17-227

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

[PROPOSED] BRIEF OF *AMICUS CURIAE* PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pacific Legal Foundation (PLF)[1] defends limited government, property rights, and a balanced approach to environmental protection in courts nationwide. PLF has extensive experience litigating environmental and constitutional issues, *e.g.*, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Sackett v. E.P.A.*, 566 U.S. 120 (2012). PLF has also participated as amicus curiae in numerous cases addressing the Dormant Commerce Clause's ban on extraterritorial regulation, including *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016); *Energy & Environment Legal Institute v. Epel*, No. 15-471 (U.S. cert. denied Dec. 7, 2015); *Rocky Mountain Farmers Union v. Corey*, No. 13-1148 (U.S. cert. denied June 30, 2014).

INTRODUCTION

The genius of American federalism is that it requires many policy questions to be decided by states that must compete for voters, taxpayers, and industry. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566,

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than PLF, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

2578 (2012); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). This competitive pressure forces them to be more responsive to the wishes of those they govern and, ultimately, leads to smarter, more cost-efficient regulation. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956) (explaining that mobility forces government to be more responsive to the wishes of those they govern).

States are generally free to experiment with novel solutions to vexing public policy problems. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) (describing the states as laboratories of democracy). But they cannot avoid competition from other states by extending their experiments beyond their borders or by shifting the costs of those experiments to residents of other states. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989).

Connecticut has violated this principle. To finance a local recycling program, it has imposed a fee on television sales nationwide. This is a naked attempt to shift the costs of Connecticut's program onto consumers in other states. VIZIO, a California manufacturer with a growing share of the national market, but a much smaller share of the Connecticut

market, bears far more of the burden of Connecticut's program than its local impacts could justify.

For that reason, Connecticut's funding scheme violates the Dormant Commerce Clause's ban on extraterritorial state regulation. If states may nationalize the costs of providing local benefits, federalism's competitive pressures will be undermined. Only a foolish state government would impose costs on its own residents, to whom it is politically accountable, if it may instead tax interstate commerce. Allowing such mischief will result in precisely the sort of barriers to interstate commerce that the Dormant Commerce Clause forbids.

ARGUMENT

I.

Federalism Promotes Governmental Accountability and Individual Liberty by Fostering Competition Among States

Federalism is the cornerstone of the United States Constitution. John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. Rev. 89, 89 (2004). Although most commonly invoked as a limit on federal power, federalism is also concerned with similar excesses by states. *See id.* at 89-90; Clint Bolick, *Grassroots Tyranny: The Limits of Federalism* 13-36 (1993). By

protecting against the risk that *any* government will obtain excess power, federalism "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). "When government acts in excess of its lawful powers, that liberty is at stake." *Bond v. United States*, 564 U.S. 211, 222 (2011).

Federalism protects liberty by pitting states against each other in competition for mobile citizens and businesses. States must be responsive to the preferences of those they govern lest they flee for greener pastures. *See* Tiebout, *supra* at 416 (government power should be decentralized to allow people to "vote with their feet"); *see also* Ilya Somin, *Tiebout Goes Global: International Migration as a Tool for Voting With Your Feet*, 73 Mo. L. Rev. 1247, 1250-51 (2008). Because of this competitive influence, states are under constant pressure to find new and better ways to address public problems while minimizing burdens. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1498-1500 (1987).

Because federalism's guaranty of intergovernmental competition aligns government with the preferences of the governed, it is non-

partisan and does not necessarily favor more or less government regulation. *See* Heather K. Gerken, *A New Progressive Federalism*, Democracy (2012);[2] Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 Harv. L. Rev. 4, 44-55 (2010); Robert D. Alt, *Is Federalism Conservative?*, National Review Online (Apr. 29, 2003).[3] Unhappy residents have taken advantage of their ability to "vote with their feet" to escape the brutality of the Jim Crow south[4] and, more recently, to leave high-tax, high-regulation states.[5] Rather than dictating a particular outcome, competitive federalism ensures that government policy aligns with the will of the governed.

For competitive federalism to work, however, courts must enforce the Constitution's structural protections for it. They must limit the federal government's power lest voters be subject to unpopular or

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[2] *Available at* http://democracyjournal.org/magazine/24/a_new_progressive_federalism.

[3] *Available at* http://www.nationalreview.com/article/206732/.

[4] *See* Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* 128-35 (2013).

