No. 101, Original

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.

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

Respectfully submitted,

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STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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?

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INTRODUCTION

The State of Pennsylvania is once again asking this Court to invoke its original jurisdiction for the purpose of restricting thirty-seven other states from regulating wholesale liquor prices within their borders pursuant to the Twenty-first Amendment to the Constitution. The earlier identical request was denied by this Court. *Pennsylvania v. New York,* 410 U.S. 978 (1972), Reh'g Denied, 411 U.S. 977 (1973).

Pennsylvania again invites the Court to undertake a broad "generic" proceeding to explore the impact on the liquor industry of each state's "affirmation" statutes, regulations, or policies. These affirmation provisions generally require a supplier to warrant or "affirm" that the price offered a purchasing state or wholesaler within a state is the lowest price at which an item is sold elsewhere in the country.

Pennsylvania claims that these affirmation provisions have an extraterritorial effect which is alleged to be impermissible under the Commerce Clause. Pennsylvania further claims that its entrepreneurial interest as a liquor purchaser has been impacted and that impact warrants this Court invoking its original jurisdiction and granting relief.

Washington joins the other thirty-six states named in the Motion in requesting that this application be denied. Pennsylvania has failed to allege a claim which warrants original jurisdiction. Pennsylvania has not clearly and convincingly demonstrated that state affirmation practices have had a *direct measurable* impact on a *compelling* state interest of Pennsylvania.

While Pennsylvania as a control state functions as a participant in the national liquor market,[1] the impact alleged in this motion is exceedingly narrow and limited. Pennsylvania alleges only the loss of potential opportunity to purchase liquor at wholesale for what it believes could

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[1]Like Washington, Pennsylvania purchases liquor at wholesale for retail distribution through a system of state stores.

be a lower price but for the affirmation provisions.[2] The alleged potential lost opportunity does not result in a significant direct fiscal impact to Pennsylvania. No impact on Pennsylvania's liquor regulatory, or any other type of interest, is alleged. This entrepreneurial or business type of interest is insufficient to justify this Court's exercise of original jurisdiction to review the impact of affirmation provisions in a generic proceeding.

In addition, the generic proceeding proposed is an unmanageable way to challenge specific affirmation provisions. Such challenges, if made, are best addressed on a case-by-case basis with the real parties in interest, the distillers and suppliers, involved.

This Court has already had the opportunity to review challenges by distillers to affirmation statutes in concrete fact situations. There also are other cases pending which involve specific statutes and participants in the market.

Washington finally contends that its actions are fully consistent with the permissible scope of state regulation under the Twenty-first Amendment as identified by this Court.

A short description of the Washington system of liquor regulation and its method of affirmation is contained in Attachment A.

Washington's brief will concentrate on the nature of Pennsylvania's interest and the lack of utility of a generic approach to resolve affirmation issues. Washington supports, adopts and incorporates by reference relevant portions of the Consolidated Brief filed by Massachusetts on similar issues and on the Commerce Clause positions.

LAW AND ARGUMENT

This Court has been exceedingly cautious about utilizing original jurisdiction to resolve state claims. Original jurisdiction is not automatic. It is invoked "sparingly" and

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[2]Pennsylvania suggests that in a free market, a purchaser with its market share would be able to command the lowest prices.

only in "appropriate cases." *U.S. v. Nevada,* 412 U.S. 534 (1973); *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972). The Court has adopted rigorous standards for determining what is an appropriate case. There must be a strong showing[3] by the requesting state that:

> 1. There has been direct and substantial harm to a *compelling state interest*[4] by the wrongful acts of another state; and,
>
> 2. That there is no other appropriate or available forum for resolution of issues presented.[5]
>
> *Maryland v. Louisiana,* 451 U.S. 725 (1981).

Pennsylvania Has Not Demonstrated A Compelling State Interest

Pennsylvania invites this Court to disregard these rigorous standards for original jurisdiction and commence a massive unprecedented generic proceeding. The basis for the request being the allegation that the extensive use of affirmation provisions has all but eliminated competition

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[3]The moving party must be able to demonstrate that the alleged injury is supported by clear and convincing evidence. *Colorado v. Kansas,* 320 U.S. 383 (1943); *North Dakota v. Minnesota,* 263 U.S. 365 (1923).

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[4]Original jurisdiction may not be invoked to press the claims of individual citizens. *New Hampshire v. Louisiana,* 108 U.S. 76 (1883); *Oklahoma ex. rel. Johnson v. Cook,* 304 U.S. 386 (1938); *Kansas v. U.S.,* 204 U.S. 331 (1907).

The vast majority of the original jurisdiction cases have dealt with direct and substantial state proprietory or sovereign interests such as boundaries, water rights and direct financial obligations.

Financial Obligations: Virginia v. W. Virginia, 246 U.S. 565 (1918);

Water Rights for Instance: Arizona v. California, 298 U.S. 558 (1936).

Boundary Disputes: See 11 Stanford Law Review, 701.

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[5]If the issues are being litigated in proceedings involving other parties with a direct interest, the Court has declined to invoke jurisdiction. In *Arizona v. New Mexico,* 425 U.S. 794 (1976) for instance, this Court refused jurisdiction because the state had not suffered any direct harm as of the time of the filing of the action *and* the state's interest was actually being represented in another proceeding.

in the liquor industry. The thrust of Pennsylvania's argument relates to the broad impact of those provisions on the entire industry. Their principal illustrations involve the market participants most directly affected — distillers and suppliers — not the State of Pennsylvania. Pennsylvania suggests that the impact industry-wide has become so great that the use of these affirmation provisions "create concrete problems of constitutional dimension" that justifies Supreme Court review.[6] *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966)).

