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No. \_\_\_\_\_, Original

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ALEXANDER L. STEVA

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1984

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COMMONWEALTH OF PENNSYLVANIA,  
Plaintiff  
vs.

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, STATE OF WYOMING,  
STATE OF ARIZONA, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE  
OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII,  
STATE OF KANSAS, STATE OF LOUISIANA, STATE OF MARYLAND,  
COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF  
NEBRASKA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NEW  
YORK, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF SOUTH  
CAROLINA, AND STATE OF TENNESSEE,

Defendants

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MOTION FOR LEAVE TO FILE COMPLAINT, WITH  
COMPLAINT AND BRIEF IN SUPPORT OF MOTION

---

Respectfully submitted,

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Chief Counsel, Pennsylvania  
Liquor Control Board  
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Attorney General

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### QUESTION PRESENTED

Whether a state law or practice which has the effect of fixing the price of distilled spirits in all other states violates the Commerce Clause and presents an issue appropriate for the exercise of this Court's original jurisdiction when thirty-eight states have such statutes, regulations or practices.



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SUPREME COURT OF THE UNITED STATES

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October Term, 1984  
No.                      Original

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COMMONWEALTH OF PENNSYLVANIA,  
Plaintiff

vs.

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VERMONT, COMMONWEALTH OF VIRGINIA, STATE  
OF WASHINGTON, STATE OF WEST VIRGINIA,  
STATE OF WYOMING, STATE OF ARIZONA,  
STATE OF CALIFORNIA, STATE OF  
CONNECTICUT, STATE OF DELAWARE, STATE OF  
FLORIDA, STATE OF GEORGIA, STATE OF  
HAWAII, STATE OF KANSAS, STATE OF  
LOUISIANA, STATE OF MARYLAND, COMMON-  
WEALTH OF MASSACHUSETTS, STATE OF  
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OF NEW YORK, STATE OF OKLAHOMA, STATE OF  
RHODE ISLAND, STATE OF SOUTH CAROLINA,  
AND STATE OF TENNESSEE,

Defendants

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MOTION FOR LEAVE TO FILE COMPLAINT

---

Pursuant to Rule 9 of the Rules  
of this Court, the Commonwealth of

Pennsylvania, by its Attorney General, asks leave of this Court to file its Complaint against the defendant states submitted herewith.

In support of this Motion, plaintiff respectfully states as follows:

1. National sales of distilled spirits to wholesalers exceeded \$14 billion in 1982. Pennsylvania, like sixteen of the defendant states, acts as the sole wholesaler within its borders, and as such, purchased in excess of \$292 million worth of distilled spirits in fiscal year 1983-1984.

2. Commencing in 1938, a nationwide system of uniform wholesale purchase prices for distilled spirits sold in interstate commerce was established and ultimately adopted by thirty-eight states, including the Commonwealth of Pennsylvania.



3. Each defendant state adopted this system, known as "price affirmation", by statute, regulation or purchase contract provision which requires, inter alia, that suppliers of distilled spirits agree for each product sold to:

(a) charge all of their wholesale customers within the state a price no higher than the lowest price charged to any other wholesale purchaser in the nation, regardless of size, location, cost of doing business, or local competitive factors anywhere in the country; and

(b) publicly post their selling prices, and in some cases their prospective selling prices, in order to facilitate policing of the various price affirmation statutes, regulations and practices.

4. The inevitable and demonstrable effect of a state's affirmation

policy is to establish the minimum prices at which a supplier may sell to its wholesale customers any where in the country, regardless of the size of those customers or local competitive conditions.

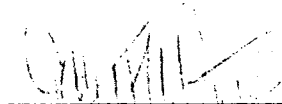
5. The inevitable and demonstrable effect of all thirty-eight affirmation policies is to set a single wholesale price in all thirty-eight states, irrespective of normal market forces; charging a customer more than the affirmation price would violate that customer's home state's affirmation policy. Charging that customer less than the affirmation price would violate the affirmation policies of the other thirty-seven states. The result is a national inflexible and noncompetitive pricing structure distorting the free market in a significant industry, in violation of the Commerce Clause of the

Constitution of the United States.

6. The Commonwealth of Pennsylvania has suffered and will continue to suffer damage due to the unavailability of a free market for products that it purchases in vast quantities. Moreover, the national economy as a whole is injured by the distortions caused by the protectionist price affirmation laws and practices.

WHEREFORE, Plaintiff respectfully requests that this Court grant its Motion for Leave to File Complaint.

Respectfully submitted,



---

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Date: February 25, 1985

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1984

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COMMONWEALTH OF PENNSYLVANIA,  
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vs.

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OF KANSAS, STATE OF LOUISIANA, STATE OF MARYLAND, COMMONWEALTH OF  
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JERSEY, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF OKLAHOMA,  
STATE OF RHODE ISLAND, STATE OF SOUTH CAROLINA, AND STATE OF  
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Defendants

COMPLAINT

Respectfully submitted,

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## COMPLAINT

The Commonwealth of Pennsylvania, by its Attorney General, institutes this action seeking a declaratory judgment and permanent injunctive relief, and alleges upon information and belief as follows:

### PARTIES

1. Plaintiff, the Commonwealth of Pennsylvania, is a sovereign state of the United States of America and, in that capacity, is the first purchaser of all distilled spirits distributed for consumption and use within its borders.

2. Defendants Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming

("the Control State Defendants") are all sovereign states of the United States of America which, like Plaintiff Pennsylvania, purchase all distilled spirits distributed for consumption and use within their respective borders each of which requires, under penalty of law, that within their respective borders initial sellers of distilled spirits maintain for each product a price uniform throughout the territories of all parties to this action.

3. Defendants Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, South Carolina and Tennessee ("the Affirmation Law Defendants") are all sovereign states of the United States of America, each of which requires, under penalty of law, that

within their respective borders initial sellers of distilled spirits maintain for each product a price uniform through the territories of all parties to this action ("the affirmation price").

#### JURISDICTION

4. The original jurisdiction of the Supreme Court is based upon Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251(a)(1), since this is a controversy between two or more states.

5. Pennsylvania possesses no plain, speedy or adequate remedy at law and suffers -- and will continue to suffer -- irreparable injury unless all distilled spirit price affirmation statutes, regulations and practices, including Pennsylvania's affirmation warranty, are permanently enjoined.



Because of the interrelated nature of the nationwide affirmation system, Pennsylvania cannot voluntarily abandon its affirmation policy without subjecting itself to significant economic harm, as described more fully in paragraphs 13 and 14 .

6. Because of the interrelated nature of the nationwide affirmation system and the limits of in personam jurisdiction, there is no other forum in which Pennsylvania can obtain a trial on the merits of this entire action except before this Honorable Court.

## DISTILLED SPIRITS AFFIRMATION

7. Following passage of the Twenty-first Amendment to the Constitution of the United States in 1933, Plaintiff and the Control State Defendants (collectively, the "Control States") sought to control the distribution of alcoholic beverages within their borders by the authorization of state-run monopolies which purchase, inter alia, distilled spirits at wholesale from distillers and other agents found within that state's borders.

8. In 1938, representatives of thirteen of the Control States participated in an industry meeting in Des Moines, Iowa, to discuss common problems. Pennsylvania did not participate in the meeting.

9. Following the Des Moines Convention, all Control States adopted a then existing Virginia Contract provision

which, as a condition of purchase, required that all suppliers of distilled spirits affirm that the price charged the purchasing state would be the lowest price at which that particular product was sold in the United States ("the Des Moines Warranty"). The Des Moines Warranty typically provides that the supplier--the first seller into a Control State--guarantees that the

Basic Costs (Cost F.O.B. designated shipping point) at which merchandise is quoted. . . shall not exceed such Basic Costs quoted by the vendor or by an agent or subsidiary of the vendor or by any other person. . . to any purchaser, dealer, agent or agency of any nature or kind whatsoever anywhere in the United States of America. The vendor further guarantees that in the event the price quoted covers delivery. . . such delivery cost shall in no instance exceed the actual delivery cost per case to such warehouses. Should the delivery price in any other State or the District of Columbia include freight absorption, then the vendor guarantees that the same freight absorption will be offered to the [control state]. . . The vendor further guarantees that if and when special cash or commodity, allowances

postoffs, or discounts are offered to purchasers in any other State or the District of Columbia, the same allowances, postoffs, discounts or their equivalent shall also be offered the [control state].

Vendor agrees, upon discovery . . . and notice to the vendor of any breach of the pricing guaranties. . . to reimburse the Board for the differential in price at which said merchandise was sold. . . and the price at which it was quoted or sold, whichever was lower, to any purchaser, dealer, agent or agency anywhere in the United States of America.

10. Commencing in 1964 with Defendant New York, states other than the Control States required initial sellers of distilled spirits to adhere to the affirmation in connection with sales to private wholesalers within their state borders. The Affirmation Law Defendants and their respective affirmation statutes and regulations are as follows:

a. Arizona requires that a supplier of distilled spirits selling to any wholesaler in Arizona must file a schedule, together with an "affirmation

duly verified by the supplier that the bottle and case price of spiritous liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the supplier or any related person 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. . . ."

