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No. A-03-2020

**STATE OF MINNESOTA
IN SUPREME COURT**

COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS
OF AMERICA, CAROLINA TOBACCO COMPANY,
AND WINNER TOBACCO WHOLESALE, INC.,

Appellants,

v.

THE STATE OF MINNESOTA AND DAN SALOMONE,
IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF
THE MINNESOTA DEPARTMENT OF REVENUE,

Respondents.

APPELLANTS' PETITION FOR REHEARING

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I. INTRODUCTION

Pursuant to Minnesota Rule of Civil Appellate Procedure 140, Appellants-Petitioners Council of Independent Tobacco Manufacturers of America, Carolina Tobacco Company and Winner Tobacco Wholesale, Inc., (“Appellants”) respectfully submit this Petition for Rehearing regarding this Court’s March 16, 2006 decision in the above matter. This case should be reheard because this Court’s decision “overlooked, failed to consider, [and] misapplied” controlling legal authority in several respects, each of which independently requires rehearing. See Minn. R. Civ. App. P. 140.01.

First, this Court’s decision overlooked and failed to consider controlling United States Supreme Court authority, Minneapolis Star & Tribune v. Minn. Comm’r of Revenue, 460 U.S. 575 (1983), in erroneously ruling that Minn. Stat. § 297F.24 (the “Cigarette Fee Act”) does not violate Appellants’ First Amendment and equal protection rights. This Court’s analysis of Appellants’ First Amendment challenge to the Cigarette Fee Act is contrary to the United States Supreme Court’s holding in Minneapolis Star & Tribune, a case this Court’s decision fails to cite, distinguish or otherwise acknowledge.

Second, this Court’s decision erroneously relied upon Xcaliber International Limited, LLC v. Ieyoub, 397 F. Supp.2d 567 (E.D. La. 2005), a case that was reversed and vacated by Xcaliber International Limited, LLC v. Foti, No. 05-30323, 2006 WL 473792 (5th Cir. March 1, 2006). This Court also misapplied cases addressing challenges to “Qualifying Statutes” enacted in other states. These cases are distinguishable because of fundamental differences between the Qualifying Statutes and the Cigarette Fee Act.

Finally, this Court's decision misapplied Reserve Mining Co. v. State, 310 N.W.2d 487 (Minn. 1981), in rejecting Appellants' Bill of Attainder challenge to the Cigarette Fee Act. The Cigarette Fee Act imposes a tax on only those cigarettes made by manufacturers who have refused to settle with the State and exempts only those cigarettes made by manufacturers who are making settlement payments to the State for their past unlawful conduct—payments the State itself calls "retribution payments."¹ As such, the Cigarette Fee Act imposes punishment without judicial process in violation of the Bill of Attainder Clause.

II. ARGUMENT

1. **This Court's Decision Overlooked and Failed to Consider Controlling United States Supreme Court Precedent Governing Appellants' First Amendment and Equal Protection Arguments.**

This Court ruled that the Cigarette Fee Act does not violate Appellants' rights under the First Amendment and is not subject to strict scrutiny under the Equal Protection Clause because Appellants would be subject to a greater financial burden if they surrendered their First Amendment rights under the "voluntary" agreement authorized by the statute than they would be under the Tax imposed by the statute. Slip Opinion at 6-10. This Court did so without citing, distinguishing or otherwise recognizing the United States Supreme Court's decision in Minneapolis Star & Tribune v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983). This Court's holding and reasoning are contrary to Minneapolis Star & Tribune for several reasons.

¹ See Annual Synar Report FFY 2003, at 4, available at http://www.dhs.state.mn.us/main/groups/disabilities/documents/pub/dhs_id_003465.hcsp (visited March 23, 2006).

