No. 101 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

COMMONWEALTH OF PENNSYLVANIA,
Plaintiffs,

v.

STATE OF ALABAMA, STATE OF ARIZONA, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII, STATE OF IDAHO, STATE OF IOWA, STATE OF KANSAS, STATE OF LOUISIANA, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MISSISSIPPI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF SOUTH CAROLINA, STATE OF TENNESSEE, STATE OF UTAH, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON, STATE OF WEST VIRGINIA, AND STATE OF WYOMING,
Defendants.

BRIEF FOR DEFENDANT STATE OF MARYLAND IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED

1. Whether Pennsylvania's constitutional challenge to the diverse liquor price affirmation statutes, regulations, or policies of 38 States (including Pennsylvania) presents an appropriate case or a proper controversy for exercise of this Court's original jurisdiction?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes
Rules and Regulations Involved

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JURISDICTION

The plaintiff invokes the original jurisdiction of this Court under Article III, §2 of the United States Constitution and 28 U.S.C. §1251(a)(1). However, defendant State of Maryland contends that Pennsylvania's request for a declaratory judgment that the liquor price affirmation statutes, regulations or policies of 38 States are unconstitutional and for an injunction against their enforcement fails to present an appropriate case or a proper controversy for exercise of this Court's original jurisdiction.

PARTIES

The parties to this proceeding are the plaintiff, the Commonwealth of Pennsylvania, and the following defendant States: Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana,

Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Article I, Section 8, Clause 3:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article III, Section 2, Clause 1:

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, 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.

United States Code

28 U.S.C. §1251(a):

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

Annotated Code of Maryland [1/]

Article 2B, §109 (c-1):

Affirmation by suppliers or wholesalers. -- the Comptroller may require, by regulation, that suppliers or 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.

Code of Maryland Regulations

COMAR 03.02.01.13

A. Application. The net price of a brand item or size of distilled spirits sold by any manufacturer, non-resident dealer, or other supplier of distilled spirits to a Maryland wholesaler exclusive of routine transportation costs, may not be higher than the lowest price at which the brand item or size is contemporaneously being sold or offered for sale by the manufacturer, non-resident dealer, or other supplier to any wholesaler in any state or the District of Columbia or to any state, state agency, or subdivision which owns or

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1/ The remaining State statutes and regulations challenged by Pennsylvania are found in the Appendix to Plaintiff's Motion for Leave to File Complaint.

operates, or both, retail liquor stores, anywhere within the United States.

B. Affirmed Price Oath. Every manufacturer, non-resident dealer, or other supplier of distilled spirits to wholesalers in Maryland shall affirm under oath and in writing to the Alcohol and Tobacco Tax Division of the Comptroller of the Treasury that the net price of each brand item or size of distilled spirits offered for sale or sold to a wholesaler in Maryland, exclusive of routine transportation costs, is not higher than the lowest price at which the brand item or size is sold or contemporaneously offered for sale anywhere within the United States or the District of Columbia or to any state, state agency, or subdivision which owns or operates, or both, retail liquor stores.

C. Lowest Price Determination. In determining the lowest price for which any brand item or size of distilled spirits is sold in any other state, or in the District of Columbia, or to any state or state agency or subdivision which owns or operates, or both, retail liquor stores, appropriate reductions shall be made to reflect all discounts and all rebates, free goods, allowances, and other inducements of any kind whatsoever offered or given to any such wholesaler or state or state agency or subdivision purchasing these items in the other states or in the District of Columbia, except that nothing contained in this regulation shall prevent differentials in price which make only appropriate allowance for difference in state taxes and fees paid by the manufacturer or non-resident dealer or supplier and in the actual cost of delivery. As used in this regulation, the phrase "State taxes and fees" means excise taxes or fees imposed on manufacturers, non-resident dealers, or suppliers by any state or the District of Columbia upon, or based upon the gallon of liquor, and the term "gallon" means 128 fluid ounces, or the metric equivalent.

D. Penalty for Violation. Any manufacturer, non-resident dealer, or other supplier who violates any of the provisions of this regulation directly, indirectly, or by subterfuge shall be subject to suspension or revocation of its license or permit.

