IN THE

Supreme Court of the United States

October Term, 1970
No. 45
Original

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, *et al.*,

Defendants.

On Motion for Leave to File Complaint.

Brief for the States of Alabama, et al., as Amici Curiae.

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This brief *amici curiae* is submitted by the States of Alabama, et al., pursuant to Rule 42(4) of the Rules of this Court. *Amici* are 16 states of the United States and the City of New York, New York. In common with plaintiffs, *amici* have complained against defendants seeking affirmative equitable relief from the injury wrought by the antitrust violations involved in these cases.

Although a number of *amici* first brought their complaints in the district courts, we agree with plaintiffs here that as matters now stand the controversy should more appropriately be considered by this Court as an original matter. If the Court agrees to entertain this complaint, *amici* will seek leave to join as plaintiffs here.

The complaint plaintiffs ask leave to file seeks a remedy for the fouling of the nation's air that has resulted from the automobile manufacturers' conspiracy to delay research, development and installation of auto pollution control devices. The principal remedy plaintiffs seek in order to undo the massive consequences of that violation is feasible legally, technically and economically. That remedy is to require defendants to install ("retrofit") emission control devices on used cars presently on the road.

Amici agree with plaintiffs that this nationwide litigation presents a rare and urgent situation which calls for this Court's exercise of its original jurisdiction. While the pleadings thus far submitted by the parties preceded this Court's decision in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), we shall show that the present circumstances fully satisfy the criteria for the exercise of original jurisdiction laid down in *Wyandotte.*

Statement of the Case.

Plaintiffs have presented a full statement of the case. For present purposes, only a few essential facts need be highlighted.

Arrayed as plaintiffs, both in this Court and in the lower courts, are 34 sovereign states, representing the preponderant portion of the nation's population and the geographic areas most seriously affected by the polluting emissions from defendants' automobiles.

The defendants—manufacturers of most of the cars produced in this country—stand charged with antitrust violations of unprecedented seriousness. Essentially, plaintiffs and *amici* allege that defendants engaged in a

long-standing antitrust conspiracy,[1] starting before 1955, to retard and prevent research, development and installation of effective air pollution control devices on their automotive products. The effects of this antitrust violation can now be seen from almost any urban window, as massive amounts of pollutants emitted from automobiles not equipped with emission control devices literally color the nation's skies.

An appreciation of the matters now before the Court requires an understanding of the overall history of the automotive air pollution litigation.

Prior Federal Proceedings. In 1965 the federal government issued a civil investigative demand inquiring into defendants' actions on air pollution, and a grand jury later conducted an extensive investigation. Although no indictment was requested, in early 1969 a civil complaint was filed by the Antitrust Division charging defendants with conspiracy to eliminate competition in research, development, manufacture and installation of motor vehicle air pollution control equipment. The civil case was soon settled by a consent decree that did no more than forbid any future combination to restrain air pollution control despite the strenuous objections of many major public bodies that such relief was inadequate. *United States v. Automobile Manufacturers Ass'n,* 307 F. Supp. 617 (C.D. Cal. 1969) *aff'd sub nom. City of New York v. United States,* 397 U.S. 248 (1970).

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[1]The proffered original complaints also allege common law conspiracy and nuisance counts in addition to the antitrust violations. However, the antitrust violation is patently the principal charge, and is the one which *amici* contend furnishes the clearest basis for this Court to accept original jurisdiction. This litigation stems from the civil antitrust complaint filed by the federal government against the automobile manufacturers which was settled by consent decree. See page 3, *infra.*

"Private" Actions in the District Courts. Most of the objecting public bodies then instituted their own antitrust actions seeking the relief that had been omitted from the federal consent decree. In substance, those cases seek two kinds of relief: (1) an injunction requiring the defendants to "retrofit" used cars with the antipollution devices that would have been installed as original equipment but for the conspiracy, and (2) damages for injuries to interests represented by the plaintiffs that have already occurred from air pollution caused by the conspiracy. On April 6, 1970, the actions filed by these public bodies in district courts throughout the Nation were consolidated under 28 U.S.C. §1407 for pretrial proceedings in the Central District of California; they are henceforth referred to as the "Docket 31" litigation (using the docket number assigned them by the Judicial Panel on Multidistrict Litigation).[2]

