

1 IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
2 IN AND FOR LEON COUNTY, FLORIDA

3 JETBLUE AIRWAYS CORPORATION &
4 SUBSIDIARIES,

5 Plaintiff,

CASE NO.: 2024 CA 1177

6 vs.

7 STATE OF FLORIDA,
8 DEPARTMENT OF REVENUE,

9 Defendant.
10 _____/

11 TRANSCRIPT OF PROCEEDINGS

12 HELD BEFORE: THE HONORABLE JONATHAN E. SJOSTROM

13 "Defendant's Motion to Dismiss the Complaint"
14 "Plaintiff's Motion for Judgment on the Pleadings"

15 DATE: November 5, 2024

16 TIME: 8:58 a.m. - 10:30 a.m.

17 PLACE: Leon County Courthouse
18 301 South Monroe Street, Room 315
Tallahassee, Florida 32301

19 This cause came on to be heard at the time
20 and place aforesaid, when and where the following
proceedings were stenographically reported by:

21 Deborah Alff, RPR

22 For the Record Reporting, Inc.
23 519 East Park Avenue, Suite 4
Tallahassee, Florida 32301

1 APPEARANCES OF COUNSEL:

2 On behalf of the PLAINTIFF:

3 MICHAEL J. BOWEN, ESQUIRE
4 Akerman LLP
5 500 North Laura Street, Suite 3100
6 Jacksonville, Florida 32202-3659
7 Phone: 904-598-8625
8 Email: Michael.Bowen@akerman.com

9 LORIE A. FALE, ESQUIRE
10 Akerman LLP
11 98 Southeast Seventh Street, Suite 1100
12 Miami, Florida 33131
13 Phone: 305-982-5550
14 Email: Lorie.Fale@akerman.com

15 On behalf of the DEFENDANT:

16 JACEK P. STRAMSKI, SPECIAL COUNSEL
17 Florida Department of Revenue
18 P.O. Box 6668
19 Tallahassee, Florida 32314-6668
20 Phone: 850-617-9347
21 Email: Jacek.Stramski@floridarevenue.com

22 MICHAEL AYALA, ESQUIRE (Via Zoom Video-Conference)
23 Office of the Attorney General
24 The Capitol, PL-01
25 Tallahassee, Florida 32399-1050
Phone: 407-241-5372
Email: Michael.Ayala@myfloridalegal.com

LISA KUHLMAN TIETIG, ESQUIRE
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-6536
Phone: 850-414-3300
Email: Lisa.Kuhlman@myfloridalegal.com

Also Present:

Jon Luke Dueltgen, Esq. - JetBlue Airways
And others via Zoom Video-Conference

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-- PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS --

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P R O C E E D I N G S

1
2 (Whereupon, the hearing was called to order
3 by the Honorable Jonathan E. Sjostrom, presiding.)

4 THE COURT: All right. So we'll go ahead and
5 get started on the record. This is State of -- I'm
6 sorry -- JetBlue Airways Corporation vs. State of
7 Florida, Department of Revenue. Case number is
8 24-CA-1177 in Leon County. We're here on the
9 Department's Motion To Dismiss and Jet Blue
10 Airways' Motion for Judgment on the Pleadings. I
11 know that motion for judgment on the pleadings was
12 kind of my idea. And the Department has filed what
13 looks like some fairly compelling authority
14 suggesting that was a bad idea that I had. You
15 try.

16 So does it make sense to concentrate just on
17 the motion to dismiss today, or do you want to --
18 we can treat your document really as a memorandum
19 on the motion to dismiss if that would make sense?

20 MR. BOWEN: Well, Your Honor, do you mind if I
21 stand up?

22 THE COURT: You can sit or stand however
23 you're comfortable.

24 MR. BOWEN: I think, as a housekeeping matter,
25 we think it's important that you treat the motion

1 for judgment on the pleadings as a motion for
2 summary judgment as to Count IV, only, of our
3 complaint. And the reason why we asked that is
4 that Count IV is strictly a facial challenge. The
5 Department's defense to arguing against the motion
6 for summary judgment is that they needed further
7 discovery. But again if Count IV as advocated by
8 JetBlue is truly a facial challenge, then no facts
9 are necessary.

10 Now, there's no harm in you considering it a
11 motion for summary judgment. And if at the end of
12 the hearing, Your Honor, you say, 'You know what,
13 Mr. Bowen, there are facts denied,' better to have
14 that and have that before you, because, if you rule
15 in our favor and push for summary judgment, the
16 case is over today and there's no need for a
17 further hearing.

18 THE COURT: Well, does the rule of civil
19 procedure allow me to do that without a -- without
20 agreement by the Department? Because they're
21 supposed to get 40 days notice before the hearing
22 that if it's going to be a summary judgment. I
23 know it was originally --

24 MR. BOWEN: It was originally --

25 THE COURT: -- denominated as summary

1 judgment, but then --

2 MR. BOWEN: And it's still, still we didn't
3 pull it. The summary judgment motion is still
4 there. And the arguments that we made are the same
5 arguments in the summary judgment on the pleadings
6 which the Department responded to yesterday.

7 THE COURT: Yeah, but they would have had --
8 they'd have the benefit of 20 days.

9 What's the Department's position as to whether
10 or not I should consider the motion for judgment on
11 the pleadings as a motion for summary judgment?

12 MR. STRAMSKI: Your Honor, we believe that's
13 inappropriate. One, I don't believe this is just a
14 facial challenge. The complaint states that Count
15 IV is a facial and as-applied challenge. If
16 JetBlue is abandoning the as-applied challenge
17 today, then that's news to us, but we still think
18 it would be inappropriate to hear the motion as a
19 summary judgment motion.

20 Fundamentally, we dispute that they would have
21 standing to challenge any -- the alleged double
22 taxation issues that they raised as a basis for
23 Count IV. We haven't had any chance to engage in
24 discovery into that.

25 We also have affirmative defenses that we

1 might raise in our answer that would obviate the
2 need to even consider the merits of Count IV.

3 Finally, I believe that JetBlue intends to
4 offer this poster (indicating) here today as
5 evidence in support of its Count IV summary
6 judgment or judgment on the pleadings request. We
7 haven't had a chance to engage in any discovery
8 with respect to that poster. We believe it
9 actually contradicts at some point so it's
10 inappropriate for a number of reasons, Your Honor.

11 THE COURT: We still have people joining us.
12 So give me just a second to let these people in.
13 It's on them, though, because it's now 9:01 so we
14 can start. And if they're late, they're late, it's
15 on them.

16 All right. So I'll give you the last word
17 on that. Anything else as far as whether I should
18 treat this as a motion for summary judgment,
19 Mr. Bowen?

20 MR. BOWEN: Yes, Your Honor. You'll notice
21 Mr. Stramski's comments, there's no procedural
22 argument. It's a question of whether or not
23 there's a genuine issue of material fact, a
24 standing challenge, those are all arguments against
25 you granting summary judgment, not actually hearing

1 the motion for summary judgment. And that's the
2 crucial distinction. If you consider it and you
3 rule against us today, that's fine. We can refile
4 it another time.

5 THE COURT: Fair enough. All right. No, I
6 think, I think procedurally I can't do what you're
7 asking me to do. It's still a relatively new case,
8 yeah, the complaint date of July 19. And we don't
9 have pleadings closed.

10 I know that's not always an impediment to
11 proceeding with a motion for summary judgment, but,
12 under all of the circumstances, I'm going to deny
13 the motion to treat the motion for judgment on the
14 pleadings as a motion for summary judgment. I'm
15 going to deny the motion for judgment on the
16 pleadings without prejudice to re-raising it once
17 the pleadings are closed, assuming that the motion
18 to dismiss is denied and we'll proceed on the
19 motion to dismiss.

20 Counsel, whenever you're ready.

21 MR. STRAMSKI: Thank you, Your Honor. I'll
22 stand so I can see you better.

23 THE COURT: And you know what? This room is
24 what it is. This is by far the fanciest hearing
25 that I've ever had in here. Usually, I'm divorcing

1 people in this room. So I appreciate y'all putting
2 up with this.

3 MR. STRAMSKI: Understood. I didn't know this
4 room actually existed so I learned something today.

5 So, Jacek Stramski for the Department, along
6 with Ms. Kulhman. I believe Mr. Ayala may be
7 joining us remotely from Orlando. Today we are
8 asking for dismissal of JetBlue's complaint.

9 THE COURT: And Mr. Ayala is on the Zoom.

10 MR. STRAMSKI: Excellent. And our auditor,
11 Ms. Harris, may also be observing.

12 Today, the Department is asking for dismissal
13 of the complaint in its entirety. With respect to
14 four counts, Counts I, II, III, and VIII, we
15 believe that this complaint should be dismissed
16 with prejudice. We don't believe that those counts
17 can be amended to cure their deficiencies.

18 With respect to the remaining counts, while of
19 course the Department disputes the merits and
20 probably the likelihood that JetBlue could ever
21 prevail on them, we submit that those counts would
22 be dismissed with -- without prejudice, excuse me,
23 for a failure to state a claim.

24 Before I address the complaint itself and the
25 grounds for dismissal with respect to the counts, I

1 do want to address Rule 1.071. In its response,
2 JetBlue argues that that issue has been mooted by
3 the notice of the constitutional question that
4 JetBlue filed on August 28th.

5 We believe that's not accurate, Your Honor.
6 The notice of constitutional question filed by
7 JetBlue does not comply with the rule. The rule
8 requires a party who is challenging a
9 constitutional issue to identify the constitutional
10 question in the notice. And JetBlue did not
11 identify the constitutional question in its notice.
12 It simply stated that statute 220.151(2)(c) is
13 being challenged on constitutional grounds, but
14 JetBlue did not identify the constitutional basis
15 for that challenge. And we believe that's fatal to
16 JetBlue's complaint for the following cases.

17 I think the Lee Memorial Health Services case
18 cited in our motion to dismiss is directly on
19 point. There, the Florida Supreme Court recently,
20 in 2018, considered a challenge to a health lien
21 law that allowed the health service provider to
22 obtain a lien for cost of service provided to
23 patients. And that lien could attach to any
24 insurance claims and the like. And the law
25 provided that that lien could not be dismissed or

1 wiped out by the claimant without the lienholder's
2 permission.

3 So an insurance company challenged that lien
4 law on two constitutional bases: On the basis that
5 it was an improper special law addressing liens or
6 an impairment of liens; and on the basis that it
7 was an improper impairment of contracts.

8 The Florida Supreme Court considered this
9 issue and it noted that because the constitutional
10 issue notice did not mention Article 1, Section 10,
11 so specifically the impairment of contracts
12 provision of the Constitution, that argument could
13 not be considered.

14 Here, JetBlue's challenge is entirely based on
15 constitutional grounds. The Constitutional notice
16 filed by JetBlue doesn't identify any
17 constitutional questions, and so for that reason
18 alone we believe that the complaint should be
19 dismissed.

20 Now, JetBlue will probably argue, as it did in
21 its response, that the Department of Revenue was
22 represented by attorneys from the Attorney
23 General's Office, and that, therefore, the notice
24 requirements should be disregarded, but that's not
25 really the standard that's been recognized by the

1 courts.

2 In fact, recently, the Third District Court of
3 Appeal considered that question directly, and we
4 have not seen any authority on this question from
5 any other district courts. This was in the Ramle
6 International Corp. v. Miami Dade County case at
7 388 So. 3d 126.

8 There, plaintiffs were challenging a statute
9 that addressed the distribution of surtax proceeds
10 from tax deed sales, and some of the challenges
11 were constitutional in nature. The Department, the
12 Department was a defendant, a co-defendant in that
13 case. It was represented by the Attorney General's
14 Office. In fact, if you look at the opinion you'll
15 see Attorney General Bondi and the assistant
16 attorney generals that were representing the
17 Department listed on that opinion.

