OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JAMES B. BEAM DISTILLING COMPANY,

Petitioner v. GEORGIA, ET AL.

CASE NO: 89-680

PLACE: Washington, D.C.

DATE: October 30, 1990

PAGES: 1 thru 34

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES B. BEAM DISTILLING :

COMPANY, :

Petitioner :

v. : No. 89-680

GEORGIA, ET AL. :

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Washington, D.C.

Tuesday, October 30, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

MORTON SIEGEL, ESQ., Chicago, Illinois; on behalf of the Petitioner.

AMELIA W. BAKER, ESQ., Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Respondents.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
MORTON SIEGEL, ESQ.	
On behalf of the Petitioner	3
AMELIA W. BAKER, ESQ.	
On behalf of the Respondents	18
REBUTTAL ARGUMENT OF	
MORTON SIEGEL, ESQ.	
On behalf of the Petitioner	33

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PROCEEDINGS

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-680, James B. Beam Distilling Company v. Georgia.

Mr. Siegel.

ORAL ARGUMENT OF MORTON SIEGEL

ON BEHALF OF THE PETITIONER

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

The James B. Beam Distilling Company is an out-of-state producer of alcoholic beverages. Under the taxing scheme that was in effect at the time Beam was required to pay an excise tax at twice the rate as producers of alcoholic beverages within the State of Georgia. The Georgia Supreme Court agreed that that tax was unconstitutional because Beam was not a producer in State. The tax, they concluded, followed this Court's long line of Commerce Clause discriminatory taxing structures, and said that it was parochial, protectionist, and it only benefitted the in-state producers. Thus, the tax is similar to the tax that this Court reviewed in Bacchus.

Georgia in fact has a clear prescribed remedy under both the statute that the refund was filed under as

well as its own constitution. Beam was denied a refund because the Georgia Supreme Court refused to retroactively apply its decision. Therefore retroactivity of Bacchus is now before this Court.

QUESTION: What years were in question?

MR. SIEGEL: The first year of the refund was 1982 through 1984, so it covers a period prior to your decision in Bacchus.

QUESTION: Just out of curiosity, does Georgia require that in order to get a refund the tax has to be paid under protest?

MR. SIEGEL: Georgia had no predeprivation statute. The relief that they provide by statute is post remedy. The only way that Beam could do business, the only way that they could ship product into the State is if they paid this tax.

QUESTION: And they paid it.

MR. SIEGEL: They paid it, indeed, otherwise they would be precluded from being able to sell its fine products to the people of Georgia.

Georgia was wrong not to apply this tax retroactively. Based upon the different opinions of this Court last term in American Trucking Association, there are two alternative ways to reach this conclusion. Clearly Beam would prevail under either of these tests.

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Under the view of five of the Justices, all civil constitutional decisions should be applied retroactively. Thus, the tax was unconstitutional when Beam made its very first payment in 1982. The per se rule would therefore result in a reversing of the decision of the supreme court on retroactivity and the case should be remanded for purposes of considering the remedy.

If the Court was to adopt the view of the plurality in the American Trucking Association case, as it recognized the narrow exception that is set forth in the three-step test of Chevron, then it would be the burden of the State to show, as the Court explained in Ashland Oil, that first the decision of the Court was overruling a clear past precedent on which litigants may have relied, or it must be an issue of first impression which resolution was not clearly foreshadowed.

Bacchus may be subject to differing viewpoints, but Bacchus in terms of its analysis of the Twenty-first Amendment was not revolutionary. It was not shocking. Bacchus contributed to the continuing jurisprudence of the Commerce Clause --

QUESTION: Well, Mr. Siegel, do you think that's the test under the plurality view in -- in American Trucking Association, that it should be shocking or revolutionary in order to be denied retroactive effect?