In the almost two years since the first public body complaints were filed in the district courts, the Docket 31 litigation has made little progress:

Defendants moved to dismiss the Docket 31 cases on the grounds, *inter alia,* that plaintiffs lacked standing and were seeking relief which could not be granted. On September 4, 1970 the district court denied defendants' motion to dismiss but thereafter certified its de-

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[2]*In re Multidistrict Private Civil Treble Damage Antitrust Litgation Involving Motor Vehicle Air Pollution Control Equipment,* 311 F. Supp. 1349 (JPML 1970). Since the original jurisdiction complaints were filed, seventeen states which had not previously filed in the district court have done so in order to protect themselves from the bar of the statute of limitations. Included among these recently filing states are 16 who had previously filed in this Court and who then filed in the district court on a "standby basis" in the event this Court declined to accept original jurisdiction.

cision denying defendants' motion as appropriate for appellate review under 28 U.S.C. § 1292(b). Permission to appeal was granted by the court of appeals on February 17, 1971. Defendants' briefs were filed on July 26, 1971.

On January 26, 1971 the district court released to the plaintiffs most of the documents gathered in the federal grand jury investigation. M.D.L. Docket 31 Pretrial Order No. 3. These had previously been impounded by the district court for the use of "treble damage claimants or others" when the consent decree was approved. 307 F. Supp. at 620. The Docket 31 plaintiffs have been reviewing this voluminous evidence since then. (Some of the Docket 31 cases were withheld from certification to the court of appeals, so that proceedings could go forward in the district court during the interlocutory appeal.)

Ultimately, when the pending appeals, further pretrial procedures, and any other interlocutory appeals that may arise are completed, the Docket 31 cases will be returned to the 23 districts where they began, for trial on the merits, subsequent determination of appropriate remedies, appeal to the respective courts of appeal and, inevitably, review by this Court.

In this setting *amici* urge this Court to assume original jurisdiction of the controversy.

Summary of Argument.

When the principles outlined in this Court's decision last Term in *Ohio v. Wyandotte,* 401 U.S. 493 (1971), are applied to the circumstances of the present case, it becomes clear that this is a case where both the policies of Article III and "reasons of practical wisdom" call

for the retention of original jurisdiction. This is not, like *Wyandotte,* a single State's suit of local concern based on local law that could be brought in the plaintiff's own courts. Rather, it is a case where numerous states seek relief under the federal antitrust laws—as to which this Court has a special role—for a problem of urgent nationwide concern. This litigation cannot feasibly be handled in separate suits in federal courts in each of the plaintiff States, and moreover, Article III contemplates that a State unable to sue in its own State courts should not be required to look elsewhere than this Court for judicial relief.

None of the practical considerations considered in *Wyandotte* favors a declination here of the jurisdiction that this Court should presumptively exercise:

> (1) This case raises fundamental questions of federal antitrust law, relating to the offense charged, plaintiffs' standing to sue and the power of a court of equity—which we show to be indisputable—to provide the relief plaintiffs seek. Plaintiffs seek principally to undo future effects of the violation alleged by requiring defendants to install *i.e., "retrofit,"* antipollution devices in existing automobiles. These are questions that must be resolved in this Court sooner or later, wherever the cases are tried.
>
> (2) The problem is plainly of nationwide import.
>
> (3) The retrofit remedy central to this litigation is unavailable in any nonjudicial forum. The limited federal administrative regulation of automotive air pollution covers only post-1968 new cars and even those incompletely, and state regulation is inappropriate and inadequate for coping with the national

problem created by defendants' efforts to impede the fight against air pollution.

(4) As our brief exposition of air pollution technology shows, that technology is not the mystery defendants claim it to be and pollution-control devices are readily available for retrofit in the present state of the art; thus, the factual and remedial elements of this case are not unmanageable for this Court assisted by a Special Master.

The enormity and urgency of the nationwide health and economic problem that gives rise to this suit calls for expeditious resolution that can come only if this Court takes the case now.

ARGUMENT.

