No. 45 Original

In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF WASHINGTON, et al.,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, et al.,
Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED

Fifteen States have petitioned this Court to entertain an original action against the four major motor vehicle manufacturers and the Automobile Manufacturers Association, all of which are citizens of other states. The proposed complaint poses complex factual issues under the Federal antitrust laws, the common law of conspiracy in restraint of trade and the common law of public nuisance, and seeks injunctive relief in areas already subject to a Government consent decree and far-reaching legislative

and administrative regulation. The question presented is whether this Court, in the exercise of its sound discretion, should refuse to assume jurisdiction since:

1. The plaintiff States have an adequate alternative forum in other courts, to which some of them have already resorted for similar relief against the same defendants in pending litigation;

2. The initial disposition of the controversy by the lower courts would better serve the interests of convenience, efficiency and justice; and

3. The specific relief sought by the plaintiffs—including the adoption by this Court of appropriate anti-pollution standards and supervision of their implementation and mandatory installation of emission controls on new and used cars at defendants' expense —would require inappropriate and unwarranted judicial intervention in a highly technical field currently subject to extensive state and federal regulation.

STATEMENT

1. The Background of Industry and Governmental Efforts to Control Auto Pollution.

In the early 1950's, when it was first recognized that motor vehicle emissions were a source of air pollution in the Los Angeles area,[1] California officials urged the automobile industry to reduce the emission of atmospheric pollutants by motor vehicles. From the beginning, it was recognized that automotive emissions were a potential

[1] See Haagen-Smit, *Chemistry and Physiology of Los Angeles Smog,* 44 Ind. & Eng. Chem. 1342 (1952).

subject for government regulation. The present litigation has its origin in the cooperative research and development program which was initiated, in response to the pressure of California officials, to measure such emissions, to develop preventative devices and to formulate test procedures for measuring the efficacy of such devices. As part of that program, the manufacturers in 1955 entered into an open-access, royalty-free, cross-licensing agreement as the basis for industry-wide exchanges of technical and engineering information about the nature, measurement and control of vehicle emissions. These industry cooperative efforts were initiated before the adoption of specific legislation regulating vehicle emissions by the Federal or State governments and absent any market demand for automotive emission controls.[2]

Comprehensive state regulation of vehicle exhaust emissions began with a 1959 California statute which required the State Department of Public Health to develop standards of air quality for motor vehicles. Cal. Stats. 1959, ch. 200, § 1, p. 2091; Cal. Health & Safety Code, §§ 426.1, 426.5. Exhaust emission controls first became mandatory

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[2] The market demand which creates a normal competitive incentive is not present because the installation of air pollution devices tends to increase a car's cost and affect its engine performance without increasing its saleability to the ultimate consumer. See, *e.g.*, Gerhardt, *Incentives to Air Pollution Control,* 33 Law & Contemp. Probs. 358, 359 (1968); Report of the Panel on Electrically Powered Vehicles to the Commerce Technical Advisory Board, The Automobile and Air Pollution: A Program For Progress, Pt. 1, at 36 (Dept. of Commerce Print, October, 1967); Ruff, *The Economic Common Sense of Pollution,* The Public Interest, Issue No. 19, Spring, 1970, pp. 69-85.

in California for 1966 model cars.[3] On October 20, 1965, Congress enacted the Motor Vehicle Air Pollution Control Act (79 Stat. 992), which was amended and revised in 1967 to become the National Emission Standards Act (Title II of the Air Quality Act of 1967, 81 Stat. 499, 42 U.S.C. § 1857f-1). The statute directed that the Secretary of Health, Education and Welfare:

> "[s]hall by regulation, giving appropriate consideration to technological feasibility and economic costs, prescribe as soon as practicable standards, applicable to the emission of any kind of substance, from . . . new motor vehicles . . . , which in his judgment cause or contribute to, or are likely to cause or to contribute to, air pollution which endangers the health or welfare of any persons . . ."[4]

The Federal Act provides that "no State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this Act" (42 U.S.C. §1857f-6a(a)),[5] but preserves the right of the states "otherwise to control, regulate or restrict the

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[3] Acting on their own, the companies had voluntarily installed crankcase emissions controls on 1961 model cars sold in California starting in 1960, and on 1963 model cars sold nationally in 1962. Crankcase emission controls became mandatory in California for 1963 models. HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions From Mobile Sources, p. xv (March, 1970).

