IN THE SUPREME COURT OF FLORIDA

Case No. SC14-2404
L.T. Case No. 4D13-1472

FLORIDA DEPARTMENT OF REVENUE,
Appellant,

vs.

AMERICAN BUSINESS USA CORPORATION,
Appellees.

On Appeal from the Fourth District Court of Appeal
Case No. 4D13-1472

Amended Amicus Curiae Brief from American Association of Attorney – Certified Public Accountants, Inc Florida Association of Attorney – Certified Public Accountants, Inc. in Support of the Appellee

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SUMMARY OF THE ARGUMENT

Florida's law regulating the taxation of florists violates existing dormant commerce clause jurisprudence. *See*, *Goldberg v. Sweet*, 488 U.S. 252 (1989). The business model used by the industry, allowing a customer to order flowers in one store to be prepared and delivered by another florist, was truly amazing when it blossomed over 100 years ago, 20 years before any state imposed a sales tax.

When state sales taxes where were first enacted during the 1930's, the florist industry realized that their business model had a problem: who should be liable for the sales tax and to which state? The florist industry lobbied state legislatures to force flowers to be taxed only by the state where the order is placed. Starting in the 1930's, the industry was successful in only 36 states and the District of Columbia, as admitted by the Appellant. What the florist industry did not realize at the time is that they should have lobbied the US Congress, who has the power to regulate interstate commerce. Any attempts for states to do so are limited by now well-developed dormant commerce clause precedents. The fact that the industry was partially successful in accomplishing at the state level what should have been done at the federal level does not make such state laws any less unconstitutional.

Appellant's assertion that the business model used by the florist industry is unique is unfounded in today's world. While, the florist wire service business model was ingenious and new in the early 1900's, the concept of a customer ordering a

product from one location to be fulfilled and delivered by another company at another location is commonplace today. Drop shipment businesses and internet only retailers number in the tens of thousands. This business model is a very large part of both Amazon and E-bay sales, totaling billions of dollars each year for just these two companies. Appellant's assertion that the flower industry is unique so as to allow states more dormant commerce clause latitude is without merit.

Because, the Appellee's business model is so similar to thousands of other internet retailers initiating sales online with absolutely no inventory, it may be that Appellee is not a florist under Florida law. If this court holds that Appellee is not a florist, then the issue of whether Florida's statute violates the commerce clause would be moot with respect to Appellee.

Appellant erroneously mistakes cases discussing whether a state has nexus over a taxpayer with those cases discussing nexus over particular transactions. Cases such as *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) review the facts to determine whether an out of state taxpayer has enough "substantial nexus" to constitutionally allow the state jurisdiction over the out of state taxpayer. However, the instant case turns on the other type of "nexus" cases,[1] which involve the analysis of whether particular transactions have enough connection with the state to be taxed

[1] *See*, The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation, Bradly W. Joondepth, 71 Fordham L. Rev. 149 (2002)(Available at: http://ir.lawnet.fordham.edu/flr/vol71/iss1/3)

in full without violating notions of justice and fair play. In the instant case, the transactions were consummated completely outside of Florida and thus are beyond the reach of Florida's taxing jurisdiction.

Florida's special sourcing statute for florists is unconstitutional because the tax is not fairly apportioned to the state with jurisdiction to tax the flower sales relevant to this case. It fails both the internal and external consistency tests, violating all notions of justice and fair play in interstate commerce taxation.

I. INDUSTRY LOBBYING, ON A STATE BY STATE BASIS, TO CHANGE WELL SETTLED CONSTITUTIONAL LAW REGULATING INTERSTATE COMMERCE IS AT THE HEART OF THE DORMANT COMMERCE CLAUSE JURISPRUDENCE

The "Floral Wire Service" industry ("FWS") blossomed in the early 1900's with the prevalence of the telegraph and telephone.[2] When there were still more horses on the roads than automobiles, the FWS allowed customers to walk into a participating florist's store and place an order for flowers to be delivered anywhere in the world by a second florist, an amazing feat of capitalistic ingenuity.

