facilities here. It ignored the undisputed evidence that the total tax burden under Ch.88-308 is closely apportioned between imported wines and liquors and domestic wines and liquors according to their relative contributions to the societal costs of alcohol consumption.

Ivey timely appealed the final judgment to the First District Court of Appeal. That Court certified the case to this Court under Fla. R. App. P. 9.125, and this Court accepted jurisdiction.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court made a fundamental error at the onset of this case which prejudiced its rulings and its view of the challenged statute throughout the trial proceedings below. The court misconstrued Bacchus Imports v. Dias, 104 S.Ct. 3049 (1984) (hereinafter Bacchus") and Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988) (hereafter "McKesson"). The court also failed to understand the clear distinction between the 1985 statutes under consideration in McKesson and the statutes presently under review in this case.

Contrary to McKesson, the statutes presently under review (§§9, 10 and 11, Ch. 88-308, Laws of Fla.) rest squarely upon the Twenty-first Amendment to the Constitution of the United States and constitute a direct exercise of Florida's constitutional power under that Amendment. No such facts were presented in McKesson. The State did not defend in McKesson based upon the Twenty-first Amendment, but conceded that the Commerce Clause presented the correct rule of decision. Because the court failed to understand the clear distinctions between this case, on the one hand, and McKesson and Bacchus, on the other, it ruled that the provisions of Ch. 88-308 were to be judged, not just under Commerce Clause principles to the exclusion of Twenty-first Amendment tests, but under an unprecedented strict scrutiny standard applicable only in cases involving fundamental personal liberties or inherently suspect personal classifications. The court so ruled despite the fact that nothing in McKesson or in

Bacchus even suggested that Commerce Clause standards were to be applied in judging a bona fide Twenty-first Amendment case. The court ignored numerous precedents which showed clearly that the standards that should be used to judge the validity of statutes such as Ch. 88-308 under Twenty-first Amendment analysis look only to whether a valid Twenty-first Amendment purpose is addressed in a rational manner. It erroneously placed the burden of proving constitutionality upon the State. It incorrectly considered the wisdom of the statutes as a primary basis in judging their constitutionality. Finally, the trial court failed to even acknowledge or address unrebutted evidence presented by the State as to valid Twenty-first Amendment police power purposes underlying Ch. 88-308. In all these respects, the trial court committed reversible error.

Contrary to the trial court's view, Bacchus was a pure Commerce Clause case. It did not change the decades of case law which had established the mode of constitutional analysis to be used when a state's exercise of the Twenty-first Amendment power is challenged under the dormant Commerce Clause. It simply held that "mere economic protectionism" is not within the scope of central purposes of the Twenty-first Amendment. Bacchus, supra, 104 S.Ct. at 3058-3059. Bacchus did not overrule the numerous decisions, beginning with State Bd. of Equalization of California v. Young's Mkt. Co., 299 U.S. 59 (1936) (hereafter "Young's Mkt. Co.) which have held that, when a state acts to control or regulate the importation of alcoholic beverages under the Twenty-first Amendment, its decisions in that regard are "unfettered by

the Commerce Clause," Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939), and "totally unconfined by traditional Commerce Clause limitations." Joseph E. Seagrams & Son's, Inc. v. Hostetter, 384 U.S. 35 (1966). The trial court failed to understand that Bacchus was decided on narrow and unique facts. Hawaii did not contend in Bacchus that its statute addressed any police power concern of the Twenty-first Amendment; it contended instead that the central powers of the Twenty-first Amendment extended to and encompassed the right of a state to act thereunder to achieve the sole objective of economic protectionism. Bacchus simply held that Twenty-first Amendment powers do not extend so far as to include economic protectionism as a core purpose of that Amendment.

While Bacchus refined the scope of the state's Twenty-first Amendment powers, it did not change the well-established test to be applied when a Commerce Clause challenge is brought against a statute which does implicate police power concerns under that Amendment. That test remains as it has always been: If a statute addresses police power concerns of the State under the Twenty-first Amendment, the State is free to choose its means "unfettered by the Commerce Clause." Ziffrin, Inc. v. Reeves, supra, even if the means chosen burdens or impedes interstate commerce in alcoholic beverages. Young's Mkt. Co., supra; Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Heublein, Inc. v. State, 256 Ga. 578, 351 S.E.2d 190 (1987), appeal dismissed, 107 S.Ct. 3253 (1987).

Again contrary to the trial court's view, McKesson was also a pure Commerce Clause case. The statutes under review in McKesson did not involve the exercise of the State's power to directly regulate the importation of alcoholic beverages destined for consumption in Florida. No regulatory objectives (as opposed to economic objectives) were apparent on the face of those statutes, nor was any evidence adduced by the State that regulatory objectives in respect to alcoholic beverages were advanced by those statutes. As in Bacchus, the State did not contend in McKesson that the 1985 statutes were grounded in the Twenty-first Amendment. The Court found that "[n]o clear concern of the twenty-first amendment has been shown to be furthered" by the 1985 statutes. McKesson, supra, at 1009. The case properly, then, was relegated to a decision on Commerce Clause principles. McKesson, supra, at 1003.

