

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
  
**OF THE**  
  
**UNITED STATES**

CAPTION: McKESSON CORPORATION, Petitioner V. DIVISION  
OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT  
OF BUSINESS REGULATION OF FLORIDA, ET AL.

CASE NO: 88-192

PLACE: Washington, D.C.

DATE: December 6, 1989

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ORAL REARGUMENT OF

PAGE

DAVID G. ROBERTSON, ESQ.

On behalf of the Petitioner

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H. BARTOW FARR, III, ESQ.

On behalf of the Respondents

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REBUTTAL ARGUMENT OF

DAVID G. ROBERTSON, ESQ.

On behalf of the Petitioner

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P R O C E E D I N G S

(11:49 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 88-192, McKesson Corporation v. the Division of Alcoholic Beverages and Tobacco, et cetera, of Florida.

Mr. Robertson.

ORAL REARGUMENT OF DAVID G. ROBERTSON

ON BEHALF OF THE PETITIONER

MR. ROBERTSON: Mr. Chief Justice, and may it please the Court:

McKesson has challenged Florida's enactment of a tax scheme that discriminated against interstate commerce in favor of local interests.

McKesson maintains that under federal constitutional law the appropriate remedy includes retroactive as well as prospective relief. Florida's response has been that its unconstitutional statutes, to use the words of one Florida legislator, should not cost the state even dollar one.

Florida enacted the unconstitutional statutes in violation of clearly established Commerce Clause law. Florida forced McKesson to pay the discriminatory tax for approximately 23 months while McKesson litigated the constitutionality of the statute.

Florida, after McKesson succeeded on its



1 constitutional claim, refused to refund any portion of the  
2 unconstitutional taxes. And indeed, the Florida  
3 Legislature, after McKesson succeeded, simply replaced the  
4 old unconstitutional statute with a new unconstitutional  
5 statute.

6 This Court's first question on reargument asks  
7 whether a state whose tax statute violates clearly  
8 established Commerce Clause law must provide retroactive  
9 relief. McKesson's affirmative answer requires a narrow  
10 ruling on retroactivity.

11 Other states in other cases, where the state has  
12 passed a law that does not violate clearly established  
13 constitutional law, may have appropriate arguments against  
14 retroactive relief. But Florida in this case does not.

15 QUESTION: Mr. Robertson, do you take the  
16 position that the nature of the relief is limited to a  
17 refund of any taxes paid? Is that the relief that the  
18 federal constitution requires the state to give you?

19 MR. ROBERTSON: We are basing our claim upon  
20 this Court's historic interpretations of the Commerce  
21 Clause, and we are asking for a very precise equitable  
22 remedy. The difference between --

23 QUESTION: Well, do you say -- I'll try to  
24 rephrase my question so you can answer it.

25 Do you say that the Constitution requires for a

1 Commerce Clause violation that the state refund all the  
2 taxes that you paid under the unconstitutional scheme?

3 MR. ROBERTSON: We think in a situation where a  
4 state has passed a statute that violates --

5 QUESTION: Can't you -- is that unanswerable?

6 MR. ROBERTSON: We would say sometimes.

7 QUESTION: Sometimes.

8 MR. ROBERTSON: Sometimes.

9 QUESTION: Okay.

10 MR. ROBERTSON: When the state has passed a law  
11 that violates clearly established Commerce Clause law,  
12 then the state has no right to rely upon its collection of  
13 those revenues, and the state should refund the  
14 discriminatory tax.

15 QUESTION: Well, are we guided by the principles  
16 set forth in Milliken against Bradley for devising  
17 equitable remedies?

18 MR. ROBERTSON: The Court is, and in this  
19 particular case we think the only remedy that protects the  
20 constitutional interest, that protects interstate commerce  
21 against protectionist legislation is a retroactive refund,  
22 at least where the statute violated clearly established  
23 law.

24 QUESTION: Well, what -- why can't a state  
25 constitutionally limit its remedial scheme to actual

1 damages?

2 MR. ROBERTSON: We would agree in a case where  
3 the state is applying its own state law; it could do that.  
4 But in a Federal constitutional case, where the state  
5 invokes the Federal Constitution to declare a statute  
6 unconstitutional, we believe the state has to apply  
7 Federal remedial principles.

8 QUESTION: Well, but Milliken against Bradley  
9 says an equitable remedy need only restore the victims of  
10 discriminatory conduct to the position they would have  
11 occupied in the absence of that conduct.

12 MR. ROBERTSON: And in this particular case we  
13 are saying that the taxpayers who paid the  
14 unconstitutional tax should receive only the  
15 discriminatory tax as their refund, not the entire tax.

16 QUESTION: Well, what if it's been entirely  
17 passed on to McKesson's customers so McKesson isn't out a  
18 dollar?

19 MR. ROBERTSON: As the Court recognized in the  
20 Bacchus decision at footnote 7, McKesson and any other  
21 interstate competitor in a competitive market, whether it  
22 passes on all, some or none of the taxes, suffers a severe  
23 competitive injury.

24 The Florida Legislature anticipated --

25 QUESTION: Yeah, but I'm talking about the



1 principles of Milliken against Bradley that you -- you  
2 agree should be applied here.

3 MR. ROBERTSON: We think that the narrow  
4 principle that should be applied here is that when an  
5 interstate competitor competes in a competitive market and  
6 suffers an economic loss as a result of a discriminatory  
7 tax, the legislature should not be allowed to enforce that  
8 competitive tax either retroactively or prospectively.

