

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1565

TITLE BACCHUS IMPORTS, LTD., ET AL., Appellants v. GEORGE FREITAS,
DIRECTOR OF TAXATION OF THE STATE OF HAWAII, ET AL.

PLACE Washington, D. C.

DATE January 11, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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BACCHUS IMPORTS, LTD., ET AL.,	:
	:
Appellants	:
	:
v.	:
	:
	:
GEORGE FREITAS, DIRECTOR OF	:
TAXATION OF THE STATE OF	:
HAWAII, ET AL.	:
	:
	:
-----x	

No. 82-1565

Washington, D.C.

Wednesday, January 11, 1984

The above-entitled case came on for oral argument before the Supreme Court of the United States at 2:04 p.m.

APPEARANCES:

FRANK H. EASTERBROOK, ESQ., Chicago, Illinois; on behalf of the Appellants.

WILLIAM DAVID DEXTER, ESQ., Special Assistant Attorney General of Hawaii, Renton, Washington; on behalf of the Respondents.

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- - -

1 in the statute?

2 MR. EASTERBROOK: You mean if they were
3 administrative exceptions, Your Honor?

4 QUESTION: No. Simply if -- if the statute
5 had just been across the board.

6 MR. EASTERBROOK: An argument was raised in
7 the state court that a tax of 20 percent levied on a
8 base which includes all transportation charges and
9 earlier taxes operates in practice as a discrimination
10 under the principles of Pike against Bruce Church, but
11 that argument is not being pursued in this Court.

12 The argument on the Commerce Clause that we
13 make here is rather straightforward. Since 1875 this
14 Court has held that a state may not levy different taxes
15 on products produced in state and products brought in
16 from out of state. Such a differential taxation creates
17 the very multiplicity of preferential trade zones that
18 the Commerce Clause was designed to eliminate.

19 In response to that fairly simple argument,
20 the State Supreme Court gave three answers. One is that
21 this tax is not designed to discriminate against
22 out-of-state products, but instead to help local
23 Hawaiian industry, and that therefore it has a
24 legitimate purpose.

25 The second argument is that it's permissible

1 to discriminate against out-of-state products so long as
2 you permit all wholesalers to sell both the taxed
3 product and the untaxed product.

4 And third, the Supreme Court of Hawaii argued
5 that the tax is fairly apportioned.

6 QUESTION: Mr. Easterbrook, Paradise and
7 McKesson did not appeal or did not come here, as they,
8 except as Respondents?

9 MR. EASTERBROOK: They did not appeal. They
10 are Appellees appearing in support of Appellant.

11 QUESTION: Is there a reason for not joining
12 you and your client?

13 MR. EASTERBROOK: I can't speak for them, Your
14 Honor, but McKesson has sent a letter to the Clerk
15 saying that they relied on the Supreme Court's rule that
16 one appeal is enough from a single judgment. There was
17 only one judgment entered by the Supreme Court of
18 Hawaii. And their view was that one appeal having been
19 filed, they did not need to file additional notices of
20 appeal to bring their case here.

21 QUESTION: Get a free ride, hmm?

22 MR. EASTERBROOK: Yes.

23 QUESTION: Saves money. It saves money.

24 MR. EASTERBROOK: Yes.

25 QUESTION: Unless your fee award is allocated.

1 MR. EASTERBROOK: I'm going to try hard not to
2 talk about fee awards here.

3 QUESTION: But they have filed a brief and
4 hired attorneys.

5 MR. EASTERBROOK: They have. McKesson has
6 filed a brief, but I assume that McKesson is willing to
7 bear its own attorney fees as are the other Appellants
8 in this case.

9 QUESTION: The only thing they've saved are
10 the filing fees.

11 MR. EASTERBROOK: Hmm-hmm.

12 QUESTION: Mr. Easterbrook, before you get
13 into the three points of the Hawaiian Supreme Court's
14 reasoning, those footnotes that point out that the two
15 products that are exempted are apparently not widely
16 produced throughout the world, to what extent do you
17 contend that all alcoholic beverages are fungible?

18 MR. EASTERBROOK: We -- we say two things
19 about that, Your Honor. The first is that the Hawaiian
20 statute itself defines the pertinent category as all
21 alcoholic beverages; and in fact, a Hawaii statute --
22 it's Hawaii revised statute 281-1 -- defines okolehac to
23 be an alcoholic beverage.

24 And the second part of our argument is that
25 alcoholic beverages are reasonably substitutable in use;

1 that someone who drinks okolehao is doing that in
2 preference to tequila or benedictine, someone who drinks
3 the wine that was made in Hawaii is doing that in
4 preference to someone else's wine, and that that form of
5 substitution is all that's necessary. And indeed,
6 that's why they passed this statute.

7 The legislative history suggests that one
8 reason for exempting okolehao was to enable the
9 producers to advertise nationwide and to boost it, as
10 the legislative history said, to a position of tequila.

11 QUESTION: Would your argument be the same if
12 -- on behalf of a wholesaler who stocked some of the
13 exempted products?

14 MR. EASTERBROOK: Yes, it would, Your Honor.

15 QUESTION: You'd say even if you carried these
16 products, that you'd still have the same --

17 MR. EASTERBROOK: Yes. That the prohibited
18 discrimination is between products and that as a matter
19 of Commerce Clause jurisprudence, the highest tax that
20 can be levied on the product that comes in from out of
21 state is the tax that's levied on the product from in
22 state, and that taxation here is on the product directly.

23 Two of the three arguments I would like to
24 dismiss very quickly, largely because the state has
25 abandoned them. One argument, which is that it is

1 permissible to tax the products at different rates as
2 long as you allow the wholesaler to sell the untaxed
3 product, is inconsistent with the entire line of this
4 Court's cases, and the State of Hawaii has properly
5 abandoned it in Note 23 of its brief in this Court.
6 The other argument, that so long as the tax is
7 fairly apportioned to transactions in Hawaii, the
8 discrimination is all right, is not even mentioned in
9 this Court by the State of Hawaii. None of the
10 apportionment cases has to do with express
11 discrimination.

12 Well, that leaves the argument that it's
13 permissible to discriminate because it's beneficial to
14 Hawaiian industry to do so; and that argument must fail,
15 we submit, because it's nothing other than a frontal
16 assault on the Commerce Clause.