In stark contrast to Bacchus and McKesson, the present case involves laws which are facially grounded in regulatory concerns that fall squarely in the center of the State's Twenty-first Amendment power. Further, the evidence in this case shows that the statutes in question here rationally advance Twenty-first Amendment police power objectives. No such case was presented by the laws under review in McKesson or Bacchus.

The statutes here are aimed directly at the regulation and control of imported wines and liquors. They are based upon concerns central to the adoption of Section 2 of the Twenty-first Amendment: These statutes encourage a distribution structure over which the State has maximum regulatory control, seek to

reduce the health risks associated with the consumption of alcoholic beverages, and fairly apportion the societal costs of such consumption, while furthering the first two objectives. Section 9, Ch. 88-308, Laws of Fla., contains express legislative policy findings that the importation of wine and liquor requires strict enforcement of State statutes regulating the manufacture, distribution and sale of alcoholic beverages, that production of lower quality beverages should be discouraged, and that imported beverages should bear their fair cost of regulation. No such policy statements supported the tax at issue in McKesson. Indeed in McKesson, the State conceded that the basis for the tax differential was purely economic, and was governed solely by the Commerce Clause.

Moreover, §565.12(4), Fla. Stat., as amended by §11, Ch. 88-308, Laws of Fla., requires that: "All beverage distilled in this state for sale in this state shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors." See also 564.06(7), Fla. Stat., as amended by §10, Ch. 88-308, Laws of Fla. As more fully discussed below, the evidence showed there are valid, health-related reasons for those requirements. The importation tax has the effect of encouraging consumption of distilled spirits and wines which present fewer health risks. It further has the effect of encouraging an industry structure over which Florida has the best legal and practical control from the point of manufacture to the point of consumption. This case is therefore clearly a Twenty-first Amendment case, not to be judged

by Commerce Clause standards, and is therefore not controlled by McKesson.

The trial court failed to appreciate that critical distinction. The court therefore imposed an inappropriate test for constitutionality which it articulated as follows:

> Now, whether it does so by rationally relating the statute to some 21st Amendment, I think it is probably a bit more than that, Dan, frankly. I think McKesson, the answer I think is to be found in McKesson, it is not to really be found in Bacchus.
>
> I think the State has got to justify in 21st Amendment -- on 21st Amendment grounds, and that's the way I see the matter proceeding. I think the great burden is going to be on the State to justify this statute on 21st Amendment grounds.
>
> It is really important at this point in time -- because haven't I really just articulated what the strict scrutiny test is anyway? Isn't that a strict scrutiny test? Isn't that the compelling State interest test? You have got to demonstrate some compelling interests as to why when something so clearly violates the commerce clause on its face then you have got to show that there is something more than just a rational relationship, it seems to me.
>
> * * * * *
>
> Now, if that means subjecting the statute to strict scrutiny, I think that's what's got to be done, because I think it is so clearly discriminatory on is face that in order to justify it, the State -- well, the State has got to justify it, and that's going to be my ruling in the matter.

(App. Vol. II, p. 53-54) (emphasis supplied).

That test, as articulated by the trial court, is more stringent than even the per se test applied in Commerce Clause cases dealing with state regulation of ordinary articles of

interstate commerce which do not implicate Twenty-first Amendment principles. See Pike v. Bruce Church, Inc., 399 U.S. 137 (1970). It takes no cognizance whatsoever of the special powers of the states affirmatively granted by the Twenty-first Amendment over the importation of intoxicants and treats this case as though that Amendment were non-existent.

In summary, the trial court's misreading of McKesson and Bacchus led the court to put these statutes to a test more onerous than the most stringent test called for by the Commerce Clause in cases involving ordinary articles of commerce, the test applied only in suspect classification cases. In fact, these statutes were entitled to be reviewed under much less exacting standards. That misunderstanding led the court at the outset to commit reversible error: the application of an egregiously wrong standard of review and a wholly incorrect allocation of the burden of proof. That error, in turn, led to compounded error throughout the course of the trial.

Accordingly, Appellant Ivey will first address the correct standard of review, the test which the trial court should have applied to Ch. 88-308. Under the correct test, the evidence at trial compels a conclusion of constitutionality. Ivey will then demonstrate that the trial court's confusion as to the correct standard for constitutional review led it to commit further error: judging a valid exercise of constitutional power by the subjective motivations of some legislators and judging the constitutionality of Ch. 88-308 based upon its personal critical view of the wisdom of the legislature's choice of means.

