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**FLORIDA SUPREME COURT**
**CASE NO. 79,061**

**TOM GALLAGHER, as Florida Commissioner of Insurance and Treasurer; GERALD A. LEWIS, as Florida Comptroller; J. THOMAS HERNDON, as Executive Director of the Department of Revenue, State of Florida; DEPARTMENT OF INSURANCE, STATE OF FLORIDA; DEPARTMENT OF BANKING, STATE OF FLORIDA; and DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,**

**Appellants/Cross Appellees,**

**v.**

**MOTORS INSURANCE CORPORATION; CIM INSURANCE CORPORATION; MIC PROPERTY AND CASUALTY INSURANCE CORP.; MIC INSURANCE CORPORATION; and MIC GENERAL INSURANCE CORPORATION,**

**Appellees/Cross Appellants.**

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# REPLY AND CROSS-ANSWER BRIEF OF APPELLANTS/CROSS-APPELLEES


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## STATEMENT OF THE CASE AND THE FACTS

The nature of the Statement of the Facts in the Answer Brief of the Appellees/Cross-Appellants (hereinafter referred to as "the Taxpayers") requires the Appellants/Cross-Appellees (hereinafter referred to as "the State") to correct certain statements of fact made by Taxpayers.[1]

The State's asserted objective - maximizing regulatory control over insurers operating in Florida - is apparent from the text of the statutes involved. Section 624.512, Florida Statutes (1987), incorporates the requirements of section 628.271, Florida Statutes (1987), as conditions of the tax exemption. Section 628.271, Florida Statutes, must therefore be read *in pari materia* with sections 624.512 and 624.514 in considering the exemption's validity. Section 628.271, which this Court and the trial court are entitled to judicially notice, requires that an insurer maintain its assets, books, and records in this State as a condition of exemption, in addition to the requirement of section 624.512 that the insurer be incorporated under the laws of this state.

No witness disagreed that the state of domicile, and only the state of domicile, may act to protect Florida policyholders of a financially weak insurer. There was unanimity that Florida, as the state of domicile, enjoys more regulatory control in relation to a domestic

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[1] The State is also concerned that the Taxpayers make assertions in their brief not supported by the record. We have attached to this brief an appendix containing pages of the Taxpayers' Answer and Cross-Appeal Brief highlighting those statements not supported by fair inference from the record. We believe those assertions require no further comment.

insurer than in relation to a foreign insurer operating here. (R1284-1285, 1373-1382, 1387-1388, 1444-1466).

Dr. Hofflander, Taxpayers' expert witness, testified as follows:

Q. You agree, don't you, that it's sound policy for a state to place itself in the position of being able to exert as much influence and control over insurers operating in a state as possible, don't you?
A. Yes.
Q. And you would agree, wouldn't you, that taking the regulatory power of a state as a whole, an insurer's state of domicile is in a position to exercise the most effective regulatory control over that insurer, would you not?
A. I think it has the most, the most power to regulate a particular insurer although other states also have power to regulate.
Q. But, you don't disagree, do you, that by comparison the state of domicile as a whole has the most power and influence over an insurance company, do you not?
A. No, I think that's probably correct.
Q. You also agree, don't you, that it's a sound policy for the state to attempt to secure placement within its borders of as many assets as possible of insurance companies operating in that state?
A. In the case of liquidation or insolvency, certainly.
Q. You think that that's a sound policy?
A. Yes, sir.
Q. You also agree, don't you it's a sound policy for the state to do what it can to induce insurers to physically locate their books and records in a state?
A. I think that's a fair statement.

(R1324-1325).

Q. So I assume that you would agree with me that there are trade-offs to be made in the regulation of insurance?
A. As in all human endeavor.
Q. Would you also agree that it's a fair statement that it would be a practical impossibility for any state to require that all insurers operating within its borders be organized under the laws of that state and maintain all of their assets there?
A. Oh I think that's clearly impossible.

(R1324-1325, 1327).

Dr. Hofflander stated the scope of his opinion as follows:

Q. Do you have an opinion as to whether a person could reasonably believe that Florida's discriminatory premium tax would increase the State of Florida's control over the insurance industry?
A. Yes.
Q. What is that opinion?
A. That it does not.
Q. Would you explain the basis for that?
A. Well, it's a two-prong kind of approach. The first prong is that if -- some people would argue, some people would argue that you could have more control over a domestic company than you do over a foreign company. Then the second question is, the second prong is the -- does the tax structure give you the opportunity, that is to say are more companies domiciled because of the tax structure which then gives you this proposed additional control? And what I am saying is that the tax structure doesn't affect domicile so it can't affect maximum -- what is the word you used?
Q. The words I used --
A. -- regulatory control I think is all you said.

(R1284-1285). *See also* (Defendants' Exhibit 8, pp. 68, 69, 80, 99, 116, 135-137, 183-186) Thus Dr. Hofflander agreed that the state has more regulatory control to the extent that it can encourage domestication. He merely did not believe the tax differential provided an effective inducement to domestication. Dr. Hofflander's testimony regarding the state's regulatory control over insurers agreed with the State's evidence. (R1374-1377, 1444-1470)

Dr. Hofflander conceded that it would be rational to conclude from economic theory that the tax differential would encourage the formation of Florida domestic companies. (Defendants' Exhibit 8, p. 80). He held the opinion that the tax structure was not rational in that regard simply because the tax, standing alone, was not statistically associated in his study with the largest populations of domestic insurers. (Defendants' Exhibit 8, pp. 96-98; R1284-1285).

Dr. Hofflander conceded that his statistical regression analysis, which was the sole basis for his opinion (Defendants' Exhibit 8, pp. 95-98), bears marked limitations. He testified as follows:

> Q. First of all I'd like to talk with you about the nature of a regression analysis. That is a statistical technique, is it not?
> A. It is.
> Q. And it measures the degree to which certain phenomenon appear together; is that right?
> A. That is correct.
> Q. The degree to which those factors appear together is called statistical correlation, is that right?
> A. That's one of the terms, correct.

Q. You agree, do you not, that the existence of a statistically significant correlation between two phenomena proves absolutely nothing about causation, don't you?

A. It does not speak to the issue of cause and effect.

Q. It just says you find these two things together a lot.

A. That's correct, they tend to move together.

Q. Now, that being the case, a lack of statistically significant correlation does not prove that the two phenomena were not important to the people actually making the decisions being studied, does it?

A. All it proves is that one did not have an effect on the other.

Q. Regression analysis...does not inquire into the minds of any insurance company executive as to why they decided to locate in a particular state, does it?

A. No it just looks at their behavior.

Q. Do you think its a fair statement that the department -- or excuse me an insurance company executive making a decision as to where to domicile would look at a number of factors together?

A. I would think a multitude of factors, yes.

Q. So from your study you cannot prove or disprove that a differential premium tax was a consideration weighing in favor of domestication in the state among other factors, can you?

A. It is not statistically significant.

Q. My question, sir, is you cannot prove or disprove from your study that in the minds of the decision maker it may have been a factor weighing in favor of domestication; isn't that true?

A. It would be pure speculation on my part to tell you what was on their minds.

Q. The answer is from your study you don't know?

A. One cannot determine.

Q. From your study do you know?

A. I think I just said no.

Q. Would you agree with me that New York, Connecticut and perhaps Massachusetts are widely known as insurance centers?
A. I think that's probably the case.
Q. And they have a large domestic population of insurance companies, do they not?
A. Yes.
Q. You agree, don't you, that that's probably an historical phenomenon?
A. We believe that to be the case.
Q. Trade and settlement and commerce first arose in the colonies there, right?
A. That's correct.
Q. The first need for insurance arose there probably, correct?
A. Correct.
Q. So they had about a century leeway on some other states, is that correct?
A. About.

* * * *

Q. One of the things that you studied and found a high degree of statistical correlation for in your 1984 study was that if a state had a large number of domestic companies in 1945, they tended to have a large number of companies in 1984 when you did your study; is that right?
A. Correct.
Q. That's not real surprising, is it?
A. No we hypothesized it.

(R1333-1336) *See also* (Defendants' Exhibit 8, pp. 95-98, 116, 135-137).

