

No. 60 Orig.

Supreme Court, U. S.  
FILED

FEB 9 1973

In the  
**SUPREME COURT OF THE UNITED STATES**

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

No. \_\_\_\_\_

COMMONWEALTH OF PENNSYLVANIA,  
*Plaintiff,*

VERSUS

STATE OF NEW YORK, STATE OF KANSAS, COMMONWEALTH  
OF MASSACHUSETTS, STATE OF NEW MEXICO, STATE OF  
SOUTH CAROLINA, STATE OF GEORGIA, STATE OF NEW JER-  
SEY, STATE OF OKLAHOMA, STATE OF ALABAMA, STATE OF  
IDAHO, STATE OF IOWA, STATE OF MAINE, STATE OF MICHIGAN,  
STATE OF MISSISSIPPI, STATE OF MONTANA, STATE OF  
NEW HAMPSHIRE, STATE OF NORTH CAROLINA, STATE OF  
OHIO, STATE OF OREGON, STATE OF UTAH, STATE OF VER-  
MONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHING-  
TON, STATE OF WEST VIRGINIA, and STATE OF WYOMING,  
*Defendants.*

**BRIEF OF DEFENDANT STATE OF OKLAHOMA IN  
OPPOSITION TO MOTION FOR LEAVE TO FILE  
COMPLAINT AND COMPLAINT**

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February, 1973



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In the  
Supreme Court of the United States

OCTOBER TERM, 1972

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No. \_\_\_\_\_  
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COMMONWEALTH OF PENNSYLVANIA,  
*Plaintiff,*

V E R S U S

STATE OF NEW YORK, STATE OF KANSAS, COMMONWEALTH  
OF MASSACHUSETTS, STATE OF NEW MEXICO, STATE OF  
SOUTH CAROLINA, STATE OF GEORGIA, STATE OF NEW JER-  
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*Defendants.*

**BRIEF OF DEFENDANT STATE OF OKLAHOMA IN  
OPPOSITION TO MOTION FOR LEAVE TO FILE  
COMPLAINT AND COMPLAINT**

---

**PROPOSITION I**

**THE ORIGINAL JURISDICTION OF THIS COURT MAY NOT  
BE INVOKED WHERE A STATE, ACTING IN A PROPRIETARY  
CAPACITY AS A WHOLESALE AND RETAIL LIQUOR  
DEALER, ALLEGES ONLY AN INABILITY TO BARGAIN  
FOR LOWER PRICES FOR CONSUMERS OF ALCOHOLIC  
BEVERAGES.**

Plaintiff's Motion for Leave to File Complaint con-  
fronts this Court with a question which it has faced on

prior occasions: Will it allow a movant to invoke its extraordinary power to control the internal conduct of twenty-five states on the basis of an alleged invasion which is neither of serious magnitude nor established with any degree of certainty?

In *New York v. New Jersey*, 256 U.S. 296, 41 S.Ct. 492, 65 L.Ed. 937, New York brought suit to enjoin the discharge of sewage into New York Bay. It was alleged that said discharge was a public nuisance causing "grave injury to the health, property, and commercial welfare" of the citizens of New York. This Court assumed jurisdiction due to the serious and immediate injury alleged, and although the Court dismissed the bill sought for evidentiary insufficiencies, the Court noted:

"Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of a *serious magnitude* . . ." (Emphasis added.)

See also *Connecticut v. Massachusetts*, 282 U.S. 660, 51 S.Ct. 286, 75 L.Ed. 602, involving an alleged nuisance and "menace to public health."

The Court discussed in great detail the type of injury necessary to confer original jurisdiction in *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117. The suit involved legislative action by the State of West Virginia which allegedly threatened to cut off the supply of natural gas to other states. The Court noted that:

"The first question is whether the suits involve a justiciable controversy between states in the sense of

the Judiciary Article of the Constitution. We are of the opinion that they do and that every element of such a controversy is present . . .

“What is sought is not an abstract ruling on that question, but an injunction against such a withdrawal presently threatened and likely to be productive of *great injury* . . .

“Their [the plaintiff’s citizens] health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of *grave public concern* in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.”

The alleged invasion in the instant case has been aptly summarized in plaintiff’s statement in support of motion as follows:

“The adoption of this Liquor Affirmation Policy by the several states has interfered with Pennsylvania’s ability to bargain for discounts . . . as the sole wholesaler and retailer of alcohol liquor and beverages within its borders, Pennsylvania is the largest purchaser of such products in the United States. As such, the vendors of alcoholic liquor and beverages save money in dealing with Pennsylvania . . . Pennsylvania could bargain for and receive price discounts and share these vendor savings by passing on such discounts to the Pennsylvania consumer absent a restrictive Liquor Affirmation Policy. . . .” (Emphasis added.)

