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 STATES OF ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, IOWA, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED

Whether Pennsylvania's Commerce Clause challenge to thirty-eight state liquor price affirmation requirements, brought to obtain a more favorable climate for negotiating price discounts from liquor suppliers, lies within the original jurisdiction of this Court.

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JURISDICTION

The plaintiff Commonwealth of Pennsylvania invokes the original jurisdiction of this Court, under Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251(a), to invalidate the liquor price affirmation practices of the thirty-seven defendant states, as well as its own.[1/]

CONSTITUTIONAL AND STATUTORY PROVISIONS 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.

1/ All parties to the case are identified in the caption of this case.

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 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.

State Statutes

The state statutory and regulatory provisions challenged by Pennsylvania are set forth in the Appendix to Plaintiff's Motion for Leave to File Complaint. However, the Massachusetts statute, Mass. Gen. Laws ch. 138, §25D(a-d) is incorrectly set forth therein, and is reproduced in the Appendix to this Brief.

STATEMENT OF THE CASE

The plaintiff Commonwealth of Pennsylvania and the thirty-seven defendant states have liquor price affirmation statutes, regulations or policies, that generally require liquor suppliers to

affirm that the wholesale prices to or within each state are no higher than the lowest price offered elsewhere in the United States. Pennsylvania seeks to invoke the original jurisdiction of this Court to challenge the constitutionality of the various state policies and to enjoin the enforcement of each statute, regulation or practice, including its own.

The liquor price affirmation practices challenged here were initiated nearly fifty years ago by Pennsylvania and the seventeen Control State Defendants -- those states which control the distribution of alcoholic beverages within their borders by the use of state-run monopolies which purchase distilled spirits at wholesale (Complaint, ¶¶7-10). The monopoly states adopted a contract

provision, known as the Des Moines Warranty, which requires that the initial seller or supplier of distilled spirits affirm that the price charged to the purchasing state is the lowest price at which the particular product is sold in the United States.[2/]

Beginning in 1964 with New York, and continuing to the present, the twenty remaining state defendants have adopted, by statute or regulation, a similar approach, but with divergent methodologies, for the regulation of wholesale liquor prices within their borders. While each non-monopoly state requires the liquor supplier to affirm that a price offered

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2/ The typical contract provision required of suppliers by the Control States is reproduced in plaintiff's Complaint, ¶9.

to a private wholesaler within that state is the lowest price offered elsewhere in the country, the policies of the defendant states vary widely with respect to the time period for fixing and revising the pertinent wholesale price, compare, e.g., Ariz. Rev. Stat. Ann. §4-253(A) (affirmation of lowest price at which item was sold) with Neb. Rev. Stat. §53-170.02 (lowest price at which item is currently being sold), and to the extraneous charges or discounts used to compute the affirmed price. Compare, e.g., Mass. Gen. Laws ch. 138, §25D(d) (price reflects discounts, rebates, free good, allowances and other inducements) with S.C. Code Ann. §61-7-100 (price means platform price at the distillery). Thus, even though the regulatory objec-

tives of the twenty states are similar, the means employed necessarily differ.

The price affirmation requirements of the states are not unfamiliar to this Court. In Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), New York's nascent statute was upheld; and in Pennsylvania v. New York, 410 U.S. 978, rehearing denied, 411 U.S. 977 (1973), the Court denied Pennsylvania leave to file a similar action against twenty-six states with price affirmation policies. The present action includes eleven more state defendants, but adds little to the constitutional analysis which would justify the exercise of the Court's original jurisdiction in this matter.

SUMMARY OF ARGUMENT

1. Pennsylvania seeks to invalidate the price affirmation laws, regulations and policies of thirty-eight States, in the belief that if they are held invalid, Pennsylvania could successfully negotiate with liquor suppliers for greater price discounts on liquor. Pennsylvania's suit is not properly within the Court's original jurisdiction.

First, there is no case or controversy within the meaning of Article III because Pennsylvania has not suffered any wrong from actions of the defendant States. With a monopoly on the wholesale purchase of liquor at the lowest price offered in the United States, Pennsylvania cannot claim it suffers a wrong simply because it has not received a greater discount from liquor suppliers.

Further, any eventual benefit to Pennsylvania is speculative and unrelated to the challenged practices of the defendant States.

Second, jurisdiction does not lie because Pennsylvania is not the real party in interest. The liquor suppliers are the real and primary parties in interest as they alone bear the burden of price affirmation.

Third, Pennsylvania's inability to obtain additional discounts is not a grave injury warranting the exercise of the Court's original jurisdiction, especially since the issues raised here continue to be addressed by the lower courts in actual controversies. The ordinary course for the resolution of such claims need not be bypassed by the exercise of the Court' original jurisdiction.

2. Pennsylvania has alleged that the thirty-eight liquor price affirmation laws and practices in issue here, including its own, are unconstitutional under the dormant or negative aspect of the Commerce Clause of the United States Constitution. But in the absence of conflicting federal laws, the states retain the authority under their police powers to regulate matters of legitimate local concern even though interstate commerce may also be affected.