E. Prima Facie Violation. Any discrepancy in a price posted for sale in Maryland or sales made in Maryland in any month by a manufacturer, non-resident dealer, or other supplier with its price posted or sales made in any other state or the District of Columbia for the same month that results in a higher price to a Maryland wholesaler for any brand item or size of distilled spirits shall be considered prima facie evidence of a violation of this regulation.

STATEMENT OF THE CASE

Thirty-eight states, including the plaintiff, Pennsylvania, and the defendant, Maryland, have liquor price affirmation statutes, regulations or policies that generally require liquor suppliers to affirm that their wholesale prices are no higher than the lowest price offered for sale elsewhere in the United States. However, as plaintiff's brief indicates, these regulatory policies were developed at different times over nearly the last half-century by States

with differing motives. Plaintiff's Brief In Support of Motion for Leave to File Complaint at 47-50. The first states to require price affirmation were states with liquor monopolies, and, Pennsylvania, a liquor control state, adopted its own price affirmation policy decades before most of the states named as defendants in this action.

Aside from the difference between liquor control states concerned with their proprietary activities and states that have adopted price affirmation as a purely regulatory policy, there are other significant differences among the challenged policies. Most notably are the reference points adopted by the states for computing wholesale prices. For example, some states have adopted laws, like that upheld in Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), which limit prices to the lowest price charged wholesalers in any other state during the

preceding month. See e.g. Mass. Gen. Laws Ann. Ch. 138, §25D(a-b). Others like Minnesota hinge prices to the lowest price the liquor is "contemporaneously" being sold by the supplier. See Minn. Stat. §340.114. Some statutes do not specify any particular reference point. See e.g. Ariz. Rev. Stat. Ann. §4-253(A).

The Maryland General Assembly, in 1967, authorized the State Comptroller to adopt a regulation requiring price affirmation by liquor suppliers. Md. Code, Art. 2B, §109(c-1). However, that authority was not exercised and Maryland had no price affirmation policy until 1981. That 1981 regulation generally limits liquor prices to the lowest amount at which the brand item or size is sold or contemporaneously offered for sale anywhere within the United States. COMAR 03.02.01.13B.

In 1972, Pennsylvania attempted to file an action similar to this one, challenging on

Commerce Clause grounds the liquor price affirmation policies of 26 states. However, leave to file the complaint was denied. Pennsylvania v. New York, 410 U.S. 978, rehearing denied, 411 U.S. 977 (1973). Pennsylvania's latest suit adds 11 new defendants, including Maryland. It prays for a declaration that the price affirmation laws, regulations and policies of 38 states (including Pennsylvania) are violative of the Commerce Clause and an injunction against their enforcement. See Plaintiff's Motion for Leave to File Complaint at 10 and 37.

SUMMARY OF ARGUMENT

Pennsylvania's constitutional challenge to the liquor price affirmation statutes, regulations, and policies of 38 states fails to present a proper controversy or an appropriate case for resolution under this Court's original jurisdiction. Thus, the plaintiff's motion for leave to file complaint should be denied.

No Proper Controversy

A plaintiff in an original action bears a heavy burden of convincing the court that a "proper controversy" exists. Maryland v. Louisiana, 451 U.S. 725 (1981). Pennsylvania cannot make such a showing. It has not suffered an imminent injury of serious magnitude. Alabama v. Arizona, 291 U.S. 286 (1934). The plaintiff has sued only to protect a proprietary interest, does not feel the principal impact of price affirmation and, in fact, benefits from its own price affirmation scheme. In addition, Pennsylvania's "injury" was voluntarily incurred and aggravated by its own delay in litigating in an appropriate forum the constitutional issue pressed here. Finally, the plaintiff's challenge to 38 state statutes, regulations, and policies results in misjoinder warranting dismissal. Alabama v. Arizona, supra.

Inappropriate Case

An "appropriate case" for original jurisdiction is one where the claim is serious and dignified and cannot be pressed in another forum. The Commerce Clause issue pressed by Pennsylvania seeks, as to some defendants, a refinement of a summary disposition of this Court and, as to others, the overruling of clearly established precedent. Secondly, an original challenge to the statutes and policies of 38 states is inimical to federalism, because it assumes that states will not comply with an appellate decision of this Court or open their courts to the plaintiff's claim. Thirdly, an original suit against the majority of states of the union represents "an extremely awkward vehicle to manage." Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 504 (1971). Finally, alternate forums exist where Pennsylvania's claim may be resolved.