When industry started, no one questioned the sales tax on the sale of flowers because the first state sales tax was not enacted until the early 1930's, more than 20 years after the FWS industry started.[3] As sales tax was deemed an effective revenue

[2] Source: http://en.wikipedia.org/wiki/Florists'_Transworld_Delivery (providing a full history of the Florists' Transworld Delivery (FTD Companies, Inc))

[3] There is some debate whether the first, broad based state "sales tax" was initiated by Kentucky in 1930 or Mississippi in 1932 (See. *State and Local Taxation*, West

source during the Great Depression, it was adopted by 24 states as of 1940 and another eleven states before 1960 (including Florida in 1949).[4,5] During the infancy of our commerce clause jurisprudence, the FWS industry tried to address the sales tax questions face by the industry. Lobbying state by state, the industry convinced 36 state legislatures[6] that they had the power to regulate the interstate commerce by taxing not only sales of flowers within the state's borders, but also sales of flowers anywhere in the world, if the original order was taken by an in-state florist store.[7]

However, by 1959 there were over 300 judicial opinions expanding and restricting the states' rights under the "dormant commerce clause."[8] Well after the FWS industry began lobbying states to enact laws regulating the interstate taxation of the florist industry, it became clear that regulating interstate commerce is practically in the sole purview of the US Congress. Courts often judicially forbade

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Publications, 9th Edition, by Hellerstein, Stark, Swain, & Youngman, pg. 607; compared to *History and Economic Impact* [of Sales Tax], March 13, 2002, by William F. Fox, Professor of Economics, University of Tennessee).

[4] *Id*, Fox, page 1

[5] *See*, Florida Revenue Act of 1949.

[6] *See*, Initial Brief of Appellant filed in this case, page 11, in which the Appellant admits only 36 out of the 45 states with a sales tax have enacted similar laws.

[7] The Amici refers to all Florists as "Florist Stores" because at the time these laws were put into place, there was no such thing as the Internet or even a "florist" that never actually handled flowers. In fact, there is no statute in Florida Chapter 212 or Florida Administrative Code 12A-1 that defines a "Florist."

[8] *See, National Bellas Hess, Inc. v. Dep't of Rev. of Ill*., 386 U.S. 753 (1967) interpreting U.S. Const. art. I, § 8 commonly referred to as the "Dormant Commerce Clause."

states from regulating interstate commerce, inviting Congress to act.[9] No matter how much a state attempted to simplify matters or what the commerce clause jurisprudence was when the state law was enacted,[10] regulation of interstate commerce is at the very heart of current dormant commerce clause jurisprudence.[11]

II. THE APPELLANT IS MISTAKEN IN ITS ASSERTION THAT ORDERING A PRODUCT FROM ONE COMPANY TO BE DELIVERED BY ANOTHER COMPANY IN ANOTHER STATE IS UNIQUE IN TODAY'S WORLD OF INTERNET-ONLY RETAILERS

A. THE FLORIST INDUSTRY IS NOT UNIQUE IN TODAY'S WORLD OF DROP-SHIPMENT COMPANIES AND INTERNET RETAILERS

The Florida Department of Revenue asserts in its Initial Brief, pgs.7-9, that the

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[9] *See, e.g., Quill Corp., v. North Dakota*, 504 U.S. 298 (1992), *see also, Complete Auto Transit, Inv. V. Brady*, 430 U.S. 274 (1977); *National Bellas Hess, Inc. v. Dep't of Rev. of Ill*., 386 U.S. 753 (1967)

[10] *See, e.g.*, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896) (a prime example of how it may take a long time for the courts to see the unconstitutional error in the minds of state legislatures, but it is our judicial system's duty to continue such review).

[11] *See, e.g., Direct Marketing Association v Colorado Department of Revenue*, 575 U.S. ____, (US Sp Ct, March 3, 2015) (remanded to the 10th Cir. Ct. Ap.) (In an effort to effectively impose use taxes on its own residents, Colorado created a law requiring out of state vendors selling into Colorado to merely tell Colorado customers that they had a use tax obligations and, at the end of the year, provide the customer and the state a type of 1099 report showing how much would be subject to use tax. A large multistate marketing company challenged the Colorado law in federal court, which was found at the trial level to be a burden on interstate commerce under our dormant clause jurisprudence. The question is now before the 10th Circuit to decide and may very well end up before the Supreme Court again).