9 The Florida legislature knew that McKesson and  
10 other interstate competitors would have to pass on that  
11 tax by raising its prices and that the inevitable result  
12 would be that interstate commerce would lose transactions  
13 and the local protected interests would gain as a result.

14 I think that this Court's cases in the antitrust  
15 context are illuminating. In Hanover Shoe and in Illinois  
16 Brick the Court recognized the difficulties of forcing a  
17 plaintiff who is challenging improper conduct to prove the  
18 vagaries of pricing decisions. And the Court in effect  
19 said that the person who is complaining of that injury  
20 does not have to prove the exact disruption of the market.

21 And we think in the constitutional context the  
22 Commerce Clause deserves at least as much protection.

23 QUESTION: Could you prove these damages here if  
24 were to hold otherwise, if we were to require you to prove  
25 the damages?

1 MR. ROBERTSON: In fact, we could, and in fact  
2 the Florida Supreme Court recognized that. The court,  
3 when it resolve the issue of McKesson's standing to bring  
4 the action, stated that McKesson in fact had suffered a  
5 severe economic injury.

6 Our products directly competed against the local  
7 producers' products and we lost sales as a result of the  
8 discriminatory tax. Indeed, one might argue that a  
9 damages remedy, which we're not seeking, would result in a  
10 higher recovery than a refund remedy which simply carries  
11 out the equitable principles that this Court has applied  
12 in earlier tax cases.

13 McKesson submits in this case that Chevron does  
14 provide the appropriate standard for permitting state  
15 courts to make occasional exceptions to the general rule  
16 of retroactivity. As the Court noted in *Lemon v.*  
17 *Kurtzman*, which the Florida Supreme Court cited in  
18 passing, parties who justifiably rely upon old law  
19 sometimes deserve protection. And Chevron permits state  
20 courts to protect parties who justifiably rely upon old  
21 law when the court pronounces a new principle of law.

22 Now, we further submit that that Chevron test,  
23 that first prong, should be a threshold test. Chevron's  
24 first prong requires the Court initially to determine  
25 whether the Court in fact did articulate a new principle

1 law.

2 A court, as this Court noted in Hanover Shoe,  
3 has no reason to confront the theory of retroactivity  
4 unless the court has declared a new principle of law.

5 Hanover Shoe characterizes a change in law that  
6 would allow a court to use retroactivity principles as an  
7 evulsive change which causes the current of the law to  
8 pass between new banks.

9 Now, the state in effect ignores the rationale  
10 for Chevron. The state suggests that in any tax case a  
11 state court may refuse to give its constitutional ruling  
12 full effect in order to avoid a refund of taxes.

13 We think the Court's decisions suggest  
14 otherwise. We think the issue of prospectivity should  
15 only arise when a decision of law constitutes a new  
16 unexpected rule of law.

17 Twenty other states in their amicus brief  
18 demonstrate that they understand the rationale for  
19 Chevron. A state that enacts a statute in violation of  
20 clearly established law is very, very different from a  
21 state that enacts a statute that does not violate clearly  
22 established law.

23 QUESTION: Mr. Robertson, what -- what other  
24 areas of the Constitution have we acknowledged the  
25 existence of a damages action merely from the text of the



1 Constitution and not required the creation of a damages  
2 action as by Section 1983 or something like that?

3 The only thing I can think of is -- is -- is  
4 Bivens, I guess. Do you have anything else?

5 MR. ROBERTSON: Well, there's -- there's, of  
6 course, the line of cases where the Court has allowed  
7 actions for damages, such as Bivens and Carlson.

8 In this case, we are not asking you to create an  
9 action for damages. We are asking you to utilize the same  
10 equitable principles that the Court has exercised whenever  
11 taxpayers have challenged state tax statutes on the basis  
12 that they conflict with federal law.

13 If you go back as far as Justice Holmes'  
14 decision in Atchison, or if you go back to Justice  
15 Brandeis' opinion for the Court in Iowa-Des Moines, you  
16 see the Court saying that proper relief in a case of  
17 discriminatory taxation involves equal treatment of the  
18 parties.

19 And so we're saying that under that tradition,  
20 under that line of cases, all we are asking --

21 QUESTION: We'll resume there at one o'clock,  
22 Mr. Robertson.

23 (Whereupon, at 12:00 noon, oral argument in the  
24 above-entitled matter was recessed, to reconvene at 1:00  
25 p.m. this same day.)



1 Under either economic scenario McKesson suffered  
2 a significant economic injury.

3 The state's --

4 QUESTION: Well, of course, all that depends on  
5 inelasticity or elasticity of demand in a very -- really  
6 complex inquiry, doesn't it?

7 MR. ROBERTSON: It depends --

8 QUESTION: Especially when you're talking about  
9 brand -- brand liquor which is often inelastic.

10 MR. ROBERTSON: That is correct, and that's why  
11 we submitted the affidavits of a professor of economics  
12 from Stanford and a viticologist from Davis to  
13 demonstrate, along with our own personnel's affidavits,  
14 that we had suffered a significant injury.

15 QUESTION: Of course, it ill-behooves Florida to  
16 say that it didn't -- it didn't cost you sales since the  
17 whole object of it was to cost you sales. I mean, that  
18 is --

19 MR. ROBERTSON: That's exactly our point. In  
20 the words of the Florida legislators, they passed the  
21 statute so that our market would shrink and the local  
22 producers' market would expand.