First, this Court's analysis of the relative burdens on Appellants under the Tax imposed by the Cigarette Fee Act and a "voluntary" settlement is expressly prohibited by the holding in Minneapolis Star & Tribune. In Minneapolis Star & Tribune, the State of Minnesota made the same argument as set forth in this Court's decision, the United States Supreme Court rejected it, and the Court remanded the case to the Minnesota courts for further proceedings. Specifically, the State argued that a tax which singled out newspapers for different treatment than other businesses actually favored the press over other businesses and therefore did not violate the First Amendment. 460 U.S. at 588. The Court rejected this argument, refusing to "fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses." Id. The Court explained that singling out entities based on their exercise of First Amendment rights threatens such entities "not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment." Id. (emphasis in original). In other words, although a party may be treated favorably under the tax statute today, it may easily be treated unfavorably under the same statute in the future. Id. "Thus, even without actually imposing an extra burden on the [taxpayer], the government might be able to achieve censorial effects, for the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions." Id. (internal quotations and alterations omitted). The United States Supreme Court buttressed this conclusion by explaining that "courts as institutions are poorly equipped to evaluate with precision the

relative burdens of various methods of taxation” and, given the threat to fundamental First Amendment rights, the Court could not “tolerate th[e] possibility” of miscalculating the relative burdens. Id. at 589

Accordingly, a statute that distinguishes among parties based on the retention of First Amendment rights is not valid simply because it appears to treat a party retaining its rights favorably. Id. at 588-89. Instead, such a statute is unconstitutional because it distinguishes among parties based on their retention of First Amendment rights. Id.

Second, even if it was proper to compare the relative burdens under the Cigarette Fee Act Tax and a “voluntary” settlement agreement, which it is not, there are serious flaws in this Court’s conclusion that Appellants are better off paying the Tax and not waiving their First Amendment rights under a “voluntary” settlement agreement. This Court’s comparison of the payment under the “voluntary” agreement authorized by the statute and the Tax mandated by the Cigarette Fee Act ignores the “value” of First Amendment rights and the “cost” of waiving those rights. By entering into the “voluntary” agreement, the manufacturer makes the formulated payments to the State on each pack sold and incurs the “cost” of waiving its First Amendment rights in exchange for a release from civil liability for any claims relating to its sale of cigarettes. Non-settling manufacturers such as Appellants incur the burden of the Tax imposed under the Cigarette Fee Act and retain the “value” of their First Amendment rights, while receiving none of the civil liability protections granted under the release in the “voluntary” settlement. Thus, it is impossible to determine which of these “choices” has the greater inherent value or economic benefit for cigarette manufacturers, let alone to

evaluate the level of coercion imposed on such manufacturers. The only thing that is clear is that the Cigarette Fee Act, just as the Minnesota tax law that was struck down in Minneapolis Star & Tribune, unconstitutionally singles out and taxes certain businesses based on their First Amendment rights.²

Third, this Court's decision ignores the United States Supreme Court's holding that a government cannot impose a tax "as a condition of engaging in protected" First Amendment activities. Minneapolis Star & Tribune, 460 U.S. at 586 n.9. The Cigarette Act imposes the Tax based upon whether a manufacturer has surrendered its First Amendment rights—cigarettes made by manufacturers that refuse to surrender their First Amendment rights are taxed and those that surrender their First Amendment rights are exempt. The statute draws an explicit distinction and imposes the Tax based on whether the manufacturer has relinquished its First Amendment rights. Thus, the Cigarette Fee Act violates the First Amendment by effectively conditioning the right of Appellants to retain their First Amendment rights upon the payment of the Tax on their products. See Minneapolis Star & Tribune, 460 U.S. at 586 n.9 ("By imposing the taxes as a condition of engaging in protected activity, [the government] imposed a form of prior

² Also, the record establishes that the amount Appellants would have to pay under a "voluntary" settlement agreement authorized by the Cigarette Fee Act is a moving target. The State initially represented to the District Court that manufacturers entering agreements with the State would be required to pay 36 cents per pack. (Appellants' Appendix at 248.) This amount subsequently increased to 48 cents per pack in the parties' stipulation. (Id. at 175, 260.) This imprecision in the State's calculation exemplifies the concerns the Supreme Court outlined in Minneapolis Star & Tribune and further demonstrates why this Court should have rejected such an analysis. "The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes." Minneapolis Star & Tribune, 460 U.S. at 589. "Taking the chance that [the State's calculations] or others like them are erroneous is a risk that the First Amendment forbids." Id. at 590 n.14.

