Sixty-Fourth Annual
National Moot Court Competition
Transcript of Record

SUPREME COURT OF THE UNITED STATES
October Term 2013

Docket No. 2013-01

Association of Beverage Producers and Retailers,
Petitioner,
v.
Ron Fraper, in his official capacity as the Governor of the State of Old York,
Respondent.

Background

In the fall of 2011, Ron Fraper was elected Governor of the State of Old York. Fraper and his wife, Netty, charmed the Old York electorate with their good looks and throwback fashions. Fraper campaigned on a platform of social liberalism and economic conservatism.

Immediately upon taking office, Fraper became concerned about two issues: (1) rising obesity levels and associated health care costs in Old York and (2) the fraudulent redemption in Old York of beverage containers originating from outside the State. To address these issues, he proposed the Comprehensive Beverage and Bottle Act of 2012 (the "2012 Act").[1] The 2012 Act consisted of two major changes to Old York's laws on beverage sales and bottling.

First, to address health-related issues, it mandated that beverage retailers post the following sign in their stores:

You Have To Walk <u>3 Miles</u> To Burn Off The Calories In One 20oz. Soda.*
The Consumption Of Sugary Drinks Can Lead To Obesity, Diabetes, Cardiovascular Disease, And Tooth Decay.
*According to the Mayo Clinic, a 160lb. person will burn 277 calories in an hour walking 3.5 mph.
Secretary of Health, State of Old York

1 The full text of the 2012 Act is set forth on pages 8-10 of the Record.

Second, to address the fraudulent redemption issue, the 2012 Act also amended a previous law on the books, the State of Old York Bottle Deposit Act of 2000 (the "2000 Act").[2] The 2000 Act required distributors and retailers to collect a refundable deposit of ten (10) cents on certain beverage containers. Consumers could obtain a refund of the deposit by returning the empty container to a retailer or to a reverse vending machine. Retailers, in turn, could return the empty containers to beverage distributors or manufacturers to obtain the ten-cent refund. The purpose of the 2000 Act was to reduce litter by providing an incentive to recycle.

Under the 2000 Act, if a distributor collected more deposits than were refunded in a calendar year, the excess was remitted to the Old York Department of Treasury ("DOT"). The DOT disbursed 25% of the monies to retailers to assist with handling costs, and 75% to a special fund used for cleanup and redevelopment of Old York. Although the 2000 Act had good intentions, there was a significant problem of "over-redemption," which occurred when a distributor or manufacturer paid out more in refunds than it collected in deposits. Over-redemption resulted in lost revenue for Old York's special fund and sometimes a direct financial loss to beverage distributors and manufacturers.

One cause of over-redemption was the fact that individuals would redeem containers in Old York even though they were purchased outside of the State. Consumers were incentivized to do this because other states collected a refundable deposit at the point of sale that was less than 10 cents. If, for example, a consumer purchased a beverage container in a state that collected only five cents at the point of sale and returned the container in Old York, the consumer would profit five cents. A cottage industry grew around this practice and even formed the basis of an episode of a sitcom that was popular in Old York called, "Kleinfeld."

2 The full text of the 2000 Act is set forth on pages 6-7 of the Record.

To combat this problem, the 2012 Act requires bottles and cans sold in Old York to contain a unique, state-specific identifying mark. Redemption can occur in Old York only for beverages that display the mark. The 2012 Act also made it illegal to sell containers with the Old York mark outside Old York.

In February 2012, the House and Senate of the State of Old York both passed the 2012 Act with over 60% of each house voting in favor of the law. Governor Fraper signed the bill into law on March 3, 2012.

Beverage retailers who complied with the 2012 Act saw their beverage sales decrease 10% over the first six months after the law was enacted. One retailer in Old York, Meggie Molson, had to close down her shop due to the decreased sales.

Beverage producers struggled to implement the portion of the 2012 Act relating to bottle deposits because the new law required a unique mark for bottles sold in Old York. One smaller but well-established Old York producer, Merling-Hooper-Rice LLC, found the cost of re-labeling bottles prohibitively expensive and felt that it could not compete with producers who sold their products exclusively in Old York.

Procedural History

On November 15, 2012, the Association of Beverage Producers and Retailers (the "Association"), on behalf of its members, sued Governor Fraper in his official capacity as the Governor of the State of Old York to invalidate the 2012 Act on two grounds: (1) the 2012 Act violated retailers' First Amendment rights by forcing them to post a sign regarding sugary beverages and (2) the 2012 Act violated producers' rights under the Dormant Commerce Clause by requiring unique markings for bottles sold in the State of Old York.

Following a short period of discovery, both parties moved for summary judgment in the United States District Court for the District of Old York. On March 15, 2013, Judge Patrick

Dalin granted summary judgment in favor of Governor Fraper and denied the Association's motion. The Association appealed, and on September 3, 2013, the United States Court of Appeals for the Twelfth Circuit reversed.

State of Old York Bottle Deposit Act of 2000

Section 1 – Definitions

1. "Beverage container" means an airtight metal, glass, paper, or plastic container, or a container composed of a combination of these materials, which, at the time of sale, contains one gallon or less of a beverage.

2. "Empty returnable container" means a beverage container which contains nothing except the residue of its original contents.

3. "Returnable container" means a beverage container upon which a deposit of at least 10 cents has been paid, or is required to be paid and for which a refund of at least 10 cents in cash is payable by every dealer or distributor in this State of that beverage in beverage containers.

4. "Nonreturnable container" means a beverage container upon which no deposit or a deposit of less than 10 cents has been paid or for which no cash refund or a refund of less than 10 cents is payable by a dealer or distributor in this State of that beverage in beverage containers.

5. "Person" means an individual, partnership, corporation, association, or other legal entity.

6. "Dealer" means a person who sells or offers for sale to consumers within this State a beverage in a beverage container, including an operator of a vending machine containing a beverage in a beverage container.

7. "Distributor" means a person who sells beverages in beverage containers to a dealer within this State, and includes a manufacturer who engages in such sales.

8. "Manufacturer" means a person who bottles, cans, or otherwise places beverages in beverage containers for sale to distributors, dealers, or consumers.

9. "Within this State" means within the exterior limits of the State of Old York, and includes the territory within these limits owned by or ceded to the United States of America.

10. "Nonrefillable container" means a returnable container which is not intended to be refilled for sale by a manufacturer.

