IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 89,909

THE DEPARTMENT OF REVENUE, OF THE STATE OF FLORIDA,

Petitioners,

v.

JUDITH A. NEMETH, DONALD J. NEMETH, and JOHN L. VITALE,

Respondents.

On Appeal From the District Court Of Appeal
For the Fourth District

BRIEF OF THE AMICUS CURIAE

The Certified Class, *Leon v. Department of Revenue*,
Case No. 96-0902-CA 23 (11th Jud. Cir., Dade County, Fla.)

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STATEMENT OF THE ISSUES

I.

WHETHER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THE STATE TO PROVIDE REFUNDS TO TAXPAYERS WHO HAVE PAID TAXES WHICH HAVE SUBSEQUENTLY BEEN DECLARED FACIALLY UNCONSTITUTIONAL?

II.

WHETHER THIS COURT'S 1954 DECISION IN VICTOR CHEMICAL MUST BE LIMITED TO ITS FACTS IN LIGHT OF THE UNITED STATES SUPREME COURT'S 1990 DECISION IN MCKESSON AND WHETHER THIS COURT'S RECENT DECISION IN KUHNLEIN WAS, THEREFORE, PROPERLY DECIDED?

INTEREST OF THE AMICUS

The *amicus* is a class of eight hundred and fifteen (815) similarly situated taxpayers (represented by individual taxpayers Anahidia Leon and Richard Munson) who are currently seeking refunds for taxes illegally collected by the State, pursuant to Fla. Stat. § 212.0505. Section 212.0505 imposed a sales tax on unlawful transactions involving medicinal drugs, cannabis, or controlled substances. This Court declared Section 212.0505 unconstitutional on its face in *Florida Dept. of Revenue v. Herre*, 634 So.2d 618 (Fla. 1994).

To obtain refunds of the unconstitutionally-imposed taxes, Plaintiffs Anahidia Leon and Richard Munson filed suit against the Department of Revenue ("the Department") on their own behalf and on behalf of a class defined as "[a] persons, who, as of March 31, 1994, had paid a sales tax on transactions involving marijuana and controlled substances pursuant to Section 212.0505, Florida Statutes (Supp. 1988)." *See Anahidia Leon and Richard Munson v. Department of Revenue*, Case No. 96-0902-CA 23 (11th Judicial Circuit, Dade County, Florida) (hereinafter "*Leon*").

The class in *Leon* is currently seeking both a declaration that the time period for seeking tax refunds in Fla. Stat. § 215.26(2) does not apply to those who seek refunds of an unconstitutionally-imposed tax and a refund of the taxes paid by the class members, pursuant to *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). On July 12, 1996, the Circuit Court entered an Amended Order certifying the class under Fla. R. Civ. P. 1.220(b)(2) with respect to the declaratory relief sought and under Fla. R. Civ. P. 1.220(b)(3) for the refunds sought. A copy of this Amended Order is attached as **APPENDIX A.**

The Department of Revenue ("the Department") has opposed giving refunds to the class members in *Leon* for the identical reasons it seeks to deny the taxpayers relief in *Nemeth & Vitale* -- *i.e.,* because the Department contends the refund requests in both cases are time barred under Section 215.26(2). Therefore, the rights of the class members in *Leon* to refunds will be significantly, if not irrevocably, influenced by the decision rendered in *Nemeth & Vitale*. The class in *Leon* thus has a strong interest in ensuring that this Court fully understands the constitutional implications of the arguments raised by the Department herein.

STATEMENT OF THE CASE

The *amicus* adopts the "Statements of the Case" filed by the parties in *Nemeth & Vitale*. The following summarizes the parallel status of the pending litigation in *Leon* and the position of the Department in both cases.

On March 31, 1994, this Court ruled that Fla. Stat. § 212.0505 (Supp. 1988), which imposed a sales tax on unlawful transactions involving medicinal drugs, cannabis, or controlled substances, was unconstitutional on its face. *Florida Dept. of Revenue v. Herre*, 634 So. 2d 618, 621 (Fla. 1994). The Court found Section 212.0505 unconstitutional because to pay the tax would result in self-incrimination in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 9 of the Florida Constitution.[1]

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[1] Although the issue was raised in *Herre*, this Court did not address another unconstitutional aspect of the tax. On June 6, 1994, the United States Supreme Court held that a similar "drug tax" statute enacted in Montana was unconstitutional under the Double Jeopardy Clause of the Fifth Amendment. *See Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

After the decision in *Herre*, the Department took no steps to voluntarily refund taxes illegally collected under Section 212.0505. Nor did the Department notify taxpayers that they now had a right to a refund and should do so within the time limits of Section 215.26(2). After the class in *Leon* filed suit, the Department continued to refuse the payment of any refunds obtained illegally under Section 212.0505. As in the instant case, the Department relies solely on the provisions of Fla. Stat. §§ 72.011(1) and 215.26(2) to argue that Plaintiffs' claims for refund are barred.[2]

Section 215.26(2) requires taxpayers to file for refunds within three years of when the right to a refund "*accrued*."[3] The Department contends, as it does in *Nemeth & Vitale*, that a failure to seek a refund within three years of *payment* divests every court of jurisdiction to consider claims for refunds. According to the Department, a taxpayer's right to a refund "accrues" within three years of its payment even if the tax statute at issue has not yet been declared unconstitutional by any state or federal court. The Department -- both in *Leon* and in *Nemeth & Vitale*-- relies primarily on the 1954 decision in *State ex rel. Victor Chemical Works v. Gay*, 74 So. 2d 560, 562 (Fla. 1954). As discussed more fully below, *Victor Chemical* involved a tax statute that had been invalidly enacted under *Florida* law. In such a context, this Court held that the State's duty to refund taxes was solely "a matter of grace"

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[2] Section 72.011 requires a taxpayer to contest the legality of any tax assessment or denial of a refund pursuant to § 215.26 within sixty (60) days from when the assessment becomes final or refund is denied. Fla. Stat. § 72.011(2). The cases that have addressed the refund issue under Section 72.011 follow the same reasoning as in the cases construing Section 215.26.