The defendant State of Oklahoma urges that the plaintiff herein has alleged no grave injury of a serious magnitude, sufficient for this Court to assume jurisdiction.

In addition, plaintiff is not seeking to vindicate an interest related to its sovereign capacity. *Louisiana v. Mississippi*, 202 U.S. 1, 50 L.Ed. 913 (1906). There is presented here no boundary dispute involving jurisdiction over lands and their inhabitants, no issue affecting property rights and interests of a state, no asserted concern for the health and comfort of the inhabitants of a state and no question respecting rights in rivers and water courses. *Missouri v. Illinois*, 180 U.S. 208, 45 L.Ed. 497 (1901); *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945). Plaintiff is before this Court exclusively in its capacity as "the sole wholesaler and retailer of alcoholic liquor and beverages within its borders." The right it asserts is not its own but that of liquor consumers within its borders. The "right" plaintiff is attempting to assert on their behalf is that of being able to procure preferential price treatment and "passing on such discounts to the Pennsylvania consumer." Defendant submits that to invoke the original and exclusive jurisdiction of this Court under 28 U.S.C.A. § 1251(a)(1) a movant has the burden of demonstrating that there is in fact a genuine controversy "between two or more states." This Court has made it patently clear that a dispute which bears no reasonable relationship to any interest of a state in its sovereign capacity does not constitute a controversy between states. The rationale for this rule becomes apparent where, as here, the dispute amounts to little more than an assertion that the internal regulatory policy of foreign jurisdictions has adverse effects on the prices paid by individual liquor consumers, for whose cause the plaintiff has voluntarily become an advocate.



In *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966), this Court pointed out that the Twenty-first Amendment bestowed broad regulatory power upon the states relative to the control of liquor traffic within their territories. Implementation of the amendment "demands a wide latitude for regulation by the state." Consequently, a state is totally unconfined by traditional Commerce Clause limitations in the restriction and regulation of the in-state distribution and use of intoxicants. [See Proposition II.] The asserted grounds upon which plaintiff relies is the same interference-with-commerce argument which this Court explicitly rejected in *Seagram, supra*. The Oklahoma statute under challenge is indistinguishable from the New York statute upheld in *Seagram, supra*. A state within its sovereign capacity clearly has an interest in the price regulation of alcoholic beverages delivered for distribution within its borders. Plaintiff urges this Court to overturn its consistent line of decisions upholding such regulatory power solely on the grounds that plaintiff is deprived of a bargaining advantage in negotiating for preferential prices for its customers. The extra territorial effects asserted exist, if at all, solely because of a wholly arbitrary exercise of discretion by national distributors of liquor, who may well be the real parties in interest; hence, the case at bar goes no further than *Seagram, supra*, in clearly presenting such effects. The following language in *Seagram, supra*, thus becomes applicable:

"The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

This pronouncement itself effectively abrogates the grounds asserted for plaintiff's Motion for Leave to File Complaint.

Under the governing rule set forth in *New York v. New Jersey, supra*, a movant may not invoke the original jurisdiction of this Court under 28 U.S.C.A. §1251(a)(1) unless the threatened invasion of rights is of serious magnitude, which has not been shown in this case. Moreover, plaintiff is not seeking to vindicate an interest in its sovereign capacity as required by *Louisiana v. Mississippi, supra*. Grounds whereby this Court might assert original jurisdiction under 28 U.S.C.A. §1251(a)(1), therefore, have not been stated, and plaintiff's Motion for Leave to File Complaint should be denied.

## PROPOSITION II

**TITLE 37 O.S. §536.1 OF THE OKLAHOMA STATUTES IS A VALID REGULATION OF THE SALE OF LIQUOR WITHIN THE BORDERS OF THE STATE OF OKLAHOMA AS AUTHORIZED BY THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.**

In the State of Oklahoma, liquor distribution is channeled through privately owned and operated liquor wholesalers, to privately owned and operated retail liquor outlets. The one principle throughout the Oklahoma law is that the sales of liquor, at all levels, shall be without discrimination. Article 27, Section 3 of the Oklahoma Constitution, which was adopted by the people of Oklahoma on April 7, 1959, provides:

“ . . . any manufacturer, . . . distiller, bottler, brewer, or importer of alcoholic beverage . . . shall be required to sell such brands or kinds of alcoholic beverages to every licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination, . . . ”

Title 37 O.S. 1971, §536.1, enacted pursuant to the Oklahoma constitutional mandate, provides:

“No distiller shall sell alcoholic beverages to a wholesaler licensed under the ABC Act at a rate higher than the lowest rate at which such distiller sells in any other state.”