23 QUESTION: Mr. Robertson, do you know of any  
24 case where although a state has allowed suit in its own  
25 courts it has not explicitly waived its Eleventh Amendment



1 immunity and we have entertained a suit for money damages  
2 where the suit was not initiated by the state but was  
3 initiated by an individual?

4 MR. ROBERTSON: I think --

5 QUESTION: Where we've entertained such a case  
6 on appeal?

7 MR. ROBERTSON: I think it's clear that this  
8 Court has held that a state must explicitly waive its  
9 rights under the Eleventh Amendment for it to be sued in  
10 Federal court. That's one of the two reasons why we  
11 brought our suit in state court. The other reasons, of  
12 course, being the Federal Tax Injunction Act.

13 QUESTION: So how are you up here is what I'm  
14 saying?

15 MR. ROBERTSON: We're up here because we believe  
16 that irrespective of the Eleventh Amendment this Court  
17 retains the jurisdiction to make final determinations  
18 concerning state court treatment of Federal law.

19 In other words, we would view the Eleventh  
20 Amendment, of course, as affecting the Federal courts'  
21 original trial court jurisdiction. We do not believe that  
22 over the long history of this Court the Court has ever  
23 viewed the Eleventh Amendment as restricting its right to  
24 make final determinations on Federal constitutional  
25 issues.

1           QUESTION: I'm asking you for a case where --  
2 where we've done that and where it wasn't the state that  
3 initiated the suit, and where it was only money damages  
4 involved in the suit and not an injunction.

5           MR. ROBERTSON: Well, I think even if you go  
6 back to the case of -- a Commerce Clause case, Best v.  
7 Maxwell. In that particular case, the Court reversed a  
8 state court determination that the party was not entitled  
9 to a refund.

10           And I think in other cases such as Halliburton,  
11 indeed, and in a recent case --

12           QUESTION: Is that in your brief? Best?

13           MR. ROBERTSON: Yes. Yes, it is. In cases such  
14 as Halliburton and Texas Monthly, indeed in the case -- in  
15 cases as recent as Allegheny Pittsburgh, the Court has  
16 never suggested -- and Justice Stevens has made this clear  
17 in some of his Eleventh Amendment dissenting opinions, the  
18 Court has never suggested that it does not have  
19 jurisdiction to consider state court treatment of Federal  
20 constitutional issues.

21           If it were otherwise, we would have 50 states  
22 making constitutional determinations that would not be  
23 subject to review, at least with respect to damages  
24 issues.

25           QUESTION: Mr. Robertson, would you tell me that

1 if -- I take it it's your position that the Commerce  
2 Clause violation gives you an individual constitutional  
3 right to recover something. I mean, your client.

4 MR. ROBERTSON: We believe that that --

5 QUESTION: An individual right.

6 MR. ROBERTSON: We believe that's the case.

7 QUESTION: Well, why is it a right for  
8 restitution of the taxes as opposed to the actual damages  
9 that were suffered? The competitive injury damages?

10 MR. ROBERTSON: As a matter of history and as a  
11 matter of equity, I think that the Court has, in cases  
12 such as Iowa-Des Moines, simply seen that as the most  
13 precise way of correcting the constitutional infirmity. I  
14 don't think --

15 QUESTION: If you were -- if you were applying  
16 the Milliken v. Bradley factors, you wouldn't necessarily  
17 come to that conclusion, would you?

18 MR. ROBERTSON: I think that in this particular  
19 case you would. In other cases you might not.

20 QUESTION: But in others you might not.

21 MR. ROBERTSON: That's correct.

22 QUESTION: Perhaps not here. Now, what if this  
23 -- here you have a state that provides a remedy by way of  
24 refund of taxes. Now, what if the state does not?

25 MR. ROBERTSON: As you have said, in this case

1 the issue of sovereign immunity is not really an issue. I  
2 think that if the state did not provide a remedy, this  
3 Court's power to enforce and protect the Commerce Clause  
4 would allow it to create a remedy so that that structural  
5 provision which does generate benefits for interstate  
6 competitors would be effective.

7 Right now the states are watching this case and  
8 looking for guidance. Historically, state legislators  
9 have been very responsive to parochial pressures. They  
10 see little reason to resist the temptation to shift taxes  
11 to other states.

12 Only retroactive tax decisions will cause  
13 legislators to consider the constitutionality of their  
14 legislation.

15 QUESTION: I take it you say such a remedy would  
16 override the Eleventh Amendment.

17 MR. ROBERTSON: Since we have brought the action  
18 in state court, not Federal court, we think that we would  
19 have a right to proceed with that -- with that attempt at  
20 equitable relief against the state.

21 QUESTION: Well, but if the state refused to  
22 waive it, sovereign immunity, then what?

23 MR. ROBERTSON: I think one would still proceed  
24 in the state court on a federal cause of action under the  
25 federal Constitution, asking for, of course, an injunctive



1 against prospective enforcement and also for retroactive  
2 relief.

3 I'd like to --

4 QUESTION: (Inaudible) relief in this case not  
5 by retroactively taxing the people who should have been  
6 taxed to be treated equally with you but saying in the  
7 future they'll be taxed a little higher. Why wouldn't  
8 that --

9 MR. ROBERTSON: I think in many cases states can  
10 use retroactive taxation to cure unconstitutional  
11 taxation.

12 QUESTION: No, I'm not talking about retroactive  
13 taxes. I have troubles with retroactive taxation. I'm  
14 not sure that they constitutionally can simply write you a  
15 letter saying, by the way, you're being taxed for activity  
16 several years ago. That's at least some problems.