FWS industry is a completely unique industry that requires special treatment so that dormant commerce clause limitations do not apply. Admittedly, in the early 1900's, the concept of establishing a way of purchasing something from one business to have it almost immediately relayed to a completely different business in another location was not only unique, it was amazing. However, technology has changed greatly since the early 1900's. Now, literally thousands of businesses allow you to order a product from one company to be fulfilled and delivered to the customer by another company. The concept of "drop-shipments" is based on this business model, is found throughout the world, and there are well developed sale tax/use tax laws handling taxation of drop shipments.

In the last 15 years, the concept of purely internet based retailers has also become common place, with e-retailers having no inventory of their own. In fact, the Appellee is a pure internet based retailer with no flower inventory.[12] Thus, there is nothing unique today about the Florist industry or the Appellee that would justify special sourcing laws on a florist's business.

B. AN INTERNET RETAILER WITH NO INVENTORY OF FLOWERS IS NOT A "FLORIST" UNDER FLORIDA LAW

There is no definition of what constitutes a "florist" under Florida's Florist law.

[12] *See*, the record on appeal for this case, R:1:58.

Both sec. 212.05(1)(l), F.S., and Rule 12A-1.047, F.A.C., simply refer to "florist" as a retailer of tangible personal property taxable in the state, with no specific definition. Because Appellee never actually has an inventory of flowers, the Amici herein questions whether Appellee is actually a florist under Florida law. Reviewing the record on appeal, one of the first arguments the Appellee made is that the Appellee is not a florist.[13] Florida has been known to use the North American Industry Classification System, (NAICS) to define industries.[14] As with most industries, the NAICS has a very clear definition for a "florist" under code 453110:[15]

> "This industry comprises establishments known as florists primarily engaged in retailing cut flowers, floral arrangements, and potted plants purchased from others. These establishments usually prepare the arrangements they sell."

However, the description for NAICS code number 453110 goes on to provide that "Retailing flowers via electronic home shipping, mail-order, or direct sale—are classified in Subsection 454, nonstore retailers." In other words, the NAICS classifies someone that sells flowers without a store as something other than a "florist." Thus,

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[13] *See*, Appellee's response to interrogatories, R1:40 (question 15(1) in which the Appellee clearly declares "AMERICAN BUSINESS CORPORATION, USA IS NOT A FLORIST AS WE DO NOT ENGAGE IN THE BUSINESS OF SELLING 'TANGIBLE PROPERTY" NOR DO WE HAVE ANY KIND OF INVENTORY. WE ARE ALSO NOT A BRICK AND MORTAR BUSINESS. OUR BUSINESS IS TO PROVIDE AN ONLINE SERVICE TO FLORIST/FLOWER PROVIDER …"

[14] *See, e.g.*, Rule 12A-1.0091, F.A.C., refer to NAICS code number 561720 to define what is a taxable "nonresidential cleaning services."

[15] To look up any NAICS code by key words, go to http://www.naics.com/search/

Appellee is more akin to a facilitator to the flower industry in a manner similar to how the on-line travel companies are facilitators to the travel industry.[16] If Appellee is not a "florist," then the special sourcing rules for florists would not even apply to this company and the out of state sales would be exempt under Florida's normal sales tax rules for shippers of tangible person property. It is also relevant that the Appellee is barred from participation in the florist wire service because the company has no inventory to reciprocate local flower deliveries.[17] The court could completely avoid the thorny question of whether Florida's florist sourcing statute is unconstitutional.

III. APPELLANT CONFUSES SUBSTANTIAL NEXUS OVER THE TAXPAYER WITH LONG SETTLED JURISPRUDENCE REQUIRING A STATE TO HAVE NEXUS OVER THE TRANSACTION IN SALES TAX (OR SIMILAR TAX) CASES

In its Initial Brief[18] the Appellant confuses the constitutional difference between nexus over a taxpayer with nexus over a transaction. A substantial portion of our dormant commerce clause cases involve the question of whether an out of state business has enough connection with a particular state for that state to assert its judicial control over that out of state business. This is commonly called

[16] *See*, cases currently before this court: *Alachua County, ET AL v Expedia, Inc., ET AL.*, Fla. Sp. Ct. Case No. SC-13-838 (undecided), *Leon County v. Expedia, Inc., ET AL.*, Fla. Sp. Ct. Case No. SC13-2056 (undecided), and *Broward County, Florida v. Orbitz, LLC, ETC., ET. AL.*, Fla. Sp.. Ct. Case No. SC14-395 (undecided).