Dr. Hofflander further testified that the regional home office credit against Florida's retaliatory tax would encourage the placement of fixed assets in Florida, making them available to Florida in the event of insolvency, that it therefore would enhance Florida's

ability to protect Florida policyholders, and that such a strategy is legitimate from a regulator's prospective. (Defendants' Exhibit 8, pp. 109-113).

Dr. Lilly testified, without rebuttal by Taxpayers' witness,[2] that Dr. Hofflander's ideas for strengthening control over foreign insurers - increasing deposit requirements, posting bonds, requiring foreign assets to be kept in Florida, suspending Florida licenses and so forth - either would not be realistically possible, would be counter-productive, or, in any event, still would not give Florida as much control as it enjoys over a similarly-situated domestic insurer (R1377-1382).

In view of that testimony, the trial court specifically held:

> Further, the Court finds that the purpose put forward by the Defendants for this discriminatory tax structure is to acquire a greater degree of regulatory control over insurance companies, which in itself is a legitimate state purpose.... The Court finds that, based upon the evidence, a discriminatory insurance premium tax statute does not, in fact, cause an insurance company to change its state of domicile. However, the Court further finds that the Legislature could have believed that the tax would have the effect of causing a company to change its state of domicile and therefore increase the State's ability to regulate such companies. (emphasis supplied)

(R780).

The trial court found that the premium tax differential did not in fact cause an insurer to change its state of domicile. The trial court did not find that the premium tax

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[2] On rebuttal, Dr. Hofflander merely asserted that Florida could make compliance with such conditions voluntary on the part of foreign insurers. (R1480)

differential would not encourage the formation of new domestic insurance companies. The testimony was that it should, and did, have that effect. (Defendants' Exhibit 8, pg. 80; Defendants' Exhibits 2, 3, 4).

Taxpayers assert that the State never articulated purposes for the retaliatory tax. Under equal protection analysis, the State was not required to adduce testimony on the conceivable purposes for the statute. The United States Supreme Court definitively canvassed the rationale for retaliatory taxes in *Western and Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648 (1981). The State notified the trial court on its reliance on *Western and Southern* and the trial court was entitled to take judicial notice of the United States Supreme Court's canvassing of the rationales for such taxes. Taxpayers' own witness testified to facts which established both the legitimacy of and the rationality of the regional home office credit in the retaliatory tax statute. (Defendants' Exhibit 8, pp. 109-113; R1338-1340) *See* Section 624.429(3), Fla. Stat. (1987).

The trial court did not find, as the Taxpayers assert at page 9 of their Statement of Facts, that "the State can assess pro forma assessments for increased assessments in retaliatory tax . . .". The trial court found that "the June 6, 1991 pro forma retaliatory tax assessments under Section 624.429, Florida Statutes, are valid" (R781); that the State is "entitled to the amounts set forth in the pro forma assessments against Plaintiffs . . ." (R782); and that "in order to reach a just result, any refunds due Plaintiffs [of premium tax] should be off-set against these assessments for the tax years 1983-1988." (R784). Indeed the record

shows that these pro forma assessments were exactly that: calculations of the amount of retaliatory tax Taxpayers would have owed had the premium tax not been validly collected - documents without the force of formalized tax assessments, rather than formal assessments of tax due under Department of Revenue assessment powers and procedures. (R713-716, 731-737). *See also* (Defendants' Exhibit 9).

The State objected to entry of judgment on Count V (Taxpayers' claim under 42 U.S.C. § 1983). The State asserted that it was entitled to present evidence at trial on Count V that the formal assessments of additional premium tax were made at the request of the Taxpayers; that the assessments would not have been issued without that request; and that, therefore, the Defendants could not be found to have "caused" a deprivation of Taxpayers' equal protection rights within the meaning of 42 U.S.C. § 1983 on the facts of this case. (R764-1064-1067, 1083-1085, 1092-1094). The trial court overruled that objection and entered judgment on Count V without benefit of either trial or timely noticed motion for summary judgment as to Count V.

## SUMMARY OF ARGUMENT

### THE PREMIUM TAX

The Taxpayers fail to refute these central points: (1) Only when an insurer is domiciled in Florida and maintains its assets here can Florida exercise the range of regulatory power needed to fully protect Florida policyholders. In the case of all non-domestic insurers, the well-being of Florida policyholders is at the discretion of officials of

other states, not answerable to Florida policyholders. (2) There is therefore a distinction in Florida's regulatory relationship to domestic insurers as compared to foreign insurers. (3) Florida cannot gain such plenary regulatory power over a foreign insurer. (4) It is therefore a wise and sound regulatory strategy to encourage domestication to the extent possible. (5) Florida's premium tax structure, should, in theory, and did, in fact, encourage the formation of domestic insurance companies serving Florida. The degree to which that inducement was successful is an irrelevant quibble with the wisdom or utility of the tax structure, and is immaterial to constitutional inquiry under the Equal Protection Clause and the Due Process Clause.

Under traditional rational basis review standards, this tax clearly passed scrutiny. Although the Taxpayers try to disavow it, they must show that *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869 (1985) [hereinafter "*Ward*"] changed the rules of analysis when a residency distinction is under review. *Ward* did not do so, and should not be expanded to do so. If *Ward* adopted the position which Taxpayers here assert, no residency based distinction could ever survive scrutiny. Yet *Ward* remanded that case for consideration of other purposes than those presented to the Court which might sustain the tax - including regulatory purposes such as those asserted by Florida.

In *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985) [hereinafter "*Northeast Bancorp*"], the Court upheld a residency-based distinction which completely disallowed foreign banks' participation in the local banking market because

the prohibition was tied to legitimate regulatory concerns of the states. That is precisely the circumstance which this record demonstrates in relation to the business of insurance. Taxpayers have failed to convincingly rebut these fundamental points.

Taxpayers choose to mischaracterize the State's position rather than meeting the State's arguments directly. The State does not assert that Congressional removal of Commerce Clause restraints also removes all Equal Protection Clause requirements. The State asserts that reading *Ward* to invalidate Florida's tax on this record requires stepping away from traditional rational basis analysis and adopting a new, strict rule of across-the-board invalidity for residency-based distinctions, even when such distinctions are tied to regulatory objectives, and to readily-apparent distinctions in the State's regulatory relationship to foreign and domestic insurers.

Such a reading of *Ward* is constitutionally dangerous. Such a view should not be adopted by the Court. It was not adopted by the United States Supreme Court in *Ward.* Instead, Florida's premium tax must be analyzed under traditional rational-basis review standards. Under those standards, the tax structure is clearly valid.

## THE RETALIATORY TAX

The retaliatory tax in Florida is nearly identical to that upheld in *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 457 U.S. 648 (1981). The trial court should therefore be affirmed in its holding that the retaliatory tax does not violate the Equal Protection Clause. Taxpayers do not distinguish this case from *Western & Southern.*

Taxpayers' own insurance expert testified that the regional home office credit (which Taxpayers contend distinguishes this tax from that upheld in *Western & Southern*) would enhance Florida's ability to protect Florida policyholders in the event of the insurer's insolvency and was legitimate and rational.

The off-set of increased retaliatory tax otherwise due, had premium taxes not been paid, does not violate the Equal Protection Clause. *Western & Southern* expressly recognized such an effect. *Western & Southern, supra, at p. 651, n.2.* Moreover, such does not result in collecting an unconstitutional tax. *See Id.* The two taxes are imposed by different statutes, and have different tax bases. They are separate, though overlapping, taxes.

Nor does the retaliatory tax violate Florida's non-delegation doctrine. The issue is controlled by *Eastern Airlines, Inc. v. Department of Revenue*, 455 So.2d 311, 314 (Fla. 1984). The retaliatory tax statute merely directs the taxing authority to compare two factually ascertainable sums, and to impose the larger on insurers operating from states which impose a higher aggregate tax burden on insurers operating there than Florida imposes on similar insurers operating there. That direction is no different in principle than the case in which the Legislature directs a taxing authority to measure future tax rates by future changes in federal indices, which are subject to the discretion of the federal agency producing the measuring index, a situation which this Court specifically upheld in the face of an invalid delegation challenge. *Eastern Air Lines, supra.* In order for Taxpayers to succeed in this challenge, they must persuade the Court to overrule the *Eastern Airlines* decision.

