No. 101 Original

In The

Supreme Court of the United States

October Term, 1984

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

v.

STATE OF ALABAMA, *et al.,*
Defendants.

BRIEF OF DEFENDANT, COMMONWEALTH OF VIRGINIA, IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

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STATEMENT OF THE CASE

The Commonwealth of Pennsylvania has moved for leave to file a complaint and institute an original action in this Court against the State of Alabama, the Commonwealth of Virginia, and thirty-five (35) other states.[1] Pennsylvania

[1] The plaintiff's "Motion for Leave to File Complaint, with Complaint and Brief In Support of Motion" names the following states as defendants: 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

claims that the various defendants each have adopted "price affirmation" statutes, regulations or practices which have the effect of fixing the price of distilled spirits in all other states in violation of the Commerce Clause.[2] Its complaint requests that this Court "declare all distilled spirit [price affirmation] statutes, regulations and practices unconstitutional," and that it enter an appropriate order to "enjoin the enforcement of all distilled spirit price affirmation statutes, regulations and practices."

In its complaint and supporting brief, Pennsylvania classifies the defendants under two categories, the "Affirmation Law Defendants" and the "Control State Defendants." [3] It describes the affirmation states as allowing privately licensed distributors to sell distilled spirits at both wholesale and retail. In such states, applicable law generally requires all suppliers to affirm to the state that the prices charged its private wholesalers within the state are no greater than the lowest price charged nationally for a particular brand or product during the preceeding month. The plaintiff describes the control states as those which, following the ratification of the Twenty-first Amendment to the United States Constitution in 1933, elected to exercise broad regulatory authority over intoxicating liquors and operate state-controlled distribution systems. In such a system, the state, itself, serves as both wholesaler and retailer. The control states, including Virginia, have used their constitutional authority and bar-

Jersey, State of New Mexico, State of New York, State of Oklahoma, State of Rhode Island, State of South Carolina, and State of Tennessee.

[2] The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, provides "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[3] The first seventeen (17) defendant states listed in note 1, *supra,* are classified by Pennsylvania as the Control State Defendants. The remaining twenty (20) are classified as the Affirmation Law Defendants.

gaining power to obtain price affirmation warranties in their procurement contracts with suppliers of distilled spirits. The control states, by contract, receive the assurance of the supplier that the prices charged the state are no greater than the lowest price charged another buyer. Pennsylvania operates as a control state and admits that it obtains price affirmation warranties from its suppliers.[4]

Although the particular laws and practices of each individual defendant may have some incidental extraterritorial effect in the distilled spirits marketplace, Pennsylvania claims that, collectively, the various price affirmation statutes, regulations and practices operate to deprive it of free and open competition. The plaintiff characterizes the collective effect as a "national liquor price affirmation system," but it has failed to properly allege that it has suffered any particular losses or damages caused by the individual conduct of Virginia, or any other state. Since 1937 (for nearly fifty years), Virginia has contracted for price affirmation warranties from suppliers of distilled spirits, and it has done so independently and of its own accord.[5] Virginia has never acted in concert, or agreed, with other states to interfere with the market for distilled spirits, as implied by Pennsylvania, and has at all times acted pursuant to its authority under the Twenty-first Amendment.[6]

In essence, Pennsylvania seeks declaratory and injunctive relief of sweeping proportions that would strike down dozens of different state statutes and regulations enacted by affirma-

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[4] *See* Pennsylvania's Complaint, paragraph 5, and its Brief In Support of Motion for Leave to File Complaint, p. 48.

[5] Virginia's warranty predates the 1938 industry meeting in Des Moines, Iowa, referenced in plaintiff's Brief at pp. 47-48.

[6] The U.S. Const., Amendment XXI, § 2, provides as follows: "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."

tion states and void the contractual price affirmation warranties customarily received by the control states. In so moving, it asserts that this Court has "refined the state of the law with respect to the interplay between the Twenty-first Amendment and the Commerce Clause," and that the Twenty-first Amendment no longer authorizes a state, as a part of its scheme to regulate intoxicating liquors, to insist on a price affirmation warranty of any kind.

SUMMARY OF ARGUMENT

I. Virginia asserts that Pennsylvania has not presented a justiciable controversy for adjudication by this Court and has failed to allege it has suffered a wrong caused by the individual price affirmation practices of Virginia or any other control state. This Court should refuse to exercise its original and exclusive jurisdiction because the complaint is multifarious and does not set forth an "appropriate case" of sufficient dignity to implicate concerns of federalism.

II. The central question presented, as it pertains to the individual defendant states, has been decided by this Court. Price affirmation statutes or practices which do not directly interfere with commerce in another state are authorized by the Twenty-first Amendment.

III. The practice of Virginia in requiring contractual price affirmation warranties when purchasing alcoholic beverages is squarely within the scope of the Twenty-first Amendment, and any extraterritorial effect of Virginia's individual price affirmation practices is incidental.

IV. Recent decisions of this Court have not changed the law as it applies to Pennsylvania's complaint. Such recent decisions have not reversed or limited the previous ruling of this Court that a price affirmation statute which does not

directly affect and interfere with interstate commerce will be upheld under the Twenty-first Amendment.