18 And the plaintiff was arguing that the
19 constitutional questions could have been reached
20 because the Department of Revenue was a state
21 agency and that sufficed for providing notice to
22 the state.

23 The Third District rejected that argument
24 directly and said that the Department of Revenue is
25 not the Attorney General's Office. And that stands

1 to reason. Yes, the Department of Revenue is
2 oftentimes represented by attorneys from the
3 Attorney General's Office. They do not represent
4 the Attorney General in such cases and so it's
5 improper to conflate the two.

6 JetBlue, I think, also argued that the notice
7 provisions in rule 1.071 applied to litigation
8 between private parties. There's no authority for
9 that. And I think, again, the Ramle International
10 Corp. case stands directly for the opposite
11 proposition, that litigation between private
12 parties, including the Department of Revenue, if
13 there's a constitutional challenge, the statute
14 still requires strict compliance with the notice
15 requirements of rule 1.071.

16 Now, turning to the counts of the complaint,
17 Your Honor, I will address those individually, but,
18 before getting to that, I'd like to discuss the
19 concept of apportionment generally speaking.

20 It's important to keep in mind when we're
21 analyzing or looking at JetBlue's arguments,
22 specifically with respect to the border issue and
23 JetBlue's claims that any attempt by the Department
24 to engage in enforcement methodology that captures
25 any income or looks at any activity outside the

1 borders is essentially per se invalid. I don't
2 think they use that phrase, but it sounds like that
3 is really the standard that JetBlue is pushing in
4 each one of its counts.

5 So apportionment addresses the way that states
6 can attribute some income of a multi-state entity
7 to the state itself for tax purposes.

8 Traditionally, there have been several approaches
9 to this, to this question, so allocation is one.
10 Allocation will provide that with certain discrete
11 transactions, the income from that transaction can
12 be fully allocated to the taxing jurisdiction.

13 An example could be certain asset sales that
14 are specifically located within one jurisdiction
15 that do not form part of a larger business
16 enterprise. So you can think of a sale of real
17 property that was purchased perhaps as an
18 investment that was not part of the larger business
19 enterprise. The transaction and income for
20 something like that could be allocated to a
21 specific taxing jurisdiction.

22 Separate accounting is a similar concept.
23 It's a little bit more nuanced. With separate
24 accounting, a multi-state entity might, through
25 accounting practices, try to establish that a

1 certain business process is discrete from the
2 larger whole, and all the income that it generates
3 can be attributed specifically to a taxing
4 jurisdiction.

5 And we're not here on those two issues. We're
6 here for apportionment. And apportionment
7 recognizes that when there is a multi-state
8 business that transacts and uses operations across
9 taxing jurisdictions to drive income, it is
10 oftentimes impossible to rationally argue that any
11 activity is discretely located with or any income
12 is discretely attributable to a specific
13 jurisdiction based on the activities of the unitary
14 business.

15 So concepts like functional integration among
16 corporations, including subsidiaries,
17 centralization of management and economies of scale
18 all lead to this conclusion. We can think of a
19 very simple example where an entity might have
20 manufacturing in one state, warehousing and
21 management in another state and sell those
22 products. Perhaps if they're specialized in two,
23 two additional states, it would be impossible to
24 say that those two additional states where the
25 sales actually take place are the sole sources of

1 income.

2 The same argument would be made for, say, the
3 manufacturing component. Apportionment tries to
4 address that issue by ascribing a certain
5 proportion of the value and income derived from
6 that multi-state business to a jurisdiction.

7 The unitary business concept or unitary
8 business principle, Your Honor, is the underlying
9 principle here for apportionment. And it's again
10 important to note that the unitary business
11 principle is not being challenged here. Jet Blue
12 is not arguing that any of the income apportions
13 within the Department's assessment does not fall
14 within this unitary business principle.

15 And courts have recognized in many cases that
16 we've cited, that with the unitary business
17 principle, it is appropriate to look to activities
18 beyond the state's taxing borders to ascribe
19 income.

20 Most apportionment factors use a combination
21 of several factors or formulas. Excuse me. Most
22 apportionment formulas use one or several factors
23 including sales, payroll, property within the state
24 compared to the total sales, payroll, and property
25 everywhere to define what -- what this

1 apportionment factor will be to describe the value
2 to the jurisdiction.

3 But it's important to note that with these
4 apportionment formulas, the use of sales payroll
5 for property is not the same as, and cannot be
6 equated to, a tax on sales. It's not a tax on
7 payroll and it's not a tax on property. This is an
8 income tax. And those are just factors used to,
9 again, apportion that value of the multi-state
10 unitary business to that state for taxation
11 purposes.

12 So Florida airline apportionment uses a
13 different factor. We'll admit it's somewhat unique
14 as far as we know. Since 1971, though, it has been
15 in effect for over 50 years. And the airline
16 industry has relied on this. The taxing
17 authorities have relied on this. There, to our
18 knowledge, have not been really many challenges to
19 this except recently. Certainly, the tax has been
20 in effect for all this time. The factor is used
21 based on revenue miles flown within the statutorily
22 defined area in section 220.151(2)(c) that JetBlue
23 is challenging.

24 We can refer to it as "the box" colloquially.
25 It probably would be better shorthand than reading

1 out the statute. And Florida takes those revenue
2 miles flown within that box and divides it by
3 revenue miles flown everywhere, and then derives
4 the apportionment factor in that fashion.

5 Now, again, it's important to note as JetBlue
6 concedes that miles flowing over the box do not
7 come into the numerator for this factor. They're
8 excluded. So we're only talking about flights to
9 and from Florida in this case.

10 THE COURT: Landing or taking off in Florida.

11 MR. STRAMSKI: Yes, Your Honor. Undeniably,
12 the box includes areas beyond Florida's geographic
13 borders, we do not dispute that, but that does not
14 mean that Florida is taxing value earned beyond the
15 borders. JetBlue does not sell revenue miles.
16 They don't charge by the revenue mile. If your
17 credit card runs out while JetBlue is flying, you
18 don't have to leave the airplane.

19 Tickets are purchased, you know, in Florida
20 and in other states, perhaps, through a combination
21 of various business operations that JetBlue has.
22 We don't have those facts here, they're not
23 alleged, but that income is earned within
24 jurisdictions for the most part. It's not, it's
25 not the right international waters. So, in any

1 event, there's no allegation that the revenue
2 really is earned through selling revenue miles on
3 their mileage. So that's apportionment kind of in
4 a nutshell in Florida's apportionment methodology.

5 I do want to address also the motion to
6 dismiss standard and the issue of standing before I
7 get into the specific counts. So, of course,
8 well-pleaded factual allegations can be presumed as
9 true, but that's not the end of the story here.
10 Conclusory factual allegations, of course, are not
11 entitled to many points. Neither are legal
12 conclusions or unwarranted deductions, which we
13 contend, each count is really just a set of
14 unwarranted deductions and legal conclusions with
15 very few facts underlying it, aside from this
16 contention that Florida looks at revenue miles
17 outside of its geographic borders.

18 So Florida Rules of Civil Procedure require
19 more detailed factual pleadings than that. Every
20 fact essential to the underlying claim has to be
21 set out, pleaded distinctly, definitely, and
22 clearly. This is so the Department or any
23 defendant can prepare a defense.

24 I'll get into this in more detail, but just
25 for an example, there's a count that the Department

1 is somehow impinging the federal government's
2 ability to speak in foreign, foreign affairs. No
3 foreign policy, no federal treaty is identified at
4 a kind of level of pleading with each for the
5 Department to sift through. Who knows what to
6 identify, what foreign policy issue is being
7 implicated here?

8 Again, Florida Rules of Civil Procedure
9 require more specificity than what was set out in
10 the claim. Also, a party alleging a claim must set
11 out sufficient facts and specific facts to
12 establish standing to raise that claim, meaning,
13 the party must show that it is a real party in
14 interest with respect to each claim raised, and it
15 has an articulable interest in the judicial
16 resolution of that claim.

17 Factors considered for standing purposes are
18 injury, causation, and redressability. What does
19 that mean here? Well, at least with respect to
20 double taxation and this claim that there's a
21 double taxation issue, why we disagree with that,
22 and we're going to show why mathematically it's
23 really impossible with the Department's formula.

24 But to establish standing to raise that claim,
25 JetBlue would have to establish that it's either

1 being injured or is facing a real and immediate
2 injury or potential injury from this claimed double
3 taxation problem.

4 A challenger to the constitutionality of a
5 statute, excuse me, cannot raise any theory that's
6 unrelated to its specific particular injury or
7 potential injury just to see if that can gain
8 traction and invalidate the statute.

9 So, again, with respect to dismissal,
10 dismissal of a claim with prejudice is appropriate
11 if amendment would be futile. And I want to
12 quickly address the Frontier case that was recently
13 decided by this Court, as well.

14 THE COURT: You know, it's funny -- "funny" is
15 probably the wrong word, but, inside baseball. So
16 this Court, we usually, usually refers to this
17 Judge, the Second Circuit. I know what you're
18 saying. You're not --

19 MR. STRAMSKI: Yes, you're right.

20 THE COURT: You're not reminding me of an
21 order that I entered previously. It's entered by a
22 judge of the Second Circuit.

23 MR. STRAMSKI: Correct, thank you. Thank you.
24 I'll be more clear.

25 THE COURT: It's okay. I have to say that.

1 Otherwise, well, one of my colleagues would be
2 disappointed in me, so I don't want that, but go
3 ahead.

4 MR. STRAMSKI: Understood. You're absolutely
5 right. The Second Circuit recently decided, in
6 2023, a complaint that was nearly identical. This
7 was the Frontier case. The case number is
8 2023-CA-1433.

9 Now, the order of the counts was slightly
10 different. And nexus was not included in that
11 complaint. It is here. But aside from that, all
12 the other issues were essentially identical.

13 So Frontier challenged the box on the basis of
14 the Supremacy Clause, on the basis of fair
15 apportionment which would include internal and
16 external consistency. Those phrases were not used,
17 but those are really legal tests of fair
18 apportionment.

19 Frontier challenged the fair relationship
20 between the taxes imposed and the services
21 provided, and also had a Foreign Commerce Clause
22 challenge in there. It alleged that the box
23 doesn't comport with the Florida constitutional
24 requirements of Florida boundaries.

25 And it was the same counts that we're asking

1 for to be dismissed today with prejudice were
2 dismissed, again, with the exception of nexus since
3 that was not at issue there, were dismissed there.
4 Of course, JetBlue is correct in that that decision
5 is not binding on this Court, on Your Honor, but it
6 should be instructive and I think are highly
7 persuasive.

8 It was recently issued, the complaint again
9 was very similar if not -- well, very similar, I'll
10 put it that way, and it was properly granted.
11 JetBlue argues that there was no record of that
12 hearing or that the opinion maybe was not as
13 lengthy as one could imagine, and that therefore we
14 don't know on what basis the judge in that case
15 will rule.

16 I don't think that's really fair. I think a
17 dismissal with prejudice has to identify that the
18 amendment of the complaint would be futile. That's
19 enough for our purposes to identify that the same
20 grounds were ruled on, and really the basis of the
21 motion to dismiss with respect to the overlapping
22 counts was the same.

23 To the extent that the order dismissed other
24 counts without prejudice, it specified that there
25 were not sufficiently specific facts pled in the

1 complaint. And again that's the same issues that
2 we are dealing with here today.

3 So turning now to the counts that we argue
4 should be dismissed with prejudice, these are
5 Counts I, II, III, and VIII. Again, they cannot be
6 amended and should be dismissed with prejudice.

