No. 11-2097
In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION,

Plaintiff-Appellant,

v.

RICK SNYDER, Governor, *et al*,

Defendants-Appellees.

&

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATON,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division

DEFENDANTS' PETITION FOR PARTIAL PANEL REHEARING OR CLARIFICATION

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INTRODUCTION

This case represents one of the rare circumstances when panel rehearing or clarification is indispensable for further litigation of this dispute. A concurrence filed after this panel issued its Opinion "clarified" a substantive issue that both governs this case on remand and is significant to the posture of any subsequent petition for certiorari to the United States Supreme Court. But that concurrence does not represent the Opinion of the Court, and the holding of the full panel on that substantive issue is ambiguous. Thus, Defendants ask this panel to clarify the Order to (1) prevent confusion on remand and (2) prevent a potential and unnecessary barrier to Defendants' ability to seek timely petition for certiorari. Significantly, resolution of this substantive issue would not necessarily be apparent to the district court. Indeed, it arises from, in the words of this panel, "a novel issue of an 'unusual extraterritoriality question.'" (11/29/2012 Op at 17.)

Prior Proceedings and Nature of the Ambiguity

This case involves a challenge to a Michigan law that sought to combat a multi-million dollar fraud problem by amending its Bottle Bill law to require that certain beverage containers sold in Michigan include

a unique-to-Michigan mark, ensuring the designated beverage containers sold in states without a deposit could not be redeemed as though they had been sold in Michigan with the required deposit having been paid. Addressing this challenge, the panel considered two legal issues involving the dormant Commerce Clause: first, whether Michigan's unique-mark is discriminatory on its face, or in its purpose or effect; and second, whether this unique-mark requirement is extraterritorial under an infrequently applied strand of the dormant Commerce Clause.

This panel issued its opinion on November 29, 2012, concluding that the unique-mark requirement is not discriminatory but does have an impermissible extraterritorial effect. (11/29/2012 Opinion and Order at 17-18.) The panel, thus, reversed the district court in part and remanded the case with instructions to proceed consistently with the Court's Opinion. But the panel's Opinion did not address Defendants' alternative argument for rejecting the Association's *per se* challenge—that a holding of extraterritoriality did not end the inquiry and instead triggered a second inquiry to analyze the requirement's legitimate purpose. (*Id.* at 37-38.)

In a lengthy concurrence by Judge Sutton, he joined the majority opinion in full but expressed doubt as to the continued viability of extraterritoriality as a freestanding branch of the dormant Commerce Clause analysis. (*Id.* at 19-26, Sutton, J., concurring.) One day after the Court issued its Opinion, Judge Rice filed a concurrence. (*Id.* at 27-28, Rice, J., concurring.) Judge Rice wrote separately to clarify the point that since the unique-mark is extraterritorial, it is *per se* invalid and the inquiry ends, thus entitling Plaintiff to judgment. Judge Rice concluded that the parties and the district court had erroneously assumed that if the statute were found to be either discriminatory or extraterritorial, the next step would be to determine whether it "advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." (*Id.* at 28.) Judge Rice disagreed, stating instead that the additional "legitimate purpose" inquiry has no application to a statute that has been deemed extraterritorial. (*Id.)* Because the panel's Opinion did not address Defendants' argument that there should be an additional inquiry for extraterritorial statutes, Defendants ask the full panel to address this point, particularly now that Judge Rice has responded to it. Moreover,

in addressing Defendants' argument, this panel should conclude—contrary to Judge Rice's concurrence—that there is a distinct inquiry about whether a statute with extraterritorial application may survive a dormant Commerce Clause analysis. Under this standard, Michigan's statute passes constitutional muster.

ARGUMENT

I. Without clarification of this Court's Order, there will be confusion on remand and Defendants may lose their subsequent appellate rights.

While this Court reversed the district court in part and remanded the case with instructions to proceed consistent with its Opinion, the district court and the parties are unable to determine how to proceed and what action would be consistent with this Court's Opinion. That is because the Opinion does not address whether the holding as to extraterritoriality ends the inquiry or triggers another step of analysis—heightened scrutiny to examine the State's legitimate purpose. Although Judge Rice clarified this point from his perspective, that clarification does not necessarily represent the perspective of all members of the panel and therefore does not constitute the holding of the Court on this important issue.