This Court's decision last Term in *Ohio v. Wyandotte,* 401 U.S. 493 (1971), established the framework for the Court's determination as to whether the federal antitrust count of the present complaint should be retained here or remitted to the concurrent jurisdiction of the several district courts.

As this Court recognized in *Wyandotte,* that determination starts with the presumption that the Court must generally exercise the jurisdiction it has, 401 U.S. at 497, but proceeds on the principle that the Court may exercise discretion to select those cases that are especially deserving of and appropriate for original consideration. That is, the Court "may decline to entertain a complaint brought by a State against the citizens of another State * * * only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) [there are] reasons of practical wisdom that persuade us that this Court is an inappropriate forum * * *." 401 U.S. at 499. We shall show that application of these criteria to the unique circumstances of this case militates in favor of the Court's exercising its jurisdiction over the present complaint.

The Article III policies discussed in *Wyandotte* add up to a general principle that a state should not be required to resort to another state's courts or indeed to any court other than its own in order to obtain relief. In *Wyandotte,* the Court concluded that plaintiff Ohio's own courts would be competent to entertain its lawsuit, which was based purely on local law. Here, unlike *Wyandotte,* a federal forum is available (indeed

many are available) to these plaintiffs but the nature of the case is such that (1) no state's own courts have jurisdiction, and (2) no state's claim can, as a practical matter, be handled in the federal court sitting in that state even if that would satisfy the Article III policy. In fact, the pending district court cases brought by the states are all now centralized in a California federal district court for pretrial proceedings.

The second branch of the Article III policy articulated in *Wyandotte* makes it insufficient that a state plaintiff has a remedy in a lower federal court. Rather, Article III by its terms reflects the Framers' judgment that a state unable to sue in its own court should not be required to go anywhere else except this Court: "Such exclusive jurisdiction was given to this court because it best comported with the dignity of a state that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation." *United States v. Texas,* 143 U.S. 621, 643 (1892). There is, moreover, the further Article III policy, reflected in such cases as *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), and *Oregon v. Mitchell,* 400 U.S. 112 (1970), that matters of urgent importance to all or many of the states of the Union are particularly appropriate for determination here, without the necessity of time-consuming and duplicative litigation in numerous district courts and courts of appeals.

Thus the principles of *Wyandotte* permit this Court to decline original jurisdiction only if the declination is *both* consistent with Article III policies *and* required by practical considerations. The practical considerations outlined in *Wyandotte* are four:

1. Whether there are serious issues of federal law presented;

2. Whether the matter is one of national import;

3. Whether other official bodies are "actively involved in regulating the conduct complained of" (401 U.S. at 502); and

4. Whether there are complex fact questions which would be better dealt with initially at a trial level.

Measured against these standards, this litigation merits treatment different from *Wyandotte*.

I.

REASONS OF PRACTICAL WISDOM FAVOR THIS COURT'S RETENTION OF ITS ORIGINAL JURISDICTION IN THIS LITIGATION.

1. Issues of Federal Law.

In *Wyandotte*, the single factor which weighed most heavily was that only an issue of local law was presented. The State of Ohio sought abatement of a nuisance. This Court held that "much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law." 401 U.S. at 497. In this litigation, however, every important issue is one of federal antitrust law—the nature of the offense, plaintiffs' standing to sue, and the propriety of the relief sought. These are issues with which this Court is continually concerned. They are bound to come to this Court eventually if they are not entertained now.

Nature of the Offense. The gravamen of the complaint here is Count I, the charge of violation of the antitrust laws. What is charged is a classic antitrust conspiracy to suppress technology. See *Rep. of Attorney General's Comm. to Study Antitrust Laws,* 230-231

(1955), and cases cited. However, defendants' assertion that the theory of violation is "novel and unadjudicated,"[3] raises a fundamental question of the interpretation of the Sherman Act, a staple of this Court's business.