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MR. SIEGEL: That is the effect of what I see coming out of the Ashland language, although it was per curia. The language that was implied in there is that some type of strike of lightning, so that perhaps there, as I pointed out, there may be differing viewpoints. I fully recognize that three Justices dissented in Bacchus. But I don't believe that when Bacchus was decided anyone was taken by surprise, if we go back and take a look at the Commerce Clause cases, or indeed if we look at any other direction where the Twenty-first Amendment was judged in view of other constitutional principles.

It is on that point, the test of the plurality, that I would like to continue with my remarks. The State would argue that Young's Market is the controlling case here. Young's Market was decided shortly after the country went through the noble experience of prohibition. It reflected, and I think there is some significance to this, the viewpoint that national control of the industry was not appropriate, that each State should be able to determine whether it or not it desires to permit the sale of alcoholic beverages or not to permit the sale of alcoholic beverages.

I would submit, however, that if I was a lawyer working for the State of Georgia, understanding full well that there may be some respectful disagreement on this

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point, and I was to look in the year 1982 at the cases that have been decided by this Court from 1934 -- from 1930 forward, I would clearly see the Hostetter v. Idlewild decision in 1964, where a majority of the Court took a look at the Twenty-first Amendment, looked back on the cases that had been decided in the 1930's, and acknowledged the fact that the States were totally unconfined when it restrains the importation of alcoholic beverages destined for use. But the Court then went on to say, to draw a conclusion from this line of cases, that the Twenty-first Amendment has been repealed is absurd, and they went on to say it is bizarre and incorrect.

At that point the Court stated that the Twenty-first Amendment, like other provisions in the Constitution, must be considered as it relates to the very factual setting, and it must take into account whatever competing constitutional provisions are applicable.

QUESTION: Well, Mr. Siegel, now, your client didn't bring any challenge here until after Bacchus was decided.

MR. SIEGEL: That is correct, Your Honor.

QUESTION: And yet you thought the law was clear before Bacchus, apparently. Why didn't you bring the challenge then?

MR. SIEGEL: The plaintiff in this case, Your

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Honor, James Beam Distilling Company, like other out-of-state distillers, engages in business in all 50 States. Every State has a pervasive system of regulation. The regulations vary from State to State. The Beam Distilling Company is not in the business of filing lawsuits. It rather would devote its resources to doing business, nor does it look kindly upon the prospect of filing suit against State Government, the very institution that regulates it.

However, when this Court spoke in 1984 in Bacchus, it reignited our interest in these discriminatory taxing statutes, and it was at that time that they sat down and decided that after all they were at a great disadvantage doing business in the State. And that is the reason why they elected to file the claim after the Bacchus decision came down.

So clearly the difference here is that we are dealing with a 3-year statutory period for a refund prior to Bacchus, as opposed to the case that you reviewed in McKesson. If that Georgia lawyer was to continue on into the 1970's it would take a look at Craig v. Boren, which applied the principles of the Fourteenth Amendment as it relates to the Twenty-first Amendment, and they concluded at that time that gender based discrimination could not be tolerated even under the Twenty-first Amendment.

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The case that I feel most clearly drives home the point that we may have differing viewpoints as to how the earlier 1930 cases were interpreted, I would contend first of all that the reasoning in those cases has been totally repudiated at this point. It may well be the opportunity for the Court to consider that point.

What I think is important about Midcal is that it looked back and it took a look at the historical development of this fascinating Twenty-first Amendment. It acknowledged that some of the decisions of the Court have dealt squarely with the express terms of section 2. It also acknowledged that in some instances it applied a much broader application in the interpretation of the amendment. But it made it clear that where the core powers of the Twenty-first Amendment -- importation, transportation, and what this Court has defined in Midcal as distribution -- when those core powers are not involved in a particular case the Federal competing interests, so long as there can be shown that there was a longstanding interest such as the -- a principle in favor of free and open competition that was the subject of the Midcal case, such as the Court's consistent declaration of not countenancing any type of discriminatory taxation --

QUESTION: All of this, I take it, is on -- you're still on the fact that that was a plurality opinion

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in the case last term?

MR. SIEGEL: That is correct. Our position --

QUESTION: And you are still on the first criterion?

