

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

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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., and
AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.;
Petitioners V. MAURICE SMITH, DIRECTOR,
ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT,
ET AL.

CASE NO:

88-192; 88-325

PLACE:

WASHINGTON, D.C.

DATE:

March 22, 1989

PAGES:

1 thru 57

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 McKESSON CORPORATION, :
4 Petitioner, :
5 V. : No. 88-192
6 DIVISION OF ALCOHOLIC BEVERAGES :
7 AND TOBACCO, DEPARTMENT OF :
8 BUSINESS REGULATION OF :
9 FLORIDA, ET AL.; :
10 AND :
11 AMERICAN TRUCKING ASSOCIATIONS, :
12 INC., ET AL., :
13 Petitioners, :
14 V. : No. 88-325
15 MAURICE SMITH, DIRECTOR, :
16 ARKANSAS HIGHWAY AND TRANS- :
17 PORTATION DEPARTMENT, ET AL. :
18 -----x

19 Washington, D.C.

20 Wednesday, March 22, 1989

21 The above entitled matter came on for oral argument
22 before the Supreme Court of the United States at 1:22
23 o'clock p.m.
24
25

1 APPEARANCES:

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3 PETITIONERS IN No. 88-325

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5 BEHALF OF PETITIONER IN No. 88-192

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7 OF RESPONDENTS IN No. 88-192

8 A. RAYMOND RANDOLPH, ESQ., WASHINGTON, D.C., ON BEHALF
9 OF RESPONDENTS IN No. 88-325

C O N T E N T S

ORAL ARGUMENT OF	PAGE
ANDREW L. FREY, ESQ.	
ON BEHALF OF THE PETITIONER MCKESSON CORPORATION	4
DAVID G. ROBERTSON, ESQ.	
ON BEHALF OF THE PETITIONERS, AMERICAN TRUCKING ASSOCIATION ET AL	17
H. BARTOW FARR, III, ESQ.	
ON BEHALF OF THE RESPONDENTS, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL	27
A. RAYMOND RANDOLPH, ESQ.	
ON BEHALF OF THE RESPONDENTS, MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT ET AL	40
ANDREW L. FREY, ESQ.	
ON BEHALF OF THE PETITIONERS, AMERICAN TRUCKING ASSOCIATION ET AL -- REBUTTAL	53

1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear
3 argument next in No. 88-192, McKesson Corporation v.
4 Division of Alcoholic Beverages of Florida, consolidated
5 with No. 88-325, American Trucking Associations v.
6 Maurice Smith.

7 Mr. Frey, you may proceed whenever you are
8 ready.

9 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

10 ON BEHALF OF THE PETITIONER, MCKESSON
11 CORPORATION

12 MR. FREY: Thank you, Mr. Chief Justice, and
13 may it please the Court, in 1983, the Arkansas
14 Legislature enacted the Highway Use Equalization tax,
15 imposed for the right to operate certain heavy trucks on
16 the State's highways.

17 This tax was assessed at a rate of five cents
18 a mile, up to a ceiling of \$175 or 3,500 miles of
19 operation. All operations each year in excess of 3,500
20 miles were untaxed.

21 Now, because vehicles base registered in
22 Arkansas tend to make much more extensive use of the
23 State's highways than non-Arkansas vehicles, the free
24 ride given by Arkansas for operations in excess of 3,500
25 miles resulted, as both courts below found, in a

1 substantially lower tax cost per mile for Arkansas than
2 for non-Arkansas truckers.

3 In fact, most members of the petitioner class
4 paid the five cent a mile option, and the average cost
5 for the in-state vehicle was one cent per mile.

6 Now, before this HUE tax even went into
7 effect, this suit was filed challenging the validity of
8 the tax on various grounds, and on behalf of a subclass
9 consisting of non-Arkansas base registered truckers, a
10 challenge was made under the commerce clause to the HUE
11 flat tax on precisely the grounds ultimately upheld by
12 this Court in the Scheiner case some four and a half
13 years later.

14 Now, this extended effort by interstate
15 truckers to rid themselves of the discriminatory HUE tax
16 -- I think it is important to appreciate what we went
17 through during this period. We began with an effort to
18 have the tax proceeds placed in escrow rather than
19 deposited in the State treasury, to facilitate refunds
20 in the event that the tax was struck down. That was
21 rejected.

22 We went through the lower Arkansas courts and
23 the Arkansas Supreme Court, and they upheld the validity
24 of the tax under the commerce clause. The case came up
25 here. Eventually, after the Scheiner decision, it was

1 remanded.

2 After it was remanded, the State continued to
3 collect the tax, doing everything in its power to delay
4 the inevitable decision holding it un-Constitutional
5 under the principles of Scheiner.

6 As a result of these efforts, we came back to
7 Justice Blackmon, a circuit justice, seeking the
8 imposition of an escrow to stop the bleeding, basically,
9 and it was granted, and the funds from August 14, 1987
10 on were placed in escrow.

11 This, I think, is what produced legislation in
12 Arkansas in October of 1987 repealing the HUE tax and
13 replacing it with a tax of 2.5 cents per mile, but not
14 flat -- it would be paid by everybody.

15 The Arkansas Supreme Court actually did not
16 get around to invalidating the HUE tax in this case
17 until March of 1988.

18 Now, in what some might consider a tacit
19 admission of weakness on the merits of the retroactivity
20 issues brought before this court for review, Arkansas
21 devotes nearly half of its brief to strikingly novel
22 and, we think, quite farfetched arguments designed to
23 avoid the merits, such is the contention that the 11th
24 Amendment bars the exercise of appellate jurisdiction
25 over a Federal question decided by a State court in any

1 case that could not have been brought within the
2 original jurisdiction of the Federal courts.

3 Now, unless there are questions on issues of
4 this sort, I would like to devote my limited time to the
5 merits of the retroactivity issue.

6 QUESTION: Well, it seems to me that the
7 question is not only retroactivity, but assuming that
8 the tax is retroactively stricken, what the remedy is.

9 MR. FREY: I do not believe that question is
10 the question for this Court at this time.

11 That is, this is a suit that was brought under
12 the illegal exactions provision of the Arkansas
13 Constitution, and I think that it has to be taken as
14 matters stand in this Court, although there is an
15 unresolved claim of sovereign immunity in the case, as
16 matters stand in this Court, in light of the decision of
17 the Arkansas Supreme Court, Arkansas will give refunds
18 if these taxes were exacted in violation of Federal law.

19 Whether they were exacted in violation of
20 Federal law depends, in Arkansas' view, on the
21 application of the Chevron test.

22 QUESTION: And is that a statutory refund
23 procedure?

24 MR. FREY: It happens to be Constitutional. It
25 is a provision under the Arkansas Constitution.

1 QUESTION: So you do not argue that there is
2 some Federal rule requiring a refund whenever a State
3 tax is struck down as un-Constitutional?

4 MR. FREY: We would argue that if we were
5 pressed to it in a subsequent stage of this case. We do
6 not argue that now.

7 That is, we do believe there is a Federal --

8 QUESTION: That is your bottom line -- you
9 think there is some flat Federal requirement that
10 whenever a State tax is struck down as un-Constitutional
11 that refunds are required?

12 MR. FREY: No, no.

13 First of all, it is not our bottom line,
14 because the question here is whether -- the question of
15 whether Scheiner is retroactive is a question of what
16 substantive rule of law governs our claim for refund of
17 taxes. I do not believe it is a question of our right
18 to a remedy.

19 Now, if you say that the substantive rule of
20 law that governs this case is not Aero Mayflower but
21 Scheiner, you remand the case back to the Arkansas
22 Supreme Court.