[3] The statute itself does not define "accrued," it simply states that "[a]pplication for refunds ... shall be filed with the Comptroller, ... within 3 years after the right to such refund shall have *accrued* else such right be barred." Fla. Stat. § 215.26(2) (emphasis added). The definition of "accrued" has been left to Florida courts to resolve.

and, therefore, held that the right to a refund accrued at the time the payment was initially made -- not when the tax was subsequently declared invalid. *Id.* at 564-565.

In *Department of Revenue v. Kuhnlein*, 647 So.2d (Fla. 1994), this Court declined to follow *Victor Chemical* in a situation where the tax statute was deemed unconstitutional on its face under the *United States Constitution*. Although the Court's decision in *Kuhnlein* was plainly necessary, in light of intervening precedent interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments, *see McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the Department continues to maintain: (1) that *Victor Chemical* is valid and binding precedent; (2) that *Kuhnlein* was wrongly decided; and (3) that it has no obligations under the United States Constitution to refund the funds collected in violation of the Constitution to aggrieved taxpayers or to even notify aggrieved taxpayers that they may have a right to refunds. Thus, according to the Department, under *Victor Chemical*, because the claims for refunds in both *Leon* and *Nemeth & Vitale* were not made within the requisite period, no right to refunds exists to be adjudicated even though the taxes in question have been declared facially unconstitutional.

SUMMARY OF THE ARGUMENT

I. This case is governed by *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), and its progeny. *McKesson* requires States to refund taxes it has collected under statutes declared unconstitutional under the United States Constitution. Although *McKesson* gives more leeway to States in fashioning post-deprivation remedies in situations where the tax statutes are voided for merely being unduly discriminatory, *McKesson* unmistakably holds that in situations where a state has no power to impose the tax -- *i.e.,* due to its facial unconstitutionality -- "no corrective action by the State could cure the invalidity of the tax *during the contested tax period.*" *McKesson*, 496 U.S. at 39, 110 S.Ct. at 2251 (emphasis added). Thus, the availability of refund procedures "during the contested period" does not constitute an adequate remedy under *McKesson*. Where statutes are unconstitutional, *McKesson* holds that states "would have no choice but to 'undo' the unlawful deprivation *by refunding the tax previously paid* under duress...." *Id.* (emphasis added).

II. This Court's decision in *Department of Revenue v. Kuhnlein*, 647 So.2d (Fla. 1994), correctly reasoned that refund procedures were inadequate for unconstitutional taxes. The precedents relied upon by the State, including *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560 (Fla. 1954), all pre-date *McKesson* and are either distinguishable or no longer good law. The Fourth District Court of Appeal in *Nemeth v. Florida Dept. of Revenue*, 686 So. 2d 778, 779-80 (4th DCA 1997), correctly followed *Kuhnlein* and *McKesson*. Indeed, all of the Department's arguments were addressed and rejected in *McKesson*. Therefore, *Nemeth* must be affirmed.

ARGUMENT

I. SINCE THE TAX STATUTE AT ISSUE HEREIN VIOLATES THE UNITED STATES CONSTITUTION, UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS, THE STATE HAS "NO CHOICE" BUT TO ISSUE REFUNDS

In *Florida Dept. of Revenue v. Herre*, 634 So. 2d 618, 621 (Fla. 1994), this Court ruled § 212.0505 unconstitutional. That same year, in *Department of Revenue v. Kuhnlein*, 647 So.2d (Fla. 1994), the Court ruled Fla. Stat. § 319.231 unconstitutional under the Commerce Clause. Now, in both *Nemeth & Vitale* and *Leon*, the issue is whether the State of Florida should be allowed to retain tax revenues that were collected in violation of the United States Constitution. In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the United States Supreme Court ruled that it may not.

McKesson analyzed what remedy must be afforded taxpayers who had paid Florida liquor taxes which were subsequently found unconstitutionally discriminatory in violation of the Commerce Clause of the United States Constitution. This Court had previously ruled that, although the tax violated the Commerce Clause, the taxes paid did not have to be refunded to taxpayers. According to the Court, all that was constitutionally necessary was that enforcement of the tax cease.

The United States Supreme Court rejected this Court's assessment of the State's constitutional obligations. In reversing the Court, the Supreme Court reasoned:

> Our precedents establish that if a state penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpay-

> ment relief for taxes already paid pursuant to a scheme ultimately found unconstitutional. We therefore agree with petitioner that the state court's decision denying such relief must be reversed.

McKesson, 496 U.S. at 22, 110 S.Ct. at 2242. As framed by the Supreme Court, the question to be addressed was whether prospective relief was sufficient to satisfy federal law. The Supreme Court's resounding answer was no:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

Id., 496 U.S at 31, 110 S.Ct. at 2247 (footnote omitted). The Court specifically defined "duress" in the taxation context:

> We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress" in the sense that the State has not provided a fair and meaningful predeprivation procedure.

