UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Docket Nos. 08-3268 and 08-3302

ROBERT FREEMAN and JUDY FREEMAN, WALTER HANSEL WINERY, INC., MEYER FRIEDMAN and BEVERLY FRIEDMAN, Plaintiffs,	On Appeal From a Final Order of The United States District Court for the District of New Jersey, dated June 30, 2008 Civil Action No.03cv03140(KSH)
v.	
JERRY FISCHER, Director of the New Jersey Division of Alcoholic Beverage Control, Defendant,	Sat Below: Hon. Katharine S. Hayden, U.S.D.J.
and	
R&R MARKETING LLC, ALLIED BEVERAGE GROUP, LLC and FEDWAY ASSOCIATES, INC., Intervenor-Defendants.	

DEFENDANT-APPELLANT/CROSS-APPELLEE JERRY FISCHER'S PETITION FOR PANEL REHEARING AND EN BANC REHEARING

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L.A.R. 35.1 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit, Davis v. Phila. Hous. Auth., 121 F.3d 92, 98 (3d Cir. 1997)(P9-13),[1] and the Supreme Court of the United States, Granholm v. Heald, 544 U.S. 460 (2005)(P3-4, 7-9), and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

Moreover, this matter involves one or more issues of exceptional importance. First, the panel's decision is in conflict with decisions of other Courts of Appeals on several significant matters (P3-5, 7-9). Second, since certain issues were raised by the District Court sua sponte, the State was denied the opportunity to present evidence that laws found to be facially discriminatory serve legitimate purposes that cannot be adequately served by non-discriminatory

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[1]PO refers to the Third Circuit Panel Opinion issued on December 17, 2010.
ABCb refers to Director Fischer's Step 1 brief.
P refers to Director Fischer's Petition.

alternatives (P5-6). Finally, the 21st Amendment delegates alcohol regulation to the states and the panel failed to allow the New Jersey Legislature a reasonable amount of time in which to act on remedy (P13-15).

ARGUMENT

I. THE PANEL'S DECISION IS IN CONFLICT WITH DECISIONS FROM OTHER UNITED STATES COURTS OF APPEALS; ALSO, REHEARING EN BANC IS NECESSARY TO MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

En banc review is appropriate when a case involves one or more questions of exceptional importance. F.R.A.P. 35. A question of exceptional importance is one where the panel's decision conflicts with the decisions of other United States Courts of Appeals that have addressed the issue. F.R.A.P. 35(b). Moreover, consideration by the full Court is necessary if the panel's decision is in conflict with other decisions of this Court. F.R.A.P. 35(a). This petition presents such issues.

A. The Panel's Decision Erroneously Treats On-Premise Sales as a State Imposed Barrier to Interstate Commerce.

The panel decision found that New Jersey's laws allowing in-state wineries to sell to consumers violate

the dormant Commerce Clause (PO35, 48). Thus, it prevents New Jersey wineries from selling wine at their own winery premises, a result contrary to that reached in other jurisdictions having wineries, whether or not direct shipment is authorized by state law. The decision is also in conflict with decisions from other Courts of Appeals.

The decision to strike down in-state wineries' face-to-face sales to consumers at the winery premises erroneously equates two distinct commercial activities: selling in face-to-face, over-the-counter transactions on the premises of a licensed winery in New Jersey, and selling any wine, from any place, by direct shipment delivery. A failure to recognize this distinction ignores the Supreme Court's continuing recognition of the validity of the three-tier system. Granholm v. Heald, 544 U.S. 460, 474 (2005). The Granholm decision, and the decisions of other Circuit Courts on this issue, illuminate the panel's error.

Unlike the laws at issue in Granholm, and as recognized by the panel (PO41-48), New Jersey prohibits both in-state and out-of-state wineries from directly

shipping wine to consumers, with no exceptions. Other Circuit Courts which have considered this issue have interpreted Granholm to recognize the distinction between on-premises face-to-face sales and direct shipping. These courts understood that physical presence is an unavoidable requirement for on-premises sales and the prohibition of direct shipping in conjunction with such permission to sell in face-to-face transactions at a winery neither discriminates against, nor unduly burdens, interstate commerce. See Cherry Hill Vineyard v. Baldacci, 505 F.3d 28 (1st Cir. 2007); Baude v. Heath, 538 F.3d 608 (7th Cir. 2008).