[4] 42 U.S.C. § 1857f-1(a).

[5] Except in the case of California, for which the Secretary may grant waivers of preemption under specified circumstances. 42 U.S.C. § 1857f-6a(b). Operating under such a waiver, California has enacted standards, applicable to 1970-1974 model year vehicles, for emissions control which are more stringent than current Federal requirements.

use, operation, or movement of registered or licensed vehicles'' (§ 1857f-6a(c)).[6]

Based on technical data supplied by the automobile industry, the State of California and its own staff, the Department of Health, Education and Welfare has prescribed rigid emissions standards. Such standards were initially set for the 1968 model year,[7] and the Secretary has established increasingly stringent standards for emissions control through the 1971 model year.[8] Still more demanding proposals have been announced for the 1973 and 1975 model years,[9] and a bill is currently before Congress which would require the Secretary to impose even stricter standards for 1975 model vehicles than those currently proposed.[10] Even without this proposed legislation, the effect of the presently envisioned 1975 standards will be to reduce total hydrocarbon emissions 97% as compared with uncontrolled models and carbon monoxide emissions by 91%, and also

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[6] See S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967); HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions From Mobile Sources, ¶ 4.5, ¶ 4.5.3 (March, 1970). This power to impose emission controls on used vehicles has not been exercised, except for some devices in some areas in California as to cars when they are transferred.

[7] 31 Fed. Reg. 5170 (1966).

[8] 45 C.F.R. Part 85 (January, 1970).

[9] Advance Notice of Proposed Rule Making, 35 Fed. Reg. 2791 (February 10, 1970).

[10] Such a requirement is contained in the Senate version of the bill, approved by the Senate September 22, 1970. 116 Cong. Rec. 16260. The bill is now before a conference committee. H.R. 17255, Cong., 2d Sess. §202(b)(1) (1970).

substantially to reduce emissions of oxides of nitrogen and particulates.[11]

2. The Related Government and Private Suits Involving Auto Pollution.

On January 10, 1969, the United States filed a complaint in the United States District Court for the Central District of California charging, in substance, that the cooperative efforts of the defendant automobile manufacturers and the Automobile Manufacturers Association to develop anti-pollution devices had restrained competition in such devices in violation of the Sherman Act. The filing of that complaint as a practical matter compelled the negotiation of a consent decree. The complaint challenged the practice of acting jointly in response to the demands of governmental agencies. But such cooperation by industry as a whole with government was essential to meet many of the difficult problems, such as, for example, the establishment of a workable method of measuring automobile emissions in the interest of the public as well as the industry. Once the civil suit was filed, however, the continuance of cooperation would have exposed company engineers and scientists to potential claims that they were consciously flouting the antitrust laws, with the possible risk of criminal prosecution. And the resulting uncertainties and distractions would clearly have impeded scientific progress in emission reduction.

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[11] Department of HEW press release, National Air Pollution Control Administration, Rockville, Maryland (July 15, 1970). The standards established by the Secretary for the 1970 and 1971 model years reduced hydrocarbon and carbon monoxide emissions by more than two-thirds in comparison with pre-1968 vehicles. Second Report of the Secretary of Health, Education and Welfare, S. Doc. No. 91-11, 91st Cong., 1st Sess., pp. 38-40 (1969); Advance Notice of Proposed Rule Making, 35 Fed. Reg. 2791 (Feb. 10, 1970).

On September 11, 1969, the parties filed in the District Court a proposed consent decree which enjoined continuation of those aspects of defendants' cooperative program to which the Government objected and prescribed precise rules as to the types of continuing technical cooperation to which the Government did not object[12] and which would be permitted in the future. After hearing objections and motions to intervene from various sources, the court approved the decree on November 29, 1969 (*United States* v. *Automobile Manufacturers Association*, 307 F. Supp. 617), observing that "the Government's case is based upon a novel and unadjudicated theory." (*id.* at 621). The decree was affirmed by this Court on March 16, 1970, *sub nom. City of New York* v. *United States*, 397 U.S. 248.