[unconstitutional] restraint on speech.”) Accordingly, as in Minneapolis Star & Tribune, the Cigarette Fee Act violates the First Amendment.

Finally, contrary to this Court’s decision, the Cigarette Fee Act does not merely offer a “voluntary” waiver of First Amendment rights. Rather, the statute attempts to force small tobacco manufacturers to waive their First Amendment rights by offering such a waiver as the only alternative to the Tax. Under such circumstances, First Amendment rights cannot constitutionally be waived, irrespective of whether the State chooses to characterize the waiver as “voluntary.” See, e.g., O’Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716 (1996) (“A State may not condition public employment on an employee’s exercise of his or her First Amendment rights.”).

2. This Court’s Decision Erroneously Relied On Case Law that Has Been Overruled and Misapplied Case Law Addressing Constitutional Challenges to “Qualifying Statutes.”

This Court’s decision erroneously relied upon Xcaliber International Limited, LLC v. Ieyoub, 397 F. Supp.2d 567 (E.D. La. 2005) (“Xcaliber I”), a case that has been overruled, in rejecting Appellants’ First Amendment challenge to the Cigarette Fee Act. Slip Opinion at 9-10. The District Court’s decision in Xcaliber I was reversed and vacated by the United States Court of Appeals for the Fifth Circuit on March 1, 2006 in Xcaliber International Limited, LLC v. Foti, No. 05-30323, 2006 WL 473792 (5th Cir. March 1, 2006).³ Because Xcaliber I has been reversed and vacated, this Court should not have relied upon Xcaliber I in its decision.

³ On March 2, 2006, Appellants’ submitted to the Clerk of Appellate Courts a copy of the Fifth Circuit’s decision in Xcaliber International pursuant to Minn. R. Civ. App. P. 128.05.

Similarly, this Court misapplied cases addressing constitutional challenges to “Qualifying Statutes” enacted in other states. Slip Opinion at 9-10, 15-17. These cases are distinguishable because of the fundamental differences between the Qualifying Statutes and the Cigarette Fee Act.

The Qualifying Statutes require non-settlement cigarette manufacturers to make payments into an interest bearing escrow account, roughly equivalent to payments that would be required if these manufacturers were parties to the national Master Settlement Agreement entered into by forty-six states and the major tobacco companies. The escrow payments remain the property of the non-settlement manufacturers and the manufacturers are entitled to the return of all escrow payments with interest unless and until they are held liable for damages caused by their conduct. Thus, under the Qualifying Statutes, a non-settlement manufacturer will receive all of its escrowed funds back with interest unless a state can prove that the non-settlement manufacturer engaged in unlawful conduct.

In contrast, the Cigarette Fee Act imposes a direct Tax, not an escrow obligation, on only those cigarettes made by non-settling manufacturers who have refused to surrender their First Amendment rights. The Cigarette Fee Act Tax is not refundable; the manufacturers will never receive the funds back; the State never has to establish that the manufacturer engaged in unlawful conduct; and the Tax payments go directly into the State’s General Fund without any requirement that the State establish the non-settling manufacturers’ liability. In short, this Court’s decision is fundamentally flawed because

it treats the Cigarette Fee Act and the Qualifying Statutes as similar when they are materially different.

3. This Court's Decision Misapplied Precedent Concerning Appellants' Bill of Attainder Argument.

This Court's decision misapplied Reserve Mining Co. v. State, 310 N.W.2d 487 (Minn. 1981), in rejecting Appellants' Bill of Attainder challenge to the Cigarette Fee Act.