None of the price affirmation laws and practices challenged here, either on its face or in practical effect, discriminates against, constitutes a direct regulation of, or substantially burdens interstate commerce in violation of the Commerce Clause. The dominant purpose of price affirmation, as facially

reflected in the challenged requirements, is not to discriminate, but to eliminate price discrimination by the liquor suppliers in the sale of like liquor products to in-state and out-of-state wholesalers. Although all of the price affirmation policies in issue here are geared to the liquor suppliers' pricing policies in other states, those out-of-state pricing decisions are made by the suppliers, and none of these policies directly controls any of those decisions. Thus, price affirmation does not directly regulate and control the suppliers' wholesale liquor transactions in other states, but affects such transactions only indirectly as part of the defendant States' requirement of domestic wholesale liquor prices as low as liquor prices offered wholesalers elsewhere. Because

the defendant States' price affirmation requirements operate evenhandedly, affect interstate commerce only indirectly, and do not impose any excessive burdens on interstate commerce in relation to their legitimate purpose of eliminating price discrimination, these policies do not violate the Commerce Clause.

Moreover, under the "market participant" doctrine, the affirmation practices of the control states are not subject to the restraints imposed by the dormant or negative aspect of the Commerce Clause, because the states are themselves participants in the wholesale liquor market.

3. Apart from the Commerce Clause considerations, the price affirmation requirements are valid exercises of the power to regulate intoxicating liquors

reserved to the states by the Twenty-first Amendment to the United States Constitution. While not entirely removing state regulation of intoxicating liquors from the ambit of the Commerce Clause, the Twenty-first Amendment has created an exception to the normal operation of the clause by empowering the states to impose burdens on interstate commerce that would otherwise be invalid.

The price affirmation policies eliminate price discrimination by governing the conditions under which liquor may be imported or sold within these states and directly implicate the central power reserved to the states by the Twenty-first Amendment. As such, the challenged state requirements outweighs any burden these schemes may impose on interstate commerce.

ARGUMENT

I. PENNSYLVANIA'S ACTION DOES NOT LIE WITHIN THE COURT'S ORIGINAL JURISDICTION BECAUSE THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES.

A. Pennsylvania Has Suffered No Wrong at the Hands of the Defendant States.

Pennsylvania may not maintain this action because it has not been wronged by the defendant States. To present a justiciable controversy between states, "'it must appear that the complaining State, has suffered a wrong through the action of the other State, furnishing ground for judicial redress . . . .'" Maryland v. Louisiana, 451 U.S. 725, 735 (1981), quoting from Massachusetts v. Missouri, 308 U.S. 1, 15 (1939).3/

3/ Alternatively, the plaintiff state must assert a right against the other state which is susceptible of judicial enforcement. Maryland v. Louisiana, 451 U.S. 725, 735-36 (1981). The assertion of a right is not at issue here.

The burden on the complaining state in original actions is much greater than that generally imposed on private parties, and the threatened harm must be of serious magnitude. Colorado v. Kansas, 320 U.S. 383, 393 (1943); Washington v. Oregon, 297 U.S. 517, 522 (1936); North Dakota v. Minnesota, 263 U.S. 365, 374 (1923). Original jurisdiction will not be exercised unless the necessity is absolute. Alabama v. Arizona, 291 U.S. 286, 291 (1934); Louisiana v. Texas, 176 U.S. 1, 15 (1900).

In this case, it does not appear that Pennsylvania has suffered any cognizable wrong, let alone a wrong due to the actions of the defendant States. A state which purchases liquor at the lowest price available in the United States, and enjoys a monopoly in both the whole-

sale purchase and retail sale of liquor within its borders, cannot be heard to complain simply because it cannot obtain an additional discount.

Pennsylvania does not sue in its parens patriae capacity. Rather, it sues as a purchaser and seller of liquor (Complaint, ¶¶1, 16, 21, 22), and its singular concern is profit; but, if Pennsylvania's profit on its liquor sales is inadequate, the damage is self-inflicted. Pennsylvania holds the monopoly and it alone determines its profit margin. Pennsylvania therefore cannot sue other states over dissatisfaction with its own choices. See Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) ("No State can be heard to complain about damage inflicted by its own hand.").

Even if the failure to enjoy a discount were to be considered a wrong, Pennsylvania's alleged injury is not directly caused by the defendant States, but by the liquor suppliers who decide what discounts may be available. Thus, original jurisdiction is wanting because "a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." Pennsylvania v. New Jersey, 426 U.S. at 663.

To the extent that the challenge to the various price affirmation policies arises from any indirect effect on Pennsylvania's ability to purchase liquor at cheaper prices, the complaint is speculative and vague. "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." Alabama v. Arizona, 291 U.S. at 291. Pennsylvania announces "there has now been ample time to develop economic evidence on the effects of affirmation on the free market system . . ." (Brief in Support of Motion for Leave to File Complaint at 62, n. 4) but fails to specify how it is that each of the defendant States has contributed to Pennsylvania's injury and in what amount. In the absence of specific and sufficient facts to support the complaint, Pennsylvania falls considerably short of the high duty placed on plaintiff states in original actions.