Beginning on September 16, 1969, a series of 17 private antitrust suits were filed in district courts in Illinois, California, Pennsylvania, New York, Wisconsin and Minnesota. The actions were brought by the States of Illinois, California, Connecticut, New Jersey, New Mexico, New York, Wisconsin and Minnesota, and by various individuals and municipalities on behalf of classes which in total included all residents of the United States as well as all States and municipalities. The substantive allegations of the complaints were taken almost *in haec verba* from the Government's complaint. In all cases the plaintiffs seek damages for the alleged injuries caused by automobile emissions attributable to the alleged antitrust violation, and request trial by jury. In all but one case there is also a prayer for equitable relief. In many of the cases the

[12]A Department of Justice press release dated September 11, 1969 stated that the decree had received the approval of the Department of Health, Education and Welfare, the Science Advisor to the President, and representatives of the Air Resources Board of the State of California.

equitable relief requested, taken as a whole, is the same as that sought here, *viz.*, an injunction against the continuation of any illegal activities and a requirement that defendants install pollution control devices at their own expense in all new and most used vehicles.

The pendency of these related cases led the Judicial Panel on Multidistrict Litigation, on its own motion, to issue an order to show cause why the cases should not be transferred and consolidated for pretrial purposes pursuant to Section 1407 of the Judicial Code. On April 6, 1970, the Panel ordered all of the then pending cases[13] consolidated for pretrial purposes before the Hon. Manuel L. Real in the Central District of California "so that pretrial proceedings can commence without duplication or disruption."[14] Since that time, Judge Real has allowed certain cases to proceed as class actions on behalf of all states and political subdivisions thereof and of all crop farmers, but not on behalf of all individuals in the nation or in the plaintiff States or cities. At the same time he denied defendants' motion to dismiss the complaints.[15] Thereafter the Court authorized discovery to commence by allowing all parties to inspect and copy nearly all the documents obtained by the Antitrust Division and the grand jury in connection with the prior Government investigation.[16]

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[13] The subsequent *City of New York* and *Minnesota* cases were thereafter ordered transferred.

[14] See the decision of the Judicial Panel reprinted in Appendix C to Plaintiffs' Brief in Support of Motion for Leave to File Complaint.

[15] *In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment,* M.D.L. Doc. No. 31 (U. S. Dist. Ct. Central Dist. Calif.), order of September 4, 1970.

[16] *Id.,* Transcript of September 14, 1970, pp. 348-354.

In addition to the foregoing antitrust actions, the City of Chicago, on July 31, 1970, filed a tort suit in equity in the Northern District of Illinois alleging that automobile emissions are harmful to the public and that the vehicles designed and developed by defendants were unreasonably dangerous and defective because of the emission of pollutants. The complaint prays that defendants should be enjoined from selling new vehicles in Chicago which do not conform to specified emission standards and that they be required to install air pollution devices without charge in all used cars manufactured between 1960 and 1970.

3. The Present Proceeding.

On August 5, 1970, 15 States (including Illinois and Minnesota, which had also filed suits in the district courts) moved for leave to file an original action in this Court. Count I of the attached complaint charges a violation of the Federal antitrust laws in substantially the same language as in the antitrust cases brought in the district courts. Count II, realleging the same facts, asserts that it is brought "under this Court's general equitable powers . . . independent of the Sherman and Clayton Acts, to eliminate and remedy conspiracies in restraint of trade by the defendants, as recognized at common law. . . ." Count III, entitled "Public Nuisance", alleges that automobile emissions are dangerous to "human health and welfare" and harmful to "flora and fauna", and that the continued manufacture and distribution of motor vehicles "as presently engineered and designed" constitute a nuisance "contrary to the public policy of the Plaintiff States, as well as the federal government. 42 U.S.C., § 1857(4)(8) [sic]." There is no allegation that defendants have not complied with the standards prescribed by the Department of Health, Education and Welfare, the requirements of the consent decree, or any federal or state law relating to emission controls on used cars.