Id. 496 U.S. at 38, n. 21, 110 S.Ct. at 2251, n. 21. *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 2519 n. 10, 125 L.Ed.2d 74 (1993) ("[t]he State accordingly may not confine a taxpayer under duress to prospective relief"). There is no question that the taxpayers in *Nemeth & Vitale*, as well as in *Leon*, were required to pay their taxes "in order to avoid ... sanctions." Thus, the payments were made under duress.

In *McKesson*, the Supreme Court analyzed Florida's tax refund scheme -- the exact scheme at issue in both *Leon* and *Nemeth & Vitale* -- and ruled that it did *not* provide taxpayers with a meaningful predeprivation remedy:

> Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the of the tax assessment's validity; rather, Florida requires taxpayers to raise their objections to the tax in a postdeprivation refund action.

Id., 496 U.S at 38-39, 110 S.Ct. at 2251 (footnote omitted). Thus, McKesson was -- as are class members in *Leon* and *Nemeth & Vitale* -- relegated to a post-deprivation procedure to obtain refunds of taxes unconstitutionally imposed.[4]

The Supreme Court in *McKesson* next addressed the types of post-deprivation procedures that a State may consider. As the Supreme Court explained, the range of remedies was defined primarily by the reason for the tax being deemed invalid.

The Florida tax at issue in *McKesson* was found unconstitutional by this Court in *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1008 (Fla. 1988), *rev'd on other grounds*, 496 U.S. 18 (1990) -- *not* because it was facially unconstitutional but merely because it placed "a discriminatory burden on interstate

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[4] In fact, it was not possible to pay the sales tax at issue in *Herre* and then contest it because the Department never even promulgated any rules, regulations, or instructions for paying the tax, as required by Fla. Stat. § 212.18(2). Even had such rules been promulgated, however, it would violate the Fifth Amendment and Article I, Section 9, to require the class members in *Leon* to have paid the tax and then contest the amount. This tax specifically applied to:

> Every person ... who engages ... in the *unlawful* sale, use, consumption, distribution, manufacture, derivation, production, transportation, or storage of [controlled substances.

Fla. Stat. § 212.0505(1)(a) (emphasis added). Thus, only those engaged in unlawful activities were subject to the tax. Furthermore, the Department was required to "notify the state attorney of the appropriate circuit of an assessment made under this section." Fla. Stat. § 212.0505(6)(a). Paying one penny pursuant to this tax would, therefore, subject the taxpayer to prosecution and thereby result in self-incrimination prohibited by the Fifth Amendment and Article I, Section 9 -- exactly the harm that rendered § 212.0505 unconstitutional.

commerce." Accordingly, when addressing the types of post-deprivation remedies available to the State of Florida, the Supreme Court in *McKesson* noted that "Florida may reformulate and enforce the Liquor Tax ... in a manner consistent with the dictates of the Commerce Clause." *McKesson*, 496 U.S. at 40, 110 S.Ct. at 2252. In a footnote and accompanying text, the Supreme Court also explained that in fashioning a remedy for the discriminatory tax at issue in *McKesson*, the State had more "freedom to impose various procedural requirements on actions for post-deprivation relief," including the "enforce[ment] of relatively short statutes of limitations applicable to such actions." *McKesson*, 496 U.S. at 45 & n. 28, 110 S.Ct. at 2254 & n. 28.

However, the Supreme Court made perfectly clear that if taxing schemes are deemed *facially* unconstitutional, the State has no such leeway:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose ... *no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress*, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

Id., 496 U.S. at 39, 110 S.Ct. at 2251 (emphasis added), citing *Ward v. Board of County Com'rs*, 253 U.S. 17, 24, 40 S.Ct. 419, 422, 64 L.Ed. 751 (1920). *Accord U.S. On Behalf of Cheyenne River Sioux Tribe v. SD*, 105 F.3d 1552, 1560 (8th Cir. 1997). *See also United States Shoe Corp. v. United States*, 907 F. Supp. 408, 425 (Ct. Intl. Trade 1995) (Musgrave, J., concurring) (since tax statute was unconstitutional, two year statute of limitations for seeking refunds was inapplicable under *McKesson*; "it is my opinion that the imperatives of due process require a full refund back to the date of the Act's implementation"); *Cambridge*

State Bank v. Comm., Dept. of Rev., 514 N.W.2d 565, 570 (Minn. 1994) (ordering tax refunds as remedy for unconstitutional tax; rejecting arguments that State's refund procedures provided adequate remedy under *McKesson*).

A state has "no choice" but to give refunds for the collection of *unconstitutional* taxes, because the retention of the funds obtained itself is unconstitutional:

> [A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.

Carpenter v. Shaw, 280 U.S. 363, 369, 50 S.Ct. 121, 74 L.Ed.2d 478 (1930).