Any eventual benefit to Pennsylvania, should the case proceed, is similarly speculative. It is certainly not clear

that, if the price affirmation system were abolished, Pennsylvania would in fact be purchasing liquor at lower prices than it now enjoys.4/

Pennsylvania's situation is like that of the plaintiff in Alabama v. Arizona, supra. There Alabama moved for leave to file a complaint against five states that prohibited the sale of goods made by prison convicts. In denying Alabama leave to file, the Court explained that "not every matter of sufficient moment to warrant resort to equity by one person

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4/ Even if Pennsylvania succeeded in negotiating further discounted prices, it is not clear that Pennsylvania would benefit financially. If the mark-up is a fixed percentage of the wholesale price, Pennsylvania would earn less profit on each retail sale. Alternatively, Pennsylvania could increase the retail mark-up and, consequently, its profits; but that course of action is available regardless of discounted prices or this action.

against another would justify an interference by this court with the action of a State." 291 U.S. at 292. Since there was no purchase agreement between Alabama and any defendant State, nor any direct issue between the states, the Court found the allegations insufficient to warrant a finding that enforcement of the statutes would cause Alabama to suffer great injury.

Here, as in Alabama v. Arizona, Pennsylvania has alleged no facts sufficient to warrant a finding that the defendant States' price affirmation practices have caused or will cause Pennsylvania any substantial or specific injury. Pennsylvania simply seeks further discounts on its purchases of liquor, but it fails to posit the necessary injury and direct issue between the states to warrant in-

voking the original jurisdiction of the Court.

B. Pennsylvania Is Not the Real Party In Interest.

Pennsylvania falls short of Article III, Section 2 requirements not only because it fails to present a justiciable case or controversy, but also because it is not the real party in interest. A state has standing to sue under Article III, Section 2, only when it is the real party in interest, and it may not employ the Court's original jurisdiction to press claims which are properly those of others. Oklahoma ex rel. Johnson v. Cook, 304 U.S. 386 (1938); Kansas v. United States, 204 U.S. 331 (1907). The simple fact that a state is the named plaintiff in a suit against other states

is not conclusive proof that the controversy arises between states. The Court looks "beyond mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest." Oklahoma ex rel. Johnson v. Cook, 304 U.S. at 393.

Through this action, Pennsylvania seeks to release others, namely liquor suppliers, from state regulation. If successful, Pennsylvania hopes to obtain even lower liquor prices than the lowest now available in the United States. The nature of Pennsylvania's interest is, thus, indirect, secondary, and dependent on a speculative sequence of future events.

The real parties in interest are the liquor suppliers to whom the state price affirmation practices apply. It is the

suppliers' responsibility to provide the information each state requires to effect price affirmation, and they suffer the loss of sales or state-prescribed penalties for failure to obey price affirmation requirements.[5/]

5/ This is why suppliers are typically the plaintiffs in suits challenging price affirmation laws, regulations and practices. See, e.g., United States Brewers Ass'n v. Healy, 104 S. Ct. 265 (1983), aff'g, 692 F.2d 275 (2d Cir. 1982); Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966); United States Brewers Ass'n v. Healy, No. H 84-816 PCD (D. Conn. filed 1984); Laird & Co.v. Cheney, 196 Kan. 675, 414 P.2d 18 (1966); Federal Distillers v. Minnesota, 304 Minn. 28, 229 N.W.2d 144, appeal dismissed, 423 U.S. 908 (1975); Finacchiaro v. Nebraska Liquor Control, 217 Neb. 487, 351 N.W.2d 701 (1984); United States Brewers Ass'n v. Rodriguez, 100 N.M. 216, 668 P.2d 1093 (1983), appeal dismissed, 104 S. Ct. 1581 (1984); Brown-Forman Distillers Corp. v. State Liquor Authority, Slip op. (N.Y. Court of Appeals, April 2, 1985). See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980) (wine distributors challenged

(footnote continued)

The Court's original jurisdiction, of "so delicate and grave a character," Louisiana v. Texas, 176 U.S. at 15, is not properly invoked where, as here, the nature of the plaintiff state's interest is so removed or indirect.[6/] See

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(footnote continued)

California's resale price maintenance and price posting statutes for the wholesale wine trade); Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939) (challenge to Michigan law prohibiting dealers in Michigan from selling any beer manufactured in a state which discriminates against beer manufactured in Michigan); Joseph S. Finch and Company v. McKittrick, 305 U.S. 395 (1939).

6/ Even Pennsylvania's Complaint demonstrates that its interest is secondary to that of the liquor suppliers. Paragraph 16 of the Complaint describes the alleged harm due to affirmation policies, yet devotes three of its four subparagraphs to the concerns of the suppliers.

(footnote continued)

Oklahoma v. Atchinson, Topeka and Santa Fe Railway Co., 220 U.S. 277, 286-87 (1911) (state's railroad rate dispute dismissed as more appropriate between the shippers and the company); Alabama v. Arizona, 291 U.S. at 292 (challenge could be "speedily and conveniently . . . tested by the contracting company," or seller, rather than by state).

(footnote continued)

That the suppliers are the real parties in interest is also revealed by the curious posture of Pennsylvania and the relief requested. It asks the Court for the same relief against itself as against the other defendant States, that is, invalidation of its own price affirmation practices.

II. THE NATURE OF PENNSYLVANIA'S CLAIM DOES NOT WARRANT ORIGINAL JURISDICTION AND THE ISSUE IS MORE APPROPRIATELY ADDRESSED IN PENDING LOWER COURT PROCEEDINGS.

The Constitution does not require the Court to entertain every case falling within its original jurisdiction, and the Court has historically relied on prudential and equitable constraints to weed out inappropriate cases.

> In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State - the essential quality of the right asserted - but we must also inquire whether recourse to that jurisdiction in an action by a State . . . is necessary for the State's protection.