The complaint prays for a declaration that defendants' conduct was unlawful (Prayer, par. 1) and for a general injunction against its continuance (Prayer, par. 5). In addition, plaintiffs seek mandatory orders requiring defendants:

> Prayer, par. 2. To accelerate "spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date as shown by the evidence, specifically, if applicable on the evidence, that date by which such device or devices or such pollution free engine would have been developed but for the conspiracy alleged herein."
>
> Prayer, Par. 3. " * * * to cause to be installed, at defendants' expense, as standard equipment in all new motor vehicles sold, or delivered in the United States such effective anti-pollution control devices as could have been installed in said motor vehicles but for the conspiracy alleged herein."
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> Prayer, Par. 4. " * * * to cause to be installed, at defendants' expense, such effective anti-pollution control devices, as the Court deems reasonable and proper, on all motor vehicles owned or possessed by anyone in the United States, manufactured by the defendants during or following the period of the conspiracy alleged herein."

The relief sought here is in substance that already requested in the cases pending in the district courts, although paragraph 2 of the prayer would appear to go further in requiring this Court to supervise a research and development program to solve the automotive emission problem.

ARGUMENT

This Court has original but not exclusive jurisdiction over suits "by a State against the citizens of another State" (28 U.S.C. § 1251(b)(3); Const., Art. III, § 2). The exercise of this jurisdiction is "not mandatory in every case" (*Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 464 (1945)) and is to "be invoked sparingly" (*Utah* v. *United States*, 394 U.S. 89, 95 (1969)). Thus "the Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. at 464-65; *Massachusetts* v. *Missouri*, 308 U.S. 1, 18-20 (1939).

Here, there is no want of other suitable forums to try the federal antitrust issues which plaintiffs seek to bring before this Court, as the cases pending in other federal courts attest. The common law restraint of trade and nuisance claims, if they involve a common nucleus of fact, could be heard in the same federal courts under the doctrine of pendent jurisdiction or, if not, in the courts of the respective plaintiff States. Clearly the trial of such issues in trial courts is preferable to initial proceedings in this Court, particularly since the presence of the federal legislative scheme and the consent decree demonstrates that there is no pressing need for action by this Court.

1. Plaintiffs Have A Suitable Alternative Forum In Other Courts.

To support the exercise of jurisdiction over Count I, plaintiffs rely mainly on *Georgia* v. *Pennsylvania R. Co.*, the only antitrust case in which this Court has granted

leave to file a complaint.[17] In that case, however, the Court left little doubt that if plaintiffs could have obtained jurisdiction over the defendants in a single district, a denial of leave to file would have been "wholly appropriate", since the "facilities and prescribed judicial duties [of the district court] are better adapted to the extended trial of issues of fact than are those of this Court" (324 U.S. at 465 (Douglas, J.), 469-470 (Stone, C. J., dissenting)). It was only because the Court found that in no place other than the Supreme Court could Georgia obtain jurisdiction over all the defendant railroads that it granted the motion for leave to file the complaint.[18] In the instant case, there is no question that all the defendants are suable in the same district, as they already have been in a number of districts.

The common law antitrust count is in no different posture. Clearly a district court having jurisdiction over the statutory antitrust claim would have pendent jurisdiction over Count II (*United Mine Workers* v. *Gibbs,* 383 U.S. 715, 721-729 (1966)). In any event, the common law (which under *Erie* v. *Tompkins* would presumably be the law of the several states) provides no basis for antitrust relief broader than that available under the federal antitrust statutes, which were designed to strengthen and reinforce the early common law doctrines.[19]

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[17] After hearings by a special master, the complaint was eventually dismissed on the motion of all parties (340 U.S. 889 (1950)).

[18] The dissenting opinion of Chief Justice Stone, on behalf of four Justices, thought this fact not established, and also insufficient of itself to warrant an exercise of the original jurisdiction.