## NO LIMITATIONS ON OFF-SETS OF RETALIATORY TAX

Section 95.091, Florida Statutes (1991), imposes no limitation period on the set-off of otherwise-due retaliatory tax, in the event that Taxpayers are entitled to a refund of premium tax. Under section 95.091(3)(a)1.a., Florida Statutes, the Department of Revenue may "determine and assess the amount of any tax due . . . within five years after the date the tax is due . . ." No additional retaliatory tax was due from the Taxpayers during the period of time that the premium tax, which they were paying, was regarded as valid and constitutional, since Taxpayers properly credited their premium tax payments against their overlapping retaliatory tax obligations. Thus, either formal assessment of such otherwise-due retaliatory taxes is now timely (since the tax could not have become due until such time as the Court invalidated the premium tax and ordered refunds of premium tax), or the Taxpayers must be held estopped from "having their cake" (the return of premium tax payments) and "eating it, too" (retaining the benefit of previously-paid premium tax against otherwise-previously-due retaliatory tax).

The "pro forma assessments" of such additional retaliatory tax are simply calculations of the retaliatory tax Taxpayers would have been obligated to pay had they timely brought a challenge to the premium tax in the past, rather than continuing to credit premium tax paid against otherwise-due retaliatory tax. The Taxpayers did not contest the correctness of those calculations.

## TAXPAYERS' CIVIL RIGHTS CLAIM

Remand for trial of Count V is required if the Court finds that the trial court's disposition of the Taxpayers' claim under 42 U.S.C. § 1983 was incorrect. The State objected to the entry of judgment on Count V of the Taxpayers' complaint (the 1983 claim) without the opportunity for the State to present evidence at trial, or, at least, at a duly noticed summary judgment hearing. The State proffered to the trial court that it would present evidence showing the assessments of additional premium tax (the only underpinning for their § 1983 claim) were made at the request of Taxpayers. There was a triable issue, which precluded entry of judgment summarily on Count V, even if it had been properly noticed for summary disposition: whether, under the circumstances, the Defendants "caused" a deprivation of the Taxpayers' equal protection or due process rights by issuing assessments for additional premium tax at Taxpayers' own request. Moreover, no motion for summary judgment on Count V was filed or noticed for hearing more than twenty days before hearing at which the trial court summarily disposed of Count V. The trial court's disposition of Count V was therefore improper. Remand is necessary, should the Court uphold the trial court's determination that the premium tax violates the Equal Protection Clause or the Due Process Clause.

## NO PRIVILEGES AND IMMUNITIES CLAUSE CLAIM

Taxpayers, corporations all, have no claim under the Privileges and Immunities Clause. *E.g. Western & Southern, supra*, at 656.

## ARGUMENT

### I. THE PREMIUM TAX IS CONSTITUTIONAL UNDER TRADITIONAL AND APPROPRIATE REVIEW STANDARDS.

### A. THE STATE'S POSITION IS SUPPORTED BY THE EVIDENCE AND BY THE TRIAL COURT'S FINDINGS THEREON.

#### 1. The State's position

The State asserts nothing novel here. The historically-developed equal protection and due process review standard is that a statute such as this must be sustained if any state of facts, known or assumed, shows that the statute is rationally related to a conceivable state goal which is legitimate.[3]

The State is not required to demonstrate that the statute in fact will efficiently achieve the objective. The burden is on one attacking the statute to show it to be not even fairly debatable that the statute would help in achieving a legitimate goal. *E.g., United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980).*

The State asserts: (1) Acquiring the maximum degree of regulatory power over insurers operating here is a sound and legitimate state goal. (2) It is undisputed that Florida has more regulatory influence and control over domestically-organized insurers than it can

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[3] *E.g., United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980); *Glendale Fed. S. & L. Ass'n. v. State*, 587 So.2d 534 (Fla. lst DCA 1991), *pet. rev. pending*, case no. 79,025 (Fla. 1991). When such facts are shown in the record, the courts conclusively presume that the legislature was aware of them in enacting the statute and ascribe that knowledge to the legislature, in the exercise of the courts' obligation of deference to a coordinate branch of government. *See, e.g., Flemming v. Nestor*, 363 U.S. 603 (1960). These equal protection/ due process principles are what Taxpayers purport to assail as "legal fiction" in their brief. *See* Answer Brief of Appellees, pp. 4, 6, 23).

ever achieve over any foreign insurer. (3) It is undisputed that Florida can never achieve equivalent power over foreign insurers by any practicable means. (4) It is undisputed that Florida can better protect Florida policy holders in the event of an insurer's financial impairment if Florida wields the powers accorded only to a state of domicile. (5) It is undisputed that Florida could not require all insurers serving Floridians to be domestically organized. (6) It is therefore a legitimate and sound objective to encourage the formation of domestic insurers in order to increase Florida's ability to protect Florida insurance customers. (7) That objective is fairly inferred from the very text of the statutes challenged. (8) The proposition that the premium tax differential would encourage the formation of domestic insurers subject to Florida's most plenary regulatory control is, without question, a proposition subject to fair debate.

**2. The evidence**

The legitimacy of the goal of maximizing regulatory power over insurers operating here was supported by the testimony of all witnesses. There was no question that Florida, in all cases, has more regulatory power to protect the Florida policyholders of a domestically-organized insurer than it has to protect the interests Florida policyholders of foreign insurance companies. There was no question that it is sound regulatory policy to encourage the placement of assets in this State subject to its *in rem* jurisdiction. There was no dispute that Florida could not practically require all insurers serving Florida to domesticate here and to keep substantially all of their assets here. Therefore, the only

avenue realistically available to Florida in seeking the most effective regulatory environment was to create an inducement to domestication, such as the domestic premium tax differential.

There was no dispute that, based on accepted economic theory, the tax differential could rationally be viewed as encouraging domestication. And, three company officials offered unrebutted testimony that the domestic preference was, in fact, a causative factor in their decisions to form insurers domiciled in Florida. (Defendants' Exhibits 2, 3, 4).[4]

The only dispute offered by Taxpayers on an arguably germane point was Dr. Hofflander's opinion that the tax differential was not a rational means of encouraging domestication. The defects in Dr. Hofflander's analysis are addressed in the State's initial brief. They are apparent from his own testimony, set forth at pages 4-6, above. He conceded

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[4] In the face of this evidence, Taxpayers nevertheless assert that there was no information from which the legislature could conclude that the tax differential would induce the formation of domestic insurers. *See* Appellees' Answer Brief, pp. 7, 48, 49. They assert that the statute failed the "rationally related" prong of the test on that basis. The sole arguable support for that position is the opinion of Dr. Hofflander. He conceded that his opinion was based exclusively on a statistical study, which he conceded could neither prove nor disprove that the tax differential was a positive influence on decisions as to where to form an insurer. Lack of statistically significant correlation does not satisfy a taxpayer's burden in challenging a statute under the Equal Protection Clause. *Western & Southern, supra*, at 671-674. Dr. Hofflander testified that, aside from his empirical study, economic theory supports the conclusion that the tax differential would encourage formation of domestic insurers. (Defendants' Exhibit 8, p. 80)

He further testified that his study in 1984 was the first published empirical study of the subject. (Defendants' Exhibit 8, pp. 127-129) It is difficult to perceive, therefore, how it is that the legislature can be held to have acted irrationally. The information offered by Taxpayers to support that proposition, limited and inconclusive as it is, was not even in existence when this tax structure was enacted as long ago as 1925.

that his opinion was based solely on his view that the inducement was not statistically demonstrated to be effective. Dr. Hofflander's "no-rationality" opinion was properly rejected by the trial court. (R780). Whether the tax differential worked efficiently is irrelevant to the constitutionality of the statute in equal protection and due process cases. *E.g., Western & Southern, supra.*

Therefore, if this case is to be decided on traditionally-applied review standards, the premium tax clearly passes constitutional scrutiny.