Ariz. Rev. Stat. Ann. § 4-253(A) (Supp. 1984).

b. California requires that a supplier may not "sell any brand of distilled spirits to any wholesaler. . . in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler... during any calendar month anywhere in any other state or in the District of

Columbia or to any state, or state agency, which owns or operates retail distilled spirits stores. . . ." Cal. Ann. Bus. & Prof. Code § 4-23673 (West Supp. 1984).

c. Connecticut requires that "every [supplier] shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of such alcohol and spirits posted certifying that at the time of posting the bottle, can or case price or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of alcoholic liquor is or will be sold . . . to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets."

Conn. Gen. Stat. § 30-63b(a) (1985).

d. Delaware requires that a supplier of distilled spirits "shall file by January 15 of each year. . . a verified affirmation that the bottle and case price of all alcoholic liquors. . . offer[ed] for sale to a Delaware importer will be sold to that importer at a price which is no higher than the lowest price at which such items will be offered for sale at the same at the time by such manufacturer or distillery to any wholesaler in any state or the District of Columbia or to any state, or state agency, which owns and/or operates retail liquor stores." Del. Code Ann. tit. 4, § 508(a) (1974)

e. Florida requires that every six months American suppliers shall submit a "duly verified affirmation that the net prices to be charged for such distilled

spirits, when computed on a single F.O.B. point-of-origin basis, whether sold by bottle or case, will be no higher than the lowest net prices, when computed as defined in this chapter, to be charged to any distributor in any other state or the District of Columbia or to any state or state agency which owns and operates retail liquor outlets during the same six-month period. Any such primary American source of supply . . . may amend such affirmation by the 15th day of any month, such amended affirmation to take effect on the first day of the following month. . . ." Fla. Stat. Ann. § 565.15(1) (West Supp. 1984).

f. Georgia requires, by regulation, that "[e]very producer or manufacturer of distilled spirits shall affirm that the prices at which he sells to distributors is as low as the lowest price for which each identical item is sold



anywhere in any state within the United States. Georgie Department of Revenue, Alcohol and Tobacco Tax Unit, Chapter 560-2-3-.47 (1982).

g. Hawaii requires that a supplier file an "affirmation, duly verified, certifying that such supplier will not sell or offer to sell any item of liquor in any state or the District of Columbia at a price lower than the price for which the same item is sold or offered for sale by such supplier to a Hawaii wholesaler. . . .[A supplier may file] a revised schedule at any time to reflect changed or modified prices, provided that any price increase shall not be effective until thirty days from the date of the filing." Hawaii Rev. Stat. §§ 281-122, 281-123 (Supp. 1983).

h. Kansas requires that the price charged to a Kansas wholesaler by a supplier be filed with the state and

that the price "shall be as low as the lowest price. . . for which the item will be sold in any other state in the continental United States by [such supplier]. . . ." Kan. Stat Ann. § 41-1112(a) (Supp. 1983).

i. Louisiana requires that "any person or company who sells liquor to any Louisiana liquor dealers shall give the same discounts as are given by them to any liquor dealers in any other state so that Louisiana liquor dealers shall pay the same price as dealers in all other states." La. Rev. Stat. Ann. §26:370(B) (West 1975).

j. Maryland's legislature, in 1967, passed a statute which states that "[t]he Comptroller may require, by regulation, that suppliers of wholesalers of distilled spirits affirm that the net price of each item offered for sale, exclusive of routine transportation

costs, is no higher than the lowest price at which such item is being offered for sale elsewhere within the United States, including the District of Columbia." Md. Ann. Code Art. 2B, § 109(c-1) (1981).

k. Massachusetts requires the filing of a schedule of minimum consumer prices and on "affirmation duly verified by the [supplier] that the bottle and case price of alcoholic beverages . . . set forth in such schedule is no higher than the lowest price at which such item of alcoholic beverage was sold . . . anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency). . . at any time during the calendar month immediately preceding the month in which the schedule is filed. . . ." Mass. Gen. Laws Ann. ch. 138, §§ 25C(a), 25D(a-b) (West Supp. 1985).

1. Minnesota requires that "[n]o licensed importer or manufacturer shall offer or sell to any licensed wholesaler any intoxicating liquor of a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such [supplier] 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 . . . ." Minn. Stat. § 340.114 (Subd. 3) (Supp 1984).

m. Nebraska's statute states that no "licensed manufacturer or importer shall sell or offer to sell to any licensed Nebraska wholesaler, distributor, or jobber any item of alcoholic liquor. . . at a price which is higher than the lowest price at which such item is currently being sold or offered for sale to any wholesaler, distributor, of

jobber in any other state or the District of Columbia or to any state agency." The statute further requires that each manufacturer or importer file an affirmation with the Liquor Control Commission not to violate the above noted statute. Further, a monthly filing is required setting forth the "current scheduled prices for each brand and each size of alcoholic liquor, . . . sold or offered for sale in Nebraska, which prices, at the time of filing, are not higher than the lowest price at which the brand and size are offered for sale to any wholesaler, distributor, or jobber in any state or the District of Columbia or to any state agency." A revised schedule or a statement of no revision is to be filed on the fifteenth day. Any price increases are effective forty-five days after the date of filing. Neb. Rev. Stat. §§ 53-170.02, 53-170-03 (1978),

n. New Jersey requires that "[e]very [supplier] intending to sell alcoholic beverages to wholesalers or distributors within this State shall . . . [p]rior to any sale or delivery of distilled spirit alcoholic beverages, or annually by August 1 of each year, file with the Division a written statement under oath affirming that its prices to New Jersey wholesalers and distributors have not been and will not be a price or discount higher than the lowest price or lower than the highest discount which has been or will be offered to any wholesaler or distributor or state agency (which operates retail stores) in any other State of the United States or in the District of Columbia." N.J. Admin. Code tit 13, § 2-24.5(a)(3)(1980).

o. New Mexico's statute provides "No brand of alcoholic beverages shall be sold to or purchased by a wholesaler. . . unless a price and discount schedule is filed with the director and is then in effect." Accompanying, as part of the schedule must be "a verified affirmation that the price to New Mexico wholesalers is no greater than the lowest price at which the item of alcoholic beverages is sold by the brand owner or any related person to any other 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." Alcoholic beverages can only be sold at the scheduled price and the schedule is in effect on a monthly basis. N.M. Stat. Ann. §§ 60-8A-12(A), 60-8A-15 (1981).

p. New York's affirmation statute prohibits suppliers from selling distilled spirits in the state, unless a supplier files a schedule with the state liquor authority of all items offered for sale in the succeeding month. Included, as part of the schedule, must be "an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case prices of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such brand owner or such wholesaler designated as agent, or any related person, 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. . . ."

The New York statute requires that all discounts offered by a supplier nationally to be offered to New York wholesalers. It, however, limits the amount of any discount offered to New York wholesalers. N.Y. Alco. Bev. Cont. Law § 101-b-3(d) (Consol. 1980).

g. Oklahoma requires that "[n]o distiller shall sell alcoholic beverages to a wholesaler licensed under the Alcoholic Beverage Control Act at a rate higher than the lowest rate at which such distiller sells in any other state." Okla. Stat. Ann. tit. 37, § 536.1 (West Supp. 1985).

r. Rhode Island's statutes states "no holder of a certificate of compliance for distilled spirits. . . shall ship, transport or deliver within this state, or sell or offer for sale, to a

wholesaler any brand of distilled spirits. . . at a bottle or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such holder of a certificate of compliance to any wholeseller in any other state of the United States or in the District of Columbia or to any state, including any agency or such state, which owns and operates retail liquor outlets." The statute requires a written affirmation certifying compliance with the above noted provision and require the affirmation price to be the lowest price offered anywhere in the calendar month in which shipment is made. The affirmation price may be changed, but must be filed 15 days prior to the proposed effective date and subsequently approved by the liquor administration. R.I. Gen Laws § 3-6-14.1

(1976).

s. South Carolina requires each registered producer of distilled spirits who, at the time of registration with the state, file with the Alcoholic Beverage Control Commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold or offered for sale, franchise or distributed by such a producer in the state. "The affirmation shall certify that the producer will not willfully sell or offer for sale any alcoholic liquors of a particular brand and proof in any State in the United States at a price lower than the price such liquors are sold or offered for sale to licensed South Carolina wholesalers." Quantity discounts are not considered violations of the producers affirmation if such discounts are offered to South Carolina wholesalers in the same quantities.

Violations of these provisions can result in the suspension or cancellation of the producers ability to do business in South Carolina. S.C. Code Ann.