ARGUMENT

PENNSYLVANIA'S MOTION FOR LEAVE TO FILE COMPLAINT SHOULD BE DENIED

I.

This Is Not A Proper Case In Which To Invoke The Original And Exclusive Jurisdiction Of This Court.

An examination of the motion and complaint filed herein reveals that there is no justiciable controversy between Pennsylvania and any individual control state defendant. In the recent case of *Maryland* v. *Louisiana,* 451 U.S. 725, 735-736 (1981), this Court reiterated that "[i]n order to constitute a proper 'controversy' under our original jurisdiction, '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' " (quoting *Massachusetts* v. *Missouri,* 308 U.S. 1, 15 (1939)). Pennsylvania has failed to allege sufficient facts evidencing that it has suffered a wrong, or incurred any damages or loss, as a result of Virginia's individual practice of obtaining price affirmation warranties. As noted in the case of *Alabama* v. *Arizona,* 291 U.S. 286, 291 (1934), "[a] State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor." Pennsylvania cannot comply with this requirement with respect to Virginia and the other control states, especially when the equitable doctrine of unclean hands is

considered. The plaintiff, as one of the largest single purchasers of alcoholic beverages, has been engaged in the practice of requiring price affirmations for many years, and its presence in the distilled spirits marketplace is significant. Pennsylvania's own practice runs contrary to the relief sought in its complaint, and equity should dictate that the plaintiff not be afforded the opportunity to contest such practices in other states.

Further, it was held in the case of *Alabama* v. *Arizona* that "[u]nless necessary for the prompt, convenient and effective administration of justice, a suit by one State against several States to set aside a statute of each is properly to be regarded as multifarious." *Id.* at 290. Although it was further stated that no clear test or rule was firmly established to determine whether a complaint was multifarious, it is submitted that the present case misjoins what purport to be causes of action challenging the constitutionality of certain statutes enacted by affirmation law states together with clearly insufficient claims for relief against the contractual practices of Virginia and other control state defendants.

In addition, Virginia asserts that if the complaint is insufficient or without merit as to each or any individual defendant state, standing alone, that Pennsylvania cannot overcome such deficiencies through the practice of joining all defendant states, and relying on the theory that the whole will be stronger than the sum of its parts.

This Court also has made it clear that its exclusive jurisdiction should be exercised "sparingly" and only in "appropriate cases." *Maryland* v. *Louisiana,* 451 U.S. at 739. In *Alabama* v. *Arizona,* it is asserted that jurisdiction will not be exerted in the absence of absolute necessity. 291 U.S. at 291. In *Maryland* v. *Louisiana,* it was held that "the issue of appropriateness in an original action between States must

be determined on a case-by-case basis;" that the "seriousness and dignity of the claim" and the availability of another forum would be factors to consider; and that, most importantly, the question presented should "implicate the unique concerns of federalism forming the basis of our original jurisdiction." 451 U.S. at 743, 740, 743. The present case involves the exercise of authority by the defendant states under the provisions of the Twenty-first Amendment, which, by its terms, repealed national prohibition and granted to the states direct control over the transportation or importation of intoxicating liquor into the state for delivery or use therein.[7] It does not involve unique concerns of federalism. When consideration is given to all these factors, it is submitted that Pennsylvania's complaint would not be an appropriate case in which to invoke the original and exclusive jurisdiction of the Court. It would also appear that the propriety of allowing the continuance of the so-called national price affirmation system, allegedly created by the collective effect of numerous individual, but clearly constitutional, state price affirmation statutes, laws and practices, presents a matter for political debate rather than an appropriate case for judicial determination.

II.

The Question Presented By Pennsylvania, As It Pertains To The Individual Defendant States, Has Already Been Decided.

In the case of *Joseph E. Seagram & Sons* v. *Hostetter,* 384 U.S. 35 (1966), this Court upheld New York's then existing price affirmation law and determined that it was

[7] Although, customarily, this Court has focused primarily on the terms of the Twenty-first Amendment rather than its history, it has clearly recognized the Amendment grants control to the states, and that "such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." *California Liquor Dealers* v. *Midcal Aluminum,* 445 U.S. 97, 107 (1980).

not unconstitutional on its face. It was noted that, factually, the case concerned liquor destined for distribution or use in New York, and that in such a situation "the Twenty-first Amendment demands wide latitude for regulation by the State." *Id.* at 42. The clear holding of this Court was that the mere fact New York geared its price affirmation law to pricing policies in other states was not sufficient to invalidate the statute, and that "[a]s part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Id.* at 43. After noting that the regulatory procedure followed by New York was comparable to the procedure followed by the control state defendants, this Court plainly held, *inter alia,* that New York's price affirmation statute, on its face, placed no unconstitutional burden on interstate commerce. *Id.* at 45.

Joseph E. Seagram & Sons v. *Hostetter* has remained as a controlling authority to the present time. Although it was inferred by this Court that it might assess the extraterritorial effects of New York's price affirmation law when a proper case arose, Pennsylvania's complaint does not present such a case. The Court in *Seagram* undoubtedly was looking for circumstances that would constitute a grave commercial interference with a manufacturer or distiller's operations elsewhere, not an alleged interference with the activities of a sovereign entity such as Pennsylvania.