Massachusetts v. Missouri, 308 U.S. 1, 18 (1939); accord California v. Texas, 457 U.S. 164 (1982). The prudential

limitations on the exercise of the court's original jurisdiction are in harmony with changes in American society and the legal system, such as the increased importance of the Court's role as the final appellate court. Ohio v. Wyandotte Chemicals Corporation, 401 U.S. 493, 497-99 (1971).7/ Consequently, the Court has applied a two-part test to a case within its original jurisdiction, appraising the seriousness and dignity

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7/ Original actions strain the resources of the Court. Virginia v. West Virginia came before the Court nine times. 206 U.S. 290 (1907); 209 U.S. 514 (1906); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S. 531 (1916); 246 U.S. 565 (1918). In Wyoming v. Colorado, the bill filed in 1911 took 46 years to resolve. 353 U.S. 953 (1957). The trial in Arizona v. California, 373 U.S. 546 (1963), consumed two years, encompassed 340 witnesses and a 25,000 page transcript, and produced a 433-page report from the Master to the Court.

of the claims, and the availability of an alternate forum. Maryland v. Louisiana, 451 U.S. at 739-40; Arizona v. New Mexico, 425 U.S. 794, 795-97 (1976); Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

A. Pennsylvania's Claim is Not Significant or Serious Enough to Warrant the Exercise of the Court's Original Jurisdiction.

In allowing for original jurisdiction in the Supreme Court, the Framers sought to honor the dignity of the parties through the status of the Court. California v. Arizona, 440 U.S. 59, 65-66 (1979). It was thought that "Great States have a temper superior to that of private litigants." Virginia v. West Virginia, 220 U.S. 1, 36 (1911). The Court anticipated entertaining only

significant claims under its original jurisdiction, see Bors v. Preston, 111 U.S. 252, 260 (1884), and expected States would through "patriotism, the fraternity of the Union, and mutual consideration" strive to reconcile their differences. Virginia v. West Virginia, 220 U.S. at 36.

Pennsylvania's suit here does not rise to the dignity of cases previously entertained. Its concern is not with the public health or welfare,[8/] but with a possible opportunity, as a purchaser of liquor, to obtain a further

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8/ Cf. Missouri v. Illinois, 180 U.S. 208 (1901), 200 U.S. 496, 517 (1906) (alleging that Illinois' planned discharge would "send fifteen hundred tons of poisonous filth daily into the Mississippi"); New Jersey v. New York, 283 U.S. 336, 342 (1931) (water in an interstate water rights dispute "offers a necessity of life").

discount on prices. Although the issue is money, the magnitude does not equal that of an economic measure which shackles the economic development of a region.[9] The question here is far smaller; it is merely a matter of possible additional profits.[10]

9/ Cf. Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 451 (1945) (discriminatory rate structure fastened on a state "limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister States"); Pennsylvania v. West Virginia, 262 U.S. 555 (1923) (state law curtailing or cutting off supplies of natural gas to the plaintiff states would seriously injure the states and their citizens).

10/ Moreover, if this suit is deemed worthy of the Court's original jurisdiction, it may invite a host of suits from states who would allege that they may be able to get lower prices on goods or services or operate state-run entities more efficiently if other states would modify their purchasing or regulatory laws. This use of the court's original jurisdiction would ill-serve its constitutional function.

When Pennsylvania sought to file this action before, suggesting that, as the largest purchaser of liquor in the United States, it was entitled to bargain for price discounts, the Court properly denied Pennsylvania leave to file the complaint. Pennsylvania v. New York, 410 U.S. 978, reh'g. denied, 411 U.S. 977 (1973). The situation has not changed in the intervening years and the claim of inability to negotiate a further discount on liquor prices remains the same. That claim does not represent a grave injury of serious magnitude warranting assertion of the Court's original jurisdiction.

B. The Issue Pennsylvania Seeks to Put Before the Court is More Appropriately Addressed in the Pending Lower Court Proceedings.

In the exercise of the prudential limitations, the Court also inquires into the availability of another forum before it exercises its original jurisdiction, Illinois v. City of Milwaukee, 406 U.S. at 93; Massachusetts v. Missouri, 308 U.S. at 18-19; and the Court has declined to take original jurisdiction of the suit where an alternate forum is available. Arizona v. New Mexico, 425 U.S. 794 (1976); United States v. Nevada, 412 U.S. 534 (1973); Washington v. General Motors Corporation, 406 U.S. 109 (1972).

In the case of the price affirmation statutes, regulations and policies at issue here, there have been and continue

to be suits in both state and federal courts raising the same challenges that Pennsylvania asks this Court to entertain.11/ In such cases, the plaintiffs are those directly affected by the action challenged, and the same constitutional issues can be litigated as are tendered by Pennsylvania. See Arizona v. New Mexico, 425 U.S. 794 (1976) (alternate forum provided by ability of utility companies to litigate legal incidence of New Mexico tax).

Although Pennsylvania is not currently a party in the lower court suits, the interest advanced here is so remote and derivative of that of the liquor suppliers, that the suits brought by the liquor suppliers in the lower courts should be deemed an adequate alternative

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11/ See the case cited in note 5 above.

forum for this case.[12/] Compare Maryland v. Louisiana, 451 U.S. 725 (1981), where identifiable injury to the state and its citizens necessitated its appearance as a direct party. Pennsylvania's effort to bypass the lower courts, and to present its claims against thirty-eight different statutes, regulations and practices, should accordingly be rejected.