§ 61-7-100 (Law Co-op. 1976).

t. Tennessee requires manufacturers and distillers of distilled spirits, before offering their products for sale in Tennessee, to file "an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state. . . . The affirmation shall certify that the manufacturer, distiller . . . shall not willfully sell or offer for sale any alcoholic spirituous beverages. . . of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered

for sale to licensed wholesalers in any other state in the United States. Quantity discounts are not considered a violation of the manufacturer's affirmation if such discounts are offered to Tennessee wholesalers for purchases in the same quantities." Tenn. Code Ann. § 57-3-202(e1-3) (1980).

11. Although the Affirmation Law Defendants' statutes and regulations are not in all respects identical, all require suppliers to affirm to state government that the price offered to wholesalers in that State is the lowest price at which the item is sold nationally. This affirmation price must take into account all discounts, allowances, rebates and transportation factors not related to actual cost. Some statutes carry criminal penalties in addition to civil and economic sanctions.

12. The combination of the Control States' Des Moines Warranties and their legislative mirror images in the Affirmation Law States results in a national liquor price affirmation system.

13. Throughout the thirty-eight states which are party to this action, suppliers must charge a uniform price for each of their brands. A lowering of a price to a public or private wholesaler in any state automatically requires an identical lowering of price to all wholesalers in all thirty-eight states. A raising of price to less than all wholesalers nationwide is likewise prohibited by the affirmation provisions of every state where such a price increase is sought, and in the District of Columbia, charging a wholesaler in any of these uninvolved states a lower price than that prevailing in the thirty-eight states would violate each

of the existing affirmation provisions.

14. In addition, Defendants require that suppliers maintain the national affirmation price for up to forty-five days after publicly posting their price. Coupled with the affirmation policies described above, these provisions further insure price stability and rigidity.

#### VIOLATIONS OF THE COMMERCE CLAUSE

15. The national price affirmation system prevents, as intended, the normal operation of the free market and replaces it with a system of state regulation resulting in uniform prices to all wholesalers in all thirty-eight affirmation states.

16. Each Defendant's affirmation policy, statute and/or regulation has significant extraterritorial effect on the price of distilled spirits in all

other states, by inter alia:

a. Making it impossible for interstate suppliers to adjust prices in response to local competition and competitive forces in other states without making the same price adjustments in each affirmation state.

b. Making it impossible for interstate suppliers to differentiate among customers based upon such actual cost factors as volume purchases, centralized marketing and delivery, and payment terms without offering the best of such terms to all customers in each affirmation state, regardless of actual cost factors.

c. Making it impossible for interstate suppliers to expand their market share in any state by using price inducements without reducing its price in all existing markets to the lower price level in each affirmation state.



d. Preventing large purchasers, such as Pennsylvania, from negotiating a free market price based on competitive cost factors, payment terms and quantity discounts.

17. Faced with the extraterritorial impact of each such pricing decision, interstate suppliers forego competition in local markets, thereby restricting the free flow of goods in interstate commerce.

18. By adopting an affirmation provision, a defendant state projects his economic regulations directly into other states by establishing the prices paid by public and private wholesalers in all other states.

19. In 1982 national sales of distilled spirits to wholesalers and control states exceeded 14 billion dollars.

20. The distilled spirit industry is concentrated, with Joseph E. Seagram & Sons, Hublein, National and Brown-Forman, the four largest interstate suppliers, accounting for at least 31 percent of all distilled spirit sales in the United States. Nevertheless many local and regional suppliers exist and compete with the large interstate suppliers on the basis of price.

21. Plaintiff Pennsylvania, in fiscal year 1983-1984, purchased approximately \$292 million worth of distilled spirits, the vast majority of it from suppliers located outside of Pennsylvania.

22. Because of the artificial restrictions placed on the distilled spirit market by the national price affirmation system, Pennsylvania and other purchasers are deprived of the benefits of free and open competition in

the sale and purchase of distilled spirits.

23. The affirmation statutes, regulations and practices of the parties to this action are violative of Article I, Section 8, Clause 3 of the Constitution of the United States because the effect of each such statute, regulation and practice-- and all such statutes, regulations and practices taken as a whole--is to regulate liquor prices in all other states.

24. This extraterritorial scope of the challenged statutes, regulations and practices substantially burdens interstate commerce by requiring suppliers to sell their products at a single national price level for each distilled spirit product sold in interstate commerce, regardless of local competitive factors, and thereby seriously distort the pricing, marketing and purchasing of the

multibillion dollar distilled spirits industry.

25. The Twenty-first Amendment to the Constitution of the United States does not permit the Defendants to regulate the prices of extraterritorial interstate sales and purchases of distilled spirits.

WHEREFORE, the Plaintiff, Commonwealth of Pennsylvania, respectfully requests that this Honorable Court:

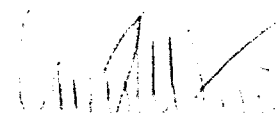
a. Assume jurisdiction of this case;

b. Declare all distilled spirit statutes, regulations and practices unconstitutional;

c. Enjoin the enforcement of all distilled spirit price affirmation statutes, regulations and practices; and

d. Grant such further and other relief as justice may require, together with the costs of this action.

Respectfully submitted,



---

GARY DiVITO  
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Liquor Control Board  
Counsel of Record

LEROY S. ZIMMERMAN  
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Date: February 25, 1985

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OREGON, STATE OF UTAH, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA,  
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COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF  
NEBRASKA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NEW  
YORK, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF SOUTH  
CAROLINA, AND STATE OF TENNESSEE,

Defendants

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BRIEF IN SUPPORT OF MOTION FOR LEAVE  
TO FILE COMPLAINT

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BRIEF IN SUPPORT OF MOTION  
FOR LEAVE TO FILE COMPLAINT  
JURISDICTION

Plaintiff, the Commonwealth of Pennsylvania, is a sovereign state of the United States and a major purchaser of distilled spirits. It brings this action against thirty-seven other sovereign states of the United States whose statutes, regulations and practices impose a national system of distilled spirit price affirmation in violation of Article I, Section 8, Clause 3 of the Constitution of the United States seeking to have those statutes declared unconstitutional and to have their enforcement enjoined. This is, therefore, an action over which this Court has original and exclusive jurisdiction under Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251(a) (Supp. 1983).

## STATUTE AND CONSTITUTIONAL

### PROVISIONS INVOLVED

#### UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3. Power of Congress to regulate commerce.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article III, Section 2, Clause 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to controversies to which the United States shall be a Party; to Controversies between two or more States; --between a State and Citizens of another State;--between citizens of different States;--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

#### AMENDMENT XXI.--REPEAL OF PROHIBITION AMENDMENT

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation 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. . .

#### FEDERAL STATUTES

28 U.S.C. §1251. Original jurisdiction.

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

#### STATE STATUTES

Given the voluminous nature of the twenty state statutory schemes involved herein, the relevant portions of those statutes (and their accompanying regulations) are set forth in the Appendix of this Brief.

## HISTORY OF PRICE AFFIRMATION

In 1933, by virtue of the passage of the Twenty-first Amendment to the United States Constitution which repealed Prohibition, the states were granted broad regulatory power over the transportation, possession, delivery and use of alcoholic beverages within their borders. Seventeen states opted to control the distribution of liquor by operating wholesale liquor monopolies. Many of those states (including Pennsylvania) also have state-run retail liquor monopolies. These states are known as the "Control States." The remaining states, and the District of Columbia, chose to regulate distribution of liquor by licensing and regulating private wholesalers and retailers.

In 1938, representatives of thirteen of the seventeen Control States met in Des Moines, Iowa to discuss common

business problems. Liquor industry members also attended the meeting. At the time of that meeting, Virginia and some other attendees already had a provision in their standard liquor purchase contracts that required suppliers to affirm that the prices charged to the state were the lowest prices at which the suppliers sold their products anywhere in the United States. The use of similar contract provisions by all Control States was openly discussed. Within several years, all Control States, including Pennsylvania (which was not a participant at the meeting), adopted affirmation provisions in their liquor purchase contracts. This type of provision is known in the liquor industry as the "Des Moines Warranty."

In 1964, the second phase in the development of the national price affir-

mation system began. In that year, New York--a non-control state with private wholesale and retail distributors--passed a liquor affirmation statute which required all suppliers to affirm to the state that the prices charged to wholesalers within the state were no greater than the lowest price charged nationally for any particular item in the preceding month.<sup>1</sup> The act required that sellers post these prices and maintain them for thirty days. Violators of the act are subject to criminal and civil sanctions. New York is a non-control-state -- a state with private wholesale and retail distributors. It was the first such state to enact an affirmation statute. Chapter 531, 1964

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<sup>1</sup>Chapter 531, 1964 Session Laws of New York. In 1977, New York amended its price affirmation law. The current statute (25a-26a), is significantly broader in scope than its predecessor.



Session Laws of New York.