### B. TAXPAYERS REFUTE NEITHER THE EVIDENCE NOR THE AUTHORITIES SUPPORTING THE STATE'S POSITION.

The Taxpayers point to nothing in the record which refutes the evidence discussed above. Nor do they show the trial court's conclusion - that traditional standards of rational-basis review were satisfied - to be unsupported by competent substantial evidence or otherwise incorrect.[5] Instead, they either misunderstand or mischaracterize relevant evidence, rely on evidence which is not relevant, assert an inappropriately narrow standard of review, and fail to distinguish the State's authorities.

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[5] The trial court found that the State's objective was legitimate. The court found that the legislature could have believed that the tax differential would encourage domestication and thereby enhance Florida's regulatory control over insurers writing coverage here. (R780). Traditional standards of rational-basis review were therefore satisfied. The trial court held the statute invalid because of its view that a residency distinction rendered any goal advanced by it illegitimate. (R780, 1102). That view is necessarily based on a broad reading of *Ward*, which the State demonstrated in its initial brief to be incorrect and constitutionally dangerous.

Taxpayers claim that a company official, Mr. Alexander, testified that he formed a new company to be subject to less regulation in Florida. *See* Appellees' Answer Brief, p. 7. To the contrary, he testified that he formed his company in Florida because of the premium tax exemption for Florida domestic companies. He testified that his Florida company, as a non-admitted carrier in states other than Florida, could write less-regulated "surplus lines" insurance in states other than Florida. In point of fact, an insurer admitted in Florida is ineligible to write such surplus line coverage in this State. *See* Sections 626.913-626.918, Fla. Stat. (1991). Taxpayers' own expert witness confirmed this point. (R1298).

In reality, Mr. Alexander's testimony is case-in-point evidence that Florida's regulatory assertions are not "pretextual" as the Taxpayers assert. Without the inducement of the premium tax differential, Mr. Alexander's company would have been domiciled elsewhere. It would then have been eligible to offer less-regulated "surplus lines" insurance in Florida. Thus the record shows in the case of Mr. Alexander's company that Florida's domestic premium tax exemption gave Florida more regulatory control, rather than less, over that company's business in Florida.

The Taxpayers assert at page 8 of their brief that Messrs. Butler, Menke and Alexander testified that their companies moved their state of domicile, and suggest that such testimony was rejected by the trial court's finding that the tax structure did not, in fact, cause a company to change its domicile. That assertion is incorrect. The company officials testified that they formed three new Florida companies or Florida subsidiaries. Mr. Menke

testified that a fourth company was redomesticated to Florida. (Defendants' exhibits 2, 3, 4). The trial court found that the tax structure did not in fact cause a company to change its state of domicile. It did not find that the tax structure was no encouragement to the formation of Florida insurance companies - either wholly new or subsidiaries of out-of-state insurers. Indeed, the testimony was that the tax structure did induce new companies, or subsidiaries of existing companies to be formed as Florida domestic insurers. Those companies thereby became subject to Florida's plenary control.

At page 37 of their brief, Taxpayers assert that "[a] domestic company gets the exemption regardless of the degree that its assets are here." The text of sections 624.512 and 628.271, Florida Statutes (1987), plainly shows that statement to be false. In order to qualify for exemption, the insurer must both be incorporated under the law of Florida and maintain its assets and records in this State. Removal of assets by a domestic insurer without express consent of the Department of Insurance is a crime. Section 628.271(3), Fla. Stat. (1987)

At footnote 11, page 23 of their brief, Taxpayers assert that they "sought to take the deposition of representatives of the State as to the legislative history of Florida's premium tax." They then assert: "The State, however, indicated that it had no witnesses who would testify on this issue." Taxpayers attempt to argue, on the basis of those assertions, that the State made "no attempt .... to tie this purpose [encouraging more regulatory control] to

Florida's .... tax," and that the objective is therefore pretextual. Appellees' Answer Brief, p. 23.

However, the notices of deposition and responses which Taxpayers cite to support those assertions show that the Taxpayers served designation deposition notices on executive branch officials to testify concerning matters of legislative history. The responses of those executive branch officials was that they were not competent, as executive branch members, to testify about records of another branch of government. Under equal protection review, nothing requires testimony from any state official that the goals asserted in defense of the statute were, in fact, expressly in the mind of any legislator. Defendants need only show that objective is "plausible," *e.g., United States R.R. Retirement Bd. v. Fritz*, 499 U.S. 166, 175 (1980), or "conceivable," *e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970). *See also Flemming v. Nestor, supra*. The very text of the statutes involved meets that test. Sections 624.512, 624.514, 628.271, Fla. Stat. (1987). Further, the Defendants are not required to adduce testimony from a particular class of witnesses, such as state officials, that there is a logical relationship between domestication and increased regulatory control. The State did not need to call legislators, or any particular state official, to establish that point. The testimony of Taxpayers' own expert witness supported the point (R1324-1325, 1327; Defendants' Exhibit 8, pp. 109-113), as did Mr. Castellanos. (R.1438-1466)

The Taxpayers fail to address or fail to distinguish a number of authorities which clearly support the State's arguments.

At page 19 of our Initial Brief, we noted that *Associated General Contractors of California, Inc. v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), treated *Ward* as limited to its precise facts and held *Ward's* analysis not to apply where any goal of the legislation, other than mere discrimination solely because of non-residency, appeared in the record. Taxpayers are silent on this case.

Taxpayers also fail to convincingly distinguish other subsequent federal decisions which treat *Ward* as sharply limited. *Trojan Technologies, Inc. v. Commonwealth of Pa.*, 916 F.2d 903 (3d Cir. 1990) *cert. denied*, 111 S.Ct. 2814 (1991); *International Org. of Masters, Mates, & Pilots v. Andrews*, 626 F. Supp. 1271 (D. Alaska 1986), *aff'd.in part, vacated in part on other grounds*, 831 F.2d 843 (9th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988).[6]

Taxpayers repeatedly assert that *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926), invalidated a premium tax like Florida's. However, they fail to address the State's observation that the tax at issue in *Hanover Fire* was not a gross premium tax. Because it was tied to net receipts rather than gross premiums written, it was not susceptible of analysis sustaining a rational connection to the regulatory goal of encouraging domestication in order to acquire increased control over insurers writing increasing amounts of insurance in the

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[6] Taxpayers superficially assert that *International Org. of Masters, Mates & Pilots v. Andrews* is distinguished because the state was there acting as a"market participant" rather than a "market regulator." However, in that case the state imposed the challenged pay differential on a transportation company, and was therefore a "market regulator" in Taxpayers' lexicon. Moreover, Taxpayers have cited no case, and we can find none, which squarely holds that requirements of equal protection and due process applies to the exercise of some state powers, but not to others. We find it surprising that the Taxpayers would urge the Court to adopt such a rule.

state. Taxpayers simply ignore this point. We respectfully direct the Court's attention to pages 20-21 of Appellants' Initial Brief.

Taxpayers also attempt to ignore *Board of Ed. v. Illinois*, 203 U.S. 553 (1906) (analyzed at p. 22 of our Initial Brief) by noting that the *Ward* opinion found it irrelevant to the *Ward* decision. *See Ward, supra*, at 876, n.6. Contrary to Taxpayers' argument, the key to correctly understanding *Ward* is contained in its statement that, since *Board of Ed. v. Illinois* dealt with the state's power over probate matters, it was irrelevant. It was irrelevant precisely because such power is an exercise of the state's regulatory functions. In *Ward*, the majority deemed it improper to consider any regulatory objective fostered by the tax. The case was remanded for further development of the record on those objectives. *Board of Ed. v. Illinois*, on the other hand, was a case in which the state did show a regulatory justification for a residency distinction. Thus, its holding was deemed irrelevant to the record which the court had before it in *Ward*. *Board of Ed. v. Illinois* is on point, here, however, since this record conclusively demonstrates valid regulatory concerns advanced by the distinction in treatment.

As the State has consistently contended, *Ward* is to be understood merely to hold that favoritism to residents simply to encourage local industry, as an end in itself, is irrational. It is irrational because, whether industry within the State is owned by a resident or a non-resident, it has the same economic benefits and burdens to the state. Therefore, no rational distinction based solely on economic benefit to the state can be drawn.