17 But suppose, instead of that, Florida says you  
18 got undertaxed in our view the last couple of years, we're  
19 going to -- we're going to tax you a little higher the  
20 next few years --

21 MR. ROBERTSON: That -- that, of course, --

22 QUESTION: -- would that --

23 MR. ROBERTSON: -- would not correct the  
24 economic mischief that's been wrought during the earlier  
25 period of discriminatory practice.

1 QUESTION: Well, you can't tell. Maybe it would  
2 and maybe it wouldn't. It's -- it's a good try.

3 QUESTION: Well, for instance, in this  
4 particular case one saw a change in composition among the  
5 competitors in the market as a result of the  
6 discriminatory tax.

7 I'd reserve my remaining time.

8 QUESTION: Let me ask you one question, if I  
9 may, Mr. Robertson.

10 When you said a moment ago that you would  
11 proceed in Florida courts under a Federal cause of action,  
12 what cause of action would that be?

13 MR. ROBERTSON: If Florida did not provide a tax  
14 refund --

15 QUESTION: Yes.

16 MR. ROBERTSON: -- remedy, we would assume that  
17 the Florida courts would enforce the Federal Constitution  
18 just as the Federal courts are required to do.

19 QUESTION: Oh, I though -- I thought you were  
20 talking about a Federal statutory remedy that would --

21 MR. ROBERTSON: No, no. No. We're just talking  
22 about the right to protect our constitutional rights vis-  
23 a-vis the Commerce Law.

24 QUESTION: What -- who would you sue?

25 MR. ROBERTSON: If the statute were in effect,

1 we would, of course, sue the state and those who were  
2 actually enforcing the statute.

3 QUESTION: You think -- you think you have a  
4 Federal cause of action for any violation of the Federal  
5 constitution?

6 MR. ROBERTSON: Absolutely not. We think that  
7 in this particular case the Court can either construct an  
8 equitable remedy that will correct the discrimination, or,  
9 alternatively, of course, the Court could consider  
10 constructing a Bivens or Carlson type cause of action.

11 QUESTION: Thank you, Mr. Robinson -- Robertson.  
12 Excuse me.

13 Mr. Farr.

14 ORAL REARGUMENT OF H. BARTOW FARR, III  
15 ON BEHALF OF THE RESPONDENTS

16 MR. FARR: Thank you, Mr. Chief Justice; may it  
17 please the Court:

18 As we see it, the issue in this case is whether  
19 Petitioner, who brought a state cause of action in state  
20 court, is entitled to a particular remedy, a refund from  
21 the state treasury, as a matter of Federal law.

22 We think the answer is that McKesson is not  
23 entitled to that refund for several reasons, two of which  
24 I'd like to emphasize this afternoon.

25 First of all, we think that in a state cause of

1 action for monetary relief against the state, a state  
2 court can generally apply its own remedial principles so  
3 long as they are not arbitrary or discriminatory.

4 Second, we think that even if Federal principles  
5 did apply here, they wouldn't require the state courts to  
6 give a windfall to a taxpayer who would have paid the same  
7 tax with or without the unlawful provision, passed on the  
8 tax to its customers and suffered, at most, a minor  
9 competitive injury for which it has expressly not sought  
10 relief.

11 Now, I'd like to step back at the outset and  
12 just bring into focus what is and isn't at issue in this  
13 case.

14 All that Petitioner has chosen to do here is to  
15 bring a state cause of action for a tax refund. There is  
16 no question in this case, therefore, of a state court  
17 providing an inadequate remedy in a Federal cause of  
18 action. And I think that's an important distinction.

19 State courts generally are not able to limit  
20 remedies in Federal causes of action, such as Section 1983  
21 actions. That's what this Court held in *Felder v. Casey*.

22 But at least since *Erie* it has generally been  
23 the opposite when a state creates the cause of action.

24 QUESTION: Well, he asserts that -- he asserts  
25 that the state has opened its courts to the suit, but he's



1 asserting that this is a Federal cause of action, isn't  
2 he?

3 MR. FARR: Your Honor, I do not understand him  
4 to assert that. And, let me say, if he is asserting that,  
5 he's then wrong for a different reason because there is no  
6 Federal cause of action that applies against the state  
7 itself and the state treasury for damages in these  
8 situations.

9 QUESTION: For a void tax?

10 MR. FARR: That's correct.

11 QUESTION: For a wrongful tax. What about our -  
12 - our opinion in First English which says that you have an  
13 automatic Federal cause of action for a taking?

14 MR. FARR: First English is a case that involves  
15 the takings clause, and as I understand it, the takings  
16 clause is the only clause in the Constitution in which  
17 this Court has said there is an automatic remedy for  
18 damages that flows from the -- from the particular  
19 provision itself.

20 QUESTION: Oh. And if you call it a tax, it's  
21 not a taking?

22 MR. FARR: It is not a taking. There is no  
23 suggestion here, Your Honor, that this claim has ever been  
24 brought under the takings clause. There has never been  
25 that allegation. The Florida Supreme Court, of course,

1 never had an opportunity to -- (inaudible) taking --

2 QUESTION: Well, the state wasn't the defendant  
3 in First English, was it?

4 MR. FARR: Not in First English. You're right.  
5 But even if -- even if First English -- the logic of that  
6 was extended to states, there has never been a claim here  
7 that this is a takings claim. Whether it could have been  
8 brought as a takings claim is simply not an issue right  
9 now.