17 This Court has implemented the Commerce Clause
18 through a rule that no state may enact expressly
19 protectionist laws. No state may, at its own say-so,
20 exalt its products at the expense of those from outside.

21 Now, we don't doubt that protectionism is
22 often in fact in the interest of local industry, as the
23 Supreme Court of Hawaii said it was. We're not accusing
24 the State of Hawaii of acting against its own interest
25 in passing this statute. But the Supreme Court of

1 Hawaii seemed to say that because this statute is in the
2 interest of Hawaii that it's not an irrational law;
3 therefore, it's a constitutional law.

4 But quite the contrary. It's precisely
5 because protectionism is so often in the interest of
6 local prosperity at the expense of those elsewhere that
7 the Commerce Clause prohibits those kinds of
8 discriminations. That's why the national government
9 must step in; a beggar thy neighbor policy is not a
10 constitutional policy. Discrimination may be practiced
11 only if Congress, on behalf of Hawaii's many affected
12 neighbors, permits it.

13 Now, that antidiscrimination principle is
14 almost universally applicable, and it's been applied by
15 this Court even when the state has advanced a legitimate
16 reason in support of its discrimination.

17 In Philadelphia against New Jersey, for
18 example, where the State of New Jersey attempted to
19 prohibit the import of garbage from out of state, the
20 State of New Jersey adopted and advanced in this Court a
21 rational justification: that is, protection of the
22 quality of its environment. And the Court said that
23 even a rational, well-supported justification cannot
24 excuse blatant discrimination against interstate
25 commerce.

1 Here, however --

2 QUESTION: Let me interrupt you. What relief
3 are you seeking here?

4 MR. EASTERBROOK: We are seeking a refund of
5 taxes paid and a declaratory order against such
6 discrimination.

7 QUESTION: If you get the refund, what happens
8 to it? This tax has been passed on, hasn't it?

9 MR. EASTERBROOK: The -- it is passed on, Your
10 Honor, in the sense that every person in business who
11 wants to stay in business must recover all of his
12 costs. To what extent the tax is actually borne, the
13 economic incidence of the tax is borne by retailers,
14 consumers or producers -- the other possible people --
15 we simply don't know.

16 The state -- you may be referring, Your Honor,
17 to an argument that the state has made in this Court,
18 that the tax was passed on. That argument was not made
19 in the Supreme Court of Hawaii, and we take it as
20 foreclosed here by not having been made there.

21 QUESTION: Would you be content with just the
22 declaratory judgment in prospective relief?

23 MR. EASTERBROOK: No, Your Honor, we would
24 not, because the declaratory judgment in prospective
25 relief only allows the state to keep the proceeds of the

1 discrimination. It invites --

2 QUESTION: Well, then it's their -- it's their
3 windfall rather than yours, to use the expressions
4 thrown around in the preceding case.

5 MR. EASTERBROOK: I -- I hate to talk about
6 this as windfalls, just as my friend in the preceding
7 case hated to talk about windfalls. But, you know, if
8 it is permitted to collect and keep the discriminatory
9 tax, then every state's incentive is to levy a
10 discriminatory tax and see how long they can get away
11 with it until someone finally gets a declaratory order
12 to stop it.

13 The Tax Injunction Act requires as a condition
14 of litigation that taxes be paid in to the claiming
15 state, and that means effectively that a rule that the
16 Appellants here could not get refunds would be a rule
17 inviting states to pass and maintain discriminatory
18 taxes.

19 QUESTION: Mr. Easterbrook, if your complaint
20 here were an equal protection claim rather than a
21 Commerce Clause claim and the Court were to agree with
22 your equal protection analysis, that your client was
23 denied equal protection of the law because of these
24 exemptions in the law, typically a mandate from this
25 Court and an opinion of this Court upholding your

1 contention would say, in effect, to the Supreme Court of
2 Hawaii you either don't tax Mr. Easterbrook's clients or
3 you tax the Hawaiian drink and the pineapple wine people.

4 Why wouldn't the same sort of an opinion and
5 mandate be appropriate in a Commerce Clause case?

6 MR. EASTERBROOK: There are two principal
7 reasons for that, Justice Rehnquist. One is, as I said
8 in response to Justice Blackmun's question, the argument
9 that refunds are inappropriate was never made in the
10 State of Hawaii. It's a brand-new argument which we
11 take it is foreclosed to the state.

12 This was brought as a suit for refund of
13 taxes. The state was entitled to defend on the ground
14 that --

15 QUESTION: Well, but I don't think the equal
16 -- the equal protection analysis, as I understand it,
17 doesn't depend on any claim that refunds are
18 inappropriate. The equal protection approach depends on
19 saying that the exemptions are no good, so you either
20 don't tax anybody or you tax everybody. You can't tax
21 them with the exemptions.

22 And so the state can go back and say okay,
23 we'll tax nobody over that period, or we'll tax
24 everybody over that period.

25 MR. EASTERBROOK: Your Honor, we have no doubt

1 -- we are expressing no doubt today that for the future
2 it is perfectly adequate for Hawaii to eliminate the
3 exemption and to tax everyone at 20 percent. We have no
4 doubt about that. The question is what happens to
5 transactions with respect to which the tax has already
6 been levied and collected and the state does not propose
7 to go out and tax the other people at 20 percent.

8 The whole series of Commerce Clause decisions
9 that this Court has had since 1875 and on which we're
10 relying were almost to a case either suits for refund of
11 taxes or suits to avoid the state's claim for penalty.

12 QUESTION: Well, the state might be able to,
13 for the future, as you say, to either tax everybody or
14 not, but it is -- this is a past transaction.

15 MR. EASTERBROOK: It is, Your Honor.

16 QUESTION: That's what you're saying.

17 MR. EASTERBROOK: Yes. The transactions --

18 QUESTION: You're out of pocket.

19 MR. EASTERBROOK: The transactions we're
20 concerned about here are past transactions. The tax has
21 been collected; it is in the state's treasury. And the
22 exemptions which give rise to this particular case
23 expired in 1981. There's a new exemption passed which
24 is now in effect for rum, and a declaratory order of the
25 sort Justice Rehnquist described might be most

1 appropriate for the rum exemption for the future.