That is not to say that distinctions based on residency are irrational when consistent with a difference in the state's regulatory powers, and its regulatory relationship to resident and non-resident insurers. *See, e.g., Madden v. Kentucky*, 309 U.S. 83 (1940). No case cited by Taxpayers, including *Ward*, holds to the contrary. Indeed, *WHHY, Inc. v. Glassboro*, 393 U.S. 117, 120 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572 (1949), *Southern R. Co. v. Greene*, 216 U.S. 400, 417 (1910) all were careful to note that their rulings did not extend to cases where a meaningful distinction existed in the state's relation to the objects of the classification.

That distinction in the State's regulatory relation to the two classes of insurers is established without dispute in this case. Florida's statute is therefore constitutional under traditionally-applied rational basis standards of review. Only if *Ward* established a new, strict-scrutiny rule in cases of residency distinctions can this statute be stricken on this record.

If *Ward* established such a new rule, Taxpayers are at a loss to reconcile it with the subsequent decision in *Northeast Bancorp. Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985), analyzed at pages 25-29 of our Initial Brief. Taxpayers have not satisfactorily explained how the Equal Protection Clause can permit the state to completely prohibit foreign participation in an industry because that prohibition is tied to regulatory objectives, and simultaneously prevent the less drastic step of encouraging domestication through a tax differential, when also related to valid regulatory objectives.

In their attempt to reconcile *Ward* and *Northeast Bancorp*, Taxpayers reveal the lack of logic in their argument. In order to reconcile the two decisions to reach the result they seek, the Taxpayers argue that "it is generally recognized that the State of Florida can deny the right of foreign insurance companies to sell insurance in Florida if they wished." Appellees' Answer Brief, p. 52. From that premise they assert that an inducement to domesticate is therefore pretextual or irrational as a means of acquiring more regulatory control.

Put aside momentarily the difficulty that, according to Taxpayers' own expert, requiring all insurers serving Florida to be domestic insurers is impossible as a practical matter (R1327). Taxpayers have an even more fundamental difficulty. They still do not explain how, on the one hand, the Equal Protection Clause countenances the power to completely exclude foreign insurers in all cases, and thereby reserve the Florida insurance market exclusively to domestic companies; yet prevents a less drastic posture - allowing foreign insurers to sell here, but creating an incentive for foreign insurers to domesticate.

The answer to that dilemma, we assert, is that *Ward* did not create a bright-line exclusionary rule under the Equal Protection Clause for residency-based distinctions. Instead it applied traditional constitutional tests to the narrow and specific facts of that case. The record in this case is vastly different.

Finally, Taxpayers argue that this tax is unconstitutional because, no matter what activities a foreign insurer undertakes, it cannot gain the same tax treatment as a domestic.

What Taxpayers fail to address, however, is that such a result not arbitrary because of the other side of that coin: Florida can in no circumstance gain as much regulatory control over a foreign insurer as it has over a domestic insurer. Moreover, that fact was present, as well, in *Ward*. Taxpayers again fail to adequately explain how that fact conclusively invalidates a differential tax, when *Ward* remanded for consideration of regulatory objectives for the tax which could pass constitutional inspection, rather than summarily invalidating the tax because of that fact.

### C. TAXPAYERS' ATTEMPT TO LIMIT INQUIRY AS TO CONCEIVABLE LEGITIMATE PURPOSES IS INCORRECT.

Being unable to logically sustain the position that *Ward* created a bright-line exclusionary rule for residency distinctions, the Taxpayers try to persuade the Court not to apply the liberal review standards accorded to statutes challenged on equal protection grounds. They argue that, because the 1982 legislative session stated some non-revenue objectives for the tax differential, the Court may not employ the traditional mode of analysis, which calls for the tax to be sustained if any plausible or conceivable legitimate goal would be advanced by the statute. Their arguments are, again, incorrect.

Taxpayers can draw no support for a stricter standard of review from *Allied Stores Of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). In the course of *Allied Stores*, the Court referred an earlier decision, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), and observed that the tax statute reviewed in *Wheeling* declared its purpose, leaving no room to

conceive of any other purpose for the statute. The statute in *Wheeling*, however, was of a different sort from Florida's premium tax statute.

As we noted in our Initial Brief, *Wheeling* involved an ad valorem tax, a tax on the value of property owned. There was no support, either in the purposes expressed by the State or in the statute's text itself, for concluding that a purpose other than exporting ad valorem tax burdens could have underlaid the statute, or that the difference in tax treatment conformed with any regulatory goal. The statute's sole conceivable purpose, as well as its avowed purpose, was to export the burden of the property tax. Indeed, since the burden of property ownership on the State is the same, regardless of who owns the property, there could have been no other conceivable purpose for the tax structure under review in *Wheeling*. Such was *Wheeling's* holding. *Wheeling* itself noted that it was limited to the arena of ad valorem taxation, and recognized that the Equal Protection Clause may not prevent a residency-based difference in tax treatment in situations where a dissimilarity exists in the State's relationship to classes of taxpayers. *Wheeling, supra*, at 571-573.

The manner in which the *Allied Stores* opinion treated *Wheeling* was unnecessary to the decision in *Allied Stores*, and therefore *obiter dictum*, because the tax at issue in *Allied Stores* did not rest solely upon residence, but was based upon a reasoned distinction in state policy.

In contrast to the legislation reviewed in *Wheeling*, the Florida legislature, enacting the premium tax differential as long ago as 1925, *See Ch. 10150, Laws of Fla.* (1925), did not

expressly articulate objectives. The 1982 legislature articulated *some* non-revenue objectives of the tax structure. The tax structure, however, is not of the type considered in *Wheeling*, which on its face could never support the inference of any purpose other than to export tax burdens.

Unlike the case presented in *Wheeling*, it is unsound to speculate here that the objectives articulated by a single legislative session necessarily encompass all goals which preceding legislatures, from 1925 on, had in mind. The challenged tax statutes incorporate, and therefore must be read *in pari materia* with, Section 628.271, Florida Statutes (1987). The text of these related statutes clearly manifests the regulatory goals asserted by the State defendants in this case.

Moreover, the 1988 legislature recognized the importance of such regulatory goals. *See Ch. 88-206, Laws of Fla.* Thus if, as Taxpayers contend, the Court must consider the goals expressed by the 1982 legislature regarding the business of insurance, it must likewise consider the policy goals voiced by 1988 legislature. It is equally as probable that legislatures preceding the 1982 session regarded the tax structure as implicating policy considerations akin to those expressed in 1988, as it is that earlier legislatures contemplated only the objectives voiced by the 1982 session.

Most fundamentally, it is illogical, and would be poor constitutional policy, to construct a more onerous standard of rational-basis review in a case where one legislative session articulates some purposes for a long-standing statute than in a case where none are

expressly voiced. When the courts address the construction of a statute, they look for guidance in what the legislature expressly has said; a form of deference that the judicial branch owes to the legislature. However, judicial thought under the Equal Protection Clause posits a different sort of deference when the question is a statute's constitutionality. The test historically in that circumstance has been: Could the legislature rationally have believed, on a fairly debatable standard, that any reasonable purpose was advanced?

The policy reason for those two lines of cases is the same: the deference owed by the judiciary to the legislative branch under the doctrine of the separation of powers. When a party challenges that statute, that duty of deference, as the courts have historically recognized, requires the courts to look to any plausible purpose which may fairly be said to be advanced by the challenged statute.