ARGUMENT

Introduction

This Court has repeatedly observed that its original jurisdiction should be exercised "sparingly." Maryland v. Louisiana, 451 U.S. 725, 739, (1981); United States v. Nevada, 412 U.S. 534, 538 (1973); Massachusetts v. Missouri, 308 U.S. 1, 18-20 (1939). This restraint is grounded in the Court's recognition of the awkwardness of appellate court adjudication in original cases, Ohio v. Wyandotte Chemical Corp., 401 U.S. 493, 498 (1971), and its fear that the expansion of original jurisdiction would intrude on the paramount role of the Court in appellate cases, Illinois v. City of Milwaukee, 406 U.S. 91, 93-94 (1972). To counter these concerns, a State seeking to invoke the discretion of the Supreme Court in the exercise of its original jurisdiction bears a burden heavier than that of a petitioner for

certiorari or even an applicant for an injunction in a nisi prius setting. Maryland v. Louisiana, 451 U.S. at 736, n.11; Alabama v. Arizona, 291 U.S. 286, 292 (1934). Thus, a plaintiff state must clearly convince the Court that this is a "proper controversy" under its original jurisdiction as well as an "appropriate case" for resolution in an original action. Maryland v. Louisiana, 451 U.S. at 735, 739. Pennsylvania can satisfy neither of these tests.[2/]

I. Pennsylvania's Constitutional Challenge To The Statutes, Regulations And Policies Of 38 States Fails To Present A Proper Controversy For Resolution Under This Court's Original Jurisdiction.

Leave to file a complaint in this Court will not be granted "unless the threatened injury is clearly shown to be of serious magnitude and imminent." Alabama v. Arizona,

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[2/] Part I will discuss whether Pennsylvania's suit presents a "proper controversy"; Part II treats the issue of whether this is an "appropriate case" for original jurisdiction.

supra 291 U.S. at 292 (emphasis added). This threatened invasion of rights must be established by clear and convincing evidence. New York v. New Jersey, 256 U.S. 296, 309 (1921). In addition, to constitute a "proper controversy" in an original case, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." Massachusetts v. Missouri, supra, 308 U.S. at 15. Defendant Maryland submits that under these common law and equitable principles, plaintiff has failed to assert sufficient harm to invoke original jurisdiction, particularly in light of its long-standing involvement in liquor price affirmation and its delay in litigating the issue

presented here in other appropriate forums. Also, these principles mandate that Pennsylvania's action be dismissed for misjoinder of parties defendant and of causes of action.

First, it should be noted that Pennsylvania is suing not as a sovereign performing a governmental function, but as a mere "trader" with a liquor-distribution monopoly. See Garcia v. San Antonio Metro. Transit Autho., 105 S. Ct. 1005, 1013 n. 7 (1985); Ohio v. Helvering, 292 U.S. 360, 369 (1934); Flint v. Stone Tracy Co., 220 U.S. 107, 172 (1911). Thus, whatever injury plaintiff suffers from a nationwide system of liquor price affirmation is not unique to either its sovereign or quasi-sovereign interests. Contrast Maryland v. Louisiana, supra, 451 U.S. at 739-741.

Second, the adverse impact of liquor price affirmation is felt not principally by Pennsylvania but by private liquor suppliers

who have shown no reluctance in challenging the affirmation laws of individual states. See United States Brewers Association, Inc. v. Rodriquez, 104 S. Ct. 1581 (1984) (mem.) (concurring opinion of Justice Stevens); Healy v. United States Brewers Association, Inc., 104 S. Ct. 265 (1983) (mem.). In fact, liquor control states, like Pennsylvania, do derive substantial benefits from price affirmation. See Joseph E. Seagram & Sons, Inc. v. Hostetter, supra, 384 U.S. at 44, n. 14. It would be difficult for plaintiff to contend that it pays exorbitant prices as a result of price affirmation. Instead, its "harm" is reduced to its assertion that it cannot obtain supplier discounts which "large volume purchasers enjoy in an unfettered market." Brief in Support of Motion for Leave to File Complaint at 58. In short, Pennsylvania's allegation of harm from price affirmation stems from the fact that it

voluntarily has chosen to operate a liquor monopoly and has become the largest of such monopolies. This hardly amounts to harm of "serious magnitude."