## ARGUMENT

### POINT I

THE CORRECT CONSTITUTIONAL TEST FOR JUDGING CH. 88-308, LAWS OF FLA.,IS THE TRADITIONAL TWENTY-FIRST AMENDMENT TEST: ARE VALID TWENTY-FIRST AMENDMENT OBJECTIVES RATIONALLY ADVANCED, THEREBY REMOVING COMMERCE CLAUSE LIMITATIONS ON THE STATE'S ACTION?

Unlike McKesson and Bacchus, this is a bona fide Twenty-first Amendment case. The legislature set out Twenty-first Amendment core purposes on the face of the Ch. 88-308. The evidence at trial further demonstrated that core Twenty-first Amendment objectives was addressed by the law.

Ivey contends, therefore, that the correct standard against which to judge the validity of Ch. 88-308 is simply this: Do these statutes address police power objectives of the sort which gave rise to the grant of power to the states under the Twenty-first Amendment? If so, are the means chosen to advance those objectives rational? That is the test which recurs throughout the five decades of constitutional litgitation over the Commerce Clause and its relationship to State powers under the Twenty-first Amendment. That is the test which remains in effect after Bacchus. That is the test which is required by the unique provisions of the Twenty-first Amendment. That is the test applied to Congressional action in furtherance of its power to enforce the dormant Commerce Clause, a power completely analogous to the affirmative grant of power to the several states to regulate the importation of alcoholic beverages into their

territories for consumption. That is the only test which gives equal dignity to both the Commerce Clause and the Twenty-first Amendment. That is the only test which allows each to operate within its proper channels, without swallowing up the other.

The Twenty-first amendment is a unique provision in the Constitution of the United States. It, alone, affirmatively grants powers to the States rather than merely reserving to them so much power as is not granted to the federal government. Compare, Amend. X, Constitution of the United States. The Twenty-first Amendment affirmatively empowers the States to prohibit and to regulate the importation of alcoholic beverages into their territories for consumption and use, in no uncertain terms:

> The transportation or importation into any State . . . of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Amend. XXI, §2, Constitution of the United States.

The primary effect of the Twenty-first Amendment was recognized early on to be the removal of traditional Commerce Clause constraints on the States when they act to control the importation of alcoholic beverages.

One of the earliest cases decided after adoption of the Twenty-first Amendment was Young's Mkt. Co., supra. That case presented a taxpayer's challenge to the validity of a California statute which imposed a license fee of $500 for the importation of beer. A distributor's license fee of only $50 was charged for distribution of domestic alcoholic beverages. The taxpayer

claimed that such a price differential constituted a discriminatory burden on interstate commerce in alcoholic beverages which was unconstitutional under the Commerce Clause, Art. I, §8, Constitution of the United States. The Court upheld the validity of California's differential fee, reasoning as follows:

> [The taxpayers] request us to construe the [21st] amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that would involve not a construction of the amendment, but a rewriting of it.
>
> * * * * *
>
> Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a monoploy of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importations by laying a heavy impost . . . . Moreover, in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic.

Id., at 57 S.Ct. 78-79.[2] (citations omitted).

---

[2] It is not noteworthy that the taxpayer's argument in Young's Mkt. Co. is identical to the argument presented by Plaintiffs in this case. It is also noteworthy that Bacchus did not overrule Young's Mkt. Co., but instead noted that the State was there acting at least in part in furtherance of police power, rather than economic, objectives under the Twenty-first Amendment. Bacchus, supra, 104 S.Ct. at 3057, n.13.

That primary purpose of the Twenty-first Amendment - to remove Commerce Clause constraints on the states in regard to the regulation of imported alcoholic beverages - has been repeatedly acknowledged in ensuing decisions. Ziffrin, Inc. v. Reeves, supra (21st Amendment "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause"); Joseph F. Finch & Co. v.McKittrick, supra ("Since [the 21st] amendment, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."); Indianapolis Brewery Co. v. Liquor Control Comm., 305 U.S. 391, (1939); Mahoney v. Joseph Triner Corp., supra; California Retail Liquor Dealer's Ass'n. v. MidCal Aluminium, Inc., 100 S.Ct. 937 (1986) ("The Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); Joseph E. Seagrams & Sons, Inc. v. Hostetter, supra (upholding New York price posting law against Commerce Clause challenge and reiterating that "a state is totally unconfined by traditional Commerce Clause limitations when it restricts intoxicants distilled for use, distribution or consumption within its borders.").