In both *Leon* and *Nemeth & Vitale*, the pertinent tax statutes were declared unconstitutional on their face; they were not merely found to be discriminatory (as was the tax statute at issue in *McKesson*). That is, the tax statutes at issue in *Leon* and *Nemeth & Vitale* were "beyond the State's power to impose." Under *McKesson*, in this situation "no corrective action by the State could cure the invalidity of the tax *during the contested tax period*." *Id.*, 496 U.S. at 39, 110 S.Ct. at 2251 (emphasis added). Thus, the mere availability of tax refund procedures "during the contested tax period," does not satisfy the due process concerns underlying *McKesson*. The Supreme Court in *McKesson* could not have been more

> *"Had the Florida courts declared the [tax] invalid ... because ... it was beyond the State's power to impose[,] ... no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress...."*
>
> *McKesson v. Div. of Alcoholic Beverages*, 496 U.S. 18, 39, 110 S.Ct. 2238, 2251, 110 L.Ed.2d 17 (1990).

clear. In fashioning a remedy for *unconstitutional* tax statutes, states "have no choice but to 'undo' the unlawful deprivation *by refunding the tax previously paid* under duress...." *Id.* (emphasis added). Moreover, having violated the United States Constitution in enforcing the unconstitutional taxes in *Leon* and *Nemeth & Vitale*, the Department should not be allowed to violate it again by retaining its ill-gotten gains.

The constitutional inadequacy of the refund procedures in Fla. Stat. § 215.26(2) is clear for other reasons as well. *McKesson* teaches that whatever discretion a State has to fashion a remedy through its own procedures, those procedures must provide "a meaningful opportunity to secure postpayment relief...." *McKesson*, 496 U.S. at 22, 110 S.Ct. at 2242. The Department's refund procedures do not and cannot provide "meaningful" relief for taxpayers seeking refunds for taxes which have not yet been declared unconstitutional by a state or federal court for the simple reason that administrative agencies, such as the Department, have no authority to declare statutes unconstitutional and, therefore, could not grant the refunds. In its Brief, the Department takes the position that before *Kuhnlein* and *Herre* were even decided, taxpayers were required to pay the unconstitutional taxes and seek refunds from the Department within the time period set forth in Section 215.26(2), even though the Department had no power to declare the tax statutes unconstitutional -- and hence, could not refund the taxes. Requiring taxpayers to exhaust such a futile procedure obviously does not provide the type of "meaningful" post-deprivation procedure required by *McKesson*. *See United States Shoe Corp. v. United States*, 907 F. Supp. 408, 419 (Ct. Intl. Trade 1995) (refunds required following decision declaring Harbor Maintenance Tax unconstitutional, holding that refund procedure in Customs regulations was inapplicable, because the Customs Service was "powerless to correct the constitutional infirmities raised by the plaintiff). *See*

generally McCarthy v. Madigan, 503 U.S 140, 147-48, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992) (noting agency may be unable to consider whether relief should be granted, because of lack of institutional competence to resolve issues presented); *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed 1107 (1930) (finding due process violation when Missouri Supreme Court denied remedy to taxpayer by holding that taxpayer failed to take advantage of administrative remedies when the court had previously found that the agency lacked power to hear the type of case at issue).[5]

The Department has filed a 37-page Brief before this Court herein but discusses *McKesson* only once. At page 19 of its Brief, the Department erroneously contends that *McKesson* actually *approved* "time bars, such as Section 215.26(2), Florida Statutes, where refunds of unconstitutionally collected taxes are not timely sought." Petitioner's Initial Brief, at p. 19. As discussed above, *McKesson* actually held precisely the contrary. For its reading of *McKesson*, the Department relies the portion of *McKesson* discussing the broader range of remedies which may be utilized for merely discriminatory taxes. *See McKesson*, 496 U.S. at 45 n. 28, 110 S.Ct. at 2254, n. 28. As already discussed, however, *McKesson* made clear that states have no such "freedom" when fashioning remedies for taxes which were "beyond the State's power to impose." In that context, the Due Process Clauses of the Fifth and Fourteenth Amendments give states "no choice." States must "'undo' the unlawful deprivation *by refunding the tax previously paid* under duress." (Emphasis added.)

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[5] Indeed, in *Florida Dept. of Revenue v. Herre*, 634 So.2d 618 (Fla. 1994), Petitioner Herre attempted to challenge the constitutionality of the tax before the Department of Revenue during the administrative portion of the litigation. The Department refused to rule on the issues, stating that it was not empowered to determine the constitutionality of statutes and declined to express any opinion on the arguments. *See* Brief for the Appellee, *Florida Dept. of Revenue v. Herre*, 634 So.2d 618 (Fla. 1994).

In *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), the United States Supreme Court revisited *McKesson* and reaffirmed the need for refunds in situations like those at issue in *Leon* and *Nemeth & Vitale*. *Reich* was one of many tax refund cases filed to recover improperly taxed federal retiree benefits. The Georgia Supreme Court had interpreted *McKesson* in a manner that allowed Georgia to avoid refunding the improper taxes by relying on Georgia's predeprivation procedures, despite the fact that Georgia law provided a refund statute -- a post-deprivation procedure similar to Florida's -- as the exclusive remedy for unlawful taxes. *Id.* at 550. In rejecting the Georgia court's interpretation, the Supreme Court stated:

> [W]e find it significant that, for obvious reasons, States ordinarily *prefer* that taxpayers pursue only postdeprivation remedies, *i.e.*, that taxpayers "pay first, litigate later." This preference is significant in that taxpayers who may have ignored the possibility of pursuing predeprivation remedies out of respect for that preference.

115 S.Ct. at 551 (italics in original). Because the Georgia court improperly applied *McKesson*, the United States Supreme Court reversed the decision and remanded the case for the "meaningful backward-looking relief ... consistent with due process and our *McKesson* line of cases" -- *i.e.*, refunds. *Id.* at 551 (citations and internal quotations omitted).

The Supreme Court also rejected the contention that the State's refund procedures constituted a sufficient post-deprivation remedy, since the taxing scheme in Georgia did not provide a procedure for paying an unconstitutional tax under protest.

