FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 60 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

vs.

STATE OF NEW YORK, STATE OF KANSAS, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW MEXICO, STATE OF SOUTH CAROLINA, STATE OF GEORGIA, STATE OF NEW JERSEY, 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 VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON, STATE OF WEST VIRGINIA, and STATE OF WYOMING,
Defendants.

BRIEF OF THE STATE OF KANSAS OPPOSING THE MOTION OF THE COMMONWEALTH OF PENNSYLVANIA FOR LEAVE TO FILE A COMPLAINT

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INDEX

Statement of Facts 1
Argument and Authorities 2
Conclusion 7
Appendix "A" 9

TABLE OF CASES

Alabama Power Co. v. *Ickes*, 302 U.S. 464, 479, 83 L.Ed. 374, 58 S.Ct. 300 (1937) 5
Ashwander v. *T.V.A.*, 297 U.S. 288, 80 L.Ed. 688, 56 S.Ct. 466 (1936) 7
Beard v. *City of Alexandria*, 341 U.S. 622, 95 L.Ed. 1233, 71 S.Ct. 920 (1951) 5
California v. *LaRue*, ... U.S. ....., ... L.Ed.2d ....., 93 S.Ct. 390 (1972) 3-4
California v. *Washington*, 358 U.S. 64, 3 L.Ed.2d 106, 79 S.Ct. 116 (1958) 4
Cities Service Gas Co. v. *Peerless Oil & Gas*, 340 U.S. 179, 186, 71 S.Ct. 215, 95 L.Ed. 190 (1950) 2-3
Department of Revenue v. *Beam Distilling Co.*, 377 U.S. 341, 12 L.Ed.2d 362, 84 S.Ct. 1247 (1964, import-export clause) 4
Ferguson v. *Skrupa*, 372 U.S. 726, 10 L.Ed.2d 93, 83 S.Ct. 1028 (1963) (Harlan, J., concurring) 5
Frothingham v. *Mellon*, 262 U.S. 447, 67 L.Ed. 1078, 43 S.Ct. 597 (1922) 6
Hines Trustees v. *United States*, 263 U.S. 143, 68 L.Ed. 216, 44 S.Ct. 72 (1923) 6-7
Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330, 12 L.Ed.2d 350, 84 S.Ct. 1293 (1964) 3, 4
Jameson & Co. v. *Morgenthau*, 307 U.S. 171, 83 L.Ed. 1189, 59 S.Ct. 804 (1939, Federal Alcohol Administration Act) 4

Joint Anti-Facist Refugee Committee v. *McGrath*, 341 U.S. 123, 151, 95 L.Ed. 817, 71 S.Ct. 624 (1950, Frankfurter, J., concurring) 6

Joseph S. Finch & Co. v. *McKittrick*, 305 U.S. 395, 83 L.Ed. 246, 59 S.Ct. 256 (1939) 4

Joseph E. Seagram & Sons, Inc. v. *Hostetter*, 384 U.S. 35, 43, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966) 2, 6

Laird & Company v. *Cheney*, 196 Kan. 675, 414 P.2d 18 (1966), App. Dis., 385 U.S. 371, 17 L.Ed.2d 430, 87 S.Ct. 531 (1966) 6

License Cases, 5 How. (U.S.) 504, 12 L.Ed. 256 (1847) .. 4

Mugler v. *Kansas*, 132 U.S. 562, 31 L.Ed. 205, 8 S.Ct. 247 (1887) 4

Nebbia v. *New York*, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505 (1933) 4

South Carolina State Highway Department v. *Barnwell Brothers*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938) 2

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 767, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) 2

Sprunt & Son v. *United States*, 281 U.S. 249, 74 L.Ed. 832, 50 S.Ct. 315 (1929) 6

State Board of Equalization v. *Young's Market Co.*, 299 U.S. 59, 62, 81 L.Ed. 38, 51 S.Ct. 77 (1936) 3, 4, 5

Tennessee Electric Power Co. v. *T.V.A.*, 306 U.S. 118, 137, 140, 83 L.Ed. 543, 59 S.Ct. 366 (1939) 5, 6, 7