The obvious intent and purpose for these laws was to protect the twelve licensed Oklahoma wholesalers from pricing abuses by out-of-state distillers and manufacturers of liquor. The Oklahoma laws obviously are directed to-

ward the control of intoxicating liquor within the territorial limits of the State of Oklahoma. This Supreme Court has repeatedly upheld the state's power to regulate intoxicants within their borders, notwithstanding some effect on interstate commerce.

In *U. S. v. Frankfort Distilleries*, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951, the Court reviewed convictions for restraint of trade of liquor under the Sherman Act. The accused raised the defense that the Sherman Act was inapplicable due to the state's power under the Twenty-first Amendment. The Court concluded that the state law did not apply to the restraints of trade being reviewed, hence there was no question presented concerning a state law pursuant to the Twenty-first Amendment in conflict with the Sherman Act. However, in his concurring opinion, Justice Frankfurter noted the effect of such a state law, pursuant to the Twenty-first Amendment, if present, in relation to the Commerce Clause, at p. 301:

"If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it."

In *Carter v. Commonwealth of Va.*, 321 U.S. 131, 88 L.Ed. 605, the Court reviewed and upheld a "comprehensive scheme" of regulations which controlled liquor trade. The Court held that the state, pursuant to the Twenty-first Amendment and the Commerce Clause, could regu-

late interstate shipments of liquor *through* Virginia and destined for another state. Despite the effect of the Virginia regulation on interstate commerce, the Court upheld the requirements. In his concurring opinion Justice Frankfurter noted the Virginia regulation was sustainable, even though the liquor in question was destined for another state. In commenting on the various state's powers to regulate liquor pursuant to the Twenty-first Amendment, he stated:

“State control must yield to superior Federal power, but state control by one state, since the Twenty-first Amendment, need not yield to state control by another state.”

Since Oklahoma's regulation comes within the purview of the Twenty-first Amendment, then it should not fail because of any purported “extraterritorial” effect on any other state's regulation of intoxicants.

In *Ziffrin v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128, the Court upheld Kentucky regulations of those persons permitted to transport liquor. In answering alleged violations of the Commerce Clause, the Court noted:

“The power of a state to regulate her internal affairs notwithstanding the consequent effect upon interstate commerce was much discussed in *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 189, 82 L.Ed. 734, 741, 58 S.Ct. 510. There it was again affirmed that although regulation by the state might impose some burden on interstate commerce this was permissible when ‘an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.’”

The defendant, State of Oklahoma, submits that the regulation of intoxicating liquor within its boundaries is an inseparable incident of the legislative authority as granted by the Tenth and Twenty-first Amendments.

In *State Board of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38, the Court upheld a California regulation which required a license to import beer, a direct burden on interstate commerce. In upholding the regulation the Court noted:

“The words used [in the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions it prescribes.”

A review of the cases construing a state's power under the Twenty-first Amendment clearly establishes the principle that the Commerce Clause does not restrict a state in regulating the importation of intoxicating liquor notwithstanding the fact that said regulation may impose a burden on the interstate commerce. The preceding cases have upheld regulations which have imposed more direct and substantial burdens on commerce than that alleged herein.

We have been unable to find any case which even infers that individuals have a constitutional right to purchase liquor at the lowest possible price. Indeed, there is no such “right.” On the other hand, numerous cases have repeatedly held, that a state does have a plenary power to regulate intoxicants which are for “delivery or use” within its borders.

The defendants submit that the interests of the twenty-five defendants, including the State of Oklahoma,

in controlling liquor for the general health, welfare, and safety of its citizens, far outweighs any alleged interest of Pennsylvania in cheaper liquor. The defendants have regulated liquor to prevent a chaotic price structure, with potential evils arising therefrom. Such power was exercised pursuant to the Twenty-first Amendment, and should be sustained as a matter of law. The defendant State of Oklahoma respectfully urges this Court to deny the Motion for Leave to File Complaint herein.

Respectfully submitted,

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February, 1973





# APPENDIX

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This is to certify that I mailed a copy of the instrument to which this certification is attached to the following named counsel of record this \_\_\_\_ day of \_\_\_\_\_, 1973:

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