The more recent case of *United States Brewers Ass'n, Inc.* v. *Healy,* 692 F.2d 275 (2d Cir. 1982), aff'd ____ U.S. ____, 104 S.Ct. 265 (1983), is significant in that it provides an example of what type of price affirmation statute is repugnant to the Commerce Clause. This case distinguishes an unconstitutional Connecticut price affirmation statute from the valid New York statute upheld in *Seagram.* The Con-

necticut statute contained provisions which controlled a brewer's future conduct in selling its product and had the direct effect of regulating prices in Connecticut as well as in surrounding states. It was noted in *Healy,* that the effects of Connecticut's statute on interstate commerce were not merely incidental but direct, and, therefore, in violation of the Commerce Clause. Virginia's practice of requiring contractual price affirmation warranties in no manner operates to directly regulate or control commerce outside Virginia and is a valid exercise of its Twenty-first Amendment authority and control.

In addition, some significance certainly can be assigned to the fact that in 1973 this Court refused to grant a similar motion for leave to file complaint submitted by Pennsylvania. The earlier motion and complaint, first presented in 1972, sought relief nearly identical to that again pursued by Pennsylvania in the case at hand. The 1972 motion was summarily denied without opinion. *Pennsylvania* v. *New York,* 410 U.S. 978, reh. den., 411 U.S. 977 (1973).

III.

The Practice Of The Commonwealth Of Virginia In Requiring Contractual Price Affirmation Warranties When Making Procurements Of Alcoholic Beverages Is Squarely Within The Scope Of The Twenty-First Amendment.

The "view of the scope of the Twenty-first Amendment with regard to a State's power to restrict, regulate or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned." *Hostetter* v. *Idlewild Liquor Corp.* 377 U.S. 324, 330 (1964). This view holds that the state is not confined by the Commerce Clause when restricting "the importation of intoxicants destined for use, distribution or consumption within its borders." *Id.* In

California Liquor Dealers v. *Midcal Aluminum,* 445 U.S. 97 (1980), it was noted that there was no "bright line" between Twenty-first Amendment powers and Commerce Clause powers, and that in an appropriate case Commerce Clause considerations may outweigh "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110. This is not such a case.

It is submitted that Virginia's procurement practice in requiring contractual price affirmation warranties is squarely within its Twenty-first Amendment powers. As a control state operating its own system of retail outlets, Virginia should be able to contract for the lowest price available, avoid constant dealing and negotiating of prices, obtain the best prices possible for her citizens and conduct business in the most efficient manner possible. Any extraterritorial effect of Virginia's individual purchase practices is purely incidental and in no manner do such practices violate the Commerce Clause.

IV.

Recent Decisions Of This Court Have Not Changed The Law As It Applies To The Facts And Allegations In Pennsylvania's Complaint.

Although in 1973 Pennsylvania was unsuccessful in invoking this Court's original jurisdiction and in obtaining leave to institute a proceeding similar to that outlined in the present motion and complaint, it now again feels its opportunity is ripe. Pennsylvania believes the state of the law has been redefined to an extent that the fate of its previous efforts should not befall the current motion and complaint.

The recent cases of *Bacchus Imports, Ltd.* v. *Dias* ____ U.S. ____, 104 S.Ct. 3049 (1984), and *Capital Cities*

Cable, Inc. v. *Crisp*, ____ U.S. ____, 104 S.Ct. 2694 (1984), do not overrule the decision of this Court in *Joseph E. Seagram & Sons* v. *Hostetter, supra.* The *Crisp* case was primarily a Supremacy Clause case, where federal laws controlling cable communications were held to pre-empt a state's alleged Twenty-first Amendment right to ban liquor advertisements coming into the state over television cables.[8] The *Bacchus* case presented more complex issues with respect to the Twenty-first Amendment. In *Bacchus,* however, the element of discrimination was an overriding factor. The practice of obtaining price affirmation warranties by Virginia and other control states does not discriminate against suppliers of distilled spirits, nor does it operate to favor locally produced products. Suppliers remain free to set their prices as high or as low as market conditions will bear. Procurement practices by Virginia and other control states are an integral part of the process of importing intoxicating liquors, and the requirement for a contractual price affirmation warranty clearly is within the ambit of the Twenty-first Amendment powers granted to each and every state.

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[8] The *Crisp* decision noted that under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws may be pre-empted by federal laws or regulations in a number of different circumstances. 104 S.Ct. at 2700. The case further held that Oklahoma's advertising ban against the importation of cable television signals carrying liquor advertisements, which engaged only indirectly the central power under §2 of the Twenty-first Amendment, conflicted "with the accomplishment and execution of the full purposes of federal law" and the regulatory framework established by the Federal Communications Commission, all of which was designed to insure the "widespread availability of diverse cable services throughout the United States." 104 S.Ct. at 2709.

CONCLUSION

This is not an appropriate case in which to invoke the original and exclusive jurisdiction of this Honorable Court. The plaintiff's Motion for Leave to File Complaint should be denied.

Respectfully submitted,

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