Townsend v. *Yeomans*, 301 U.S. 441, 81 L.Ed. 1210, 57 S.Ct. 842 (1936) 4

United States v. *Frankfort Distillers*, 324 U.S. 239, 89 L.Ed. 951, 65 S.Ct. 661 (1945, Sherman Anti-Trust Act) 4

Ziffrin v. *Reeves*, 308 U.S. 132, 138, 84 L.Ed. 128, 60 S.Ct. 163 (1939) 3, 4, 5

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STATE OF NEW YORK, *et al.*,
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BRIEF OF THE STATE OF KANSAS OPPOSING THE MOTION OF THE COMMONWEALTH OF PENNSYLVANIA FOR LEAVE TO FILE A COMPLAINT

COMES NOW the State of Kansas and respectfully files its brief in opposition to Pennsylvania's motion for leave to file a complaint herein.

STATEMENT OF FACTS

The State of Kansas has enacted various liquor control regulations among which is a series of statutes referred to as the Liquor Affirmation Policy (Appendix A, pg. 9). That policy requires the monthly filing of price schedules by suppliers for liquor sales to distributors in the State of Kansas. Accompanying this price list must be an affirmation that the filed price is no higher than the lowest price at which sales were made anywhere else in the United States. Distributors may purchase only from those suppliers complying with this affirmation policy.

Thus, instead of licensing the out-of-state suppliers, the State of Kansas has chosen to exercise control over them by authorizing distributors to purchase only from those suppliers who comply with the affirmation policy.

The plaintiff, Commonwealth of Pennsylvania, now alleges that by virtue of a suppliers' decision to sell in the State of Kansas, the Kansas Affirmation Policy has somehow jeopardized "plaintiff's right to bargain for and receive discounts, including quantity and prompt pay discounts." Support for this action is based on the "extraterritorial effect" phrase found in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 43, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966), a case that involved a similar affirmation policy of the State of New York.

ARGUMENT AND AUTHORITIES

When a state regulates matters of local concern, local in character and effect such that its impact on national commerce does not seriously interfere with its operation, and the consequent incentive to deal with the subject matter on a national level is slight, then such state regulation has generally been held to be within the state's authority. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *South Carolina State Highway Department* v. *Barnwell Brothers,* 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938).

The only requirement consistently recognized is that the state regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that local interest at stake outweigh whatever national interest there might be in the prevention of the state restriction. *Cities Service Gas Co.* v. *Peerless Oil & Gas,* 340 U.S. 179, 186, 71 S.Ct. 215, 95

L.Ed. 190 (1950). The Kansas Affirmation Policy clearly falls within the purview of this guideline. Moreover, the history of Congressional legislation in the area of intoxicants[1] and the 21st Amendment[2] point unmistakingly to the conclusion that the regulation and control of intoxicants in all its phases is a matter of local interest. In this regard, the second clause of the 21st Amendment to the United States Constitution clearly indicates that:

> "The importation or transportation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

These words have been held to confer upon the State the power to forbid all importations which do not comply with the conditions prescribed; *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 62, 81 L.Ed. 38, 51 S.Ct. 77 (1936); allow the State to exercise its police power totally unconfined by traditional commerce clause limitations; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330, 12 L.Ed.2d 350, 84 S.Ct. 1293 (1964); and exercise large discretion as to the means employed. *Ziffrin* v. *Reeves*, 308 U.S. 132, 138, 84 L.Ed. 128, 60 S.Ct. 163 (1939). The greater includes the lesser. *Young's Market*, supra at U.S. 63. This right of the states to control and regulate intoxicants unfettered by the commerce clause has been consistently followed in later decisions. *California* v. *LaRue*, ... U.S. ....., ... L.Ed.2d ....., 93 S.Ct.

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1. 26 Stat. 313, 27 U.S.C. 121 (Wilson Act); 49 Stat. 877, 27 U.S.C. 122 (Webb-Kenyon Act).