[17] *See*, record on appeal for this case: R1:98.

[18] Appellant's initial brief as e-filed on 3/3/2015, filing #24442830.

"substantial nexus."[19] *See, e.g., Quill Corp. v. North Dakota,* 504 U.S. 298 (1992). However, there are a significant number of sales tax or similar tax cases in which the court reviewed transactions by a wholly in-state company to determine whether there was enough constitutional nexus with a transaction to allow the state to tax the whole transaction. Appellant's initial brief is riddled with these cases.

Oklahoma Tax Commissioner v. Jefferson Lines, Inc. 514 U.S. 175 (1995) is a perfect example of the Court analyzing not whether the state has the jurisdiction over the in-state company, but instead, whether the state has jurisdiction to tax a particular transaction. In that case, Jefferson Lines sells a bus ticket inside the state of Oklahoma to a passenger who will embark on the trip from within Oklahoma. The court analyzed the transaction's connection to Oklahoma and whether the tax on the ticket was fairly apportioned among the states. The court held that (1) the purchase of the ticket was inside Oklahoma and (2) the initiation of the bus service was within Oklahoma, when combined, was enough connection to the state to satisfy the nexus and fairly apportioned prongs of *Complete Auto Transit, Inc, v. Brady*, 430 U.S. 274 (1977). However, when analyzing the instant case in light of the *Jefferson Lines'* logic, the flowers are merely purchased

[19] *See*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (combining decades of commerce clause jurisprudence into one "4 prong" test to determine whether a taxing statute passes constitutional standards: (1) substantial nexus, (2) non-discriminatory, (3) fairly apportioned, & (4) fairly related to the services provided by the state)

through a web site whose owner happens to be based in Florida. The purchaser is not necessarily located in Florida and could be anywhere in the world. None of the flower orders that are the subject of this case are fulfilled within Florida. Instead, the flowers are prepared and delivered wholly outside the state. Appellee neither has title to the flowers nor does it own any tangible flowers. So, unlike *Jefferson Lines*, neither the origination nor destination of the tangible personal property is actually in Florida. Because the transactions do not have nexus in Florida to justify the state taxing the transactions, the lower court's holding should be affirmed.

Another example of the US Supreme Court admitting nexus over the vendor, but limiting a state's right to tax a particular transaction based on the amount of connection with the state is *Goldberg v. Sweet*, 488 U.S. 252 (1989). The Court analyzed which state or states should be able to tax interstate phone calls. Recognizing that the taxpayer had substantial nexus with the state, the question before the court was which calls could the state tax, given that other states might have an equal or greater right to tax part or all of the call. The Court devised a method to determine which transactions a state would have the right to tax. It held that a call may only be taxed by the state if (1) the call originates and terminates in that state or (2) the call originates or terminates in that state and is billed to a service address in that state.[20] If the call neither originated nor terminated in the

[20] *Goldberg v. Sweet*, 488 U.S. 252 (1989).

state, then the state did not have the right to tax the call even if it was billed to an address in the state. Comparing the legal analysis of *Goldberg v Sweet* to our flower case, we have the owner of the web site located in Florida that takes the flower order purely online. The flowers are owned/titled outside of Florida by an out of state florist and title is delivered to a final customer outside of Florida. Therefore, since title transfer originates and terminates outside of Florida and, potentially, the originating customer is not even in Florida, *Goldberg v. Sweet* tells us that Florida does not have enough nexus to provide jurisdiction to tax the transactions in question. There is a litany of other cases reviewing whether a transaction has enough nexus with a state to allow that state to subject the transaction to sales tax.[21] The precedents clearly show that it is the state in which title passes that has the right to tax the flower, which is never Florida in the case. Thus, the lower court ruling should be affirmed.