23 We believe that under Arkansas law, we would
24 be entitled to a remedy at that point.

25 Now, if the Arkansas courts were to say, we

1 are sorry, you are not entitled to any remedy, then they
2 would have to overcome an argument that we have made and
3 would make again that Federal law requires a refund.
4 When I say a refund, I do not mean necessarily 100
5 percent of the taxes, but some retroactive relief.

6 QUESTION: Well, did the Supreme Court of
7 Arkansas pretermite all other issues except whether or
8 not this was -- complied with the Chevron tax?

9 MR. FREY: It simply decided -- which was all
10 it needed to decide if it was correct -- that under the
11 Chevron test, Scheiner was not retroactive, and we agree
12 that if that ruling is correct, we lose. Our claim for
13 refunds is foreclosed.

14 QUESTION: Well, they did order a refund, did
15 they not?

16 MR. FREY: They did order a refund. In other
17 words, they decided in effect that the effective date of
18 the Scheiner decision was August 14.

19 QUESTION: So if there was more -- if it was
20 retroactive beyond that, there would be a refund?

21 MR. FREY: The significant thing about the
22 fact that they ordered a refund is that it shows that
23 there is an Arkansas refund remedy.

24 QUESTION: Exactly.

25 MR. FREY: So I do not believe that we have

1 the problem that you have posed at this stage of the
2 case. It is a fascinating problem, but I do not think
3 that you have to decide it on our case.

4 QUESTION: Let me --

5 QUESTION: It may be around in the next case.

6 MR. FREY: It may be. It may be.

7 QUESTION: Mr. Frey, is there any way in which
8 the truckers could have resisted payment, been sued, and
9 have the case come up that way?

10 MR. FREY: Well, there are cases -- you have
11 pending on your docket the Ashland Oil case, which was a
12 sales tax type of case, gross receipts tax case, where
13 the tax was not paid, and they were sued by the State.

14 QUESTION: But not this kind of a tax?

15 MR. FREY: In this kind of tax, that cannot be
16 done, because basically there would be criminal
17 penalties for attempting to operate in the State of
18 Arkansas without having paid the tax.

19 QUESTION: You cannot pay under protest?

20 MR. FREY: Arkansas would not allow payment
21 under protest. But we did file a suit -- I think that
22 it is quite clear under this Court's precedents, and I
23 do not think that Arkansas contests it, that the filing
24 of the suit before any payments of the tax were made
25 constitutes the equivalent of a protest for purposes of

1 Federal Constitutional law.

2 We did everything in our power to resist the
3 payment of the tax, including asking for an escrow.

4 QUESTION: Well, does the State court have any
5 latitude in determining how retroactivity is affected?
6 That is to say, if in a case it said all the tax was
7 passed on, and this particular taxpayer has not had any
8 loss, does that affect retroactivity so that State
9 issues are bound up with what you are going to begin
10 talking to us about?

11 MR. FREY: Well, I would say this. First of
12 all, the question of whether taxes were passed on, which
13 no claim of pass-on was made in our case, would figure
14 in for the Federal Chevron test. That is, it would
15 relate to the equities of making a refund.

16 Now, it might also relate to a separate, that
17 is, the State may have a separate rule. For example,
18 States sometimes have rules that if you did not bear the
19 legal incidence of the tax, say, in the case of a sales
20 tax, the person that remits the tax, the store, is just
21 a collector of the tax. Some States have rules that say
22 you cannot get a refund if the tax is invalid.

23 The question for this Court would be whether
24 that would be, I think, an adequate State ground for
25 denying a refund.

1 But I think it is clear from this Court's
2 decisions that where the State court decides a question
3 of Federal law is the basis for its decision, this court
4 clearly has jurisdiction to review it. Michigan against
5 Long Three Affiliated Tribes -- this goes back to
6 Standard Oil v. Johnson in 1942, or even further.

7 QUESTION: Are our cases clear that Chevron is
8 the appropriate test to apply for determining
9 retroactivity?

10 MR. FREY: We suggest -- everyone has thought
11 it. Most of the State amicus briefs in this case
12 suggest the Chevron test. The court has generally dealt
13 with questions of retroactivity under the Chevron test
14 in the civil area.

15 We think the Chevron test should be modified
16 in the case of Constitutional violations by the
17 Government in light of the principles that were set
18 forth in the Owen case.

19 We think that there is a different problem
20 presented when the Government violates Constitutional
21 rights and then seeks to avoid retroactive application.
22 On the other hand, we think the Chevron test does state,
23 in a general sense, the framework that you would look
24 at. We have not pressed our position so far as to say
25 that all decisions involving claims of Constitutional

1 violation have to be retroactive.

2 QUESTION: Well, the State says, I guess, that
3 we should apply the State rules on retroactivity, not a
4 Federal rule at all.

5 MR. FREY: I do not understand the State to be
6 arguing that in this case. If they are arguing that,
7 that is news to me.

8 Now, they have argued that the commerce clause
9 does not of its own force provide a cause of action or
10 provide a right to relief. We do not agree with that,
11 but my point again is that Arkansas law, as Justice
12 White pointed out, clearly provides a right to relief,
13 because we got it on the escrow monies.

14 So I do not -- I think this is all a
15 distraction, and not a problem, in this case.

16 Now, I think, given the limitations of time --
17 I have said a little bit about the first prong of the
18 Chevron test, which goes to the question of the extent
19 of justifiable reliance by the party seeking
20 non-retroactive application. Now, you have to look at
21 this case with the understanding that it is now -- we
22 now know, in light of the Scheiner decision, that the
23 State exacted from non-Arkansas truckers millions of
24 dollars of taxes, un-Constitutionally.

25 That is a fact that we know. The question we

1 are addressing in the retroactivity inquiry is whether
2 the rules under which this action was un-Constitutional
3 should not apply. The first prong of this retroactivity
4 inquiry asked how strong is the reliance interest of the
5 people who say do not apply the correct rule of law to
6 this case.

7 Now, I am willing to concede that before
8 Scheiner was decided, the outcome was not a sure thing.
9 I think Scheiner was a close case. It could have gone
10 either way. The thing that made it a close case was the
11 old Aero Mayflower precedents. I think that even
12 Justice O'Connor, in your dissent, that was the factor
13 that was critical in your concerns in that case.

14 I think that but for Aero Mayflower, there
15 would not have been any serious dispute under Complete
16 Auto and Commonwealth Edison about the
17 un-Constitutionality of the HUE tax.

18 Now, all I want to say about this kind of a
19 close case is that if you satisfy the first prong --the
20 first prong of Chevron is designed to establish the
21 general rule that most decisions are retroactive.
22 Non-retroactivity is the exception.

23 Now, if you say every case that is close
24 qualifies for treatment as a non-retroactive case, you
25 are basically saying that virtually every case the

1 Supreme Court of the United States decides is
2 presumptively or likely to be non-retroactive, where you
3 have to go through a Chevron analysis. I wonder whether
4 you want to walk down that road.

5 Now, let me turn to the second prong very
6 briefly, and there is wealth of things to cover here.
7 But it is a very important point that the State court
8 missed, and that the State misses in its brief, in
9 talking about the importance of the policies that
10 underlay the Schelner rule, and whether, in deciding the
11 retroactivity of Schelner, you would be furthering or
12 impeding those policies.

13 They say, well, there are no individual rights
14 under the commerce clause, they say, well, the problem
15 has been cured for the future, so what is the problem?

16 Now, what they are turning a blind eye to is
17 the institutional concerns that underlie the commerce
18 clause itself, which is the tremendous hydraulic
19 pressures on State legislators to enact parochial,
20 discriminatory legislation that favors local interests
21 at the expenses of out-of-State interests.