The only cases in which the Courts have failed to uphold the validity of a direct state regulation of imported alcoholic

beverages against a dormant Commerce Clause challenge[3] are cases where the states have reached beyond the powers granted them to regulate the importation of beverages for use within the enacting state's borders, and attempted to enact regulations having extra-territorial effects, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (New York attempt to control sales in export stream); Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S.Ct. 2080 (1986); United States Brewers Assoc. v. Healy, 692 F.2d 275 (2d Cir. 1982) aff'd, 464 U.S. 909, (1983) (attempts to control extraterritorial pricing); or where the State's action is not directed at futhering any central concern under the Twenty-first Amendment. Bacchus, supra, (holding that "mere economic protectionism" is not a central Twenty-first Amendment concern). But where the States have acted to regulate the importation of intoxicants and can show a rational relationship to state police power objectives, the Twenty-first Amendment insulates the States not only from dormant Commerce Clause restraints, e.g., Young's Mkt. Co., supra, but even from the normal rule of federal preemption under the Supremacy Clause. In fact, when the States act in furtherance of

---

[3]A number of cases have held that the Twenty-first Amendment must give way in the context of regulations which infringe upon fundamental personal liberties or in which suspect individual classifications, such as sex, are implicated. E.g., Craig v. Boren, 97 S.Ct.(1976). However those cases are quick to remind us that the primary purpose of the Twenty-first Amendment was to "create an exception to the normal operation of the Commerce Clause," Id., 97 S.Ct. at 461, particularly in cases "centered upon the importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear. . . ." Id., 97 S.Ct. at 462 (e.s.).

their Twenty-first Amendment police power concerns, the ordinary rule of federal-state preemption is stood on its head: it is the State's regulation which controls over a conflicting federal regulation. Wine Industry of Florida, Inc. v. Miller, 609 F.2d 1167 (5th Cir. 1980); Castlewood Int'l Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979); Washington Brewer's Institute v. United States, 131 F.2d 964 (9th Cir. 1964), cert. denied, 320 U.S. 776.

The strength and vitality of the States'Twenty-first Amendment powers are thus apparent. It is against this landscape that Bacchus must be viewed.

Bacchus did nothing surprising to Twenty-first Amendment analysis. In Bacchus, the State of Hawaii did not claim, nor did it present record support for the proposition, that Hawaii's tax differential advanced any regulatory or health and safety objective within the umbrella of State power granted by the Twenty-first Amendment. Instead, Hawaii asserted that the Twenty-First Amendment's grant of powers extended to "mere economic protectionism." The Court simply held that Twenty-first Amendment powers did not extend so far as to justify "mere economic protectionism" standing alone. Id., 104 S.Ct. at 3058. The majority opinion in Bacchus summed up its holding concisely:

> Here the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but acknowledges that the purpose was "to promote a local industry." Brief for Appellee Dias 40. Consequently because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the

> Twenty-first Amendment, we reject the State's belated claim based on the Amendment.

Id., 104 S.Ct. 3058-3059 (emphasis supplied).

That test is no different from prior cases which resolved conflicts between the dormant Commerce Clause and the State's Twenty-first Amendment powers. There is no implication in the opinion that the Bacchus majority would advocate the weighing of a concededly valid Twenty-first Amendment State objective against the principles of the Commerce Clause according to the personal value judgments of a given judge or panel of judges, rather than applying the established Twenty-first Amendment analysis. Under that analysis, the presence of a valid Twenty-first Amendment purpose removes Commerce Clause strictures that would otherwise apply. Indeed, barely two weeks prior to the Bacchus decision, the same Court cited Young's Mkt. Co. with favor for the proposition that the Twenty-first Amendment "reserves to the States the power to impose burdens on interstate commerce that, absent the Amendment, would clearly be invalid under the Commerce Clause." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). In 1988 that same Court dismissed the appeal in Hublein, Inc. v. State, supra, in which the Georgia Supreme Court upheld on Twenty-first Amendment grounds, against a Commerce Clause challenge, Georgia's tax structure which imposed an importation tax analogous to the tax structure in Ch. 88-308.

Furthermore, the opinion in WardAir Canada, Inc. v. Florida Dept. of Revenue, 106 S.Ct. 2369 (1986) is instructive here. There the Court considered a dormant Commerce Clause challenge to Florida's aviation fuel tax. The Court found that dormant

Commerce Clause analysis had no place in judging the constitutionality of the tax, because of the "negative implications" of the international agreements made at the federal level:

> . . . in the context of this case we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis. On the contrary, the international agreements cited demonstrate that the Federal Government has affirmatively acted, rather than remained silent, with respect to the power of the States to tax aviation fuel, and thus, . . . the case does not call for dormant Commerce Clause analysis at all.

Id., 106 S.Ct. at 2374. In the case at bar, far from the mere "negative implications" of federal actions, we find an affirmative grant of authority to the States made a part of our Constitution. Thus, even more so than in WardAir Canada, this case "does not call for dormant Commerce Clause analysis at all." Yet, the trial court imposed far more than a dormant Commerce Clause burden on the State to justify these statutes. In the trial court's view, the statutes could not be constitutional unless that the State proved that they were absolutely necessary to promote compelling state interests. That conclusion by the trial court is reversible error. The record below demonstrates that §§10 and 11, Ch. 88-308, Laws of Fla., advance legitimate police power objectives aside from "mere economic protectionism" and do so in a rational manner.