MR. SIEGEL: I am, Justice White, because I don't think the State can bear the burden of satisfying that first prong in order to get prospective relief in this case.

QUESTION: How about the other prongs?

MR. SIEGEL: If we were to go to the second prong, the best example I can give you in the second prong being that you do not apply prospective relief in the case if it frustrates the very purpose of the -- of the rule. Here you have a situation much the same as what you had in Florida. The original tax was knocked out. The legislature in Florida came right back. Parochial indeed, that is precisely what the second prong addresses. Georgia legislature did the same thing. It appears to me as though they have not yet been willing to accept the principles of this Court when it comes to discriminatory taxation.

And if we were to go to the third point, which is to take a look at the hardship, we are talking about a total of $30 million. That's a lot of money, but it is not going to put the State of Georgia in a financial bind.

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At this point then --

QUESTION: May I ask on that $30 million, is that the total amount collected or the amount by which, is that the discriminatory increment?

MR. SIEGEL: My client, Justice Stevens, Beam, their claim for refund is $2.4 million. Two other companies filed refunds as well. The total is $30 million for this period.

QUESTION: But if you, if they only give the amount of refund that the Federal Constitution mandates you would only get 1 point -- you would only get half of that amount, is that right?

MR. SIEGEL: Would we settle for half?

QUESTION: I mean, that's all you would be entitled to as a matter of Federal law. Maybe you would get more as a matter of State law.

MR. SIEGEL: That is correct. We are looking for equality, the point that you addressed in McKesson. There is no question about it.

(Laughter.)

MR. SIEGEL: And the Attorney General is here, be delighted to talk with him right after the hearing. The point is in this entire discussion with regard to the Twenty-first Amendment that nothing really was revolutionary when Bacchus came down in terms of the

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pronouncements of this Court. The development of the Twenty-first Amendment law has been clear for everyone, and I think that even the Georgia lawyer that sat down and took a look at it at that point would have to agree that there was nothing so revolutionary --

QUESTION: Well, three Justices thought we were pretty well doing away with some prior precedent, didn't they?

MR. SIEGEL: They did. But even within that context --

QUESTION: So what about a -- what about a State official? Couldn't -- a State official might have been misled too.

MR. SIEGEL: I think the decisions have been very, very clear on this point, if they were just to take a look at Hostetter. And what is interesting about Hostetter is --

QUESTION: Well, the dissenters took a look at it.

MR. SIEGEL: They did. And the dissenters pointed out as well in Hostetter that although they didn't agree with the majority, they pointed out that this is a change in the decisions that we have rendered up to this point on the Twenty-first Amendment. That is the point of all this. There, they weren't taken by surprise. We may

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differ as to our analysis, but they were not taken by surprise.

QUESTION: Yet Hostetter purported to reaffirm Young's Market, didn't it?

MR. SIEGEL: It did not reaffirm Young's Market, nor would I stand here and tell you that any of your subsequent decisions have totally overruled Young's Market. But what I do feel has happened is through the progression of the decisions in the '60's, the '70's, and the '80's -- if we were to take a look at the Court's Twenty-first Amendment decisions since 1980 -- Midcal, Rice v. Williams, Grendle v. Larkin, Bacchus, Capital Cities -- in every instance except your recent decision in North Dakota you have determined that the Federal interest that was competing with the Twenty-first Amendment was more significant than what the State was attempting to protect. Perhaps the one exception to that, Justice Rehnquist, would have been South Dakota v. Dole where you really didn't get into the Twenty-first Amendment that much.

That says to me that there has been a historical progression here which has looked back and brought us up to the 1980's. So I think what is significant about Hostetter is the fact that it rejected any notion that the Commerce Clause had been repealed.

QUESTION: At what point was an official in the State of Georgia on notice here that Young's Market could no longer be relied on? Was it back at the time Hostetter was decided?