22 We would say that the commerce clause cases
23 are almost a paradigm of the case in which the second
24 prong of the Chevron test calls for full retroactivity.

25 Let me just say, I will not talk about the

1 equities, because my time is running out. I would just
2 like to say one word about the post-Scheiner taxes, and
3 reserve the balance of my time for rebuttal.

4 I do not understand. The State collected
5 substantial sums of money after Scheiner was decided
6 under a tax that was plainly un-Constitutional. It
7 makes no defense here --

8 QUESTION: Well, are you claiming that your
9 clients did not have to pay it, or should pay no tax to
10 Arkansas?

11 MR. FREY: No we are certainly -- they should
12 pay their fair share. What we are looking for is,
13 Arkansas was willing to let its own people operate their
14 trucks on the highways for basically one cent a mile.

15 QUESTION: But I mean, during this period of
16 time when you were running trucks on the Arkansas
17 highways do you concede that you are liable for some
18 sort of tax?

19 MR. FREY: Yes, certainly. Certainly.

20 The problem is that we should not be made to
21 pay the tax that should have been paid by the Arkansas
22 people, and that is the focus of our complaint. We are
23 not seeking refunds. We do not say Federal law requires
24 every penny of tax that we paid to be refunded. We say
25 Federal law requires a refund of the illegal portion,

1 the discriminatory portion.

2 I would like to reserve the balance of my time.

3 QUESTION: Very well.

4 We will hear now from you, Mr. Robertson, and
5 you are representing the Petitioner McKesson
6 Corporation, are you not?

7 ORAL ARGUMENT OF DAVID G. ROBERTSON, ESQ.,
8 ON BEHALF OF THE PETITIONER MCKESSON
9 CORPORATION

10 MR. ROBERTSON: Yes, we are.

11 Mr. Chief Justice, and may it please the
12 Court, in June, 1986, Petitioner McKesson decided to
13 challenge Florida's successive enactments of the
14 Alcoholic Beverage tax schemes that discriminated
15 against interstate commerce in favor of local interests.

16 McKesson's Constitutional claims in State
17 court requested relief both prospectively and
18 retroactively. For prospective relief, we asked the
19 State court to enjoin the State's continuing enforcement
20 of a discriminatory tax, and for retroactive relief, we
21 asked the State court to grant Florida's historic remedy
22 for a discriminatory, un-Constitutional tax, a Florida
23 tax refund.

24 McKesson challenged Florida's alcoholic
25 beverage tax scheme on commerce clause and other

1 Constitutional grounds. McKesson argued that the
2 Florida tax, both in purpose and in effect,
3 discriminated against interstate commerce in favor of
4 local interest.

5 McKesson specifically invoked Florida's
6 general tax refund scheme, specifically section 216.25.
7 McKesson argued that under this Court's decisions, as
8 well as the State statute, the appropriate remedy for
9 the extraction of un-Constitutional taxes was the
10 return, not of the entire tax, but only of the
11 discriminatory portion of the tax.

12 In February, 1988, a unanimous Florida Supreme
13 Court agreed with McKesson that the Florida tax scheme
14 discriminated against interstate commerce in violation
15 of the commerce clause. The Court recognized that
16 McKesson's disfavored products directly competed with
17 the local producers' favored products.

18 The court recognized that as a result of the
19 tax scheme, the State in effect had to use the courts --
20 stripped away from McKesson its natural economic
21 advantages, and thus the court concluded that the tax
22 scheme has disadvantaged McKesson, raising our relative
23 cost of doing business, and had advantaged McKesson's
24 favorite competitors.

25 Nevertheless, despite this Court's decisions

1 on Constitutional tax refunds, despite the Florida
2 court's own decisions, and despite those findings of
3 competitive injury, the State refused to refund any
4 portion of the un-Constitutional taxes. The Florida
5 court denied McKesson relief by constructing its own
6 retroactivity doctrine that totally collides with this
7 Court's retroactivity doctrine in Chevron.

8 QUESTION: And you take that position that the
9 rule that has to be applied is the Chevron rule?

10 MR. ROBERTSON: We take the position that when
11 a State court invokes the Federal Constitution to
12 declare a State tax un-Constitutional, the court should
13 use the Chevron standard to decide whether that finding
14 should be applied retroactively or only prospectively.

15 QUESTION: How in that Chevron test does the
16 action, the continuing action of the Florida legislative
17 process fit into the test?

18 MR. ROBERTSON: We brought Florida's
19 continuing history of enacting un-Constitutional
20 statutes to the attention of the Florida courts for two
21 reasons, vis a vis Chevron.

22 First, under our commerce clause claim, we
23 wanted the court to see what the legislature's purpose
24 was in enacting the particular statutes. Secondly, vis a
25 vis Chevron, we wanted to demonstrate to the court that

1 in applying a test for retroactivity, the court should
2 pay close attention to whether our basic commerce clause
3 interests in the national common market would be
4 frustrated or advanced by a particular remedial measure.

5 McKesson, indeed, submits that Chevron's first
6 prong should be a threshold test. Chevron's first
7 prong, of course, requires a court to demonstrate that
8 it has established a new rule of law. And the reasoning
9 of Chevron strongly suggests that that initial
10 requirement should be a threshold requirement.

11 Chevron, of course, cites to Hanover Shoe, and
12 Hanover Shoe says that a court has absolutely no reason
13 to consider the theory of prospectivity unless the court
14 has overruled clearly declared judicial precedent, and
15 therefore needs to consider whether parties who
16 reasonably relied upon a law may be injured by
17 retroactive application of the new law.

18 QUESTION: If this is a State cause of action,
19 in the other case there is no dispute that you are
20 proceeding under Chevron, and the dispute is just how
21 Chevron applies.

22 Here, I gather, there is a dispute as to
23 whether to use Chevron or a State rule. Why should you
24 not use a State rule, if it is a State cause of action?

25 In other words, do you not have to establish,

1 in this case, unlike the other one, that it is a Federal
2 right that you are asserting?

3 MR. ROBERTSON: Well, in this particular case,
4 we based our claim upon the commerce clause, and we said
5 to the Florida Supreme Court that we were entitled, as a
6 matter of Federal as well as State law, to a refund of
7 the discriminatory taxes. And the Florida Supreme
8 Court, in its opinion, notes that fact.

9 QUESTION: Do you agree that that is essential
10 to your case, that you have to establish that you have a
11 Federal right to the recovery of the money?

12 MR. ROBERTSON: We do not believe that that is
13 essential, because in this particular case --

14 QUESTION: Well, why is it not, if it is a
15 State right to the recovery of the money, cannot the
16 State condition that right on whatever it wants,
17 including using its own retroactivity?

18 MR. ROBERTSON: In this particular case, the
19 only basis for the State Supreme Court's refusing to
20 grant a refund was its application of a retroactivity
21 standard. All we are saying in this particular case is
22 that when a State court invokes the Federal Constitution
23 to declare a statute un-Constitutional, along with it
24 comes the obligation to use the Chevron standard to
25 determine whether that finding should be retroactive.

1 Other than that, we had complied with every
2 facet of the State procedures for refunds.

3 QUESTION: Well, why cannot I say that it is
4 Federal -- it is un-Constitutional under Federal law,
5 and therefore in the future you cannot do it?

6 Now, I am willing, although I am not bound to
7 do so -- as a State, I am willing to provide monetary
8 compensation for past violations. But for that purpose,
9 I am going to have my own retroactivity rules. I do not
10 know why, just because you are deciding the unlawfulness
11 under Federal law, you also must decide the compensation
12 under Federal law.