C. Pennsylvania's Claim is Multifarious and Not Suited to Adjudication in this Court.

In Alabama v. Arizona, supra, the Court rejected as multifarious Alabama's amended complaint challenging the stat-

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12/ Furthermore, there is no apparent reason that Pennsylvania or its State Liquor Control Board could not participate as a party or amicus in the lower courts, should it choose to do so.

utes of five states, setting forth a general rule:

> "Unless 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." 291 U.S. at 290.

The reason for this rule is surely practical: where statutes are similar, "if one is repugnant to the commerce clause, all transgress . . . . Presumably no other State could attempt on similar facts to enforce a like measure. . . ." 291 U.S. at 291.

Here, Pennsylvania asks the Court to review thirty-eight state requirements for price affirmation. Pennsylvania asserts an absolute need for jurisdiction in this Court, saying "a decision invalidating any single provision will have no impact on the operation of the entire

system."[13/] Pennsylvania's Brief at 59. Pennsylvania is incorrect: a decision in one case could affect all.

Furthermore, Pennsylvania does not come within the exception for cases that might otherwise be multifarious. The case Pennsylvania seeks to file is not likely to be prompt, convenient or effective. Because the case would require the Court to examine thirty-eight similar but distinct requirements, and to hear detailed economic evidence, it does not promise to be prompt or convenient. Nor will it necessarily be effective, from

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13/ Somewhat inconsistently, Pennsylvania also claims that although its complaint is addressed only to price affirmation statutes, regulations and policies governing distilled spirits, a ruling by this Court would dispose of the legality of price affirmation in the entire liquor industry, including wine and beer. Pennsylvania's Brief at 57 n. 2.

Pennsylvania's point of view, because the Court may find distinguishing features among the various practices which validate some and invalidate others.[14/] Therefore Pennsylvania should not be granted leave to initiate this suit in this Court. The sensible course would be to permit the lower court litigation challenging price affirmation to percolate up to this Court, enabling this Court to consider price affirmation provisions in specific and fully defined contexts.

14/ Pennsylvania states that it will suffer harm unless each and every price affirmation statute, regulation and practice is permanently enjoined. Complaint, ¶5.

III. THE STATE LIQUOR PRICE AFFIRMATION REQUIREMENTS DO NOT VIOLATE THE COMMERCE CLAUSE.

Pennsylvania's challenge to the liquor price affirmation laws rests on the dormant or negative aspect of the Commerce Clause of the United States Constitution, Art. I, §8, cl. 3, which limits the power of the States to impose burdens on interstate commerce. See Lewis v. B T Investment Managers, Inc., 447 U.S. 27, 35 (1980); Hughes v. Oklahoma, 441 U.S. 322, 326 (1979); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976). However, this limitation is not absolute. In the absence of conflicting federal law, the States retain the authority, under their police powers, to regulate matters of legitimate local concern even though in-

terstate commerce may also be affected. Lewis v. BT Investment Managers, Inc., 447 U.S. at 36; Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945). Where state regulation operates evenhandedly and affects interstate commerce only indirectly, it must be sustained unless the burden imposed on such commerce is clearly excessive in relation to the State's legitimate local purpose. See Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 472 (1981); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Pennsylvania has attempted to frame the price affirmation schemes of the States as essentially homogeneous in operation and uniform in effect. However, as this portion of the brief will illustrate, the price affirmation requirements are not significantly uniform

in their operation and effect on interstate commerce, and this case therefore requires the presentation of particularized economic evidence of the effect of each -- a burden that Pennsylvania seems ill-prepared to carry. See Pennsylvania's Brief at 76, n. 8. Because of the absence of an impermissible restraint of interstate commerce, the extraordinary relief sought by Pennsylvania -- that all of these schemes be enjoined -- is not available.

A. The Price Affirmation Policies Do not Impermissibly Regulate Interstate Commerce.

1. The States' price affirmation laws and practices do not discriminate against or burden interstate commerce.

Pennsylvania does not explicitly allege that price affirmation requirements

discriminate against interstate commerce, see Complaint, ¶¶15-25, but it does suggest in its Brief that the purpose and intent is to protect local wholesalers from competition (Pennsylvania's Brief at 53, 84). However, the States' price affirmation schemes are not designed to discriminate, but rather to eliminate discrimination by the liquor suppliers in the sale of like liquor products to in-state and out-of-state wholesalers.

Price discrimination in the liquor industry was a true concern after the adoption of the Twenty-first Amendment, when suppliers offered secret discounts, rebates and other special concessions to favored trade buyers. See deGanahal, Trade Practice and Beverage Control in the Alcoholic Beverage Industry, 7 Law & Contemp. Prob. 664, 666 (1940). Favored

buyer arrangements between the suppliers and the retailers contributed to the creation of the "tied-house" system, which was designed to stimulate sales of the suppliers' products to favored retailers and, in turn, to encourage greater liquor consumption by the public.15/

The Control States were the first to adopt measures intended to eliminate discrimination in liquor prices through use of the Des Moines Warranty in their liquor purchase contracts. It was the liquor suppliers' practice of "offering free deals, discounts and secret rebates in license states to strengthen a brand"

15/ Problems resulting from the tied-house system led, in part, to the adoption of the Eighteenth Amendment. Byse, Alcoholic Beverage Control Before Repeal, 7 Law & Contemp. Prob. 544, 564 (1940).

that led to the Des Moines meetings of most of the Control States in 1937 and 1938, and to each Control State's eventual use of the Des Moines Warranty in its contracts. deGanahal, supra at 677. It was also the elimination of price discrimination that led to enactment of New York's liquor price affirmation statutes, see Joseph E. Seagram & Sons v. Hostetter, 384 U.S. at 39, 47-48; Brown-Forman Distillers Corp. v. State Liquor Authority, (N.Y. Court of Appeals, April 2, 1985), Slip op. at 2, 7, and similar regulatory measures in the non-monopoly states.