11. "Overredeemer" means a distributor or manufacturer whose annual total value of deposits collected on beverage containers sold within this State is less than the annual total value of refunds made upon beverage containers redeemed within this State.

12. "Underredeemer" means a distributor or manufacturer whose annual total value of deposits collected on beverage containers sold within this State exceeds annual total value of refunds made upon beverage containers redeemed within this State.

Section 2 – Acceptance of Containers and Payment of Refunds

1. A dealer within this State shall not sell, offer for sale, or give to a consumer a nonreturnable container or a beverage in a nonreturnable container.

2. A dealer shall accept from a person an empty returnable container of any kind, size, and brand sold or offered for sale by that dealer and pay to that person its full refund value (10 cents) in cash.

3. A distributor shall accept from a dealer an empty returnable container of any kind, size, and brand sold or offered for sale by that distributor and pay to the dealer its full refund value (10 cents) in cash.

4. Each beverage sold or offered for sale by a dealer within this State shall clearly indicate by embossing or by a stamp, a label, or other method securely affixed to the beverage container, the refund value of the container and the name of this State.

Section 3 – Unclaimed Bottle Deposits

1. The Department of Treasury ("DOT") will collect the amount of money in unclaimed bottle deposits owed to this State, and enforce the obligation to pay the amount owed.

2. An underredeemer shall pay to the DOT that amount of money by which its annual total value of deposits exceeds its annual total value of refunds made on redeemed beverage containers, subject to the overredemption credit contained in this section.

3. An underredeemer who becomes an overredeemer in a subsequent year may credit the value of the overredemption in order to reduce the amount of money owed to the DOT under this section in one (1) or more subsequent years as a result of that person again becoming an underredeemer. The value of the overredemption may be carried forward for not more than three (3) years or until the credit granted in this section is completely depleted, whichever occurs first.

Section 4 – Bottle Deposit Fund

1. A Cleanup and Redevelopment Trust Fund (the "Fund") is created. The Fund will be administered by the DOT.

2. The amount paid to the DOT by underredeemers will be deposited annually by the DOT into the Fund in the following manner:

    a. Seventy-five percent to the Cleanup and Redevelopment Trust Fund;

    b. Twenty-five percent to dealers to be apportioned to each dealer on the basis of the number of empty returnable containers handled buy a dealer as determined by the DOT.

State of Old York Comprehensive Beverage and Bottle Act of 2012

Sec. 1 – Definitions

1. "Sugar-sweetened beverages" are any beverages to which any caloric sweetener, such as corn syrup or sucrose, has been added. This includes, for example: soft drinks (soda or pop); fruit drinks; sports drinks; energy drinks; sweetened milk or milk alternatives.

2. "Beverage" means a soft drink, soda water, carbonated natural or mineral water, or other nonalcoholic carbonated drink; beer, ale, or other malt drink of whatever alcoholic content; or a mixed wine drink or a mixed spirit drink.

3. "Beverage container" means an airtight metal, glass, paper, or plastic container, or a container composed of a combination of these materials, which, at the time of sale, contains one gallon or less of a beverage.

4. "Empty returnable container" means a beverage container which contains nothing except the residue of its original contents.

5. "Returnable container" means a beverage container upon which a deposit of at least 10 cents has been paid, or is required to be paid and for which a refund of at least 10 cents in cash is payable by every dealer or distributor in this State of that beverage in beverage containers.

6. "Nonreturnable container" means a beverage container upon which no deposit or a deposit of less than 10 cents has been paid or for which no cash refund or a refund of less than 10 cents is payable by a dealer or distributor in this State of that beverage in beverage containers.

7. "Person" means an individual, partnership, corporation, association, or other legal entity.

8. "Dealer" means a person who sells or offers for sale to consumers within this State a beverage in a beverage container, including an operator of a vending machine containing a beverage in a beverage container.

9. "Distributor" means a person who sells beverages in beverage containers to a dealer within this State, and includes a manufacturer who engages in such sales.

10. "Manufacturer" means a person who bottles, cans, or otherwise places beverages in beverage containers for sale to distributors, dealers, or consumers.

11. "Within this State" means within the exterior limits of the State of Old York, and includes the territory within these limits owned by or ceded to the United States of America.

12. "Nonrefillable container" means a returnable container which is not intended to be refilled for sale by a manufacturer.

Sec. 2 – Findings Pertaining to the Effects of Sugar-Sweetened Beverages on our Youth

1. The Centers for Disease Control and Prevention (the "CDC") found that the obesity rate among children aged 6 to 11 years increased from 6.5% in 1980 to 19.6% in 2008, and the obesity rate for adolescents aged 12 to 19 years increased from 5.0% to 18.1% over the same period.

2. The CDC has found that sugar-sweetened beverages ("SSBs") are the largest source of added sugars in the diet of youth in the United States.

3. The CDC has found that high consumption of SSBs is associated with obesity and that the reduction of the consumption of SSBs among adults was significantly associated with weight loss.

4. The CDC has found that the consumption of SSBs is also associated with diabetes, elevated triglycerides, cardiovascular disease, nonalcoholic fatty liver disease, gout, and dental caries.

5. In June of 2013 the American Medical Association declared obesity to be a disease.

6. According to the CDC, the highest consumers of SSBs are adolescents aged 12-19 years.

7. According to the CDC, children that are obese have a 70% to 80% chance of becoming overweight or obese as adults.

8. The addition of caloric sweeteners to drinks adds no beneficial nutrients.

9. A 2008 study by the Federal Trade Commission entitled "Marketing Food to Children and Adolescents" found that beverage companies spent $492 million on youth-directed marketing in 2006. The same study found that beverage companies spent almost $90 million dollars on teen-directed packaging and in-store marketing efforts.

10. The legislature recognizes that some beverage companies have elected to self-regulate its marketing to children and adolescents. However, the legislature has found that the marketing of SSBs to children and adolescents persists. In addition, the legislature has found that beverage companies deceptively market SSBs — to all age groups — as healthy sources of refreshment. These deceptive practices include, inter alia, portraying SSBs as invigorating and refreshing beverages without any reference to their detrimental side effects and the promotion of alleged benefits derived from added vitamins, antioxidants, and/or stimulants.

11. According to the Harvard School of Public Health, the United States spends $190 billion per year treating obesity-related health conditions.

