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May 12, 2006

The Honorable Chief Justice Ronald M. George
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Joan Kiley, et al. v. California Department of Alcoholic Beverage Control*
Docket No. S142281; *amicus curiae* letter of the Washington Legal Foundation

To the Chief Justice and the Associate Justices:

Pursuant to Rule 28(g) of the California Appellate Rules of Court, the Washington Legal Foundation respectfully submits this *amicus curiae* letter in opposition to the Petition for Review in the above-captioned case.

Interests of the *Amicus Curiae*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states, including many in California. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other State and federal courts to address the proper scope of government regulation of the business community. *See, e.g., Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134.

WLF is troubled by the position espoused by Petitioners. If adopted by this Court, it would disrupt the marketing of a broad range of products within California. WLF believes that the Court's intervention in this issue would be inappropriate, particularly because the California legislature not only has indicated its support of the policy being challenged in this case but also is in the midst of a comprehensive review of the issue. WLF believes that any further judicial consideration of the issue is inappropriate in light of the circumstances.

WLF shares the concerns of those who seek to prevent those under 21 from gaining access to alcoholic beverages. But WLF does not believe that such concerns warrant the drastic action sought by Petitioners, given that there is no evidence that the classification or marketing of FMBs has played any role in underage drinking.

Introduction

This case presents a challenge to the long-standing policy of the California Department of Alcoholic Beverage Control (the "Department") to classify Flavored Malt Beverages ("FMBs") as "beer" for regulatory purposes under California state law. Petitioners contend that FMBs should instead be classified as "distilled spirits," a reclassification that would significantly increase the retail cost of FMBs and prohibit as many as 35,000 small retailers from continuing to offer those beverages for sale. Petitioners contend that the reclassification is required by the statutory definitions of "distilled spirits" and "beer." *See* Bus. & Prof. Code §§ 23005, 23006. Petitioners and their supporting *amici* also contend that the classification of FMBs as beer contributes to the consumption of alcoholic beverages by those under 21.

Petitioners filed this action in the California Court of Appeal, First Appellate District, Division Two, on January 17, 2006, seeking issuance of a writ compelling the Department to classify and regulate FMBs as "distilled spirits." The Court of Appeal denied the petition on March 23, 2006. Petitioners filed their petition for review with this Court on April 4, 2006. Petitioners do not contend that the decision below conflicts with any other court decision. Rather, they seek review solely on the ground that the case "presents an important question of law greatly affecting the public welfare." Pet. 9.

Reasons Why the Petition Should Be Denied

WLF agrees with Respondent that review is unwarranted both because the Department has properly interpreted California law and because that interpretation is entitled to considerable deference. *See, e.g., Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 128 Cal. App. 4th 1195, 1205. WLF writes separately in order to emphasize several prudential factors that weigh heavily against granting review.

First, review by this Court is inappropriate in light of the Legislature's on-going review of the issue. Contrary to Petitioner's contention, all indications from the Legislature are that it fully agrees with the Department's long-standing classification of FMBs as "beer." In response to criticisms by the Attorney General and others of the Department's classification of FMBs, the Legislature in September 2005 adopted A.B. 417, a bill stating (in agreement with the Department's position) that a malt product should be classified as "beer" so long as any flavors added to the product do not provide a majority of its alcoholic content. Moreover, the Legislature made clear that A.B. 417 was not intended to amend existing law but rather "simply clarifies existing law." Although Governor Scharzenegger later vetoed the bill, his veto message made clear that he agreed that the bill would simply "codify current law and practice." Furthermore, the veto was not intended to signify his disagreement with current law and practice but rather "to allow a full discussion of the issues surrounding flavored malt beverages."

That "full discussion" is currently taking place. The Senate held hearings on FMBs on February 14, 2006. The Legislature may ultimately decide once again to express a vote of confidence in current Department classification policy, or it may decide to change that policy. But while that review is ongoing, there is little reason for this Court to go out of its way to inject itself into the controversy, given that the Legislature and the Governor will have the last word on this matter. Review is particularly inappropriate given that the Court of Appeal has examined and rejected Petitioners' claims, and given that Petitioners cannot point to case law that conflicts with the Court of Appeal's decision.

Review is also unwarranted in light of the significant impact that a decision overturning the Department's policy could have on the State's economy. A decision requiring that FMBs be classified as "distilled spirits" would result in large price increases for consumers and would cause significant losses to the nearly 35,000 small retail establishments that would no longer be permitted to sell FMBs. Moreover, as explained in detail in the *amicus* letter from the Flavored Malt Beverage Coalition (pp. 9-10), a decision requiring reclassification could have major repercussions far beyond the marketing of FMBs, including the marketing of wine, beer of all types, and all products containing distilled alcohol – even products not intended for consumption as beverages. In light of those potential impacts, resolution of the classification issue is better left to the Department and the Legislature, which are far better positioned that are the courts to weigh the importance of those impacts.

Finally, Petitioners and their supporting *amici* are wrong in suggesting that review is warranted by a pressing need to prevent improper marketing of FMBs to those under age 21. To the contrary, the Federal Trade Commission has determined that charges of improper marketing lack evidentiary support. After being requested by Congress to investigate the issue, the Federal Trade Commission in 2003 issued a study that found "no evidence of targeting underage consumers in the FMB market." FTC, *Alcohol Marketing and Advertising, A Report to Congress*, p. *i* (Sept. 2003). Nor is there any evidence that marketing of FMBs has led to increased underage drinking. Indeed, in the period during which FMBs have been aggressively marketed, teen drinking has continued to decline. *Id.* In any event, while underage drinking is a serious problem, imposing significant new restrictions on the sale FMBs could not possibly have any appreciable impact on the problem – given that FMBs' share of the market (2.6% of beer volume and only 1.5% of total beverage alcohol in 2004) is small and getting smaller. In light of those statistics, there is little reason for this Court to reach out to address an issue that has already received the considered attention of the Department and the Court of Appeal – particularly given that the Legislature's statutory resolution of this issue would supersede any decision the Court might render.

Conclusion

The Washington Legal Foundation respectfully requests that the Court deny the petition for review.

Sincerely,

Daniel J. Popeo
President and General Counsel
Washington Legal Foundation

Richard A. Samp
Chief Counsel
Washington Legal Foundation