The challenged policies do not have a discriminatory purpose, nor do they discriminate, in practical effect, against out-of-state wholesalers. Price affirmation does not protect a domestic wholesaler from competition with any

out-of-state wholesaler for the very basic reason the two simply do not compete. But, even if some competition did exist between in-state and out-of-state wholesalers,[16/] the latter are not placed at any competitive disadvantage because the price affirmation policies require no more than that the in-state wholesalers receive liquor prices as low as prices offered to wholesalers in other states. Such equality of treatment is constitutionally permissible. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. at 43 ("As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor

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16/ Cf. Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3054-55 (1984) (Court unwilling to conclude that no competition existed between in-state wine exempted from Hawaii liquor tax and non-exempted out-of-state wine).

prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country."). See also United States Brewers Ass'n., Inc. v. Rodriguez, 104 S. Ct. 1581, 1582 (1984) (Stevens, J., concurring), dismissing appeal, 100 N.M. 216, 668 P.2d 1093 (1983).

Finally, in light of the objective of equal treatment and the even-handed operation, the challenged price affirmation requirements do not pose a substantial burden on interstate commerce in excess of the states' legitimate purposes. See Pike v. Bruce Church, Inc., 397 U.S. at 142; Minnesota v. Cloverleaf Creamery Co., 449 U.S. at 472. Any incidental effects on interstate commerce are insufficient to invalidate price affirmation.

2. The States' price affirmation schemes do not directly regulate interstate commerce.

The thrust of Pennsylvania's Commerce Clause challenge is that the state price affirmation requirements directly regulate and control wholesale liquor transactions in other states. This impermissible extraterritorial effect, it is alleged, results from the restraints liquor price affirmation imposes on the suppliers' pricing decisions in wholesale transactions outside each defendant State. Complaint, ¶16. To support its argument, Pennsylvania seeks to equate the liquor price affirmation policies with the Connecticut statute struck down in United States Brewers Ass'n., Inc. v. Healy, 692 F.2d 275 (2d Cir. 1982), summarily aff'd, 104 S. Ct. 265 (1983), and

to distinguish the present state requirements from the New York scheme upheld in Joseph E. Seagram & Sons, supra.

Pennsylvania tries to distinguish the affirmation statute upheld in Seagram, on the ground that the current requirements operate by using either a contemporaneous or prospective time period to compute the lowest affirmed price, whereas New York's original price affirmation law used the preceding month as the reference point for the required lowest price. See 384 U.S. at 39-40.[17/] However, as explained below, a meaningful distinction cannot be made.

17/ It should be noted that at least one of the challenged statutes does not employ either a contemporaneous or prospective time period reference point. Arizona employs a non-specific retro-

(footnote continued)

a. Contemporaneous price affirmation schemes do not directly regulate interstate commerce.

All of the Control States and most of the other, non-monopoly States refer to a contemporaneous or current time period as the reference point for the lowest or affirmed price. A contemporaneous price requirement only means that a supplier's price is to be no higher than prices elsewhere at the time of sale to or in the affirmation state. That

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(footnote continued)

spective time period as its lowest price reference point. See Ariz. Rev. State. Ann. §4-253(A) (Supp. 1984). This approach would appear to fall within Pennsylvania's reading of permissible price affirmation under Seagram, and undercut its demand that all of the schemes be enjoined.

requirement does not impose any impermissible extraterritorial effects on interstate commerce; after a sale to any particular contemporaneous price state, the supplier is free to alter its pricing policies, as it chooses, in wholesale liquor transactions in other states.

Moreover, nothing in this Court's opinion in Seagram, or in the opinion of the Second Circuit Court of Appeals in United States Brewers Ass'n, Inc. v. Healy, supra, indicates that the use of a contemporaneous lowest price affirmation would make such a practice constitutionally invalid. Indeed, the court in Healy indicated, by dicta, that a price affirmation scheme employing a requirement of a contemporaneous pricing might

well be valid under Seagram. See 692 F.2d at 283-84.[18/]

b. Prospective price affirmation schemes do not directly regulate interstate commerce.

Several of the non-monopoly affirmation states employ a prospective time period as the reference point for the lowest or affirmed price. In attacking these statutes and regulations, Pennsylvania places great reliance on the deci-

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18/ In Seagram, the Court noted that a supplier's "burden of gathering information" on its prices in other states might be troublesome because the affirmation covered prices elsewhere at the time of sale to the monopoly state. Seagram, 384 U.S. at 45. Whatever additional burdens may have been imposed on a supplier in 1966 in trying to gather information on its prices, it is unlikely that today, where computerized accounting is the norm, that any information gathering further burdens a supplier.

sion in United States Brewers Ass'n v. Healy. See Plaintiff's Brief at 70-74.

