No. 19-1948

United States Court of Appeals For the Eighth Circuit

Sarasota Wine Market, LLC, d/b/a Magnum Wine and Tastings; Heath Cordes; Michael Schlueter; Terrence French

Plaintiffs - Appellants

vs.

Eric Schmitt, Attorney General of Missouri; Dorothy Taylor, State Supervisor of the Missouri Div. of Alcohol and Tobacco Control; Michael L. Parson, Governor of Missouri

Defendants - Appellees

On appeal from the U.S. District Court for the Eastern District of Missouri, 4:17-cv-02792 HEA, Hon Henry E. Autry.

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

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I. Introduction

Missouri authorizes its local wine retailers to take online orders and deliver to consumers throughout the state. Am. Compl., ¶¶ 14-16, J.A. 18-19; Mo. Rev. Stat. §§ 311.200(1), 311.300(2). However, it will issue the necessary license only to an applicant who is "a qualified legal voter and a taxpaying citizen" of Missouri. Mo. Rev. Stat. § 311.060(1). Therefore, only in-state retailers may sell wine online; out-of-state retailers may not. Plaintiffs assert this scheme discriminates against nonresidents in violation of the Commerce Clause, U.S. CONST. art I § 8, and Privileges and Immunities Clause. U.S. Const., art IV, § 2.

The panel dismissed the complaint on the pleadings under Fed. R. Civ. P. 12(b)(6). It concluded that the physical-presence and citizenship requirements were constitutionally "unquestionable" and immune from challenge. It did not require the State to produce any evidence that these requirements actually served any state purpose that could not have been advanced by reasonable nondiscriminary alternatives. Plaintiffs contend that the Supreme Court clearly requires the state to produce such evidence, so the case should have been remanded to the district court for that purpose.

II. Reasons for panel rehearing

Plaintiffs-Appellants Sarasota Wine Market et al. petition the court for panel rehearing on the following grounds:

a. The panel dismissed the Commerce Clause complaint under Fed. R. Civ. P. 12(b)(6). The Supreme Court and this Circuit hold that a factual record is required to affirm a law that discriminates against interstate commerce, so dismissal on the pleadings was premature. We do not know yet whether the evidence will show that this particular physical-presence requirement is integral to Missouri's "three-tier" wine distribution system or serves merely to protect Missouri businesses from competition, or whether simple non-discriminatory alternatives are available. The case should have been remanded to the district court to develop the necessary factual record to make those determinations.

b. The panel also dismissed the Privileges and Immunities Clause complaint under Fed. R. Civ. P. 12(b)(6). The Supreme Court holds, and the panel acknowledged, op. at 18-19, that although the denial of licenses to nonresidents would usually violate the Clause, such denial may be upheld if there is a legitimate reason that bears a substantial

relationship to the state's objectives. We do not know yet whether the evidence will show that there is a legitimate, non-protectionist, reason for Missouri to discriminate against nonresidents. The case should have been remanded to the district court to develop the necessary factual record.

III. Reason for rehearing en banc

Plaintiffs-Appellants Sarasota Wine Market et al. petition the court for rehearing *en banc* on the following ground:

The panel decision conflicts with two decisions of the United States Supreme Court. In *Granholm v. Heald,* 544 U.S. 460 (2005), the Court held that a state could not limit direct wine shipments to in-state wineries only unless the state proved with "concrete evidence" that such a requirement was necessary and no reasonable nondiscriminatory alternative was available. 544 U.S. at 475, 490, 493. In *Tenn. Wine & Spirits Retailers Asso. v. Thomas*, 139 S.Ct 2449 (2109), the Court held that a state could not limit wine retail licenses to in-state residents only unless the state proved with "concrete evidence" that such a restriction was necessary and "nondiscriminatory alternatives would be insufficient." 139 S.Ct. at 2474. The panel did not

adhere to the Court's requirement of a factual record, but upheld a physical-presence and residency requirement as "unquestionably legitimate" without any evidence whatsoever, op. at 16-17, and without even discussing the availability of nondiscriminatory alternatives such as licensing direct shipping as Missouri does for shipments from out-of-state wineries. Mo. Rev. Stat. § 311.185. Consideration by the full court is therefore necessary to secure and maintain uniformity of decisions.

IV. Argument

A. Plaintiffs have pled a valid Commerce Clause claim.

Plaintiffs have asserted that Missouri's prohibition against interstate wine shipping violates the Commerce Clause. Missouri allows only those retailers with physical premises in the state to ship wine to consumers. Missouri does not require a consumer to actually appear on those premises, but allows wine to be ordered online from in-state retailers and out-of-state wineries. The physical-presence requirement therefore seems to be unrelated to the state's legitimate interests in regulating direct shipping and be primarily protectionist.