10 But the Federal cause of action, of course, that  
11 most typically applies in the case of a constitutional  
12 violation is Section 1983 and, as the Court held last  
13 term, that is not a statute that provides a cause of  
14 action against states themselves, or state officials in  
15 their official capacity.

16 And even the implied causes of action, the  
17 Federal causes of action that this Court has implied  
18 directly from the Constitution, leaving out the takings  
19 clause for a second -- such as Bivens, for example --  
20 applies only against individual officers in their  
21 individual capacities. There is no claim against the  
22 Federal Government itself under Bivens.

23 So the issue then here is really whether, when  
24 the state has created the cause of action under which the  
25 suit is brought, can it put reasonable limitations on the

1 right to recovery so long as they don't offend some other  
2 constitutional provisions such as due process or equal  
3 protection. I think the answer to that is generally yes.

4 QUESTION: Mr. Farr, would it be a reasonable  
5 limitation to say we just won't give refunds for  
6 violations of Federal law?

7 MR. FARR: No, I don't be reasonable, Justice  
8 Stevens. I think that would be a discriminatory  
9 limitation. But that is certainly not what the Florida  
10 Supreme Court said here.

11 QUESTION: Well, what's -- what's really the  
12 difference between that case and this?

13 MR. FARR: Well, I think what the difference is  
14 -- that one would be essentially a generic rule. That  
15 Florida says if you have a state claim --

16 QUESTION: Well, let's say they have no -- they  
17 will have no -- no remedy by way of compensation for the  
18 taxpayer who paid more taxes than he should have.

19 MR. FARR: Regardless of the basis of your  
20 claim?

21 QUESTION: No. Whenever it's a federal claim.

22 MR. FARR: I think that is an arbitrary and  
23 discriminatory rule under the Court's precedents.

24 QUESTION: Well, what is the -- what is the  
25 Florida rule that you think is in effect here? One of the

1 -- the other side of this coin is when can a Federal court  
2 entertain a cause of action seeking to enjoin a state tax  
3 and avoiding the Tax Injunction Act by saying the Florida  
4 law is inadequate?

5           Would you say that whenever the Florida remedy  
6 is less than complete that that means the taxpayer can  
7 always go into Federal court?

8           MR. FARR: I don't think so, Your Honor, but I  
9 don't think that is the issue here in all honesty. I  
10 think what the Florida Supreme Court said is not that we  
11 don't provide any refunds or that we don't provide any  
12 refunds if there is a Federal right involved.

13           What it said is we are not going to provide a  
14 refund in this case because of equitable considerations,  
15 in particular the fact that this was a tax that was passed  
16 on.

17           Now, it doesn't seem to me that there is  
18 anything arbitrary or irrational about that rule, or  
19 anything that closes the Federal -- excuse me, the state  
20 courts to claims against their tax statutes based on  
21 Federal law, simply because a particular litigant lost on  
22 that basis.

23           QUESTION: Well, is there -- do you have any  
24 examples where -- where the -- the Court has imposed this  
25 kind of a limitation on a refund with respect to a --



1 where there is a claim that local law has been violated?  
2 We just deny a refund for equitable reasons?

3 MR. FARR: Yes. In fact, that's the particular  
4 case that the -- one of the two cases that the Florida  
5 Supreme Court cited. The Galesian case is the case that  
6 was brought solely under state law and in a state cause of  
7 action, and the Court held no refund was appropriate in  
8 that case for, as it said here, equitable consideration.

9 QUESTION: But do they have any -- do you have  
10 any pass-on cases under state law?

11 MR. FARR: Well, the pass-on case that is most  
12 noted under state law is the Szabo case in which the Court  
13 held that if you have passed on the tax, you don't have --  
14 you are not entitled to get a refund.

15 They did not cite that particular case in its  
16 opinion in this case, but that is the prevailing law in  
17 Florida.

18 QUESTION: I don't understand what that means,  
19 to pass on a tax. I suppose any tax imposed on a  
20 business, if the business wants to make the same profit it  
21 made, it raises its -- I mean, you know, you can view any  
22 tax as being passed on.

23 MR. FARR: Well, I think there are a couple of  
24 things. First of all, I think there are certain kinds of  
25 taxes, the basic sort of sales taxes, which more typically

1 are ones that are simply added on to the price, where by  
2 operation of the law it is expected that the particular  
3 person who remits the tax is essentially more of a  
4 collector of the tax.

5 QUESTION: Yeah, but you may have to lower your  
6 price if -- if you want to sell the same number of goods  
7 and pass it on that way. And that doesn't seem to me to  
8 be different in kind from, let's say, an unconstitutional  
9 occupational tax that's imposed on a lawyer, or something,  
10 and the lawyer raises his fees to cover that.

11 I'm not sure it means anything to me to say this  
12 is a special kind of a tax that's been passed on. They  
13 all are.

14 MR. FARR: But I think -- well, I think the  
15 question that is addressed, in any case, is whether this  
16 taxpayer actually bore the economic incidence of the tax.

17 We are not suggesting, Justice Scalia, that  
18 there is not the possibility of some competitive injury  
19 when a tax is passed along.