Therefore, the traditional (and current) test under the Equal Protection Clause is fully applicable here[7]: Since the regulatory objectives for the tax structure asserted by the State

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[7] As we noted in our Initial Brief, Taxpayers improperly rely on cases such as *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Zobel v. Williams*, 457 U.S. 55 (1982) in search of support for a more rigorous standard of review. We respectfully direct the Court's attention to the discussion at pages 37-38 of our Initial Brief. Taxpayers' reliance on cases such as *Minneapolis Star & Tribune Co. v. Com'r. of Revenue*, 460 U.S. 575 (1983); and *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981) is likewise misplaced, since they are fundamental rights cases where strict-scrutiny analysis has been adopted under the Equal Protection Clause. Taxpayers' reliance on this Court's decision in *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343 (Fla. 1978), is misplaced. That case did not involve the exercise of the State's taxing power over the business of insurance, and, therefore, did not address the effect of the Congress' policy declaration in the McCarran-Ferguson Act. Moreover, that case purported to follow Mr. Justice Brennan's view that the Equal Protection Clause incorporated notions of federalism, a view which, as we have noted, has never been adopted by a majority of the United States Supreme Court, and from which Mr.

are readily ascertained from reading sections 624.509, 624.514 and 628.271, Florida Statutes (1987), *in pari materia*, those purposes must be ascribed to the challenged laws. *See, e.g., Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984); *Glendale Fed. S. & L. Ass'n. v. State, supra.*

Taxpayers' reliance on Commerce Clause cases throughout its brief, such as *Kassel v. Consolidated Freight Ways Corp. of Delaware*, 450 U.S. 662 (1981), and *DABT v. McKesson Corp.*, __ U.S. __, 110 S.Ct. 2238 (1990), is equally untenable. Statutes challenged under the Commerce Clause are subject to a different, more rigorous standard of scrutiny. The courts routinely engage in the process of attempting to ascertain the "true" purposes of the legislature in judging a statute under the Commerce Clause. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984). In the case of the business of insurance, however, the rigors of Commerce Clause scrutiny have been expressly removed by the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* *See* Appellants' Initial Brief, p. 38.

### D. TAXPAYERS' RELIANCE ON 1987 COMMENTS OF INDIVIDUAL LEGISLATORS IS CONSTITUTIONALLY IRRELEVANT AND MISCHARACTERIZES SUCH EVIDENCE. THE TRIAL COURT PROPERLY GAVE IT NO WEIGHT.

At pages 25-28 of their brief, Taxpayers quote the comments of several individual legislators during the 1987 session, during which the tax structure was conditionally repealed

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Justice Brennan himself receded in the specific context of the business of insurance. Moreover, *AMREP* was another in that line of cases where the States imposed higher property taxes on non-residents, with no apparent or enunciated regulatory basis for doing so. Thus, while the result in that case was correct, it is inapplicable here.

and revised. Taxpayers assert that those comments show that the regulatory purposes advanced in this case were not the legislature's purposes and that the legislature conceded the tax structure to be unconstitutional. Those assertions are both irrelevant and incorrect.

It is the Taxpayers' burden to "negate every conceivable" legitimate purpose for the challenged statute. *E.g., Eastern Air Lines, Inc. v. Department of Revenue, supra*, at 314. Merely showing that some legislator had some view of the statute which would not pass constitutional muster does not carry the burden of negating the validity of other purposes which clearly met the test, which are easily gleaned from the text of the statutes themselves with a moment's thought, and which are unequivocally supported by the testimony in this case. *See, e.g., Flemming v. Nestor*, 363 U.S. 603, 612 (1960); *U.S. R.R. Ret. Bd. v. Fritz, supra.*

Likewise, whether a legislator thought that the tax was unconstitutional is irrelevant, both constitutionally and as a matter of the law of evidence. The evidence code defines "relevant evidence" as "evidence tending to prove or disprove a material fact." Section 90.401, Fla. Stat. (1991). This evidence was admitted over the State's objection. (R1256, 1258-1259, 1264, 1267) The question of the constitutionality of the tax is a legal question, not one of fact. Evidence of the personal views of legislators on the statute's constitutionality did not tend to prove or disprove a factual matter. The constitutional authority to decide the issue is reposed in the courts. Though the trial court admitted the evidence over objection, it apparently gave it no weight. (R780, 836, 840-842, 914, 918-920, 1102) Nor should this Court.

## E. TAXPAYERS' CONTENTION THAT THE TRIAL COURT DID NOT AND COULD NOT HAVE FOUND THE TAX RATIONALLY RELATED TO THE REGULATORY GOAL IS REFUTED BY THE RECORD.

Taxpayers labor at pages 48-53 of their brief to argue a lack of evidence to support a finding that the tax differential was rationally related to the acquisition of maximum practicable regulatory power. As we noted in the statement of facts, the trial court, although it opted for the strict view that the residency distinction rendered the tax invalid, found:

> ....that the purpose put forward by the Defendants for this discriminatory tax structure is to acquire a greater degree of regulatory control over insurance companies, which in itself is a legitimate state purpose.... The Court finds that, based upon the evidence, a discriminatory insurance premium tax statute does not, in fact, cause an insurance company to change its state of domicile. However, the Court further finds that the Legislature could have believed that the tax would have the effect of causing a company to change its state of domicile and therefore increase the State's ability to regulate such companies. (emphasis supplied)

(R780) The trial court clearly found a rational relationship between a legitimate goal (under traditional review standards) and the tax structure (R1102). The evidence, including the testimony of the Taxpayers' own witness, supported that finding, and is catalogued above. We reiterate the point made in our Initial Brief, which Taxpayers have not refuted, that mere evidence of lack of statistically significant correlation is not enough to carry the assailant's burden of showing no rational relationship where, as here, the record contains evidence showing it to be fairly debatable that the measure would advance a legitimate goal. *Western & Southern, supra*, at 671-674. *See also Flemming v. Nestor, supra*. Such evidence

merely goes to the wisdom or utility of the statute, not to its constitutionality under the Equal Protection and Due Process Clauses. *Id.*

## II. SECTION 624.429 DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE AUTHORITY.

In their brief on cross appeal, Taxpayers argue that the trial court erred in ruling that Florida's retaliatory tax does not violate the prohibition against delegation of legislative authority. For the following reasons, the trial court's judgment was correct and should be affirmed.

Taxpayers' premise is that section 624.429, Florida Statutes, "adopts" the laws and taxing schemes of other states, and thus invalidly delegates legislative authority to those states. In fact, however, section 624.429 does nothing more that establish the yardstick which the Department of Revenue must use to determine the tax to be imposed on insurers doing business in the State of Florida. The statute itself completely determines the measure of taxes to be paid by foreign insurers, although it requires the Department of Revenue to evaluate the amount of taxes actually paid in other jurisdiction in order to apply the taxing method created by the statute. Thus section 624.429 imposes a tax upon foreign insurers doing business in this state which is equal to the taxes imposed upon Florida insurers doing business in the foreign insurer's state. The issue presented is whether the statute's mere reference to the taxes imposed by another state constitutes an invalid delegation of legislative authority.

The cases cited by Taxpayers in support of their invalid delegation argument all dealt with contexts in which the legitimate goals of the legislature could be achieved independently of the policies of other jurisdictions. The very objective of the retaliatory tax, however, is to affect the taxing policies of other jurisdictions. It must therefore, by definition, operate in relation to the actions and policies of other states in order to work at all. *Western & Southern, supra*. Florida's authority to pursue that objective is conferred by Congress in the McCarran-Ferguson Act. *Id.* Given the approved objective of the tax, it is absurd to suggest, as Taxpayers do, that the legislature is required to exercise its Congressionally-granted power by adopting the laws of the other 49 states annually.

While it is true that Florida's sister states may modify their laws in a way which affects the measure of Florida's retaliatory tax under the structure enacted by the legislature, that is precisely the valid objective of the retaliatory tax.

The operation of the retaliatory tax is conceptually no different from the legislature directing the Department of Revenue to measure a change in fuel tax burden by as-yet-unpromulgated versions of the federal Consumer Price Index (CPI), the validity of which was specifically upheld in *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984). Although Taxpayers argue that the components of the CPI index are "by their very nature, matters of fact which can be quantified", such components actually are established and amended in the discretion and judgment of the U. S. Department of Labor. *See* 29 U.S.C.A. § 2 (West 1973). Despite the mutable nature of the CPI, the prospective adoption

of federal agency decisions for measurement of tax by CPI changes is constitutionally sound in Florida. The determination of taxes already charged for the tax year in question by other jurisdictions as the yardstick for imposing the retaliatory tax is, no less than the CPI, "a matter of fact which can be quantified". It, too, should withstand constitutional scrutiny.

The Court should not read the Florida Constitution so churlishly as to deny to the Florida legislature the means of effectively exercising a power expressly delegated to it by the Congress as long ago as 1945. Indeed, the retaliatory tax was on the books, and widely adopted at the urging of the insurance industry, *Western & Southern, supra*, at 669, for many years preceding the revision of the Florida Constitution in 1968. If anything, the Court should view that history as proof that the framers of Florida's constitution did not envision that the doctrine of non-delegation of legislative power would preclude Florida, among all the states, from the authority exercise that long-standing Congressional grant of power to regulate interstate commerce in insurance through means of a retaliatory tax.