> Under such a regime, taxpayers need not have taken any steps to learn of the possible unconstitutionality of their taxes at the time they paid them. Accordingly, they may not now be put in any worse position for having failed to take such steps.

Id. at p. 551.

In *McKesson*, the Supreme Court pointed out that Florida law also did not contain any provision for paying taxes under protest. *See McKesson*, 496 U.S. at 2243 & n. 4, 110 S.Ct. at 2243. Under *Reich*, therefore, taxpayers have no duty "to learn of the possible unconstitutionality of their taxes at the time they paid them" and then demand refunds within a prescribed time *before* the taxing scheme is even declared unconstitutional. As *Reich* teaches, this is so, because taxpayers in this situation "may not now be put in any worse position for having failed to take such steps."[6]

Accordingly, as a matter of federal constitutional law, the Department may not constitutionally use the limitations period erected in tax refund statutes as roadblocks for taxpayers seeking to obtain refunds of money collected by compulsion under statutes only later declared unconstitutional.

II. THIS COURT'S DECISION IN KUHNLEIN PROPERLY DISTINGUISHED VICTOR CHEMICAL

Essentially ignoring the impact of federal constitutional law on its constitutional obligations, the Department asks this Court to reconsider its post-*McKesson* decision in *Kuhnlein* on the grounds that it conflicts with a series of *pre-McKesson* cases, primarily *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560 (Fla. 1954). As demonstrated below, however, *Victor Chemical* is no longer good law in light of *McKesson* and its progeny. Thus, *Kuhnlein* was properly decided.

The foundation of the Department's refusal to refund the unconstitutionally-imposed taxes is *State ex rel. Victor Chemical Works v. Gay*, 74 So. 2d 560 (Fla. 1954), in which a

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[6] The Department's Brief does not cite or discuss *Reich*.

relator contested the Department's refusal to refund use taxes paid pursuant to a Fla. Stat. § 212.01, *et seq.* That tax statute was found to violate a provision of *the Florida* Constitution, Article III, Section 6 (formerly Section 16), which requires that "[e]very law shall embrace but one subject ... and the subject shall be briefly expressed in the title." *Id.* at 561. The question before the Court was when the relator's right to a refund "accrued" for purposes of § 215.26(2). *Id.* at 561. The Court held that the right to refund accrued when the tax was paid, not when the tax was found unconstitutional. *Id.* at 565.

A critical difference between the tax at issue in *Victor Chemical* and the taxes at issue in *Kuhnlein*, *Leon* and *Nemeth & Vitale* is that the *Victor Chemical* tax was only unconstitutional because of a technical defect which was unrelated to any federal constitutional right. There was no question in *Victor Chemical* that the specific tax was beyond the legislature's power to impose. *See also Thompson v. Intercounty Tel. & Tel., Co.*, 62 So.2d 16, 17-18 (Fla. 1952). In fact, the statute's defect was cured without the need to change the language of the actual statute one iota.[7] If *Victor Chemical* applied to *facially unconstitutional* taxes, it would violate the holding of *McKesson*, because it would deny the need for any post-deprivation remedy or refunds after a tax has been declared unconstitutional.

In *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 726 (Fla. 1994), this Court -- without addressing *Victor Chemical* -- required the Department to refund taxes collected pursuant to a facially unconstitutional statute, the procedures of Florida's tax refund statutes notwithstanding. *Id.* at 726. In *Kuhnlein*, this Court addressed Fla. Stat. § 319.231, which assessed a $295 impact fee on cars purchased or titled in other states and subse-

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[7] The defect was cured by the enactment of Chapter 26484, Laws of Florida, Acts of 1951. *See Victor Chemical*, 74 So.2d at 561; *Thompson*, 62 So.2d at 16.

quently registered in Florida. The *Kuhnlein* plaintiffs had brought a class action, challenging the constitutionality of the statute and seeking refunds. As in *Leon* and *Nemeth & Vitale*, the Department argued that Section 215.26 barred any recovery by the plaintiffs, *Kuhnlein*, 646 So.2d at 720, and that there was "an alleged common law rule that no one is entitled to the refund of an illegal tax." *Id.* at 721. The Court explicitly and properly rejected both these contentions:

> Even if true, these are not proper reasons to bar a claim based on *constitutional* concerns..... [N]either the common law nor a state statute can supersede a provision of the federal or state constitutions.

Id. at 721 (italics in original). Because the vehicle impact fee statute facially violated the Commerce Clause of the United States Constitution, the Court, citing *McKesson*, held that "*[t]he only clear and certain remedy is a full refund to all who have paid this illegal tax.*" *Kuhnlein*, 646 So. 2d at 726 (emphasis added).

The taxes at issue in *Kuhnlein* and *Nemeth & Vitale* (as well as in *Leon*) differ substantially from the tax at issue in *Victor Chemical*. In *Herre*, this Court held that "section 212.0505 violates the Fifth Amendment of the United States Constitution and article I, section 9 of the Florida Constitution." *Herre*, 634 So. 2d at 621. Similarly, the Court in *Kuhnlein* found Fla. Stat. § 319.231, "void from its inception." *Kuhnlein*, 646 So. 2d at 726. These statutes were not unconstitutional as a result of an easily remediable technical defect, as was the statute at issue in *Victor Chemical*. They were unconstitutional in their entirety. The *Victor Chemical* tax was well within the Florida legislature's powers; the taxes at issue in *Kuhnlein* and at issue here were outside the legislature's powers. Consequently, the

Victor Chemical analysis does not apply and cannot apply if the mandate of *McKesson* is to be followed.