When the states act within the legitimate parameters of the Twenty-first Amendment, they act under a constitionally granted affirmative power, a power of equal dignity with the powers granted to Congress to act in furtherance of Commerce Clause

objectives in other contexts. Florida's action is thus entitled to be judged under no more strigent tests than those applied in review of Congressional action under its affirmative grant of authority over general commerce. Congress is simply required to show that its action is reasonably related to an end encompassed by the Commerce Clause when a challenge is leveled against such Congressional legislation. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264 (1981). The State of Florida, therefore, should only be required to show that the legislature's action in Ch. 88-308 is reasonably related to objectives within its powers under the Twenty-first Amendment.

It does not matter, under that test, whether legislators voting for the statute under scrutiny had motivations in addition to futhering Twenty-first Amendment objectives, so long as the statute can be said to rationally relate to the State's Twenty-first Amendment authority. See, e.g., Heart of Atlanta, Motel, Inc. v. United States, 379 U.S. 241 (1964) (motives of proponents to eliminate injustices of racial segregation do not detract from Commerce Clause objectives). See also, Henneford v. Silas Mason Co., 300 U.S. 577, 578 (1937) ("motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful.") The same standards apply in judging the validity of Florida's enactment of Ch. 88-308. The only constitutionally relevant inquiries are: Do the statutes address police power objectives under the Twenty-first Amendment, and, if so, can the means chosen be said to rationally relate those objectives?

Judged by that standard, the evidence below overwhelmingly supports the constitutional validity of Ch. 88-308. The State is not required, as it was by the trial court, to demonstrate that the provisions of Ch. 88-308 are necessary to promote compelling state interests. The State is not required, as the trial court held, to bear the burden of persuasion. The State is not required, as the trial court held, to dispel evidence that some legislators viewed these statutes as advancing their own agendas in addition to promoting bona fide Twenty-first Amendment police power objectives. Such evidence is irrelevant to the question of the legislature's constitutional power to act. The State is not required to persuade the courts, as the trial court held, that the legislature's choice of means is the most effective. That is a question of wisdom, not of authority to act. In so holding, the trial court committed reversible error.

## POINT II

SECTIONS 9-11, CH. 88-308, LAWS OF FLA., ARE VALID UNDER THE CORRECT CONSTITUTIONAL TEST APPLIED IN TWENTY-FIRST AMENDMENT CASES.

There can be no serious dispute that core powers under the Twenty-First Amendment include the following state objectives: (1) imposing conditions upon the importation of intoxicants in order to encourage an industry structure where Florida has maximum control of the distribution system from the manufacture of an alcoholic beverage to its retail sale, e.g., Ziffrin, Inc., supra; Young's Mkt.Co., supra, California Retail Dealer's Assn. v. MidCal Aluminium, Inc., supra, (2) reducing to the extent possible health risks associated with the consumption of

alcoholic beverages, and (3) apportioning the costs to society attributable to the consumption of alcoholic beverages. Heublein, Inc. v. State, supra. The evidence showed that each of those objectives is advanced by the provisions of §§9-11, Ch. 88-308, Laws of Fla.

The undisputed testimony of John Harris was that the interests of Florida in regard to the regulation of the alcoholic beverage distribution system are best served when the actors in the entire distribution system, from the manufacturer, to the intermediate distributor, to the retailer, are all located in Florida[4]. The Georgia courts, in Heublein, Inc. v. State, supra, found that "it is axiomatic that the state may better police, regulate and control alcoholic beverages produced within its borders than that which is imported from other states. . . ." Id., 351 S.E.2d at 195.

One of the laws which pertains to the regulation of wines and liquors is Florida's Tied House Evil Act, §561.42, Fla. Stat. That statute prevents any alcoholic beverage manufacturer from having any direct financial interest in the business of a retail outlet for alcoholic beverages, and from lending credit or

---

[4]Plaintiffs, on cross examination, elicited from Mr. Harris that he personally did not know of instances where DABT had physically gone out-of-state for the purpose of investigating a manufacturer (App. Vol. II, p. 127). They did not elicit facts however, which would undercut Mr. Harris' testimony that, whether a manufacturer is a target of an investigation, or has valuable information about an investigation of another, DABT has more authority to compel both compliance with Florida law and cooperation in investigations of violations when the manufacturer is located in Florida, and its economic life is dependent on the continuation of its manufacturing license.

giving gifts to such retailers. This Court has observed that the purpose of that Act was to prevent monopoly or control by manufacturers of retail outlets and to promote temperance. Pickerill v. Schott, 55 So.2d 716, 718-719 (Fla. 1951). See also, California Beer Wholesaler's Ass'n. v. Alcoholic Beverage Control Appeals Bd., 96 Cal. Rptr. 297, 487 P.2d 745, 748 (1971). Thus, it is a legitimate objective under the Twenty-first Amendment for Florida to structure its wine and liquor distribution system in such a matter that it maximizes its enforcement ability over the Tied House Evil Act, for purposes of temperance. That is best done by encouraging the location of manufacturers in Florida where they will be subject to the full coercive force of Florida's regulatory authority by being subjected to Florida's full licensure provisions. The tax differential in question encourages that state of affairs by offering an inducement to locate manufacturing facilities here.