Plaintiffs' Standing to Sue. In the Docket 31 cases, defendants have also attacked plaintiffs' standing, claiming that the state and other public body plaintiffs are not entitled to sue because they were not the parties against whom the violation was directed, had no "commercial relationship" with defendants, and were not within the "target area" of the violation. Although we believe this issue was decided correctly against defendants by the §1407 judge, his certification of the issue to the Ninth Circuit incorporated his determination that it is "a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Issues relating to standing to sue under the antitrust laws are of a kind over which this Court does have a "claim to special competence." *Wyandotte,* 401 U.S. at 497-8. See, *e.g., Hawaii v. Standard Oil of California,* No. 70-49.

The Relief Sought—Retrofitting. The ultimate issue presented in this litigation is whether, if the allegations of the complaint are sustained, the defendants should be required to "retrofit," *i.e.,* install anti-pollution devices on the automobiles they manufactured during the conspiracy period. In this Court, defendants have reiterated their contention, previously urged in lower courts, that the mandatory relief which plaintiffs

[3]Br. in Opp. 7. Defendants rely on a comment by Judge Curtis made in support of his approval of the consent decree in the federal case. *United States v. Automobile Manuf. Ass'n.,* 307 F. Supp. at 621.

seek is beyond the equitable powers of *any* federal court. (Br. in Opp. at 22 n. 23.) This argument is based on defendants' construction of §16 of the Clayton Act. That, of course, raises a question of *federal* law.[4] And defendants' subsidiary arguments that such a remedy would be inappropriate because of state and federal laws dealing directly with pollution likewise raise issues which—if they are sufficiently substantial to merit notice at all—involve federal questions, and of a character particularly suitable for *this* Court. For whether federal courts should defer in formulating a remedy for a violation of a federal statute to various state schemes of regulation is an issue of federalism which has historically been within this Court's special competence. And defendants' alternative assertion that there is some inconsistency between an order requiring retrofitting of cars manufactured in the past, pursuant to an antitrust conspiracy, and their duty under recent Acts of Congress to install such devices on cars built in the future, invites an accommodation of federal statutes. This, too, is a task which only this Court can fulfill with authority and finality. Compare *Boys Markets v. Retail Clerks,* 398 U.S. 235 (1970); *Mine Workers v. Pennington,* 381 U.S. 657 (1965).

In summary, it is plain that at every turn this litigation presents federal questions, and federal questions only. It is a foregone conclusion that, given their importance, and the enormous stakes involved, the parties to this litigation are unlikely to rest until they have made every effort to have these issues finally decided by this Court.

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[4]We treat this issue on the merits at pp. 20-21, *infra,* because it is logically antecedent to consideration of defendants claim that the retrofitting remedy involves such factual complexities that this Court should stay its hand.

2. Matters of National Import.

In *Wyandotte,* the problem concerned the contamination of a limited geographic area, Lake Erie. One state brought the complaint. Here the problem is national and 34 states are seeking relief.

The national character of the problem results principally from the oligopolistic character of the automobile industry. Through 1969 the defendant automobile manufacturers consistently accounted for over 85% of all cars registered in the nation.[5] When these manufacturers conspired, the result was inherently a national problem, compounded by the natural movement of the air and the mobility of motor vehicles. In this litigation the enormity of the injury caused by defendants overshadows every other consideration.

This Court declined *Wyandotte* because otherwise it "would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers." 401 U.S. at 498. This litigation presents precisely those serious "matters of federal law and national import" which are deserving of this Court's attention. Accordingly, assertion of jurisdiction in the present case would not, as in *Wyandotte,* require the Court to "pick and choose arbitrarily among similarly situated litigants" (401 U.S. at 504) with localized pollution problems. The magnitude of the automotive air pollution problem and its nationwide character differentiaties this case in kind, not merely in degree.

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[5]See *Automotive News,* 1971 Almanac, issue of April 26, 1971, p. 20, Table: Percentage of Car Makes to Total U.S. Registrations, 1962-1970.

3. Involvement of Other Official Bodies.

In *Wyandotte* this Court declined to commit its "resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis." 401 U.S. at 503. The case here is far different.