Under the holding in *Kuhnlein*, the taxes collected under a facially unconstitutional statute must be refunded, irrespective of the procedures set forth in Section 215.26. Since the holding of *Kuhnlein* is consistent with *McKesson*, it, not *Victor Chemical*, must be deemed the law in Florida.

Contrary to the Department, Florida courts have not applied the rule of *Victor Chemical* to *unconstitutional* taxes. In *Lee, Comptroller v. Bigby Electric Co.*, 136 Fla. 305, 186 So. 505 (1939), this Court declared a corporation tax unconstitutional. Subsequent to that decision, another corporation which had already paid the same tax, Hardaway Contracting Company, sought a refund. The State argued, among other things, that Hardaway Contracting Company "had forfeited his right by laches." *State ex rel. Hardaway Contracting Co. v. Lee*, 21 So.2d 211 (Fla. 1945). This Court rejected the "laches" argument, holding that the "refund was properly and timely made...." *Id.* Later that same year, this Court addressed whether another taxpayer should receive a refund. *See State ex rel. Badgett v. Lee*, 22 So.2d 804 (Fla. 1945). Badgett had paid the tax in 1936; the tax was declared unconstitutional in 1939; and he filed for a refund in 1944. Relying on *Hardaway*, the Court denied the State's attempt to block the refund action.[8]

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[8] Courts in other states interpreting time limitations for tax refunds and come to similar conclusions when dealing with unconstitutional taxes. These courts have ruled that statutes limiting the time periods in which taxpayers may ordinarily seek refunds do *not* apply to taxes which have been declared unconstitutional. These courts correctly reason that an unconstitutional tax is void *ab initio* and, therefore, limitations periods are also void. *See, e.g., Family Hospital Nursing Home, Inc. v. Milwaukee*, 78 Wis. 2d 312, 254 N.W.2d 268 (Wis. 1977).

Even if the general rule in Florida could once have been applied to unconstitutional taxes, the law is now otherwise. Since federal constitutional rights now apply to the States, "the recovery of illegally exacted taxes" is no longer "solely a matter of governmental grace." As *McKesson* and its progeny make clear, states have a constitutional obligation under the Due Process Clauses of the Fifth and Fourteenth Amendments to provide meaningful backward-looking remedies when a tax is voided. And, when a tax is declared facially unconstitutional, it has "no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment." *McKesson*, 496 U.S. at 39, 110 S.Ct. at 2251. Thus, the premise of *Victor Chemical* -- that "a refund is a matter of grace," *id.* 74 So. 2d at 562 -- is not the law when a tax has been declared unconstitutional under the United States Constitution.[9]

The Fourth District Court of Appeal in *Nemeth v. Florida Dept. of Revenue*, 686 So. 2d 778, 779-80 (4th DCA 1997), properly applied *Kuhnlein* and *McKesson*, as did the First District Court of Appeal in *Public Medical Assistance Trust Fund v. Hameroff*, 21 Fla. Law Weekly D497 (1st DCA, Feb. 18, 1997). In the latter case, the court addressed an appeal by the State of a non-final order certifying a class for purposes of a constitutional challenge to Fla. Stat. § 395.7015(2)(b). The defendant, a state trust fund, again claimed

[9] Indeed, the decision in *Victor Chemical* was rendered before most of the landmark United States Supreme Court decisions of the 1960's applying the Bill of Rights to the States through the Fourteenth Amendment.

that Section 215.26 was a procedural bar to bringing the action. The First District properly rejected this argument:

> Appellees argue ..., and we agree, that under ... *Kuhnlein* ... compliance with the refund procedure is not required as a condition of bringing the instant action.... We read *Kuhnlein* as creating an exception to the general rule ... which requires a party to first seek and be denied a refund before filing suit for a tax refund.... *[T]he clear holding in Kuhnlein [was] that fulfilling the state's refund procedures is not a condition precedent to bringing a constitutionally-based refund action.*

Id. at 947-948 (emphasis added). *But see Westring v. State*, 682 So. 2d 171, 172 (Fla. 3d DCA) (relying on *Victor Chemical* and requiring the plaintiff -- who was still within the three years provided—to file for a refund pursuant to § 215.26 before suing for a refund), *rev. denied*, 686 So. 2d 583 (Fla. 1996).

As were the *Kuhnlein* plaintiffs, the plaintiffs in *Leon* and *Nemeth & Vitale* were forced to pay unconstitutional taxes. They now seek the refunds to which they are entitled. Relying on the very same arguments put forth -- and properly rejected -- in *Kuhnlein*, the Department seeks to use the procedural requirements of Florida's tax refund statutes to avoid refunding taxes obtained in violation of the United States Constitution. *Victor Chemical* does not and cannot, in light of *McKesson*, govern *Leon* and *Nemeth & Vitale* under these circumstances.