In the wake of this Court's decision, in Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), not to invalidate the New York statute prior to its becoming operative, additional non-control states soon passed their own affirmation laws. Presently, twenty-one non-control states ("the Affirmation Law States") have such laws or regulations. Although not in all detail identical, all affirmation laws require distilled spirit suppliers--on their first sale into a state--to charge to that state's private wholesalers a price no greater than the current lowest price offered anywhere in the United States for any particular item.

## EFFECTS OF PRICE AFFIRMATION

Each state's price affirmation requirement has the effect of converting the wholesale price in that state into the minimum wholesale price in all states. Since thirty-eight states have virtually identical requirements, this minimum wholesale price becomes the actual wholesale price through these thirty-eight states.

A price increase to a wholesaler in Kansas, for example, must be accompanied by an identical increase to all other public and private wholesalers in these thirty-eight states pursuant to Kansas law. See, Kan. Stat. Ann. § 41-1101(a) (Supp. 1983). A price decrease to a wholesaler in Kansas must be accompanied by an identical decrease to all other public and private wholesalers in these thirty-eight states pursuant to the laws of the other thirty-seven states.

Additionally, many affirmation laws require that price changes remain in effect for specific lengths of time. Minnesota, for example, requires that all price changes must be filed by the first day of the month, become effective on the first day of the following month, and remain in effect for that entire month. Thus, a supplier's Minnesota price posted on January 1 becomes the selling price in all thirty-eight states for the month of February. See, Minn. Stat. § 340.114 (Subd. 3) (Supp. 1984).

Suppliers and purchasers of distilled spirits are therefore confronted with an interrelated system of state protectionist regulations, each of which creates a single national affirmation price.

## SUMMARY OF ARGUMENT

The scope and intent of these laws are undeniably extraterritorial in nature. States may claim that the purposes of these laws are to secure lower prices for the public or private wholesalers within their respective borders; however, these affirmation statutes, regulations and practices instead target the prices suppliers charge (and purchasers, such as Pennsylvania, pay) in other states and seek to protect their local wholesalers by regulating the prices to be charged throughout the nation.

Most revealing is the fact that affirmation laws apply only to interstate suppliers. A distiller who only sells his product in Rhode Island, for example, is not obliged to charge the affirmation price to its Rhode Island wholesale customers, while a competitor who also

sells in neighboring Connecticut and Massachusetts must bring its prices in those states into line with the Rhode Island price. See, R.I. Gen. Laws § 3-6-14.1 (1976).

Even the Twenty-first Amendment does not authorize this direct regulation of the extraterritorial sale and purchase of distilled spirits. It is, therefore, illegal regulation of interstate commerce, barred by the Commerce Clause.

## ARGUMENT

### I. THE COMPLAINT PRESENTS SUBSTANTIAL FEDERAL QUESTIONS CONCERNING THE CONSTITUTIONALITY OF STATE POLICIES WHICH CONTROL THE PRICES PENNSYLVANIA MUST PAY FOR LIQUOR.

This case involves a dispute between sovereign states. This Court may, therefore, exercise original jurisdiction over the complaint in this case pursuant to Article III, Section 2 of the United States Constitution and 28 U.S.C. §1251(a)(1).

The exercise of this jurisdiction is discretionary and is only invoked in "appropriate cases." Maryland v. Louisiana, 451 U.S. 725, 739 (1981); Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972). However, this is such a case.

In this regard, this Court has held that:

[W]hat is 'appropriate' involves not only 'the seriousness and dignity of the claim' but also 'the availability of other forum where there is jurisdiction over the named parties, where the issues may be litigated', and where appropriate relief may be had.

Maryland v. Louisiana, 451 U.S., at 739-740. This case presents a substantial controversy between Pennsylvania and the defendant states, involving important and serious federal questions concerning the interplay between the Commerce Clause and the Twenty-first Amendment of the United States Constitution. Moreover, there exists no other forum in which Pennsylvania can obtain a trial on the merits concerning the legality of the entire nationwide price affirmation system.

Pennsylvania, in its sovereign capacity, operates a liquor monopoly which purchases all distilled spirits

sold in the Commonwealth.<sup>2</sup> The Defendant States, by individual and collective operation of distilled spirits price affirmation statutes, regulations and policies, have created a national price affirmation system. This system requires interstate suppliers of distilled spirits to fix a uniform wholesale price for all products sold within the borders of the thirty-eight states party to this action. This affirmation price additionally becomes a wholesale price floor within all other

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<sup>2</sup>Affirmation statutes, regulations and contract provisions effect all segments of the liquor industry, including distilled spirits, and to a lesser extent, wine and beer. For purposes of this litigation, Pennsylvania will restrict its Complaint to the distilled spirits industry, in which it is a major purchaser. Since the constitutional objections to all affirmation statutes are the same, it is Pennsylvania's belief that this Court's disposition of this Complaint will be dispositive of the legality of all affirmation practices in the liquor industry.



states and territories. This system unlawfully restricts and interferes with the operation of the free market system in the 14 billion dollar distilled spirits industry in violation of the Commerce Clause.

Pennsylvania is harmed by defendants' actions by being deprived of the normal advantages which large volume purchasers enjoy in an unfettered market and is further harmed by the restriction placed by affirmation inter-brand competition in markets within its borders. Moreover, under Pennsylvania law, and consistent with the Twenty-first Amendment, Pennsylvania acts in its sovereign capacity when it controls the purchase of liquor within its borders as the sole purchaser and distributor. Biello v. Pennsylvania Liquor Control Board, 301 A.2d 849, 852, 454 Pa. 179, 185 (1973).

This Complaint, therefore, presents an appropriate and proper controversy for the exercise of this Court's original jurisdiction: Pennsylvania has suffered a wrong in its sovereign capacity through the actions of other states and the federal question involved is of a serious and substantial nature.

Moreover, only this Court, through a special master, can adjudicate the facts and determine the ultimate merits of Pennsylvania's claim. As will be shown herein, aside from the individual impact of each of the Defendant States' affirmation provisions, all affirmation provisions combine to create the national price affirmation system. Because of that interrelatedness, a decision invalidating any single provision will have no impact on the operation of the entire system. Thus, resorting

to the several Federal District Courts in the Defendant States for relief will not provide Pennsylvania with a timely or adequate remedy.

In addition, "minimum contacts" with the forum jurisdiction are required for the exercise of personal jurisdiction. It is, therefore, extremely doubtful that any one district court would have jurisdiction over all Defendant States.<sup>3</sup> See World-wide

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<sup>3</sup>It may be argued that the U.S. District Court of the District of Columbia, because of the necessary contacts all states have with the federal government, would have in personam jurisdiction over all parties. However, that court would be lacking proper venue. A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law. 28 U.S.C.A. §1391(b). Since no parties resided in the District of Columbia, nor did the claim arise there, that court could not serve as an alternate forum to adjudicate the merits of Pennsylvania's claim.

Volkswagen Corporation, et al, v. Wood-  
son, 444 U.S. 286 (1980); International  
Shoe Company v. Washington, 326 U.S. 310  
(1945).

The filing of thirty-seven separate actions in the federal courts of all defendant states does not provide Pennsylvania with an adequate alternative forum. Such an approach would constitute an enormous waste of judicial resources and create a significant risk of inconsistent adjudications. Thus, no single forum, other than this Court, has the power and jurisdiction to resolve this matter effectively.

Pennsylvania's Complaint presents serious and substantial federal issues and is in complete accord with the purposes and reach of the original

jurisdiction of this Court.<sup>4</sup> The Court should, therefore, grant leave to file this Complaint.

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<sup>4</sup>In 1972, this Court denied, without opinion, a motion for leave to file a complaint against twenty-six states who, at that time, had affirmation statutes, regulations or policies. Pennsylvania v. New York, 407 U.S. 206 reh den., 409 U.S. 897 (1972). That complaint sought to challenge only discreet portions of the national price affirmation system. Since then, this Court has refined the state of the law with respect to the interplay between the Twenty-first Amendment and the Commerce Clause. See Bacchus Imports, Ltd. v. Dias, No. 82-1565 (June 29, 1984), California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Affirmation has spread to other states and there has now been ample time to develop economic evidence on the effects of affirmation on the free market system in a 14 billion dollar a year industry. Pennsylvania believes that the time is now ripe for this Court to address the important constitutional questions inherent in the national price affirmation system and thereby avoid piece-meal--and potentially conflicting--adjudications of this national question. See United States Brewers Association, Inc. v. Healy, 692 F.2d 275 (2d Cir. 1982), aff'd, No. 82-1493 (October 17, 1983). See also Joseph E. Seagram & Sons, Inc. v. Gazzara, 83 Civ. 6825 (LBS) (S.D. N.Y. October 13, 1983).

## II. THE PRICE AFFIRMATION SYSTEM BURDENS INTERSTATE COMMERCE

It is well-settled doctrine under the Commerce Clause that where a state regulation effects a direct control on the out-of-state pricing of any commodity it "is a prohibited regulation and invalid, regardless of the purpose for which it was enacted." Shafer v. Farmers Grain Company, 268 U.S. 189, 199 (1925); Edgar v. MITE Corp., 457 U.S. 624, 641-643 (1982); Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922).