7 Counts I, II and VIII are largely variations
8 on the same theme, that the box somehow enlarges
9 Florida's boundaries or disregards them, and that
10 therefore is an automatic violation of the
11 Supremacy Clause, the Florida boundaries defined in
12 the Florida Constitution, and the Due Process
13 Clause, the federal Due Process Clause.

14 Count I simply charges that because the
15 boundaries of the state of Florida are defined by
16 the Florida Constitution, and the state's
17 apportionment and method exceeds the territorial
18 jurisdiction of the state of Florida, it violates
19 Article II.

20 Well, the problem with that argument, Your
21 Honor, is that Article II of the Florida
22 Constitution says nothing about the apportionment
23 of income tax. And really this argument, well,
24 I'll go on to Count II as well, because Count II is
25 a similar argument. It's rooted in the federal

1 Constitution. It states again that because the box
2 defined by section 220.151(2)(c) lies largely
3 outside the United States, the method of
4 apportionment imposed by the NOPA exceeds the
5 territorial jurisdiction of the state, and
6 therefore it violates Article VI, Section 2 of the
7 United States Constitution.

8 Again, that section does not identify how
9 states can apportion income to their jurisdictions.
10 And, in fact, this argument is directly
11 contradicted by the case law.

12 Count VIII is similar. It's grounded in the
13 Due Process Clause of the 14th Amendment, so it's
14 framed, but simply alleges that there exists no
15 constitutionally significant definite link or
16 minimum connection to aircraft flying outside the
17 geographical border of the state of Florida.

18 THE COURT: Let me stop you for just a second.
19 You can talk faster than I can think, so you got to
20 slow down just a little bit.

21 MR. STRAMSKI: I apologize. I have a tendency
22 to speak too quickly.

23 THE COURT: No. Well, it's an artifact of a
24 quick mind. So I appreciate it very much, but I
25 can't quite keep up because I'm a good deal older

1 than you are. Go ahead.

2 MR. STRAMSKI: So again, that allegation in
3 Count VIII is again very conclusory. It also
4 ignores the fact that we're only dealing with
5 flights coming to and from Florida in this case.
6 And for really the due process purposes, that
7 really should be a nexus argument, and it kind of
8 is separated out in a separate count, but due
9 process is satisfied when there are minimal
10 connections between the state and the taxing
11 authority. And clearly here there are minimal
12 connections. Every flight is to or from Florida.

13 THE COURT: Is it important for the
14 analysis -- and I've tried to read the authorities
15 that you-all cited. I can't tell you that I've
16 read every one of them, but I've tried to read the
17 authorities that you-all have cited, and some of
18 them are familiar from law school.

19 So is it important for the analysis at all
20 that Florida's geography is so unique, that it's a
21 giant right angle with the leg jutting into the
22 into the ocean, does that factor into the analysis
23 at all?

24 MR. STRAMSKI: I don't know if that factors
25 into the constitutional analysis specifically,

1 except for the fact that the Supreme Court has
2 regularly identified that an analysis of an
3 apportionment methodology will look to its
4 practical effects and not be constrained by any
5 technicalities. And here I do think that the
6 Legislature was taking into consideration the
7 practical constraints of Florida's geography by
8 designing this box.

9 THE COURT: When you look at the box, the
10 boxes, the box's easternmost portion of Florida
11 pretty much all of the Straits of Florida, all the
12 way to the border of the western panhandle, and
13 that's pretty much -- it basically is the other
14 side of the right angle is added back in.

15 And as I was thinking about this, it seems
16 like sort of what you're capturing is all of the
17 business going to somehow get to Florida and get
18 across. It has to get to Florida, has to get out
19 of Florida, and it's captured until it gets to
20 another jurisdiction, basically.

21 MR. STRAMSKI: Yeah.

22 THE COURT: Is that sort of the idea and is
23 there, is there a legislative history to that, that
24 that's how the box was designed? I don't know, I
25 don't know how good legislative history was in

1 1971.

2 MR. STRAMSKI: I could not find, perhaps
3 unsurprisingly, any detailed legislative history on
4 this issue. But I think, Your Honor, it's on an
5 important practical point, which is -- I'm getting
6 ahead of myself a little bit, but what JetBlue
7 argues is that we should rewrite the statute here
8 and ignore the box and only allow taxation or
9 apportionment through revenue miles within the
10 coastal waters and over the state itself.

11 Well, if we consider Florida's unique
12 geography in flights, say, going from Tampa to
13 Phoenix, if we did that then we'd be taxing perhaps
14 10 miles out of a 2,000-mile flight, and
15 apportioning a fraction of a fraction of a percent
16 of the income of that flight to Florida, which
17 there's no fair relationship which is ultimately
18 the guiding principle here.

19 THE COURT: Are there cases, are there cases
20 that discuss at all, in the airline industry in
21 particular that the places where the state provides
22 the greatest service, where the industry imposes
23 the greatest costs in the airline context is
24 wherever the airplane touches the ground. And so
25 is that authority -- do the taxation authorities

1 consider that, is that important to the analysis at
2 all?

3 MR. STRAMSKI: I have not seen --

4 THE COURT: I mean nexus because you've been
5 telling me that it's a nexus issue, but --

6 MR. STRAMSKI: That might also get to the
7 "fairly related" portion of JetBlue's argument that
8 we can only look at the miles within the state's
9 geographical borders to establish that they're
10 fairly related. They make that argument with
11 respect to nexus. The arguments really all mirror
12 each other.

13 And I think the Jefferson Lines case expressly
14 rejected that argument, at least with respect to
15 the nexus point, where there the challenger was
16 arguing that the state had to establish nexus for a
17 sales and use tax imposition on the sale of a bus
18 ticket that was traveling over state lines. And
19 the taxpayer was arguing, well, you have to
20 establish nexus for each mile, and the miles that
21 are outside the state don't have nexus.

22 And the court said no, that's really a fair
23 apportionment question, it's not nexus, and
24 really just cast aside that argument. But, unless
25 Your Honor has any follow-up questions --

1 THE COURT: No, I think that answers it. I
2 appreciate you. Thank you.

3 MR. STRAMSKI: Yeah. So again, if JetBlue's
4 arguments here that there's some kind of
5 bright-line constitutional barrier around the
6 borders of the state, and that's determinative, and
7 that's the only issue that we need to look at as it
8 was dispositive, really the unitary business
9 principle would fall apart, right?

10 Mobil Oil couldn't have been decided with
11 Vermont imposing tax on the dividends earned
12 abroad. The Barclays Bank case couldn't have been
13 decided in the way it was where California required
14 a worldwide combined reporting, including
15 imposition of tax on income that was unquestionably
16 earned overseas. And in the context of the unitary
17 business principle and an apportionment, the
18 Supreme Court said that was fine, within, of
19 course, the other constraints that the Due Process
20 Clause and the Commerce Clause imposed. But that
21 in itself was not a reason to disinvalidate the
22 taxing scheme. More had to be shown by the
23 challenger.

24 And that's what we're essentially arguing
25 here. Wherein, a motion to dismiss, we're pointing

1 out that, well, on the Supremacy Clause and the
2 Florida Constitutional border arguments, those fail
3 to state a claim. And they can't be amended
4 because there is no bright-line test that follows
5 the orders of a state to cut off taxation.
6 Otherwise, there would not even be the unitary
7 business analysis for a lot of these other cases.
8 The Supreme Court couldn't have said as it did in
9 Comptroller of the Treasury vs. Wynne, that the Due
10 Process Clause allows the state to tax all income
11 earned of its residents, even income earned outside
12 the taxing jurisdiction.

13 If there was, again, a strict border barrier
14 to taxation, none of these cases could have been
15 decided in the way they were. The analysis would
16 have been that, well, this activity is beyond the
17 borders. We're done. So Counts I, II, and VIII
18 should be dismissed with prejudice on that basis.

19 Count III is the nexus count. JetBlue charges
20 that on Count III, aircraft flying outside the
21 geographic boundaries of the state are not engaged
22 in an activity having the requisite substantial
23 nexus with the state of Florida. Thus, the method
24 fails the Commerce Clause test.

25 And again, with respect to -- we don't believe

1 that's the appropriate test. Because each of these
2 flights originated or terminated in Florida, there
3 is requisite nexus. In fact, the substantial nexus
4 question is satisfied under the Commerce Clause,
5 Your Honor. What is attached to this is from South
6 Dakota vs. Wayfair, when the taxpayer avails itself
7 the substantial privilege of carrying on business
8 in that jurisdiction. And that test is readily
9 satisfied here. JetBlue flies out of many
10 locations, has substantial business contacts here,
11 and satisfies the substantial nexus requirements,
12 even for those flights taking place within and
13 without the state.

14 In opposition, JetBlue relies mainly on Allied
15 Signal. That case, I didn't read it to address
16 nexus at all under the Dormant Commerce Clause.
17 And that really dealt with an issue of non-unitary
18 business income as well, so I think it's very
19 different from the issues that we're looking at
20 here.

21 I mentioned the Jefferson Lines case, which
22 outright rejected the sort of nexus argument they
23 have to look at each discrete mile just to where
24 it's taking place.

25 I would also cite, Your Honor, to Mobil Oil

1 Corp. v. Commissioner of Taxes at 445 U.S. 425.
2 This is at page 435 where the Supreme Court stated
3 that the facts, excuse me, the fact that tax is
4 contingent upon events brought to task without a
5 state does not destroy the nexus between such a tax
6 and transactions within the state for which the tax
7 is an exception.

8 And that's exactly what's happening here.
9 Yes, the box does look a little bit outside of some
10 situations, a little bit further outside the
11 jurisdictional or geographical quarters of the
12 state, but the entire purpose is to allocate or to
13 apportion, excuse me, those values that JetBlue
14 derives from flying flights in and out of the state
15 of Florida and to Florida for taxation purposes.

16 So we would argue, Your Honor, that JetBlue's
17 nexus argument is contradicted by its own pleadings
18 which state that we're only dealing with flights to
19 and from Florida. Nexus is really not an issue
20 here, and that count should also be dismissed with
21 prejudice.

22 Now, I'm going to turn to the remainder of the
23 complaints. I do want to just quickly touch on
24 some general principles behind the Dormant Commerce
25 Clause because I think they kind of illustrate what

1 should be the guiding -- kind of guiding principles
2 here as we analyze JetBlue's claim.

3 So certainly states may not discriminate
4 against foreign commerce. States may not favor
5 in-state interests against out-of-state interests.
6 That issue is not at play here. But the other kind
7 of guiding thrust of the Dormant Commerce Clause is
8 that states may not impose an undue burden on
9 interstate commerce.

10 Now, the flipside is the Commerce Clause also
11 does not shield a taxpayer from its fair share of
12 the state tax burden. And I think this concept of
13 fairness is important. Fairness doesn't mean the
14 taxpayer can minimize or is automatically entitled
15 to minimize its taxes, but the fair share means
16 something that fairly represents the value that
17 generates within the borders.

18 States are also allowed flexibility in
19 creating the apportionment formulas. The
20 (inaudible) case, which is Michigan Department of
21 the Treasury, stands for its proposition as do many
22 others. And I think my colleague on the other side
23 even concedes that point at least in principle.

24 Now, the inquiry here has to be guided and
25 informed by these guiding principles. Is the

1 apportionment method that Florida uses an undue
2 burden on interstate commerce? That seems like a
3 factual question and I don't think, ultimately,
4 ultimately general legal improvement, but it has to
5 establish the factual basis for this argument.

6 And the flipside is, does this tax tax more
7 than JetBlue's fair share of its taxable part? And
8 again, I think that's a heavily, heavily fact-based
9 inquiry that requires specific facts to establish
10 that haven't been done here.

