No. 07-748

In The Supreme Court of the United States

PUERTO RICAN ASSOCIATION OF BEER IMPORTERS, et al.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

BRIEF IN OPPOSITION

SUSANA PEÑAGARÍCANO-BROWN
Assistant Solicitor General
Counsel of Record

SALVADOR J. ANTONETTI-STUTTS
Solicitor General of Puerto Rico
Office of the Solicitor General
Department of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192
Tel. (787) 721-8010 Ext. 2702
Fax (787) 724-3380
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE PETITION 6

I. The Puerto Rico Courts did not decide that the dormant commerce clause does not apply to Puerto Rico 7

A. The Supreme Court of Puerto Rico did not decide that the dormant commerce clause does not apply to Puerto Rico 7

B. The Court of Appeals did not hold that the dormant commerce clause does not apply to Puerto Rico..... 9

C. The trial court did not hold that the dormant commerce clause does not apply to Puerto Rico 9

D. The Puerto Rico courts scrutinized Act No. 69 and held that it did not violate the anti-discrimination prohibitions of the Federal Relations Act..... 10

II. Petitioners are requesting that this Court issue an advisory opinion 10

III. Petitioners have had several opportunities, in both federal and Puerto Rico courts, to present their statutory and Constitutional challenges to the statute 12

CONCLUSION..... 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Coors Brewing Co. v. Calderón, 225 F. Supp. 2d 22 (D.D.C. 2002).....13

Coors Brewing Co. v. Secretary of the Treasury, Civil No. 06-2150 (DRD), Opinion and Order of September 30, 2007 (D.P.R. 2007).....14

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 11

Massachusetts v. Environmental Protection Agency, ___ U.S. ___, 127 S.Ct. 1438 (2007) 11

U.S. Brewers Ass'n, Inc. v. Pérez, 592 F.2d 1212 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979).....12, 13

PUERTO RICO CASES

Banco Popular de Puerto Rico v. Municipio de Mayagüez, 126 D.P.R. 653 (1998) 5

Ex Parte Alexis Delgado Hernández, 2005 T.S.P.R. 95 at 10-11 7

Figueroa Méndez v. Superior Court, 101 D.P.R. 859 (1974).....7

RCA v. Gobierno de la Capital, 91 D.P.R. 416 (1964).....5, 6

Rivera Maldonado v. Commonwealth of Puerto Rico, 119 D.P.R. 74 (1987).....7

U.S. Brewers Ass'n, Inc. v. Secretary of the Treasury, 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980).....2, 4, 12

TABLE OF AUTHORITIES – Continued

Page

FEDERAL LAWS

28 U.S.C. § 2201 14

48 U.S.C. § 1983 14

Federal Relations Act .....*passim*

Interstate Commerce Clause of the Constitution of the United States 2

PUERTO RICO LAWS

Art. III, § 2 of the Constitution 10

Public Law 69 .....*passim*

Puerto Rico Acts

Act No. 69 of May 30, 2002 .....*passim*

Act No. 37 of July 13, 1978 .....2, 12

PUERTO RICO RULES

Rule 44 of the Rules of the Supreme Court of Puerto Rico 4 L.P.R.A. App. XXI-A R. 44.....7

TREATISES

Erwin Chemerinsky, *Federal Jurisdiction* § 2.2 at 51 (4th ed. 2003) 11

INTRODUCTION

Contrary to petitioners' claims, this case does not present a conflict between the federal courts and the Supreme Court of Puerto Rico, or even an instance where the Supreme Court of Puerto Rico has contravened or ignored precedents established by this Court or lower federal courts. Petitioners have isolated a portion of a concurring opinion by an associate justice of the Puerto Rico Supreme Court in order to give the impression that this case presents an issue worthy of *certiorari* review. However, in reaching its decision in this case, the courts below assumed that the dormant commerce clause of the United States Constitution applies to Puerto Rico and considered the relevant constitutional and statutory norms, even if the result of that analysis did not meet petitioners' expectations.

Further, petitioners and their privies have had several opportunities to present their constitutional arguments, which have been thoughtfully considered by Commonwealth and federal courts. The fact that those courts have not granted the remedies sought by petitioners does not transform this case into one worthy of the issuance of a writ of certiorari by this Court.