Accordingly, in Edgar v. MITE Corp., supra, this Court held that, despite a lack of discriminatory purpose, the Illinois takeover statute was facially invalid because it sought to control the conduct of nationwide tender

offers. The Court reasoned that:

[T]he Commerce Clause. . . permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited.

457 U.S., at 640 (emphasis supplied). Similarly, in Lemke v. Farmers Grain Co., supra, the Court invalidated a state statute which permitted state officials to set resale profit margins on all grain bought at North Dakota grain elevators. Despite the fact that there was no showing that the prescribed margins discriminated against out-of-state purchases, the Court held that:

The principles recognized in decisions of this Court which permit the State to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce. . . ha[ve] no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it.

258 U.S., at 58-59 (emphasis supplied).

In Baldwin v. G.A.F. Seelig, Inc., 294

U.S. 511 (1935), the Court invalidated a New York "equal price" statute similar to the affirmation provisions at issue here. The New York statute in Baldwin required distributors selling milk in New York to warrant that, if they purchased milk from producers outside New York, they would pay a price no lower than the price charged by New York producers for similar milk. 294 U.S., at 520. Although the Court did find that New York's statute was protectionist in purpose, the statute was struck down as a direct restraint on interstate commerce. 294 U.S., at 521-522, 525-526, 528. The foundation for the decision in Baldwin rings particularly true here:

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.

294 U.S., at 521.



For similar reasons, a state may not regulate liquor pricing beyond its borders. See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); United States Brewers Association, Inc. v. Healy, No. 82-1493 (October 17, 1983) sum aff'd, 692 F.2d 275 (2nd Cir. 1982); United States v. State Tax Commission, 412 U.S. 363 (1973).

The Court's decision in Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) does not compel a different result. In that case, the Court held that an early and much less burdensome type of affirmation statute than those at issue here<sup>5</sup> would not be invalidated prior to its effective date

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<sup>5</sup>See pages 69-72, infra.

in the absence of compelling evidence that it would place an undue burden on interstate commerce. In that case, Seagram unsuccessfully challenged Section 9 of New York's original price affirmation law, Chapter 531, 1964 Session Laws of New York (superceded), which required that "the bottle and case price of liquor [sold to any New York wholesaler be]. . . no higher than the lowest price anywhere in the United States during the preceding month." Seagram, 384 U.S., at 40-41. (emphasis supplied). The Court explicitly declined to reach the central issue presented by this case, stating that

[W]e need not now decide whether the mode of liquor regulation chosen by a state in such circumstances could ever 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. The Court closed its opinion by again observing that

[a]lthough it is possible that specific future applications of Chapter 531 may engender concrete problems of constitutional dimensions, it will be time enough to consider any such problems when they arise.

384 U.S., at 52.<sup>6</sup>

This case squarely presents the Court with those "concrete problems of constitutional dimensions." In the eighteen years since the Seagram decision, nineteen non-control states have joined New York in requiring that no sale be made to any wholesaler in any other state at a price lower than that

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<sup>6</sup>Additionally, the Court in Seagram appears to have adhered to the view, since rejected by Bacchus Imports, Ltd. v. Diaz, No. 82-1565 (June 29, 1984), and Capital Cities Cable, Inc. v. Crisp, No. 82-1795 (June 18, 1984), that the states have an almost limitless right to control all aspects of liquor sales within their borders, regardless of the state's purpose or the impact on interstate commerce. Seagram, 384 U.S., at 42 and 47.

charged to wholesalers in the exacting state. The current laws in California, Connecticut, Delaware, Georgia, Kansas, Louisiana, Maryland, Tennessee and South Carolina require that the wholesale price in each state be no higher than the lowest contemporaneous price anywhere else in the United States. Thus, unlike the situation presented in Seagram, interstate sales to wholesalers in each of these states must conform to the prices charged simultaneously to all wholesalers in all Defendant States. These statutes and regulations are designed to have the same effect as the Des Moines Warranties utilized by the Control States. The Court in Seagram may have recognized the added burden on interstate commerce inherent in a state requirement that sellers base their actual selling price to Pennsylvania on the price that suppliers will contempor-

aneously charge in some other state when it suggested that the Des Moines Warranties:

may be more onerous than that required for the affirmation under §9, since the [Des Moines] Warranties generally cover prices in other states at the very time of sale to the [Control State]. . .

384 U.S., at 45. See Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511 (1935).

More pernicious still are requirements imposed by Florida, Hawaii, Minnesota, Nebraska, New Mexico, New York and Rhode Island which directly "tell a [supplier] that for any given month when it sells [distilled spirits] to a wholesaler [in any other state], it may not do so at a price lower than it has previously announced it will charge to . . . wholesalers" in these "prospective" affirmation states. United States Brewers Association, Inc. v. Healy, 692 F.2d 275, 282 (2d Cir. 1982), aff'd, No.

82-1493 (October 17, 1983). As the Second Circuit noted in Healy, "reliance on [Seagram] as sanctioning [prospective] affirmation provisions, is misplaced." 692 F.2d at 282.

As an example of this direct regulation, New York's current affirmation law requires a distilled spirit supplier to post monthly schedules with the State Liquor Authority stating the per bottle and per case price (including all discounts) for each item offered for sale to New York wholesalers as a condition of doing business in the state.<sup>7</sup> The posted price must remain in effect for the month covered by the schedule. This schedule must be accompanied by an affirmation that the quoted price is the

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<sup>7</sup>That statute has been superceded by a less burdensome, but no less constitutionally infirm, "current" price affirmation statute .

lowest price offered for the item anywhere in the United States for the month following the effective date of the posted schedule. Violation of this requirement can give rise to criminal and civil sanctions. N.Y. Alco. Bev. Cont. Law § 101-b-3 (Consol. 1942, as amended, 1964). Thus, on its face, the New York statute directly and prospectively controls the minimum wholesale price a seller, doing business in New York, may offer in any other state.

In United States Brewers Association, Inc. v. Healy, supra, this Court summarily affirmed a ruling of the Second Circuit, which struck down a similar Connecticut beer affirmation statute. That statute required all beer suppliers to post the wholesale price at which it could sell its product in bordering states. Postings remained in effect on a monthly basis and were accompanied by

an affirmation that the price posted was the lowest price offered in any bordering state during the month following the effective date of the posting. The court of appeals found that Connecticut's statute prospectively controlled the minimum price that could be charged to non-Connecticut suppliers in a non-Connecticut transaction. Finding the statute invalid, that court noted:

Nothing in the Twenty-first Amendment permits Connecticut to set the minimum price for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

Healy, 692 F.2d at 282.

Where the effect of a state law is to regulate conduct occurring wholly outside the state the burden on commerce is impermissible. "Thus, it has been held repeatedly that where the practical effect of a state regulation is to



control conduct in other states, the regulation violates the Commerce Clause." Healy 692 F.2d at 279, citing New York, Lake Erie and Western Railroad v. Pennsylvania, 153 U.S. 628, 646 (1894); Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935); Southern Pacific Co. v. Arizona, 325 U.S. 761, 775 (1945); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982).

On a practical basis, the affirmation system--regardless of the form of any specific state's regulation--requires sellers to offer their products to all wholesalers at the same price in all thirty-eight states. In setting a sales price for its product to Pennsylvania, any interstate supplier must price that product with the certain knowledge that it has no choice but to offer the same price in each Defendant

State. Thus, each Defendant State's affirmation policy requires that an interstate supplier consider market conditions existing in all Defendant States as a factor in setting its Pennsylvania price. This process is repeated continuously for each state until the supplier arrives at a price that it feels it can live with. The price then offered to wholesalers including Pennsylvania, on a national basis, bears no direct relationship to the price which any given wholesaler, such as Pennsylvania, would otherwise pay.

After the original New York affirmation statute became effective, the minimum price on major interstate brands of distilled spirits rose to the

New York level.<sup>8</sup> Affirmation is a system which in operation merely insures that all wholesale customers receive a uniform price, not a competitive price. When each Defendant State individually controls the lowest price which a supplier may charge Pennsylvania, by tying that price to the price offered by the supplier to its smallest private wholesaler customer in any of these thirty-eight states, irrespective of actual cost factors, the concept of a

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<sup>8</sup>This marketplace experience is consistent with the concerns expressed by the plaintiff in Seagram. The Court declined to invalidate New York's statute on that basis, since it was, at that time, a matter of "conjecture." The Court noted that it "is by no means clear, for instance, that \$9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York." Seagram, supra, 384 U.S., at 43. Pennsylvania is prepared to present detailed economic evidence of the effect affirmation has had on price levels should the Court grant Pennsylvania's motion for leave to file the complaint.

single national market place, unimpeded by insular state regulation, is defeated. Thus, the cumulative effect of all affirmation policies is to unlawfully burden interstate commerce because of the extraterritorial impact on supplier pricing decisions in transactions occurring wholly beyond individual state borders. This direct extraterritorial regulation of commerce is barred by the Commerce Clause.