Florida also has a policy of excluding from the alcoholic beverage distribution system those who are not of good moral character and those who are convicted felons. E.g., §561.15, 561.17, Fla. Stat. The condition for licensure is a thorough background investigation to ensure that those having interests in the license to manufacture are of good moral character. §561.17, Fla. Stat. Such conditions cannot practically be laid upon or enforced against out-of-state manufacturers. Accordingly, it is a legitimate objective of Florida under the Twenty-first Amendment to encourage the location of manufacturers in Florida in order to subject them to full background investigations as a

condition of operating in this state.

Moreover, the evidence reveals further regulatory benefits from encouraging manufacturers of wines and liquors to locate in Florida. Florida has chosen a policy to reduce the health risks associated with the drinking of alcoholic beverages which is readily policed. By requiring Florida that distilled beverages in Florida which are to be sold in Florida be distilled above 185 proof (§11, Ch. 88-308, Laws of Fla.) the State has introduced a mechanism for the removal of congeners which present significant health hazards. It is a regulatory mechanism which can be policed with less manpower than any random inspection program of bottled alcoholic products off the shelves of retail stores. It can be readily policed by on-site inspection at a relatively small number of manufacturers' locations. That mechanism will work well to the extent that Florida has both legal and practical access on a freely available basis to the manufacturing facilities. Florida cannot obtain that legal and practical access to manufacturing sites outside the State. It is therefore, again, rational under the Twenty-first Amendment to encourage manufacturers whose products will be sold in Florida to locate manufacturing facilities here. The tax structure of Ch. 88-308 provides such an inducement.

California Wine contended at trial that these requirements had no application to wines, since they are not distilled. However, that argument fails to take into account the undisputed testimony of Mr. James Hammond that a carefully controlled fermentation process for wines can eliminate the majority of

these chemical elements, the congeners which the evidence showed to present health hazards (App. Vol. II, p. 270-271). Further §564.06(7), as amended by §10, Ch. 88-308, requires wine made in Florida for sale in Florida to be made from produce of Florida-inspected land. By limiting the fermentation base for wine made in Florida for sale in Florida to inspected crops, one can further reduce the introduction of potentially harmful chemicals at the front end of the process. Moreover, many wines are fortified - increased in alcoholic content - by adding distilled ethanol. Chapter 88-308 requires such fortification to be done with spirits distilled above 185 proof, to prevent the introduction of harmful substances by the fortification process.

Since the reduction of hazardous chemicals can be accomplished through a carefully monitored fermentation process, it is within the legitimate sphere of Twenty-first Amendment objectives for Florida to encourage that manufacturing process to take place within the State, by a licensee subject to the full coercive weight of Florida's licensure, so that Florida can best monitor the process. Again, the tax structure of Ch. 88-308, provides an inducement to that end.

In respect to the reduction of hazardous chemicals in alcoholic beverages to be consumed by Florida residents, the evidence is unequivocal that the requirement of distillation above 185 proof for Florida-made and Florida-sold products is an effective police power tool. Coupling that tool with the import tax is a rational response to the problem. Florida could simply prohibit the introduction into this state of intoxicants not

distilled in excess of 185 proof. See, e.g., Young's Mkt. Co., supra. Absolute bans were discarded as unworkable at the national level when the Prohibition experiment was repealed by the Twenty-first Amendment, because such action always creates further problems of police control: smuggling, blackmarketing and the like. A large portion of the existing market for alcoholic beverages in Florida is in bourbons, scotches, and other products which cannot be distilled above 185 proof (App. Vol. I, p. 230). The Florida Legislature is therefore rationally entitled under the Twenty-first Amendment to select a mechanism to address the health problems other than an unworkable total prohibition of products distilled below 185 proof. The choice made by Florida is rational. It requires such beverages, if made in Florida for sale in Florida, to be distilled above 185 proof. It then provides a carrot to encourage their use, rather than a stick to restrain consumption of more risky beverages.

Finally, the tax structure enacted by Ch. 88-308 was shown by the evidence to address the foregoing purposes without placing an overall tax burden on imported wines and liquors wholly out of line with their contribution to the problems of alcohol consumption in Florida.[5] The testimony shows that imported

---

[5]Plaintiffs argued that the costs to society must be measured only by the costs of the DABT. That is an incorrect, and in fact a myopic, analysis. Section 9, Ch. 88-308, Laws of Fla., does not in terms refer to the costs of the Division, but instead to the costs of regulating and administering such beverages and to "the economic integrity of the state." The economic integrity of the state is affected by the overall cost of society's response to alcohol usage, responsibility which is imposed both at the state level on agencies such as the Department of Highway Safety

beverages as a group constitute 97.54% of the wine and liquor which will be consumed in Florida this year. That group will pay 98.06% of the total tax burden on wine and liquor under Ch. 88-308. While that close parity is not required even under pure Commerce Clause analysis, see, e.g., Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), and certainly not under proper Twenty-first Amendment analysis, it does demonstrate that the Twenty-first Amendment objectives supporting Ch. 88-308 are not merely illusory attempts to mask simple economic protectionism as the trial court seems to have held. (App. Vol. I, p. 223).