Third, the harm Pennsylvania purportedly suffers from liquor price affirmation cannot be described as "imminent." Alabama v. Arizona, supra, 291 U.S. at 292. Plaintiff has subscribed to price affirmation for decades -- long before most of the defendants. In fact, it is by no means clear that Pennsylvania's early entry into price affirmation has not subsequently stimulated similar action by other states. And Plaintiff has not lacked opportunities over the years to pursue a challenge to price affirmation in an appropriate forum. Even after the failure in 1972 of Pennsylvania's unprecedented attempt to challenge in this Court the price affirmation policies of 26 states, see Pennsylvania v. New York, supra,

the plaintiff made no attempt to target a single state for litigation to obtain through the appellate process a decision that would bind the remainder of the affirmation states.

The inability to demonstrate serious and imminent harm is not the only defect in Pennsylvania's complaint. Its attempt to challenge 38 widely varying statutes, regulations and policies raises problems of misjoinder that this Court in the past has relied upon to dispose of unwarranted invocations of original jurisdiction.

In Alabama v. Arizona, supra, the Court characterized as "multifarious" a suit by one state against several states to set aside a statute of each. 291 U.S. at 290-291. Although the Federal Rules of Civil Procedure have lessened the success of misjoinder contentions in the typical district court case, such rules serve as only a "guide" in original actions and then only when their

application is deemed "appropriate." Utah v. United States, 394 U.S. 89, 95 (1969); Rule 9.2 of the Supreme Court of the United States. There is ample reason to believe that Alabama v. Arizona regarded its misjoinder rule as one grounded in policy rather than procedure. For example, the Court noted that:

> Considerations of convenience that in suits between private parties reasonably may justify exercise of discretion in support of such joinders have no bearing in a case such as this. If, in a suit brought by Alabama against one of these states, this court should hold the assailed statute invalid and enjoin its enforcement, the decision would be authoritative and controlling as a precedent in all courts, state and federal. Presumably no other state would attempt on similar facts to enforce a like measure, and Alabama would have no occasion to invoke our jurisdiction further. The amended bill is multifarious. 291 U.S. at 291.

In addition, long after the Federal Rules of Civil Procedures were adopted, this Court in the face of the defendants' reliance upon Alabama v. Arizona rejected the price affirmation challenges Pennsylvania leveled at 26

states in 1972. Pennsylvania v. New York, supra.

In summary, under prior decisions of this Court, Pennsylvania is unable to show that the case is a "proper controversy" warranting exercise of original jurisdiction. 3/

II. This is not an appropriate case for exercise of the Court's original jurisdiction.

Another hurdle Pennsylvania has failed to clear is convincing the Court that this is an "appropriate case" for the exercise of original jurisdiction. In Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972), this Court noted that what is "appropriate" involves not only "the seriousness and dignity

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3/ There is an additional ground why this action is not a "proper controversy" for original jurisdiction. Pennsylvania expressly seeks to enjoin its own policy as a result of this litigation. See Motion for Leave to File Complaint at 10. Although Pennsylvania is free to challenge its price affirmation policy in its own courts, such relief is unavailable in an original action where the controversies must exist between "two or more states."

of the claim," but also "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." These factors undercut any possible contention that there exists here "the necessity" to exercise original jurisdiction. Louisiana v. Texas, 176 U.S. 1, 15 (1900).

It is not just the relatively insubstantial and voluntary nature of the injury purportedly suffered by Pennsylvania that diminishes the "seriousness and dignity" of the plaintiff's claim. As to some defendant states, the legal issue pressed by Pennsylvania amounts to no more than a refinement of Healy v. United States Brewers Association, Inc. 104 S. Ct. 265 (1983) (mem.) As to other defendant states, Pennsylvania's complaint seeks an overruling of Joseph E. Seagram v. Hostetter, supra, --

a course neither justices of this Court, see United States Brewers Association, Inc. v. Rodriquez, 104 S. Ct. 1581 (1984) (mem.) (concurring opinion of Justice Stevens), nor judges of lower courts, see e.g. United States Brewers Association, Inc. v. Healy, 692 F.2d 275, 282-284 (2nd Cir. 1982), appear to believe warranted.

