17-0227-cv

United States Court of Appeals

for the

Second Circuit

VIZIO, INC.,

Plaintiff-Appellant,

– v. –

ROBERT J. KLEE, in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT

VINCENT LEVY
DANIEL M. SULLIVAN
DANIEL M. HOROWITZ
HOLWELL SHUSTER & GOLDBERG LLP
Attorneys for Amicus Curiae
750 Seventh Avenue, 26th Floor
New York, New York 10019
(646) 837-5151

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases raising issues of concern to the nation's business community.[1]

This appeal implicates the Chamber's interest in the proper application of constitutional principles that facilitate commerce across state lines and prevent state governments from imposing disproportionate burdens on out-of-state businesses. The Chamber has

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* certifies that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus*, its members, and its counsel, made a monetary contribution intended to fund its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties to this appeal have been requested to consent to the filing of this brief, and all parties consent.

filed numerous *amicus* briefs in litigation implicating challenges to state legislation under the Commerce Clause. For example, the Chamber recently filed *amicus* briefs in *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 136 S. Ct. 1838 (2016), and *23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174 (2d Cir. 2012). This appeal, like appeals in which the Chamber has previously participated as *amicus*, raises important questions of whether and to what extent the Commerce Clause permits states to impose burdens on companies on the basis of out-of-state commercial activity.

INTRODUCTION

In 2007, Connecticut enacted Public Act No. 07-189 to regulate the recycling of household electronics (the "E-Waste Law"). The E-Waste Law requires manufacturers of household electronics, including televisions, to fund the recycling of these products in Connecticut.

Yet, in regulating television recycling, the law apportions a manufacturer's responsibility for the costs of recycling used televisions in Connecticut based upon the manufacturer's share of the *national* market for *new* television sales. Conn. Gen. Stat. § 22a-631(a) (2007). Thus, the more televisions a manufacturer sells outside Connecticut, the greater economic burden it incurs in Connecticut, regardless of whether it contributes in any way to the cost of recycling old televisions in Connecticut. For the reasons VIZIO explains, this scheme contravenes the Commerce Clause as an extraterritorial regulation, an excessive user fee, and a disproportionate burden on interstate commerce under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The Chamber writes to emphasize the broader context of the E-Waste Law, because that context confirms that judicial intervention is both necessary and appropriate here. The E-Waste Law is not the only state statute to impose fees for electronics recycling, but it is an outlier.

Connecticut's law is an Extended Producer Responsibility ("EPR") statute, a form of regulation that has recently become a popular solution for states seeking to shift the costs of product disposal onto manufacturers. Most EPR statutes apportion costs to manufacturers based upon local metrics, such as state sales data or the manufacturers' share of the total weight of products returned for recycling within the state (i.e., their "return share"). Even the E-Waste Law uses return share for recycling of electronics—all electronics, in fact, except televisions. In regulating television recycling, however, the E-Waste Law ties manufacturers' share of the in-state recycling cost to their out-of-state sales, effectively imposing a double tax on interstate commerce and overstepping Connecticut's authority under the U.S. Constitution.

In light of this background, the E-Waste Law should be analyzed as a user fee under *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). All EPR statutes create state-sponsored recycling schemes, the purpose of which is to force manufacturers to internalize disposal costs. To achieve that purpose, EPR statutes use some proxy for a given manufacturer's use of in-state recycling facilities to calculate the cost that will be imposed upon it. In

this way, EPR statutes impose state-mandated costs that are no different from the fees states levy for any other government-provided service, such as roads, airports, and garbage collection. And here, Connecticut's method of determining manufacturers' duties under the E-Waste Law—its proxy for manufacturer's use of in-state recycling facilities—simply has no correlation to manufacturers' actual use of those facilities, and thus violates the rule of *Evansville*.

But the district court refused to analyze the E-Waste Law as a user fee. It did so on a technicality—reasoning that private entities (rather than the state itself) run the facilities that recycle televisions. The district court misread the Supreme Court's user-fee cases, which do not turn on whether the state deputizes private companies to run a state-sponsored program. Nor would such a technical linchpin make sense, as it would allow states to circumvent the Commerce Clause by simply privatizing state-mandated services.

Beyond that, the practical background of the E-Waste Law also makes clear that it is an impermissible extraterritorial regulation of intra-state commerce. That the E-Waste Law's effects extend beyond Connecticut's borders is clear, but the district court disregarded this

reality on the theory that manufacturers could withdraw their products from the Connecticut market. As a threshold matter, it is not feasible for manufacturers like VIZIO that sell their products through multi-state distribution networks to avoid distributing products into a particular state. More importantly, the district court ignored that, even if manufacturers could avoid selling products into a particular state, it would make no sense to require manufacturers to manipulate their multi-state distribution networks around the vagaries of potentially 50 different state statutes—which are of course subject to change—in order to avoid duplicative taxation. On the contrary, such state-by-state fetters on interstate commerce are just what Commerce Clause jurisprudence aims to prevent.