The Court is under a duty to construe section 624.429 in any reasonable way which preserves its constitutionality. *Firestone v. News-Press Pub. Co.*, 538 So.2d 457 (Fla. 1989). Since the method for computing the retaliatory tax is fundamentally no different than the method approved in *Eastern Air Lines* for calculation of a fuel tax, this tax should likewise be upheld.

## III. FLORIDA'S RETALIATORY TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE ON ITS FACE OR AS APPLIED IN THIS CASE.

Contrary to Taxpayers' arguments, the State was not required to adduce testimony to articulate purposes for the retaliatory tax. In cases involving rational-basis scrutiny under the Equal Protection and Due Process Clauses, the State's only obligation is to show a conceivable and legitimate purpose for the statute. *Flemming v. Nestor, supra; Eastern Air Lines v. Department of Revenue, supra; Glendale Fed. S. & L. Ass'n. v. State, supra.* The State in this case notified the trial court that it relied upon the decision of the United States Supreme Court in *Western & Southern, supra*, in support of the constitutionality of Florida's retaliatory tax. In *Western & Southern*, the court comprehensively canvassed the rational for retaliatory taxes such as Florida's. The trial court was entitled to take judicial notice of that decision, which supplies the required legitimate rationale for Florida's retaliatory tax.

Florida's retaliatory tax is nearly identical to the tax upheld by the United States Supreme Court in *Western & Southern*. The trial court should therefore be affirmed in its holding that the retaliatory tax does not violate the Equal Protection Clause.

Taxpayers argue that Florida's tax is distinguished from that upheld in *Western & Southern* in two respects: first, that Florida's tax contains a regional home office credit which was not in the California tax; and second, that Florida's premium tax, which favored domestic insurers, somehow invalidates the separate retaliatory tax. The latter argument is put to rest by *Western & Southern*. In *Western & Southern* the court considered a challenge

both to California's premium tax and to California's retaliatory tax. California's premium tax favored domestically incorporated insurers, as does the premium tax under review in this case. *Western & Southern* rejected a challenge to California's preferential premium tax, noting that, if the premium tax credit allowed domestic insurers was invalid, California's retaliatory tax would simply increase by an off-setting amount. *Western & Southern, supra*, at 651, n. 2[8]. Thus, the United States Supreme Court in that case had before it a challenge to a premium tax structure which favored domestic insurance companies, in tandem with a challenge to California's retaliatory tax. The court nevertheless upheld the retaliatory tax. The structure of Florida's premium tax therefore does not distinguish this case from *Western & Southern*, or call for a different result here.

The other distinction asserted by Taxpayers - that the regional home office credit in Florida's retaliatory tax statute distinguishes this case from *Western & Southern* - is likewise incorrect. Taxpayer's own insurance expert testified that the regional home office credit would enhance Florida's ability to protect Florida policyholders in the event of the insurer's insolvency, and was therefore legitimate and rational. (Defendants' Exhibit 8, pp. 109-113).

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[8] "Western & Southern also challenges a provision of California property tax law, since repealed, which permitted certain domestic insurance companies to credit a greater portion of property tax paid on their principle offices against their premium tax liability than foreign insurers could. [cite omitted]. We need not consider this challenge, <u>because any increase in the property tax deduction would merely trigger an off-setting increase in the retaliatory tax</u>." [emphasis added]

That testimony alone is sufficient to uphold the constitutionality of the retaliatory tax. *E.g., Western & Southern, supra.*[9]

The off-set of increased retaliatory tax otherwise due from Taxpayers, had the premium taxes which they took credit for not been paid, does not violate the Equal Protection Clause, either. *Western & Southern* expressly recognized such an interplay between the two taxes, and recognized that it was not a violation of the Equal Protection Clause. The two taxes are imposed by different statutes, have different tax bases and are simply separate, though overlapping, taxes.

All of Taxpayers' arguments are predicated on the incorrect premise that the operation of the retaliatory tax is somehow affected by the level of taxation of domestic insurers in Florida. That is not the case. The retaliatory tax simply measures the difference between aggregate tax levels imposed on foreign insurers in Florida as compared to the aggregate level of taxation imposed on foreign insurers by another state, the insurer's state

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[9] Taxpayers appear to suggest at pages 60-61 of their brief that *Western & Southern* is distinguishable because California's retaliatory tax was aimed only at states which both discriminated in favor of their domestic insurers and imposed higher overall tax burdens than did California, while Florida's tax operates whenever there is a higher aggregate tax burden imposed by another state, regardless of whether that state favors its domestic insurers in tax treatment. If Taxpayers indeed assert that distinction, they are incorrect. The California retaliatory tax under review in *Western & Southern* was identical to Florida's, with the exception of Florida's regional home office credit discussed above. California, like Florida, imposed retaliatory tax irrespective of the other state's treatment of its domestic insurers, if the other state's aggregate tax burden on out-of-state insurers doing business in that state was higher than that imposed on out-of-state insurers doing business in California. *Western & So., supra*, at 650, n. 1

of domicile. The level of taxation of domestic insurers does not affect the computation or imposition of the retaliatory tax in either state.

The Taxpayer's "principles of statutory construction" arguments at pp. 63-65 of their brief presents arguments not raised below and, therefore, waived. In any event, it is nothing more than another version of Taxpayers' argument that the offset of retaliatory tax violates equal protection as applied. That argument has been refuted immediately above.

## IV. NO LIMITATIONS PERIOD APPLIES TO THE SET-OFF OF PRO FORMA OR OTHERWISE-DUE RETALIATORY TAXES IN THE EVENT THAT PREMIUM TAXES ARE REFUNDED TO TAXPAYERS.

The Taxpayers incorrectly argue that section 95.091, Florida Statutes, imposes a limitation period on the set-off of otherwise-due retaliatory tax in the event that Taxpayers are entitled to a refund of premium tax. Section 95.091(3)(a)1.a., Florida Statutes (1991), provides that the Department of Revenue may "determine and assess the amount of any tax due . . . within five years after the date the tax is due . . ." No additional retaliatory tax could have been due from the Taxpayers during the period of time that the premium tax, which they were paying, was regarded as valid and constitutional. Premium tax payments were properly credited by Taxpayers against their overlapping retaliatory tax obligation. Thus, either formal assessment of such otherwise-due retaliatory taxes is now timely (since the tax could not have become due until such time as the Court invalidated the premium tax

and ordered premium tax refunds), or, as the trial court viewed the matter, the Taxpayers must be prevented in equity from "having their cake" (the return of premium tax payments) and "eating it, too" (retaining the benefit of previously-paid premium tax against otherwise-previously-due retaliatory tax).

The trial court acted correctly to shape its decree in a fashion which prevents an inequitable result. The court required that premium tax refunds be reduced by the amount of retaliatory tax imposed by section 624.429, Florida Statutes (1987), which Taxpayers would have been obligated to pay in the event they had owed less premium tax to Florida than they actually paid.

Taxpayers' claim for tax refund sounds in mandamus, *State, ex rel. Victor Chemical Works, Inc. v. Gay,* 74 So.2d 560 (Fla. 1954), as to which equitable defenses apply. *E.g., State, ex rel. Mann v. Burns*, 109 So.2d 195 (Fla. 1969) (laches barred issuance of writ of mandamus). *See also Seaboard Coastline Railroad Co. v. McKelvey*, 259 So.2d 777 (Fla. 3d DCA 1972); *McNulty v. Blackburn*, 42 So.2d 445 (Fla. 1949); *Jannett v. Windham*, 109 Fla. 129, 147 So. 296 (1933), *aff'd.*, 290 U.S. 602 (1933); *Hess v. Mullaney*, 213 F.2d 635 (9th Cir. 1954); *In re: Chicago, Milwaukee, St. Paul & Pac. R. Co.,* 713 F.2d 274 (7th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (one taking advantage of statute's benefits estopped from later challenging it).