The most important issue which this Court is being asked to resolve, and the one with which *amici* are principally concerned, is the appropriateness of a decree requiring retrofitting. Assuming the automobile manufacturers' violation ceased as of the entry of the consent decree, the automobiles manufactured and sold during the time of the conspiracy are still on the road, and, lacking control equipment, continue to spew their pollutants into the atmosphere. The violation caused these polluting cars and the "natural remedy" is to retrofit them, just as the "natural remedy" for an illegal merger is dissolution. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961).

This issue is one which can best be resolved in this Court. Defendants of course say otherwise. The simple fact is that the auto manufacturers are currently engaged in seeking to persuade each adjudicatory and regulatory body before whom they appear on any pollution problem, that the relief "pea" is not under that "shell."

In this Court the manufacturers point to federal regulatory statutes. They argue that plaintiffs "do not assert that defendants are not or will not continue to be in compliance with Federally prescribed standards." (Br. in Opp. 21.) This argument is at best unseemly. Defendants stand accused of a conspiracy in violation of federal law, resulting in an enormous nationwide injury. They should not, in effect, taunt the injured

parties with the claim that there were not at the time of injury any laws which affirmatively required them to do that which they illegally conspired not to do.

More important, as defendants know full well, there is no federal regulation covering emissions on used cars or retrofitting. Federal regulation of automotive emissions began with the 1968 model year—but only for *new* cars.[6] Accordingly, the effects of the antitrust violation which was the subject of the 1969 consent decree remain to be dealt with—at the least—with respect to pre-1968 models.[7] Defendants' only answer to the indisputable fact that retrofit is solely a matter of judicial concern is the suggestion that a conflict "may * * * arise" if federal legislation is passed in the future. (Br. in Opp. 21.) Such a possibility cannot meet the *Wyandotte* test of involvement by other adjudicatory and regulatory bodies.

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[6]Public Law 89-272 enacted October 20, 1965 [42 U.S.C. §1875f-1 *et seq.*] authorized the Secretary of Health, Education and Welfare to establish national Standards applicable to emissions from "*new* motor vehicles or *new* motor vehicle engines * * *." (Emphasis added.) Partial regulations were promulgated under this law for vehicles beginning with the 1968 model year. See generally 45 C.F.R. §85 (1970). Stricter and more comprehensive controls were imposed by the Clean Air Act of 1970, Pub.L.91-604. None of these statutes or regulations, however, dealt with retrofitting of pre-1968 models.

> "In explaining the EPA's approach to automotive pollution control to the Detroit Auto Writers Group, [Eric] Stork, [Acting Director, Mobile Source Pollution Control, Environmental Protection Agency], indicated that the Federal Government will continue to concentrate its regulatory efforts on the auto industry. On retrofitting used cars with emission control equipment—a move which would greatly speed the current downward trend in total automotive emissions—Stork said the federal level has no authority to act." *Automotive News*, July 26, 1971, p. 12.

[7]Although an argument against granting relief with respect to *new* vehicles in the 1968 and later model years may have

(This footnote is continued on next page)

Defendants also seek to have this Court defer to "the important role assigned to state and local governments under the provisions of the Air Quality act of 1967 * * * in the control of pollution from all sources." (Br. in Opp. 22.) But automotive air pollution is a problem which inherently has nationwide significance.[8] Moreover, since federal law "control[s] the appropriateness of redress despite the provisions of [existing] state * * * law," *J. I. Case Co. v. Borak,*

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superficial appeal, the delay caused by defendants' conspiracy in all likelihood set back the state of auto pollution control technology even after the conspiracy purportedly ended. And since the National Emissions Standards Act, unlike the Shipping Act, contains no provision "explicit [or otherwise] exempting activities which are lawful under * * * the Act from the Sherman and Clayton Acts," *Carnation Co. v. Pacific Conference,* 383 U.S. 213, 216 (1966), defendants' argument loses much of its force. *United States v. Borden Co.*, 308 U.S. 188, 198-202 (1939); *United States v. R.C.A.*, 358 U.S. 334, 339-346 (1959); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 461 (1945).