[19] The opinion of then Circuit Judge Taft in *United States* v. *Addyston Pipe and Steel Co.,* 85 Fed. 271 (C.C.A. 6th, 1898), aff'd, 175 U.S. 211 (1899), reviews the common law authorities. See also

With respect to Count III, which charges a public nuisance, plaintiffs have either the federal district courts or the State courts open to them. If the nuisance and antitrust claims are found to be derived "from a common nucleus of operative fact" (*United Mine Workers* v. *Gibbs,* 383 U.S. at 725), a federal court having jurisdiction over the antitrust charges could also have pendent jurisdiction over the nuisance claim. Whether or not such pendent jurisdiction is found to exist, the courts of each plaintiff State clearly would have jurisdiction to hear the nuisance allegations, and plaintiffs do not suggest that these defendants are not subject to the jurisdiction of the State courts. The case thus differs fundamentally from the nuisance cases in which this Court has exercised original jurisdiction, where no other suitable forum was available to the complaining State. Contrast *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Missouri* v. *Illinois,* 180 U.S. 208 (1901), 200 U.S. 496 (1906); *New York* v. *New Jersey,* 256 U.S. 296 (1921); *New Jersey* v. *New York City,* 283 U.S. 473 (1931). There is no indication here, as there was in those cases, of a conflict between the states necessitating resort to the original jurisdiction of this Court as the constitutional substitute for the use of diplomacy or force by one state in dealing with another

(footnote 19 continued)
Standard Oil Co. v. *United States,* 221 U.S. 1, 50-51, 58 (1911). In *Georgia* v. *Pennsylvania R. Co.,* Chief Justice Stone, dissenting, noted that (324 U.S. at 469):

> "The Court disregards the fainthearted and unconvincing assertion of the State that it has a 'common law' cause of action entitling it, independently of the Clayton Act and the federal antitrust laws, to maintain the present suit . . . We are of the opinion that the objections to the maintenance of the present suit are essentially the same, whether it be regarded as a suit upon a cause of action arising under the Clayton Act or as one maintainable upon the equitable principles generally applicable in the federal courts independently of the Clayton Act."

(180 U.S. at 241; 200 U.S. at 518, 520-521; 206 U.S. at 237). Thus, no need for the extraordinary resort to this Court's original jurisdiction has been established.

Plaintiffs make the novel suggestion that this Court should exercise original jurisdiction because no other *Federal* court can hear the nuisance claim because of the absence of a Federal question and diversity of citizenship (Pl. Br., p. 16). But the lack of a Federal question or other basis for Federal jurisdiction is hardly a reason for this Court to take a case which could otherwise be brought in state courts.

2. The Facilities Of The District Courts Are Better Adapted To Complex Trials Of Factual Issues Than Those Of This Court.

It would seem obvious that the district courts are more suitable than this Court for the trial of cases involving issues of fact, particularly complex cases such as these. Some of the reasons why this is true were stated by Chief Justice Stone in his dissenting opinion in *Georgia* v. *Pennsylvania R. Co.*, as follows (324 U.S. at 469-470):

> ". . . the remedy asked is one normally pursued in district courts whose facilities and prescribed judicial duties are better adapted to the trial of issues of fact than are those of this Court. In an original suit, even when the case is first referred to a master this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties. No reason appears why the present suit may not be as conveniently proceeded with in the district court of the proper venue as in this Court, or why the convenience of the parties and witnesses, as well as of the courts concerned, would be better served by a trial before a master appointed by this Court than by a trial in the appropriate dis-

> trict court with the customary appellate review. The case seems preeminently one where this Court may and should, in the exercise of its discretion and in the interest of a more efficient administration of justice, decline to exercise its jurisdiction, and remit the parties to the appropriate district court for the proper disposition of the case there. . . ."

The opinion of the Court (per Douglas, J., 324 U.S. at 465), did not disagree with these reasons; it merely concluded that they were inapplicable to the *Georgia* case since all of the defendants were not suable in the same district. There being no difficulty in obtaining jurisdiction over all the defendants in the same district in the instant litigation, the reasoning of Chief Justice Stone should control here. While assignment to a special master, who would be guided by the Rules of Civil Procedure (Supreme Court Rule 9(2)), might result in a trial not significantly different from trial in a district court, experience indicates that masters' hearings often take substantially longer. Moreover, a master's rulings, even on interlocutory matters, are merely recommendations, which must come before this Court for consideration and approval. The judgment of a district court on the other hand is binding in the absence of an appeal, and many orders, judgments or parts of judgments are never taken to an appellate tribunal.