Discrimination under the dormant Commerce Clause assumes a comparison of substantially similar entities competing in the same market. See General Motors Corp. v. Tracy, 519 U.S. 278, 298-299 (1997). The First Circuit recognized that selling via direct shipping and selling at the winery involve two different markets.

> The market for on-site wine purchases, requiring a trip to the winery, is different in kind and reach from the convenience-oriented market that would be created and facilitated by a law allowing direct shipping. [Baldacci, 505 F.3d at 37; see also Baude v. Heath, 538 F.3d at 615].

These different markets do not compete against one another, and allowing one and prohibiting the other does not offend the dormant Commerce Clause. Finally, the Supreme Court has declared,

> When allegedly competing entities serve different markets, eliminating ... a regulatory differential would not serve the dormant Commerce Clause's fundamental objective ... [General Motors Corp., 519 U.S. at 299].

That is precisely the case here.

The panel's decision striking down in-state wineries' ability to sell to consumers does not follow from Granholm and is in conflict with decisions of other Courts of Appeals. Thus, en banc review is required and this part of the decision must be vacated.

B. The Panel's Decision Invalidated New Jersey Law as Facially Discriminatory on an Incomplete Record, Without Providing for a Remand.

The panel found that New Jersey's laws allowing in-state wineries' to sell to retailers and its caps on personal importation of alcohol from out-of-state are facially discriminatory, requiring strict scrutiny. Generally, where a state law is found to be facially discriminatory, the state is permitted to offer

evidence that the law serves a legitimate purpose that cannot be adequately served by a non-discriminatory alternative (PO27). If such evidence is presented, the law may nevertheless be considered constitutional.

In the instant matter, the panel noted, "[T]he District Court, which apparently raised these issues sua sponte, cites to no evidence in the record for this proposition" (PO37). Since the parties had no opportunity to brief this issue and no oral argument was ever held on any issue before the District Court, an absence of evidence is not surprising. Nevertheless, the panel found that no one attempted to save the law allowing in-state wineries to make direct sales to retailers. Thus, the panel concluded that "this absence of evidence is dispositive" (PO38), and held that the laws were unconstitutional.

The absence of an opportunity to offer evidence on significant policy issues prior to the panel's decision is an issue of exceptional importance. Petitioner Jerry Fischer urges that these issues be reviewed en banc and, if the Court finds a deficiency, that the State be permitted to supplement the record on a remand

of these issues to the District Court.

C. Public Policy Concerns Create an Issue of Exceptional Importance Which Must Be Reviewed by the Court En Banc.

The panel struck down New Jersey's law requiring out-of-state wineries to be licensed to sell in the state, as an "indirect way of subjecting out-of-state wineries ... to the three-tier system," citing to Granholm v. Heald, 544 U.S. 460, 474 (2005) (PO34). This conclusion challenges the three-tier system, a system that was upheld as "unquestionably legitimate" by the Supreme Court in Granholm, 544 U.S. at 474.

Moreover, the panel's conclusion conflicts with that of the Fifth Circuit, when it recently considered this issue in the context of retailer sales. In Wine Country Gift Baskets v. Steen, 612 F.3d 809 (5th Cir. 2010), the Fifth Circuit stated that "because Granholm told us that the three-tiers are legitimate under the 21st Amendment," alcoholic beverage laws are not constitutionally suspect when they dictate something that "is an inherent aspect of the three-tier system." Id. at 821. See also Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 192 (2d Cir. 2009). Thus, states are

entitled to establish limitations on how producers, wholesalers and retailers are licensed and operate.

Furthermore, states are never required to give dramatically greater rights to out-of-state businesses, only to level the playing field for interstate commerce (ABCb45). Indeed, in-state winery privileges to sell to consumers and retailers are presumptively valid, since they principally derive from geography and licensing and not an intent to discriminate. See Baldacci, 505 F.3d at 37. They are also "inherent" in a local winery's agricultural function, as evidenced by the fact that nearly every state that has a three-tier system also grants these privileges to their in-state wineries. To find otherwise is to hold that the regulatory pattern established throughout the United States, and the licensing requirements inherent in this pattern, fail.