STATEMENT OF THE CASE

This case began as a challenge to Puerto Rico Act No. 69 of May 30, 2002, which amended certain provisions of the Puerto Rico small brewer exemption,

first enacted through Act No. 37 of July 13, 1978. Substantially similar provisions are currently found in a number of states and the Federal Government itself.[1] The constitutionality of the small brewer exemption, first enacted through Act No. 37, was originally challenged in 1978. The Puerto Rico Supreme Court upheld the Act's constitutionality two years later. *U.S. Brewers Ass'n, Inc. v. Secretary of the Treasury*, 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980).

Twenty-seven years later, the Supreme Court of Puerto Rico entered judgment, again upholding the constitutionality of the current version of Puerto Rico's small brewer exemption. Two of the six Justices issued concurring opinions. Pet. App. 3. One of these, Associate Justice Fuster, sadly now deceased, wrote that although mere application of the *U.S. Brewers* precedent sufficed to resolve the issue before the Court, he personally "wish[ed] to deal . . . with the thorny subject of whether the limitations arising from the Interstate Commerce Clause of the Constitution of the United States apply to Puerto Rico *ex proprio vigore*." Pet. App. 4-5. He then proceeded to explain at length his own view that Congress has not clearly intended to subject Puerto Rico to those limitations. Pet. App. 4-20.

---

[1] *See, e.g.*, MCA 16-1-406 (Montana); M.C.L.A. 436.1409 (Michigan); McKinney's Tax Law § 424 (NY); M.S.A. § 297G.04 (Minnesota); R.C. § 4303.332 (Ohio); W.S.A. 139.02 (Wisconsin); West's RCWA 66.24.290 (Washington); 72 P.S. § 9010 (Pennsylvania); 26 U.S.C. § 5051 (U.S.).

The other concurring Justice, Mr. Rebollo, wrote at even greater length to say, among other things, that while the Federal Relations Act ("FRA") forbids discrimination between articles imported from the United States and foreign countries and similar articles produced in Puerto Rico, and although the dormant commerce clause of the U.S. Constitution *does* apply to Puerto Rico, the small brewer exemption as amended is not discriminatory and contravenes neither the FRA nor the dormant commerce clause. Pet. App. 20-60. Neither of these concurring opinions are the opinion of the court. What the Court as a whole actually did was to affirm the judgment of the court below, the Puerto Rico Court of Appeals, although without explaining its reasons.

The judgment of the Puerto Rico Court of Appeals did explain *that* court's reasoning in detail. Pet. App. 61-97. Specifically, the Court of Appeals discussed and applied both the dormant commerce clause and the Federal Relations Act. With respect to petitioners' challenge under the dormant commerce clause, the Court of Appeals undertook what it termed "an in-depth analysis of this point." Pet. App. 88. After discussing at length this Court's relevant dormant commerce case law, the Court of Appeals held that, as amended, Puerto Rico's small brewer exemption was

not discriminatory in its face, nor did it have a discriminatory purpose or effect.[2] *See*, Pet. App. 88-96.

With respect to petitioners' challenge based on the FRA, the Court of Appeals noted that the same argument had been addressed by the Puerto Rico Supreme Court in its 1980 *U.S. Brewers* decision with respect to the small brewer exemption as originally enacted. After quoting extensively from the Puerto Rico Supreme Court's reasoning in *U.S. Brewers*, the Court of Appeals observed that the very same arguments applied in this case and therefore compelled the same result. *See* Pet. App. 82-86. The Court of Appeals therefore affirmed the judgment of the trial court, the Court of First Instance, Superior Court of San Juan, which had upheld the constitutionality of the small brewer exemption, as amended.

The trial court had dismissed petitioners' complaint only after considering their arguments based on the FRA and the dormant commerce clause on the merits. In this respect, it should be noted that petitioners' suggestion that the trial court rejected their dormant commerce claims on grounds that *stare decisis* bound it to ignore the applicability of the dormant commerce clause is both misleading and out of context. *See*, Pet. 13 and 23-24 (quoting Pet. App. 111). It is misleading because, although petitioners

[2] Petitioners admit that the small brewer exemption is not discriminatory on its face. *See*, Pet. 10 ("As written, Law No. 69 appears to be non-discriminatory.").