11 So turning to --

12 THE COURT: So fact-based inquiry, that sounds
13 like you are arguing against your motion to dismiss
14 if it's a fact-based inquiry. You're not arguing
15 that their allegations are insufficient, that they
16 needed to --

17 MR. STRAMSKI: Not with respect to Counts I,
18 II, III and VIII. Now we're focusing on the
19 Commerce Clause counts and we're arguing that they
20 should be dismissed without prejudice so that
21 JetBlue can actually identify the factual basis for
22 its challenge because we -- we don't really have
23 any of it other than some revenue miles are within
24 the box, but outside the geographic borders of the
25 state. And I don't think that's enough to

1 demonstrate an undue burden on interstate commerce
2 or a taxation of an unfair share of JetBlue's
3 value.

4 So I want to turn to fair apportionment
5 specifically in the internal and external
6 consistency requirements. Internal consistency
7 provides that a formula must be such that, if it is
8 applied in every jurisdiction, it would result in
9 no more than all the unitary business of the income
10 being taxed. This is in Trinova Corp. Container
11 Corp., I think this is the gravamen, and
12 essentially the Count IV has alleged that.

13 Now, internally, so the complaint fails to
14 establish sufficient facts to demonstrate that the
15 boxes methodology is internally inconsistent. The
16 complaint alleges that Florida includes revenue
17 miles not only in Florida, but in portions of
18 Alabama, Georgia, and non-U.S. waters.

19 With respect to Alabama, we believe it's
20 really a de minimis overlap. The Florida box does
21 not actually go to the western terminus of the
22 border. It actually cuts off a little bit shorter.
23 It excludes a portion of Florida and includes a
24 portion of Alabama. The net inclusion is 24 square
25 miles of Alabama is included within the state of

1 Florida that compares to 52,000 plus square miles
2 for Alabama. That's a fraction of a fraction of a
3 fraction of a percent of Alabama's area.

4 The northern border of the box is
5 co-extensive, at least over land, but the border
6 with Georgia, it does not cut over Georgia's land
7 area as JetBlue alleges in its complaint. And
8 that's in effect the statute, Your Honor.

9 THE COURT: Does that depend on a surveyor
10 telling me where that -- telling me where that
11 border is?

12 MR. STRAMSKI: Not for the northern border,
13 Your Honor. The statute specifically says it
14 follows 31 degrees north of the land border with
15 Georgia. So with borders over Georgia, with the
16 boxes over Georgia, it follows the land border of
17 Georgia.

18 THE COURT: Okay.

19 MR. STRAMSKI: Now, JetBlue's allegations on
20 this internal consistency issue are minimal.
21 Simply states that if every state adopted a revenue
22 miles methodology that exceeded the state's
23 geographical borders, a taxpayer would be subject
24 to state income tax on more than 100 percent of its
25 income. As a general proposition, that conclusion

1 does not flow from its assumptions for a number of
2 reasons.

3 So, first of all, 100 percent of income could
4 only be apportioned and taxed if there was
5 significant overlap between other hypothetical
6 boxes. The allegation is only that if a state
7 exceeds its jurisdictional or geographical borders,
8 there necessarily is going to be a threat of
9 taxation, but if a state expands a box mainly
10 into, say, the ocean, like Florida's boxes
11 predominantly -- again, there's a minuscule overlap
12 over Alabama, but the box is largely over the
13 ocean. And there is no overlap with another
14 state's box. There could not be double taxation on
15 income because there would not be that requisite
16 overlap where two states would be apportioning
17 revenue miles from multiple layers of multiple
18 boxes.

19 THE COURT: So let's go back to your Tampa --
20 what did you say, Tampa to Phoenix? Well, Tampa,
21 let's say Tampa to Houston.

22 MR. STRAMSKI: Okay.

23 THE COURT: Tampa to Houston, and let's assume
24 Texas has a box. Are you assuming Texas or is
25 it the Texas box would have the same principle, in

1 other words, the western, the eastern end of the
2 Texas box would end at the Texas-Louisiana border
3 or --

4 MR. STRAMSKI: I don't know that that's
5 actually the guiding principle because the box is
6 not -- it's not that easy to put the box in a box,
7 so to speak. It's the western border of the box
8 does not go to the western terminus of the state.
9 It cuts off before the western part. So on the
10 northern edge, it just follows the land border.

11 So any box, at least with respect to Florida,
12 I mean, the way Florida's box is designed, any box
13 over any state that's inland would probably just
14 follow the land borders, or there might be some
15 minuscule, really minuscule --

16 THE COURT: So I'm thinking about, when you're
17 trying to decide about universalize this statute to
18 the other states, somehow it would be a box, a box
19 related somehow to the state's geography, I guess?

20 MR. STRAMSKI: I think the threat of overlap
21 is grossly overstated because it just doesn't
22 happen over land. And over the ocean it follows,
23 Florida's box follows pretty straight lines. And
24 so I don't know if there would be much overlap, if
25 any, over the ocean. But this threat of overlap

1 over land is completely, I think, hypothetical.
2 Well, not hypothetical. It's actually contradicted
3 by the box in how Florida has passed it.

4 So, one, to have this threat of double
5 taxation, there would have to be significant
6 overlap which we would not see if other states
7 impose the box-like methodology. But, second, 100
8 percent of income could only be taxed of states are
9 taxed over flight miles. And this is a critical
10 component. States do not tax over flight miles.
11 Florida does not. Other states don't use a
12 box-like methodology, but this is a -- it makes it
13 mathematically almost certain.

14 THE COURT: And that's another way of saying
15 that the flight has to originate or end in Florida
16 or that's what we mean -- by "over flight miles,"
17 you're meaning just because you fly over Florida
18 doesn't mean it's going to -- you're going to be
19 taxed on that flight?

20 MR. STRAMSKI: Absolutely, but those flight
21 miles are included in the denominator. So, so over
22 flight miles are not excluded from the calculation
23 entirely.

24 THE COURT: Oh, okay. Because it's taxable,
25 taxable miles versus total miles?

1 MR. STRAMSKI: Exactly.

2 THE COURT: Okay. All right.

3 MR. STRAMSKI: And so necessarily, by simple
4 mathematics, since all those over flight miles are
5 included in the denominator, even if states adopted
6 box-like methodologies, airlines would never be
7 taxed on 100 percent of their income.

8 And in fact, I suspect this is probably one of
9 the reasons why we have not seen challenges to the
10 box. It's actually a pretty favorable tax scheme
11 from the airlines point of view. If states used
12 other three-factor tests, they probably could
13 capture in total 100 percent of income. If states
14 all used the box, airlines would never be subject
15 to taxation on 100 percent of their total income.

16 Now, these deficiencies are apparent from the
17 complaint again. JetBlue makes an interesting
18 counterpoint, which is, well, let's just ignore
19 that fact. And so, and it tries to save its Count
20 IV on this point. It states simply that because no
21 states can tax flyover miles, we should just ignore
22 that fact for internal consistency purposes, but
23 that's not how the test works.

24 The test would require an application of some
25 sort of analog, usually an identical analog, but if

1 we can't precisely define what that would look
2 like, it was some sort of analog with the test.
3 And you cannot ignore the fact that overflight
4 models are not used for apportionment purposes.

5 THE COURT: Is there -- is that just the way
6 it's always done everywhere or is there an
7 appellate opinion that says you can't get at, you
8 know, Arizona can't get at Florida's flights from
9 Florida to Los Angeles.

10 MR. STRAMSKI: I think, I think JetBlue makes
11 an argument that that would be barred by due
12 process. There's a federal statute that addresses
13 whether or not states can tax or impose tax on
14 flights that do not depart or terminate in those
15 states. So there's at least a federal statutory
16 requirement that would preclude them.

17 THE COURT: Only reach originating and
18 terminating flights. Okay.

19 MR. STRAMSKI: But the Department in Florida
20 has not expressed any, any intention, should that
21 statute ever be repealed, which I'm not aware of
22 any likelihood of taxing over-flight miles. And
23 because that is, again, in the allegation, the
24 methodology that authority uses excludes
25 over-flight miles from the numerator, but includes

1 those in the denominator. And, in fact, that's how
2 the methodology works. If we're going to look at
3 internal consistency, we'd have to apply that test.
4 And that bars any, any threat of more than 100
5 percent of income being taxed.

6 THE COURT: Is the federal statute cited in
7 your materials?

8 MR. STRAMSKI: Not in our statute. I think
9 JetBlue cited it in its response. I don't have the
10 statute now off the top of my head, but it's really
11 not a component that the State is looking to tax,
12 as far as I'm aware.

13 THE COURT: Well, not looking at tax, but I
14 mean critical to the whole question. The state
15 can't tax it, the state can't reach flyover miles
16 because it's federally prohibited.

17 MR. STRAMSKI: Yeah, absolutely. And it's
18 federally prohibited. It might be prohibited by
19 the Constitution, as well, and Florida would
20 respect that. But the formula, as it's being
21 challenged today, includes those miles in the
22 denominator and includes those from apportionment.
23 And, necessarily, that would mean that no airline
24 would ever be taxed on anything approaching 100
25 percent of its income should other states adopt

1 box-like methodologies.

2 THE COURT: All right. Fair enough.

3 MR. STRAMSKI: So, again, we don't think that
4 JetBlue's invitation to ignore that point is fair
5 for the internal consistency test. There's no
6 authority for the proposition that we should ignore
7 portions of a formula for judging whether or not
8 it's internally consistent or not.

9 JetBlue's second point is to prepare this
10 exhibit. (Indicating.) I suspect they're going to
11 try to show you, Your Honor, which draws boxes
12 around the most extreme terminuses of every state
13 and to claim that that's the box methodology.
14 Again, that is contradicted by their complaint.

15 Their complaint attaches an exhibit to it that
16 has a different, incorrect version of the box, but
17 it does show that, for example, Florida's western
18 border does not actually go to the furthest western
19 point. The statute, again, contradicts this notion
20 that there's a straight line drawn across the land
21 borders of the state. So this exhibit that was
22 attached to the response is not evidentiary. We
23 have not had a chance to challenge it, but on its
24 face it contradicts the complaint, and it shouldn't
25 be a basis to dismiss without prejudice, again,

1 Count IV.

2 Now, because of the overflight miles issue,
3 honestly, I don't think that JetBlue can allege a
4 proper internal consistency issue, but, you know,
5 erring on the side of caution, we submit that
6 should be dismissed without prejudice.

7 External consistency, Your Honor, is a test
8 that states that the factors used in the
9 apportionment formula must reflect a reasonable
10 sense of how income is generated. It doesn't have
11 to be a strict correlation. And in order to
12 prevail, many Supreme Court cases have stated this
13 test. The plaintiff must prove, by clear and
14 cogent evidence, that the income attributed to the
15 state is, in fact, out of all appropriate
16 proportions to the business transacted in the
17 state.

18 This, again, is not a bright-line test. That
19 an apportionment methodology looks beyond the
20 borders of the state, that necessarily fails. This
21 is an evidentiary-based test. And JetBlue's count
22 simply doesn't raise the factual predicate for it.
23 It simply repeats the claim that taxation of air
24 travel occurs outside the border.

25 Well, again, we don't. We dispute that we're

1 taxing the revenue miles themselves, but again,
2 external consistency requires showing that the
3 resulting taxes out of all appropriate portions to
4 the business being conducted in the state.