Neither the Commerce Clause issue advanced by Pennsylvania nor the asserted damage to its proprietary concerns "implicate serious and important concerns of federalism" consistent with the purposes and reaches of original jurisdiction, Maryland v. Louisiana, supra, 101 S. Ct. at 2127. In fact, permitting an original action challenge to 38 separate state statutes would be inimicable to the interests of federalism. Pennsylvania's attempt to invoke original jurisdiction betrays assumptions, already rejected by this Court, that a State will not comply

with an appellate decision of this Court on the question herein, or that lower courts, be they state or federal, will not enforce the plaintiff's asserted rights. See Alabama v. Arizona, 291 U.S. 286, 291 (1934); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976). 4/ A single suit against a single defendant in an appropriate forum may be enough to alleviate Pennsylvania's concern without the severe rebuke to federalism represented by the plaintiff's unprecedented original action.

Similarly, if plaintiff's action were to proceed, it would be "an extremely awkward vehicle to manage." Ohio v. Wyandotte Chemical Corp., supra, 401 U.S. at 504. The statutes, regulations and policies of the defendant states are not identical. They

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4/ For example, the General Assembly of Maryland responded immediately to the decision of the Court in Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984), by enacting emergency legislation repealing a discriminatory exemption in the State's wine tax statute that favored in-state wineries. See Chapter 30, Laws of 1985.

were adopted at different times and with different purposes. The interests of "control" states may be different from those of "non-control" states. Thus, the local interests to be weighed as part of the necessary balancing test employed in Commerce Clause analysis may vary from state to state. So, too, will the impact of Pennsylvania's liquor monopoly differ from state to state. For this reason the evidence proffered by each of the 37 defendants, each of whom are separately represented, will necessarily vary. All of these factors make this action inappropriate for original jurisdiction.

Finally, Pennsylvania has a variety of alternative forums in which to press its Commerce Clause claim. The plaintiff can sue in the courts of another state to obtain a precedent-setting ruling eventually of this Court. The Attorney General of Pennsylvania could bring suit in that State's courts

against the Liquor Control Board to contest the validity of the Pennsylvania price affirmation scheme, with a right of review in this Court.[5/] The only objections Pennsylvania could muster to a trial forum other than this Court are those grounded in unfounded fears that states and state courts will not honor federal rights. Alternatively, the plaintiff could allow its claim to be presented by liquor suppliers, who, in recent years have shown no hesitancy in challenging price affirmation schemes as creating an impermissible burden on commerce and in pressing their claims in the Court. Each of

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5/ Pennsylvania courts have sanctioned the authority of its Attorney General to bring a declaratory judgment action to challenge the constitutionality of a State law. See Hetherington v. McHale, 10 Pa. Commonw. 501, 311 A.2d 162, 167 (1973), rev'd on other grounds, 458 Pa. 479, 329 A.2d 250 (1974) ("If the Attorney General in his opinion believes that a statute is unconstitutional, he has the right and indeed the duty to . . . cause to be initiated an action in the courts of this Commonwealth and thus obtain judicial determination of the issue"). See also, Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595 (1978), appeal dismissed, 440 U.S. 942 (1979).

these alternatives carries the possibility that this issue could eventually reach this Court through the orderly appeal process.

CONCLUSION

For all of these reasons, Maryland contends that the plaintiff has failed to show that this suit presents a proper controversy or an appropriate case for exercise of this Court's original jurisdiction. Accordingly, Pennsylvania's motion for leave to file a complaint should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald Langbaum, one of the attorneys for the State of Maryland in the aforegoing proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on this 29th day of April, 1985, I served copies of the Brief For Defendant State of Maryland In Opposition To Motion For Leave To File Complaint by sending three copies thereof each by first class mail, postage prepaid, to the Governor and Attorney General of each party in this proceeding.

All parties required to be served have been served.

Gerald Langbaum
Assistant Attorney
General