12. A 2013 article in the Journal of Adolescent Health documenting a survey of college students conducted by Harvard Medical School/Harvard Pilgrim Health Care Institute concluded that most college students had no awareness of beverage calorie content. The study

also reported that students indicated that shocking educational messages would lead them to reduce their consumption of SSBs.

13. The Johns Hopkins School of Public Health conducted a study in 2011 wherein researchers placed warning signs providing information pertaining to the caloric content of SSBs inside four corner stores in Baltimore. The researchers then monitored beverage sales to black adolescents in those stores. The study found that the provision of caloric content information can reduce purchases of SSBs. Moreover, the study found that one sign which stated an estimate of how much physical activity would be required to burn off the calories in a soda reduced the odds of a SSB purchase by 50%.

Section 3 – Purpose

Section 4's posting requirement is enacted to address the increasing percentage of the State's population inflicted with the disease of obesity, which increases a person's risk of other diseases such as diabetes and cardiovascular disease. The posting requirement promotes reduced consumption of sugar-sweetened beverages, especially among youth and adolescents, in order to reduce future risk of disease among the State's population, and to reduce financial and social costs to the State associated with regular consumption of sugar-sweetened beverages. By clearly and effectively communicating some of the negative health consequences of consuming sugar-sweetened beverages, a point-of-sale warning sign will close the information deficit pertaining to the caloric content of sugar-sweetened beverages and encourage persons of all ages to reduce or possibly eliminate their consumption of such beverages.

Section 5's unique mark requirement is intended to stem the tide of fraudulent redemption of beverage containers in this State, Old York's Bottle Deposit Act of 2000 met its intended goals to curb littering and promote recycling. However, the State has lost over $20 million in the fraudulent redemption of beverage containers originating from outside Old York. This money is sorely needed to fund the State's Cleanup and Redemption Trust Fund, which protects and preserves Old York's natural beauty, and to assist retailers with handling costs associated with the bottle deposit law.

Section 4 – Posting Requirement

1. Any person in the business of selling sugar-sweetened beverages face-to-face to consumers in the State of Old York shall post at each location where sugar-sweetened beverages are displayed a sign measuring two feet in height by two feet in width to be produced by the Old York Secretary of Health, as described in paragraph (2), below, so that:

   a. The sign(s) are unobstructed in their entirety and can be easily read by each person considering a sugar-sweetened beverage purchase; and

   b. the sign should be displayed so that the distance between the bottom of the sign(s) and the floor shall be no less than three feet and the distance between the top of the sign(s) and the floor shall be no more than six feet.

2. The Old York Secretary of Health shall produce a sign that meets the criteria in paragraph (1) and which warns prospective consumers of the negative health effects of sugar-

sweetened beverages, as described in the findings in Section 2 of this Act. The sign shall also provide a representative example of the amount of physical activity required to burn the calories in a sugar-sweetened beverage.

Section 5 – Unique Mark

1. A manufacturer of alcoholic and nonalcoholic beverages shall not sell, offer for sale, or give a beverage to a consumer, dealer or distributor in this State in a 12-ounce metal beverage container, 12-ounce glass beverage container, or a 20-ounce plastic beverage container, unless the container includes a symbol, mark, or other distinguishing characteristic that is placed on a designated metal container, designated glass container, or designated plastic container by a manufacturer to allow a reverse vending machine to determine if that container is a returnable container that is unique to this State, or used only in this State and one or more other States that have laws substantially similar to this Act.

2. A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 180 days or a fine of not more than $2,000.00, or both.

3. As used in this section:

   a. "Alcoholic beverage" means beer, ale, any other malt drink of whatever alcoholic content, a mixed wine drink, or a mixed spirit drink.

   b. "Nonalcoholic beverage" means a soft drink, soda water, carbonated natural or mineral water, or other nonalcoholic carbonated drink.

   c. "Reverse vending machine" means a device designed to properly identify and process empty beverage containers and provide a means for a deposit refund on returnable containers.

   d. "This State" means within the exterior limits of the State of Old York, and includes the territory within these limits owned by or ceded to the United States of America.

UNITED STATES DISTRICT COURT
DISTRICT OF OLD YORK
Docket No. 12-113310

Association of Beverage Producers and Retailers,
Plaintiff,
v.
Ron Fraper, in his official capacity as the Governor of the State of Old York,
Defendant.

MEMORANDUM AND ORDER

DALIN, J.

This matter comes before this Court on the parties' cross motions for summary judgment. Upon consideration of the submissions of the parties and the relevant law, Defendant's motion is GRANTED and Plaintiff's motion is DENIED.

RELEVANT BACKGROUND

On March 3, 2012, Defendant Ron Fraper, the Governor of the State of Old York (the "State") signed the Comprehensive Beverage and Bottle Act of 2012 (the "2012 Act"). Section 4 of the Act requires retailers of sugar-sweetened beverages to post a two-feet-wide by two-feet-tall sign at all places where such beverages are displayed. The sign contains two statements pertaining to sugar-sweetened beverages, one stating "You Have to Walk 3 Miles To Burn Off The Calories In One 20oz. Soda," and the other stating "The Consumption Of Sugary Drinks Can Lead To Obesity, Diabetes, Cardiovascular Disease, And Tooth Decay." The Association of Beverage Producers and Retailers' members include retailers affected by this provision. Those retailers contend that they are being forced to make statements with which they do not agree and that may cause them to lose profits due to reduced beverage sales. Plaintiff sued on behalf of its member retailers seeking declaratory and injunctive relief under the First Amendment.

Plaintiff also claims that the 2012 Act is unconstitutional as a violation of the Dormant Commerce Clause. Pursuant to the State of Old York Bottle Deposit Act of 2000 (the "2000 Act"), the State sought to reduce litter and provide an incentive to recycle by requiring distributors and retailers in the State of Old York to collect a refundable deposit of ten (10) cents on certain beverage containers at the point of sale. Consumers could later obtain a refund of the deposit by returning the empty container to a retailer or to a reverse vending machine. The retailers, in turn, could return the empty containers to beverage distributors or manufacturers to obtain the ten-cent refund.

If a distributor collected more deposits than were refunded in a calendar year, the excess was remitted to the Old York Department of Treasury ("DOT"). The DOT disbursed 25% of the monies to retailers to assist with handling costs, and 75% to a special fund used for cleanup and redevelopment of Old York. When a distributor or manufacturer paid out more in refunds than it collected in deposits ("over-redemption"), the State of Old York lost revenue for the fund, and the distributor or manufacturer could suffer a direct financial loss.