There is the further drawback that in reviewing a master's findings this Court does not have the benefit of "the valuable assistance of the Courts of Appeals" (*United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n. (1963)). Consequently, as with direct appeals under the Expediting Act, the Court is faced with "the often arduous task of searching through voluminous trial testimony and exhibits to determine whether . . . findings of fact are supportable" (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 364 (Harlan, J.)).

For these reasons, this Court has on several occasions expressed its unwillingness to assume original jurisdiction over types of cases which might frequently bring before it litigation which would otherwise be disposed of in lower courts. Thus, in *Massachusetts* v. *Missouri*, 308 U.S. 1, 19 (1939), the Court observed that:

> ". . . To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it. . . ."

Cogent reasons, the Court said (*ibid.*) "point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States." *Oklahoma* v. *Cook*, 304 U.S. 387, 394 (1938), on the same grounds, rejected an original action to enforce claims of an insolvent institution against citizens of other States.

These considerations point even more forcefully to the undesirability of permitting States to invoke the original jurisdiction in complex antitrust cases. For in recent years States have become increasingly active in instituting antitrust suits on behalf of themselves, their governmental subdivisions, and their citizens.[20] An appellate court is obviously neither designed nor equipped to try such cases.

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[20] Among the cases brought by States in recent years are *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F.Supp. 391 (S.D. Iowa, 1968), aff'd on other grounds, 408 F.2d 1171 (8th Cir., 1969) and 409 F.2d 1239 (8th Cir., 1969); *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn., 1968); *Hawaii* v. *Standard Oil*

3. Invocation Of This Court's Original Jurisdiction Is Not Required To Insure The Expeditious And Fair Handling Of This Matter.

Plaintiffs argue that this Court should take jurisdiction because of the alleged urgency of the problem presented, and because this Court is purportedly the only forum where a single unified trial can be obtained. Neither argument withstands analysis.

a. The alleged saving in time from an original action is illusory.

Plaintiffs do not claim there would be a saving in pretrial or trial time. On the contrary, they suggest that the pretrial in this Court be coordinated with the pretrial in the pending multi-district litigation and that a district judge be appointed as special master to try the case. A trial does not become more expeditious because a district judge is denominated a "master". Indeed, trial under such a procedure might be slower, since this Court might have to rule on interlocutory matters which would not ordinarily be presented to an appellate body.

Plaintiffs' only alleged time saving would thus result from the elimination of the court of appeals from the case, and it is apparent from plaintiffs' brief (p. 21) that this is their primary concern. Of course, time can be saved in any case by skipping the court of appeals. This Court, however, does not regard the time spent in a court of

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(footnote 20 continuel)
Co., 301 F. Supp. 982 (D. Haw., 1969); *In re Antibiotic Drugs*, 295 F. Supp. 1402 (JPML, 1968); *In re Western Liquid Asphalt*, 303 F.Supp. 1053 (JPML, 1969); *In re "West of the Rockies" Concrete Pipe*, 303 F. Supp. 507 (JPML, 1969); *In re Plumbing Fixtures*, 295 F. Supp. 33 (JPML, 1968); *In re Children's Books*, 297 F. Supp. 385 (JPML, 1968); *In re Concrete Pipe (East)*, 302 F. Supp. 244 (JPML, 1969); *In re Admission Tickets*, 302 F. Supp. 1339 (JPML, 1969).

appeals as wasted, as is shown by its criticism of the present statutory provisions for direct appeals in antitrust cases. See p. 15, *supra*. The review by the intermediate court of voluminous fact findings often relieves this Court of that burden, either because the parties do not challenge large portions of the findings of the court of appeals or because this Court refuses to review them.

Furthermore, if the principal objection is to the time consumed by review in a court of appeals, the remedy is not invocation of this Court's original jurisdiction but the granting of a writ of certiorari to review the district court's judgment before hearing in the court of appeals, pursuant to 28 U.S.C. § 1254(1). Whether there will be a need for expedition which warrants this extraordinary step, reserved for matters of great importance, can obviously better be assessed after the Court has the benefit of a decision in the district court.