13 MR. ROBERTSON: Our contention is that
14 historically this Court, not only in criminal cases such
15 as Chapman, but also in civil cases, as recently as
16 Allegheny Pittsburgh, has not allowed the State court to
17 dictate the remedy for a Constitutional violation vis a
18 vis a tax statute.

19 Rather, the Court has required the State to
20 follow Federal equitable standards in determining
21 whether the particular decision should be applied
22 retroactively or prospectively.

23 Indeed, right now --

24 QUESTION: Even though it is a State remedy,
25 and not a Federal claim?

1 MR. ROBERTSON: In a sense, to go back to the
2 words of Bacchus, the Federal claim and the State remedy
3 are intertwined, and in each particular case, the State
4 court has to be sure that enforcing the Federal remedy
5 it does not allow the State remedy procedure to collide
6 with the Federal Constitutional right and its attendant
7 equitable doctrine.

8 QUESTION: Well, suppose we have a State
9 remedial scheme that is evenhandedly applied, and it
10 operates as a matter of State law to deny you recovery
11 in this case?

12 MR. ROBERTSON: We think as the Court decided
13 in the old case of Sunburst that a State court has an
14 absolute right to use any retroactivity standard it
15 wants, as long as it is exclusively deciding an issue of
16 State law.

17 But once a State court begins to use the
18 Federal Constitution to enforce Federal Constitutional
19 principles, then the Court should look to the Federal
20 standard.

21 Otherwise, we will end up with very different
22 State enforcing very different standards, and utter
23 confusion in terms of whether parties who pay taxes
24 inter- and intra-State are deserving of a refund.

25 But I think what is critical --

1 QUESTION: So you have an interest other than
2 simply being treated equally with Florida taxpayers
3 under Florida law?

4 MR. ROBERTSON: Absolutely not. We are only
5 looking for equal treatment.

6 We are only looking for the State to tax us at
7 exactly the same rate as it taxed our local competitors,
8 and that is why we are not asking for a return of the
9 entire tax. Far from it. We are simply saying that
10 since, in this particular case, Florida cannot make any
11 type of argument whatsoever -- and the Florida has not,
12 on appeal, tried to do it -- that their decision
13 constituted a new principle of law.

14 In this particular case, given that Chevron's
15 first prong should be a threshold prong, following our
16 demonstration that their decision, which relied on old
17 decisions like Hunt and Lewis and Pike and Bacchus --
18 you know, this was not a situation where they were
19 confronting a new situation. They were applying this
20 Court's oldest commerce clause cases, and in doing that,
21 they said the Florida legislature once again has
22 overstepped and tried to extract un-Constitutional taxes.

23 All we are saying is that since the court did
24 not have to create a new principle of law to reach that
25 finding, they cannot invoke any type of retroactivity

1 doctrine. They fail to meet Chevron's first prong, and
2 therefore in this particular situation a refund of the
3 un-Constitutional taxes is appropriate.

4 QUESTION: What if it were proven that -- what
5 if the Court just said, well, you may be entitled to a
6 refund if you have really been hurt, but we hold that
7 you have passed on every dollar worth of this tax?

8 MR. ROBERTSON: First, under Chevron's three
9 prongs, a court would have to get by that initial prong,
10 because after all, retroactivity is a word --

11 QUESTION: But you say that you are only
12 asking for the return of a -- you only want to be
13 treated fairly.

14 MR. ROBERTSON: Exactly.

15 QUESTION: And you want to -- but if you have
16 never been hurt by this tax, if all you have done is
17 passed it on to your customers, why should you get a
18 refund?

19 MR. ROBERTSON: Let me speak to that.

20 This is not a case like Bacchus. McKesson in
21 this particular case suffered a significant economic
22 injury, and the Florida Supreme Court so found.
23 McKesson's products were competing across a broad
24 spectrum, with the local producers' products, and
25 McKesson, in that competitive marketplace, suffered --

1 QUESTION: You want your refund, and to get a
2 refund you are going to have to prove competitive
3 injury, and recover only what the competitive injury was?

4 MR. ROBERTSON: We have two answers to that.

5 The first is, under Chevron's first prong, the
6 court should not reach that, because Florida, after all,
7 cannot prove that it justifiably relied upon those
8 un-Constitutional statutes.

9 But the second answer is -- and this draws
10 back to some of the Court's decisions in the anti-trust
11 area -- it does not make sense, as it did not make sense
12 in Hanover Shoe, to allow the perpetrator, the State
13 extracting un-Constitutional taxes, or the anti-trust
14 violator -- to force the victim to prove the amount of
15 the disruption of the economic market.

16 QUESTION: But you are saying in effect that
17 you are getting damages for competitive injury, which
18 could be totally different than the amount of the tax
19 paid, I would think.

20 MR. ROBERTSON: That is correct. We -- it
21 could be totally different, and we are not asking for
22 damages.

23 We are only asking for a tax refund.

24 QUESTION: But you are saying that you
25 --because you have competitive injury, you are entitled

1 to the tax refund, even though you may have completely
2 passed the tax along?

3 MR. ROBERTSON: We are saying that in this
4 case, as in Bacchus, we had to demonstrate our standing,
5 and to do that, we established to the satisfaction of
6 the Florida court that we had suffered a significant
7 economic injury.

8 We are saying that once we have established
9 that, it does not make sense for the State to turn
10 around and say, "You passed it on."

11 I mean, this is a situation where the
12 legislature was intending to injure us.

13 QUESTION: I think that you have answered the
14 question.

15 Thank you, Mr. Robertson.

16 We will hear now from you, Mr. Farr. Mr.
17 Farr, you are representing the State of Florida, right?

18 MR. FARR: That is correct, Mr. Chief Justice.

19 ORAL ARGUMENT OF H. BARTOW FARR III, ESQ.

20 ON BEHALF OF THE RESPONDENTS DIVISION OF
21 ALCOHOLIC BEVERAGES AND TOBACCO,
22 DEPARTMENT
23 BUSINESS REGULATION, STATE OF FLORIDA, ET
24 AL

25 MR. FARR: Mr. Chief Justice, and may it

1 please the Court, I think the best way to see why
2 McKesson is not entitled to a tax refund in this case is
3 to look at the Injunction issued by the State courts,
4 and to ask what tax McKesson would have paid if that
5 Injunction had been issued the day before the tax took
6 effect.

7 As the Court is aware, the Injunction
8 effectively denied tax preferences which had been in the
9 statute for sales of a small group of alcoholic
10 beverages, striking the preferences from the statute. No
11 one questions that this was the right remedy, the right
12 way to make the statute Constitutional.

13 If that same Injunction had been issued on
14 June 30, 1985, which is the day before the effective
15 date of the 1985 statute, McKesson would not have paid
16 one penny less in taxes.

17 Given that fact, it was entirely reasonable
18 for the Florida State court to say that it was
19 inappropriate to force a refund that would have a severe
20 impact on the State treasury solely for the purpose of
21 giving a windfall to McKesson.

22 QUESTION: Florida producers were operating at
23 an advantage during that time, as compared to McKesson?

24 MR. FARR: That is correct, Mr. Chief Justice.

25 The rule that we are seeking here and

1 advancing here is a very narrow one. It is simply that
2 when a very minor exemption is part of a general taxing
3 statute and is struck down, that does not bring down the
4 entire taxing statute during the period that the
5 exemption was in effect.