2 But these transactions are transactions from
3 1974 to 1981 with respect to the other exemption.

4 QUESTION: Mr. Easterbrook --

5 QUESTION: Well, Mr. --

6 QUESTION: Oh, excuse me. I was just going to
7 ask you to tell me what case you think provides the
8 strongest support you can find for your position, if you
9 had to name one case?

10 MR. EASTERBROOK: For the position about the
11 refund of taxes?

12 QUESTION: Yes.

13 MR. EASTERBROOK: Your Honor, we have --

14 QUESTION: And these -- closest to these facts.

15 MR. EASTERBROOK: Yes. Our reply brief
16 collects quite a series of them at Footnote 9, I
17 believe. The very first case in the series was a case
18 to avoid criminal prosecution for refusal to pay the
19 tax. The James B. Beam case, on which we have heavily
20 relied, is a suit for refund of tax. The I.M. Darnell
21 case is a suit for refund of the tax. I think those
22 three are substantial support for our position.

23 QUESTION: Well, Mr. Easterbrook, I suppose
24 that if the Court were to agree with you that this
25 particular scheme violates the Commerce Clause and

1 therefore reverse, that on remand it would be open at
2 least for Hawaii to make its argument as to what
3 defenses it might have on the remedy, would it not?

4 MR. EASTERBROCK: We -- we believe it will be
5 open for the future. The state is not under --

6 QUESTION: Well, possibly even for the past in
7 this case.

8 MR. EASTERBROCK: As we understand Hawaii
9 practice, it follows the federal rule that new arguments
10 cannot be injected into a case so late as this one. But
11 our view, Your Honor, is that for the past transactions,
12 the transactions from 1974 to '81 for which a refund is
13 claimed, no remedy would be sufficient unless it
14 restored those transactions to equal status. The state
15 has not offered to go out and collect the 20 percent tax
16 on okolehao. In fact, a case called --

17 QUESTION: Well, it might be cheaper for the
18 state to go back and produce tax revenues to pay it for
19 the wine than to pay your clients the \$10 point some
20 million that you're claiming.

21 MR. EASTERBROCK: It might be cheaper for the
22 state, Your Honor, but it would not have avoided the
23 harm in this case. In a case called Ward against Love
24 County back in 1920, the state made, as I recall, almost
25 an identical argument in a discriminatory taxation

1 case. And the argument was that there was in fact
2 absolutely no state authority for the refund of taxes,
3 and therefore, the only permissible relief was
4 prospective relief.

5 This Court rejected the argument in Ward on
6 the ground that retrospective relief was necessary to
7 assure the equal treatment, and the lack of state
8 authority for the refund could not stand in the way.

9 QUESTION: Mr. Easterbrook, a moment ago you
10 said that mere prospective application couldn't remedy
11 the harm that your clients had suffered. Are you
12 speaking now of actual proven harm?

13 MR. EASTERBROOK: The stipulations in this
14 case recite the taxes made the liquors brought in from
15 out of state relatively less attractive compared to
16 other liquors. When your price rises relative to the
17 price of other liquors, you will sell less, you will
18 have to sell on a lower margin.

19 QUESTION: Well, you know, I've taken
20 Economics 1, too, but I was wondering if is there
21 something more in the record indicating that your
22 client's products were handicapped because the Hawaiian
23 beverage the pineapple wine were not taxed?

24 MR. EASTERBROOK: There is nothing in the
25 record other than the stipulation which appears at page

1 10 of the Joint Appendix about competitive disadvantage.

2 QUESTION: Is there a statute of limitations
3 on collecting tax on past transactions?

4 MR. EASTERBROOK: The Hawaiian statute of
5 limitations is five years, and the claim here was made
6 in 1979 back to 1974 consistent with the Hawaiian
7 statute. We're not doubting that statute.

8 QUESTION: Pursuing Justice Rehnquist's
9 thought that the stipulation indicates the harm caused
10 by the tax, but it doesn't indicate that the harm is any
11 different than it would be if these exotic products had
12 also been taxed.

13 MR. EASTERBROOK: I understand that, Your
14 Honor. The stipulation is, I am afraid, ambiguous.

15 I would like to mention just briefly an
16 argument that Hawaii now makes in this Court. In the
17 state court the issue was joined rather squarely on the
18 meaning of the Commerce Clause, and in fact, at page 29
19 of its brief in the Supreme Court of Hawaii, the state
20 expressly repudiated any reliance on the 21st Amendment.

21 In this Court the state now relies on the 21st
22 Amendment. Needless to say, our first response to that
23 is that the claim is not preserved, it is not properly
24 within the jurisdiction of this Court, and that an
25 effort by the state to invoke a new source of federal

1 authority, which is has never invoked in the state
2 court, is not appropriate at this late stage. In fact,
3 Illinois against Gates is perhaps our strongest support
4 for that position.

5 Nevertheless, the distinction between a new
6 ground and an elaboration of the Commerce Clause ground
7 is a rather fine one; and I would like to say a few
8 words about the 21st Amendment argument, just in the
9 event the Court should disagree with our contention that
10 it's not properly preserved.

11 We have made two principal points about the
12 21st Amendment. One is that the Court has consistently
13 held that state liquor laws must yield when they
14 conflict with actual federal statutes enacted pursuant
15 to federal authority. The Idlewild-Bon Voyage Liquor
16 case is such a case involving federal customs statute,
17 and the Mid-Cal case on antitrust laws.

18 There are many other federal statutes in this
19 field. The Alcohol Administration Act, which was passed
20 at the same time as the 21st Amendment, is a rather
21 detailed regulatory scheme.

22 There is such a statute in this case. The
23 Wilson Act, enacted in 1890, expressly provides that
24 states must be evenhanded between in-state and
25 out-of-state products in their regulation of alcohol.

1 In fact, it says that states have to proceed -- and I
2 quote -- "to the same extent and in the same manner as
3 though such liquids or liquors had been produced in such
4 state." And Scott against Donald in 1897 held that that
5 means exactly what it says.

6 The other --

7 QUESTION: What did the Court below say about
8 that?

9 MR. EASTERBROCK: Since the state had refused
10 to rely on the 21st Amendment, the court below said
11 nothing about any of this, Your Honor.