MR. SIEGEL: Your Honor, just as it is my job to advise my clients of the development of the law, it is the job of the Attorney General's office or lawyers working in that office. How many times do we see governmental administrations come to their legislatures --

QUESTION: Yes, but I am entitled to ask you a question, even though you are not consulting with the State of Georgia, as to when you think someone consulting with the State of Georgia should have realized that Young's Market was no longer a good law. Was it at the time of the decision in the Hostetter came down?

MR. SIEGEL: Clearly 1964 in my judgment. That is the Hostetter decision. Because they came right out and repudiated what had been the thinking up to that point, and they said any idea that the Commerce Clause has been repealed is absurd, is incorrect. That is very strong language. And they then went further to state that in any Twenty-first Amendment case we balance the constitutional -- competing constitutional interests in view of the context of the facts that are submitted at any particular time. I think that would have been the point

in which the State of Georgia should have recognized that there is a change from the earlier rulings of this Court back in 1930.

So under the Chevron analysis it is our judgment that the State of Georgia cannot bear the burden of satisfying the first prong, and therefore it would not be necessary to go any further. If that's the case, then the decision of the Georgia Supreme Court in not granting retroactive relief should be reversed. And as I pointed out in this instance, although this case is not directly involved with McKesson, clearly there is a prescribed remedy under the Georgia refund statute which would allow our client to get a refund consistent with this Court's decision in McKesson.

Thank you.

QUESTION: May I ask you one question before you sit down? You mentioned the refund statute. Your question presented in the cert. petition said when a taxpayer pays under protest the States tax and so forth. You left the words "under protest" out of your merits brief.

MR. SIEGEL: That is correct.

QUESTION: What is the, what is the significance of that?

MR. SIEGEL: Well, actually when you are paying

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a tax, Justice Stevens, and you are forced to pay it really under duress, because if Beam was to ship goods into that State -- what happens is they buy tax stamps. If the product comes in without those stamps it will be seized and their license to do business would be revoked. So they were obviously not in agreement with what was going on. They didn't file any official protest, but when they finally got around to recognizing that they were going to take advantage of the Court's decision in Bacchus they then went ahead and protested every subsequent payment.

QUESTION: What you're saying is that every taxpayer in order to ship into the State, I mean, every liquor company must get the stamps, and that is enough, that is all the protest you need in order to file a refund action. Is that what you're saying?

MR. SIEGEL: Once you pay the tax you are -- yes, you are entitled to --

QUESTION: That is all that Georgia procedure requires.

MR. SIEGEL: That is correct.

QUESTION: Would that be true in a State that specifically required by law payment of tax under protest following certain procedures?

MR. SIEGEL: If we're talking about a

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predeprivation remedy?

QUESTION: Yes.

MR. SIEGEL: Then obviously it would have applied the same way. And if that would have been the case --

QUESTION: So your answer is you would ignore the State law?

MR. SIEGEL: Oh, absolutely not. We would have -- if we would have had that opportunity we would have taken advantage of it.

QUESTION: If you had had an opportunity to file a statement that said we protest?

MR. SIEGEL: Yes.

QUESTION: You don't think you had that opportunity?

MR. SIEGEL: No, I don't.

QUESTION: You don't think you could have written a letter?

MR. SIEGEL: I think I could have, Justice O'Connor, but I don't think that the State of Georgia would have paid much attention to it. After all, in this particular instance when we filed our post-remedy claim for refund they took no action on that, even after Bacchus. And under the statute in Georgia we have the right if the State takes no action. So I don't think it

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would have meant, made any difference to the State of Georgia in this instance.

Thank you.

QUESTION: Thank you, Mr. Siegel. Ms. Baker.

ORAL ARGUMENT OF AMELIA W. BAKER

ON BEHALF OF THE RESPONDENTS

MS. BAKER: Mr. Chief Justice, and may it please the Court:

The only issue before this Court is whether the Georgia Supreme Court properly gave prospective effect to its decision invalidating a longstanding state alcoholic beverage tax statute. This is essentially the same issue that this Court addressed in the ATA case last term. We submit that the Chevron Oil test used by the plurality in ATA represents the appropriate approach for analyzing this case, and that under Chevron --

QUESTION: (Inaudible) votes to the contrary.