For these reasons, the panel's decision striking down the ability of in-state wineries to sell to consumers and retailers does not follow from the Supreme Court's decision in Granholm and is in conflict with decisions by other Courts of Appeals. Thus, en

banc review of the panel's decision is required and this portion of the panel's decision must be vacated.

D. The Panel's Extension of the Standing "Zone of Interest" is a Matter of the First Impression and is Unsupported; Thus, Consideration En Banc is Necessary to Secure and Maintain Uniformity Within the Court's Decisions.

In its opinion, the panel reiterated the well-settled principle from Davis v. Phila. Hous. Auth., 121 F.3d 92, 98 (3d Cir. 1997), that

> [t]he zone of interests test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit. [PO13].

The panel acknowledged that the Third Circuit has not previously held that plaintiffs have prudential standing when they are not directly regulated by the statute at issue (PO23). Nevertheless, the panel severely stretched the notion of standing in this matter, holding that the Consumer Plaintiffs, the Freemans, demonstrated sufficient interest, simply by virtue of their claims that some wine they desired was not available for purchase in New Jersey. On the basis of this amorphous allegation, they were given standing to pursue claims that directly regulate producers (out-

of-state wineries), and not consumers. The panel held that "such plaintiffs can come within the zone of interests if their ability to freely contract with out-of-state companies was directly infringed by local regulation" (PO23). The panel explained:

> We adopt this rule because such plaintiffs seek to vindicate interests related to the protection of interstate commerce. In particular, plaintiffs who seek to protect "the right as a consumer to purchase ... services across state boundaries" assert interests closely related to the purposes of the dormant Commerce Clause. [PO23].

This conclusion is an unsupported extension of the concept of "zone of interest."

The Consumer Plaintiff Freemans did not participate in any decision made by any producer (out-of-state winery) regarding whether or not to "lose profit" or pay the fee for a New Jersey wholesale license. They allege nothing more than that New Jersey's regulatory scheme may lead some producers to choose not to enter the market, thereby preventing the Freemans from buying such products. This claim is so generalized that conferring standing on this basis neuters the concept. The choice regarding whether or not to put wines into

the stream of commerce in New Jersey was not made by the Freemans, but by each out-of-state winery.

Notably, the panel based its extension of the concept of standing on a dissent written by Judge Barry in Oxford Assoc. v. Waste Sys. Auth of E. Montgomery County, 271 F.3d 140 (3d Cir. 2001). Judge Barry disagreed with the majority decision, which found that the plaintiffs had standing. However, a review of Judge Barry's dissent discloses that the plaintiffs in Oxford did not allege that their ability to contract directly with an out-of-state company was adversely affected. In fact, the plaintiffs in Oxford were merely consumers of services. Thus, she would not have granted them standing. Judge Barry explained that she would find standing if a plaintiff's ability to freely contract with out-of-state companies was directly infringed by local regulation. That is not the situation in the instant matter.

There is no requirement for the Freemans to buy New Jersey wine (or any wine from anywhere). The Freemans have the choice to buy out-of-state. It might just cost more for them to travel, which they claim is not

economically feasible. Thus, the panel was in error when it concluded that the Freemans' ability to freely contract with out-of-state companies was directly infringed by New Jersey law. On the contrary, the Freemans allege only that as a result of "economic disincentives" resulting from New Jersey's laws, they have become in-state consumers wishing to access out-of-state products. While that status may grant them standing to pursue claims regarding consumer-related laws, it cannot grant them the ability to pursue producer-related claims.

Since cases support the conclusion that plaintiffs lack prudential standing where they allege that a party with whom they merely wish to contract is subject to an undue burden (ABCb37-39), the panel's stretch to grant the Freemans standing to pursue the claims of producers is erroneous. Especially in the context of a case involving alcohol, one of the most highly regulated commodities in the United States, and in light of the 21st Amendment, the panel's decision on this issue distorts the meaning of standing and should be reviewed en banc and reversed to maintain uniformity. Moreover,

since the only consumer-related issue in the instant matter is direct shipment and the panel upheld New Jersey's total ban, the remand of this matter on the producer-related issues by the panel must be vacated.