Finally, plaintiffs' insistence that the urgency of the problem requires immediate action by this Court completely disregards the existing legislative and administrative machinery for dealing with this very matter. Plaintiffs also ignore the relief which has already been obtained in the Government antitrust action. Thus, the substance of the urgency argument is that Congress, the federal administrative agencies, and the States, including the plaintiff States, are not acting rapidly enough, and that this Court alone can provide the speedy remedy which is required. There is no reason to believe, however, that the responsible public officials are not fully mindful of the public interest in this area, which, as we show below (*infra*, pp. 20-24), is much more suitable for legislative and administrative regulation than for judicial control and administration.

b. Plaintiffs do not need an original action in this Court to secure a single unified trial.

Plaintiffs say that a single unified trial can be held only in the Supreme Court; the alternative, in their view, is 15 separate actions in the 15 respective states. But there is nothing to prevent all the plaintiffs from joining in a single suit in any of the numerous districts in which jurisdiction over the defendants can be obtained. If a unified trial is as desirable as plaintiffs assert, they can obtain it at their own option.

Plaintiffs are not seeking merely a single unified trial, but a trial in *this* Court, which they believe would be dispositive of all of the multi-district litigation, including the cases now pending before Judge Real. Certainly a decision by this Court would, as a practical matter, be controlling throughout the nation. But this would be true in any kind of case the Court might be willing to hear originally. It is clearly not a sufficient basis for trying exceedingly complicated litigation in this Court.

Furthermore, the cases presently pending in the district courts involve plaintiffs who could not be parties to an original action in this Court, and involve claims for damages to be tried before juries. *Beacon Theatres* v. *Westover,* 359 U.S. 500 (1959), holds that the right to trial by jury in an antitrust case may be impaired if the merits of injunctive and other equitable prayers arising out of the same issues are first tried to the court in equity. The same considerations should make this Court reluctant to accept jurisdiction of this matter in order to reach a judgment based on a master's report before the presently pending jury cases can be tried. The constitutional difficulties suggested by the *Beacon Theatres* decision are, of course,

obviated by remitting these plaintiffs to the district court where trial judges can arrange for the appropriate order of trial of both the legal and equitable claims.

Plaintiffs' criticism of the alleged inadequacies of district court jurisdiction does an injustice to the formal and informal mechanisms available for the just and efficient disposition of multi-district litigation. At the request of the Judicial Conference, Congress has already established a procedure for handling such complicated litigation through their transfer to a single district for pre-trial purposes (28 U.S.C. § 1407). Additionally, a committee of the Judicial Conference has approved the *Manual for Complex and Multi-District Litigation* to guide the district courts in their disposition of such cases. These procedures are currently being followed by Judge Real in the 17 cases assigned to him. Plaintiffs' attempt to substitute this original case for those proceedings, in which many States are named parties and all are members of the described classes, does not solve any of the problems or eliminate any of the difficulties which confront courts in such mass litigation; it would merely transfer them to this Court.

4. There is No Public Need for the Exercise of This Court's Original Jurisdiction.

Plaintiffs' insistence that the urgency of the air pollution problem requires immediate resort to the original jurisdiction of this Court completely disregards both the consent degree obtained in the Government case and the pervasive legislative and regulatory controls designed to reduce vehicle emissions. No reasonable argument can be advanced as to why this Court should extend its jurisdiction to a highly technical and complicated field presently subject to legislative and administrative regulation.

To whatever extent a negative injunction against continuation of alleged improper joint conduct is requested, such an injunction has already been entered in the Government's antitrust case, and plaintiffs do not allege that defendants are not fully complying with that decree.

The mandatory injunctive relief sought by plaintiffs infringes upon an area already subjected by Congress to comprehensive and vigorous Federal regulation.[21] Stringent emission standards have been applicable to new motor vehicles sold in the United States since late 1967, and more stringent standards for future models are presently under consideration by the Department of Health, Education and Welfare. The effect of this regulation has been to lower the quantity of automobile emissions; further reductions will result as the proportion of post-1967 cars increases and the authorized level of motor vehicle emissions is reduced. Plaintiffs do not assert that defendants are not or will not continue to be in compliance with the Federally prescribed standards. Insofar as the prayers for relief request the Court to set standards for emissions for new motor vehicles, they raise a conflict with the Federal agency charged by Congress with precisely this same task. Since the Senate has passed a bill providing for Federal pre-marketing certification of devices for used cars as well, a similar conflict may also arise as to the prayer for relief for such cars. H. R. 17255, § 211, 91st Cong., 2d Sess.