MS. BAKER: There are four votes in the Court that there should be retroactive application, however, Justice Scalia sided with the plurality in giving Scheiner prospective application in ATA. Although he did not use the analysis of the plurality, his reasoning allowed him to come to the same conclusion as the plurality in ATA did.

We would submit that that is the appropriate

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approach in a case such as this. In a case where you have a decision such as Bacchus Imports, that establishes a new principle of law, we think it is appropriate and consistent with the precedent of this Court to apply the Chevron Oil test, because it is intended to protect the good faith reliance on prior law and to protect against the injustice and hardship of a retroactive application by permitting courts to give prospective application to decisions creating new principles of law.

It is particularly important to protect reliance interest with State Governments, who must rely on presumptively valid statutes in conducting government operations. Protecting reliance, good faith reliance such as in this case on prior law is essential to permitting government operations to go forward and to protecting the financial stability of the State.

Under the Chevron Oil test, as the petitioners recognize, there are three prongs that must be met before a decision can be given prospective application. Under the first prong Chevron Oil states that a decision creates a new principle of law where it overturns clear past precedent or decides an issue of first impression whose resolution was not clearly foreseeable.

We submit that Bacchus established a new principle of law by overturning clear past precedent in

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the Twenty-first Amendment jurisprudence, by holding contrary to the holdings of this Court up until that time that the Twenty-first Amendment empowers a State to regulate the importation of alcoholic beverages into its borders without limitation by the Commerce Clause.

As the dissent pointed out in Bacchus, the majority in Bacchus adopted a totally novel approach to the Twenty-first Amendment in that case by going beyond the express language of the Twenty-first Amendment and by going beyond the precedent of this Court in finding that for the first-time State regulation of alcoholic beverages must implicate some central purposes underlying the Twenty-first Amendment in order to outweigh Commerce Clause principles. The central purposes identified by the Court in Bacchus are not found in the language of the Twenty-first Amendment, nor are they found in the legislative history underlying the Twenty-first Amendment.

Prior to this case never had the Court indicated that there were some central purposes that must be identified, but rather beginning in 1939 with the Young's Market case, the Court said that the language of the Twenty-first Amendment is clear. We don't need to go beyond the language of the Twenty-first Amendment, and the Twenty-first Amendment empowers a State to regulate or prohibit importation of alcoholic beverages without

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limitation by the Commerce Clause, period. The right to, according to the Court in Young's Market, the right to import free has been abrogated by the Twenty-first Amendment.

This view of the Twenty-first Amendment, we submit, remained unquestioned until Bacchus. Even in cases where the regulations in effect constituted economic protectionism, the Twenty-first Amendment was still held to support State regulation of alcoholic beverages.

QUESTION: Ms. Baker, your opponent says that the Hostetter decision in 1964 was the watershed, so to speak, rather than Bacchus. What is your response to that?

MS. BAKER: Mr. Chief Justice, I would disagree with the petitioner on that point. The Hostetter case represents one type of limitation that the Court did recognize in the Twenty-first Amendment, and that the Court said that where you -- where the State attempts to regulate alcoholic beverages that are not being transported into the State for use therein as prescribed by the language of the Twenty-first Amendment, then the State cannot regulate alcoholic beverages. And in the Idlewild case the State was attempting to regulate alcoholic beverages that were ultimately destined for a foreign country, and the Court found that that regulation

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did not fit within the express language of the Twenty-first Amendment.

It is also true that in that case the Court recognized that the Twenty-first Amendment did not divest Congress of its power to regulate alcoholic beverages. That's the important statement that was made in Idlewild, and the statement was made to make sure that the States were aware that the Federal Government, pursuant to the Commerce Clause, could continue to operate and enact statutes such as the Sherman Act that would also regulate alcoholic beverages.