If the legislature was attempting only to provide economic protection by the passage of Ch. 88-308, one would expect a much greater disparity between the actual aggregate tax burden imposed on imported wines and liquors under Ch.88-308 and the aggregate gallonage sales of such products.

Since legitimate Twenty-first Amendment objectives are advanced by §§9-11, Ch. 88-308, those provisions are manifestly constitutional.

## POINT III

BECAUSE THE TRIAL COURT PREJUDGED THIS CASE AND INITIALLY IMPOSED AN INCORRECT STANDARD OF REVIEW, THE COURT ULTIMATELY DECIDED THE CONSTITUTIONALITY OF CHAPTER 88-308 ON IMPROPER GROUNDS.

There are clear signals in the record of this case that the trial court had its mind made up about this case before it heard the first piece of evidence at trial. In response to a problem

Footnote 5 Cont'd.

and at the local level to enforce laws relating to alcohol consumption. See, e.g., §§316.193, 327.35, 327.351, 396.022(1), (4), 396.072, 396.141, 562.11(1)(a), 562.111, 562.41, 562.45, 856.011, Fla. Stat. (1985).

with the order of proof at the outset of trial, the trial court stated, "I don't think it really matters. This record is being built by ladies and gentlemen for the benefit of the appellate courts." (App. Vol. II, p. 61). The Court, during the first day of trial proceedings, indicated that it had already made up its mind that the bill on its face violated the Commerce Clause (App. Vol. II, p. 189).

At the beginning of the second trial day, the Court stated: "My thought is that we had probably put on all of the testimony we are going to put on, because the purpose of taking the testimony is primarily for the benefit of the appellate courts. I have believed and continue to believe it primarily is a matter of law, but I want some, I want a record to send up there." (App. Vol. II, p. 190). In response to arguments over a contested item of evidence the trial court spoke thusly: "I am going to give you a ruling this day. I am going to go ahead and let everything come in, I really don't care." (App. Vol. II, p. 215).

The reason for the trial court's attitude, as evidenced in the foregoing statements, is to be found in its initial error. At the outset it misread Bacchus, it misread McKesson, and it concluded that the Commerce Clause, and only the Commerce Clause, applied to this case. The court held the opinion from pretrial forward that the statutes "clearly violate" the Commerce Clause and that the state had to prove not only the application of the Twenty-first Amendment to the case as a "saving grace", but had to convince the court subjectively that the weight of the state's

Twenty-first Amendment objectives were sufficient to overcome the weight assigned, by its own personal value system, to the Commerce Clause (App. Vol. II, p. 53-54). In sum, the trial court gave ascendancy in its own mind to the Commerce Clause over the Twenty-first Amendment, disregarding scores of cases which clearly have held that a bona fide Twenty-first Amendment objective removes the traditional Commerce Clause constraints on state action. Given that view, the trial court was not interested in the evidence adduced showing Twenty-first Amendment objectives. It is not that the court was unpersuaded by the evidence, but rather that it chose to disregard it. Since all that mattered, in the court's view, was the Commerce Clause, no amount of proof could convince the court that the legislation in fact promoted state interests which are clearly valid under the Twenty-first Amendment.

Since all that mattered to the court was the Commerce Clause, it concluded early on that this statute was "but a warmed-over version" (App. Vol. II, p. 357) of the Commerce Clause case in McKesson. Since all that mattered to the court was the Commerce Clause, it reached its conclusion of unconstitutionality by considering the personal motivations of the sponsors of the legislation, instead of limiting itself the question of constitutional power to act under the Twenty-first Amendment. In other words, the court improperly considered the wisdom of individual legislator's motivations and the wisdom of the means chosen to advance Twenty-first Amendment purposes in judging the legislature's right to act. That was clear error.

Jerome H. Shiep Co. v. Amos, 100 Fla. 863 , 130 So. 699, 703 (1930).

That the trial court rested its decision upon disagreement with legislative wisdom is apparent in its comments incorporated into the judgment. The court there stated:

> I might look at it, at this case a good deal differently if the State did have an inspection program, a quality control to protect its citizens. The State didn't have any quality control program as that, they never have prior to now. They do not now inspect any property upon which grain or other vegetables are grown that are used in the distilling process. I think all of that is just illusory.

(App. Vol. I, p. 223). (emphasis supplied).