[5] *See* Sherry Bebitch & Jeffe Douglas, *California v. Texas in fight for the future*, Reuters (Mar. 8, 2013), *available at* http://blogs.reuters.com/great-debate/2013/03/08/california-v-texas-in-fight-for-the-future/.

ineffective federal policies with no means to escape. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); The Federalist No. 45 (Madison). And they must invalidate state laws that attempt to squelch competitive pressures, including restrictions on the right to enter or exit the state,[6] attempts to appropriate immobile assets,[7] and restrictions targeting vulnerable minorities.[8]

II.

The Dormant Commerce Clause Forbids State Laws That Frustrate Interstate Competition

Another structural protection for federalism that courts must enforce is the Commerce Clause. U.S. Const. art. I, § 8. Although primarily a positive grant of power to the federal government, courts have recognized for nearly two centuries that this clause also implicitly limits state power. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189

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[6] *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (the Privileges or Immunities Clause protects freedom of movement among the states).

[7] *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-48 (2005) (Due Process Clause protects against uncompensated takings and takings that do not substantially advance a legitimate public purpose.).

[8] *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); John Hart Ely, *Democracy and Distrust* (1980) (explaining how minority groups are more vulnerable to abuse by local majorities).

(1824); *see also New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). It prohibits state regulation that frustrates interstate commerce and barriers to the movement of persons and goods across state lines. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390-91 (1994); The Federalist No. 22 (Hamilton).

State-erected barriers to interstate commerce were a chief concern of the Constitution's architects. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 132-46 (2001); The Federalist No. 11 (Hamilton). Consequently, the Supreme Court's Dormant Commerce Clause jurisprudence reflects a special focus on maintaining a national economic union free of such barriers. *See Healy*, 491 U.S. at 335-36.

Some state laws are so odious to the Commerce Clause that they are *per se* invalid, including those that expressly discriminate against interstate commerce, *see City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978), and those that have the practical effect of regulating conduct beyond a state's borders, *see Healy*, 491 U.S. at 332 ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause.");

Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982). Extraterritorial state laws undermine competitive federalism and burden interstate commerce.

The Supreme Court has invalidated many types of extraterritorial state laws for this reason. For instance, it has forbidden state laws that require out-of-state producers to affirm that they will not charge a higher price for products sold within the state than that charged in neighboring states. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 575 (1986); *Healy*, 491 U.S. at 326; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935). These statutes have the practical effect of regulating pricing beyond the state's borders and prohibiting producers from charging a price that reflects the costs of a state's regulatory burden. *See Brown-Forman*, 476 U.S. at 575-76; *Healy*, 491 U.S. at 326.

If states could impose a price-control requirement, they could shift the cost of their regulations from their own citizens to residents of surrounding states—to whom they are not politically accountable. *See* A.C. Pigou, *The Economics of Welfare* 172 (1920) (explaining the externality problem). Since they cannot, residents see the cost of their state's regime and are forced to bear it themselves. *See* Paula J. Dalley,

A Theory of Agency Law, 72 U. Pitt. L. Rev. 495, 498-99 (2011) (discussing cost-benefit internalization).

Another example of a forbidden extraterritorial regulation is a state law that prevents commercial activity from fleeing to other states where costs are lower.[9] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-45 (1970) (local processing requirements "have been consistently invalidated"); *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948); *Johnson v. Haydel*, 278 U.S. 16, 16-17 (1928); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 11-14 (1928). These laws impermissibly promote or protect local industry at the expense of out-of-state competition. *See Pike*, 397 U.S. at 144-45. They are "basically a protectionist measure[.]" *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1385 (8th Cir. 1993) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

[9] Donald J. Boudreaux, "Comparative Advantage," *The Concise Encyclopedia of Economics* (2d ed. 2007), *available at* http://www.econlib.org/library/Enc/ComparativeAdvantage.html.

III.

If State Governments Could Impose the Costs of Their Programs on Their Neighbors, They Could Avoid Accountability and Frustrate Competitive Federalism

State laws that impose an extraterritorial tax or fee on interstate commerce raise the same concerns as other extraterritorial laws and are unconstitutional. *See Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992). Such laws undermine competition among the states. By allowing states to shift the costs of their programs onto residents of other states, they reduce the ability of residents or industry to flee excessive burdens.

Extraterritorial taxes and fees also reduce political accountability, by allowing states to concentrate benefits within their borders while dispersing costs beyond them. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965) (explaining that it is easier for political interests to rally behind securing benefits concentrated on a few than opposing costs dispersed among many). If a state's voters like a policy, they should be willing to pay for it. But there's no end to the lavish goodies voters might support if they know that the costs will be borne by others, to whom state politicians are not

accountable. This undermines competitive federalism's restraining influence, by thwarting states' abilities to compete on the cost side of the cost-benefit ledger.