allegedly quoted literally from the opinion of the Court of First Instance, *see* Pet. at 13, they did so in an incomplete fashion, so as to give the erroneous impression that the Court of First Instance simply followed the Puerto Rico Supreme Court's previous ruling that the dormant commerce clause is inapplicable to Puerto Rico. *See*, Pet. App. at 111. It is out of context because it is clear from the very language of the trial court immediately following the portion "quoted" by petitioners, that the lower court did in fact consider petitioners' dormant commerce clause arguments at length, and rejected them on the merits, in light of this Court's applicable dormant commerce case law. *See*, Pet. App. 111-125.[3]

The trial court similarly rejected petitioners' challenge based on the FRA, holding that there was no meaningful difference between the small brewer exemption as amended, subject of the challenge here, and the small brewer exemption as originally

[3] The Court of First Instance expressly called into question the continuing validity of *RCA v. Gobierno de la Capital*, 91 D.P.R. 416 (1964) – upon which petitioners premise their claim of a "conflict" between P.R. Supreme Court and federal courts' views of the applicability of the dormant commerce clause to Puerto Rico – in light of subsequent Puerto Rico Supreme Court decisions entertaining the merits of challenges based on dormant commerce grounds. Pet. App. 111-112 (citing *Banco Popular de Puerto Rico v. Municipio de Mayagüez*, 126 D.P.R. 653, 658 (1998)). In fact, the Court of First Instance specifically noted that, given these subsequent Puerto Rico Supreme Court cases, it felt compelled to consider the merits of petitioners' dormant commerce clause claims. *Id*.

enacted, whose validity had been upheld by the Puerto Rico Supreme Court in *U.S. Brewers* after due consideration of both the FRA and the dormant commerce clause. Consequently, the court determined that the Puerto Rico Supreme Court's reasoning in *U.S. Brewers* compelled the same result here, and upheld the statute's validity against petitioners' challenge. Pet. App. 105-111.

REASONS FOR DENYING THE PETITION

Petitioners argue that there is a conflict over whether the dormant commerce clause applies to Puerto Rico. If there be such a conflict, this case certainly does not present any such conflict. Here, as noted above, the Commonwealth lower courts *did* analyze petitioners' dormant commerce claims on their merits, and their judgments went on to be affirmed by the Supreme Court of Puerto Rico. The Commonwealth courts also considered the merits of petitioners' arguments based on the antidiscrimination provisions of the Federal Relations Act, and although the result of the courts' analysis predictably did not satisfy petitioners – who have unsuccessfully challenged and are still challenging the statute in question and its predecessor statutes in federal and commonwealth courts – the fact that those courts to date have simply not ruled as petitioners would have wished does not create a conflict with decisions of this Court nor does it imply that petitioners have been without an adequate forum to present their

arguments in this regard. This Court should deny the petition.

I. The Puerto Rico Courts did not decide that the dormant commerce clause does not apply to Puerto Rico.

In a specious attempt to get this Court to grant discretionary review, Petitioners boldly misconstrue the record below erroneously alleging, among other things, that the Puerto Rico Courts held that Act 69 does not contravene the dormant commerce clause because said clause is inapplicable to Puerto Rico. Contrary to Petitioners' claims, however, the Puerto Rico Court's did not reach such a conclusion. Indeed, those Courts expressly assumed that the dormant commerce clause applies to Puerto Rico, yet concluded that Act 69 does not discriminate against interstate or international commerce.

A. The Supreme Court of Puerto Rico did not decide that the dormant commerce clause does not apply to Puerto Rico.

A judgment issued without opinion by the Supreme Court of Puerto Rico does not establish a rule, nor does it reverse an existing rule. *Ex Parte Alexis Delgado Hernández*, 2005 T.S.P.R. 95 at 10-11; *Rivera Maldonado v. Commonwealth of Puerto Rico*, 119 D.P.R. 74 (1987). *See also Figueroa Méndez v. Superior Court* 101 D.P.R. 859, 862-863 (1974); Rule 44 of

the Rules of the Supreme Court of Puerto Rico 4 L.P.R.A. App. XXI-A R. 44.

The judgment of the Supreme Court of Puerto Rico in this case, issued without opinion, does not establish a precedent. In addition, a concurring opinion of one of the associate justices, *a fortiori*, does not represent the position of the court. Here, in a judgment that did not have precedential effect, two of the six justices did not participate and the remaining four voted to affirm.