12 QUESTION: I see.

13 MR. EASTERBROCK: It was just not an issue.
14 It has become an issue only because of the state's new
15 contention.

16 QUESTION: Does this argument mean that Hawaii
17 could -- could not prohibit the sale of all beverages,
18 all alcoholic beverages except these two products?

19 MR. EASTERBROCK: The statute, the state
20 statute, the South Carolina statute, which this Court
21 considered in Scott against Donald, was a statute that
22 did exactly that, Your Honor. It prohibited the import
23 into South Carolina of alcoholic beverages, but allowed
24 people in South Carolina to brew their own and sell it
25 to their hearts' content.

1 This Court held that the Wilson Act absolutely
2 prohibited that state statute, and we think the same
3 would be the case today under the Wilson Act.

4 The -- more generally, the purpose of the 21st
5 Amendment as this Court has construed it, especially in
6 cases like *Mid-Cal*, has been to preserve a sphere within
7 which the state may regulate in the name of temperance
8 free of the meandering path of Commerce Clause cases,
9 which in the past, especially the original package
10 doctrine cases and the decision in *Leisy against Hardin*,
11 it made it difficult, even impossible, for a state that
12 desired to adopt temperance rules to adopt and enforce
13 those rules.

14 The 21st Amendment made it sure that a state
15 that wanted temperance could get it despite the original
16 package line of cases. It established concurrent
17 powers. But this is not a case in which the state
18 advocates that it has a temperance interest at heart.
19 Quite the contrary. The interest the state advocates is
20 in getting more *okolehao* sold and more Hawaiian fruit
21 wine sold to the extent it can possibly do that through
22 this statute.

23 So since the kind of interest involved in this
24 case is not even assumed -- not even asserted to be a
25 temperance interest, the state's argument on the 21st

1 Amendment ultimately is unsuccessful.

2 In all events, it seems to me important that
3 as it survives now, it is at best a very attenuated
4 argument. It's an argument that you can think about the
5 Commerce Clause through the lens of the 21st Amendment.
6 And given that attenuation, the state's argument is
7 very weak.

8 On the other hand, we invoke on our behalf the
9 James Beam case in which the Court held that the Foreign
10 Commerce Clause makes it impossible for a state to levy
11 discriminatory taxes on liquor when they would otherwise
12 be prohibited by the Foreign Commerce Clause.

13 Our argument is very simple. It's that the
14 Interstate Commerce Clause has the same force in liquor
15 cases as the Foreign Commerce Clause does under the
16 doctrine of Beam.

17 Finally, the state has made a number of
18 arguments which can be described only as fairness
19 arguments. The arguments have to do with retroactivity,
20 with the passing on argument and so on. As I said
21 earlier in response to Justice Blackmun's question,
22 those arguments were not raised below; but we think it
23 important to the extent they are here at all simply to
24 point out that this is not a case like the Chevron Oil
25 case where there has been a sudden, evulsive change in

1 the law which the state could not have anticipated.

2 Since 1875 taxes of this sort have been
3 plainly unlawful. Since 1897 when this Court construed
4 the Wilson Act, they have been unlawful as applied to
5 liquor. And a whole lot of that line of cases has been
6 cases for the refund of taxes. So ultimately, what the
7 state is arguing in its fairness argument is that its
8 tax is so large that the discrimination between the
9 in-state and the out-of-state products is so great that
10 it really ought to be allowed to keep it. And that's
11 kind of like the argument of someone who's murdered both
12 of his parents and gets called before the bar that he
13 shouldn't get punished because he's an orphan; that he's
14 made the stakes so big that he is entitled, therefore,
15 to immunity.

16 Well, the argument doesn't fly for the orphan,
17 I don't think it flies for the State of Hawaii, and this
18 judgment should be reversed.

19 Thanks very much.

20 CHIEF JUSTICE BURGER: Mr. Dexter.

21 ORAL ARGUMENT OF WILLIAM DAVID DEXTER, ESQ.,

22 ON BEHALF OF RESPONDENTS

23 MR. DEXTER: Mr. Chief Justice, and may it
24 please the Court:

25 The Appellants argue that because for a

1 five-year period Hawaii exempted okolehao and pineapple
2 wine, which are made only in Hawaii, and which amounted
3 to less than one percent of the total sales of alcoholic
4 beverages in Hawaii, because of these circumstances they
5 are entitled to a refund of all the taxes Hawaii imposed
6 on all alcoholic beverages, amounting to approximately 10
7 percent of the annual budget of Hawaii.

8 Now, as indicated by their argument,
9 Appellants can only get to this point by arguing that
10 all alcoholic beverages compete with one another, and
11 that the exemption, therefore, creates some kind of a
12 per se discrimination.

13 This is contrary to a long line of decisions
14 of this Court starting with *Tiernan v. Rinker*. In
15 *Tiernan* this Court held that the exemption of beer and
16 wine produced in Texas did not invalidate a general
17 liquor tax imposed on all sales of all liquor products.
18 It recognized there that the exemption of beer and wine
19 produced in Texas could only be discriminatory as to
20 imported beer and wine.

21 So contrary to Appellants' universal argument,
22 we believe that this case should be examined in light of
23 the particular facts and circumstances here before the
24 Court.

25 We are here dealing with two unique Hawaiian

1 products. Okolehao is a traditional Hawaiian beverage
2 distilled from the ti plant. Originally it was drunk as
3 a fermented mash. In 1970 explorers taught the natives
4 how to distill the mash. In fact, the term okolehao is
5 the Hawaiian term for the iron caldron and the gun
6 barrel used for this purpose. So we are dealing with a
7 very unique, indigenous Hawaiian product, and it was so
8 found by the Supreme Court of Hawaii.

9 Also, I think it's important to realize that
10 the Appellants here do not represent the manufacture of
11 any out-state products. They are solely in-state
12 wholesalers, and so they have to limit any claim of
13 discrimination based on product discrimination and not
14 because of their particular circumstance. They as
15 wholesalers have in no way been damaged here.

16 Now, as found by the Supreme Court of Hawaii,
17 also no okolehao or pineapple wine is produced anywhere
18 else in the world. And the Hawaii Supreme Court,
19 because of this fact and because of the uniqueness of
20 these products, specifically found that these exemptions
21 had no effect whatsoever on interstate or foreign
22 commerce. And that is why the Hawaiian Supreme Court
23 really analyzed the issue as one involving equal
24 protection and not Commerce Clause considerations per
25 se, including that of the 21st Amendment.

