IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 60 Original

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

v.

STATE OF NEW JERSEY, *et al.*,

Defendants.

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

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Statement of the Case

The State of New Jersey, as have the other defendants in this matter, has enacted a regulatory scheme whose purpose, pursuant to the provisions of the Twenty-first Amendment to the United States Constitution, is to control closely the sale and consumption of alcoholic bever-

ages within the State. This regulatory scheme includes an administrative regulation promulgated by the New Jersey Division of Alcoholic Beverage Control requiring manufacturers and wholesalers of alcoholic beverages to file quarterly reports containing a variety of information, including wholesale bottle and standard case prices. In addition, Rule 2(a) of State Regulation No. 34 provides in pertinent part:

> "No manufacturer or wholesaler of distilled alcoholic beverages (including all distilled or rectified spirits, alcohol, brandy, whiskey, rum, gin and all similar distilled alcoholic beverages, and all dilutions and mixtures of one or more of the foregoing such as liqueurs, cordials and similar compounds) shall file any such price or discount listing higher than the lowest price or lower than the highest discount at which any such alcoholic beverage will be sold by said manufacturer or wholesaler to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the period for which such listing shall be in effect. Manufacturers and wholesalers of distilled alcoholic beverages filing such price and discount listings shall, not later than the fifteenth day of any month subsequent to the month of filing, file with the Director an amended reduced price and higher discount listing to become effective on the first day of the following month, to conform to the lowest price and highest discount at which any such alcoholic beverages shall be sold by such manufacturers or wholesaler or by any New Jersey or other manufacturer or wholesaler to any wholesaler

> anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during such following month."

The Commonwealth of Pennsylvania, although conceding at the outset that the Twenty-first Amendment bestowed upon the states broad regulatory power over liquor traffic within their territories, contends nevertheless that the liquor affirmation laws of New Jersey and the other defendants in some manner has caused an increase in the prices paid to producers by Pennsylvania. Pennsylvania has failed to give any hint with respect to the precise mechanism by which such increase in prices is assertedly produced, nor has it explained why the higher prices are not attributable to actions of the liquor producers themselves. Despite these obvious deficiencies, Pennsylvania has nevertheless sought leave to file the complaint as an exercise of the original jurisdiction possessed by this Court. It is the position of the State of New Jersey that the allegations of the Commonwealth of Pennsylvania do not satisfy the standard of immediate and serious magnitude susceptible of judicial redress earlier articulated by this Court as a prerequisite for the exercise of its original jurisdiction and that consequently the motion for leave to file the complaint should be denied.

ARGUMENT

Leave to file the Complaint should be denied since New Jersey and the other defendants clearly have the power pursuant to the Twenty-First Amendment to regulate the price of alcoholic beverages by enacting affirmation laws.

Earlier decisions of this Court demonstrate that, before leave will be granted to a state to invoke the original jurisdiction provisions of Article III of the United States Constitution, the state must meet a rigorous standard with respect to both the gravity of the claim and the likelihood of prevailing if the claim is litigated. The State of New Jersey respectfully submits that the complaint of the Commonwealth of Pennsylvania does not meet that standard.

As this Court noted in *State of Alabama* v. *State of Arizona,* 291 U. S. 286, 54 S. Ct. 39, 78 L. Ed. 798 (1934), the claim must be of a serious magnitude. See also *State of Colorado* v. *State of Kansas,* 320 U. S. 383, 64 S. Ct. 176, 8 L. Ed. 116 (1943). Moreover, the question of magnitude is intimately connected with the question whether the circumstances of which complaint is made are susceptible of judicial redress. Thus, in denying leave to the Commonwealth of Massachusetts to file a complaint seeking a declaration by this Court whether it or Missouri could impose inheritance and similar taxes upon the estate of a decedent, Chief Justice Hughes stated:

> "To constitute such a controversy [between the states], it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which

> is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Commonwealth of Massachusetts* v. *State of Missouri,* 308 U. S. 1, 15, 60 S. Ct. 39, 42, 84 L. Ed. 3 (1939).