6 To take an example from a case that this Court
7 decided just a few weeks ago, the Texas Monthly case,
8 the Court found that the tax exemption for sales of
9 religious publications in Texas violated the
10 establishment clause. Although the Court did not
11 directly address the issue of remedy in that case, the
12 plurality opinion indicated quite clearly its view that
13 Texas Monthly and other magazines of general circulation
14 would not be entitled to a tax refund if on remand the
15 State courts eliminated the exemption.

16 Indeed, any of those --

17 QUESTION: Now, suppose they did not, and they
18 just continued passing statutes which had tiny
19 variations from the first, but continued essentially an
20 unlawful exemption scheme in place?

21 MR. FARR: It is possible --

22 QUESTION: Which is what happened here.

23 MR. FARR: -- Mr. Justice Kennedy, at some
24 point you might get a situation where a refund was the
25 only possible remedy. But that --

1 QUESTION: Well, why is that point not here? I
2 mean, there certainly is evidence of an apparent pattern
3 of conduct by the State legislature in Florida whereby
4 the State court will find law un-Constitutional, or the
5 tax, and then the Court will apply it only
6 prospectively, and the legislature devises a new
7 variation every time one is struck down?

8 MR. FARR: Well, Justice O'Connor, let me say
9 a couple of things.

10 First of all, of course, as McKesson itself
11 points out, the Florida State courts in many situations
12 have given refunds of State taxes when they are struck
13 down on various grounds.

14 QUESTION: Well, but let us say that this is a
15 situation where they have not, and there is just this
16 pattern avoiding giving anything back. Should Chevron
17 be applied then, in those circumstances?

18 MR. FARR: I do not think Chevron is the right
19 analysis under any circumstances, Justice O'Connor. But
20 let me speak to the particular point about the so-called
21 rogue legislature -- the legislature that there is just
22 no control over.

23 First of all, I think that it is a fair
24 question even in that context whether the penalty of
25 what amounts to several hundreds of millions of dollars

1 of taxes is an appropriate penalty for a tax exemption
2 that may confer \$5 million or \$10 million worth of tax
3 benefits.

4 But the second point that I would make is that
5 the Florida courts have made very clear that they will
6 use their injunctive power not just way after the fact,
7 but in order to keep an un-Constitutional scheme from
8 going forward very shortly after it has been enacted.

9 If you look at the history in this particular
10 case, when McKesson filed suit, an injunction was issued
11 that was not stayed on appeal. But when the 1988
12 statute was challenged, the court determined that that
13 was also an un-Constitutional statute, refused to stay
14 the injunction on appeal, and ever since the date of
15 that injunction, that statute has been -- any
16 discrepancies in that statute have been enjoined.

17 So, the notion that it is necessary to have
18 what is effectively a huge damages remedy in order to
19 control the legislature simply does not fit with what
20 the Florida courts have done in this situation.

21 QUESTION: You assume that you are talking
22 about hundreds of millions of dollars when as I
23 understand it, the request is only not to refund all the
24 taxes that were paid, but only to be made whole, only to
25 be put in an equal position?

1 MR. FARR: Well, to begin with, let me say
2 that the rule that McKesson is asking for is by no means
3 limited that way.

4 If the exemption, for example, had been an
5 exemption whereby the sales tax on distribution of local
6 products was no tax at all -- was a complete exemption
7 -- then they would say, under their logic, that you are
8 entitled to all of your taxes back.

9 But in this particular case, their refund
10 request was for \$85 million, just to start with, and
11 they were just one of a great number, forty or fifty,
12 distributors of interstate products. Now, even if some
13 portion of that would not be returned because it would
14 be covered by the sliding scale taxes, that still would
15 be an enormous amount of money, particularly if spread
16 to all distributors.

17 Again, you are looking at the particular
18 nature of the violation here. This is a very small
19 exemption in a broad, general tax.

20 And if I could return to Texas Monthly for a
21 second, in the dissent in Texas Monthly, Justice Scalia
22 points out that there are numerous State taxes which
23 provide an exemption from ad valorem property taxes for
24 the homes of clergymen.

25 Now, as I understand McKesson's rule, if those

1 exemptions are now un-Constitutional, at least as of
2 February 22, 1989, the entire ad valorem taxes in all of
3 those taxes are a nullity, and that everyone who is not
4 a clergyman and pays a residential property tax could
5 come into court and say I want all of my tax back.

6 What effectively you are doing here is not
7 creating a remedy that is tailored to the violation. It
8 is really creating an incentive for lawyers just to work
9 through the tax books to try and find an exemption, no
10 matter how minor, and then use that exemption, if it is
11 improper, to create a tax shelter for years of back
12 taxes.

13 QUESTION: Of course, that is such a horrible
14 example, perhaps, because it is not unlawful to provide
15 the exemption for the clergymen. I mean, if you pick
16 some law that all the States have thought to be okay,
17 and that maybe is okay -- I was dissenting, after all,
18 in Texas Monthly --

19 MR. FARR: I understand.

20 QUESTION: -- you can get some very horrible
21 results.

22 MR. FARR: But, Justice Scalia --

23 QUESTION: That either shows that you are
24 right, or that Texas Monthly was wrong. But -- or that
25 Texas Monthly should not be extended to the logical

1 conclusion that the clergymen exemptions are wrong.

2 MR. FARR: Well, on the merits, of course, the
3 question would be -- It is certainly an open question as
4 to whether that is un-Constitutional. But just assume
5 for a moment the ridiculousness of the remedy does not
6 arise because of the fact that it would be ridiculous to
7 say that the difference is un-Constitutional.

8 The absurdity arises from the fact that the
9 remedy is just wholly disproportionate to the
10 un-Constitutionality, even if it exists.

11 QUESTION: Even in one State.

12 MR. FARR: Even in one State.

13 QUESTION: Well, suppose we were to agree with
14 the Petitioner that in view of Florida's action here,
15 that the court -- we should not just abstain from
16 deciding the issue, as the court did in *Bacchus* and
17 *Tyler Pipe* and *Scheiner*, but that some rule ought to
18 apply. What should that rule be?

19 MR. FARR: I think the question that the court
20 ought to ask is under general remedial principles, what
21 is the proper remedy? Did the Florida State courts
22 determine that this was an appropriate remedy, or not?

23 That is normally what happens in the case of a
24 Constitutional violation. Lower courts determine what
25 the remedy is, and this Court will review it --

1 QUESTION: That is within the Federal system,
2 really. We do not extent that principle to State courts.

3 MR. FARR: Well, to some extent you do, Mr.
4 Chief Justice. I mean, there are State courts that
5 determine remedies for a Constitutional violation, and
6 this Court has said, particularly in a situation like
7 Allegheny Pittsburgh, essentially there is no remedy at
8 all in a situation where you are asking somebody to go
9 out and raise every other person's allotment one by one
10 by some sort of administrative proceeding.

11 The Court has been willing to go that far in
12 terms of remedy. But I think that even if this court
13 finds a role in terms of reviewing this remedy that
14 considerable deference should be given to the State
15 courts which are obviously closer to the situation in
16 determining whether they have so misjudged the proper
17 remedy and adequate remedy in this case that their
18 judgement should be overridden. And as I submit, that is
19 a long way from what is actually happening in this case.

20 QUESTION: And you think Chevron is not the
21 proper stand?

22 MR. FARR: I think Chevron is not, Your Honor.
23 First of all, this Court has never said that
24 Chevron is a general, all-purpose rule for
25 Constitutional remedies.

1 Chevron, it seems to me, applies in a
2 particular situation when the court has established the
3 Constitutional rule, and the remedy is known, for
4 example, If there is a Constitutional violation in the
5 criminal area, which I understand is not specifically
6 governed by Chevron. The remedy is almost certainly a
7 new trial in most cases, or new sentencing. There is no
8 dispute about the remedy itself.