II. THE PANEL'S DECISION TO REMAND THE CASE TO THE DISTRICT COURT ON REMEDY WAS ERRONEOUS, SINCE THE NEW JERSEY LEGISLATURE HAS PRIMARY JURISDICTION OVER THE REGULATION OF ALCOHOL.

As the panel recognized, neither the parties nor the District Court addressed whether, in the case of a finding of unconstitutionality (PO48-49), New Jersey law should be extended to create new privileges for out-of-state wineries, or whether existing privileges for in-state wineries should be eliminated. The appropriate remedy is to allow the New Jersey Legislature a reasonable interval to make this determination,[2] since alcohol is highly regulated and

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[2] The instant case is clearly distinguishable from Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F.3d 652 (3d Cir. 1997), cert. den. 522 U.S. 966 (1997), where this Court reversed a post-appeal stay issued by the District Court, dismissing the financial expense arguments offered by the governmental defendants. The reason for a stay in the instant matter is not a mere fear of economic impact, but to allow the New Jersey Legislature to play the role delegated to it by the 21st Amendment.

the 21st Amendment has delegated such regulation to the states. See Costco Wholesale Corp. v. Hoen, 407 F. Supp.2d 1247, 1256 (D. Wash. 2005), aff'd in part, rev'd in part 522 F.3d 874 (9th Cir. 2008); Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enf. Comm., 464 F. Supp.2d 1294 (W.D. Okla. 2006).

Moreover, because the laws in this matter deal with alcohol, a product subject to pervasive state regulation due to a specific constitutional delegation of authority in the 21st Amendment, they are analogous to the laws in the redistricting cases considered by the Supreme Court. In such cases, the Court recognized the issues as primarily a matter for legislative determination, and that "judicial relief becomes appropriate only when a legislature fails to [act] in a timely fashion after having had an adequate opportunity to do so." Karcher v. Daggett, 466 U.S. 910 (1984).

Therefore, the panel should have allowed the New Jersey Legislature a reasonable time to act before remanding the case for determination by the District Court. Indeed, a court should refrain from "assuming the mantle of super legislature, actively rewriting

substantial portions of the law under the guise of validating a Commerce Clause challenge." Dickerson v. Bailey, 336 F.3d 388, 408 (5th Cir. 2003). See also Kalina v. Railroad Retirement Bd., 541 F.2d 1204, 1210 (6th Cir. 1976)(a decision to expand or contract a discriminatory statute is for the Legislature).

For these reasons, en banc review of the panel's remand on remedy to the District Court is required, and the Court must give the New Jersey Legislature the opportunity to indicate its preferences as to whether New Jersey's laws should be extended or nullified.

CONCLUSION

As set forth herein, en banc review of the parts of the panel's decision set forth above is both necessary and appropriate.

Respectfully submitted,

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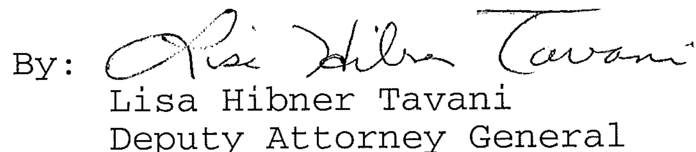
By: 
Lisa Hibner Tavani
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DATED: January 28, 2011

STATEMENT OF BAR MEMBERSHIP

I certify that I am a member in good standing of the Bar of the United States District Court of Appeals for the Third Circuit.

By: /s/ Lisa Hibner Tavani
Lisa Hibner Tavani
Deputy Attorney General

DATED: January 28, 2011

CERTIFICATION OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

I certify that this brief complies with F.R.A.P. 32(a)(7)(B) in that the principal portions of the brief contain 2,730 words and is 15 pages, according to the software program used by the Office of the Attorney General.

By: /s/ Lisa Hibner Tavani
Lisa Hibner Tavani
Deputy Attorney General

DATED: January 28, 2011

CERTIFICATION OF COMPLIANCE WITH L.A.R. 31.1(c)

I certify that this brief complies with L.A.R. 31.1(c), in that prior to it being e-mailed to the Court today, the PDF file was scanned and found to be free from computer viruses. The virus software that was used in Computer Associates eTrust InnoculateIT 8.0447.0.

By: /s/ Lisa Hibner Tavani
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DATED: January 28, 2011