Although the 2000 Act was successful in protecting the environment, the high deposit rate resulted in significant over-redemption. Old York determined that one cause of over-redemption was individuals redeeming containers in Old York that were purchased outside of the State. To combat this problem, Old York passed the 2012 Act requiring that bottles and cans sold in Old York contain a state-specific identifying mark and that redemption can occur only for beverages that display the mark. The 2012 Act also made it illegal to sell containers with the

Old York mark outside of Old York. Failure to comply is a misdemeanor punishable by imprisonment for not more than 180 days or a fine of not more than $2,000.00.

Plaintiff sued Governor Fraper in his official capacity as the Governor of the State of Old York. Plaintiff asserts that the unique-mark requirement violates the Commerce Clause by: (1) discriminating against interstate commerce, (2) regulating commerce occurring entirely outside of the State and (3) imposing a burden on interstate commerce in excess of the provisions putative local benefits.

ISSUE 1: Does the Provision of the Act Requiring Retailers of Sugar-Sweetened Beverages to Post the Secretary of Health's Warning Posters Violate the Retailers' First Amendment Right to Not Speak?

The Supreme Court has recognized that, along with the freedom to speak, the First Amendment also protects the right not to speak. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Constitution, however, "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562-63 (1980). Thus, the Constitution permits states to require businesses to communicate certain messages — for example, the State of Vermont can require the manufacturers of fluorescent light bulbs to include a label warning consumers about the presence of mercury in the light bulbs. *National Elec. Mftrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-16 (2d Cir. 2001). The level of protection granted to commercial speech "turns on the nature of the expression and the governmental interests served by its regulation." *Central Hudson*, 447 U.S. at 563.

I. Level of Scrutiny

The Court must begin its analysis by determining the appropriate level of judicial scrutiny to be applied to the sign-posting requirement of the 2012 Act (the "Sign Requirement"). The State argues that the Sign Requirement is intended to address, inter alia, the potentially misleading marketing of sugar-sweetened beverages and that the specific sign at issue provides purely factual disclosures. As such, the State argues that rational basis scrutiny applies, pursuant to the Supreme Court's reasoning in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). *See also Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 561 (6th Cir. 2012) (apply rational-basis scrutiny to a federal law requiring graphic health warnings on the packages of tobacco products).

Plaintiff, however, asserts that sugar-sweetened beverages are not, and never have been, marketed deceptively and that the State's warning sign contains a nonfactual and controversial message. Therefore, Plaintiff argues that strict scrutiny should be applied to the State's attempt to compel its members to convey the State's message in their retail space. *See Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny to a state law that required video game retailers to place warning labels on violent or sexually explicit video games).

The Supreme Court permits governments to compel commercial speech to protect consumers from "confusion or deception." *Zauderer*, 471 U.S. at 651. *See also Discount Tobacco City*, 674 F.3d at 558 (6th Cir. 2012) (required warnings on tobacco products justified by potentially misleading advertising); *CTIA-The Wireless Ass'n v. The City and Cnty. of S. F.*, 827 F. Supp. 2d 1054, 1059 (N.D. Cal. 2011), *aff'd in part and vacated in part*, 494 Fed.Appx. 752 (9th Cir. 2012) (holding that the government can require businesses to disclose facts so long as they are "reasonably related to a governmental interest in preventing deception or in protecting public health and safety, among other allowable objectives"). The State, in passing the Act, found that beverage companies have marketed sugar-sweetened beverages in a manner that is potentially misleading about the nutritional benefits, or lack thereof, of those beverages.

The State also relied upon a published study that found that college students lacked knowledge about the caloric content of sugar-sweetened beverages. The Court credits the State's findings relating to the potentially misleading nature of the beverage companies marketing, especially in light of the evidence indicating that young adults do lack an understanding of the caloric content of sugar-sweetened beverages.

The Court also agrees that the contents of the sign are purely factual and are noncontroversial. Plaintiff takes issue with the sign's statement that "You Have To Walk 3 Miles to Burn Off The Calories In One 20oz. Soda." According to Plaintiff, this statement is nonfactual because people metabolize calories at different rates. In addition, Plaintiff points out that calorie content varies across soda brands. Plaintiff therefore argues that the distance that any given person would need to walk in order to burn the calories consumed in one twenty-ounce soda would vary depending on the person's metabolic rate and the particular brand of soda that was consumed. Plaintiff's argument must fail. A factual statement does not become nonfactual, *i.e.*, opinion, merely because it is representative. *See Discount Tobacco City*, 674 F.3d at 559 (holding that pictures depicting one particular person's tobacco-induced disease is not nonfactual merely because other persons would experience different symptoms of the same disease).

Plaintiff also argues that the sign's statement that "The Consumption Of Sugary Drinks Can Lead To Obesity, Diabetes, Cardiovascular Disease, And Tooth Decay" is nonfactual because the consumption of sugar-sweetened beverages is only one of many factors involved in a person's development of any of these diseases. Plaintiff argues that consumption of other food items, lack of physical activity, and genetics also play a large role in the development of obesity, diabetes, and cardiovascular disease. Plaintiff also argues that a person's level of dental hygiene plays a significant role in the possible development of tooth decay. Plaintiff's assertions may be true, however, that doesn't render the statement nonfactual. The sign plainly states that the consumption of sugary drinks "can lead to" the listed diseases. Because the statement speaks in terms of possibility, rather than certainty, does not remove the statement from the realm of fact. Statements of likelihood or probability can be facts, and this particular statement is fact because it is supported by the findings of authoritative institutions such as the Centers for Disease Control.

Because the sign is aimed at addressing misleading advertising by the beverage industry and its statements are factual in nature, the *Zauderer* rational-basis test applies.

II. The Constitutionality of the Sign Requirement

In applying *Zauderer* our question is whether the sign's warnings about the harms of consuming sugar-sweetened beverages are reasonably related to the joint purposes of preventing consumer deception about the relative benefits and risks of consuming such beverages and reducing the consumption of such beverages by the State's residents (particularly its younger residents). *Discount Tobacco City*, 674 F.3d at 562. The Court finds that the sign's statements are reasonably related to that purpose. In passing the provision, the State referenced a study that surveyed college students and found that many of them were ignorant of the caloric content of sugar-sweetened beverages. The State also referenced another study that showed that teenagers reduced their consumption of sugar-sweetened beverages upon the posting of warning signs at the location where the beverages were sold. The signs used in that study conveyed very similar messages to those that are before the Court. The State found that, despite mounting scientific evidence concerning the harms of sugar-sweetened beverages, people continued to consume the beverages unabated. The State found that this was due, at least in part, to a fundamental information disparity among consumers about the caloric content of those beverages. That such an information disparity exists is not surprising considering what the State found regarding the substantial amounts of money beverage companies spend on advertising their products. Those advertisements only tell part of the story. The State has an interest in providing consumers with information "in order to dissipate the possibility of consumer confusion or deception." *Zauderer*, 471 U.S. 651 (citations omitted).