5 THE COURT: So the federal statute says we're
6 not taxing revenue miles, flyover miles, I'm sorry,
7 no state can tax the flyover miles. I mean, that
8 means that in every instance or most instances,
9 long-haul flights, the vast majority of miles are
10 not included in the --

11 MR. STRAMSKI: Absolutely.

12 THE COURT: That's the point?

13 MR. STRAMSKI: Not in the numerator.

14 THE COURT: See, this is what happens when you
15 can talk faster than I can think, which is that it
16 takes me about several minutes to catch up with
17 what you're saying, but I think I'm following it.
18 All right. That's why you're saying that it would
19 be impossible to --

20 MR. STRAMSKI: They're all included in the
21 denominator, right? So the denominator gets larger
22 the more overflight miles there are, but that
23 numerator will not. And so when you add up all the
24 hypothetical boxes with these large denominators
25 with over flight miles from all the states --

1 THE COURT: Now I'm wondering if the other
2 states have a due process or an equal protection
3 argument about what Florida is doing because
4 they're not getting at these miles.

5 MR. STRAMSKI: I suspect that other states,
6 because they're using probably different factors,
7 because the box necessarily could never tax 100
8 percent of the income even if it was set up, I
9 suspect other states are probably getting a larger
10 share, but it's not evidentiary. I just suspect
11 that's the case because of the way the math works
12 out.

13 THE COURT: I'm following it. I'm not able to
14 follow you on the calculation in my head, but I
15 think I understand you conceptually. Go ahead.
16 I'm sorry for the interruptions.

17 MR. STRAMSKI: No, not at all. And I'm happy
18 to walk through that again because I think it's an
19 important point. The more overflight miles exists
20 and -- and the internal consistency test looks at
21 whether or not if all states had the same formula,
22 if more than 100 percent of income could be subject
23 to taxation. Not that the tax rate would be 100
24 percent, but that taxes would be imposed on more
25 than 100 percent of it.

1 THE COURT: Sure.

2 MR. STRAMSKI: So for that to happen, if you
3 added up all these apportionment factors, they
4 would have to be greater than one, right? The
5 numerator over the denominator would have to all be
6 greater than one. And for that to be possible, the
7 numerator, when added up to overflight miles, the
8 denominator for all these miles --

9 THE COURT: Oh, yeah, yeah, yeah. Okay. Of
10 course.

11 MR. STRAMSKI: It would be constant in every
12 other state.

13 THE COURT: Relating it back to the definition
14 of the consistency.

15 MR. STRAMSKI: Right, right. It's the
16 denominator is consistent for any hypothetical
17 state, but any hypothetical state could only add in
18 its numerator that fly within the miles within its
19 box.

20 THE COURT: Okay.

21 MR. STRAMSKI: And so when you would add up
22 all those factors, you could never get to one,
23 because the denominator would always have a much
24 larger number of miles because it includes
25 overflight miles, that you could never tax 100

1 percent of the apportionment miles.

2 THE COURT: Following, yeah. Okay.

3 MR. STRAMSKI: So I want to get back to
4 external consistency. Again, so external
5 consistency requires a showing that a tax is
6 grossly disproportionate or results in the taxes
7 grossly disproportionate to the values of the
8 entity within the state.

9 THE COURT: And I've got to get you to wind it
10 up because I've got to make certain that --

11 MR. STRAMSKI: Yes, Your Honor.

12 THE COURT: -- JetBlue has a chance to
13 respond.

14 MR. STRAMSKI: Yes. Well, I think this is
15 really the count where really the most action
16 probably take place here, because this is really a
17 factual question about whether or not Florida's tax
18 results in a disproportionate share. And so how do
19 we examine that claim?

20 Well, others -- I don't want to write
21 JetBlue's complaint for it, but other Supreme Court
22 decisions have noted that we look at other
23 apportionment tests and make a comparison. And
24 that's what the Supreme Court has done.

25 In Container Corp. v. American Franchise

1 Board, for example, the Supreme Court has noted
2 that the three-factor formula has become sort of
3 the benchmark against which other tests are
4 examined. And so that would probably be the
5 appropriate way to look at this case, but the facts
6 are not stated in Count V to demonstrate that
7 there's a disproportionate share of tax being
8 allocated by Florida here. And that's why we
9 believe that that count should be dismissed without
10 prejudice.

11 Some of our discovery is geared to that
12 question and we expect to, you know, pursue
13 probably even a second round.

14 THE COURT: That's count -- what count was
15 that?

16 MR. STRAMSKI: That's Count V.

17 THE COURT: Okay.

18 MR. STRAMSKI: Very quickly, I will wrap it
19 up, Your Honor. Just Count VI, the claim that
20 Florida's services are not fairly related to the
21 services provided or taxes are not fairly related
22 to the services provided by JetBlue.

23 Again, JetBlue frames this as a geographical
24 question, but that's not really the test. *Goldberg*
25 *v. Sweet*, *Commonwealth Edison v. Montana*, all these

1 cases stand for the proposition that if you have a
2 substantial presence and you avail yourself of the
3 state's benefits and the services that it provides,
4 that's enough of a fair relationship to the tax.
5 You don't look at each component of the tax or
6 separate discrete miles for apportionment here.

7 So the Commonwealth Edison case, for example,
8 stated that the tax may be imposed on a particular
9 interstate transaction need not be limited to the
10 cost of services incurred by the state on account
11 of that particular activity. So just because
12 there's a portion of the flight flying outside of
13 the box, well, if JetBlue otherwise avails itself
14 of the services of the state, which it's doing even
15 today, that's enough to impose that tax on JetBlue.

16 And finally, very quickly with respect to the
17 Foreign Commerce Clause, as I mentioned earlier,
18 some discrete or identifiable policy or directive
19 from the federal government has to be identified
20 that Florida is apparently or allegedly impinging
21 on here. The burden should not be on Florida to
22 guess on what JetBlue is getting on with this.

23 It's also kind of beyond comprehension, in my
24 mind, on how Florida has been impinging on the
25 federal government's foreign policy goals within

1 the Caribbean and elsewhere in the box for 50 years
2 without the federal government ever saying anything
3 about it. So I don't think that that count can
4 succeed, but that should be dismissed without
5 prejudice in case JetBlue can identify the policy.
6 Thank you.

7 THE COURT: Thank you so much. Whenever
8 you're ready, Counsel.

9 MR. BOWEN: Thank you, Your Honor. Michael
10 Bowen for JetBlue Airways Corporation. Your Honor,
11 I think it's -- I know you're not a tax lawyer. I
12 get it.

13 THE COURT: What was your first hint?

14 MR. BOWEN: When I tried to explain this case
15 to my wife, she immediately walks into the other
16 room, so I get it.

17 THE COURT: I appreciate you. Go ahead. I'll
18 do my best.

19 MR. BOWEN: I think it's important to
20 understand what a unitary business is and that
21 application of that concept in this case. A
22 unitary business as best explained, Your Honor, is
23 a company that has, for example, a manufacturing
24 arm, a wholesale arm, a retail arm, a marketing
25 arm, and all those arms are operating in various

1 states.

2 The unitary business principle says you can't
3 take those individual arms and have them taxed
4 separately by each state. They're all one unit and
5 as a result, you have to be taxed as a unit. And
6 that's not what this case is about.

7 JetBlue operates an airline. That's what it
8 does. It's one business. It's not a unitary
9 business in the concept that the Department is
10 arguing in this case.

11 But further, Your Honor, what the Department,
12 I think, misunderstands here, is that it's assuming
13 that Florida Statute 220.151(2)(c) is facially
14 neutral. And what I mean by that is, it assumes
15 that the numerator of the statute -- I'm sorry --
16 the numerator of the apportionment factor refers to
17 in this state as a neutral factor. That's not what
18 it is. That's not what's going on in this case.

19 There's a disconnect, I think, Your Honor,
20 between the nature of JetBlue's fair apportionment
21 claims and how the Department is characterizing
22 them.

23 Your Honor, back in 1977, there's a case
24 called Complete Auto Transit. And in that case the
25 court said in order for a tax to survive scrutiny

1 of the Commerce Clause, the tax needs to be fairly
2 apportioned. That's where this whole fair
3 apportionment challenge issues come from.

4 There are three categories, Your Honor, for
5 fair apportionment challenges. The first one is
6 based off what's called distortion. And that's an
7 as-applied challenge. And in those cases, the
8 taxpayer must demonstrate by clear and cogent
9 evidence that the application of the formula leads
10 to a grossly distorted result.

11 Now, those are as-applied challenges, Your
12 Honor, to facially neutral apportionment formulas.
13 And an example of a facially neutral apportionment
14 formula, Your Honor, is in Florida Statute 220.15.

15 220.15 is Florida's general apportionment
16 formula applicable to all other companies,
17 corporate taxpayers in Florida who are not airlines
18 or transportation companies. Manufacturing
19 companies, for example, those companies use 220.15.

20 The apportionment formula that Florida has
21 there is a three-factor formula: Sales, payroll,
22 and property. The numerator of each of those
23 factors, Your Honor, is in this state. Sales in
24 this state. Property in this state. Payroll in
25 this state. There's no box defining what the state

1 is for purposes of 220.15. That is a facially
2 neutral apportionment formula.

3 What JetBlue is alleging in this case is that
4 by admission from the Department, section
5 220.151(2)(c) is facially discriminatory because it
6 defines "in this state" to exceed the boundaries of
7 Florida's geopolitical border.

8 So when the Department cites in its briefing,
9 Your Honor, the Moorman case, the Mobil case, the
10 Barclays case, the Container case, the Underwood
11 case, each of those cases deals with challenges to
12 facially neutral apportionment formulas. In each
13 of those cases, the state's law had a numerator set
14 in this state.

15 Let me give you an example so we can tie this
16 up. Underwood Typewriter was a 1920 case. Right?

17 THE COURT: Yes, I read that. That was one of
18 the cases I pulled yesterday, but go ahead.

19 MR. BOWEN: Yeah, so perfect. So those are
20 easy facts to understand.

21 THE COURT: That's why I chose the case to
22 read.

23 MR. BOWEN: It's short and actually,
24 coincidentally, it's a one-factor apportionment
25 formula. Right? The taxpayer in that case was

1 based in New York and it had a Connecticut arm, and
2 the apportionment factor was just based off
3 property, and it was ended up being 47 percent for
4 that taxpayer based off property.

5 And the taxpayer said no, no, no, that's
6 distorted. That's unfair. That's not fair
7 apportionment because only 3.2 percent of our
8 profits were attributable to Connecticut.

9 And the court said you didn't meet your burden
10 to show by clear and cogent evidence that there was
11 a distorted result in the case.

12 These are the cases that the Department is
13 using to challenge, for example, Counts I, II, III,
14 and VIII. They're saying, look, Florida is
15 permitted under the unitary business principle to
16 reach outside the state to tax value outside the
17 state. That's true to an extent.

18 For example, in the Underwood Typewriter case,
19 it was arguable that value was being taxed outside
20 the state, but it was a facially neutral formula.
21 And the court said that it's facially neutral.
22 Yeah, we decided we're going to use an
23 apportionment formula based off property, that's
24 the best we can do for unitary business, that's
25 what we believe your business activity is in the

1 state.

2 So again, Moorman, Mobil Oil, Barclays,
3 Container, Underwood, all deal with facial -- I'm
4 sorry, not "facial" -- as-applied challenges to
5 facially neutral apportionment formulas. That's
6 category one. And these are the cases that the
7 Department is using to argue in this case, which we
8 think is a disconnect because that's how JetBlue is
9 arguing. JetBlue is arguing under the second
10 category of apportionment challenges. That is
11 internal consistency.

12 Then I want to read from one of the
13 Department's own cases as to what the test is,
14 because, Your Honor, this is critical. And I'm
15 going to talk slowly so you can get the quote in.