9 The question is, once the violation and the
10 remedy are known, which group of people gets the benefit
11 of the remedy?

12 QUESTION: Well, apparently both parties in
13 the other case do not take issue with the application of
14 Chevron.

15 MR. FARR: Well, the Arkansas Supreme Court in
16 the other case did apply Chevron. In this particular
17 case, the Florida Supreme Court did not apply Chevron.
18 It looked to Lemon v. Kurtzman, which is a decision that
19 weighs heavily upon equitable principles, and a State
20 case called Gulesian, which makes no mention of Chevron
21 and is based solely on trying to balance the equities
22 between hardship to the treasury and the possible
23 benefits to the individual taxpayers.

24 I think that is the course that they quite
25 clearly followed here in determining that to go back and

1 to say to McKesson, "Even though you paid exactly the
2 same tax, that you should have paid, and the State can
3 Constitutionally require you to pay in the future, and
4 is requiring you to pay in the future, we are not going
5 to go back and say that you are going to get \$85 million
6 or even \$50 million of a windfall just because of these
7 minor exemptions."

8 QUESTION: Cannot a State enjoin the
9 collection of a tax prospectively if it sees this
10 differential?

11 MR. FARR: Oh, absolutely, Your Honor.

12 QUESTION: Well, does that not give the same
13 windfall?

14 MR. FARR: No, Your Honor, it does not.

15 That is exactly the point that I wanted to
16 begin with.

17 If this tax had been enjoined the day before
18 it took effect at all, McKesson would not have saved a
19 penny. They would have paid exactly the same amount of
20 tax.

21 The only difference is that a handful of sales
22 which were subject to a lower tax would have been raised
23 to a higher tax.

24 QUESTION: If that is how the injunction read.

25 MR. FARR: If that is how the injunction

1 read. But that is in fact the injunction that was
2 issued in this case, and indeed with regard to the 1988
3 statute, the statute was enjoined, really, just a matter
4 of a couple of months after it took effect. That is
5 again exactly what happened.

6 It raised the taxes -- it equalized the taxes
7 for both categories of taxpayers.

8 QUESTION: Has anybody ever made a due process
9 -- your solution seemed very nice, assuming that it is
10 proper for the Florida courts to do that, to say to the
11 people who had the lower tax that we are going to
12 determine, almost as as a legislature, that we are going
13 to raise your tax.

14 Has there ever been a due process challenge to
15 that? I mean, the legislature voted to tax me so much,
16 and here is a court coming in and saying, "No, we are
17 going to tax you more, because if we do not tax you
18 more, we are going to have to give back a lot of money
19 to these other people."

20 MR. FARR: Well, I think there are two points,
21 Justice Scalia.

22 First of all, I think that it generally is
23 within the power of the State courts -- certainly the
24 Federal courts do it with regard to Federal
25 legislation. They extend benefits and determine how --

1 QUESTION: I am not talking about extending
2 the benefits. I am talking about extending the
3 detriment. I am talking about making you pay tax which
4 the legislature never voted.

5 MR. FARR: Well, in this particular case the
6 Florida legislature -- I think that you do not have to
7 worry about that, because the Florida legislature
8 effectively ratified just what the Florida Supreme Court
9 did in this case.

10 QUESTION: Well, we have to worry about it for
11 the purposes of the validity of your theory that there
12 is no problem. Everything is okay. You are just
13 looking at the matter as though it had all come up at
14 the time of the injunction, that what the Florida court
15 would have done would have produced the same result that
16 you are now urging upon us. I am not sure that they
17 could have done that.

18 MR. FARR: Well, Your Honor, first of all, I
19 am not sure what McKesson's ground is to gripe about
20 that.

21 I mean, if McKesson is going to say that it is
22 possible that the State courts could not have issued an
23 injunction dealing with a State law, passed by the State
24 legislature, conforming that to the Constitution, which
25 would have raised somebody else's taxes, and because

1 they might not have been able to do that, we would like
2 to walk away with \$85 million or \$60 million in tax
3 refunds seems to me a burden that they are not able to
4 carry.

5 I was going to mention the 11th Amendment, but
6 I have a feeling that in the very brief time remaining
7 that I am not going to be able to say much more than
8 that nobody disagrees with the two basic premises of our
9 argument, which I will not even be allowed to state.

10 Thank you.

11 (Laughter)

12 QUESTION: You are correct.

13 Mr. Randolph? You are representing Arkansas.

14 MR. RANDOLPH: Yes, Mr. Chief Justice.

15 ORAL ARGUMENT OF A. RAYMOND RANDOLPH, ESQ.

16 ON BEHALF OF THE RESPONDENTS, MAURICE
17 SMITH,

18 DIRECTOR, ARKANSAS HIGHWAY AND
19 TRANSPORTATION

20 DEPARTMENT, ET AL.

21 MR. RANDOLPH: May it please the Court, I
22 think that no matter how one cuts it or views it, the
23 question here today in both cases is whether there is a
24 Federal right to a particular remedy, the remedy being
25 tax refunds. And I notice that my friend Mr. Frey could

1 not avoid saying that right before he sat down in this
2 case.

3 He has told, I think, only half the story with
4 respect to what happened in Arkansas here. Two grounds
5 were raised by the trucking association and the other
6 petitioners when this case went back to the Arkansas
7 Supreme Court on remand.

8 They said first, we are entitled to refunds
9 under State law. That is in their opening brief and in
10 their reply brief in the Arkansas court.

11 They said secondly, even if we are not
12 entitled to refunds under State law, the Federal
13 Constitution requires that we get refunds. They said
14 also that the only relevance that they could see with
15 respect to the division of refunds between before
16 Justice Blackmon's order in August and after Justice
17 Blackmon's order in August was State sovereign immunity,
18 because the State sovereign immunity in Arkansas runs
19 like this.

20 If the money has been deposited into the
21 treasury of the State, the State is immune from suit. A
22 suit cannot be brought against the State to recover
23 money out of the treasury. It is almost like *Edelman v.*
24 *Jordan*.

25 However, if there is an escrow account set up,

1 then the State will refund money because the sovereign
2 immunity of the State does not attach. That is why, when
3 petitioners, and Mr. Frey mentioned this, went into
4 State court for the first time on this case in 1983,
5 they sought a preliminary injunction.

6 What kind of preliminary injunction did they
7 seek? They sought an escrow order. And they said, and
8 we quoted in their preliminary injunction brief -- I
9 think it is on page, or footnote four of our brief, but
10 let me read it from the record and what they told the
11 Arkansas courts. And this is on page 234.

12 The court well knows the rules of Arkansas, of
13 the Arkansas Supreme Court concerning tax monies paid
14 voluntarily and deposited in the treasury of the State
15 cannot be recovered except under cumbersome claims
16 commission procedures and a special appropriation by the
17 legislature.

18 Now, the point of all this is as follows. In
19 the Arkansas Supreme Court, two claims were raised. We
20 are entitled to a refund under State law, and we are
21 entitled to a refund under the Federal Constitution.

22 The petitioners in this case did not get a
23 refund. Therefore, it follows necessarily that the
24 Arkansas court rejected both of those arguments.

25 As I said, the question, no matter how one

1 looks at it in this case, is whether there is some, to
2 quote Mr. Frey, Federal right to a refund.