CONCLUSION

Kuhnlein was properly decided in light of the current status of federal constitutional law after *McKesson*. The 1954 decision in *Victor Chemical* did not apply to a tax found in violation of the United States Constitution and cannot constitutionally be applied to such taxes in light of *McKesson*. Refunds are the only "meaningful, backward-looking relief" that

satisfies federal constitutional requirements because to allow the Department to retain its ill-gotten gains would violate the Fifth and Fourteenth Amendment of the United States Constitution. Therefore, the Department must refund the taxes unconstitutionally collected from Plaintiffs in *Nemeth & Vitale*, and *Nemeth v. Florida Dept. of Revenue*, 686 So. 2d 778, 779-80 (4th DCA 1997), must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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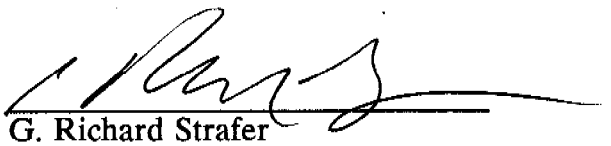
By: 
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APPENDIX A

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 96-0901 CA-23

ANAHIDIA LEON and RICHARD MUNSON, individually and on behalf of all similarly situated taxpayers,

Plaintiffs,

vs.

DEPARTMENT OF REVENUE,

Defendant.
_____/

SJB

AMENDED ORDER[1]

This matter came before the Court upon Plaintiff's Motion For Class Certification, filed on March 6, 1996, and Defendant's Motion to Dismiss Plaintiff's Amended Complaint, filed on March 18, 1996. The Court heard oral argument on both motions on April 2, 1996.

I. FINDINGS OF FACT

Plaintiffs Anahidia Leon and Richard Munson ("Plaintiffs") seek certification of this cause as a class action pursuant to Fla. R. Civ. P. 1.220. Plaintiffs have defined the proposed class as follows:

[1] The Order granting Plaintiffs' motion for class certification and denying Defendant's motion to dismiss, issued by the Court on June 7, 1996, is hereby vacated.

7/12/96
cc: SLK
cc

> All persons who, as of March 31, 1994, paid a sales tax on transactions involving marijuana and controlled substances pursuant to Section 212.0505, Florida Statutes (Supp. 1988).

Plaintiffs seek a declaratory judgment pursuant to Chapter 86, Florida Statutes, as to their right and the right of similarly situated taxpayers to obtain refunds of sales taxes collected pursuant Section 212.0505, declared unconstitutional by the Florida Supreme Court in *Department of Revenue v. Herre*, 634 So. 2d 618 (Fla. 19894). Plaintiffs further seek refunds of the unconstitutional sales taxes collected.

Defendant Department of Revenue ("Defendant") stipulated that approximately 478 individuals have paid sales taxes pursuant to Section 212.0505. Defendant asserts that those taxpayers in the proposed class who failed to file for a refund within three (3) years of the date that the taxes were paid are jurisdictionally barred from making claims for refunds, pursuant to Section 215.26, Florida Statutes. Defendant estimates that approximately twenty-five (25) taxpayers still had time to make a timely refund request as of March 29, 1996, but asserts that they must comply with Section 215.26 to obtain a refund.

Both Plaintiff Leon and Plaintiff Munson paid sales tax pursuant to Section 212.0505. Defendant has denied refunds to both, asserting as to both that they are barred from seeking a refund for failing to file for a refund within three (3) years of the date that the taxes were paid, as provided by Section 215.26.

II. CONCLUSIONS OF LAW

For a motion for class certification to be granted, Fla. R. Civ. P. 1.220(a) requires that

1) the members of the class are so numerous that separate joinder of each member is impracticable;
2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class;
3) the claim or defense of the representative party is typical of the claim or defense of each member of the class; and,
4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

The Court finds that each of these requirements is satisfied by the proposed class.

A. Numerosity.

Defendant has stipulated that the proposed class contains approximately 478 individuals. This number is sufficient to meet the numerosity requirement. *See, e.g., Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 739 (Fla. 2d DCA 1990).

B. Commonality of Questions of Law or Fact.

Plaintiffs' claims as representatives of the proposed class raise claims common to the entire proposed class. Sales taxes

were collected from both Plaintiffs pursuant to Section 212.0505; Defendant has refused to refund the taxes paid because Plaintiffs failed to file for a refund within three (3) years of the date that the tax was paid.

Based upon these facts, the evidence shows that the following factors are common to all members of the proposed class:

1. Whether the decision in *Department of Revenue v. Herre* requires a finding that the Department is required to refund taxes collected pursuant to Section 212.0505 to the members of the proposed class; and,
2. Whether Section 215.26 must be complied with to obtain a recovery of the taxes collected pursuant to Section 212.0505 by the members of the proposed class.

These factors are sufficient to satisfy the commonality requirement. The key questions are whether the representatives' claims arise from the same course of conduct by the Department of Revenue, with respect to the representatives as well as to the class, and whether the class claims are based upon a common theory. *Love v. GDC Develop. Corp.*, 555 So. 2d 397, 398 (Fla. 3d DCA 1989). The Court answers both in the affirmative; therefore, the commonality requirement is satisfied.

C. Typicality.

Plaintiffs Leon and Munson as representative parties have claims that are typical of the claims of each member of the proposed class. If a named plaintiff's claim arises from the same

event or course of conduct giving rise to the claims of the absent class members, the plaintiff's claim is typical of the class. *Love, supra*, 555 So. 2d at 398. The critical issue is whether the claims of the named plaintiffs and the claims of the class are so interrelated that the interests of the absent class members will be protected.

The facts show that Plaintiffs Leon and Munson were required to pay sales taxes assessed pursuant to Section 212.0505, that they sought refunds, and that the Department of Revenue denied those refunds using the same grounds: Section 215.26. Further, Defendant asserts that all members of the proposed class are required to comply with Section 215.26. Therefore, the Court finds that Plaintiffs Leon and Munson are typical members of the class such that the interests of the absent members will be protected.