III. THE TWENTY-FIRST AMENDMENT DOES NOT AUTHORIZE STATES TO REGULATE THE PRICES OF DISTILLED SPIRITS SOLD OUTSIDE OF THEIR BOARDERS.

It is against the background of the operation of the national price affirmation system that we must analyze the impact, if any, of the Twenty-first Amendment.

When the Eighteenth Amendment was repealed in 1933 by the Twenty-first

Amendment, each state was granted broad regulatory power over the delivery into and subsequent use within its borders of alcoholic beverages. Article 2 of the Twenty-first Amendment states:

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

That regulatory power includes the authority to completely forbid the importation of liquor into a state if the state so desires. United States of America v. Frankford Distillers, 324 U.S. 293 (1945); State Board v. Young's Market Co., 299 U.S. 59 (1936). A state is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption solely within its borders. See California Retail Liquor Dealers

Ass'n. v. Midcal Aluminum, Inc., 445  
U.S. 97 (1980).

However, while the Twenty-first Amendment permits the states to regulate and restrict the importation sale, and use of alcoholic beverages within their borders to a greater extent than they may regulate other commodities in interstate commerce, the Amendment has never been construed to supersede other provisions of the Constitution. This Court specifically has rejected the contention that Article 2 of the Twenty-first Amendment freed the states from all constitutional restrictions upon the exercise of the police power. Young's Market Co., 299 U.S., at 64. Despite the existence of the Twenty-first Amendment, states cannot tax imported liquor in violation of the Export-Import Clause, Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964); insulate the liquor

industry from the Fourteenth Amendment requirement of equal protection, Craig v. Boren, 429 U.S. 190, 204-209 (1976); or of due process, Wisconsin v. Constantineau, 400 U.S. 433 (1971); or permit violation of the Establishment Clause of the First Amendment, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). Furthermore, this Court has long recognized the supremacy of the Commerce Clause despite the existence of the special power given to the states under the Twenty-first Amendment.

In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), the Court sustained the enjoining of New York's attempt to prevent Idlewild from engaging in the sale of liquor destined exclusively for export from New York. The Court emphasized that the focus and operational sphere of state power under the Twenty-first Amendment

powers was limited to intrastate commerce. In rejecting the argument that the Twenty-first Amendment obviated the operation of the Commerce Clause, the Court stated:

To draw a conclusion. . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

377 U.S., at 331-332. The Court ruled that an examination of any conflict between the Commerce Clause and state regulation under the Twenty-first Amendment required a balancing of the federal and state interests involved. The Court noted:

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other



provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

377 U.S., at 331-332.

More recently, seeking to develop standards for assessing specific state regulations, the Court noted in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, (1980), that there was no bright line between federal and state power over liquor:

The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'

445 U.S., at 110.

Last term, in Bacchus Importers, Ltd. v. Dias, No. 82-1565 (June 29, 1984),

and Capital Cities Cable, Inc. v. Crisp, No. 82-1795 (June 18, 1984) the Court made it clear that the state interests to be accorded weight are limited to those which stem from the "principles underlying the Twenty-first Amendment.. .." Bacchus, Slip op., at 11.

Bacchus involved a state excise tax designed to protect local manufacturers from out-of-state competition by raising the effective selling prices of out-of-state alcoholic beverages in relation to locally produced products.

Noting that:

A cardinal rule of Commerce Clause jurisprudence is that '[N]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce. . . by providing a direct commercial advantage to local business. . . .

Id., Slip op., at 4. (citations omitted), the Court struck-down the tax, holding that the Twenty-first Amendment was not designed to empower states to

favor local liquor industries by erecting barriers to competition. Id., Slip op., at 12. The Court stated emphatically that:

State laws that constitute mere economic protectionism are. . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

Ibid.

State regulation of prices in the distilled spirits industry enacted with the purpose and intent to protect local wholesalers by creating a uniform price floor effective in other states cannot be accorded the deference necessary to overcome their obvious burdensome impact on interstate commerce. The affirmation statutes, rules and practices challenged here were not adopted to promote temperance or to protect the public health, safety or morals. They were adopted in an attempt to regulate the price paid by private

sector wholesalers and the states themselves. Moreover, they have that effect not only in the regulating state, but also in every other state of the union. It is this extraterritorial effect which is beyond the protection of the Twenty-first Amendment and which violates the Commerce Clause.

### CONCLUSION

The line of cases culminating with the decisions in Bacchus and Crisp establish a test for balancing conflicting state and federal interests. Bacchus and Crisp hold that state regulation of alcohol unrelated to the control of the inherent evils associated with alcoholic beverages falls outside the protection of the Twenty-first Amendment when it clashes with federal policy. Given the significant national

impact of price affirmation, both the Des Moines Warranties of the Control States and the challenged statutes and regulations of the Affirmation Law States must be invalidated.

Respectfully submitted,



---

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Date: February 25, 1985



No. \_\_\_\_\_, Original

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1984

---

COMMONWEALTH OF PENNSYLVANIA,  
Plaintiff

vs.

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, STATE OF WYOMING,  
STATE OF ARIZONA, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE  
OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII,  
STATE OF KANSAS, STATE OF LOUISIANA, STATE OF MARYLAND,  
COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF  
NEBRASKA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NEW  
YORK, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF SOUTH  
CAROLINA, AND STATE OF TENNESSEE,

Defendants

APPENDIX

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## APPENDIX

The following is a compilation of each Affirmation Law State's affirmation and related statutes and their accompanying regulations.

### ARIZONA

#### Article 4. DISCRIMINATION IN SUPPLYING SPIRITUOUS LIQUORS

§ 4-253. Affirmation; filing;  
violation; penalty

A. There shall be filed in connection with, and when filed shall be deemed part of, the schedule filed for a brand of spirituous liquor, an affirmation duly verified by the supplier that the bottle and case price of spirituous liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the supplier or any related person to any wholesalers 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. As used in this section "related person" means any person:

1. In the business of which the supplier has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers;

2. In the exclusive, principal or substantial business of selling a brand or brands of spirituous liquor purchased from the supplier; or

3. Who has an exclusive franchise or contract to sell the brand or brands.

\* \* \*

Ariz. Rev. Stat. Ann. § 4-253(A)  
(Supp. 1984).

CALIFORNIA

§ 23673. Sale of brand distilled spirits to wholesaler or rectifier; price; remedies; exemption

No owner of distilled spirits or his agent shall sell any brand of distilled spirits to a wholesaler or rectifier in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler or rectifier during any calendar month anywhere in any other state or in the District of Columbia or to any state or state agency which owns or operates retail distilled spirits stores.

\* \* \*

Cal. Ann. Bus. & Prof. Code § 4-23673  
(West Supp. 1984).

CONNECTICUT

§ 30-63b. Affirmation re price.

(a) At the time of posting of the bottle, can and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of such alcohol and spirits posted certifying that at the time of posting, the bottle, can or case price or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of alcoholic liquor is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets.

\* \* \*

Conn. Gen. Stat. § 30-63b(a) (1985)

DELAWARE

§ 508. Affirmation and filing of price schedules required.

(a) All manufacturers and distilleries offering for sale in the State alcoholic liquors other than beer or wine, shall file by January 15 of each year, or within 30 days of the first time they become licensed in the State to sell such alcoholic liquors, a verified affirmation that the bottle and case price of all alcoholic liquors, excluding beer and wine, which such distillery or manufacturer shall offer for sale to a Delaware importer will be sold to that importer at a price which is no higher than the lowest price at which such items will be offered for sale at the same time by such manufacturer or distillery to any wholesaler in any state or the District of Columbia or to any state, or state agency, which owns and/or operates retail liquor stores.

\* \* \*

Del. Code Ann. tit. 4, § 508(a) (1974).

## FLORIDA

### 565.15. Price affirmation

(1) Each 6 months, at such dates as the division shall determine, each primary American source of supply authorized to sell distilled spirits to licensed distributors in Florida shall submit to the division a duly verified affirmation that the net prices to be charged for such distilled spirits, when computed on a single F.O.B. point-of-origin basis, whether sold by bottle or case, will be no higher than the lowest net prices, when computed as defined in this chapter, to be charged to any distributor in any other state or the District of Columbia or to any state or state agency which owns and operates retail liquor outlets during the same 6-month period. Any such primary American source of supply authorized to sell distilled spirits to licensed distributors in Florida may amend such affirmation by the 15th day of any month, such amended affirmation to take effect on the 1st day of the following month. Included in such duly filed affirmation shall be a listing of all of the licensed distributors in Florida to whom distilled spirits will be sold during such period and the net price, by brand, by bottle or case, to be charged to such distributors. The net price as reported in such duly filed or amended affirmation shall in each event be the gross price to be charged each distributor less any allowances or discounts in cash or merchandise or any other consideration or anything of intrinsic value to be received by the distributor. The reporting requirements imposed by this

section shall not apply to transactions  
between distributors licensed in Florida.