16 THE COURT: I can type faster than I can
17 think, as it turns out, but go ahead.

18 MR. BOWEN: This is Goldberg v. Sweet,
19 488 U.S. 252, page 261.

20 THE COURT: Give me the site again?

21 MR. BOWEN: 488 U.S. 252 at page 261. It's a
22 1989 case, U.S. Supreme Court. And the court said,
23 I quote, "To be internally consistent, a tax must
24 be structured so that if every state were to impose
25 an identical tax, no multiple taxation would

1 result." Period. The court cites to Container
2 Corp. for that proposition.

3 You probably didn't hear me say anything about
4 100 percent in there. You didn't hear me say
5 anything about more than 100 percent.

6 THE COURT: So if everybody imposed the
7 identical --

8 MR. BOWEN: Tax.

9 THE COURT: -- tax, no -- what's the last one?

10 MR. BOWEN: Multiple taxation would result.

11 THE COURT: Multiple taxation.

12 MR. BOWEN: Taxation of the same income
13 multiple times. This is the Goldberg case. This
14 is the Jefferson Lines case by the U.S. Supreme
15 Court in 1995. This is the Wynne case that we cite
16 in our briefing.

17 THE COURT: So we go back to -- if we go back
18 to the Typewriter case, we go back to Underwood, I
19 can't remember whether it was -- which was the
20 state that was being challenged in that case?

21 MR. BOWEN: Connecticut.

22 THE COURT: So if New York had exactly the
23 same?

24 MR. BOWEN: It's entirely consistent because
25 47 percent is being taxed by Connecticut. And they

1 can only tax 47 percent.

2 THE COURT: Okay. All right.

3 MR. BOWEN: It's based off property. And
4 that's facially neutral.

5 THE COURT: All right. Fair enough. I'm
6 struggling to follow you, but I think I'm following
7 you.

8 MR. BOWEN: Yeah. Every state applied at the
9 same apportionment formula in Underwood, only a
10 state that had property could tax.

11 THE COURT: Oh, of course. Of course.

12 MR. BOWEN: So that's a facially neutral
13 formula. Internal consistency, again, is a facial
14 challenge, as I read the test to you from Goldberg.
15 And again this is cited numerous times, but there's
16 also a case by the Florida Supreme Court called
17 American Business USA Corp. v. Department of
18 Revenue. And I'll share this site with you in a
19 moment. I don't have it in front of me, but I'll
20 provide it.

21 In that case, the Florida Supreme Court cites
22 the exact same test for what Florida internal
23 consistency is. They don't mention 100 percent.
24 This is something that --

25 THE COURT: And that's in your --

1 MR. BOWEN: Yeah, we mentioned the word 100
2 percent, but that's not the test.

3 THE COURT: No, no, no, but the authority that
4 you just cited, the Florida Supreme Court case is
5 in your motion for judgment on the pleadings?

6 MR. BOWEN: Yes, Your Honor.

7 THE COURT: Yeah. Don't worry, I can dig up
8 the authorities easily enough.

9 MR. BOWEN: Okay. So I've walked through the
10 first two categories. One is distortion and that
11 is to a facially neutral apportionment formula as
12 applied. Number two is the internal consistency
13 test. That's Count IV in our complaint, facial
14 challenge based off multiple taxation. Period.

15 The last category is called external
16 consistency, and that's Count V of our complaint.
17 And that's an as-applied challenge. The state's
18 only permitted to tax a portion of the in-state
19 revenues that reasonably reflect the taxpayer's
20 business activity in the state.

21 Every state that I cited to you that talks
22 about internal consistency discusses external
23 consistency. So any case that you typed in about
24 discussing internal consistency when
25 jurisdictional, they all discuss the same topics.

1 So you'll see the exact same cases. So there's
2 three different challenges that taxpayers raise.

3 The Department's defenses in the motion to
4 dismiss are premised off category one. Say,
5 JetBlue can't show that there's distortion here.
6 We're permitted to reach outside our borders to tax
7 extraterritorial value because that's permitted
8 under the unitary business principle.

9 So I think that's verbatim what the Department
10 is arguing. That's true if we were doing a fair
11 apportionment challenge, category one, to a
12 facially neutral apportionment formula, but that's
13 not what's happening here.

14 We're arguing internal consistency, arguing
15 that it's facially unconstitutional, and then we're
16 also making the external consistency argument in
17 Count V.

18 Oh, Your Honor, I would be remiss. The
19 Department at the beginning of its argument
20 mentioned rule 1.071.

21 THE COURT: I was going to ask you about that.

22 MR. BOWEN: Yeah, I think it's important I
23 address that, so yes. I think the Department is
24 being a bit disingenuous. The notice, we attached
25 a copy of the complaint to it. So as opposed to

1 spelling out in the notice exactly what the
2 arguments were, instead attached to the complaint.

3 THE COURT: Fair enough.

4 MR. BOWEN: And the complaint and the notice
5 actually has the case site on it, too, so it wasn't
6 a surprise, but I wanted to make sure that I
7 address that.

8 THE COURT: All right.

9 MR. BOWEN: Okay. So I addressed the three
10 categories of apportionment. Now you're all up to
11 speed. You could be a tax lawyer like us.

12 There's one more point, one more general
13 point I wanted to address, and that's what I want
14 to make sure that The Court understands, that in
15 the event that this Court strikes down
16 220.151(2)(c) as unconstitutional, it doesn't
17 become the wild, wild west with respect to airlines
18 and taxation. Right?

19 Section 220.151(2) has the apportionment
20 formula in it, and it says revenue miles in the
21 state versus revenue miles everywhere. So if
22 220.151(2)(c) is stricken, we're still left with
23 the apportionment formula. It's simply defined by
24 "in this state." Does that make sense?

25 THE COURT: Sure.

1 MR. BOWEN: 220.15 is the exact same rule.

2 THE COURT: So it's saying it --

3 MR. BOWEN: It's the definition of "in this
4 state" is the problem.

5 THE COURT: It would, it would revert back to
6 the same formula that applies to everything else?

7 MR. BOWEN: Everybody else, yep. Correct.

8 Okay. Your Honor. I'll just move on to the
9 more specific arguments. Well, I'm going to
10 address some threshold issues first.

11 The Department raised the issue again of
12 standing and I'm slightly confused. I think we all
13 know from law school what the elements of standing
14 are. Injury in fact, causal connection, and
15 substantial likelihood that relief will remedy the
16 injury. We were issued an assessment in this case
17 by the Department, and we're seeking to have that
18 assessment invalidated.

19 Now, that would seemingly mean to me that
20 we've met the requirements of standing. The
21 Department raises an additional standing argument
22 in its briefing, saying that somehow that we don't
23 have standing with respect to certain counts.

24 I don't think that's technically a standing
25 argument, I think the basis for a motion to dismiss

1 those counts, but it's not a general standing
2 argument. I'll address those arguments as we walk
3 through the counts.

4 In this argument, Your Honor, the Department
5 has talked about the history of the apportionment
6 statute, 220.151(2)(c). And it argues, made the
7 case that it's rarely challenged.

8 I mean, as we noted in footnote two in our
9 response to the motion to dismiss, that's not
10 entirely true. It's been repeatedly
11 challenged. 2016 by UPS, 2008 by American
12 Airlines. Mr. McCauley, who's on the call here
13 today, he's represents Southwest in DOAH. And
14 there's an article that we indicated in our motion,
15 in our response to the motion to dismiss, where we
16 note an article that discusses many cases that the
17 Department has just settled on this very same
18 issue. So it's a little bit disingenuous to say
19 that this issue has not come up before.

20 And those are only the cases that we know of.
21 Again, we don't know the cases that were challenged
22 on administrative appeal that never made their way
23 to court.

24 The Department also argues that this Frontier
25 complaint is substantially identical to JetBlue's

1 complaint in this case. That is, Your Honor, I
2 don't need to tell you that. I mean, I'm sure you
3 could find the Frontier complaint if you needed to.
4 You can see that the complaints are not identical.

5 Frontier raises four counts. We raise eight.
6 We break down our apportionment arguments into
7 separate counts, whereas, Frontier, in their case,
8 they only had one general count for fair
9 apportionment. And we think that's a critical
10 distinction.

11 But it's also important to note, Your Honor,
12 that, again, there was no court reporter in
13 Frontier. We have no idea what Judge Marsh may
14 have felt were important arguments in the case.
15 Maybe he made up his own arguments as to why he
16 ruled the way he did. We simply don't know. And
17 his one-page order doesn't explain why he ruled the
18 way he did.

19 But even stepping away from that, Your Honor,
20 and walking away from the fact that Frontier even
21 exists, I think at the end of the day Judge Marsh
22 gave -- he denied the motion to dismiss in the case
23 with respect to the Commerce Clause counts, so, at
24 least from that case if it's helpful.

25 Let's move on to the count specific arguments

1 for dismissal. So the Department argues that Count
2 I, II, and VIII should be dismissed. And again,
3 Your Honor, the basis for their argument as to why
4 those counts should be dismissed is because,
5 although those particular counts deal with a
6 technical definition of what the border of Florida
7 should be, and argues that 220-151(2)(c) is
8 unconstitutional because it taxes value outside
9 those borders, their argument is we can do that
10 under the unitary business principle.

11 And this is the argument that I relayed to you
12 at the top of our position, is that, yes, under the
13 unitary business principle, if you're using a
14 facially neutral apportionment formula, you can tax
15 value that may occur outside the state.

16 And I think that's a good distinction to make
17 here at this point, Your Honor. In the Container
18 Corp. case, the U.S. Supreme Court justices, who
19 are not tax lawyers either, referred to
20 apportionment as what's called a --

21 THE COURT: I'm sure they would take no
22 offense.

23 MR. BOWEN: Yeah, I'm sure they -- they refer
24 to apportionment as what's called a mathematical
25 generalization. That's a terminology that they

1 used. And that's a true statement, right? I mean,
2 states are wrestling at how do we tax this
3 multi-state business income, how do we say exactly
4 what that is?

5 THE COURT: This is what happens when you
6 divide a continent up into 50 sovereigns.

7 MR. BOWEN: 50 separate countries.

8 THE COURT: Yes.

9 MR. BOWEN: Yeah, basically. So, yeah, it's a
10 mathematical generalization where states try to use
11 their best judgment as to how to apportion income
12 on a facially neutral basis. But that's not what
13 we're talking about here.

14 Again, JetBlue's argument is that, on its
15 face, Florida's statute with respect to
16 apportionment is unconstitutional because it is
17 facially discriminatory on its face. Right?

18 So mathematical generalizations, facially
19 neutral apportionment formulas, I think the best
20 way to describe it is those facially neutral
21 formulas may tax value. It's arguable that they
22 will tax value outside the state in Underwood
23 Typewriter. It's arguable, but that's not enough
24 for facially neutral formulas.

25 The difference in this case is, because

1 Florida defines "in this state" more broadly than
2 the borders, this formula will tax value outside of
3 the state. There's no question. That's not even
4 arguable. It will tax value outside of the state.
5 And that's why Count I, II, and VII are valid
6 considerations because the border is defined by
7 Florida law and the Constitution as to what the
8 border is.

9 THE COURT: I'm struggling a little bit
10 because the part of this -- and I know you've got
11 the issue with the line of Georgia and the line of
12 Alabama, but the majority of the geography that's
13 defined by the box is no taxing authority
14 jurisdiction. Does it matter, does that have any
15 effect on the analysis? Do we have any authority
16 that talks about it?

17 I remember from reading your motion that the
18 box is unique to Florida. There's no other
19 state --

20 MR. BOWEN: No other state.

21 THE COURT: -- that does anything at all like
22 that? Does it matter that -- and so there's no
23 other example of somebody reaching business
24 activity in --

25 MR. BOWEN: Well, that's not true. Again, the

1 cases that we cite that the Department hasn't
2 addressed are Central Greyhound.