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[21] *E.g.*, in *International Harvester Co. v. Department of Revenue of Treasury*, 322 U.S. 340, 345 (1944) the Court held that when the customer came into the state to take delivery of the goods for transportation and use outside the state, the ***instate delivery*** was enough to allow the state of the seller to tax the transaction. In *State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605, 606 (1963), the court held that the state had jurisdiction to tax the transaction "***since the passage of title and delivery to the purchaser took place within the state***." The pattern of these cases is obvious. The general rule of sales tax is that the state in which title or possession transfers has jurisdiction to impose sales tax. This is why the US sales tax system is commonly referred to as a "destination tax."

It should be no surprise to the Appellant that Florida lacks jurisdiction to tax a sale of tangible personal property that tenuously initiates in Florida, but is delivered to customers in another state because of the well settled law in Florida for virtually every other seller of tangible personal property. For example, sec. 212.06(5)(a)1, F.S., provides that "it is **not** the intention of to this chapter to levy a tax upon tangible personal property imported, produced, or manufactured in this state for export, provided that the tangible personal property" is shipped via licensed exporter or common carrier. In doing so, Florida's legislature recognized that such a sale is forbidden to be taxed by Florida as interstate commerce, as it is already subject to tax at the destination state.[22] This apparent conflict between the legislative intent of Chapter 212 and sec. 212.05(1)(l), F.S., is a result of a lobbying effort by an industry prior to our judicial system's full development of commerce clause jurisprudence. Florida's statute on Florists is not only against the unambiguously stated legislative intent of Chapter 212, but it is also clearly unconstitutional as infringing upon the dormant commerce clause. Thus, the lower court's holding should be affirmed.

[22] It is interesting to note that while sec. 212.05(1)(l), F.S., provides the tax is imposed on the flower vendor, sec. 212.07(4), F.S., is a directly conflicting statute making it a misdemeanor for any dealer to absorb or not separately line item the sales tax to the customer.

IV. FLORIDA'S IMPOSITION OF SALES TAX ON IN-STATE FLORISTS WHEN THE SALE IS ORDERED, FILLED, AND DELIVERED WHOLLY OUTSIDE STATE BORDERS CREATES THE SUBSTANTIAL RISK OF MULTIPLE TAXATION, AS ADMITTED BY APPELLANT

Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), in order to pass constitutional muster, Florida's taxing statute on the interstate transactions of the florist industry must be "fairly apportioned." The fairly apportioned prong endeavors to "ensure that each State taxes only its fair share of an interstate transaction." *Jefferson Lines*, 514 U.S. at 184. The courts developed a two step approach to evaluate fair apportionment, by applying "internal consistency" and "external consistency" tests. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). In the materials that follow, it becomes clear, under the facts of this case, Florida's statute fails both the internal and the external consistency tests.[23]

First we examine the ***internal consistency test*** to show how Florida's tax on the florist industry violates the dormant commerce clause. Under the internal consistency test, we need to confirm that "the imposition of a tax identical to the one

[23] *See, e.g.*, *D.H. Homes Co. v. McNamara*, 486 U.S. 24 (1988) (use tax on magazines), *Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (sales tax on fuel upheld when purchased ***and delivered to customers in Florida*** but used in international commerce), and *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Louisiana's use tax on natural gas held unconstitutional under the dormant commerce clause because the tax was to be borne by out of state consumers).

in question by every other State would add no burden to interstate commerce that an intrastate commerce would not also bear." *Jefferson Lines*, 514 U.S. at 185. In essence, the test looks to see if the same statute were in effect everywhere, would the statute prevent double taxation on interstate transactions that is not borne by intrastate transactions. Florida's statute fails this test. First, let us review the two sentence statute in question.

> Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered. Florists located in this state are not liable for sales tax on payments ***received from other florists*** for items delivered to customers in this state. Sec. 212.05(1)(l), F.S. [*emphasis added*]

Note that the first sentence implements the tax and the second sentence implements the exemption. However, the exemption sentence is narrower than taxing statute and here lies the problem. While all sales by a florist located in Florida are subject to tax, the exemption only applies if the order is received from another Florist. If the same law were implemented in every state, as this test requires, the result is often at least two states would tax the same sale of flowers.