D. Adequacy of Representation.

The issues of the typicality of the named plaintiffs and adequacy of their representation of the proposed class overlap significantly. The major areas where the two inquiries are not duplicative is with respect to the possibility that the named plaintiffs' interests might conflict with those of the absent class members and with respect to the adequacy of named plaintiffs' counsel. Based upon the facts before the Court, the Court finds that there is no likelihood that the interests of

Plaintiffs Leon and Munson will conflict with those of the absent class members.

Furthermore, Plaintiffs' counsel is experienced in class litigation and is particularly well qualified to represent the proposed class since it litigated the action wherein Section 212.0505 was declared unconstitutional. Therefore, the Court finds that the named plaintiffs will adequately represent the class.

III. CLASS CERTIFICATION

Based upon the foregoing, the Court finds that Plaintiffs' action should be and is certified as a class action.

A. Fla. R. Civ. P. 1.220(b)(2).

Plaintiffs have met the requirements of Rule 1.220 (b)(2). The evidence introduced at the class certification hearing shows that the Defendant has collected sales taxes from Plaintiffs and all persons similarly situated—approximately 478 individuals—pursuant to Section 212.0505. Section 212.0505 was declared unconstitutional by the Florida Supreme Court in *Department of Revenue v. Herre*. Defendant has refused to refund the sales taxes collected from Plaintiffs based upon its interpretation of Section 215.26(2) and asserts that basis as grounds for refusal to refund the taxes collected from the class. The Court finds that the Department of Revenue has acted on grounds generally applicable to all members of the class, thereby making final declaratory relief

concerning the class as a whole appropriate. Therefore, the Court finds that this action should be and is certified as a class action pursuant to Fla. R. Civ. P. 1.220(b)(2).

B. Fla. R. Civ. P. 1.220(b)(3).

The Court also certifies this action Rule 1.220 (b)(3). The Court finds that the common issues of law and fact predominate over individual issues. In specific, the Court finds that the issue of whether the class members are entitled to refunds of sales taxes collected pursuant to a statute later declared unconstitutional predominates over the individual issues that could arise. Plaintiffs' claims are predicated on a single common theory, *i.e.*, that refusal to refund taxes collected pursuant to Section 212.0505 is illegal. The Department of Revenue has acted on grounds generally applicable to the members of the class, contending that Section 212.26 must be complied with to obtain refunds taxes collected pursuant to Section 212.0505.

Defendant asserts that approximately twenty-five of the 478 members of the proposed class are not jurisdictionally barred; however, class certification should not be denied merely because the claims of the representatives arise in a factual context that differs from that of other members of the proposed class. *Love, supra*, 555 So. 2d 398. The Court's concern is whether the proffered representatives' claims arise from the same course of conduct by Defendant with respect to the class as a whole; the Court finds that they do.

Furthermore, it is evident that addressing these common issues in a single action is more efficient than addressing 478 individual claims, which would be costly, time consuming, and a burden on the court system. "The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist." *Tenney v. City of Miami Beach*, 11 So. 2d 188, 189 (Fla. 1942).

Class representation is superior to other methods for the fair and efficient adjudication of the controversy; therefore, the Court finds that this action should be and is certified pursuant to Fla. R. Civ. P. 1.220(b)(3).

IV. DEFENDANTS' MOTION TO DISMISS

Defendants moved to dismiss Plaintiffs' complaint pursuant to Fla. R. Civ. P. 1.140 for failure to state a cause of action. As its grounds, Defendants assert that the failure of Plaintiffs Leon and Munson to file a request for refund within the three (3) year time period set forth in Section 215.26(2), Florida Statutes, bars them from seeking a refund from the State Treasury. Defendants further assert that the failure by Plaintiffs to file for a refund within the three-year time period means that the Court does not have jurisdiction over the complaint under Section 26.012(2)(e),

Florida Statutes, and, therefore, that the Court must dismiss the action with prejudice.

The Court has reviewed the memoranda of law filed by the parties and received oral argument on the issues raised by Defendant's motion. Having entertained the arguments of the parties, the Court has determined that Defendants' motion to dismiss must be denied.

V. ORDER ON PENDING MOTIONS

It is therefore ORDERED that:

A. Plaintiffs Motion for Class Certification is GRANTED;

B. The Class is hereby certified pursuant to Fla. R. Civ. P. 1.220(b)(2), with respect to the declaratory relief sought;

C. The Class is hereby certified pursuant to Fla. R. Civ. P. 1.220(b)(3), with respect to the claim for refunds of the sales taxes collected pursuant to Section 212.0505;

D. Plaintiff's Anahidia Leon and Richard Munson are certified as representatives of the Class;

E. Plaintiff's counsel, ZUCKERMAN, SPAEDER, TAYLOR & EVANS LLP and QUIÑON & STRAFER, P.A., are designated as counsel for the Class; and,

F. The Department of Revenue is ordered to consult and coordinate with plaintiffs' counsel on a method of

notification to each member of the class who can be identified and located through reasonable effort. Notice shall conform to the requirements of Fla. R. Civ. P. 1.220(d)(2). Costs of such notice shall be initially born by the plaintiffs subject to reimbursement in the event that plaintiffs prevail in the action.

G. Defendant's Motion to Dismiss Plaintiff's Amended Complaint is DENIED.

DONE and ORDERED this 11 day of July 1996.

AMY STEELE DONNER
CIRCUIT JUDGE

AMY STEELE DONNER
CIRCUIT COURT JUDGE

cc: Eric Taylor, Esquire
Sharon L. Kegerreis, Esquire