In *City of Chicago v. General Motors Corporation, et al.,* No. 70 C 1904 (N.D. Ill.), Judge Marovitz dismissed a "class action products liability case," brought under state law, against the auto manufacturers based on the charge that motor vehicles are products creating a hazard to health and welfare of the Chicago area. Opinion filed June 25, 1971. In doing so he held that federal legislation "essentially pre-empts the motor vehicle pollution field" insofar as an action based on state law is concerned, but nevertheless recognized that "the vehicles in question [pre-1968 models] are not covered by recent federal legislation." (Slip Opin. p. 12.)

[8]Indeed, in the very act on which defendants rely for their "state and local government" argument there was a specific finding that "federal standards should supersede state and local laws on emissions from motor vehicles * * * in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles." *H.R. 728 on S. 780,* 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Adm. News 1956. Even earlier, in passing the Motor Vehicle Air Pollution Control Act of 1965, Congress found that "The high rate of mobility of automobiles suggests that nothing short of nationwide control would scarcely be adequate to cope with the * * * problem." *H.R. No. 899 on S.306,* 89th Cong., 1st Sess., 1965 U.S. Code Cong. & Adm. News 3608, 3612.

377 U.S. 426, 434 (1964), the argument that a state or local government's remedy under the federal antitrust laws can be defeated by self-help, *i.e.*, by enacting state or local legislation to provide it, is undeserving of serious consideration.

While seeking to avoid this Court's jurisdiction on retrofit as an antitrust remedy, the manufacturers are concurrently indicating their inability to meet future federal regulatory standards on new cars.[9] At the same time, the manufacturers are of course complaining of the burden and interference of state regulation.[10]

The pollution created by used cars is in itself a clearcut and separable problem to be remedied, quite

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[9]See, *e.g.*, statement by H. L. Misch, Vice President-Engineering and Manufacturing, Ford Motor Company, to the Environmental Protection Agency, May 6, 1971:

> "Ford Motor Company is actively engaged in an extensive research and development program in an all-out effort to meet the emission requirements of the Clean Air Amendments of 1970. The attainment of 1975 standards in the short time available is a tremendous task. It is too early to determine whether we will actually be able to meet those requirements * * *."

And see statement by S. L. Terry, Vice President-Safety and Emissions, Chrysler Corporation, to the EPA, May 7, 1971:

> "[P]assage of the Clean Air Act of 1970 completely changed our plans. As you know, the Act calls for reduction of 98% of the hydrocarbons, 97% of the carbon monoxide, and 90% of the oxides of nitrogen from unmodified cars. Today we know of no way to meet these levels * * *."
>
> * * *
>
> "The passage of the Clean Air Act of 1970, however, has removed all sense of order from our development and planning because of the completely unexpected stringency and timing of the emission levels required for all new cars."

[10]"Ford Motor Company shares with you the objective of complying with the 1975-76 standards specified in the Clean Air Amendments of 1970, but we are compelled to tell you that our engineering efforts to realize that goal are being diluted by the necessity to respond to the 1972-74 standards of EPA and California." Misch statement to EPA, *supra,* note 9.

apart from the problems of new cars. Defendants nowhere advance the contrary contention. Indeed, the most defendants say is that "further reductions [in emissions] will result as the proportion of post-1967 cars increases * * *." (Br. in Opp. 21.) This statement undoubtedly reveals the basic thrust of the manufacturers' efforts, which is to thwart and delay being brought to book for their antitrust violation until corrective action will no longer be of any use, and full compensation for the injury done may be impossible. It is to prevent precisely such a result that this Court should assume jurisdiction of the problem.

4. Whether There Are Complex Fact Questions.

In *Wyandotte* this Court concluded that what was "in dispute is not so much the law as the facts." 401 U.S. at 503. The Court found "virtually no published research" on how to solve the fact problem presented, and that "novel scientific issues of fact [were] inherent." 401 U.S. at 503, 504-5. Accordingly this Court indicated that it would be "to say the least unrealistic" to expect an appellate tribunal to deal with complex facts involved "even with the assistance of a most competent Special Master * * *" 401 U.S. at 504.

Again, the situation here is the contrary. The principal issue of liability involves essentially a legal question centering on Federal antitrust law. Defendants freely admit the contractual framework of their conspiracy. (Br. in Opp. 3) Defendants' documents now under protective order of the district court in the Docket 31 proceedings will establish the actions, and non-action, of the defendants within this framework. Knowledge of the intricacies of automotive technology is not necessary to the proof of the initial issue of whether defendants'

actions constituted an antitrust conspiracy. The issue of relief, as discussed in point 1, *supra,* also basically involves an issue of federal law.