In short, states are free to design schemes to recycle electronics in a variety of ways, but imposing an arbitrary levy on interstate commerce to support a state-sponsored recycling scheme is not one of them. This Court has an opportunity to enforce that minimum, constitutional parameter on EPR statutes. We urge the Court to take it.

ARGUMENT

I. The E-Waste Law's Use of National Market Share Makes It an Outlier EPR Statute That Imposes an Improper Double Tax

A. Over the past decade, EPR statutes have become a common tool for states to shift the costs of collecting and recycling electronic consumer products to manufacturers. Since Maine enacted the first EPR statute in 2004, at least twenty-two other states have adopted laws that specifically address electronic waste. *See, e.g.*, Jennifer Nash and Christopher Bosso, *Extended Producer Responsibility in the United States: Full Speed Ahead?*, 17 J. Indus. Ecology 175, 175–76 (2013); Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 Harv. Envtl. L. Rev. 51, 86–91 (2006) (noting, eleven years ago, the dearth of EPR statutes).

EPR statutes apportion manufacturer responsibility in various ways. In some states, television manufacturers are responsible for either establishing a recycling program for their own branded products or paying fees in proportion to their in-state sales. *See, e.g.*, 30 Tex. Admin. Code § 328.171-175 (2012); Md. Code Ann., Envir. § 9-1727-30 (2007); N.Y. Envtl. Conserv. Law § 27-2601-05 (2010). In other states, including Connecticut, manufacturers are permitted to sell goods within the state

only if they pay a fee to fund a state-wide recycling program established by the statute. Conn. Gen. Stat. § 22a-631(a) (2007); Me. Stat. tit. 38, § 1610(5)(D) (2004). Although Connecticut uses the return share to apportion the costs of recycling electronics other than televisions, for televisions it uses national market share.[2]

B. Predictably, the mishmash resulting from these varying state-administered schemes has, as one commentator observed, "create[d] a large burden on manufacturers because the programs vary depending on the state." Valerie Eifert, *Collaboration Before Legislation: The Current State of E-Waste Laws and a Guide to Developing Common Threads for the State Patchwork Quilt*, 18 Penn. St. L. R. 235, 241 (2010); *see also* Jeremy Knee, *Guidance for the Awkward: Outgrowing the Adolescence of State Electronic Waste Laws*, 33 Entl. L & Pol'y J. 157, 165–66 (Fall 2009) (describing the participants under various EPR laws). Although some state-level experimentation is inevitable, the burdens imposed by

[2] *Compare* Conn. Agencies Regs. § 22a-638-1(j)(3) (2012) (manufacturers' share for recycling of computers, monitors and printers, based on weight of its own products returned for recycling), *with* Conn. Gen. Stat. § 22a-631(a) (2007) (allocating costs of recycling program to television manufacturers "based on a sliding scale that is representative of the manufacturer's market share . . . based upon available national market share data").

the varying regimes heighten the need to insist on the application of long-established constitutional parameters for that experimentation.

C. The Commerce Clause provides the critical boundary line, and Connecticut's statute strays beyond it. In their various EPR schemes, states attempt to fashion a proxy for the costs manufacturers impose on each state's waste disposal system and to shift those costs to the manufacturers. Christopher Smith, *The Economics of E-Waste and the Cost to the Environment*, 30 Nat. Resources & Envt. 38, 40 (Fall 2015) ("The objective of EPR is to ensure that the costs of end-of-use management are born by the producers and consumers, rather than externalized onto society as a whole."). The aim of the statutes, in other words, is that manufacturers bear their fair share of recycling costs required *within* the state by their sales of electronics *within* the state.

Consequently, a "common characteristic of state mandatory e-waste programs is the need to *exclude* out-of-state electronics . . . to ensure collection and processing of only in-state returns." Nat'l Ctr. For Elecs. Recycling, *A Study of the State-by-State E-Waste Patchwork*, at 7 (emphasis added), *available at* http://www.electronicsrecycling.org/NCER/UserDocuments/Patchwork%20Study%20final.pdf. The E-Waste

Law is no exception. *See* Conn. Gen. Stat. § 22a-631(b) (2007) (providing for the collection of electronics from "residents").