But nothing in Idlewild suggested in anyway that the State was limited in its ability to import alcoholic beverages into the State for use in the State. There is no limitation on a direct regulation of alcoholic beverages, which the State tax here clearly is.

There are, there were a number of cases between Young's Market and Bacchus in which this Court did recognize some limitations on the Twenty-first Amendment, one being the jurisdictional limitation in Idlewild. There were a number of other limitations, but none of those limitations ever went to the State's ability to regulate the importation of alcoholic beverages.

Mr. Siegel suggests that the Midcal case was sufficient to put the State of Georgia on notice. Midcal

is entirely different from this case, and the regulations involved there are entirely different. In that case the Court said that in instances where you have a Federal statute enacted pursuant to the Commerce Clause, and you have a State statute that is not directly regulating alcoholic beverages but is peripheral to the regulation of alcoholic beverages, then in those cases where you have a State statute, where you have a Federal statute and a State regulation that is not aimed at the core powers of the Twenty-first Amendment, we will engage in a weighing of interests to see whether the Twenty-first Amendment prevails.

Again, in that case that Court recognized that the ability of a State to regulate importation into its borders was not limited by the Commerce Clause. Even up until 11 days before the decision in Bacchus in this case of Capital Cities Cable v. Crisp, also decided in 1984, this Court once again reiterated that a State's power to impose burdens on interstate commerce in alcoholic beverages is not limited by the Commerce Clause.

We submit, therefore, that from the time of Young's Market until Bacchus there was absolutely no indication in the case law of this Court to put Georgia on notice that its statute was invalid. And that Bacchus clearly constituted a new principle of law, and it was

noted by three members of this Court that it was a totally novel approach and it was unanticipated by any cases, and it was inconsistent, arguably, with the express language of the Twenty-first Amendment.

Additionally, the State of Georgia relied on its own highest court, which in 1939 in the case of Scott v. State had upheld the same statute, in a different, earlier version, but essentially the same tax structure had been upheld against a Commerce Clause challenge.

QUESTION: I suppose that it's a Federal question though?

MS. BAKER: We agree that it is a Federal question, because the case here does involve the constitutional violation. And that it is a Federal question as in ATA whether the Bacchus opinion should be applied retroactively or prospectively.

QUESTION: Do we assume that Georgia would provide a refund here if we agree with the petitioner on the retroactivity of Bacchus?

MS. BAKER: I don't think that we would agree that --

QUESTION: Or has that been decided?

MS. BAKER: That issue has not been addressed by any court so far in the State of Georgia. And that issue, I think, would be open to be decided on a remand of this

case, not inconsistent with the principles announced in the McKesson case.

QUESTION: May I ask, Ms. Baker, under your refund procedure can the taxpayer get an injunction against -- future collection of the tax?

MS. BAKER: The statute in Georgia does not provide for injunctive relief. But contrary to what Mr. Siegel said, there is ample case law in the State of Georgia which says that injunctive relief is an appropriate remedy for challenging State taxation. And although we did not cite these cases in our brief, I have a number of citations in which taxpayers have successively challenged the imposition of taxes --

QUESTION: For the future.

MS. BAKER: -- in the instances of unconstitutional statutes.

QUESTION: I see. If there had been -- I was just wondering, under your view of the law, if there had never been a Bacchus case, that we just had all the other law out there, Midcal and so forth, and this refund action had been filed, and the Georgia Supreme Court looked at those old authorities and, well, it's an awful close case, but then decided the same way as the majority did in Bacchus. Would the taxpayer have been entitled to a refund, do you think?

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MS. BAKER: I think that that issue has not been definitively decided by the Georgia Supreme Court, whether the refund statute in Georgia mandates a refund in all cases. The court has indicated in Georgia that the term illegally assessed is sort of a term of art that they can interpret in appropriate cases, and in certain cases preceding this case the court found that where there is injustice and hardship by requiring a refund, they did not order a refund. So it is not clear what the court would have done, and based on the court cases I can't say definitively whether they would have --

QUESTION: I think what you're saying then is that had there been no Bacchus case, this taxpayer would have had a better chance to get a refund in this case than he does now.