Plaintiff argues that the sign is not reasonably related to the goal of addressing an information disparity as to all sugar-sweetened beverages because the sign's first warning pertains only to soda. However, it has already been established that the sign's first statement is representative. Moreover, the limitation of the first warning is cured by the broadly applicable second warning. Taken together the two warnings are rationally related to the purpose of closing the information disparity for all sugar-sweetened beverages, not just soda. *See Discount Tobacco City*, 674 F.3d 509 at 557 (the rational-basis test is met even where the required disclosure will "advance the purpose only slightly").

Plaintiff argues that the State could achieve its purpose by other means that would not involve compelling its members to convey a message against their will. Plaintiff argues that the State can purchase advertising to counteract the beverage industry's advertising or implement any of a variety of public service announcements or public education campaigns to get its message out. This argument is irrelevant, however, because the rational-basis test only requires that the State's means be reasonably related to its purpose. The standard does not require the State to use the least restrictive means available to it. The method that the State has chosen for conveying its message is reasonably related to its purpose of closing the information disparity among consumers pertaining to the caloric content of sugar-sweetened beverages.

Accordingly, I find that the Sign Requirement does not violate the retailers' First Amendment rights.

ISSUE 2: Does Section 5 of the 2012 Act Requiring Beverage Manufacturers to Include a Unique-to-Old York Mark on Beverage Containers Sold in Old York Violate the Dormant Commerce Clause?

Article I, Section 8, clause 3 of the U.S. Constitution gives Congress the power "[t]o regulate commerce with foreign Nations, and among the several states." "Although the Commerce Clause is, by its text, an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This "negative aspect" of the Commerce Clause has long been understood as a protection against the States' ability to discriminate against or burden interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988).

The first step in dormant Commerce Clause analysis is to determine whether a challenged law discriminates against interstate commerce. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). A discriminatory law is "virtually per se invalid" and "will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id*. Ac Court must next consider whether the statute is extraterritorial. If the statute is neither discriminatory or extraterritorial, the court must then apply the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1990) to determine whether the statute's burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Id.* at 142.

I. Old York's Unique-Mark Provision is Not Discriminatory

Plaintiff argues that Old York's unique-mark law discriminates against interstate commerce facially, purposefully, and in effect, because the provision penalizes manufacturers if they choose to sell the beverage containers both in Old York and in another state.

A. Facial Discrimination

"To determine whether a law violates [the] 'dormant' aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). In this context, "discrimination" is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995).

Plaintiff argues Old York's unique-mark provision is discriminatory because it affects only those who engage in interstate commerce — either Old York manufacturers who sell both in Old York and in other states or out-of-state manufacturers who sell in Old York and in other states. However, Plaintiff's argument misses a key part of the law — the unique-mark requirement applies to all manufacturers, regardless of where they do business. Thus, even a manufacturer whose sole operation is in Old York must have a "symbol, mark, or other distinguishing characteristic" on its bottles. Old York's unique-mark provision is not facially discriminatory. The provision applies equally to in-state and out-of-state beverage manufacturers and requires all beverage containers to follow the unique-mark requirement. On its face, the provision is neutral in application. *See, e.g.*, *American Beverage Ass'n v. Snyder*, 700 F.3d 796, 804-05 (6th Cir. 2012).

B. Discriminatory Effect

Plaintiff argues that even if the unique-mark requirement is not facially discriminatory, the provision nevertheless violates the Commerce Clause because it has a discriminatory effect. Plaintiff's claim that the provision requires interstate beverage companies to establish Old York-only production, warehousing, transportation and distribution operations in order to sell their product in Old York. "The fact that the burden of state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp v. Governor of Md.*, 437 U.S. 117, 127 (1978). Rather, "the claimant must show both how local economic actors are favored by the legislation and how out-of-state actors are burdened by the legislation." *Int'l Dairy Ass'n v. Boggs*, 622 F.3d 628, 648 (6th Cir. 2010).

In *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977), North Carolina enacted a statute which required all "containers of apples shipped into the state to display no grade other than the applicable U.S. grade or standard." *Id.* at 336. Washington state apple growers, which had their own, more stringent labeling requirement, brought suit. The Supreme Court held the statute was unconstitutional in three respects: (1) it increased the cost of doing business for out-of-state competitors but not in-state apple growers and dealers; (2) it stripped a competitive and economic advantage from Washington growers and dealers who complied with Washington's expensive inspection and grading system; and (3) it essentially required Washington growers to downgrade their product to inferior USDA grades, benefitting inferior North Carolina apples. *Id.* at 350-52.

In contrast, in *Int'l Dairy Ass'n v. Boggs*, the Sixth Circuit found constitutional under the Commerce Clause an Ohio law that prohibited dairy processors from making claims about the absence of artificial hormones in their milk products and required them to include a disclaimer when making such claims about their production processes. The court upheld the law finding it burdened in-state and out-of-state farmers and processors equally.

Similarly, in *American Beverage Ass'n v. Snyder*, 700 F.3d 796 (6th Cir. 2012), the Sixth Circuit held that a Michigan law similar to the 2012 Act was not discriminatory in effect because "any manufacturer who wants to sell and distribute beverage containers regardless of whether they are in-state or out-of-state, is subject to the unique-mark provision." *Id*. at 807. In *Snyder*, the court reached this holding despite the appellant's arguments that: (1) the law required the creation and maintenance of special state exclusive production and distribution operations in order to do business in Michigan; (2) it eliminated the competitive advantages otherwise enjoyed by interstate companies; and (3) it impeded the free movement of commerce by imposing an economic and practical toll on interstate companies only." *Id.*

In this case, the Old York's unique-mark requirement, like the Michigan statute at issue in *Snyder*, equally burdens manufacturers in-state and out-of-state. Any manufacturer who wants to sell and distribute beverage containers is subject to the provision, regardless of where they are located. The statute simply does not favor Old York manufacturers and distributors over manufacturers and distributors outside of Old York.