Extraterritorial taxes and fees would also allow states to engage in rank protectionism, by providing local benefits at the expense of out-of-state competitors to local businesses. Texas could favor Whataburger by funding a local benefit, like an anti-obesity program, with a fee on nationwide sales from all fast food establishments. Whataburger will pay little because, although it is big business in Texas, its limited regional distribution keeps its nationwide market share low.[10] In-N-Out Burger, on the other hand, has only a handful of stores in Texas, but its large place in the California market and other states would make it bear a disproportionate share of the costs. [11]

If a fee on nationwide sales is triggered by a single sale within the state, as Connecticut's is, the effect will be to erect a significant trade barrier to interstate commerce. Businesses with a large share of the

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[10] *See* Wikipedia, *Whataburger*, https://en.wikipedia.org/wiki/Whataburger (last visited Apr. 26, 2017).

[11] *See* Wikipedia, *In-N-Out Burger*, https://en.wikipedia.org/wiki/In-N-Out_Burger (last visited Apr. 26, 2017).

national market relative to the in-state market will be encouraged to exit the state, in order to avoid the outsized fee. And those businesses considering introducing their products within a state will think twice, because they know that they will pay a large fee based on their out-of-state sales.

A state fee or tax on interstate commerce also has the practical effect of regulating commerce that has no connection to the state. A company subject to such a fee or tax faces a strong disincentive against any expansion that would increase its ability to service out-of-state markets. Suppose a smallish, but popular, New York haberdashery was considering opening new stores and distribution facilities on the west coast. If a state where the company currently sells its wares imposes a fee or tax based on national sales, the prospect of a much larger fee would discourage this expansion even though it has no connection to the state.

IV.

Connecticut's E-Waste Law Unconstitutionally Imposes the Costs of the Program on Out-of-State Manufacturers and Consumers

Connecticut's E-Waste Law has the goal of shifting the cost of recycling consumer electronics to the manufacturers. *See* Conn. Gen.

Stat. § 22a-629 to 22a-640; Conn. Agencies Regs. §§ 22a-630(d)-1, 22a-638-1. For many devices, the amount of the fee is calculated based on the proportion of the manufacturer's products being recycled through the program. *See* Conn. Agencies Regs. § 22a-638-1(g)(1)(C) & (j)(3). The Constitution permits Connecticut to do so. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981) (states may regulate the local sale of out-of-state products based on the local effects of those products).

The fee for television manufacturers, however, is based on their share of the nationwide television market, without regard to how many of those sales are in Connecticut or how much the manufacturer impacts the state's recycling need. *See* Conn. Gen. Stat. § 22a-631(a). Connecticut has, for all practical purposes, imposed an unconstitutional tax on television sales occurring anywhere in the country. *See Allied-Signal, Inc.*, 504 U.S. at 777. The Dormant Commerce Clause forbids states from taxing commerce with no connection to the state because, "[i]n a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation." *Id*. at 777-78; *see Healy*, 491 U.S. at 336 (extraterritorial state regulation is particularly

problematic because of how the regulation "may interact with the legitimate regulatory regimes of other States").

Connecticut's law also erects a significant barrier to interstate commerce. Any manufacturer whose products are sold, directly or indirectly, within the state must pay Connecticut's fee based on all sales nationwide. The only way a manufacturer can avoid the fee for having sold a television in California to a Californian—with no tie to Connecticut—is to prevent any of its products from ever reaching the state. JA 33 (VIZIO's only recourse is "to withdraw from the Connecticut market"). The law also has the practical effect of regulating wholly out-of-state commerce by increasing the fee whenever a company expands its market elsewhere, without any impact on the state. Such obstacles to the free flow of goods across state lines is the very evil the Dormant Commerce Clause forbids. *See* Barnett, *supra* at 132-46; The Federalist No. 11; *id*. 22.

CONCLUSION

Connecticut has created a program to recycle televisions and other consumer electronics. It may do so. But it cannot shift the cost of this program onto out-of-state manufacturers and consumers engaged in

commerce with no tie to the state. Otherwise it could frustrate interstate commerce and undermine the competitive pressures of federalism. The Dormant Commerce Clause does not permit that result.

DATED: May 10, 2017.

Respectfully submitted,

s/ Jonathan Wood
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