1 And also, it's important to note there's no
2 allegation or proof in the record in these -- this case
3 that the exemptions adversely affected Appellants'
4 business of importing beer and wine or had any effect on
5 interstate or foreign commerce. Before you get to any
6 product discrimination case, you have to find that
7 okolehao and a peculiar, distinct wine produced in
8 Hawaii, pineapple wine, is competitive with the
9 importation of beer and wine.

10 Now, when the exemptions were enacted --

11 QUESTION: Why did they need the exemption?

12 MR. DEXTER: What?

13 QUESTION: Why did they need the exemption?

14 What was the motive for the exemption?

15 MR. DEXTER: The motive for the exemptions,
16 Your Honor, were to -- as far as okolehao was concerned,
17 it was in financial difficulty. This is a traditional
18 cultural drink product of Hawaii, a tourist attraction.
19 The Hawaiian legislature was trying to get that
20 fledgling industry off of its feet.

21 When they granted the pineapple wine or the
22 fruit wine exemption, there was absolutely no production
23 in Hawaii, and apparently one person wanted to try to
24 produce some kind of wine in one of the Hawaiian
25 Islands. And so the exemptions were simply to try to

1 promote either a traditional local industry, the
2 production of okolehao, or the production of pineapple
3 wine that was not in existence in 1976. In fact, in
4 1976, the first year of the wine exemption, there was no
5 sales of wine at all in Hawaii. In 1977 the sales were
6 --

7 QUESTION: You mean it wasn't -- the
8 exemptions didn't permit the company to sell its wine at
9 a lower price?

10 MR. DEXTER: Well, the exemptions, in our
11 judgment, operated in the nature of a subsidy; that what
12 the Hawaiian legislature was trying to do was to try to
13 help these -- this okolehao manufacturer and somebody
14 that wanted to get into the pineapple wine business or
15 other wine business to get started.

16 QUESTION: So they were -- they -- they were
17 competing for the tourist trade.

18 MR. DEXTER: Basically they're tourist items,
19 and they're not items that are generally competitive in
20 the --

21 QUESTION: In spite of their --

22 MR. DEXTER: -- Liquor market or -- in Hawaii.

23 QUESTION: In spite of their indigenous
24 quality, the Hawaiians don't like them.

25 MR. DEXTER: Well, Your Honor, they --

1 QUESTION: And they're competing for the
2 tourist trade.

3 MR. DEXTER: Well, one of the difficulties,
4 for example, indicating the nature of okolehao, one of
5 the parties, McKensson -- these are liquor people who
6 ought to know what they're talking -- says it's
7 something like a whiskey. Now, I think Bacchus says
8 well, it's something like a brandy. And the fact of it
9 is it's a peculiar product made by this traditional ti
10 root in Hawaii, and I don't think it's comparable to
11 anything else, and I don't think a good brandy drinker
12 would think this an appropriate substitute.

13 QUESTION: You mean they're -- you mean
14 they're trying to develop some new customers who never
15 drink anything in their life?

16 MR. DEXTER: Well, primarily it was a -- it's
17 a novelty item. It comes in a fancy -- the okolehac
18 comes in a fancy bottle and sometimes with some lava
19 rock around the outside. It's -- it's -- it's a tourist
20 item, and this is what they were trying to promote.

21 QUESTION: Mr. Dexter, at the beginning of
22 your argument you cited, I think, a Texas case where
23 they gave an exemption on beer and -- beer and wine, and
24 that did not invalidate the basic tax statute.

25 MR. DEXTER: Right.

1 QUESTION: Would you tell me the cite -- the
2 name of that case again? I didn't remember it.

3 MR. DEXTER: That's Tiernan versus Rinker.

4 QUESTION: Oh, yeah. Thank you.

5 MR. DEXTER: 102 U.S. 123 --

6 QUESTION: Thank you.

7 MR. DEXTER: -- 1880. And we'll have a little
8 bit more to say about that case later, hopefully.

9 Okay. Against this -- this factual background
10 -- well, I might turn to one other fact. I suggested no
11 pineapple wine in production in 1976, very little in
12 1977. Now, in 1976 when the exemption was enacted for
13 pineapple wine in okolehao, this product, okolehao,
14 amounted to two-tenths of one percent of the total
15 liquor sales in Hawaii. It amounted to only 3.7 percent
16 of the total liquor produced in Hawaii and sold in
17 Hawaii. It was a very minor exemption, and the
18 exemptions, as I indicated, were for a very limited
19 period of time for this express purpose of trying to
20 create a market.

21 Now, against this factual background I would
22 like to have the Court consider the following points.
23 First, the exemptions in question in our judgment are
24 not distinguishable from direct subsidies to preserve
25 Hawaii's cultural heritage, the production of okolehao,

1 and to promote a new industry such as pineapple wine.

2 Secondly, I would like to address the question
3 of the complete absence of any discrimination as a
4 matter of fact in this case. And I believe, Your
5 Honors, that if there is no discrimination as a matter
6 of fact as to these Appellants or interstate or foreign
7 commerce, there cannot be any discrimination as a matter
8 of constitutional law. I think this is rather
9 fundamental by examination of the decisions of this
10 Court.

11 And the third point I would like to make, that
12 any decision on the merits in favor of Appellant should
13 be given only prospective application, because contrary
14 to the argument of the Appellants in this case, we
15 believe that the 21st Amendment rules would be changed
16 substantially if these small, innocuous exemptions in
17 the Hawaiian liquor law were construed by this Court to
18 invalidate the entire Hawaiian liquor law under the
19 Commerce Clause.

20 QUESTION: Well, if the 21st Amendment has
21 that thrust, why shouldn't it prevent prospective relief?

22 MR. DEXTER: Why -- the -- why should it?

23 QUESTION: Why shouldn't it prevent
24 prospective relief as well as retrospective?

25 MR. DEXTER: We're asking only for -- for --

1 to limit the case to prospective relief. Maybe I
2 misstated myself.