In apportioning responsibility for television recycling based upon a given manufacturer's national sales, however, Connecticut makes no effort to tailor the costs it imposes on manufacturers to the recycling burdens those manufacturers' products create in the state. The result can only be described as double-taxation. A VIZIO television sold in New York, for instance, increases VIZIO's burdens under both New York's and Connecticut's e-waste laws. If the same television were sold in Connecticut instead, VIZIO's burden would increase in Connecticut, but not in New York because New York's statute does not use national sales data to determine manufacturer responsibility.[3] Thus, no matter what EPR scheme other states have adopted, if VIZIO makes a sale anywhere in the United States, it owes more money *to Connecticut*. The heads-I-win-tails-you-lose outcome is just the sort of "double tax burden to which

[3] N.Y. Envtl. Conserv. Law § 27-2603(4)(b) (2010) ("Each manufacturer's market share of electronic waste shall be determined by the department based on the manufacturer's percentage share of the total weight of covered electronic equipment sold as determined by the best available information, including, but not limited to, state sales data reported by weight.").

intrastate commerce [ought] not [be] exposed, and which the commerce clause forbids." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1795 (2015) (quoting *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938)).

D. Viewed against the broader spectrum of EPR statutes, the relief VIZIO seeks is narrow. Other EPR statutes use other methods for determining each manufacturer's contribution to the state's e-waste program, methods based in some way on the recycling burden the manufacturer's products create for the state. This Court need only confirm that the Constitution demands that Connecticut do at least that much.

II. The E-Waste Law Is an Excessive User Fee Because It Imposes a Burden That Does Not Approximate Manufacturers' Use of Connecticut Recycling Facilities

The district court refused to analyze the E-Waste Law as a "user fee" under the well-established line of cases limiting these fees. The court reasoned that, because "Connecticut is not imposing charges for any *state-owned* or *state-provided* facilities or services furnished at its own expense," the "E-Waste Law's charges for recycling costs are not user fees." JA038–39 (emphases added). This position misapprehends both

the jurisprudence regarding excessive user fees and the E-Waste Law's place in the wider context of EPR regulation.

A. In the *Evansville* line of cases, the Supreme Court considered whether state fees were appropriately linked to a person's use of a state-run facility. *Evansville*, 405 U.S. at 716–17 (requiring that user fees be "based on some fair approximation of use or privilege for use"); *see also Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 291 (1987) ("When the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, . . . the State is imposing an undue burden on interstate commerce."). As explained above, EPR statutes, like other regulations imposing user fees, attempt to apportion responsibility for the disposal of manufacturers' products through a state-sponsored program. Here, it is Connecticut, not private recyclers, that requires manufacturers to shoulder recycling costs. And it is Connecticut, not private recyclers, that sets the price manufacturers must pay according to their national market shares.

Thus, it should not matter that the entities to which Connecticut requires manufacturers to pay the levy are private companies rather than state-owned enterprises. The question in *Evansville* and similar

cases is whether the state imposes a levy "'designed to make (interstate) commerce bear a fair share of the cost of the local government whose protection it enjoys.'" *Evansville*, 405 U.S. at 712 (quoting *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)). The equivalent of the "protection" here is the disposal of spent televisions, which, without an EPR program, would be disposed of through ordinary state and local disposal channels.

Connecticut, like other states with EPR statutes, has set up an alternative system and, in order to encourage consumers to use it, requires manufacturers to pay into that system. That is the core of a user fee—a levy designed to support a public service. And the constitutional question under the Commerce Clause should therefore also be the same—whether the levy the state assesses reasonably approximates each user's share of the cost of providing the service.

If anything, where the state is not seeking to recover costs it has actually incurred, the levy is *more* suspect, not less. For example, in *Evansville* itself the Supreme Court contrasted the constitutional tax before it (a fee assessed on passengers at municipal airports) with the tax struck down in *Crandall v. Nevada*, which applied to passenger travel in private railroads. *See id.* ("The Nevada charge, however, was not

limited . . . to travelers asked to bear a fair share of the costs of providing public facilities that further travel."). In short, the district court erred in refusing to analyze the E-Waste Law under *Evansville* simply because the state-imposed levy pays for mandatory services outsourced to private entities.[4]

B. Because of its reliance on national sales data, the E-Waste Law fails the *Evansville* test. Under *Evansville*, a user fee is valid only "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 369 (1994).

The levy the E-Waste Law imposes is not a fair approximation of manufacturers' use of recycling facilities. Unlike state sales data or the number or weight of televisions returned, national market share has no

[4] As VIZIO explains, the district court's reliance on a footnote in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Oregon*, 511 U.S. 93, 103 n.6 (1994), is misplaced. *See* Viz. Br. at 35–37. Not only was the footnote dictum unnecessary to the Court's determination, the issue here—whether states can impose user fees and thereby circumvent the Commerce Clause by delegating certain responsibilities to private entities—was not an issue briefed before or considered by the *Oregon Waste* Court.

correlation to the number of any manufacturer's televisions that are recycled in Connecticut. This case provides a stark example: VIZIO's national market share significantly exceeds its Connecticut market share, and VIZIO has thus been subjected to disproportionate and burdensome fees under the E-Waste Law. *Cf. Scheiner*, 483 U.S. 266 at 290 (1987) (holding unconstitutional user fees that did "not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads").