MS. BAKER: I don't think that's true, because had there been no Bacchus there still was a State supreme court opinion in Georgia --

QUESTION: Yes, but this, say this State supreme court overruled that case. It said we understand Federal law has progressed to the point where this is a burden on your state commerce, and so forth. You say that -- I am not quite clear what you say.

MS. BAKER: I think that even if our court had overruled and agreed with Bacchus, that there is still

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authority in Georgia cases and there have been instances where the Georgia Supreme Court has overruled statutes, and yet decided that because of the equities of the situation they would not order a refund. Even if they weren't using Chevron at that time, just under the basic principles of equitable notions.

QUESTION: So are you -- is your position then that whenever there is a close issue of constitutional loss, not clearly foreshadowed, you are just not 100 percent sure. But if a taxpayer thinks there is an unconstitutional tax being levied which is worthy of a challenge, that taxpayer has no hope of a refund but the best the taxpayer can get is an injunction.

MS. BAKER: I think that they do have a chance of a refund. I think that the cases in which the Georgia courts have not granted refunds are very limited. I mean they really are cases that meet the Chevron test, even if at the time the Georgia courts were deciding that cases they didn't call it Chevron. It is not a very liberal test, we'll say well this seems to be a new case so we're not going to give a refund. I think that the Georgia courts are committed to giving refunds except in very limited situations where the decision would create substantial financial instability and injustice.

Under the second prong of Chevron, determining

whether the rule at issue will be furthered or retarded by the retroactive application of the case, we contend for the same reasons in ATA that prospective application here of the Bacchus opinion is consistent with the Commerce Clause, because during the period, the refund period at issue, the state statute was consistent with the precedent of this Court and with the Twenty-first Amendment, and what had been considered legitimate State taxation at that time. And as the Court noted in ATA, it is not the intent of the Commerce Clause to prevent legitimate State taxation.

Finally, under the third prong of Chevron, which requires a weighing of the equities, we clearly think that the equities here weigh in favor of prospective application. There is an extremely strong reliance interest by the State of Georgia on a State statute that had been upheld by its highest court, that was consistent with the precedent of this Court, and that was consistent with the express language of the Twenty-first Amendment. In light of this reliance interest and absolute lack of any challenge to that state statute from 1939 until 1985, and almost 1 year after the decision in Bacchus, Georgia was clearly entitled to rely on that statute.

It would also, contrary to what the petitioner said, it would create a severe financial burden for the

State of Georgia to have to pay some $30 million in tax refunds at this time. The State is in a tight financial situation and it would threaten possible government programs and services to have to pay back that kind of a refund.

QUESTION: Is that really a valid constitutional argument?

MS. BAKER: I am not sure that it comes to the level of perhaps the reliance interest.

QUESTION: In other words, if I am broke I shouldn't have to pay any income taxes?

MS. BAKER: I don't think that should be the determining factor for the Court here today. I think that the important factor is that the State in good faith relied on a statute that was consistent with case law of its own court, this Court, and the Twenty-first Amendment, and that it collected money under that tax statute and spent it in good faith for benefits for the entire citizens of the State of Georgia.

QUESTION: May I ask one other sort of fly speck? Your opponent says there is a very small part of the total amount in controversy that was post-Bacchus. Is that correct?

MS. BAKER: I don't know the exact amount.

QUESTION: But there is some --

MS. BAKER: There is some amount that is post-Bacchus.

QUESTION: And you don't deny they are entitled to that?

MS. BAKER: What I would say in response to that is that would be an issue for remand under McKesson.

QUESTION: I see.

MS. BAKER: And I would just like to end by saying that --

QUESTION: But don't end yet.

(Laughter.)

QUESTION: Do you agree that all of the taxes that they are seeking recovery for were protested? That the payments were protested, effectively protested?