3 QUESTION: Well, I know, but why -- why -- why
4 -- and you're saying the 21st Amendment should protect
5 the statute.

6 MR. DEXTER: No. What I'm -- I'm -- I'm
7 saying, Your Honor, that if this Court on the merits
8 would decide that this indeed amounts to
9 unconstitutional discrimination, we're saying that this
10 changes the -- the thrust of the prior 21st Amendment
11 decisions of this Court significantly enough --

12 QUESTION: Okay.

13 MR. DEXTER: -- To require the Court to make a
14 -- make that rule prospective rather than retroactive.

15 QUESTION: How much money's involved?

16 MR. DEXTER: There is -- there's around \$100
17 -- between \$100 and \$120 million. The Appellants in
18 this case, as well as the other wholesalers, pass the
19 tax on, they collect it from their dealers, and it's put
20 into some kind of a fund awaiting the outcome of this
21 suit. But it's about 10 percent of the total Hawaii
22 budget.

23 And the last point that I would like to make
24 is that regardless of these other issues, the Appellants
25 are not entitled to any refunds because they have not

1 borne the economic burden of the tax, and therefore,
2 they would be unjustly enriched by any refund.

3 The stipulation of facts, for instance,
4 indicates that these taxes are added on to the normal
5 selling price or the marked up selling price of these
6 Appellants, and those taxes are passed on directly as
7 part of that pricing to their retail customers. I don't
8 think there's any real issue about that. It's clearly
9 in the stipulation of fact, and I think the stipulated
10 fact provisions are quoted in the amicus brief of the
11 Multi-State Tax Commission.

12 QUESTION: Mr. Dexter, has that been a
13 requirement of our past tax decisions, that a party not
14 only have paid the tax in question, but that he have, as
15 you put it, borne the economic burden of it?

16 MR. DEXTER: Well, Your Honor, that has been
17 -- that has been a -- certainly the general pattern of
18 the -- most of the tax decisions, state and federal, in
19 the United States. I would refer you to two cases in
20 this category that we have not cited in our brief that
21 are federal cases: Travel Industries of Kansas, Inc. v.
22 United States, 425 Federal Second 1297, Tenth Circuit
23 1970; McGowan v. United States, 297 Federal Second 252,
24 Fifth Circuit 1961.

25 QUESTION: Do any cases that you know of from

1 this Court support the propositions which you're stating?

2 MR. DEXTER: I don't know as that any -- but
3 these -- there's a multitude of federal cases under
4 federal excise taxes, but I don't -- I haven't found any
5 that have gotten to this Court.

6 QUESTION: Which deny refunds because the
7 person apply for them has already passed the tax on?

8 MR. DEXTER: Right, right. In these -- and in
9 these cases the court said -- the courts -- one was the
10 Fifth Circuit, the Tenth Circuit -- they said even
11 though there wasn't any limit on the refund statutes
12 that as a general common law principle -- and it's been
13 on our judicial system for a number of years -- a person
14 who does not bear the economic burden of the tax -- I
15 mean where you're talking about a direct pass-on tax
16 now. I'm not talking about --

17 QUESTION: Well, I know. Some laws require
18 the guy who pays it to pass it on.

19 MR. DEXTER: Right.

20 QUESTION: But nobody -- nobody required a
21 pass-on in this case.

22 MR. DEXTER: Well, this --

23 QUESTION: And are these cases required
24 pass-ons or --

25 MR. DEXTER: No.

1 QUESTION: -- Optional pass-ons?

2 MR. DEXTER: Those are optional pass-ons. In
3 fact, a series of cases -- I think the McGowan case was
4 a -- one of the more recent of a series of cases --

5 QUESTION: But those cases didn't deny
6 prospective relief.

7 MR. DEXTER: What?

8 QUESTION: Those cases did not deny
9 prospective relief.

10 MR. DEXTER: No, no. Simply they said okay,
11 if you've borne the economic burden of the tax, you can
12 get it back. But the McGowan case involved a series of
13 problems that came up with the federal transportation
14 excise tax. So the question is whether you added this
15 tax to your price and passed it on to the persons
16 getting the transportation. If you did, you didn't get
17 it back.

18 The -- turning back to the first point, that
19 the exemptions in question are much more in the nature
20 of direct -- of subsidies to promote two Hawaiian
21 products rather than a form of market regulation, I
22 would like to indicate the following.

23 It's the substance of financial aid rather
24 than it's form that controls for constitutional purposes
25 in regard to the subsidy issue. I believe this was

1 pointed out by Justice Stevens in his concurring opinion
2 in Alexander Scrap. In fact, the form of subsidy here
3 is above board. Its impact on commerce can readily be
4 evaluated and judged by this Court. This is not only
5 true -- this is not true with other forms of subsidies
6 such as industrial development bonds or even some
7 indirect subsidy.

8 QUESTION: But Alexandria Scrap and Reeves and
9 cases like that did think they were speaking about the
10 market participation rather than regulation. Here you
11 have something that is by its terms a tax. Don't you
12 think we would really create chaos if we expanded the
13 market participant notion to things that were just
14 frankly admitted to be taxes?

15 MR. DEXTER: Well, Your Honor, in the first
16 place we're not saying that this is -- necessarily
17 should be treated by this Court as a subsidy per se.
18 We're saying that the nature of the exemption here and
19 its effect on interstate or foreign commerce or
20 Appellants' business is identical as if Hawaii had
21 included the okolehao and pineapple wine sales as
22 taxable sales and granted these parties a dollar amount
23 subsidy in the exact amount of a tax. The effect on
24 commerce would have been identical. And certainly I
25 think there is -- is -- is a problem, as you suggest, in

1 that area. We're saying the intent and purpose here,
2 the operative effect of what was done is analogous to a
3 subsidy, because -- and Appellants in this case admit
4 that if these were -- these were direct payments, there
5 wouldn't be any problem.

6 We're simply saying here that -- that -- that
7 form and substance should control in this area. And I
8 think that in terms of looking at this, whether it is a
9 -- intended to discriminate or burden commerce rather
10 than as a subsidy that we have to realize again that the
11 exemptions were enacted to preserve Hawaii's cultural
12 heritage and to promote a new industry. They were not
13 enacted as trade barriers. They did not operate as
14 trade barriers. And the fact that in 1976 when the
15 exemptions were enacted 96.7 percent of locally-produced
16 Hawaiian liquor products was taxed indicates the limited
17 and peculiar nature of -- of these exemptions.