3 THE COURT: Right, and the --

4 MR. BOWEN: And FedEx.

5 THE COURT: Central Greyhound buses in New
6 Jersey, is that right?

7 MR. BOWEN: There was a New York tax on a bus
8 line where the bus route went through New Jersey
9 and Pennsylvania.

10 THE COURT: Right.

11 MR. BOWEN: And New York tried to say those
12 are our miles, we're going to tax those miles. And
13 the court said it is pure fiction to assert that
14 the miles that are traveled in other states are
15 your miles. You don't have the authority to tax
16 them.

17 And the FedEx decision that we cite, although
18 it wasn't a constitutional challenge, we didn't
19 cite it because FedEx was a constitutional
20 challenge. We cited FedEx because, in that case,
21 the Department of Revenue was trying to insert into
22 the numerator of that, of the apportionment formula
23 in that case, miles that were not attributable to
24 Pennsylvania. And the court said it is a
25 fundamental principle of apportionment that the

1 only activity that goes into the numerator is
2 in-state activity.

3 THE COURT: Let me go back to something else
4 that you said just a moment ago, which is these
5 other cases that I guess have been at Division of
6 Administrative Hearings or maybe other courts. I
7 don't know, but we don't have any authority? Those
8 cases all got resolved by agreement and there's no
9 authority that came out of any of those cases?

10 MR. BOWEN: Correct. UPS and American
11 Airlines were voluntarily dismissed by the
12 taxpayer.

13 THE COURT: Right. As was Frontier, right?

14 MR. BOWEN: Correct.

15 THE COURT: In the end.

16 MR. BOWEN: But to your point, Florida is the
17 only state that has the different -- for airlines
18 defines the apportionment factor as it does. Every
19 other state, we cite many of the southeastern
20 states in our briefing that refers to how they do
21 miles for the purposes of proportional purposes.
22 And again, they define it just like 220.15 does
23 in this state. That avoids any constitutional
24 issue at all because everyone knows what "in this
25 state" is.

1 THE COURT: So for purposes of a motion to
2 dismiss, for purposes of this dispute in general,
3 is it at all meaningful that I don't know what the
4 practical consequence is for you all, for your --
5 whether it's the revenue or the ultimate
6 calculation of how much tax is owed, the difference
7 between the way the box is defined versus the more
8 general "in this state" is defined?

9 MR. BOWEN: Correct. The amount of the
10 assessment, Your Honor, is that difference. So
11 that the tax liability at issue in this case is the
12 difference between the miles that stop at the
13 border and the miles that are in the box. That's a
14 total amount at issue in the case. And that's
15 agreed to by the parties as part of the assessment.

16 THE COURT: Okay. Fair enough.

17 MR. BOWEN: So addressing I, II and VIII.
18 Again, the issue with I, II, and VIII, is that, I'm
19 talking where those counts relate to descriptions
20 as to what Florida's boundaries are, and says that
21 we have a facially discriminatory apportionment
22 provision that expands those boundaries to include
23 areas outside the border. And that's why I, II,
24 and VIII are alleged our complaint.

25 The defense the Department raises again is one

1 of fair apportionment. They're using a wrong
2 apportionment category of challenges to defend
3 against those counts, by saying they're permitted
4 to tax value outside the state under the unitary
5 business principle. And our argument is, yeah, if
6 this formula was facially neutral, then you could.
7 Because, again, apportion is what? Mathematical
8 generalization.

9 Count III, substantial nexus.

10 THE COURT: I'm glad that turned out to be a
11 rhetorical question.

12 (Laughter.)

13 MR. BOWEN: I didn't want to put you on the
14 spot, Your Honor.

15 THE COURT: Thank you, thank you for that.
16 Could you see the question bounce off my forehead?

17 MR. BOWEN: I can see the glazing over of the
18 eyes.

19 THE COURT: (Laughter.) Go ahead.

20 MR. BOWEN: Count three, substantial nexus.
21 This is where JetBlue argues that there's no
22 substantial nexus between Florida and the miles
23 that are outside the borders of the state of
24 Florida.

25 The Department's defense is that this is

1 contradictory to the complaint because JetBlue
2 admits that it has substantial nexus with the state
3 because it has airports here and take off and
4 landing here.

5 Now, Your Honor, there's a subtle distinction
6 between nexus with the taxpayer and nexus with the
7 activity of the taxpayer. In your world, Your
8 Honor, this is the distinction between general
9 jurisdiction and specific jurisdiction.

10 And this is what the Allied Signal case
11 discusses that we cite in our briefing. The court
12 said for a state tax to survive constitutional
13 attack, there must be a connection with both the
14 taxpayer and the activity taxed.

15 JetBlue files returns in this state. That's
16 part of the issue in this case. We filed a return.
17 We didn't file enough tax according to the
18 Department. We admit we have nexus. Our argument
19 is there's no nexus with the miles that are outside
20 the border. There's no sufficient connection, and
21 that's Allied Signal.

22 Again, the Department cites Wayfair, which is
23 the 2018 U.S. Supreme Court case in support of
24 their defense. But again, Your Honor, Wayfair was
25 a personal nexus issue. It was whether or not

1 South Dakota had nexus over the taxpayer in the
2 case. It wasn't an activity, whether they had
3 nexus over the activity. That was not raised in
4 the case.

5 Okay. Your Honor, now let's move on to the
6 more fun counts. Count IV, which is, frankly, the
7 strongest argument that there is in our complaint
8 for the constitutional challenge to the statute.
9 And this is, again, the internal consistency
10 challenge. Now, again, it's a facial challenge
11 based on JetBlue's facts only.

12 Again, the Department cites their 100 percent
13 rule. If you follow the U.S. Supreme Court's
14 discussion of what the internal test is in *Goldberg*
15 *v. Sweet*, you will note that the flyover issue is
16 irrelevant. It's a red herring. What internal
17 consistency addresses is whether or not we have
18 multiple taxation of the same income. It's not a
19 100 percent or more test. And I'm going to explain
20 that, why that's irrelevant.

21 But again, you don't need to go there, Your
22 Honor, because it's a multiple taxation approach.
23 And this is what Exhibit A, B, and C in our
24 response, in the response to the motion to dismiss
25 highlights.

1 Oh, I have the American Business Corp cite, do
2 you need it?

3 THE COURT: Sure.

4 MR. BOWEN: It's 191 So. 3d, Southern Reporter
5 3rd, 906. And the quote that we cite is on page
6 914.

7 THE COURT: Thanks.

8 MR. BOWEN: That's a 2016 decision.

9 So again I've articulated the test. Multiple
10 taxation is the test. There's no facts. This is
11 what we argued at the top of today's hearing, Your
12 Honor, there are no facts that go into the
13 analysis.

14 You take 220.151(2)(c) and you assume every
15 other state uses that same methodology, the single
16 apportionment approach. And if every other state
17 has a box akin to Florida, would there be overlap?

18 THE COURT: How akin?

19 MR. BOWEN: That's the hard part to understand
20 because there's no legislative history to
21 understand how Florida designed the box. As we
22 explained in our brief, we think the best way to
23 define it is northernmost, southernmost,
24 easternmost, westernmost points, and that's how
25 they drew their box. That's logical. That seems

1 like what they did. That's the only other way you
2 could get to the international waters is to have
3 that box there. So that appears to be what they
4 did. So for purposes --

5 THE COURT: Is that southern, is that the one
6 down by Cuba?

7 MR. BOWEN: I can't explain that.

8 THE COURT: All right. Because the
9 international water is eight miles, 12 miles, what
10 is it?

11 MR. BOWEN: 12 miles.

12 THE COURT: 12 miles.

13 MR. BOWEN: 12 nautical miles.

14 THE COURT: So we know it wouldn't get as far
15 as Havana Harbor.

16 MR. BOWEN: Maybe they don't like Fidel
17 Castro. I have no idea what, 1971, what they were
18 thinking.

19 THE COURT: Every day a thousand
20 opportunities.

21 MR. BOWEN: Exactly.

22 THE COURT: Whenever you're ready.

23 MR. BOWEN: So in our exhibits to our response
24 to the motion to dismiss, Your Honor, we have
25 Exhibit A, B, C. We actually give the Department a

1 break because we don't even go to Cuba. We don't
2 even draw the box that big because I can't even
3 understand why they drew it that far.

4 When we drew the box for Florida in our
5 exhibits, we stopped at the bottom of Florida by
6 the Keys, assuming that that was truly the box. So
7 we actually give the Department a break because we
8 can't explain why they went as far as Cuba in the
9 box. And I guess if you were to make that approach
10 to all the other boxes, the overlaps would be a lot
11 bigger.

12 THE COURT: Fair enough.

13 MR. BOWEN: So that's the test for internal
14 consistency.

15 Now, the Department has raised this issue of
16 flyover miles, right, and this thought process that
17 you have to show that more than 100 percent of your
18 unitary business income -- if you're assuming we're
19 dealing with a unitary business issue which we're
20 not -- assuming 100 percent of your income is being
21 taxed. Now, I can do that because, again, flyover
22 miles, the Department raises the issue that we're
23 giving you a break. We're not taxing flyover
24 miles. They're giving us a break? It's against
25 the law, right?

1 THE COURT: Right, the federal government gave
2 you a break.

3 MR. BOWEN: Right, well, the federal
4 government gave us a break and every other airline.
5 So you can't test by --

6 THE COURT: Yeah, they gave the industry a
7 break.

8 MR. BOWEN: And it makes sense, though. And
9 that law didn't come out of nowhere, meaning that,
10 there are U.S. Supreme Court cases before that
11 which said you couldn't do that. That's a
12 Northwest Airline case and the United Airlines case
13 that we cite in our briefing.

14 The U.S. Supreme Court said there's no nexus
15 between the state and 35,000 feet above them to be
16 able to tax those flights just because they fly
17 over.

18 THE COURT: I mean, why isn't -- why isn't
19 that the binding precedent then? If the U.S.
20 Supreme Court said there's no nexus over flyover
21 miles, why doesn't that mean that Florida can't
22 reach, you know, Florida can't reach the miles here
23 over the international waters because it's just a
24 flyover over international waters?

25 MR. BOWEN: Well, that's fair. Yeah. So are

1 you saying, though, that they shouldn't be able to
2 tax those miles, too?

3 THE COURT: Right. I mean that's my --

4 MR. BOWEN: And I agree.

5 THE COURT: All right. Fair enough. I will
6 pay special attention to those cases. I assure you
7 the state court trial judge is always looking for
8 the simplest --

9 MR. BOWEN: They are.

10 THE COURT: -- the simplest rule.

11 MR. BOWEN: That's Count IV here. Yeah, I
12 hear you. That's Count IV. I mean if you apply
13 the same test that Goldberg does, multiple
14 taxation, you apply a box in every other state,
15 you're going to get there. It's not going to be
16 hard. We don't need additional facts.

17 But let's talk about the flyover miles again.
18 So it's against the law to tax flyover miles. So
19 the way that we interpret the internal consistency
20 test, assuming using the Department's approach
21 which we deny we should have to do, but let's
22 assume we can. If you can only tax a certain --
23 let's back up.

24 The whole pie, all miles flown by JetBlue in
25 the United States. Of that pie, any state can only

1 tax a part of that pie, right? All the other stuff
2 is out of bounds, you can't tax it. Again we can
3 look at that pie for the 100 percent rule. 100
4 percent of that, only that income can be taxed
5 anyway.