20 When a distributor simply adds the tax to the  
21 price of the product and passes it along to the customer,  
22 it is possible that the distributor will lose market  
23 share. But there are a couple of points I'd like to make  
24 about that.

25 First of all, that is not the suit that has been

1 brought in this particular case. McKesson did not seek  
2 damages for loss of market share. And if it did, it would  
3 have had to bring an entirely different cause of action  
4 because that is not covered by the state's action for a  
5 tax refund.

6 Secondly, if it did lose market share, to be  
7 perfectly honest, it couldn't have lost much because the  
8 market for the local products is essentially 2 percent of  
9 the entire market of sales and whatever part of that  
10 McKesson might have gotten, all the other distributors of  
11 interstate products would have been entitled to fight for  
12 it as well.

13 So, the idea that their claim for a tax refund  
14 is somehow a surrogate for a competitive injury claim  
15 simply would not stand up on the facts of this case.  
16 Indeed, they conceded that at the first argument.

17 QUESTION: Well, is there some cause of action  
18 under Florida law in which the taxpayer could sue the  
19 State of Florida for damages rather than a refund?

20 MR. FARR: Mr. Chief Justice, I don't think  
21 there is an action under Florida law. I think McKesson,  
22 had it wanted to bring that suit, would have had to bring  
23 a 1983 suit, the normal -- cause of action for Federal  
24 constitutional claims, against individual defendants for  
25 damages for loss of competitive position.

1           It chose not to bring that suit, however.

2           QUESTION: The state --

3           QUESTION: (inaudible.)

4           MR. FARR: That's correct. That is the standard  
5 form of cause of action and remedy for a violation of a  
6 Federal constitutional right. And had it brought a 1983  
7 suit, there is no question -- and certainly no question  
8 after the decision in Will last term -- that they could  
9 not have brought that suit against the State of Florida or  
10 against its officials in their official capacity.

11           Just to return for a moment to the point about  
12 the state cause of action because I think it's helpful  
13 perhaps if I provide an example.

14           If, for example, the state had a statute that  
15 said if one of the state officers causes any injury to any  
16 person, violates any rights -- state, Federal, makes no  
17 distinction -- you may sue the state directly and obtain  
18 damages from the state treasury, but you may not obtain in  
19 that cause of action punitive damages and perhaps, let's  
20 say, there's a cap on damages for emotional distress.

21           We don't think that a plaintiff could come in,  
22 sue under that cause of action, establish, let's say, the  
23 violation of a Federal right, and then say we want  
24 punitive damages, or we want a million dollars in damages  
25 for emotional distress.



1           The state can properly say in this cause of  
2           action that we have provided -- there's nothing arbitrary  
3           about these limits -- those are the limits of that cause  
4           of action.

5           Now, that doesn't mean that the plaintiff  
6           couldn't have brought a 1983 action based on the same  
7           conduct against the individuals. And under Smith v. Wade,  
8           it would be entitled to punitive damages.

9           But what the Petitioner here is trying to do is  
10          essentially mix and match, say, we have brought the state  
11          cause of action and now we want to just bring in a Federal  
12          rule that overrides any limits that the state courts might  
13          put on the remedy and obtain a refund.

14          QUESTION: Mr. Farr, if the state legislature  
15          acts clearly arbitrarily and in clear violation of the  
16          Commerce Clause in enacting a particular provision, with  
17          every reason to know and understand it's unlawful under  
18          the Federal Constitution, and if the taxpayer pays the  
19          unlawful tax under protest and then subsequently it is  
20          judicially determined that yes, indeed, the law was  
21          invalid and that these taxes were paid under protest, is  
22          it your view that nonetheless the state may refuse to  
23          refund the taxes and that's reasonable?

24          MR. FARR: May I answer the question in two  
25          parts because -- I'm taking two positions in front of the

1 Court and I'd like to keep them separate for purposes of  
2 answering your question.

3 I do believe that if the state found, for  
4 example, that the tax had been passed on or that there  
5 were other good equitable reasons even in that situation,  
6 certainly in a state cause of action under my first  
7 argument the state could, still under those conditions,  
8 impose a limit on the refund. But -- I'm sorry.

9 QUESTION: What -- what is the test? Is it  
10 whether that's arbitrary or reasonable?

11 MR. FARR: That's right. Whether it would be so  
12 arbitrary under those circumstances.

13 Under the second point, which is essentially  
14 applying the Federal remedial standards of Milliken v.  
15 Bradley, we think all of those things obviously are  
16 factors.

17 The nature of the particular violation we have  
18 conceded is a factor, and if the law is clearly  
19 established, that is one factor. However, we still think  
20 that once you have crossed that first question there still  
21 is -- the major question is what exactly is the injury  
22 here and what is the proper remedy for that injury.

23 We don't think that somebody can come in and say  
24 -- for example, you couldn't say under the Equal  
25 Protection Clause a state legislature has violated the

1 Equal Protection Clause and it absolutely should have  
2 known that it did so. And therefore, we're entitled to  
3 damages against the state treasury.

4 There simply isn't a cause of action, even if  
5 the state legislature acts clearly in violation of the  
6 Equal Protection Clause --

7 QUESTION: Well, suppose --

8 MR. FARR: -- that provides that remedy.

9 QUESTION: -- you conclude that under Milliken  
10 against Bradley the most reasonable remedy is damages for  
11 the injury to competition, but the state doesn't provide  
12 that -- all it provides is a tax refund law? Does that  
13 enter into the equation then on what's reasonable?