There this Court declined to accept jurisdiction because the claims of the two states were not mutually exclusive and consequently there was no constitutional conflict, while in other cases original jurisdiction was declined because the facts presented failed to support an inference that rights had been violated. Thus, in *State of Washington* v. *State of Oregon,* 297 U. S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936), a complaint alleging wrongful diversion of the waters of a river was dismissed upon its merits because, in the words of Justice Cardozo:

> "The court is asked upon uncertain evidence of prior right and still more uncertain evidence of damage to destroy possessory interests enjoyed without challenge for over half a century. In such circumstances, an injunction would not issue if the contest were between private parties, at odds about a boundary. Still less will it issue here in a contest between states, a contest to be dealt with in the large and ample way that alone becomes the dignity of the litigants concerned." 297 U. S. at 529, 56 S. Ct. at 545-46.

Only factual substantiality of the claim combined with meritoriousness under applicable legal principles justifies the exercise of the original jurisdiction of this Court. See *State of Texas* v. *State of Florida,* 306 U. S. 398, 59 S. Ct. 563, 83 L. Ed. 817 (1939), and *State of Nebraska* v. *State of Iowa,* 92 S. Ct. 1379 (1972).

When set against this standard the complaint of the Commonwealth of Pennsylvania in the present case is obviously deficient. Even if this matter were to be adjudicated within the context of traditional Commerce Clause limitations (which it is not), the meagre factual allegations of the Commonwealth of Pennsylvania would not suffice to support a cause of action, for a state may enact reasonable regulatory measures in order to promote and protect state interests as long as such measures are not clearly outweighed by a burden placed upon a national interest deriving from the necessity for free commerce among the states. *South Carolina State Highway Department* v. *Barnwell Brothers,* 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938).

Of more immediate pertinence, however, is the proposition that state regulations controlling the sale of alcoholic beverages must be construed in light of the Twenty-first Amendment to the United States Constitution and that:

> "A State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, 330, 84 S. Ct. 1293, 1297, 12 L. Ed. 2d 350 (1959).

When this Court declared valid the New York Liquor Affirmation Law against a challenge by wholesalers which was substantially identical to that made here, it repeated this principle and held that in the circumstances designated "the Twenty-first Amendment demands wide latitude for regulation by the State." *Joseph E. Seagram and Sons, Inc.* v. *Hostetter,* 384 U. S. 35, 42, 86 S. Ct. 1254, 1259, 16 L. Ed. 2d 336 (1966).

In seeking to invoke the original jurisdiction of this Court, the Commonwealth of Pennsylvania has attempted to rest its entire claim upon a remark by Justice Stewart in *Seagram* that at some point the "extraterritorial effects" of a liquor affirmation law might be so great as to "constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause." 384 U. S. at 42-43, 86 S. Ct. at 1260. Beyond the obvious point that this Court was there referring to an interference with the private rights of the wholesaler, it must be noted that Justice Stewart followed these remarks with a citation to *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935), in which a New York milk regulation was invalidated because it erected a virtual wall upon the boundaries of New York State shutting down interstate commerce in the milk trade. Not even the Commonwealth of Pennsylvania has alleged the supposed effects of the liquor affirmation laws in New Jersey and in the other defendant states to be of such monumental consequence.

In *Seagram*, it must be remembered, this Court noted that the asserted extraterritorial effects caused by liquor affirmation laws are "largely matters of conjecture." *Id.* Indeed, this Court could find no clear inference that liquor affirmation laws "must inevitably produce higher prices in other states" and deferred any determination concerning extraterritorial effects until "a case arises that clearly presents them." *Id.* The assertion by the Commonwealth of Pennsylvania that this is that case cannot be accepted, for, as the attorneys general of the defendants Commonwealth of Massachusetts and State of Kansas have noted in their briefs, it would appear that the plaintiff's complaint is not against the twenty-five defend-

ant states and commonwealths, but against liquor wholesalers and distributors which, presumably, are not dealing freely and independently with the plaintiff in order to allow the plaintiff the bargain of the lowest price possible. If the facts alleged by the plaintiff permit any inference of a "conspiracy," the conspiracy is that of the manufacturers in restraint of trade and is subject to conventional prosecutorial and judicial relief. *See United States* v. *Frankfort Distilleries,* 324 U. S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945).