The E-Waste Law's levy is also excessive in relation to the benefits conferred on Connecticut. For example, from 2013 to 2015, VIZIO paid over $2.5 million to comply with the E-waste Law. JA237. Yet, a study of over 23,000 pounds of televisions collected for recycling in Connecticut revealed ***zero*** VIZIO products. JA226–27.

At bottom, then, the E-Waste Law imposes on VIZIO a recycling fee that is grossly disproportionate to the number of VIZIO televisions recycled in Connecticut. "[O]ne of the central purposes of the [Commerce] Clause was to prevent states from exacting *more* than a just share from interstate commerce." *Or. Waste*, 511 U.S. at 102 (internal quotations omitted). Connecticut's anomalous EPR statute does exactly that.

III. Manufacturers Neither Can, Nor Should Have to, Avoid EPR Statutes that Rely on National Sales Data

In using national sales data to apportion responsibility, the E-Waste Law imposes burdens that are clearly felt beyond Connecticut's borders. Though that would ordinarily be enough at least to state a plausible claim that the statute operates extraterritorially in violation of the Commerce Clause, the district court was untroubled. It explained that manufacturers can avoid the burdens of the E-Waste Law by requiring their distributors not to sell their televisions in Connecticut. JA032–33. The district court's assumption does not withstand scrutiny.

A. As a threshold matter, it is unrealistic to assume manufacturers can simply avoid the reach of the E-Waste Law by preventing their products from being sold in Connecticut. Currently, VIZIO does not sell to any distribution centers in Connecticut, and none of VIZIO's retail customers use distribution centers or warehouses in Connecticut. JA237. But VIZIO has little control over where its product is eventually sold once it sells a television to a retailer. JA236.

Nor is VIZIO alone. Manufacturers have little control over where their products are ultimately sold after they transfer their products to distributors. To the contrary, the market power of large multi-state

retailers often leaves manufacturers with little leverage. *See* Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 Antitrust L. J. 563, 579 (2005) ("[C]ontrol of what items will be carried, how much shelf space they will be given, how prominently they will be displayed, and whether they will be priced or marketed aggressively gives the large multi-brand retailer substantial leverage in dealing with even the largest producers of strong brands of consumer products.").

B. More fundamentally, even if manufacturers could, as a practical matter, renegotiate their distribution agreements to evade the reach of state statutes like Connecticut's E-Waste Law, forcing them to do so makes little sense in light of the complexities that various state EPR statutes already require manufacturers to deal with. Indeed, the upshot of the district court's reasoning is that a manufacturer must tailor its use of a nationwide distribution system to each state's EPR regime. Certain brands would be for sale in New York, New Hampshire, and Massachusetts, but not Connecticut and Maine. Yet the Supreme Court's Commerce Clause jurisprudence aims, for the benefit of manufacturers and consumers alike, to prevent such "economic Balkanization." *Or.*

Waste, 511 U.S. at 98; *see also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) ("[E]very craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, [and that] every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.").

That purpose, moreover, lies at the heart of our constitutional structure. As Alexander Hamilton warned in 1787, commercial relations between the states would continue to be "fettered, interrupted, and narrowed by a multiplicity of causes" if local laws were allowed to interfere with commerce among the states. The Federalist No. 11 at 63 (Hallowell ed., 1826). The solution the district court proposed to the extraterritorial burdens imposed by the E-Waste Law was that VIZIO should, in fact, fetter, interrupt, and narrow its interstate commercial activity. That is not a solution, but an admission of unconstitutionality.

CONCLUSION

The judgment of the district court should be reversed.

Dated: May 11, 2017

Respectfully submitted,

By: /s/ Daniel M. Sullivan
Daniel M. Sullivan

Vincent Levy
Daniel M. Sullivan
Daniel M. Horowitz
HOLWELL SHUSTER & GOLDBERG LLP
750 Seventh Avenue, 26th Floor
New York, New York 10019
Telephone: (646) 837-5151
Facsimile: (646) 837-5150

Attorneys for *Amicus Curiae*
The Chamber of Commerce
Of the United States of America

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B). The brief contains 3,497 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Century font, using Microsoft Word 2016.

Dated: May 11, 2017

/s/ Daniel M. Sullivan
Daniel M. Sullivan

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on May 11, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 11, 2017

/s/ Daniel M. Sullivan
Daniel M. Sullivan