One of the two who did not participate disqualified herself because, before being appointed to the Supreme Court, she had been a member of the Court of Appeals panel that issued the unanimous judgment under review. Of the four justices who did vote, all of whom voted to affirm the decision of the Court of Appeals, one wrote separately to discuss his qualms about the applicability of the dormant commerce clause to Puerto Rico. Another wrote to the contrary, to reiterate his opinion that the clause did apply to Puerto Rico. The other two voted simply to affirm. If one were to speculate about the views of these two justices, as well as the views of the justice who disqualified herself, one would have to look to the decision of the Court of Appeals.

B. The Court of Appeals did not hold that the dormant commerce clause does not apply to Puerto Rico.

The opinion of the Court of Appeals expressly assumed that the dormant commerce clause applies to Puerto Rico. The discussion at Pet. App. 86-96 is unambiguous. In particular, the Court of Appeals discussed at length this Court's case law regarding the dormant commerce clause of the U.S. Constitution and after a thorough analysis concluded that Act No. 69 does not contravene the dormant commerce clause because it not discriminatory on its face, in its intent or in its effect.

One of the judges who joined in the opinion, Ms. Fiol Matta, App. 62, was later appointed to the Supreme Court. Although for obvious reasons she disqualified herself when the case came to be considered by the Supreme Court, she had joined the decision of the Court of Appeals which clearly applied dormant commerce clause analysis to the issues under review.

C. The trial court did not hold that the dormant commerce clause does not apply to Puerto Rico.

As noted above, in reaching its decision, the Puerto Rico Court of First Instance assumed that the dormant commerce clause applies to the Puerto Rico Act. Pet. App. 111-112. Indeed, said Court specifically decided that Puerto Rico Supreme Court precedent compelled it to consider the merits of

Petitioners' dormant commerce clause claim. *Id.* Hence, the Court of First Instance undertook an analysis of the challenged Public Law 69 in light of the anti-discriminatory limitations placed on the States by the dormant commerce clause and explicitly held that it "does not have the purpose or effect of discriminating against interstate or international commerce." Pet. App. 125.

D. The Puerto Rico courts scrutinized Act No. 69 and held that it did not violate the anti-discrimination prohibitions of the Federal Relations Act.

The trial court, the Court of Appeals, and – at least by implication – the Supreme Court of Puerto Rico, all held that Act No. 69 was not improperly discriminatory on its face, in its intent, or in its effect. The Court of Appeals and the Court of First Instance both expressly undertook an analysis of the statute in light of the restrictions imposed by the dormant commerce clause, and concluded that the statute was not discriminatory. Both courts also analyzed the statute in light of the antidiscrimination provisions of the Federal Relations Act, and reached the same conclusions.

II. Petitioners are requesting that this Court issue an advisory opinion.

Art. III, § 2 of the Constitution "limits federal-court jurisdiction to 'Cases' and 'Controversies.'"

Massachusetts v. Environmental Protection Agency, ___ U.S. ___, 127 S.Ct. 1438, 1452 (2007). Among other things, this judicial limitation prohibits federal courts from issuing advisory opinions. *Id.*; *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). An opinion is not an advisory opinion and therefore justiciable, when there is "substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect". Erwin Chemerinsky, *Federal Jurisdiction* § 2.2 at 51 (4th ed. 2003). Clearly, the opinion sought by Plaintiff in this case would be an advisory opinion, since a declaration that the dormant commerce clause applies to Puerto Rico will have no effect on the validity of Act 69.

Petitioners' goal is to get this Court to issue an opinion concluding that the dormant commerce clause applies to Puerto Rico. Nevertheless, such an opinion would have no effect on this case because, as noted above, the courts of Puerto Rico assumed that the dormant commerce clause applies to Puerto Rico, examined the merits of Petitioners' dormant commerce clause claims and, after a thorough analysis of this Court's relevant case law, concluded that Law 69 does not contravene the dormant commerce clause because it did not discriminate against interstate or international commerce on its face, in its purpose, or in its effect. Therefore, an opinion concluding that the dormant commerce clause applies to Puerto Rico will not change the results reached by the Puerto Rico courts and, more importantly, will not invalidate Act 69 or bring about any change in the manner in which

it is interpreted or applied. Such an opinion from this Court would clearly be advisory and, therefore, outside of the jurisdiction of this Court.

III. Petitioners have had several opportunities, in both federal and Puerto Rico courts, to present their statutory and Constitutional challenges to the statute.