18 We believe that these facts establish that the
19 exemptions were in the nature of subsidies as intended
20 by the Hawaiian legislature. And we also believe that
21 they were intended to promote a business or a market and
22 not intended in any way to regulate.

23 Now, turning to point two, I would just simply
24 like to emphasize again there's nothing in the record to
25 establish that the exempt products here were competitive

1 with beer and wine of the Appellant or impeded any
2 interstate or foreign commerce. This is a basic factual
3 issue the Appellants have not tried to prove in any way
4 or tried to meet.

5 Now, since the exempted products were not
6 produced anywhere else, there can be no discrimination.
7 That is a matter of fact. As here indicated, Appellants
8 assume, as they must, that all alcoholic beverages
9 compete with each other in commerce; therefore, the
10 exemption of a single type of liquor discriminates
11 against all other liquor. However, the Court should
12 exercise, in our judgment, great care in determining
13 what constitutes product discrimination or state
14 constitutional purposes, particularly liquor products
15 which are covered by the 21st Amendment

16 Now, as I've indicated, this Court in the
17 Tiernan case has already indicated that the exemption of
18 beer and wine by -- locally-produced beer and wine by
19 Texas did not invalidate a Texas liquor law except to
20 the extent of competing beer and wine coming in from out
21 of state.

22 The Texas law in terms of its imposition is
23 not distinguishable from that of Hawaii. It just --

24 QUESTION: Well, I'm not so sure I would agree
25 with you on that. Does -- don't importers bring, say,

1 strawberry wine or other kinds of fruit wine into Hawaii?

2 MR. DEXTER: Well, there may -- the -- I don't
3 know. The record in this case is not clear. I do know
4 that when you look at a lot of the liquor laws that they
5 have indicated, put in -- in the appendix here of the
6 liquor industry that's filed in this case, the
7 classification of wines are very different. There could
8 be grape wines, fruit wines, specialty wines. I think --

9 QUESTION: Well, I guess grapes are fruit.

10 MR. DEXTER: And -- right. But here we had
11 only pineapple wine. But we're suggesting if there --
12 if there was any -- any product competition here, it's
13 not proven, and we don't know what it is. But what
14 they're saying is that this -- that -- that, for
15 instance, the exemption of okolehao, which has nothing
16 to do with beer and wine, knocks out the whole liquor
17 law, and wine could have nothing to do at all in
18 competition with beer again knocks out the whole liquor
19 law.

20 QUESTION: Well, you're still trying to get
21 people -- some people who are drinking X and Y to drink
22 these products instead.

23 MR. DEXTER: Yes, but --

24 QUESTION: You are competing with something.

25 MR. DEXTER: Yeah.

1 QUESTION: What are you competing with?
2 MR. DEXTER: Well, I submit --
3 QUESTION: Nothing?
4 MR. DEXTER: Okolehao -- we may be in one
5 sense competing with --
6 QUESTION: Beer.
7 MR. DEXTER: No. Possibly --
8 QUESTION: Wine.
9 MR. DEXTER: -- Brandy. They say brandy and
10 whiskey.
11 QUESTION: Well, you're competing with
12 something, some product --
13 MR. DEXTER: Well --
14 QUESTION: -- Or you wouldn't have -- wouldn't
15 --
16 MR. DEXTER: And then this gets to a very
17 interesting --
18 QUESTION: Or you're just developing a whole
19 new class of drinkers.
20 MR. DEXTER: Well, but -- but -- but it -- it
21 comes to the point, though, how much, for instance, does
22 the fact that liquor is subject to a 20 percent tax in
23 Hawaii and soft drinks aren't, how much is this liquor
24 then discriminating against soft drinks. Your -- your
25 problem is the area of product classification here, and

1 we believe --

2 QUESTION: But if this stuff is like brandy,
3 you can't call it a soft drink.

4 MR. DEXTER: No. I mean they're all alcoholic
5 beverages. We're saying -- but I'm simply saying that
6 -- that each product ostensibly competes with every
7 other product in the marketplace. So what -- what --
8 the problem is how do you classify the products, what do
9 you classify the kind of competition. We think that the
10 classification that this Court has used in equal
11 protection and due process areas is equally applicable
12 here.

13 We also believe that the -- the cases of this
14 Court dealing with defining the market and market
15 product in the antitrust cases under Section 7 of the
16 Clayton Act are equally applicable here. But on the
17 record, we don't know what's competing with what, except
18 we know that there's no alcohol, there's no pineapple
19 wine, and there's no okolehao imported into Hawaii, and
20 we know there's absolutely no proof offered or suggested
21 or relied upon by the Appellants as to product
22 competition. They simply see the class to be compared
23 is all liquor, and we know that is much, much too broad
24 and unreasonable.

25 To illustrate this, can you really imagine a

1 Redskin fan sitting down in front of the TV viewing the
2 TV, too, and really debating whether to go get another
3 beer from the six-pack or to take a drink of okolehac
4 from the --

5 QUESTION: How would you answer that?

6 MR. DEXTER: I would -- they're -- they're --
7 in my judgment they're completely uncomparable. In
8 fact, you'd have a hard time finding them in most places.

9 QUESTION: Then what is the market for this
10 okolehao? They must sell it to somebody?

11 QUESTION: Non-Redskins fans.

12 MR. DEXTER: It's primarily --

13 (Laughter.)

14 MR. DEXTER: No. It's -- it's -- it's
15 primarily a traditional drink. It was a drink --

16 QUESTION: But you say -- you -- you say it's
17 a traditional drink, and yet you say the Hawaiians don't
18 like it.

19 (Laughter.)

20 MR. DEXTER: Well, all I can tell you, Your
21 Honor, is that I have tasted it. We tried to buy it
22 generally just as part of the preparation of this case
23 in an ordinary restaurant, at bars, and it's not
24 available. We did find it in a tourist attraction
25 place. Now, that's as far as I can go with -- but

1 obviously, you know, it is a liquor, and we're not
2 denying that.

3 QUESTION: I've been over to Hawaii several
4 times. I've never seen or heard of it.

5 (Laughter.)