C. Discriminatory Purpose

"It is axiomatic that a state law that purposefully discriminates against out-of-state interests in unconstitutional." *Eastern Ky. Res. v. Fiscal Court of Magoffin Cnty.*, 127 F.3d 532, 541 (6th Cir. 1997). Plaintiff argues that the unique-mark provision is purposefully discriminatory because Old York's objective for the law is to increase the revenue it receives from unredeemed beverage containers. However, there is no evidence that Old York's motivation behind the law is to purposefully discriminate. The law itself states that the intended purpose of the provision is to prevent fraudulent redemption of beverage containers. The provision equally burdens both in-state and out-of-state actors. Nothing in the statute indicates that Old York is purposefully engaging in protectionist conduct.

II. Old York's Unique-Mark Provision is Not Extraterritorial

Although the unique-mark provision does not violate the Commerce Clause either on its face, in its purpose or in its effect, there is yet another level of scrutiny that it must satisfy — whether the law is extraterritorial. "A state law that has the 'practical effect' of 'regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause.'" *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 332 (1989). The critical inquiry under this analysis is whether the "practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 336. The court must not only consider the consequences of the statute itself, but also "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

The Supreme Court has considered the extraterritorial doctrine in the context of price-affirmation cases in both *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) and *Healy*, 491 U.S. 324. The Supreme Court struck down the protectionist regulations at issue in both cases. In *Brown-Forman*, a New York statute required all liquor distillers or producers selling to wholesalers within New York to affirm that the prices charged were not higher than the lowest price for the same product sold in any other state during the month of affirmation. *Brown-Forman*, 476 U.S. at 576. The Court struck down the law because it had the effect of "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another." *Id.* at 582.

Similarly, in *Healy*, a Connecticut statute required out-of-state beer shippers to affirm that their posted prices for products sold to Connecticut wholesalers were not higher, at the time of posting, than prices in neighboring states. 491 U.S. at 326-29. The Supreme Court found the statute violated the extraterritorial doctrine because it had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id.* at 337.

Although the Supreme Court struck down the price affirmation statutes in *Brown-Forman* and *Healy*, several more recent Circuit Court decisions have affirmed types of state statutes and regulations that practically impact businesses and commerce in other states. For example, California's emissions standards affect the price of cars that are sold across the country, *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011), Ohio's label requirements for milk sold within its boundaries affect milk labels sold in other states, *Int'l Diary Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010), and Vermont's requirement that labels on light bulbs sold within its state warn of the dangers of mercury affects labels in other states. *Nat'l Electric Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). In addition, states may tax businesses that operate across state lines. *Meadwestvaco Corp. ex rel Mead Corp. v. Ill. Dep't of Revenue*, 533 U.S. 16 (2008).

Here, Old York's unique-mark provision does not regulate conduct outside the State's borders in a manner that violates the Commerce Clause. The unique-mark requirement is not extraterritorial because its practical effect is not to control the labeling of beverage containers within other states, but solely within Old York. Similar to the mercury containing lamp label in *Sorrell*, manufacturers may label or design their bottles however they like in other jurisdictions; they simply must have a unique mark when selling their beverages in Old York. As in *Boggs*, where the Sixth Circuit found no extraterritorial effect regarding milk producers' labeling of milk in Ohio, the Old York labeling requirement has no direct effect on the manufacturers' out-of-state labeling conduct nor would the requirement raise the possibility that the manufacturers would be violating the regulations of another state.

In addition, Old York's unique-mark requirement does not create a conflict with other states with similar bottle bills because Old York is the *only* state with a unique-mark requirement.. *Sorrell*, 272 F.3d at 112 ("[i]t is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be a conflict between the challenged regulation and those in place in other states"). For these reasons, we reject the Plaintiff's argument that the unique-mark provision is extraterritorial.

In reaching this conclusion, I am aware that it is at odds with the Sixth Circuit's holding in *Snyder*. Although I agree with the Sixth's Circuit's conclusion that the Michigan bottle bill at issue there was not discriminatory (*see supra*), I believe that the Court's extraterritoriality analysis was simply incorrect. The District Court in *Snyder* reached the correct conclusion in holding that the Michigan bottle bill's unique mark requirement was not extraterritorial. The basis for the District Court's conclusion was constitutionally sound and substantially similar to my analysis set forth above.

Moreover, despite my analysis of the Old York statute under the extraterritoriality doctrine, I question whether the "extraterritoriality doctrine, at least as a freestanding branch of the dormant Commerce Clause, is a relic of the old world with no useful role to play in the new." *Snyder*, 700 F.3d at 813 (Sutton, J., concurring). I am inclined to agree with Judge Sutton's concurrence in *Snyder* and answer this question affirmatively. However, I am bound by Supreme Court precedent, and therefore am required to conduct an extraterritoriality analysis before applying the *Pike* balancing test, which requires a State to show that the in-state regulatory benefits of a law outweigh the out-of state burdens the law places on interstate commerce. As set forth below, I conclude that the 2012 Act survives scrutiny under the *Pike* test.

III. The *Pike* Balancing Test

Because the court finds the unique-mark provision is not discriminatory and does not have an extraterritorial effect, we must move to the second step of the Commerce Clause analysis and apply the *Pike* balancing test. Under this test, the statute will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. I find that the alleged burdens on interstate commerce are not excessive in relation to the putative local benefits. The burden imposed on manufacturers is minor, requiring at most, small modifications to their production and distribution systems. Any cost incurred can be passed down to Old York consumers or absorbed by manufacturers. Moreover, I find the benefits of the provision far outweigh the burdens. Defendant has presented a reasonable basis for its statute — to prevent fraudulent redemption and the resulting theft of deposit funds. The significant loss of revenue to Old York and its citizens justifies the regulation. Because the statute outweighs any burden imposed, the statute is constitutional under *Pike*.

CONCLUSION

Defendant's motion is GRANTED and Plaintiff's motion is DENIED.

Dated: March 15, 2013

/s/ Patrick Dalin
United States District Court Judge for the
District of Old York

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Docket No. 13-10024

Association of Beverage Producers and Retailers,
Plaintiff-Appellant,
v.
Ron Fraper, in his official capacity as the Governor of the State of Old York,
Defendant-Appellee.

