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.

GOVERNOR SNYDER, ATTORNEY GENERAL SCHUETTE, AND TREASURER DILLON'S MOTION TO STAY THE MANDATE

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January 14, 2013

Pursuant to Federal Rule of Appellate Procedure 41(d)(2), Defendants-Appellants Michigan Governor Snyder, Michigan Attorney General Bill Schuette, and Michigan Treasurer Andrew Dillon in their official capacities ask the Court to enter an order staying the mandate of its January 7, 2013 amended opinion and judgment striking down Mich. Comp. Laws § 445.572a(1). Mich. Comp. Laws § 445.572a(1), the amendment to Michigan's Bottle Bill Law, requires certain returnable bottles and cans to possess a unique-to-Michigan mark designation. Defendants Snyder, Schuette, and Dillon seek this stay pending the filing of a petition for a writ of certiorari in the Supreme Court. The petition will present a substantial question, and there is good cause for a stay, Fed. R. App. P. 41(d)(2)(A):

1. In 1976, in an effort to promote and encourage recycling of beverage containers, Michigan enacted a Bottle Bill that requires certain beverages to be sold in returnable containers and requires consumers of those beverages to pay a 10-cent deposit that could then be refunded by the business or a reverse vending machine. A recent amendment to the Bottle Bill required certain containers to bear a

unique-to-Michigan mark that could be used only in Michigan and states with substantially similar laws.

2. The American Beverage Association filed this action in the United States District Court for the Western District against Defendants Governor Snyder, Attorney General Schuette, and Treasurer Dillon, claiming the unique-mark requirement violated the dormant Commerce Clause and seeking declaratory, injunctive and other relief. (R. 1, Complaint.) The Michigan Beer and Wine Wholesalers Association intervened as Defendants. (R. 15.)

3. American Beverage filed a motion for summary judgment arguing that the challenged statute was discriminatory and extraterritorial in violation of the dormant Commerce Clause, and alternatively, that it should prevail under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). (R. 6, Motion; R. 7, Brief.) Snyder, Schuette, and Dillon responded and also moved for summary judgment in their favor. (R. 16, Response.)

4. The District Court granted summary judgment in favor of Defendants on the purely legal issues, holding that Mich. Comp. Laws § 445.572a(10) was neither discriminatory nor extraterritorial, but

concluding that issues of material fact as to the burden on commerce prevented it from engaging in the *Pike* balancing test. (R. 42, 5/3/11 Opinion; R. 43, Order.)

5. The District Court granted certification for interlocutory appeal on the issue of whether the challenged provision is extra-territorial or discriminatory and this Court granted permissive interlocutory appeal. (R. 52, District court order denying reconsideration, granting request for certification; R. 54 Permissive appeal.)

6. On November 29, 2012, this Court issued its decision affirming the District Court's determination that the unique-mark requirement did not discriminate against interstate commerce on its face, in its purpose, or in its effect, but reversing the District Court's decision that the requirement was not extraterritorial. (11/29/2012 Opinion at 8-12, 13.) This Court instead concluded the requirement is extraterritorial because it impermissibly regulates interstate commerce by controlling conduct beyond the State of Michigan. (11/29/2012 Opinion at 18.)

7. Judge Sutton delivered a separate concurring opinion questioning this singular application of the extraterritoriality

doctrine—the "dormant branch of the dormant Commerce Clause"—and its continued vitality. (11/29/2012 Opinion at 19 and 20 (Sutton, J., concurring, citation omitted).)

8. District Court Judge Rice, sitting by designation, later filed a separate concurring opinion, first to discuss the application of a Second Circuit case relied on heavily by the District Court, *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), and second to clarify that because the statute is extraterritorial the inquiry ends and the statute must be struck down without additional inquiry into whether the statute advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. (11/30/2012 Opinion at 28 (Rice, J., concurring).)

9. Defendants filed a petition for partial panel rehearing or clarification, asking the Court to clarify its Order as to whether on remand the District Court would be engaging in additional inquiry as to legitimate local purpose or whether the District Court would simply enter an order striking down the challenged provision as unconstitutional—in other words, to clarify whether Judge Rice's

concurrence that an extraterritorial statute is immediately struck down represents the holding of the full panel.