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[21] Paragraph 2 of the prayer for relief (*supra,* pp. 9-10) would require this Court to determine whether defendants were developing fully effective pollution control devices or pollution free engines by the "earliest feasible date." This would require this Court to exercise supervision of the various matters of policy and technical complexity which Congress has committed to the Secretary of Health, Education and Welfare.

In urging this Court to invoke its original jurisdiction, plaintiffs inexplicably neglect not only the extensive federal regulation but also the important role assigned to states and local governments under the provisions of the Air Quality Act of 1967 (81 Stat. 485, 42 U.S.C. § 1857, *et seq.*) in the control of pollution from all sources. The pattern of that statute is to require the states to adopt air quality standards and plans to implement those standards, subject to review by the Department of Health, Education and Welfare. 42 U.S.C. § 1857(d). Such plans would necessarily cover the entire range of sources of emissions into the atmosphere, including power plants, furnaces, factories and refineries, as well as used automobiles. As a part of this scheme, Congress explicitly preserved the power of states and local governments to regulate the "use" and "operation" of motor vehicles on their highways and thus, *inter alia,* to prescribe emission standards for used cars manufactured before the Federal standards were applied. See pp. 4-5, *supra.* The states may require installation of the prescribed devices whenever a used car is sold, as California has done,[22] or they may require all used cars to comply with prescribed standards. However, no state has made exhaust emission control devices or systems mandatory on all used vehicles.[23] The failure and apparent reluctance of these plaintiffs and other States to invoke their legislative and administrative power to deal with the used car emission problem hardly squares with their effort to invoke the original jurisdiction of this Court on the basis of a need for immediate action.

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[22] California Health and Safety Code, § 39129(d).

[23] No legislative body has attempted to compel the automobile manufacturers to install devices on used cars at their own expense, as the plaintiffs are requesting. Such a requirement would in no way relate to the restoration of competition in anti-pollution equipment (even if it be assumed that competition was previously cur-

In the final analysis it seems clear that the control of vehicle emissions raises technical and policy issues best reserved for legislative and administrative decision. The determination of what emission standards should be adopted for motor vehicles requires knowledge of the effects on health and property of emissions into the air of many chemical ingredients, which vary from place to place, and of the physical and economic feasibility of various kinds of mechanical and chemical devices for achieving these standards. Consideration must be given to the problems which result from the production of all forms of energy through the combustion of fuels. The benefits from the increased production of energy in areas of concentrated population cannot be achieved without cost, in the form of emissions into the air or the financial burden of reducing them. The process of regulation requires a balancing of all these factors, taking into account the possibility of harm from different levels of discharge of substances into the atmosphere and the cost of different levels of controls.

The Air Quality Act provides a legislative framework for the resolution of these issues in the context of the national and regional ambient air quality standards to be prescribed thereunder. This Court has made it clear that courts should not substitute their views for those of administrative agencies on such matters of public policy, technology and economics. Cf. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64-65 (1956); *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 767 (1947); *Pan*

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tailed). The defendants would, of course, have taken into account the cost of such devices when setting the prices of their cars if the devices had been installed during the process of manufacture. To subject them to the cost of such retrofitting on perhaps 70 million automobiles, in amounts undoubtedly exceeding a billion dollars, without being able to charge for the equipment installed, would clearly be punitive and confiscatory.

American World Airways v. *United States*, 371 U.S. 296, 303 (1963). In any event, such matters are not suitable for determination by this Court in the first instance, without the benefit of the factual and legal exploration and sifting that can be given to these complex and technical subjects in the district courts and the courts of appeals.

CONCLUSION

For all of the above reasons this case is clearly not an appropriate one for the exercise of this Court's original jurisdiction. Leave to file the complaint should, therefore, be denied.

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