Example 1: A florist in Georgia receives a large order for roses to be delivered in Jacksonville, Florida and delivers the roses to the Florida destination in its own vehicles. Georgia would have the right to tax the sale under the first sentence of the statute because the sale is made by a florist located in Georgia. However, because the Georgia florist is delivering the flowers into Florida by its own truck, the Georgia

florist is considered to be a dealer in Florida, implementing the "located in this state" first sentence of the taxation statute.[24] Therefore, Florida would also have the right to tax the roses because they were sold by a florist "located in" Florida. Unfortunately, the exemption statute would not apply because there is no payment from a second florist to trigger the exemption. The result – double taxation on interstate commerce that would not have occurred if the transaction was wholly intrastate, which violates the internal consistency test.

Example 2: This florist has locations in both Florida and Georgia and is registered as a dealer for sales tax purposes in both states. One of its Georgia locations receives an order for flowers to be delivered in Miami. The Georgia store sends the details of the order to the company's Miami location for preparation and delivery. With an identical statute in both states, Georgia would have the right to tax the sale of roses because the florist is located Georgia where the original order was placed. However, the florist is ALSO located in Florida, where the flowers are prepared and delivered to the customer. Under this statute, Florida would also have the right to tax the transaction because the florist is "located in this state" and

[24] *See, e.g.*, *Rhinehart Equipment Company v. Florida Department of Revenue*, DOAH Case No. 11-002567 (adopted in TOTO Aug. 4, 2014) (held that a Georgia farm equipment retailer's delivery of farm equipment to Florida customer by the taxpayer's own vehicles was enough to cause the company to be considered physically present in the state and a "dealer" for Florida sales and use tax purposes. This caused the dealer to be responsible for the sales tax on all sales of equipment to Florida customers during the period in question).

accepted an order for delivery of flowers in Florida. The statute, on its face, does not exempt the transaction when the customer placed the order at a separate location of the business. The exemption does not spring to life to save the day because the exemption only applies when the order is "received from other florists." Sec. 212.05(1)(l), F.S. Under this likely scenario, double taxation occurs on multistate transactions that would not occur if the transactions were to take place wholy within one state. Therefore, the statute fails the internal consistency test and must be struck down as unconstitutional.[25]

Florida's statute also fails the ***external consistency test***, which looks "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of the value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185. "Here, the threat of real multiple taxation may indicate a State's impermissible overreaching." *Id.* at 185. As Georgia has a similar florist origin sourcing rule[26] to Florida, the two examples provided in our internal consistency

[25] It is worthy to note that our sister states, Alabama and Georgia, protect against such double taxation on florists located in their states by requiring a second florist to be involved in the taxing statute as well as the exemption statute. Florida provides no such protection because the taxing statute only mentions the second florist in the exemption portion of the statute, a fatal flaw. Sec. 212.05(1)(l)., F.S., Ala. Admin. Code r. 810-6-1-.67 (2014), and Ga. Comp. R. & Regs. 560-12-2-.42 (2014).

[26] Ga. Comp. R. & Regs. 560-12-2-.42 (2014).

analysis would result in both Florida and Georgia having the right to tax the transaction. The threat of double taxation violates the external consistency test.

There is a larger, overriding reason why the external consistency test is violated – the florist sourcing laws vary from state to state. Even in the states that have "similar" statutes to Florida's, almost every state's taxing and exemption laws are slightly different. The inconsistency in state statutes trying to regulate interstate commerce results in transactions falling through the cracks of variation to be taxed by multiple jurisdictions. A simple review of the Appellant's initial brief, pg. 11-12, brings these variations and their consequences to light.

For example, in California, the Appellant admits that the definition of "florist" does not include those "who do not fulfill other florists' orders for delivery of flowers." Cal. Code Regs. Tit xviii, sec. 1571(b)(1)-(2) 2007. As a result, an order placed with the Appellee and forwarded via the florists wire service to a California florist would be taxed in Florida under the Appellant's interpretation of sec. 212.05(1)(l), but would not be exempt to the California florist because the order was not received from a company that qualifies as "another florist." This results in impermissible double taxation because of the slightly different taxing statutes.[27]

[27] The same problem occurs in Wisconsin, where the statute excludes from the definition of "retail florist" those "who do … not prepare and sell cut flowers." This results in double taxation of orders placed with the Appellee (that does not prepare flowers) in Florida and sent to a florist in Wisconsin for fulfillment. Wis. Admin. Code Dep't of Rev. sec. 11.945 (2014).