Pennsylvania's emphasis on the overall impact on the liquor market, however, does not magnify or make more compelling its own interest. Its interest now, as it was in 1972, remains limited and narrow. The only impact on Pennsylvania is the loss of a potential opportunity to purchase liquor at a lower price, assuming that distillers and suppliers would grant such concessions based on the volume of sales. Such potential lost opportunity has no significant direct fiscal impact on the state.[7]

No other regulating impact is alleged or demonstrated. This lost potential opportunity is an entrepreneurial interest which is substantially less compelling than the

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[6]Pennsylvania apparently reads *Seagrams* as an open invitation to original jurisdiction when "concrete problems of constitutional dimension" can be demonstrated. Pennsylvania apparently believes that the exclusive reason this Court denied its first motion in 1972, was that the degree of the impact of affirmation on a monopoly purchaser had not reached constitutional dimensions. *Seagrams* dealt with the impact of affirmation on distillers and suppliers. There is no hint or suggestion in the opinion that the court would recognize a limited entrepreneurial interest of a control state purchaser as sufficient to warrant review of affirmation provisions in an original jurisdiction proceeding.

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[7]The level of taxation can be set by Pennsylvania. Any hypothetical final impact based on reduction of taxes is a harm or injury over which Pennsylvania has control. This Court rejected original jurisdiction in a case where the moving state had the power to minimize or negate the harm. See, *Pennsylvania v. New Jersey,* 426 U.S. 660 (1976).

types of interests recognized by this Court as warranting original jurisdiction.[8]

The Motion should be denied on this basis alone.

Generic Proceeding Is Inappropriate

Even if Pennsylvania is considered to have the minimum state interest necessary to trigger original jurisdiction, there has been no demonstration to support the proposition that a broad generic proceeding is the only alternative to address the industry-wide situation. In fact, Pennsylvania's argument reinforces the conclusion that a case-by-case approach dealing with the real parties in interest is the most efficient way to address these issues. Pennsylvania all but admits that distillers and suppliers are most directly impacted by the patchwork quilt system of affirmation provisions. Pennsylvania also acknowledges that many issues regarding affirmation have been or are being addressed in other court proceedings, including proceedings before this Court.[9] The consolidated brief filed by Massachusetts indicates the number of cases that have dealt with affirmative issues.

Washington suggests that the selective approach is infinitely more manageable than the massive generic proceeding contemplated by Pennsylvania's request.

CONCLUSION

Pennsylvania has not clearly and convincingly demonstrated either that state affirmation provisions have had

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[8]*See, Pennsylvania v. W. Virginia,* 262 U.S. 553 (1923), cutting off of natural gas suppliers to current users; *Missouri v. Illinois,* 180 U.S. 208 (1901), planned discharge of sewer into Mississippi River; *Maryland v. Louisiana, supra,* direct tax on natural gas.

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[9]*Healy v. U.S. Brewers Assn., Inc.,* ___ *U.S.* ___, 104 S. Ct. 265 (1983) (Mem) Aff'g. 692 F2d 275 (2nd Cir. 1982); *United States Brewers Assn., Inc. V. Rodriques,* 100 N. M. 216, 668 P2d 1093 (1983), Cert. Den. ___ U.S. ___, 104 S. Ct. 1581 (1984) (Mem).

a direct impact on a compelling state interest or that a generic proceeding is the most appropriate way to address affirmation questions.

This Court should once again deny Pennsylvania's motion.

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APPENDIX

Washington, like Pennsylvania, is one of eighteen states that regulates the sale of liquor through a monopoly distribution system.[10] All liquor to be sold at retail is purchased by the Liquor Control Board and resold through a network of state stores and agencies.[11] In order to minimize the promotion of liquor sales, advertising by the state is prohibited and prices are uniform. Retail distribution therefore is non-competitive.

All contracts for the purchase of liquor by the Liquor Board from distillers or suppliers contain the following provision:

> "* * *
>
> 4. Prices of merchandise ordered by the Board do not exceed the lowest prices, F.O.B. distillery, winery, or supplier's other shipping point, whichever is less, offered to and paid by any other customer for the same merchandise anywhere in the United States regardless of the size or type of customer, and the Board is being allowed the same quantity discounts, cash rebates, and all other forms of discounts and allowances as are offered any other customer in the United States for the same merchandise.
>
> 5. Should a lower price be offered or given to any purchaser during the period this price is effective, the Board will be refunded the difference on all purchases.
>
> * * *"

[10]See RCW Title 66. This system was created by the Washington State Legislature in 1933 and has remained virtually unchanged for fifty years. As stated in RCW 66.08.010 the Washington State Liquor Control Laws are an exercise of the state's police power, the primary objective of which is to maintain direct control over the manufacture and distribution of alcoholic beverages by state government in a manner that will protect the welfare, health, peace, morals and safety of the general public. See RCW 66.08.010.

[11]See RCW 66.08.050 and Chapter 66.16 RCW. The Board also licenses and regulates the sale of liquor by the drink and strictly controls vendors of wine and beer sold in privately-operated grocery stores. See Chapter 66.24 RCW.

No distiller/supplier has challenged in court this contract provision.

The regulatory purpose of the contract clause is to keep the price of liquor as low as possible so as not to encourage bootlegging and moonshining. This is clearly within the scope of Washington's authority under the Twenty-first Amendment to the Constitution and does not violate the Commerce Clause.