It is apparent, therefore, that all of the circumstances of this matter militate against the granting to the plaintiff Commonwealth of Pennsylvania leave to file its complaint. By virtue of earlier decisions of this Court construing state power to regulate liquor under the Twenty-first Amendment the plaintiff has no hope of prevailing upon the merits of its claim; indeed, the very authority of the Commonwealth of Pennsylvania to demand the lowest possible price from the manufacturers with which it does business is grounded within the identical constitutional grant—the Twenty-first Amendment—which permits the defendant states to promulgate the liquor affirmation laws of which the plaintiff complains. Only this term this Court has reaffirmed in a pair of decisions the authority of the states to regulate, not only the importation of alcoholic beverages into their jurisdictions, but also all circumstances surrounding the use of such beverages. Thus, in *Heublein, Inc.* v. *South Carolina Tax Commission,* 41 L. W. 4093 (Docket No. 71-879, decided December 18, 1972), this Court repeated its statement in *Idlewild Bon Voyage* that the states are unconfined by traditional Commerce Clause limitations and held that South Carolina could statutorily require liquor importers to maintain records and offices manifesting a substantial business con-

nection with the state and subsequently tax the income derived from such business affairs. It is significant that, in so holding, this Court pointed out that under the regulatory scheme at issue "it is easier for the State to enforce its requirements that the wholesale price in South Corolina be no higher than that elsewhere in the country." 41 L. W. at 4095. Obviously, then, the *Heublein* decision reiterates the decision of this Court in *Seagram* that the Twenty-first Amendment permits each of the states to assure that liquor prices be as low as anywhere else in the nation. See also *State of California* v. *LaRue,* 41 L. W. 4039, 4042 (Docket No. 71-36, decided December 5, 1972), holding that the Twenty-first Amendment provides an "added presumption in favor of the validity of the state regulation. . . ."

Furthermore, in view of the fact that the dispute of the Commonwealth of Pennsylvania is not genuinely with the defendant State, but with the manufacturers which presumably are utilizing the liquor affirmation laws as a facade for sustaining higher prices, the decision of this Court in *State of Illinois* v. *City of Milwaukee, Wisconsin,* 92 S. Ct. 1385 (1972), assumes great importance. There the State of Illinois sought leave to file an original jurisdiction complaint against various political subdivisions of the State of Wisconsin for pollution of Lake Michigan. Although these political subdivisions, as citizens of a state, could have been sued under the head of original jurisdiction, this Court noted that the litigation could have been initiated in the United States District Courts and that consequently original jurisdiction was not mandatory and should be declined. If this Court did not grant leave to file an original jurisdiction complaint even there, in which the agency relationship between the political subdivisions and the State of Wisconsin could have supported the exer-

cise of original jurisdiction, the exercise of that jurisdiction should also be declined here, for in this matter it is not even clear that the plaintiff Commonwealth of Pennsylvania has identified the proper defendants nor that, if the defendants were properly identified, these twenty-five states and commonwealths rather than the private liquor producers would be named.

In short, this matter is patently deficient both in terms of its factual representations and its opportunity for legal redress. Beneath the allegations of its complaint lies no more than factual and legal conjecture. The circumstances indicate, therefore, that the matter does not present the immediate gravity required for this Court to exercise its sparingly invoked original jurisdiction. Consequently leave to file the complaint should be denied.

CONCLUSION

For these reasons the State of New Jersey respectfully submits that this Court should deny the motion of the Commonwealth of Pennsylvania for leave to file its complaint against the State of New Jersey and the other defendant states and commonwealths.

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