First, the context in which the Cigarette Fee Act was enacted demonstrates that it violates the Bill of Attainder Clause and that it is materially different than the statute at issue in Reserve Mining. The Cigarette Fee Act was enacted only as a consequence of Minnesota's settlement of the State Tobacco Lawsuit against the majors tobacco companies, a lawsuit based on the majors tobacco companies' decades-long fraud, false advertising and anti-trust violations.

Importantly, because selling cigarettes is entirely lawful, the State did not simply sue the major tobacco companies for health care costs caused by their products. Instead, the State sued the major tobacco companies under several tort theories based on their reprehensible conduct. See Appellants' Appendix at 86-124. Other courts have detailed this unlawful conduct. For example, in Williams v. Philip Morris, Inc., 127 P.3d 1165 (Or. 2006), the Oregon Supreme Court upheld a \$79.5 million punitive damages award even though the plaintiff recovered less than \$525,000 in compensatory damages. In upholding this enormous punitive damage award, the Court cataloged Philip Morris' decades of "extraordinarily reprehensible" conduct, explaining there was "no dispute"

that “Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nonetheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers’ health and lives and risk, and it continued to do so for nearly half a century.” 127 P.3d at 1177. These actions were “no isolated incident, but a carefully calculated program spanning decades.” Id. Indeed, Philip Morris’ actions “constituted manslaughter” in violation of Oregon’s criminal laws. Id. at 1179. The Court summarized the unlawful conduct as follows: “Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group.” Id. at 1181-82.

Put simply, without the majors tobacco companies’ unlawful conduct, without the State Tobacco lawsuit, and without its settlement, there would be no Cigarette Fee Act. In the Cigarette Fee Act, the State is admittedly seeking to impose the same settlement payments on Appellants for such unlawful conduct while denying Appellants access to the judicial process received by the major tobacco companies in the State Tobacco Lawsuit. By seeking to impose those same settlement payments on Appellants, the State has legislatively judged Appellants and other non-settling manufacturers guilty of the Majors’ transgressions, without giving Appellants the opportunity to rebut those charges

in court. Such a legislative attempt to circumvent the judicial process renders the statute an unconstitutional bill of attainder.

Nothing in Reserve Mining Co. v. State, 310 N.W.2d 487 (Minn. 1981), changes this analysis because Reserve Mining is clearly distinguishable from this case. The statute at issue in Reserve Mining imposed a tax on mining companies which produced taconite tailings that were not deposited into a body of water or onto land in accord with state permits. 310 N.W.2d at 489-490. Thus, the tax was imposed based on how the mining company produced taconite, not because of who the mining company was. Id. As such, this Court rejected plaintiff's Bill of Attainder challenge in Reserve Mining.

Unlike the statute in Reserve Mining, here the Cigarette Fee Act imposes the Tax based solely on upon who makes the product. The Cigarette Fee Act distinguishes based not on how the product is made, where the product is made, the affects of the products, or upon any other legitimate criteria. Instead, the Cigarette Fee Act seeks to impose on non-settlement cigarette manufacturers the same payments the State receives from the major tobacco companies based on the major tobacco companies' unlawful conduct—payments the States itself calls “retribution payments.”

Finally, this Court's decision mistakenly states that the Cigarette Fee Act “on its face, requires a payment with respect to all cigarettes, and the categories of cigarettes exempt from the tax are defined broadly.” Slip Opinion at 18. This is incorrect. The Cigarette Fee Act imposes a tax on only those cigarettes made by manufacturers who have refused to settle with the State and exempts only those cigarettes made by manufacturers who are making “retribution payments” to the State.

III. CONCLUSION

For the above stated reasons, Appellants respectfully request that this Court grant Appellants' petition for rehearing.

Dated: March 24, 2006

Respectfully submitted,

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