14 MR. FARR: I don't believe it does because that  
15 is a cause of action that could have been brought.  
16 Indeed, I think this is an important point.

17 I don't think that a plaintiff is entitled to  
18 try to put a reviewing court essentially into a box where  
19 it says, I have not sought relief for the injury I really  
20 suffered, if any. I was injured in a competitive way; I  
21 may have lost a few sales to these local products, but I  
22 haven't sued for that. And because I didn't sue for that  
23 if I don't get a tax refund, I'm not going to get any  
24 retroactive relief. So you have to give me a tax refund.

25 It seems to me that the answer to that argument

1 is that had you brought the proper suit, or if you could  
2 still bring the proper suit, the proper approach is to  
3 bring that claim and then, as Justice Kennedy points out,  
4 it would have to be tested by all of the usual ways in  
5 which you test a cause of action.

6 QUESTION: Mr. Farr, why isn't it proper for the  
7 taxpayer to sue for the refund and the state responds by  
8 saying, well, the tax had probably been passed on so at  
9 least part of it is a windfall?

10 Would the proper response be to say to the  
11 extent that there is a windfall element here, we will cut  
12 the refund down to 40 percent or 3 percent, or whatever it  
13 might be?

14 I don't see how that can justify no -- no refund  
15 at all, just because you're not entitled to a hundred --  
16 100 percent refund.

17 MR. FARR: Well, I think the question --

18 QUESTION: Your damage there just would measure  
19 the amount of the appropriate relief.

20 MR. FARR: You know, Justice Stevens, I don't  
21 think that would be an unreasonable thing for the Florida  
22 Supreme Court to have said. I think the question is when  
23 somebody puts all their eggs in one basket essentially --

24 QUESTION: But that's the only basket the state  
25 procedure authorizes.



1           MR. FARR: But the fact that that's the only  
2 basket the state procedure authorizes doesn't mean it's  
3 the only basket. It's not just the state that --

4           QUESTION: Well, do you think they could say  
5 you're wrong as to the 1986 taxes but you're right as to  
6 the 1987 taxes. You've asked for 100 percent in both  
7 years and we're not going to give you any because you  
8 asked for more than you're entitled to?

9           MR. FARR: No, because there that is not -- that  
10 is simply the amount of relief that's sought.

11          QUESTION: Well, that's all that we're talking  
12 about here, is the amount of the relief. A portion of it  
13 is -- is -- is probably refund.

14          Of course, that's only one of the two reasons  
15 they gave. The other was they thought they acted in good  
16 faith and --

17          MR. FARR: Right.

18          QUESTION: -- that the statute is presumptively  
19 valid, and all that, which I haven't noticed you rely on  
20 that at all.

21          MR. FARR: Well, I haven't talked about that.  
22 But let me say that I think that there is the difference  
23 between a particular type of claim, and we're talking  
24 about not the amount of damages for a particular injury --

25          QUESTION: Well, the amount of refund.

1 MR. FARR: -- but a completely different injury,  
2 an injury that someone says, I have suffered --

3 QUESTION: No, they say that --

4 MR. FARR: -- (inaudible) competitive.

5 QUESTION: -- they've suffered. They want an  
6 entire refund and the reason the state says for not giving  
7 it the refund is that to a certain extent it's windfall.  
8 But that's a reason for giving less than 100 percent, not  
9 a reason for denying relief entirely, it seems to me.

10 MR. FARR: Well, Justice Stevens, let me add one  
11 more thing to this. I think that in fact even if this tax  
12 hadn't been passed on, it would have been a windfall in  
13 one sense. Which is that the particular question for the  
14 taxpayer is what tax would the taxpayer have paid had the  
15 system been constitutional.

16 QUESTION: And that's another reason for  
17 reducing the amount, but it's not a reason for reducing it  
18 to zero.

19 MR. FARR: Well, it may be. But let me --

20 QUESTION: See, what you're saying is the 2  
21 percent of the -- you know, that the exemption applied to  
22 is relatively insignificant.

23 MR. FARR: The State of Florida right now has a  
24 perfectly constitutional system. All --

25 QUESTION: But it also has -- has collected in

1 its treasury some money that it was constitutionally  
2 prohibited from collecting. And you're saying it ought to  
3 be able to retain that because they framed their remedy  
4 incorrectly.

5 MR. FARR: Well, Justice Stevens, I just frankly  
6 look at that differently from the way you're looking at  
7 it. Let me explain why.

8 The flaw in this tax statute was not that the  
9 state took in money that it shouldn't have taken in. The  
10 flaw in the tax statute is that it provided a very small  
11 preference --

12 QUESTION: Right.

13 MR. FARR: -- for a number of local products.  
14 In fact, by providing that preference the state didn't  
15 take in any more money. It took in less money than it  
16 would have taken if the preference hadn't been in the  
17 statute at all. And Petitioner didn't pay any more money  
18 than it would have paid if that preference hadn't been in  
19 the statute at all.

20 As we suggested at the first argument, if  
21 Petitioner had gotten the same injunction it got the day  
22 before the tax statute took effect, it would have paid  
23 precisely the same amount of taxes it paid.

24 Now, their answer to that, as I understand it,  
25 is well, that may be true, maybe we would have paid the

1 same amount of taxes, but maybe we would have had some  
2 more sales.

3 All I'm saying is that is a different nature of  
4 injury. That's not the question of how much damages for  
5 the same injury. That's a different injury than the one  
6 they sued for.