A second glaring problem occurs from variation in state laws when some states only exempt transactions sent through some type of florist telegraph delivery system.[28] Orders placed with Appellee are relayed to out of state florists without using the florist telegraph delivery system. As a result, the receiving florist would be subject to tax on Appellee's orders because there was no special florist wire service system utilized to trigger the exemption. Again, impermissible double taxation occurs in this case due to the fact the florist industry lobbied for the regulation of interstate commerce on a state by state basis, instead of with the US Congress, which has the constitutional right to implement a consistent sourcing law for the industry. Therefore, the lower court's ruling should be upheld.

Appellant may not claim a lack of cases in which the destination florist has been subject to tax on orders from an out of state florist because that is exactly what happened in *Obrien v. Isaacs*, 203 N.E.2d 890 (Ill. 1965). That case involved an almost identical fact pattern ***except*** it was the destination state asserting taxing jurisdiction over the transaction, not the state of the originating florist.[29] The Illinois

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[28] This narrowed limitation on the exemption to require some type of wire service is most likely the result of the wire service industry lobbying for the special sourcing statute and trying to insure the florists would continue to use the wire service industry – instead of contacting the 2nd florist directly. However, it is not found in every state and is notably absent from Florida's statute.

[29] There is probably a second difference in that the originating florist was most likely a brick-and-mortar florist (instead of an internet only Florist with no inventory in the present case). However, this fact is not clear from a reading of the case. *See, generally*, *Obrien v. Isaacs*, 203 N.E.2d 890 (Ill. 1965).

Supreme Court, ruled against the plaintiffs consisting of over 1,900 Illinois florists and 500 out of state florists. The court upheld sales tax the florist on flower orders received from out-of-state florists, finding no discrimination against interstate commerce. The court further recognized that:

> "[h]ere we have not only an Illinois seller making a sale in this State and delivery of goods located in State, title to which passes in this State and delivery of which is made in this State, but [also] the goods are purchased for use in this State and are used here. We are of the opinion that the tax measured by the proceeds of such a sale [by Illinois] does not unlawfully discriminate against interstate commerce." *Id.* at 891.

It is hard to get a clearer case to show how another state can assert jurisdiction to fully tax an instate florist receiving an order from an out of state florist when the state statutes do not clearly forbid the state from doing so. Since Appellant admits only 36 states and the District of Columbia have statutes somewhat similar to Florida,[30] the result of the *Obrien v. Isaacs*' case reflects the likely outcome of any challenge by one of the 9 other states with sales taxes to impose tax on 100% of the sales price to the local florist. As discussed above, the same result occurs when the variations in the state taxing and exemption statutes cause some florists or florist transactions to fall into the tax trap of states trying to regulate interstate commerce.

Finally, the Appellant blatantly admits on pgs. 27-28 of its Initial Brief that if this court holds Florida's law unconstitutional, it "could actually burden interstate

[30] *See*, Appellant's Initial Brief, pg. 11.

commerce … potentially leading to multiple taxation." Because there are already states that do not have some variation of Florida's florist sourcing law, this is an admission by Appellant that there is a present risk of multiple taxation when Appellee forwards flower orders into these states.[31] Thus, by Appellant's own admission, Florida's statute violates the external consistency test and should be struck down as unconstitutional.

CONCLUSION

For these reasons, the American Association of Attorney – Certified Public Accountants, Inc. and the Florida Association of Attorney – Certified Public Accountants, Inc. believe that: (1) the Appellee is not a "florist" under Florida law and thus is not subject to the special sourcing rules of imposed on florists in Florida and (2) Florida's law creating a special sourcing rule for florists located in Florida violates the dormant commerce clause on its face and also as applied to the particular transactions involved in this case.

[31] *See, e.g.* neither Colorado nor Hawaii have special sourcing rules for florists, which creates an actual risk of multiple taxation when order are placed with Appellee in Florida and forwarded to florists in these states.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on March 31, 2015 to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing motion complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ James H Sutton Jr
James H Sutton, Jr., CPA, Esq.