The Opinion's footnote 7 furthers this confusion. The panel indicates that because Michigan's unique-mark provision does not discriminate against interstate commerce but is extraterritorial, the *Pike* balancing test does not apply. (*Id.* at 18, n. 7.) But the *Pike* balancing test would not apply even if a conclusion of extraterritoriality automatically triggers heightened scrutiny analysis. The more rigorous heightened scrutiny analysis would simply replace the *Pike* balancing.

An additional concern is present here. Defendants Snyder, Schuette, and Dillon may want to file a Petition for Writ of Certiorari to the United States Supreme Court on whether the extraterritoriality doctrine continues to have viability as a freestanding dormant Commerce Clause Doctrine analysis outside the regulatory context. Of course, they cannot do so without a final order. Yet, if the district court interprets this Court's order as allowing for a second-step inquiry into the legitimate purpose of the statute, it may require additional briefing or limited discovery on that issue. Such measures will take time, during which the clock for filing a Petition to the Supreme Court will be ticking. There are no guarantees that this inquiry would be resolved

within 90 days of this Court's order, thus potentially jeopardizing Defendants' appellate rights.

Accordingly, Defendants ask this panel to address the issue and clarify its instructions on remand. Alternatively, if this panel determines that its holding as to extraterritoriality triggers heightened scrutiny and no discovery is required, this panel can, in furtherance of judicial economy, engage in the heightened scrutiny analysis itself.

II. This Court's conclusion that the statute is extraterritorial does not end the inquiry.

If a state regulation is found to be extraterritorial , the inquiry does not end. In other words, a conclusion of extraterritoriality does not require automatic invalidation of the challenged statute. This conclusion is inherent in this Circuit's recent explanation of the applicable two-tiered analysis for the dormant Commerce Clause. A court first determines whether a state statute is "virtually *per se* invalid." *Int'l Dairy Foods Assoc. v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010). "[A] state regulation is 'virtually *per se* invalid' if it is *either* extraterritorial or discriminatory in effect." *Int'l Dairy Foods*, 622 F.3d at 646 (emphasis in original); see also *id.* at 645 (citing *KT & G Corp. v.*

Att'y Gen. of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008) ("[A] statute will be invalid *per se* if it has the practical effect of extraterritorial control . . . ."). Somewhat counter-intuitively, when a statute is 'virtually *per se* invalid' under the dormant Commerce Clause, this Circuit's treatment of it is *not* to immediately strike it down. Instead, it is subject to heightened scrutiny and "will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Int'l Dairy Foods,* 622 F.3d at 644. If the statute survives heightened scrutiny, the inquiry ends; there is no need to engage in the *Pike* balancing test because the heightened scrutiny analysis is more rigorous than the *Pike* test. When the statute is neither extraterritorial nor discriminatory, then the *Pike* balancing test controls." *Id.* at 646.

This two-step analysis for the extraterritorial doctrine is supported by the Supreme Court's recognition that "there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986); see also

Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd (Cloverland I), 298 F.3d 201, 2011 (3d Cir. 2002) ("[S]ometimes the distinction between state laws subject only to *Pike* balancing and those that are nearly *per se* invalid is 'hazy'"). In determining whether heightened scrutiny should be applied instead of the *Pike* test, the Supreme Court has explained that "the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 476 U.S. at 579. Thus, Supreme Court caselaw supports application of heightened scrutiny even after a finding that a state statute operates extraterritorially.

At least one Sister Circuit has also recognized that extraterritoriality triggers the heightened scrutiny analysis. The Third Circuit explains that there are two general types of discrimination that a plaintiff may show to trigger heightened scrutiny: (1) extraterritoriality; and (2) local economic protectionism that disadvantages out-of-state businesses to benefit in-state ones. *Cloverland-Green Spring Dairies, Inc v. Pennsylvania Milk Marketing Bd.*, 462 F.3d 249, 261-262 (2006). That Circuit has further explained that these two types are not entirely distinct, but instead, are just two

forms of discrimination, with significant overlap. *Id.* See also, *Cloverland I*, 298 F.3d at 211 (explaining that, in considering whether a state law violates the dormant Commerce Clause, the inquiry is twofold: a court considers first whether "heightened scrutiny" applies, and, if not, then considers whether the law is invalid under the *Pike* balancing test).