7 If I could just address one other thing quickly.  
8 The basic understanding that I have of their position is  
9 that this refund is necessary because it will rein in  
10 legislatures who act unconstitutionally. And I'd just  
11 like to make two very quick points about that.

12 First of all, that is an argument that can be  
13 made in every case, of course, where there's a  
14 constitutional violation by a state. Yet, the standard  
15 procedure, the standard cause of action and the standard  
16 remedy that is provided in such situations is a cause of  
17 action in damages against the individual state defendants,  
18 not against the state itself.

19 Secondly, at least in Florida, the remedy of  
20 seeking to enjoin taxes before they take effect is fully  
21 in effect. There is no barrier in Florida to seeking that  
22 kind of relief.

23 And therefore, for example, if petitioner  
24 thought that what was happening in Florida -- and it  
25 obviously does think this -- is that Florida's simply just



1 passing the same statute over and over again, petitioner  
2 could go in and get another injunction before a new  
3 statute took effect or, indeed, it could have, I believe,  
4 gone in and gotten its old injunction extended to the new  
5 statute saying that collection of taxes under this new  
6 statute was essentially no different from collecting the  
7 taxes under the old statute.

8 But it didn't do that. And, in fact, if it had  
9 done that -- the point I was just discussing with Justice  
10 Stevens -- there is no possibility that it would have had  
11 a claim for a refund because all that would have happened  
12 would have been that the exemptions, the preferences,  
13 would have been struck from the statute and petitioner  
14 would have paid exactly the same amount of tax.

15 QUESTION: Your argument in essence -- this  
16 particular argument is that Florida doesn't need to do  
17 anything, the Florida Supreme Court didn't need to even  
18 give an equitable reason for denying the refund. That  
19 McKesson just hasn't been hurt. It hasn't been illegally  
20 taxes.

21 MR. FARR: I mean, that is my belief, that they  
22 have not been hurt in that sense.

23 QUESTION: Well, no refund then.

24 MR. FARR: But I'm not defending the Florida  
25 Supreme Court on the grounds that it could have just

1 simply ignored their claim. I think that would at least  
2 bring into question the point that I was --

3 QUESTION: Well, I know, but --

4 MR. FARR: -- making at the beginning.

5 QUESTION: -- it would certainly avoid all the  
6 argument about the amount.

7 MR. FARR: Well, I think that the question is  
8 not whether the Florida Supreme Court could have simply  
9 said nothing and dismissed their claim.

10 Then there would have been the questions as to  
11 perhaps whether the ground for that was -- because they  
12 don't given any refunds for Federal claims, which would  
13 have been discriminatory.

14 QUESTION: Well, what if they say -- what if  
15 they say all we did was give an exemption to somebody else  
16 that we shouldn't have and we should have -- but these  
17 people were taxed at the right rate. They don't deserve a  
18 refund? They weren't hurt.

19 MR. FARR: Whether they passed it on or not --

20 QUESTION: Exactly.

21 MR. FARR: -- I think that would be a perfectly  
22 sustainable judgment of the Florida Supreme Court,  
23 particularly in this state cause of action.

24 QUESTION: Thank you, Mr. Farr.

25 Mr. Robertson, you have two minutes remaining.

1 REBUTTAL ARGUMENT OF DAVID G. ROBERTSON

2 ON BEHALF OF THE PETITIONER

3 MR. ROBERTSON: Hypothetically, if the state had  
4 taxed McKesson and the favored local producers at the same  
5 rate, McKesson would not have suffered any injury and  
6 would not be in court today. But, in fact, the state  
7 taxed McKesson at a higher rate than it taxed the favored  
8 competitors. And, as a result of that, just as the  
9 legislature intended, McKesson suffered a competitive  
10 injury.

11 QUESTION: Well, that may be -- that may be so,  
12 but it didn't pay more taxes than it should have.

13 MR. ROBERTSON: It paid more taxes in the sense  
14 that this Court in cases like Iowa-Des Moines has said  
15 that there is a right to equal treatment. And in this  
16 case we did not receive it.

17 I'd -- I'd just like to give a slight overview  
18 of Florida's view of equities.

19 First of all, in this decade Florida has passed  
20 three consecutive unconstitutional tax schemes with  
21 respect to the Commerce Clause. In the case of our  
22 statute, the governor's lawyers told him it was  
23 unconstitutional and said it would expose the state to tax  
24 refunds suits.

25 Secondly, the Florida courts, after we succeeded

1 on the merits in the circuit court, refused to enjoin the  
2 statute pending the appeal to the Florida Supreme Court.

3 We went in and said, put this in effect so there  
4 is no discrimination, so there will be no injury, and the  
5 state did not back us on that. And as a result, the  
6 unconstitutional statute continued to collect  
7 discriminatory taxes.

8 And then next, after the state's supreme court  
9 finally decided that yes, indeed, this was another  
10 unconstitutional statute and we were entitled to relief,  
11 the court ticked off these two reasons: presumptively  
12 valid -- well, all state statutes are presumptively valid.  
13 That gets you nowhere. And secondly, they said it was  
14 passed on. But anyone --

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
16 Robertson. Your time has expired.

17 The case is submitted.

18 (Whereupon, at 1:34 p.m., the case in the above-  
19 entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

NO. 88-192 - McKESSON CORPORATION, Petitioner V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL.

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*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY alan friedman

(REPORTER)

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