MS. BAKER: I don't believe any of the taxes were paid under protest, either actual protest in that they wrote protest down on their tax whatever, receipt, or in fact that they paid the taxes under protest. Because it is clear, to me anyway, that during the time they paid these taxes they had no idea, no understanding that there was anything wrong with the Georgia statute. In fact I think they paid the taxes voluntarily. There was no threatened State action against them to pay the taxes, and they did have available to them injunctive relief if indeed they thought there was something wrong with the

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tax.

QUESTION: Well, Mr. Siegel said that at least at some point there was a protest filed. You don't acknowledge that?

MS. BAKER: The protest was filed after the refund period was over, in I believe March or April of 1985, subsequent to the time that all the tax had already been paid, and subsequent to the time that this statute at issue here had been repealed.

QUESTION: I am a little confused by the various responses. Does Georgia have a statutory or administrative protest provision?

MS. BAKER: There is no requirement for a protest in Georgia. The refund statute does not require a protest.

QUESTION: So that if there is a reversal here the State of Georgia is not then going to defend, as it were, on new ground in the State courts and say there was no protest?

MS. BAKER: No, we are not.

QUESTION: Okay.

MS. BAKER: In sum, we submit that the Chevron Oil test represents the appropriate approach for analyzing this case, and it is the appropriate way of protecting good faith State reliance on a statute that was

presumptively valid, and which the State had no reason to believe would be invalidated. We believe that we satisfy each and every one of the three prongs of Chevron Oil, and we also believe that if the Court should find that we do not satisfy Chevron Oil or that the decision should be given a retroactive application for other reasons, that it should be remanded to the State court for determination of a remedy not inconsistent with McKesson.

QUESTION: May I just restate -- is this what you are saying when you talk about Chevron, that up until the date Bacchus was decided the tax was perfectly constitutional, and as of Bacchus it became unconstitutional?

MS. BAKER: Basically what we are saying is that based on the principles used in ATA that the court has the ability to determine when and how it will apply its decisions, and that --

QUESTION: Well, I understand you -- all this retroactive language. But is that the essence of your position, is the tax was fully constitutional until Bacchus was decided?

MS. BAKER: It was our position it was consistent with the Constitution and with the case law of the Court up until the decision in Bacchus.

QUESTION: Ms. Baker, is Georgia considering the

adoption of some protest procedures so that if the worst of all scenarios happens and this Court decides that its decisions are retroactive, that Georgia will be protected against the unexpected obligation to pay back money? It will always know if a protest has been made that a certain amount of money in the treasury is subject to litigation.

MS. BAKER: I think that Georgia, along with many States, are investigating the possibility of changing their statutes to give them greater protection, whether it be limiting the statute of limitations for a refund, or adopting a protest requirement. But in light of the change in this Court's doing away with prospectivity, I think there is a great possibility the State would feel compelled to change its refund statute.

If there are no further questions --

QUESTION: Thank you, Ms. Baker.

Mr. Siegel, do you have rebuttal?

REBUTTAL ARGUMENT OF MORTON SIEGEL

ON BEHALF OF THE PETITIONER

MR. SIEGEL: Just a few minutes, Chief Justice. Thank you.

Although the issue is not before this Court, I do want to make the point that there has never been a disagreement with the State of Georgia over the fact that the petitioner in this case did comply with the protest

procedure for claiming refunds. It did not technically say you have to mark protest. It says you file a claim for refund and you set forth the reasons. There has never been any disagreement that for the tax period involved in this case we complied with that procedure.

Secondly, I would like to point out that certainly the burden should not be on Beam to go beyond what the statutory structure of Georgia provides.

Thirdly, I would like to just restate that the general rule here is in favor of retroactivity. And we may differ on how we are going to read Bacchus, but the fact of the matter is the decision did not come out and reveal any new rules and -- as it applied to the Twenty-first Amendment. Therefore, I do not see how the State can get past the first prong of the Chevron case. And in that instance we would be entitled to relief, if this Court should see fit.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Siegel.

The case is submitted.

(Whereupon, at 1:41 p.m., the case in the above-entitled matter was submitted.)

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