6 THE COURT: Sure.

7 MR. BOWEN: Right? And so the Department's
8 position, Your Honor, in many respects, and I don't
9 mean to belittle it, is don't worry about it. We
10 can reach outside our borders. That's okay because
11 they get a break on flyover miles.

12 That's effectively what they're arguing, is
13 that there's a safe harbor within the Constitution
14 where they're giving states where they can make up,
15 compensate in the numerator for miles that aren't
16 taxed. Does that make sense?

17 THE COURT: Yeah, yeah, yeah, yeah. No, I
18 mean, that's the -- yes, I'm following. We've got
19 seven minutes left in the hearing. I do have
20 another hearing that starts at 10:30.

21 MR. BOWEN: It can't be as exciting as this
22 one.

23 THE COURT: That's the third time, the third
24 time the opportunity to say nothing.

25 (Laughter.)

1 THE COURT: So which I've taken every one of
2 them today. And we can go over a little bit.
3 They'll wait on me, I'm sure.

4 MR. BOWEN: I can wrap it up in seven minutes.

5 THE COURT: All right.

6 MR. BOWEN: That's not going to be a problem.

7 THE COURT: Whenever you're ready.

8 MR. BOWEN: Because the remainder of the
9 counts, Your Honor, the Department, even if you
10 were to grant the motion to dismiss, they're not
11 even arguing it's with prejudice. They're saying
12 it's without prejudice for these counts anyway, but
13 again let's just talk about them in general.

14 I mean, we have the Foreign Commerce Clause
15 count, which is Count VII. The Department says you
16 haven't articulated the specific federal directive
17 or policies.

18 I mean, we argue that it violates the Foreign
19 Commerce Clause. We articulate what the Foreign
20 Commerce Clause is, and we say that Florida is
21 exceeding its authority by reaching into federal --
22 that's federal jurisdiction, you know, outside of
23 Florida, and therefore they're regulated by taxing
24 and that's sufficient for the Foreign Commerce
25 Clause purposes.

1 Count VI, which is the "fairly related"
2 argument, this is the fourth prong of Complete Auto
3 that I talked about at the top. And the "fairly
4 related" prong, the Department cites several cases
5 where Commonwealth Edison, for example, the
6 Department cites, JetBlue's like a lot. It's hard
7 to win on a "fairly related" argument, but the fact
8 that means hard to win is not a basis for
9 dismissal. I mean, if they want to argue the
10 merits about it, we can argue the merits about it,
11 but that's not a basis for dismissal.

12 Count V is the external consistency argument.
13 That's the last argument that I'll address. And
14 again the Department has addressed what the test
15 is. Again, this is an as-applied challenge.

16 THE COURT: And let me ask you.

17 MR. BOWEN: Yeah.

18 THE COURT: So your counts are based on the
19 prongs of Complete Auto and then the Foreign
20 Commerce Clause is obviously a separate -- I mean
21 there's really one count, right, which is that it
22 violates the Commerce Clause in view?

23 MR. BOWEN: Well --

24 THE COURT: You don't have to prove each of
25 them or if it fails any one of them --

1 MR. BOWEN: If it fails any one of them.

2 THE COURT: -- that's why you're treating them
3 as separate.

4 MR. BOWEN: They're multiple silver bullets,
5 so to speak. But, Your Honor, we also have the Due
6 Process Clause count, which is Count VIII, and we
7 have I and II which are the Florida Constitution
8 and Supremacy. So five of the counts are
9 effectively the same Commerce Clause challenges --

10 THE COURT: Yeah.

11 MR. BOWEN: -- that the U.S. Supreme Court has
12 recognized are separate challenges.

13 THE COURT: All right. Fair enough.

14 MR. BOWEN: Anyone can be the winner.

15 THE COURT: Fair enough, fair enough. Count
16 V, external consistency, you were saying?

17 MR. BOWEN: That's an as-applied challenge.
18 And therefore that we need additional facts, but
19 we've alleged in the complaint what the test is.
20 And we allege why the fact -- the factual
21 allegations as to why we're entitled to relief.
22 The Department hasn't explained what additional
23 facts we would need to allege to be able to satisfy
24 the test for external consistency.

25 We argue that we are again flying outside the

1 state, and that it's unfair for the Department to
2 tax the miles that are outside the state under the
3 external consistency test. And that's sufficient
4 for the purposes of being able to make the
5 requisite allegations to satisfy that particular
6 count.

7 THE COURT: All right. I'm following you.

8 MR. BOWEN: And that is the conclusion, Your
9 Honor. Again, if I could again, just the idea that
10 the Department's primary argument again is based
11 off this first category of argument, which is that
12 JetBlue cannot show that the apportionment formula
13 is distortive, and, by the way, we can tax value
14 outside the state.

15 Again, JetBlue does not dispute that, but
16 that's not the type of formula that we're dealing
17 with here. That's Underwood Typewriter. What
18 we're talking about here is Central Greyhound
19 and/or the FedEx case.

20 And you may be saying to yourself, "Mr. Bowen,
21 surely this type of case must have come up before."
22 Well, the answer is no, other than Central
23 Greyhound and FedEx. And that's because this
24 concept of apportionment of making sure the
25 numerator is facially neutral is so fundamental

1 that every state follows it. Florida is very
2 unique with respect to its apportionment formula.
3 And with that, I'll rest.

4 THE COURT: Appreciate you. Thanks so much.
5 I'll give you the last word.

6 MR. STRAMSKI: Thank you, Your Honor.

7 THE COURT: If you want it.

8 MR. STRAMSKI: Yes, Your Honor, very briefly.
9 I know we're short on time.

10 JetBlue keeps on equating miles and revenue
11 miles with the taxation of income. We're not
12 taxing revenue miles. We're taxing income and the
13 revenue miles are just a proxy to approximate the
14 values attributable to Florida. So I think that
15 that equation that JetBlue makes is a false
16 equation.

17 JetBlue mentioned that the apportionment
18 methodology is facially discriminatory. It's the
19 first time I've heard that term in this case. It's
20 certainly not in a complaint. We would submit it's
21 also inaccurate. The box does not treat in-state
22 or out-of-state interests differently, but, in any
23 event, that's nowhere in the complaint.

24 JetBlue attempts to make a distinction between
25 a threat of multiple taxation versus a taxation on

1 100 percent of the income. The 100 percent of the
2 income standard is what was in the complaint. But
3 the multiple taxation issue that JetBlue tries to
4 state subplants that test from Goldberg v. Sweet
5 actually applied to a gross receipts tax on a
6 communications service transaction, not on income
7 tax.

8 THE COURT: Say that again?

9 MR. STRAMSKI: Yeah. Goldberg v. Sweet did
10 not deal with corporate income or apportionment of
11 corporate income. It dealt with this transaction
12 on a tax on a communication service, specifically
13 on a discrete sale of a hypothetical communication
14 across state lines. But, in any event, I have
15 heard how multiple taxation differs from 100
16 percent taxation in the context of income
17 apportionment.

18 Aside from that, JetBlue still hasn't,
19 allegedly, standing to suggest it's under threat of
20 any multiple taxation. It hasn't alleged that it
21 flies over any portion of the box that overlaps
22 with any other jurisdiction that might include
23 those revenue miles in this apportionment
24 methodology. So the complaint fails on that
25 ground.

1 JetBlue, very quickly, mentioned that to see
2 if the box is stricken, there still is an
3 apportionment methodology based on the revenue
4 miles of the state and that's what will be left
5 over. I don't think that is true for a number of
6 reasons. That goes to severability which is not
7 really at issue here, but I didn't hear any
8 distinction or any reason why revenue miles within
9 the geographical borders of the state could satisfy
10 JetBlue's nexus arguments that there's a flight
11 flying 30,000 miles over the state of Florida,
12 flying from Miami, say, to Atlanta and it's flying
13 over the state. I think we would run into the same
14 problems. I think the whole revenue miles
15 methodology would probably fall apart if the box
16 falls apart.

17 And that argument, I think, also goes to what
18 this case is about. It doesn't sound like this is
19 about fair taxation. This is about JetBlue trying
20 to minimize its taxation. If this was about fair
21 taxation, let's get the facts out as alleged in the
22 complaint as to why Florida's taxing scheme
23 captures a disproportionate share. Let's get into
24 that discovery and find out if, in fact, the box
25 does tax JetBlue more heavily than, say, the

1 benchmark the three-factor test would provide for.

2 Counts I, II, and VIII, I want to address very
3 quickly. JetBlue didn't have any independent
4 arguments there for those counts. It only
5 bootstrapped commerce clause arguments into counts
6 I, II, and VIII. For those reasons, we think those
7 should be dismissed with prejudice. There's no
8 standalone Supremacy Clause argument here.

9 FedEx is distinguishable as a plain language
10 decision regarding the statute of Pennsylvania.
11 Pennsylvania didn't have the statutory definition
12 of the Florida box that applies here.

13 Central Greyhound also, very quickly, that
14 did look about miles traversed within the state
15 versus outside of the state. But also,
16 importantly, Central Greyhound recognized that
17 there's a de minimis exception here to any tiny
18 overlap that may happen between borders.

19 And this is exactly what we're dealing with
20 here. The net 24 miles from Alabama that are
21 covered in Florida compared to Alabama's 52,000
22 miles, this does not rise to the level of severity
23 that it would warrant invalidation of a 50-year-old
24 tax statute that all sorts of parties have relied
25 on.

1 With respect to Count IV, it's only a facial
2 challenge, which it wasn't alleged as a facial-only
3 challenge in the complaint. But if Count IV is a
4 facial-only challenge, Your Honor, then I think it
5 could be dismissed with prejudice today, because
6 there's just no way that the internal consistency
7 test could be violated with the box methodology
8 because overflight miles are excluded. There is no
9 threat of multiple taxation. There can never be a
10 tax on more than 100 percent of the income using
11 the box. And that's all I have. Thank you.

12 THE COURT: Thanks very much. Well, you're
13 not going to get a ruling out of me today. Much to
14 my disappointment, I'm going to have to add this to
15 my list of cases under advisement. So let me say
16 this.

17 So what I will tell you about as far as timing
18 of a ruling is that I have 60 days before I have to
19 report myself to the chief judge for taking too
20 long, and I would rather not do that. So today is
21 November 5th, so hopefully before the end of the
22 year you'll get a ruling out of me.

23 I want to tell you how much I appreciate your
24 advocacy and professionalism. It's a privilege to
25 work with lawyers like this, and I thank you very

1 much for the hard work that you did for giving me
2 an important case to decide, and I'll get it done
3 as quickly as I can.

4 MR. STRAMSKI: Did you want any further
5 briefing on any issue?

6 THE COURT: No. I may ask for that after I
7 spend some time with the authorities, but not at
8 this point. I mean you all know this area of the
9 law so well that you've done a -- I mean I think
10 you've given me the authorities that I need. I
11 just have to consume them and feel comfortable that
12 I understand them. But I really appreciate your
13 advocacy very much.

14 All right. We are in recess on the JetBlue
15 vs. DOR, 24-CA-1177.

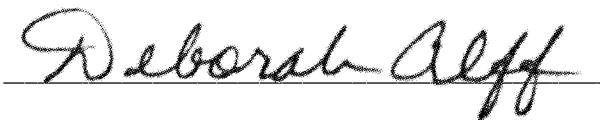
16 (Whereupon, the proceedings were concluded at
17 approximately 10:30 a.m.)
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CERTIFICATE OF REPORTER

I, DEBORAH ALFF, do hereby certify that I was authorized to and did report the foregoing proceedings, and that the transcript, pages 1 through 91, contains a true and correct record of my stenographic notes and recordings thereof.

Dated this 15th day of November, 2024 at Tallahassee, Leon County, Florida.



DEBORAH ALFF
Court Reporter

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