That is the sole reason given for finding the evidence of valid Twenty-first Amendment purposes illusory. It is evident that the trial court did not hear the evidence which showed that distillation at above 185 proof removes the hazardous congeners from distilled alcohol. Since the State has chosen a mechanism to remove hazardous substances at the distilling point, it is a legislative policy decision as to whether a random bottled-product inspection program should be adopted. It is evident that the trial court did not listen to the evidence that inspecting bottled products will not allow a determination that the product was distilled above 185 proof. If it had, the court could not conclude that there was no quality control program. Rather the evidence shows that there is one in Ch. 88-308; the trial court just did not happen to think it is a wise one.

It is evident that the mere fact that the Department of Agriculture had not implemented the legislature's directive for

land inspections in Ch. 88-308 by the time of trial (less than three months after §§-9-11 became effective), caused the trial court to conclude that the very choice of means itself was not only unwise but also unconstitutional. It is common knowledge that new legislative policy directives often are not, and cannot be, immediately implemented by the executive branch. Contrary to the trial court's thinking, the failure of the executive branch to immediately implement a legislative policy is not an issue in a facial challenge to a statute and is not a ground for striking down a statute as being facially invalid. At most, the lack of implementation of an agricultural inspection program would affect the ability to produce beverages in Florida for sale in Florida until the program is implemented.

The trial court did not even consider or comment upon the evidence that regulatory control objectives of Florida are advanced by §§9-11, Ch. 88-308, even though that evidence stood unrefuted. The court failed to do so because it gave no weight, in its personal value system, to such objectives, since it did not consider them compelling state interests under the strict scrutiny standard it imposed in judging the case. While some constitutional values call for such a test, it is clearly inapplicable in judging a case where the conflict is between a state's Twenty-first Amendment power to regulate imported wines and liquors and dormant Commerce Clause concerns, a case where the "the State's authority under the Twenty-first Amendment is transparently clear . . . . and touch[ing] upon purely economic matters that traditionally merit

only the mildest review . . . ." Craig v. Boren, 97 S.Ct. 451, 462 (1976).

Had the trial court properly analyzed the Twenty-first Amendment in relation to the dormant Commerce Clause, it would not have applied a wholly inappropriate "compelling state interest" test to judge the validity of this law. The court would have applied the proper standard and opened its eyes and ears to the evidence which amply showed that Ch. 88-308 addresses legitimate concerns of Florida under the Twenty-first Amendment. Florida is therefore constitutionally empowered to advance those concerns by any rational means it chooses, including means which have the effect of burdening the importation of wines and liquors, unfettered by the Commerce Clause. Chapter 88-308 is therefore constitutional under the Twenty-first Amendment.

## CONCLUSION

Neither Bacchus nor McKesson erased the Twenty-first Amendment from the United States Constitution. Neither Bacchus nor McKesson held that the Twenty-first Amendment is subordinated to the dormant Commerce Clause. The trial court's judgment, if allowed to stand, will have done that. The test applied by the trial court to Ch. 88-308 on these facts is unprecedented and allows the dormant Commerce Clause to swallow up and render meaningless the express terms of §2 of the Twenty-first Amendment. Under proper constitutional analysis, the provisions

of §§9-11, Ch. 88-308 are a valid exercise of Florida's powers under that Amendment, to which the Commerce Clause stands as no impediment. Appellant Ivey therefore requests that the Court reverse the trial court and remand with instructions to enter judgment declaring that §§9-11, Ch. 88-308, Laws of Fla., are constitutional.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Daniel C. Brown
Assistant Attorney General
Tax Section, Capitol Building
Tallahassee, FL 32399-1050
(904) 487-2142

Counsel for Appellant
C. Leonard Ivey

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant Ivey's Initial Brief has been furnished by the method indicated on the attached mailing list of Addressees this 23rd day of December, 1988.

Daniel C. Brown
Assistant Attorney General

MAILING LIST

MARGUERITE H. DAVIS, Esq.(Hand delivery)
GARY R. RUTLEDGE, Esq.
PAUL R. EZATOFF, Esq.
Katz, Kutter, Haigler, Alderman,
Eaton & Davis, P.A.
800 Barnett Bank Bldg.
315 South Calhoun St.
Tallahassee, FL 32301

BRUCE ROGOW, Esq., (U.S. Mail)
2097 S.W. 27th Terrace
Ft. Lauderdale, FL 33312

THOMAS F. CONNELL, Esq., (U.S. Express Mail)
ARNOLD LERMAN, Esq.
Wilmer, Cutter & Pickering
2445 M Street, N.W.
Washington, DC 20037

JAMES L. ARMSTRONG, III, Esq. (U.S. Express Mail)
BETH ANN O'NEILL, Esq.,
WILLIAM GOLDEN, Esq.,
Kelley, Drye & Warren
2400 Miami Center
100 Chopin Plaza
Miami, FL 33131

JULIUS F. PARKER, JR., Esq.,(Hand Delivery)
JENNIFER PARKER LAVIA, Esq.
Parker, Skelding, McVoy & Labasky
318 North Monroe St.
Tallahassee, FL 32301