2. Legislative debate indicates the purpose of the Twenty-first Amendment to be "to restore to the states . . . absolute control in effect over interstate commerce affecting intoxicants . . . . (L)et the people of each state deal with that subject (of control), and they will do it more effectively . . . it is not the business of the Federal Government." 76 Cong. Rec., 4143-4146 (Sen. Blain, Wisconsin).

390 (1972); *California* v. *Washington,* 358 U.S. 64, 3 L.Ed.2d 106, 79 S.Ct. 116 (1958); *Ziffrin* v. *Reeves,* 308 U.S. 132, 84 L.Ed. 128, 60 S.Ct. 163 (1939); *Joseph S. Finch & Co.* v. *McKittrick,* 305 U.S. 395, 83 L.Ed. 246, 59 S.Ct. 256 (1939).

The Commonwealth of Pennsylvania's complaint asserts neither an invasion of an enumerated power nor a violation of specific legislation of Congress, but rests its position upon the general provisions of the commerce clause. While *Idlewild* did make it clear that the second clause to the Twenty-first Amendment did not operate to totally repeal the commerce clause in the area of liquor regulation, the circumstances under which this language has been applied have involved more than the generalized authority gives Congress in the commerce clause. *Department of Revenue* v. *Beam Distilling Co.,* 377 U.S. 341, 12 L.Ed.2d 362, 84 S.Ct. 1247 (1964, import-export clause); *United States* v. *Frankfort Distillers,* 324 U.S. 239, 89 L.Ed. 951, 65 S.Ct. 661 (1945, Sherman Anti-Trust Act); *Jameson & Co.* v. *Morgenthau,* 307 U.S. 171, 83 L.Ed. 1189, 59 S.Ct. 804 (1939, Federal Alcohol Administration Act). Under the above authority, the pleadings of the complaint indicate no reason to deviate from the decision in *Young's Market.*

State laws, whether prohibiting or regulating the manufacture or sale of intoxicants, were long ago upheld when challenged as repugnant to the commerce clause. *Ziffrin* v. *Reeves,* 308 U.S. 132, 84 L.Ed. 128, 60 S.Ct. 163 (1939); *Mugler* v. *Kansas,* 132 U.S. 562, 31 L.Ed. 205, 8 S.Ct. 247 (1887); *License Cases,* 5 How. (U.S.) 504, 12 L.Ed. 256 (1847). It has likewise been well established that pricing regulations are an equally permissible exercise of state authority; *Townsend* v. *Yeomans,* 301 U.S. 441, 81 L.Ed. 1210, 57 S.Ct. 842 (1936); *Nebbia* v. *New York,* 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505 (1933); the test being whether

the regulation bears a rational relation to a constitutionally permitted objective. *Ferguson* v. *Skrupa,* 372 U.S. 726, 10 L.Ed.2d 93, 83 S.Ct. 1028 (1963) (Harlan, J., concurring.)

The objective of the Kansas Affirmation Policy is the protection of its citizens from the evils incident to intoxicants. This is a recognized, permissible objective. *Ziffrin* v. *Reeves,* supra at U.S. 139. It is a reasonable objective to protect the social, as distinguished from the economic, welfare of the state. The Court should not, because of the commerce clause, deny the exercise locally. *Beard* v. *City of Alexandria,* 341 U.S. 622, 95 L.Ed. 1233, 71 S.Ct. 920 (1951).

To sustain the plaintiff's complaint would create an unusual anomaly: the State of Kansas could absolutely prohibit any importation or sale, but is powerless to enact any lesser regulation and control. To so construe the application of the Affirmation Policy as the Commonwealth of Pennsylvania would suggest results in "not a construction of the (Twenty-first) Amendment, but a rewriting of it." *State Board of Equalization* v. *Young's Market Co.,* 299 U.S. 59, 62, 81 L.Ed. 38, 51 S.Ct. 77 (1936).