3 QUESTION: On what basis did they get a refund
4 after the date of Justice Blackmon's order?

5 MR. RANDOLPH: Under State law, because it was
6 in, the money was in escrow, and there is no sovereign
7 immunity --

8 QUESTION: I know. The money is in escrow,
9 but you have to have some right to it.

10 MR. RANDOLPH: There is an illegal exaction
11 statute, and the court --

12 QUESTION: There is a State law remedy?

13 MR. RANDOLPH: There is a Constitutional --

14 QUESTION: For a refund?

15 MR. RANDOLPH: There is a Constitutional
16 provision that is set against, the State cannot be sued
17 in its own courts, and that Constitutional provision
18 gives way when the money is in an escrow account.

19 There is a case from the 1940s, I believe,
20 called Crossett Lumber Company. We cited it on page 4
21 of our brief, or in footnote 4, that explains all that.

22 QUESTION: Do we know whether the money they
23 did get was granted pursuant to a State right or a
24 Federal right? I guess that we just do not know. We
25 just know that the State sovereign immunity was

1 eliminated for that, but we do not know whether the
2 right was a State or Federal one. There is no --

3 MR. RANDOLPH: You cannot tell in the face of
4 the opinion or the judgement. But for what it is worth,
5 the petitioners in this case filed a petition for
6 rehearing in the Arkansas Supreme Court, claiming that
7 sovereign immunity had been decided, and that the court
8 had decided sovereign immunity incorrectly and should
9 not have prevented them from getting refunds prior to
10 Justice Blackmon's escrow order.

11 But, regardless, this Court is sitting to
12 decide Federal questions, and the Federal question
13 presented in our case is, do they have a right to a
14 refund?

15 Now, they argue on the Chevron basis, and
16 claim, I suppose, that that is not really a claim under
17 Federal law for a refund, although the argument in favor
18 of retroactivity is, we are entitled to a refund.

19 That is why Chevron should be retroactive. And
20 I think we just keep going around in circles. The
21 question here is, I think, essentially, does the
22 Constitution, does the commerce clause, should it be
23 enforced by the court not only by granting injunctive
24 relief but also by giving retroactive monetary awards?
25 That is the question.

1 And our brief addresses that question, and
2 points out a number of factors here. And I would like
3 to go into them in the context of the facts of this
4 particular case, which I need to address because I think
5 there has been some misunderstanding about what we have,
6 what is involved exactly here.

7 The tax that is concerned in the Arkansas case
8 applied only to the heaviest trucks in the industry.
9 Those trucks weigh more than 36 tons -- up to 40 tons.

10 All the plaintiffs in this case, and all of
11 the petitioners here, are interstate carriers. They are
12 not intrastate carriers. Now, we heard about a test
13 that said that truckers base-registered in Arkansas pay
14 three times less than truckers based elsewhere. That is
15 not a test that has anything to do with discrimination
16 against interstate commerce, because it is a test that
17 takes a group of interstate truckers, and compares them
18 to another group of interstate truckers.

19 There is, in six years of litigation here,
20 there has never been one intra-, wholly intrastate truck
21 identified that is hauling 40 tons back and forth from
22 Fort Smith to Little Rock, or wherever, in Arkansas.
23 These are the jumbos of the industry, and to ask the
24 question how many intrastate trucks there are involved
25 in this case is to ask why do we not use the Queen Mary

1 as the Staten Island Ferry.

2 QUESTION: What is this argument addressed to?

3 MR. RANDOLPH: The remedy that they are
4 seeking is not a remedy to put Interstate commerce on a
5 plane of equality with Intrastate commerce, because that
6 remedy does not have anything to do with it.

7 More than that, you will notice in the brief
8 here that the petitioners never identify who they are --
9 very odd in a brief. But we never know who the
10 plaintiffs are, who the petitioners are.

11 The reason for that, I think, is that when
12 this case began, two Arkansas based truckers, Jones, for
13 example, and Cawood, who are named petitioners here,
14 were base-registered in Arkansas.

15 A couple years later, as Exhibit 3 in the
16 State Supreme Court shows, they just registered and got
17 their license plates from other States. Now they are in
18 the out of State class, because truckers can base
19 register wherever they have a telephone, basically. It
20 has nothing to do with Intra versus interstate commerce,
21 and it is not a question of residency or favoring local
22 commerce.

23 So that is the way this case shapes up here.
24 And what we have got -- I notice there is an analogy of
25 football, a football analogy, that the petitioners use

1 here. They talk about the University of Arkansas, and
2 people being charged three times as much to go to see
3 the game, and it is not an answer to say, well, even
4 though they were charged three times as much, take a
5 look at what happened. They saw the game. That does
6 not mean they should not get a refund.

7 This case here is before the court as a case
8 where the entire stadium is filled with interstate
9 truckers, where they have gone into Arkansas, into the
10 stadium, to make money, they made --

11 QUESTION: Mr. Randolph, can I interrupt with
12 a question?

13 MR. RANDOLPH: Yes.

14 QUESTION: At this stage of the litigation,
15 you do not challenge the -- you do not defend the
16 Constitutionality of this scheme that was in place, do
17 you?

18 MR. RANDOLPH: I do not.

19 QUESTION: So there is a class that suffered,
20 and a class that benefited?

21 MR. RANDOLPH: Well, I do not think this class
22 suffered, and that is what I am about to --

23 QUESTION: Well, then why was the statute
24 un-Constitutional?

25 MR. RANDOLPH: Because of the internal

1 consistency test of Scheiner. If every other State had
2 passed a tax like this on the heaviest trucks, then
3 interstate commerce would have been deterred, because
4 you would want to stay within the State and not go.

5 QUESTION: But then under your view, it seems
6 to me that they should not even enjoin the further
7 collection of the tax, if there are not some victims of
8 this discrimination out there. Maybe I misunderstand
9 your argument.

10 MR. RANDOLPH: Yes, I think --

11 QUESTION: But that seems to be where it is
12 leading.

13 MR. RANDOLPH: We have to be careful -- there
14 is a pejorative attached to "victim of discrimination."
15 I mean, it is clear that we do not have a 14th
16 Amendment, equal protection or due process here.

17 The Court itself said in Scheiner that
18 Congress could have done this, and I take it that means
19 that Congress would not be violating the 14th Amendment
20 of equal protection.

21 What we are talking about here is truckers who
22 were allowed to come into the State for the first time.
23 They were just charged under the wrong formula. They
24 made \$150 million a year. The roads of Arkansas
25 suffered to the tune of \$53 million a year, and the

1 total taxes collected were only \$26 million.

2 There was a subsidy there, even under the old
3 scheme, and what the petitioners are asking for is to be
4 subsidized even more. The amount of the tax they paid
5 in total was certainly fair. It was far less than the
6 damage they were causing to the highways of Arkansas.

7 QUESTION: Well, if that though is a
8 reflection on the Arkansas taxing authorities --perhaps
9 more could have been exacted if more had been exacted
10 from Arkansas truckers too.

11 MR. RANDOLPH: That is true.

12 But this leads me --

13 QUESTION: Do you think they would have been
14 -- do you think that they would have been entitled to a
15 refund back to the date of Schelner if instead of
16 remanding, we had summarily reversed?

17 MR. RANDOLPH: If you had summarily reversed
18 instead of remanding and asking for reconsideration,
19 then I think the Arkansas tax would have been void at
20 that moment. What would have happened then is that the
21 legislature of Arkansas would have had to convene a
22 special session.

23 QUESTION: But if it continued to collect the
24 tax without an escrow, you would say no refund?

25 MR. RANDOLPH: I would say that they would be

1 violating an order of this Court or an order of the
2 Arkansas court, and I think that sanctions would be
3 appropriate.

4 QUESTION: Well, that was reversed, that is
5 all.

6 MR. RANDOLPH: Well, if you reverse, then the
7 Arkansas court, I think we have to presume, would follow
8 the law. They are bound to follow the law of this court
9 as well as any other court.