Applying this framework, this panel or the district court on remand should engage in the heightened scrutiny analysis recognized in *Int'l. Dairy Foods,* 622 F.3d at 644. to determine whether Michigan's unique-mark requirement advances a legitimate local purpose that cannot be adequate served by reasonable nondiscriminatory alternatives.

III. Michigan's unique-mark requirement survives heightened scrutiny.

This argument was raised and preserved in Defendants' Brief on Appeal, pages 37 and 38, and thus, can be decided by this panel on rehearing. Section 572a(10) survives heightened scrutiny. Michigan's legitimate local purpose in requiring the unique-to-Michigan mark is to prevent fraudulent redemption and the resulting theft of deposit funds

that occurs when no-deposit containers are redeemed in Michigan for money. The widespread scale and impact of this fraudulent redemption was not only well documented and presented to the Michigan Legislature but also openly acknowledged by Beverage Association members doing business in Michigan.

As set forth in Defendants' Brief on Appeal, Michigan unsuccessfully engaged in various efforts to stop fraudulent redemptions prior to passing § 572a(10), including criminalization of fraudulent redemption and requiring retailers to post notices to that effect. See Mich. Comp. Laws 445.574a, b. Michigan's Bottle Bill, prior to the challenged amendment, also provided retailers authority to limit an individual's daily redemption amount. Mich. Comp. Laws § 445.572(10) (allowing a retailer to refuse "to accept from a person empty returnable containers for a refund in excess of $25 on any given day.") Yet none of these efforts has proven effective enough to combat the enormity of Michigan's fraudulent redemption problem.

Other nondiscriminatory means would not adequately serve the State's legitimate local purpose. As explained more fully in Defendants' Brief on Appeal, even the beverage industry in Michigan appears to

agree that reverse vending machines (RVM's) are only a part of the necessary comprehensive solution. (Defs.' Brief on Appeal, citing R. 17, Response Ex. 6, Michigan Soft Drink Association recommendations.) Other requirements are impractical and costly. For example, requiring proof of purchase at the time of redemption is unworkable because it would (1) unreasonably burden retailors with increased costs due to additional staff and handling; and (2) require consumers to retain all receipts—an unwieldy and impractical solution. Too, retailer incentives would merely shift a costly burden to them. A consumer need only go to a different retail location that will accept the containers, creating a redemption competition that hurts one retailer's business while boosting another's by bringing in customers.

In sum, even if the challenged provision is extraterritorial or discriminatory, and therefore virtually *per se* invalid, the State has a legitimate local purpose that cannot be adequately met by other less discriminatory means. This is one of the rare cases where the adverb "virtually" means something. Even though extraterritorial, the statute is not invalid. Accordingly, § 572a(10) survives heightened scrutiny and does not violate the dormant Commerce Clause.

CONCLUSION AND RELIEF REQUESTED

This Court held that although Michigan's requirement that certain returnable bottles and cans possess a unique-to-Michigan mark is not discriminatory but is extraterritorial. The Court remanded the case to the district court for proceedings consistent with its Opinion. But it is unclear what action is "consistent" with the Opinion. The panel as a whole did not clarify whether that holding triggers heightened scrutiny analysis or ends the inquiry, requiring entry of judgment for American Beverage. Only one concurrence concluded that the inquiry was over. Panel rehearing and clarification of this issue is needed to properly direct the district court on remand and to protect Defendants' appellate right to file a Petition for Certiorari to the United States Supreme Court.

Accordingly, Defendants Michigan Governor Snyder, Michigan Attorney General Bill Schuette, and Michigan Treasurer Andrew Dillon in their official capacities respectfully request that this panel grant rehearing and clarify its order:

A. directing that on remand the district court engage in heightened scrutiny to determine whether Michigan has a legitimate

local purpose that cannot be accomplished by less discriminatory alternatives; or,

B. alternatively concluding that the panel has engaged in heightened scrutiny and determined that Michigan has a legitimate local purpose that cannot be accomplished by less discriminatory alternatives, reversing its partial reversal of the district court and remanding the case for further proceedings; or

C. alternatively concluding that no heightened analysis is required, that Michigan's unique-mark requirement is *per se* invalid, and remanding the case for entry of judgment for Plaintiff.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 2286 words.

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CERTIFICATE OF SERVICE

I certify that on December 12, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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