Irrespective of this authority, and assuming arguendo that the Kansas Affirmation Policy does have the alleged extraterritorial effect, we think that plaintiff is not the proper party to raise the question. One must complain of an invasion of his legal rights; one of property, one arising out of contract, one protected against tortious invasion, or one founded in a statute which confers a privilege. *Tennessee Electric Power Co.* v. *T.V.A.,* 306 U.S. 118, 137, 140, 83 L.Ed. 543, 59 S.Ct. 366 (1939); *Alabama Power Co.* v. *Ickes,* 302 U.S. 464, 479, 83 L.Ed. 374, 58 S.Ct. 300 (1937). That the plaintiff, Commonwealth of Pennsyl-

vania, may show an adverse personal interest alone is not sufficient to confer standing. *Joint Anti-Facist Refugee Committee* v. *McGrath,* 341 U.S. 123, 151, 95 L.Ed. 817, 71 S.Ct. 624 (1950, Frankfurter, J., concurring.) While it may be of enormous financial interest to plaintiff that the suppliers choose not to confer these discounts, this interest is insufficient to confer standing to raise the issue. *Tennessee Electric Power Co.* v. *T.V.A.,* supra (1939).

Plaintiff's complaint, boiled down, is simply that it has been unable to achieve the benefit of a bargain *because* the suppliers have chosen not to bargain. There is no requirement in the Kansas Policy that prevents suppliers from dealing freely with any customer, and they may, at their discretion, sell at whatever price they deem reasonable. The plaintiff's inability to successfully bargain for those discounts creates no invasion of any legal right.

If any extraterritorial effect can be said to exist, it exists as an invasion of the legal rights of the suppliers alone. *Cf. Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* supra; *Laird & Company* v. *Cheney,* 196 Kan. 675, 414 P.2d 18 (1966), App. Dism., 385 U.S. 371, 17 L.Ed.2d 430, 87 S.Ct. 531 (1966). Plaintiff's interest remains too remote, uncertain and indirect to grant standing. *Frothingham* v. *Mellon,* 262 U.S. 447, 67 L.Ed. 1078, 43 S.Ct. 597 (1922).

Frequently, governmental actions may affect the legal interests of some persons, yet cause only a consequential detriment to another. Whether the person consequentially harmed can challenge the action depends on the "directness" of the impact of the action on him. The plaintiff can have no standing to attack a statute not applicable to him but merely affecting his business advantage over other purchasers. *Sprunt & Son* v. *United States,* 281 U.S. 249, 74 L.Ed. 832, 50 S.Ct. 315 (1929); *Hines Trustees* v. *United*

States, 263 U.S. 143, 68 L.Ed. 216, 44 S.Ct. 72 (1923); *Tennessee Power Co.* v. *T.V.A.,* supra.

We would be wise to recall Justice Brandeis' warning to "avoid passing prematurely on constitutional issues"; *Ashwander* v. *T.V.A.,* 297 U.S. 288, 80 L.Ed. 688, 56 S.Ct. 466 (1936). Plaintiff's disagreement with its suppliers, as well as its inability to achieve the benefit of the bargain, under no circumstances should confer standing in this matter.

CONCLUSION

For the reasons stated, the motion to leave to file a complaint should be denied.

Respectfully submitted,

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APPENDIX "A"

41-1111. Regulation of sales prices of alcoholic liquors sold by manufacturers, distributors and retailers; legislative findings. In the public interest and in order to promote the orderly sale and distribution of alcoholic liquor, to foster temperance and to promote the public welfare, in the state of Kansas, the legislature finds: (*a*) That sales prices of alcoholic liquor sold by manufacturers and others to distributors licensed in this state should be no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States; and (*b*) that minimum sale prices for alcoholic liquor sold by distributors and retailers licensed in this state should be determined and regulated by law. [L. 1961, ch. 241, § 1; April 10.]

41-1112. Same; prices filed by manufacturers and others to be as low as in any other state; determination. The prices filed by manufacturers and others authorized to sell alcoholic liquors to licensed distributors, pursuant to subsection (1) of section 41-1101 of the General Statutes Supplement of 1959, shall be the current prices, F. O. B. point of shipment, and said price as filed by each manufacturer or vendor shall be as low as the lowest price for which the item is sold anywhere in any state in the continental United States by such manufacturer or vendor: *Provided,* That in determining the lowest price for which an item of alcoholic liquor is sold in any such state there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such state by the vendor. [L. 1961, ch. 241, § 2; April 10.]