10 What you are asking is what if the Arkansas
11 court defied this court, and I think it is an
12 unrealistic hypothetical.

13 QUESTION: Well, the State taxing people just
14 continue to collect the tax.

15 MR. RANDOLPH: Well, if they did, they would
16 have been enjoined immediately, and the money would not
17 have been going into the treasury of Arkansas, because
18 it is not deposited until after a certain period of
19 time. And I think that it would not have been a
20 sovereign immunity problem then, Mr. Justice White.

21 QUESTION: Do you think it is irrelevant to
22 the refund question as to whether or not any fool should
23 have known after Schelner that this tax was
24 un-Constitutional?

25 MR. RANDOLPH: I do not think it was all -- I

1 think it is relevant, but I do not think it was all that
2 clear.

3 The petitioners rested on a factual basis in
4 their claim in the Arkansas courts. There were no
5 finding of fact in this case -- zero. The Arkansas
6 court denied relief on the basis of Aero Mayflower in
7 the record is stale. The figures that Mr. Frey refers
8 to are from 1983. We do not know what the situation was
9 in 1985.

10 QUESTION: We are not talking about back to
11 1983. I am just talking about back to the date of
12 Scheiner.

13 MR. RANDOLPH: I think that there was a
14 question about whether there was a factual basis for a
15 difference. But I would like to just conclude here, if
16 I may, with the question of the commerce clause.

17 This is a commerce clause violation. Does it
18 bring with it a right to receive retroactive monetary
19 awards in the form, in these cases, of taxes? And I say
20 no.

21 The commerce clause is only a grant of
22 authority to Congress, and whatever its negative
23 implications are, they do not carry with it a license to
24 the judiciary, the Federal judiciary, to create damage
25 remedies.

1 It is ironic in this case, now that Arkansas
2 has conformed its statute to the requirements of this
3 Court, that to require that kind of relief, petitioners
4 say, well, they can just raise their taxes on heavy
5 trucks. But to do that would put in Arkansas a barrier
6 -- the kind of barrier or a similar type of barrier --
7 that this court has talked about in Scheiner, to keep
8 other trucks out.

9 Arkansas has a 2.5 cent per mile tax now. It
10 raises \$26 million a year. Petitioners are asking for
11 \$122 million or so in refunds. That means that Arkansas
12 would have to raise its tax to collect that, if we are
13 talking about a fiscal year, to somewhere in the
14 neighborhood of 15, 16, 17 cents a mile --assuming that
15 any interstate trucker would be fool enough not to go
16 around Arkansas after that tax was in effect.

17 That creates a barrier. Is that the way the
18 commerce clause should be enforced to preserve Congress'
19 prerogative? If Congress had legislated Scheiner, they
20 would not have made that decision retroactive, and we
21 cited legislation in our brief to show that when
22 Congress does legislate with respect to State taxes, it
23 makes its decision prospectively only, prospective only.

24 Indeed, in the railroad area, when Congress
25 legislated and found certain State taxes to be a burden

1 on Interstate commerce, they gave the States three years
2 to adjust their State property system.

3 Now, here, all we are asking for is
4 prospective only, in terms of what the relief ought to
5 be. And it is not that these truckers suffered, because
6 they made \$115 million a year as a result of Arkansas'
7 decision to open its highways up to them.

8 QUESTION: Prospective to when? From what?

9 MR. RANDOLPH: From the date that the
10 sovereign immunity of the State did not apply, which
11 would be August 14, 1987.

12 And they have gotten that relief. And what we
13 are saying is --

14 QUESTION: That was the date of the Arkansas
15 court decision?

16 MR. RANDOLPH: That was the date of the escrow
17 order ordered by Justice Blackmon.

18 QUESTION: Thank you, Mr. Randolph.

19 Mr. Frey, you have two minutes remaining.

20 REBUTTAL ARGUMENT OF ANDREW L. FREY

21 ON BEHALF OF PETITIONER MCKESSON
22 CORPORATION

23 MR. FREY: Thank you, Mr. Chief Justice.

24 First of all, with respect to the question
25 that Justice O'Connor has asked several times, whether

1 Chevron is the test, I think that we should remember
2 that the norm is to apply the correct Federal rule of
3 law.

4 we are looking for when it is justifiable not
5 to apply correct Federal law. The Chevron test is an
6 effort by this court to explain those circumstances.

7 QUESTION: Do you say that retroactivity
8 should go clear back to 1983?

9 MR. FREY: We would say that it would go back
10 to 1983.

11 QUESTION: Because it was predictable, is that
12 it?

13 MR. FREY: When we say that when the statute
14 was enacted, it was --

15 QUESTION: Anybody should have known that it
16 was un-Constitutional?

17 MR. FREY: No. Anybody should have known that
18 it might be un-Constitutional, and we say that is enough
19 to satisfy the first prong.

20 QUESTION: Oh, I see.

21 MR. FREY: We do say it should go back to 1983.

22 QUESTION: Even though, even though there were
23 cases on the books that were against it that had not
24 been overruled?

25 MR. FREY: Even though, yes. We do, and we

1 have tried to explain in our brief.

2 QUESTION: Yes.

3 MR. FREY: Let me just say a couple of things.

4 State sovereign immunity is clearly not the
5 ground of the decision of the Arkansas Supreme Court.
6 You can read that opinion. I defy anybody to find a
7 word in there about sovereign immunity. They may rule
8 sovereign immunity if the case gets back to them.

9 I think Mr. Randolph has confused the cause of
10 action, which is a State cause of action for refund,
11 with the defense of sovereign immunity. It is clear
12 that we have a cause of action for a refund. What I
13 believe has not yet been passed upon by the Arkansas
14 Supreme Court, and I think its silence is significant,
15 because normally sovereign immunity would be decided as
16 the ground of decision if it existed -- sovereign
17 immunity.

18 They have held that the provision of the
19 Constitution does justify refunds, thus reach refunds
20 against counties and cities. They have held that the
21 provision does apply to the State. They have not yet
22 addressed the question of whether it applies to refunds
23 from the State.

24 Now, finally, Mr. Randolph says that the
25 commerce clause does not reach the discrimination

1 between Arkansas-based Interstate operators and
2 non-Arkansas Interstate operators. That is totally
3 inconsistent with Scheiner itself. That kind of
4 discrimination is clearly reached by the commerce clause.

5 The only people who maintain this claim, this
6 claim, are the non-Arkansas based people. Now, I think
7 it is also relevant, and we have answered, I think,
8 everything that Mr. Randolph has said today -- we have
9 addressed in our reply brief, so I will not try to cover
10 all those things, and I cannot in the time I have.

11 I think that it is clear that there is
12 discrimination both between our members and Arkansas
13 intrastate, and between our members and Arkansas
14 interstate.

15 Now, there is some talk about the effect of a
16 refund decision on Interstate commerce. Justice
17 O'Connor in your opinion in Scheiner itself, you
18 expressed a concern about the effect on the State budget
19 of refunds. And I think it is important to understand,
20 first of all, the refunds do not all have to be paid in
21 a year. We are not talking about raising a tax.

22 The refunds can be spread out. They can be
23 financed by bonds. Not a word was said about the
24 various ameliorative steps that can be taken.

25 Secondly, the State is a --

1 CHIEF JUSTICE KEHNQUIST: Mr. Frey, your time
2 has expired.

3 The case is submitted.

4 (Whereupon, at 2:23 o'clock p.m., the case in
5 the above-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.; and

No. 88-325 - AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., Petitioners V. MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.

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

BY alan friedman

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