The beer price affirmation scheme at issue in Healy required brewers to post a schedule, by the middle of the month, listing the wholesale prices in Connecticut for the following month, and to affirm that the posted prices would be no higher than the lowest price wholesalers would charge in the three states bordering Connecticut. 692 F.2d at 276-277. The Second Circuit Court of Appeals concluded that this prospective price affirmation scheme, on its face, controlled the wholesale beer prices in transactions occurring in the bordering states, and thus was invalid under the Commerce Clause. Id. at 282.

However, the Healy opinion does not mandate invalidation of all prospective

affirmation requirements,[19] as recognized by the New York Court of Appeals in its recent consideration of that state's prospective liquor price affirmation laws. Brown-Forman Distillers Corp. v. State Liquor Authority, (N.Y., April 2, 1985). The court there concluded that the New York affirmation requirement did not contravene the Commerce Clause. In distinguishing the New York law from that considered in Healy, the court focused on several factors.[20]

19/ This Court's summary affirmance, 104 S. Ct. 265 (1983), reflects concurrence in the result, not necessarily in the rationale employed. See Mandel v. Bradley, 432 U.S. 173 (1977); Fusari v. Steinberg, 419 U.S. 379, 391-392 (Burger, C.J., concurring).

20/ On these points it is the position of the State of Connecticut that the 1981 Connecticut Beer Price Affirmation Laws were found unconstitutional in Healy because of an impermissible extraterri-

(footnote continued)

First, the court noted the obvious discriminatory purpose of the Connecti-

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(footnote continued)

torial thrust peculiar to its mechanism, and not because of any alleged discriminatory purpose and effect, or for any other reason. 692 F.2d 275, 282. It was the combination of Connecticut's peculiar price posting, sales prohibition, and affirmation law which caused it to "control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside Connecticut." 692 F.2d 275, 282.

The Court of Appeals intimated that Connecticut could achieve its goal of price-parity, 692 F.2d 275, 283-284, and the state accordingly amended its affirmation laws to require shippers to affirm only their current price at the time of monthly posting and to hold that price for the subsequent month, to permit shippers to change their prices in other states at any time during that subsequent month without incurring penalties in Connecticut on this basis. 1984 Conn. Pub. Acts 332 (Reg. Sess.). The new provisions have come under attack again. U.S. Brewers Ass'n v. Healy, No. H 84-816 PCD (D. Conn.). That case is awaiting decision on cross-motions for summary judgment.

cut scheme. Brown-Forman, slip op. at 8. The apparent purpose of Connecticut's beer price affirmation law "was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state." Healy, 692 F.2d at 276. Thus, Brown-Forman characterized the Connecticut scheme as one designed "to discriminate against out-of-state business and protect local taxing interests." Slip op. at 8. As this Court has repeatedly held, state regulations that have a discriminatory purpose or effect do not require any extended analysis under the Commerce Clause as such regulations are subject to a "virtually per se rule of invalidity." Pennsylvania v. New Jersey, 437 U.S. 617, 624 (1978); see Hughes v.

Oklahoma, 441 U.S. 322, 336-37 (1979); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977). This factor is not at issue here, since, as noted above, the facial purpose and practical effect of liquor price affirmation is to ensure that suppliers do not discriminate in price between in-state and out-of-state wholesalers in the sale of the like liquor products. Brown-Forman, slip op. at 9; see Seagram, 384 U.S. at 39, 47-48.

Second, the court in Brown-Forman observed that the Connecticut scheme considered in Healy was directed solely at the three state markets bordering Connecticut, unlike the nationwide market to which New York's affirmation statutes were geared. Brown-Forman, slip op. at 9. Since none of the three states bor-

dering Connecticut had beer price affirmation laws, the extraterritorial impact on the brewers' pricing policies was apparent. As the court in Brown-Forman stated, "[t]he Connecticut statute was designed to affect and control regional prices in three targeted states, thereby creating an artificial disparity in interstate pricing." Slip op. at 9.21/

The simple fact that some liquor price affirmation policies employ a prospective time period as the reference point for the lowest or affirmed price

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21/ A third factor was that the Connecticut statute dealt with beer as opposed to liquor. In Brown-Forman, the court noted that beer, "unlike liquor -- the price of which is already subject to state and federal control -- is susceptible to free price fluctuation." Slip op. at 9. See 27 U.S.C. §§201-212(1935) (Federal Alcohol Administrative Act).

does not dictate the conclusion that the requirements have a discriminatory purpose or an impermissible extraterritorial effect on interstate commerce. Although price affirmation is geared to the suppliers' pricing policies in other states, it requires only that the suppliers' prices to domestic wholesalers, or to the Control States, be as low as prices offered wholesalers elsewhere in the country. As such, these requirements do not directly regulate or control the suppliers' transactions in other states; at most, they affect such transactions indirectly as part of the defendant States' broader purpose of eliminating price discrimination.

B. The Control States, As Participants in the Wholesale Liquor Market Are Not Subject to Scrutiny Under the Commerce Clause.