BEFORE Bishop, Mock, and Vicari, Circuit Judges.

BISHOP, Circuit Judge.

For the reasons set forth below, the memorandum and order of the District Court is REVERSED and this case is REMANDED to the District Court for entry of an order consistent with this decision.

BACKGROUND

The facts of this case are set forth in the District Court opinion below.

DISCUSSION

We review the District Court's grant of summary judgment *de novo*.

ISSUE 1: Did the District Court Err by Holding that Requiring Retailers of Sugar-Sweetened Beverages To Post the Secretary of Health's Warning Posters Did Not Violate the Retailers' First Amendment Rights?

As discussed in the opinion of the District Court, while commercial speech is afforded lesser protection than other constitutionally protected speech, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Constitution still protects commercial speech, including a corporation's right not to speak.

I. The Comprehensive Beverage and Bottle Act of 2012 Warrants Strict Scrutiny.

Here, as in most constitutional cases, the level of judicial scrutiny applied all but predetermines the outcome of the analysis.

To avoid the application of strict scrutiny, the party seeking to regulate — or in this case, to compel — speech bears the burden of establishing both (1) that misleading marketing of sugar-sweetened beverages has created a risk of "confusion or deception" and (2) that the speech the State seeks to compel is purely factual. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). The District Court found that the State satisfied this test. We cannot agree.

A. The Marketing of Sugar-Sweetened Beverages Is Not Misleading and Does Not Risk Confusion or Deception

The District Court credited the State's findings that sugar-sweetened beverages are marketed in a potentially misleading manner. But the record is bereft of support for that conclusion. For instance, the fact that sugar-sweetened beverages are marketed as "invigorating refreshments" (which they undoubtedly are) does not support the conclusion that manufacturers deceptively market these drinks as "healthy." Similarly, marketing that promotes the effects of the promotion of certain drink additives like vitamins, antioxidants, and stimulants does not per se represent sugar-sweetened beverages as healthy. Further, there is no evidence to support the conclusion that deceptive marketing is responsible for college students' ignorance of the nutritional content of sugar-sweetened beverages.

In any event, the sign required by the Comprehensive Beverage and Bottle Act of 2012 (the "2012 Act") does not address the alleged information deficiency by informing customers of the presence of otherwise undisclosed ingredients, nor does it provide instructions about the bottle disposal that might otherwise be unclear. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104

(2d Cir. 2001) (upholding legislation requiring certain light bulb manufacturers to disclose the presence of mercury in their product and provide instructions for safe disposal). For some time, FDA regulations have required manufacturers to disclose the nutritional contents of sugar-sweetened beverages on every carton or package offered for sale. The State admits that those disclosures list the precise amounts and percentages of daily servings for each ingredient targeted by the State's new signs.

In truth, the State's battle is not against manufacturers' deception, but against the public's apathy. *Entmt. Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). Manufacturers are not to blame for the public's — let alone children's and adolescents' — lack of interest in existing nutritional disclosures or for the public's failure to conform their activities in the way the State would prefer.

B. Factual Nature of Compelled Speech

Because we find that the State has failed to satisfy the first prong of this two-part test, we may apply strict scrutiny without analyzing the second prong. We wish to recognize, however, the dubious nature of the State's claim that the Act's warning sign contains purely factual information.

The Sixth Circuit has held that a purportedly factual statement does not become nonfactual merely because it is representative. *See Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 559 (6th Cir. 2012). But this rule oversimplifies the issue. It is undoubtedly true that a statement of possibility does not become nonfactual merely because other possibilities exist. *See id.* But a statement of an absolute rule where, in fact, numerous variables exist is not just nonfactual opinion, it is false.

The sign required by the Act illustrates the distinction. The sign's second statement ("The Consumption Of Sugary Drinks Can Lead To Obesity, Diabetes, Cardiovascular Disease, And Tooth Decay.") is qualified by the word "can" and is a clear statement of possibility. In contrast, the sign's first statement ("You Have To Walk 3 Miles To Burn Off the Calories in One 20oz. Soda.") contains no such equivocation. This first statement announces an absolute conclusion that, in truth, depends on at least three variables: (1) the physical make-up of the consumer (a factor itself composed of multiple variables), (2) the sugar content of the drink, and (3) the speed at which the consumer walks. State-compelled speech may not be used to simply replace allegedly misleading marketing with actually misleading warning labels.

II. Constitutionality of the Sign Requirements

Having found that strict scrutiny applies to this case, we must determine whether the speech the State seeks to compel is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). The State's action is narrowly tailored only if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy," *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989), and if no "less restrictive alternative would serve the Government's purpose." *Playboy*, 529 U.S. at 813.

The stated goal of the statute is to discourage the consumption of sugar-sweetened beverages by "clos[ing] the information deficit." But several less restrictive means exist to accomplish this end. For example, the State could avoid restricting or compelling anyone's speech by simply mounting a direct marking campaign of its own to disseminate the information it believes consumers lack. Alternatively, if the State believes that point-of-sale warnings are necessary, it could compel the manufacturers of the sugar-sweetened beverages themselves to put more robust nutritional disclosures on their packages.

Either of these alternatives (and there may be others) would be preferable to compelling a third party to place warning signs of questionable veracity in their places of business.

For these reasons, we hold that the statute fails strict scrutiny and violates the Plaintiff-Appellants' First Amendment rights.

ISSUE 2: Did the District Court Err by Holding that the Unique-Mark Requirement of the 2012 Act Does Not Violate the Dormant Commerce Clause?

Next we turn to the question of whether the unique mark requirement of the 2012 Act is a violation of the Dormant Commerce Clause. Although certain constitutional scholars and originalist judges have mounted a sustained attack on the Dormant Commerce Clause by arguing that the doctrine has no foundation in text or founding-era history, we follow a large body of Supreme Court precedent in holding that the 2012 Act's unique mark-requirement violates the Dormant Commerce Clause because it is both discriminatory and extraterritorial in its application.