10. On January 7, 2013, this Court issued an Amended Opinion clarifying that, having found the statute to be extraterritorial, there is no need to determine whether the State has some legitimate local purpose or whether there is a reasonable nondiscriminatory alternative; the statute must be enjoined as unconstitutional. (1/7/2013 Amended Opinion at 17.)

11. Consistent with United States Supreme Court Rule 10(a), Defendants Snyder, Schuette, and Dillon plan to file a petition for writ of certiorari because the Court's decision presents substantial questions concerning the parameters of the extraterritoriality strand of the dormant Commerce Clause, its viability as a freestanding dormant Commerce Clause doctrine, and its specific application here.

12. There is a strong possibility that the Supreme Court will grant certiorari, particularly in light of Judge Sutton's concurrence.

First, as the Court noted, the extraterritoriality question in this case is "a novel issue of an 'unusual extraterritoriality question' that

has not been addressed either by the Supreme Court or any other court." (1/7/2013 Amended Opinion at 17.)

Second, the question of whether the extraterritoriality doctrine should be applied outside the price affirmation context is a significant one, since the doctrine, while rarely applied at all, has been applied by the Supreme Court exclusively in that context. See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). And only two significant circuit cases, in addition to this one, have extended the doctrine to product labeling cases. See, e.g., *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010) (upholding an Ohio labeling rule that restricted the types of claims that dairy processors could make about milk and milk products); *Nat'l Electrical Manufacturers Ass'n v. Sorell*, 272 F.3d 104 (2d Cir. 2001) (upholding a Vermont statute that required manufacturers of products containing mercury to so label the products and direct consumers to recycle or dispose of them accordingly).

Third, and most significantly, as Justice Sutton points out in his concurrence, the Supreme Court has not applied the extraterritoriality

doctrine in nine years and it has *never* relied exclusively on the doctrine to invalidate a state law. (*Id.* at 25.)

13. Not only is the Supreme Court likely to take the case, it is likely to reverse this Court. As Judge Sutton points out in his concurrence, the extraterritoriality doctrine has outlived both its original function and its meaning. (1/7/2013 Amended Opinion at 21-22.) The main function of the doctrine is no longer to keep the States and the Federal Government in their separate spheres of regulatory authority—a function served by the doctrine—but rather, to prevent States from favoring in-state entities at the expense of out-of-state entities—a goal not served by the doctrine here. (See 1/7/2013 Amended Opinion at 21.) Additionally, States routinely regulate activities that occur wholly within one State but have effects in others, and it is questionable whether a law should be invalidated because it is extraterritorial where, as here, it does not also discriminate against interstate commerce and "complies with the traditional requirements of due process." (1/7/2013, Amended Opinion at 24.)

14. There is good cause for a stay for practical reasons. The challenged law required beverage companies that met the State's

specified threshold sales requirements to choose an option for marking their sold-in-Michigan containers with a unique mark. And by the beverage industry's own admission, they have changed the way they source, deliver, and store product in Michigan and the other states in which they operate. (1/7/2013 Amended Opinion and Order at 5.) Additionally, the State and wholesalers outlaid considerable expense to retrofit Michigan vendors' reverse vending machines to read the unique mark. The Legislature created the Beverage Container Redemption Anti-Fraud Fund and appropriated $1.5 million to that fund for use in refitting reverse vending machines to read the unique-to-Michigan mark. (Defs.' Brief on Appeal, Ex. 17, 2009 Enrolled HB 4311.) It makes no sense for these systems to be thrown into chaos when the Supreme Court might well grant certiorari and a subsequent stay.

15. Defendants-Appellants Snyder, Schuette, and Dillon have shown that their petition for a writ of certiorari will present substantial and important questions concerning the parameters of the dormant Commerce Clause, and they have demonstrated good cause for a stay while they seek a writ of certiorari from the Supreme Court.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated above, this Court should grant Defendants-Appellants Snyder, Schuette, and Dillon's motion to stay the mandate.

Respectfully submitted,

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Dated: January 14, 2013

CERTIFICATE OF SERVICE

I certify that on January 14, 2013, 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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