6 MR. DEXTER: Okay.

7 QUESTION: And I've never seen anybody that
8 has seen or heard of it.

9 (Laughter.)

10 MR. DEXTER: And the record indicates in this

11 --

12 QUESTION: Until today.

13 MR. DEXTER: Yeah. But the record indicates
14 in this case that in our appendix that it's declined 275
15 percent from the time the exemption's gone, so it may be
16 on the way out.

17 (Laughter.)

18 MR. DEXTER: So I -- I -- but our position is
19 -- these are unique products, and there's no competition
20 shown.

21 Now, as to the third reason -- that is, the
22 problem of damages, which I think is extremely important
23 here -- there is obviously a potential for this Court
24 saying that these two unique, peculiar products, even
25 though they are of limited value and significance, and

1 even though there's no proof of it, somehow discriminate
2 against interstate commerce, even though there is these
3 21st Amendment restraints. But in no event are these
4 Appellants entitled to the money that they're asking
5 for. This money was passed on. This money has been
6 absorbed by the general public of Hawaii, and when the
7 refunds are denied them, it simply means that the money
8 goes back to be used for the general public of Hawaii
9 rather than particular Appellants that are trying to get
10 significant and substantial windfalls.

11 This is the law in this country. It's a
12 general equitable principle in regard to unjust
13 enrichment. And I know of no case comparable to any
14 facts of this case except possibly some old New York
15 cases representing a minority view that would not deny
16 the Appellants the taxes they are claiming to get here.

17 And in any event, the only taxes they could
18 possibly be entitled to were taxes in regard to products
19 that they purchased that were competitive in the
20 marketplace with these two unique products, and they
21 have not proved their case there. So we -- we submit
22 they really are not entitled to any relief whatsoever.

23 I thank you very much for your kindness and
24 patience, and I will sit down.

25 CHIEF JUSTICE BURGER: Do you have anything

1 further, Mr. Easterbrook?

2 ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

3 ON BEHALF OF THE APPELLANTS -- REBUTTAL

4 MR. EASTERBROOK: I do, Your Honor. A few
5 brief words about the argument about the extent of
6 competition.

7 I'm perfectly delighted to concede that was
8 not tried as an antitrust case. We don't have a Section
9 7 Clayton Act market definition in this case. There
10 were some good reasons why that's true.

11 One is that the stipulation wasn't addressed
12 to this because the state never asserted this in the
13 initial court, and it's very difficult as a practical
14 matter for litigants to cover in stipulations things
15 that their opponents aren't denying.

16 The statute in this case defines the pertinent
17 category as all liquor, and it seemed plausible to me
18 that the plaintiffs were entitled to take the state at
19 its word, at least until the state should deny it.

20 The argument, by the way, that because
21 okolehao is produced only in Hawaii it doesn't compete
22 with Grand Marnier, which is produced only in France,
23 for example, is very strange as a market definition.
24 Ordinarily, one assumes that in most of these Commerce
25 Clause cases things are coming from different places,

1 and they're made in different places and moved.

2 In any event, this whole extent of effect
3 point is I think a point that is important only in the
4 event that you are dealing with a statute which is
5 neutral on its face, and there's a dispute about whether
6 it has a discriminatory impact, the kind of dispute
7 that's involved in a case like Pike against Bruce Church.

8 This is not a statute that's neutral on its
9 face and we're disputing discriminatory impact. This
10 statute is discriminatory on its face. When the statute
11 is discriminatory on its face, one stops.

12 We've cited in Note 4 of our brief a number of
13 cases of this Court that hold that -- of our reply
14 brief, sorry -- and the Baldwin against GAF-Sealey case
15 says that, too, and that's at page 19 of our opening
16 brief.

17 QUESTION: Mr. -- may I ask this question?
18 Supposing the statute defined alcoholic beverages in a
19 way that simply excluded these products, would you have
20 the same argument, do you think?

21 MR. EASTERBROOK: I think in that event the
22 argument would be much more difficult. The argument
23 would look more like Tiernan against Rinker where there
24 was such a statute. In that event we might well have to
25 come in and supply proof of competition in -- and that

1 might prove to be a very difficult thing to do. The
2 Clayton Act market definitions are not the easiest thing
3 to do on the back of an envelope.

4 QUESTION: I suppose the other side of the
5 coin is if the tax were on all bottled beverages, all
6 beverages sold in a glass bottle or something like that,
7 and then they had an exemption for these two, then
8 everybody who sold Coca-Cola and everything else would
9 get the refund, too.

10 MR. EASTERBROCK: We think it would probably
11 be open to the state if it wanted to contradict the
12 category of competition established in the state's own
13 statute to offer and make this kind of proof.

14 We suggest in our reply brief, in fact, that
15 if Hawaii had levied a 20 percent tax on all things with
16 alcohol in them and then exempted aftershave lotion, in
17 a suit by sellers of whiskey the state would be entitled
18 to defend by saying that aftershave lotion just doesn't
19 compete with whiskey, so why are we here.

20 But given that these are all alcoholic
21 beverages, it's an --

22 QUESTION: And they drink them, and they are
23 drunk because they are alcoholic.

24 MR. EASTERBROCK: Right. Aftershave lotion is
25 sometimes drunk for that purpose, Your Honor, but not

1 generally.

2 QUESTION: Not regularly.

3 MR. EASTERBROOK: Not regularly.

4 My last word is on *Tiernan against Rinker*, and
5 that is that I think the Court was drawing a distinction
6 there between a license tax, which applied to everyone
7 who sold any alcoholic beverages -- there was adequate
8 ground for levying that tax on people who sold the
9 in-state beverage -- and tax by the bottle or by the
10 drink. In fact, the *Tiernan* Court says "A tax cannot be
11 exacted for the sale of beer and wines when of foreign
12 manufacture if not exacted when of home manufacture."
13 We are perfectly delighted to rely on that language in
14 *Tiernan against Rinker*.

15 Thank you very much.

16 CHIEF JUSTICE BURGER: Thank you, gentlemen.
17 The case is submitted.

18 (Whereupon, at 2:58 p.m., the above-entitled
19 case was submitted.)
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CERTIFICATION

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#82-1565 - BACCHUS IMPORTS, LTD., ET AL., Appellants v. GEORGE FREITAS, DIRECTOR OF
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