I. Constitutional Foundations of the Dormant Commerce Clause

The Commerce Clause of the United States Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const., Art. I, § 8, cl. 3. That Clause's "overriding requirement" is that there be a "national 'common market.'" *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977). Indeed, the foundational purpose for its enactment was to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (internal quotation marks omitted). Thus, at its most basic level, the Commerce Clause prohibits the States from "'retreating into . . . economic isolation.'" *Department of Revenue v. Davis,* 553 U.S. 328, 338 (2008) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

For that reason, "since the early days" of the Constitution, *Davis*, 553 U.S. at 337, the Commerce Clause has not just empowered Congress to enact national legislation, but has also enforced "a negative implication," *id.*, that operates as a "restriction on permissible state regulation," *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Specifically, the Commerce Clause "significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). When a state statute discriminates against interstate commerce or purports to regulate interstate commerce, it is unconstitutional under the so-called "Dormant Commerce Clause." The unique-mark requirement of the Old York statute at issue here does both.

II. The Unique-Mark Requirement Is Discriminatory

The Commerce Clause protects interstate commerce from disadvantages imposed because of its interstate character. It therefore precludes States from " 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.' " *American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005). In particular, a State may not discriminatorily burden businesses because they engage in commerce in more than one State: that is "either [Old York manufacturers] who sell both in [Old York] and in at least one [other] State or out-of-state [manufacturers] who sell both in [Old York] and in at least one [other] State." *Healy v. Beer Inst.*, 491 U.S. 324, 341 (1989). A state law that burdens only interstate businesses while leaving purely intrastate businesses unaffected violates that cardinal principle. It is simply no answer to such discrimination, as the District Court suggests, to claim that the statute treats in-state and out-of-state businesses the same. The discrimination is against the act of engaging in multistate commerce itself, regardless of who engages in it, through the imposition of burdens "exclusively upon those who sell [products] not only in [one State] but also in the surrounding States." *Healy*, 491 U.S. at 3344 (Scalia, J., concurring). That is exactly what the Old York-specific packaging mandate of the 2012 Act does.

Here, we find that the Old York unique-mark requirement has a discriminatory effect on interstate commerce in at least three ways. First, the law requires interstate companies to create and maintain special state-exclusive production and distribution operations to do business in Old York. Second, Old York's law eliminates the competitive advantages otherwise enjoyed by interstate companies through their ability to streamline production and distribution across multiple States, as compared to purely intrastate manufacturers. Finally, the state-specific packaging requirement impedes the free movement of commerce by imposing an economic toll applicable only to interstate companies seeking to sell beverages within Old York.

That the unique mark can be used only in Old York and "one or more other States that have laws substantially similar to [the 2012 Act]" does not cure the law's Constitutional infirmities. Old York's insistence through its unique mark-requirement that a sister state either adopt a recycling program "acceptable to [Old York] or else be absolutely foreclosed from exporting its products to [Old York] would plainly 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'" *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976) (striking down Mississippi law allowing sales of safe, out-of-state milk only from States that reciprocally accepted Mississippi milk); *see also New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988) ("The present law . . . imposes an economic disadvantage upon out-of-state sellers; and the promise to remove that if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion.").

III. The Unique-Mark Requirement Is Unconstitutionally Extraterritorial in Its Reach

To further "the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce," the Commerce Clause forbids a state law that "directly controls commerce occurring wholly outside the boundaries of a State" and thus that operates extraterritorially. *Healy*, 491 U.S. at 335-336; *see also Southern Pac. Co. v. Arizona,* 325 U.S. 761, 775 (1945) (invalidating regulation where its "practical effect . . . is to control train operations beyond the boundaries of the state exacting it"). Interstate commerce "would be thoroughly stifled" by such extraterritorial laws because, if one State may impose "a direct restraint on interstate commerce" with "sweeping extraterritorial effect," then "so may other States," *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality), resulting in "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude," *Healy*, 491 U.S. at 337.

There is no question that the unique-mark requirement of the 2012 Act is unconstitutionally extraterritorial in its reach. Old York has made it a crime for covered beverage manufacturers to sell in Old York the same packaged beverages that they sell everywhere else across the United States. Requiring the creation of a state-specific commodity for a state-exclusive market and directly regulating — indeed, criminalizing — the sales of packaged beverages in other States strikes at the very heart of the Commerce Clause. Unlike other labeling or packaging requirements that have been addressed under the Dormant Commerce Clause, Old York's law not only dictates how beverages sold in Old York must be packaged, but also expressly outlaws the sale of those properly packaged beverages in almost every other State in the Union.

Here, Old York has forbidden companies engaged in interstate commerce from making a product that can both comply with Old York law and can still be sold in the national economy. The only way to comply with Old York's law is to make a product that will not and cannot be sold in almost any other State. This is precisely what the Commerce Clause is intended to prevent.

Our holding is in line with the Sixth Circuit's holding in *American Beverage Ass'n v. Snyder*, 700 F.3d 796 (6th Cir. 2012). *Snyder* examined the constitutionality of a Michigan statute that, like the 2012 Act, required a unique mark of beverage containers sold within the state. In examining the Michigan statute, the Sixth Circuit found that "Michigan's unique-mark requirement not only require[d] beverage companies to package a product unique to Michigan but also allow[ed] Michigan to dictate where the product [could] be sold." *Id*. at 810. On facts similar to those presented here, the Sixth Circuit concluded that "Michigan [was] forcing states to comply with its legislation in order to conduct business within its state, which create[d] an impermissible extraterritorial effect" in violation of Supreme Court precedent. *Id* (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583-84 (1986); *Healy*, 491 U.S. at 334). We agree with the Sixth's Circuit's holding and reasoning on this point.

The Supreme Court said long ago that our constitutional system was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The 2012 Act promotes division and therefore must yield to constraints of the Dormant Commerce Clause. Because we find that the unique-mark requirement is discriminatory and extraterritorial in effect, we will not consider whether it satisfiess the *Pike* balancing test.

CONCLUSION

For the reasons set forth below, the memorandum and order of the District Court is REVERSED and this case is REMANDED to the District Court for entry of an order consistent with this decision.

Sixty-Fourth Annual
National Moot Court Competition

SUPREME COURT OF THE UNITED STATES
October Term 2013

Docket No. 2013-01

Association of Beverage Producers and Retailers,
Petitioner,
v.
Ron Fraper, in his official capacity as the Governor of the State of Old York,
Respondent.

Petition for certiorari is GRANTED. The Court certifies the following questions:

1. Did the Fourteenth Circuit properly hold that the Comprehensive Beverage and Bottle Act of 2012's posting requirement violates Petitioners' First Amendment rights?

2. Did the Fourteenth Circuit properly hold that the Comprehensive Beverage and Bottle Act of 2012's unique mark requirement violates the dormant commerce clause?