\* \* \*

Fla. Stat. Ann. § 565.15(1) (West Supp.  
1984).



GEORGIA

560-2-3-.47 Price Affirmation. Every producer or manufacturer of distilled spirits shall affirm that the prices at which he sells to distributors is as low as the lowest price for which each identical item is sold anywhere in any state within the United States.

Georgia Department of Revenue, Alcohol and Tobacco Tax Unit, Chapter 560-2-3-.47 (1982).

## HAWAII

### [PART VIII.] PRICE DISCRIMINATION IN SUPPLYING LIQUOR

[§281-122] Price discrimination. No supplier shall sell or offer to sell to any Hawaii wholesaler any item of liquor at a price which is higher than the lowest price at which such item is currently being sold or offered for sale by such supplier to any wholesaler in any other state of the United States or the District of Columbia or to any state (or state agency) which owns and operates retail liquor outlets.

\* \* \*

[§281-123] Price affirmation; schedule, etc. Within sixty days after [June 16, 1980], every supplier desiring to distribute liquor to a Hawaii wholesaler shall first file with the commission:

- (1) An affirmation, duly verified, certifying that such supplier will not sell or offer to sell any item of liquor in any state or the District of Columbia at a price lower than the price for which the same item is sold or offered for sale by such supplier to a Hawaii wholesaler, and
- (2) A current schedule of prices, duly verified and filed in the number of copies and form as required by the commission, for each brand and each size of liquor sold or offered for sale in Hawaii by such supplier,

which prices are not higher than the lowest price at which the brand and size are offered for sale by such supplier to any wholesaler, distributor, jobber or retailer in any other state or the District of Columbia or to any state (or state agency) which owns and operates retail liquor outlets. On July 1 of each year after the initial filing hereunder, there shall be filed a revised schedule at any time to reflect changed or modified prices, provided that any price increase shall not be effective until thirty days from the date of such filing.

Hawaii Rev. Stat. §§ 281-122, 281-123  
(Supp. 1983).

## KANSAS

41-1101(a) Discrimination in sales, services or prices unlawful; statement to be filed; duties of director; exception. (1) It shall be unlawful for any distributor licensed under this act to purchase any alcoholic liquor from any manufacturer, owner of alcoholic liquor at the time it becomes a marketable product, exclusive agent of such manufacturer or owner or distributor of alcoholic liquor bottled in a foreign country either within or without this state, unless such manufacturer, owner, exclusive agent or distributor shall file with the director a written statement sworn to by such manufacturer, owner, exclusive agent or distributor or, in case of a corporation, one of its principal officers, agreeing to sell any of the brands or kinds of alcoholic liquor manufactured or distributed by such manufacturer, owner, exclusive agent or distributor to any distributor licensed in this state and having a franchise to distribute such alcoholic liquor pursuant to K.S.A. 41-410, to make such sales to all such licensed distributors in this state at the same current price and without discrimination and to file price lists showing the current prices in the office of the director as often as may be necessary or required by the director but at least once each three months.

\* \* \*

41-1112 Manufacturer's and distributor's price lists; requirements for filing. (a) On the 15th day of each month every manufacturer or vendor

filing prices pursuant to K.S.A. 1980 Supp. 41-1101 and whose prices are required to be filed under the provisions of K.A.R. 14-4-7 shall file the current price, and F.O.B., point of shipment, of each item of alcoholic liquor. The price so filed shall be the price for which the item shall be sold by such manufacturer or vendor to licensed distributors during the second calendar month immediately following the month in which the price is required to be filed. The price so filed shall be as low as the lowest price, after deducting all advertising, depletion and promotional allowances and rebates of every kind made to purchasers, for which the item will be sold in any other state in the continental United States by the manufacturer of the item and by any vendor of the item who sells the item under any contract or arrangement with the manufacturer, during the period in which the filing is in effect. As used herein the term "advertising, depletion and promotional allowances and rebates" shall only mean allowances and rebates made to wholesalers, distributors, retailers or other purchasers in those instances when such allowances or rebates actually result in the reduction of the purchase price. When the price of an item being filed is the same as the price filed in this state, the director may require the manufacturer or vendor of the item to file and affirm the price by reference to the prior price filing.

At the time of the filing of the prices every manufacturer or vendor who has filed prices of alcoholic liquor on the 15th day of the month shall file an affirmation that the price of each and

every item of alcoholic liquor so filed is as low as the lowest price (determined as hereinbefore provided) for which the item of alcoholic liquor will be sold in any other state in the continental United States by the manufacturer of the item and by any vendor of the item who sells the item under any contract or arrangement with the manufacturer or vendor during the period in which such filing is in effect.

\* \* \*

Kan. Stat. Ann. §§ 41-1101(a), 41-112(a) (Supp. 1983).

## LOUISIANA

§ 370. Out-of-state manufacturers and wholesalers to obtain written authority to make shipment and furnish notice of shipment; enforcement

\* \* \*

B. Before making shipment of any alcoholic beverages in Louisiana, the shipper shall make application to the collector for authority to ship alcoholic beverages into the state. The application must be in written form as specified by the collector. Approval must be written and must show the period of time for which the authority is issued and the conditions of issuance. The collector shall not authorize and approve shipments of any alcoholic beverages into Louisiana except shipments from the distiller the producer, the owner of the commodity at the time it becomes a marketable product, the bottler, or the exclusive agent of any such distiller, producer, bottler or owner.

The shipper shall prepare and mail a notice of shipment to the collector, and a copy to the Louisiana dealer, not later than the date of movement from the point of origin. The notice must show such information concerning the alcoholic beverages and the means of transportation as may be specified in regulations.

The collector may establish by regulation any other procedure for reporting or identifying shipments into the state as he may deem appropriate.

Any shipment into this state of any alcoholic beverage in violation of this Subsection shall render the entire shipment contraband, and it may be seized, forfeited and sold as provided in this Chapter.

Failure by any shipper to abide by the provisions of this Subsection shall also render the shipper ineligible to ship its products into the state of Louisiana, and it shall be a violation of this Chapter for any dealer to handle the product of any person prohibited from shipping into the state. The permit of any dealer who continues to handle the product of a prohibited shipper shall be revoked.

Any person or company who sells liquor to any Louisiana liquor dealers shall give the same discounts as are given by them to any liquor dealers in any other state so that Louisiana liquor dealers shall pay the same price as dealers in all other states.

La. Rev. Stat. Ann. § 26:370(b) (West 1975).



MARYLAND

§ 109. Price regulation.

\* \* \*

(c-1) Affirmation by suppliers of wholesalers.--The Comptroller may require, by regulation, that suppliers of wholesalers of distilled spirits affirm that the net price of each item offered for sale, exclusive of routine transportation costs, is no higher than the lowest price at which such item is being offered for sale elsewhere within the United States, including the District of Columbia.

\* \* \*

Md. Ann. Code. Art. 2B, § 109(C-1) (1981).

## MASSACHUSETTS

§ 250. Filing of schedule of minimum consumer prices; verification; filing and effective dates; inspection; rules and regulations.

(a) No brand of alcoholic beverages shall be sold within the commonwealth to a wholesaler or retailer, and no manufacturer, winegrower, farmer-brewer or wholesaler shall sell, offer for sale, solicit any order for, or advertise, any alcoholic beverages, the container of which bears a label stating the brand or the name of the owner or producer, unless a schedule of minimum consumer prices for each such brand of alcoholic beverages shall first have been filed with the commission and is then in effect.

\* \* \*

§ 25D. Price Discrimination.

(a) There shall be filed with, and when filed shall be deemed part of, the schedule filed for a brand of alcoholic beverage pursuant to section twenty-five B an affirmation duly verified by the owner of such brand of alcoholic beverage, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of alcoholic beverage is not licensed by the commission, that the bottle and case price of alcoholic beverages to wholesalers set forth in such schedule is no higher than the lowest price at which such item of alcoholic beverage was sold by such brand owner or such wholesaler

designated as agent, or any related person, 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 alcoholic beverage stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph, the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of alcoholic beverages purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.

(b) There shall be filed with, and when filed shall be deemed part of, any other schedule filed for a brand of alcoholic beverage pursuant to section twenty-five B an affirmation duly verified by the person filing such schedule that the bottle and case price of alcoholic beverages to wholesalers set forth in such schedule is no higher than the lowest price at which such item of alcoholic beverage was sold by such person 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 alcoholic beverage stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.

\* \* \*

Mass. Gen. Laws Ann. ch. 138, §§ 25C(a),  
25D(a-b) (West Supp. 1985).

MINNESOTA

340.114.                      Unlawful                      discrimination  
prohibited.

\*       \*       \*

Subd. 3. No licensed importer or manufacturer shall offer or sell to any licensed wholesaler any intoxicating liquor at a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer 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.