Missouri's differential treatment of in-state and out-of-state retailers who sell wine online would appear to violate the holding in

Granholm v. Heald that "discrimination is neither authorized nor permitted by the Twenty-first Amendment," 544 U.S. at 466, and that all "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *id.* at 487, so "[i]f a State chooses to allow direct shipment of wine, it must do so on even-handed terms." *Id.* at 493. It would appear to violate the holding in *Tenn. Wine & Spirits Retailers Asso. v. Thomas*, that a residency rule is a "discriminatory feature" of the state's liquor code, fully subject to Commerce Clause scrutiny, because the Court's prior endorsement of the three-tier system *in general* does not immunize from scrutiny "every discriminatory feature that a State may incorporate into its three-tiered scheme." 139 S.Ct. at 2472.

Both *Granholm,* 544 U.S. at 490, and *Tenn. Wine,* 139 S.Ct. at 2474, hold that a discriminatory liquor law is invalid unless the State proves with "concrete evidence" that such restrictions are necessary to advance a legitimate interest that cannot be furthered by nondiscriminatory alternatives. Such proof may be made only at summary judgment or trial, so dismissal on the pleadings is not appropriate.

B. Plaintiffs have pled a Privileges and Immunities Clause claim.

Plaintiffs have asserted that limiting retail liquor licenses only to an applicant who is "a qualified legal voter and a taxpaying citizen" of Missouri, Mo. Rev. Stat. § 311.060(1) violates the Privileges and Immunities Clause. It denies nonresident wine retailers the opportunity to pursue their occupations in the state. Discrimination against non-residents violates the Clause unless sufficient justification exists for it. *McBurney v. Young*, 569 U.S. 221, 227 (2013); *Hatch v. Hoeven,* 456 F.3d 826, 834 (8th Cir. 2006). On its face, the citizens-only provision would appear to violate the holding in *McBurney* that a state may not "exclude non-residents and thereby create a commercial monopoly for ... residents," 569 U.S. at 227. It therefore requires the State to present some evidence justifying why non-residents must be excluded, which can only be done at summary judgment or trial. Dismissal on the pleadings is not appropriate.

C. The State has not yet proved a public safety justification.

In *Tenn. Wine*, the Supreme Court said that the State can justify a discriminatory liquor law if it demonstrates that the restriction is closely related to public health and safety. 139 S.Ct at 2457, 2464,

2473, 2474. The State must produce "concrete evidence" showing that the requirement "actually promotes public health or safety" and "that nondiscriminatory alternatives would be insufficient to further those interests." *Id.* at 2474. In *Granholm v. Heald,* it held similarly that a discriminatory liquor law may be justified only with "concrete evidence" that makes the "clearest showing" that the law is justified; the States' unsupported assertions are inadequate. 544 U.S. at 490. *Accord Hatch v. Hoeven*, 456 F.3d at 834 (Privileges and Immunities Clause).

The panel based its decision on exactly what the Supreme Court said was improper – an allegation by state officials unsupported by any concrete evidence. The State's lawyer has alleged in a brief that an in-state presence is justified to promote Missouri's interest in public health and safety, but the State has yet to offer any evidence of this because we are still at the pleading stage. State officials have not yet even said exactly what purposes these laws promote, because they have not filed an answer, submitted evidence, or responded to discovery. We have not reached the evidentiary phase of this litigation and the defense of justification cannot be established merely by assertion and argument. *Tenn. Wine,* 139 S.Ct at 2474.

Even if the physical-presence rule were shown to advance a legitimate state regulatory purpose, the State must make a second showing – that the interest cannot be advanced by less discriminatory alternatives. *Granholm,* 544 U.S. at 476, 490-92; *Tenn. Wine,* 139 S.Ct at 2470-71. The State did not even address this element of the constitutional analysis in its brief, let alone present any actual evidence why the licensing scheme it uses to regulate wine shipped from out-of-state wineries would not also work for out-of-state retailers.

The correct allocation of burdens of proof are "extremely important." *Abernathy v. Railroad Retirement Bd.*, 716 F.2d 529, 531 n.1 (8th Cir. 1983). The panel did not properly apply them and did not adhere to the Supreme Court's proscription that the burden of proving justification falls to the State. The case should have been remanded to allow the State to plead and prove such justification.

V. Conclusion

For the foregoing reasons, rehearing should be granted either by the panel or *en banc*, the opinion of February 16 withdraw, and the case remanded for evidentiary proceedings.

Respectfully submitted,
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s/ James A. Tanford
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the length limitations of Rules 35(b) and 40(b). It has been prepared using Wordperfect X9 in 14-point Century Schoolbook font and contains 1506 words, excluding exempt sections.

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2021, I filed this petition through the CM/ECF system which will serve the defendants, all of whose attorneys are registered users.

s/ James A. Tanford
James A. Tanford