Contrary to their claims that they lack a forum, the petitioners and their privies have had numerous turns at bat, over the last thirty years, in both local and federal courts.

Their first attempt before the Commonwealth courts resulted in the 1980 decision of the Supreme Court of Puerto Rico in *U.S. Brewers*, 9 P.R. Offic. Trans. 605.[4] Plaintiffs there included, among others, Anheuser Busch, Inc. and Miller Brewing Company. Pet. App. 147. They challenged Act No. 37 of July 13, 1978, which established a differential in the excise tax imposed on beer produced by small brewers as opposed to larger ones. Pet. App. 147-218. On June

[4] No petition for a writ of certiorari was filed at that time to review the decision of the Supreme Court of Puerto Rico in that case. Plaintiffs in *U.S. Brewers* challenged the small brewer exemption simultaneously before the federal courts. *See, U.S. Brewers Ass'n, Inc. v. Pérez*, 592 F.2d 1212 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979) (rejecting the challenge on grounds of "sound equity practice and a concern for interests of federalism," in an effort to avoid the "awkward and heavy-handed remedy" of producing judicially a "broad taxing statute" not necessarily envisioned by legislation).

13, 2002, the petitioners here filed a complaint to challenge Act No. 69 of May 30, 2002, which amended the small brewer exemption established by Act No. 37.

The plaintiffs in 2002 included, among others, the distributors for Anheuser Busch (Budweiser, etc.), Miller (Miller Genuine Draft), Coors and Heineken, as well as Coors Brewing Company and Heineken Brouwerijen, N.V. Pet. App. 219-220. The 2002 complaint resulted in the judgment of the Supreme Court of Puerto Rico which petitioners now ask this Court to review.

On July 2, 2002, after an initial hearing before the trial court in Puerto Rico, one of the plaintiffs decided to shop for another forum. Although its distributor, V. Suárez & Company, Inc., Pet. App. 220-221, remained in the Puerto Rico case now under review, Coors nominally dropped out of that case and filed a separate action in the U.S. District Court for the District of Columbia. *Coors Brewing Co. v. Calderón*, 225 F. Supp. 2d 22 (D.D.C. 2002).

That sortie was not successful. *Id.* at 27. The District of Columbia federal court decided that "principles of federalism and equity cited by the First Circuit" in *U.S. Brewers*, 592 F.2d 1212, barred Coors' petition for a Temporary Restraining Order and Preliminary Injunction. *Id.* at 26-27; *see also*, n.2 herein. After a failed attempt at obtaining expedited review by the U.S. Court of Appeals for the D.C.

Circuit, 2002 WL 31519943 (C.A.D.C.) (not reported in F.3d), Coors voluntarily dismissed its appeal.

In November of 2006, and while the case now before the Court was pending in the Supreme Court of Puerto Rico, Coors went shopping again, this time filing an action in the U.S. District Court for the District of Puerto Rico, pursuant to 48 U.S.C. § 1983 and 28 U.S.C. § 2201, against one of respondents herein (Juan Carlos Méndez-Torres, in his official capacity of Secretary of the Treasury), again challenging Act No. 69 as being in violation of the Federal Relations Act and the dormant commerce clause. That case was dismissed by the U.S. District Court for the District of Puerto Rico on September 30, 2007. *See, Coors Brewing Co. v. Secretary of the Treasury*, Civil No. 06-2150 (DRD), Opinion and Order of September 30, 2007 (D.P.R. 2007). Its decision is currently pending review before the U.S. Court of Appeals for the First Circuit. *Coors Brewing Co. v. Secretary of the Treasury*, No. 07-2682.

Because the same issues raised by petitioners in the case now before the Court have been repeatedly heard and decided by federal and Puerto Rico courts over the last thirty years, and are even now being litigated by the same parties or their privies before a federal court of appeals, this is not a proper case for the issuance of a writ of certiorari.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition, and there is none. Respondents therefore respectfully request that the Petition be denied.

Respectfully submitted,

SUSANA PEÑAGARÍCANO-BROWN
Assistant Solicitor General
Counsel of Record

SALVADOR J. ANTONETTI-STUTTS
Solicitor General of Puerto Rico

Office of the Solicitor General
Department of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192
Tel. (787) 721-8010 Ext. 2702
Fax (787) 724-3380
Counsel for Respondents