Where a State is a participant in a market, rather than a regulator, it is not subject to the restraints imposed by the dormant or negative aspect of the Commerce Clause of the United States Constitution. See South-Central Timber Development, Inc., v. Wunnicke, 104 S. Ct. 2237, 2243 (1984) (opinion of White, J.); White v. Massachusetts Council of Construction Employers, Inc., 103 S. Ct. 1042, 1044 (1983); Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809-10 (1976). This "market participant" doctrine constitutes an explicit recognition that there is nothing in the pur-

poses underlying the Commerce Clause indicating an intent to limit the ability of a state, in the absence of congressional action, from freely participating in the marketplace. Reeves, Inc. v. Stake, 447 U.S. at 437; Hughes v. Alexandria Scrap, 426 U.S. at 809.

The Control States, including Pennsylvania, are participants in the wholesale liquor market. As with private participants in the market, the Control States, as wholesale purchasers of liquor, engage in the proprietary functions of large scale stock purchasing, inventory and sales control, personnel supervision and financial management. See Shipman, State Administrative Machinery for Liquor Control, 7 Law & Contemp. Prob. 600, 612 (1940).

The Control States' warranty requirement of current lowest prices is a condition of contract applicable to the immediate wholesale liquor transaction, without regulatory effects outside of the wholesale liquor market. Thus, the price affirmation restrictions which the Control States have imposed are exempt from scrutiny under the Commerce Clause, under the "market participant" doctrine.

IV. PRICE AFFIRMATION LIES WITHIN THE POWER RESERVED TO THE STATES UNDER THE TWENTY-FIRST AMENDMENT.

Quite apart from the Commerce Clause considerations outlined above, the price affirmation requirements of the states lie well within the authority reserved to the states under the Twenty-first

Amendment.[22/] Section 2 of the Twenty-first Amendment empowers the States to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause. Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 294, 2707 (1984); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964); State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62-63 (1936).

The central power reserved to the states by §2 of the Twenty-first Amend-

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22/ While the Twenty-first Amendment has not entirely removed state regulation of intoxicating liquors from the ambit of the Commerce Clause, "'[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.'" Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694, 2702 (1984), quoting from Craig v. Boren, 429 U.S. 190, 206 (1976).

ment is that of exercising "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 444 U.S. 97, 110 (1980); see Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. at 2709. When a state's exercise of its Twenty-first Amendment powers burdens interstate commerce, there must be a delicate balancing of the competing constitutional considerations involved. Such balancing must focus on "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [state regulation so as] . . . to outweigh the Commerce Clause principles that would otherwise be offended." Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3058 (1984).

In operating to eliminate price discrimination, the states' price affirmation policies challenged here directly implicate the central power reserved to the states by §2 of the Twenty-first Amendment by "governing the conditions under which liquor may be imported or sold within the [States] . . . ." Crisp, 104 S. Ct. at 2709. A supplier may not import liquor into any of the defendant States if it fails to affirm that its prices to domestic wholesalers, or to the Control States, are as low as the wholesale prices it offers elsewhere in the country. These importation restrictions are clearly addressed at liquor destined for use, distribution or consumption within these states. In this situation, the Twenty-first Amendment demands "wide latitude" for state liquor

regulation. Joseph E. Seagram & Sons, 384 U.S. at 42; see Hostetter v. Idlewild, 377 U.S. at 330.[23/] The legitimate purposes underlying price affirmation requirements implicate the central power reserved to the States by §2 of the Twenty-first Amendment, and outweigh any burden on interstate commerce that might serve to invalidate these schemes under the Commerce Clause.

23/ Prior decisions of this Court have upheld, under the Twenty-first Amendment, state regulations that have imposed more direct and substantial burdens on interstate commerce than the price affirmation schemes in issue here. See State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936) (involving California statute that imposed license fee for privilege of importing beer into State); Joseph S. Finch & Co. v. McKitterick, 305 U.S. 395 (1939) (involving Missouri statute prohibiting sale within State of intoxicating liquors manufactured in other States that discriminated against intoxicating liquors manufactured in Missouri); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) (similar).

CONCLUSION

For the foregoing reasons, the defendant States respectfully request that the Court deny Pennsylvania's motion for leave to file its Complaint.

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APPENDIX

Mass. Gen. Laws Ch. 138, 25D

(a) There shall be filed with, and when filed shall be deemed part of, the schedule filed for a brand of alcoholic beverages pursuant to section twenty-five B an affirmation duly verfied 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 alcholic beverage is not licensed by the commission, that the bottle and case price of alcoholic beverages to wholesalers set forth in such schedule is not higher than the lowest price at which such item of alcoholic beverage 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 alcoholic beverage stores at any time during the calendar month for which such schedule shall be in effect, and 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 months 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 para-

graph, 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 or alcoholic beverage will be 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 for which such schedule shall be in effect, and 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 shall be in effect and succeeding the last calendar month during which a like affirmation was in effect.

(c) In the event an affirmation with respect to any item of alcoholic beverage is not filed within the time provided by section twenty-five B, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of alcoholic beverage, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule; provided however that the commission, in writing, may, for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as it may deem necessary, allow any schedule which is otherwise sufficient to be deemed valid with respect to items of alcoholic beverage for which no affirmation has been filed, as provided by this section.

(d) In determining the lowest price for which any item of alcoholic beverage was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail alcoholic beverage stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, 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), as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in subsections (a) and (b) shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost

of delivery. As used in this subsection, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon the gallon of alcoholic beverages, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

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