\*       \*       \*

Minn. Stat. § 340.114 (Subd. 3) (Supp. 1984).

## NEBRASKA

53-170.02. Manufacturer or importer; sell in Nebraska at higher price than that of other states; prohibited. No licensed manufacturer or importer shall sell or offer to sell to any licensed Nebraska wholesaler, distributor, or jobber any item of alcoholic liquor, except wine and beer, at a price which is higher than the lowest price at which such item is currently being sold or offered for sale to any wholesaler, distributor, or jobber in any other state or the District of Columbia or to any state agency.

53-170.03. Manufacturer or importer; file affirmation and schedule of prices; contents; monthly revision; price increases; when effective. Within thirty days after May 15, 1975, each manufacturer or importer holding a Nebraska shipper's permit shall file with the Nebraska Liquor Control Commission (1) an affirmation that he or she will not willfully sell or offer to sell any item of alcoholic liquor, except wine, beer, and brandy, to any wholesaler, distributor, or jobber in Nebraska at a price higher than the lowest price for which such item is sold or offered for sale in any state or the District of Columbia and (2) a current schedule or prices for each brand and each size of alcoholic liquor, except wine, beer, and brandy, sold or offered for sale in Nebraska, which prices, at the time of filing, are not higher than the lowest price at which the brand and size are offered for sale to any wholesaler, distributor, or jobber in any state or the District of Columbia or

to any state agency. This section shall not preclude a manufacturer or importer holding a Nebraska shipper's permit from changing prices to any wholesaler, distributor, or jobber in any state or the District of Columbia or to any state agency during the period covered by the filing in Nebraska. On the fifteenth day of each month thereafter there shall be filed with the commission either a revised schedule or a statement that no revision is being made. Any price increase shown in any such revision shall be made effective forty-five days from the date of filing. When a shipper's permit is renewed, a complete new schedule of prices shall be filed and copies of all schedules previously filed may be destroyed by the commission.

Neb. Rev. Stat. §§ 53-170.02, 53-170.03 (1978).

NEW JERSEY

13:2-24.5. Supplier pricing and  
marketing information

(a) Every manufacturer, supplier, winery, brewer, importer, blender or rectifier intending to sell alcoholic beverages to wholesalers or distributors within this State shall:

\* \* \*

3. Prior to any sale or delivery of distilled spirit alcoholic beverages, or annually by August 1 of each year, file with the Division a written statement under oath affirming that its prices to New Jersey wholesalers and distributors have not been and will not be a price or discount higher than the lowest price or lower than the highest discount which has been or will be offered to any wholesaler or distributor or state agency (which operates retail stores) in any other State of the United States or in the District of Columbia.

N.J. Admin. Code tit. 13, § 2-24.5(a)(3) (1980).



NEW MEXICO

60-8A-12(A). Filing of schedules required.

A. No brand of alcoholic beverages shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a price and discount schedule is filed with the director and is then in effect.

\* \* \*

60-8A-15. Filing of affirmation.

The owner of a brand of alcoholic beverages shall file as part of the schedule a [verified affirmation that the price to New Mexico wholesalers is no greater than the lowest price at which the item of alcoholic beverages is sold by the brand owner or any related person 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.] As used in this section, "related person" means any person:

A. in any business in which the brand owner has an interest, direct or indirect, by stock or other security ownership, as lender or lienor or by interlocking director or officer;

B. in the exclusive, principal or substantial business of selling a brand of alcoholic beverages purchased from the brand owner; or

C. who has an exclusive franchise or contract to sell the brand of alcoholic beverages.

N.M. Stat. Ann. §§ 60-8A-12(A), 60-8A-15 (1981).

NEW YORK

§ 101-b-3

\* \* \*

3(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to wholesalers set forth in schedule is no higher than the lowest price at which such item of liquor will be sold by such brand or such wholesaler designated as agent, or any related person, 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 (i) at any time during the calendar month for which such schedule shall be in effect, and (ii) if a like affirmation has been filed at least once but was not filed during the calendar month immediately preceding the month in which such schedule is filed, then also at any time during the calendar months not exceeding six immediately preceding the month in which such schedule shall be in effect and succeeding the last calendar month during which a like affirmation was in effect. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as

agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.

\* \* \*

N.Y. Alco. Bev. Cont. Law § 101-b-3(d)  
(Consol. 1980).

OKLAHOMA

§ 536.1. Limitation on price of distillers' sales

No distiller shall sell alcoholic beverages to a wholesaler licensed under the Alcoholic Beverage Control Act<sup>1</sup> at a rate higher than the lowest rate at which such distiller sells in any other state.

Okla. Stat. Ann. tit. 37, § 536.1 (West Supp. 1985).

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<sup>1</sup>Section 501 et seq. of this title.

## RHODE ISLAND

3-6-14.1 Affirmation of price compliance. -- No holder of a certificate of compliance for distilled spirits or vinous beverages shall ship, transport or deliver within this state, or sell or offer for sale(,) to a wholesaler, any brand of distilled spirits or vinous beverages at a bottle or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such holder of a certificate of compliance to any wholesaler in any other state of the United States or in the District of Columbia or to any state, including an agency of such state, which owns and operates retail liquor outlets.

Prior to the shipment of such distilled spirits or vinous beverages, the holder of a certificate of compliance, or the authorized representative of such holder, shall file with the liquor control administrator a written affirmation under oath by the holder of the certificate of compliance certifying that the bottle or case price to the wholesaler will be no higher than the lowest price at which each such item of distilled spirits or vinous beverages is or will be sold, offered for sale, shipped, transported or delivered by such holder to any wholesaler in any other state in the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets, at any time during the calendar month in which such shipment is being made.

In determining the lowest price for which any item or distilled spirits or vinous beverages is or was sold, offered for sale, shipped, transported or delivered during such month by the holder of a certificate of compliance to a wholesaler in any other state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatever offered or given to any such wholesaler in another state or in the District of Columbia or to any state agency which owns and operates retail liquor outlets; provided that differentials in price which make only due allowances for differences in state taxes and fees and for the actual cost of delivery are permissible. As used herein the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon of alcoholic liquor and the term "gallon" shall mean one hundred twenty-eight (128) fluid ounces.

By and with the consent of the liquor control administrator, a holder of a certificate of compliance may file the affirmation required by this section once and may certify thereon that such affirmation shall remain in full force and effect until rescinded by such holder of a certificate of compliance and such notice of rescission shall be given at least fifteen (15) days before its effective date. In the event of the rescission of an affirmation, such holder of a certificate of compliance

shall not ship, transport, deliver, sell or offer to sell to any wholesaler until a new affirmation is filed with the liquor control administrator in accordance with the provisions of this section.

The liquor control administrator shall enforce the provisions of this section and make such regulations as shall be necessary to carry out its provisions.

R.I. Gen. Laws § 3-6-14.1 (1976).



## SOUTH CAROLINA

§ 61-7-100. Producers shall file affirmation brands will be sold to State wholesalers in parity with lowest nationwide price schedule.

Every registered producer of alcoholic liquors shall, at the time of application for registration in this State, file with the Alcoholic Beverage Control Commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such producer in this State. [The affirmation shall certify that the producer shall not wilfully sell or offer for sale any alcoholic liquors of a particular brand and proof in any State in the United States at a price lower than the price such liquors are sold or offered for sale to licensed South Carolina wholesalers.]

"Price" as used in this section shall mean platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violations of the producer's affirmation if such discount prices are also offered to South Carolina wholesalers for purchases in the same quantities.

Any registered producer who fails to file such affirmation or wilfully violates the pledges contained therein shall have its registration and privileges to import and sell alcoholic liquors in the State refused, cancelled or suspended at the discretion of the Alcoholic Beverage Control Commission for such periods as the Commission may deem necessary and proper.

Any producer may appeal a judgment of the Alcoholic Beverage Control Commission to the circuit court of Richland County.

S.C. Code Ann. § 61-7-100 (Law Co-op 1976).

## TENNESSEE

57-3-202. Manufacturer's or distiller's licenses --Qualifications of applicants -- Fees -- Permits to solicit orders -- Affirmation of corporate price policy -- Penalty -- Rules and regulations. --

(e)(1) Every manufacturer, distiller, rectifier, factor, broker, or vintner of alcoholic spirituous beverages or vintage alcoholic beverages shall, before offering for sale to any licensed wholesaler or distributor in the state of Tennessee any brand of alcoholic spirituous beverages or vintage alcoholic beverages, file with the alcoholic beverage commission [an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state;

(2) The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverages or vintage alcoholic beverages of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States;

(3) "Price" as used in this subsection shall mean platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and

proof of the product concerned. Quantity discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violation of the manufacturer's, distiller's, rectifier's, broker's, or vintner's affirmation fo such discount prices are also offered to Tennessee wholesalers for purchases in the same quantities;

\* \* \*

Tenn. Code Ann. § 57-3-202(e)(1-3)  
(1980).