A taxpayer has an action at the moment that taxes are paid by which he may simultaneously challenge the constitutionality of the statute under which the tax is levied and seek a refund of taxes paid. *State, ex rel. Victor Chemical Works v. Gay, supra*. Moreover, Taxpayers need not have waited until the payments were due to challenge the statute. Under Chapter 86, Florida Statutes, they had an anticipatory action available at all times. *E.g., Sheldon v. Powell*, 128 So. 258, 263 (Fla. 1930). *See also Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498 (1972) (declaratory relief proper where plaintiff has a present affirmative duty to comply with a civil statute). Taxpayers did not avail themselves of such remedies. Instead they continued to credit premium tax paid against their Florida retaliatory tax obligations.

The State could not have earlier assessed additional retaliatory tax. The State defendants were bound to abide by the presumption of the constitutionality of the premium tax. *E.g., Department of Ed. v. Lewis*, 416 So.2d 455 (Fla. 1982). *See also Florida Export Tobacco Co., Inc. v. Department of Revenue*, 510 So.2d 936, 951-955 (Fla. 1st DCA 1987), *cert. denied* 519 So.2d 986 (Fla. 1987). Indeed, precisely because the State lacked authority to assess additional retaliatory tax unless and until the premium tax is found to be unconstitutional, equity requires, at a minimum, a set-off of retaliatory tax in this case if the premium tax is found to be invalid.

What would the Taxpayers's position have been during the refund period, if they had been taxed as they now (post-hoc) seek to be for premium tax? They would have been taxed at a zero premium tax rate. However, they would have incurred a higher retaliatory

tax obligation equal to the lowered premium tax obligation. The United States Supreme Court recognized as much in *Western & Southern, supra,* at 651, n.2:

> Western & Southern also challenges a provision of California property tax law, since repealed, which permitted certain domestic insurance companies to credit a greater portion of property tax paid on their principal offices against their premium tax liability than foreign insurers could. [cite omitted] We need not consider this challenge, because any increase in the property tax deduction would merely trigger an offsetting increase in the retaliatory tax. [emphasis added]

The trial court therefore acted well within the permissible range of its equitable discretion in conditioning a refund of premium tax on an offset of the amount of retaliatory tax Taxpayers should have paid in combination with a zero premium tax rate.

## V. REMAND FOR FURTHER PROCEEDINGS ON COUNT V OF THE COMPLAINT IS REQUIRED IF THE COURT AFFIRMS THE TRIAL COURT'S RULING ON THE CONSTITUTIONALITY OF THE PREMIUM TAX.

The State objected to entry of judgment on Count V (Taxpayers' claim under 42 U.S.C. § 1983). The State asserted that it was entitled to present evidence at trial on Count V that the formal assessments of additional premium tax complained of in Count V were made at the request of the Taxpayers; that the assessments would not have been issued without that request; and that, therefore, the Defendants could not be found to have "caused" a deprivation of Taxpayers' rights within the meaning of 42 U.S.C. § 1983 on the facts of this case. (R764-776, 1064-1067, 1083-1085, 1092-1094;). The trial court overruled

that objection and entered judgment on Count V without benefit of either trial or timely-noticed motion for summary judgment as to Count V.

Remand for trial of Count V is required if the Court affirms the trial court's disposition of the Taxpayers' claim in respect to the premium tax. The State objected to the entry of judgment on Count V of the Taxpayers' complaint (the 1983 claim) without the opportunity for the State to present such evidence at trial, or, at least, at a duly noticed summary judgment hearing. There was a triable issue, which precluded entry of judgment summarily on Count V, even if it had been properly noticed for summary disposition: whether, under the circumstances, the Defendants "caused" a deprivation of the Taxpayers' equal protection or due process rights by issuing premium tax assessments at Taxpayers' own request. Moreover, no motion for summary judgment on Count V was filed or noticed for hearing more than twenty days before hearing at which the trial court summarily disposed of Count V. The trial court's disposition of Count V was therefore improper.[10]

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[10] Taxpayers appear to suggest at page 68 of their brief that the State was required to file a notice of cross appeal from the denial of the motion to dismiss Count V in order for the State to advance objections to the court's final ruling on Count V. The trial court entered judgment on Count V over the State's objection as to procedure. Nothing precludes the State from asserting its arguments here in that regard. *See, e.g., MacNeil v. O'Neil*, 238 So.2d 614 (Fla. 1970); *City of Hialeah v. Martinez*, 402 So.2d 602 (Fla. 3d DCA 1981), pet. for review denied, 411 So.2d 380 (Fla. 1981); *Ash v. Coconut Grove Bank*, 448 So.2d 605 (Fla. 3d DCA 1984). Indeed it would be a perverse rule which precluded a party from seeking on appeal to protect the right to full evidentiary hearing below in order to support the ultimate validity of the result reached below, when the lower court precipitously entered judgment at the invitation of the opposing party and over the State's expressed objection.

The State does not waive other arguments that the trial court was correct in regard to this count of Taxpayers' complaint. However, the Court need not address those issues here, since it would be premature to do so. Entry of judgment on Count V was clearly error. The Court should not address the merits of this significant issue until a complete evidentiary record is developed, allowing consideration of all arguments on the question, rather than piecemeal arguments.[11]

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[11] For instance, other states have concluded that a § 1983 claim cannot be brought in a state court tax case. *E.g., Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985). *See also Davis v. City of Elkhorn*, 132 Wisc.2d 394, 393 N.W.2d 95 (1986); *Stufflebaum v. Panathiere*, 691 S.W.2d 271 (Mo. 1985); *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *affirmed by an equally divided court*, 471 U.S. 82 (1985); *W. H. Backus v. Chivillis*, 236 Ga. 370, 224 S.E.2d 370, 374-75 (1976); *Vann v. DeKalb County Bd. of Tax Assessors*, 186 Ga. App. 208, 367 S.E.2d 381 (1988); *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900, 906 (La. App. 1 Cir. 1987); *Raschke v. Blancher*, 141 Ill.App.3d 813, 96 Ill.Dec. 711, 491 N.E.2d 1171, 1174 (1986); *Johnson v. Gaston County*, 71 N.C. App. 707, 323 S.E. 381 (1984).

Further the State contended below that Taxpayers had neither alleged nor proved the elements necessary for the issuance of the prospective relief sought, (an injunction against the enforcement of a statute that the trial court has declared unconstitutional). The State contends that Taxpayers are not entitled to injunctive relief for two reasons. First, the Taxpayers did not allege or prove that the State, in light of the Court's ruling, would disregard that order and attempt to enforce assessments of the tax in the absence of injunctive relief. *See generally City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Without proof of the need for such prospective relief, there is no basis for an "official capacity" 1983 action, since purely retrospective relief, such as Taxpayers' prayer for tax refund under a statute which stood repealed when they brought suit, does not state a 1983 claim against a state official sued in his official capacity. *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989).

## VI. TAXPAYERS HAVE NO CLAIM UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION.

The Principle is firmly established the corporations have no claim under the Privileges and Immunities Clause. *E.g., Western & Southern, supra*, at 656 (and cases there cited). The trial court's judgment rejecting such claim is correct, since Taxpayers are all corporations.

## CONCLUSION

The Court should reject Taxpayers' constitutional arguments in respect to the premium tax and the retaliatory tax. It should reverse the trial court's judgment that the premium tax violates equal protection or due process guarantees. It should affirm the trial court's judgment that the retaliatory tax does not violate equal protection or due process principles, either as written or as applied here, and that the retaliatory tax does not offend Florida's non-delegation doctrine. It should affirm the trial court's judgment that Taxpayers have no claim under the Privileges and Immunities Clause of the United States Constitution. Finally, if the Court affirms the trial court's judgment regarding the constitutionality of the premium tax, it should affirm the trial court's judgment insofar as the trial court ordered a set-off of retaliatory tax which Taxpayers would otherwise have been obligated to pay in the

absence of premium tax responsibility, and should vacate the judgment as to Count V of Taxpayers' complaint and remand for further proceedings on that Count.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to KENNETH R. HART, ESQ., Ausley, McMullen, McGehee, Carothers and Proctor, Post Office Box 391, Tallahassee, Florida 32302 this 6th day of February, 1992.

**DANIEL C. BROWN**

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