Defendants also claim that this Court should decline jurisdiction because the propriety of the retrofitting remedy "poses complex factual issues" involving "a highly technical and complicated field." (Br. in Opp. at 1 and 20.) This argument is inconsistent with defendants' denial that any federal court has the power, under §16 of the Clayton Act, to provide such a remedy. For, if this Court were to sustain the latter contention, no factual issues regarding propriety of this remedy or its precise terms could ever arise in the case.

Plainly, the "practical considerations" which govern the exercise or non-exercise of this Court's original jurisdiction under *Wyandotte* do not include the theoretical difficulties of litigating issues which cannot arise *as a matter of law.* This does not mean, of course, that in determining whether to entertain a case the Court must anticipate every legal question which may arise in the course of the litigation. But it does mean that, before it declines to exercise jurisdiction on grounds of avoiding unsuitably complex questions of facts, the Court must at least be satisfied that there is a substantial likelihood that those factual issues are not merely hypothetical.

Accordingly, assessment of this phase of defendants' argument that this Court is an inappropriate forum must be undertaken in two steps. First, we shall establish that this Court does have power to require retrofitting if liability is proven. It will thus appear that the supposed "factual complexity" of the retrofitting remedy is *relevant* to a disposition of the motion for

leave to file the complaint—a logical step which defendants would elide. We shall then show that this Court should nevertheless assert jurisdiction because the technical difficulties envisaged by defendants are, like the original reports of Mark Twain's death, "considerably exaggerated."

(1) The Retrofitting Remedy Is Authorized by 15 U.S.C. § 26.

Defendants have contended that §16 of the Clayton Act, 15 U.S.C. § 26, permits only injunctive relief against future antitrust violations.

Section 16 authorizes a private litigant to seek injunctive relief against "threatened loss or damage." The statutory words are clear and unequivocal. An injunction may issue under § 16 to prevent future "loss or damage"—not merely future violations. Even if the antitrust violation is over and done with, the federal courts may issue decrees to prevent continuance of the injury resulting from the past violation.[11]

The antitrust laws empower the federal courts to order whatever affirmative action is necessary "to redress the anti-trust violation proved," *United States v. E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 323 (1961), 'to make certain that justice is done," *International Boxing Club of New York v. United States,* 358 U.S. 242, 252 (1958), and to "undo what could have been prevented * * *." *Schine Chain Theatres v. United States,* 334 U.S. 110, 128 (1948). Thus, upon proof that these defendants conspired to retard and prevent the development and installation of air pollution emis-

[11]This Court has consistently construed other federal statutes to afford such mandatory relief. *E.g., J. I. Case Co. v. Borak,* 377 U.S. 426 (1963); *Louisiana v. United States,* 380 U.S. 145, 154 (1965); *Alabama v. United States,* 371 U.S. 37 (1962), aff'g, 304 F. 2d 583, 590-593 (5 Cir. 1962).

sion devices, injured private plantiffs would be as much entitled to have the federal courts "undo what could have been prevented" as would the federal government. *Cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The legislative history of the Clayton Act establishes that Congress intended the equitable remedies available to private parties under § 16 to be equivalent to those available to the United States.[12]

(2) There Is No Mystery as to the Technical Facts.

Since automobiles are ubiquitous in our society, as are garages and repair shops, the basics of automobile engine operation are necessarily well-established and not open to dispute. The basics of automotive pollution and its control are similarly well-established.[13]

These basic facts of auto pollution can be briefly stated. The important automotive pollutants are three noxious gases: hydrocarbons (HC) carbon monoxide (CO), and oxides of nitrogen (NO_x). HC, which are simply unburned gasoline particles, react chemically with NO_x in the presence of sunlight to form photochemical smog. CO is in itself a noxious gas which is lethal in sufficient concentrations.

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[12]51 Cong. Rec. 14214-14215 (1914). This is why, for example, divestiture has been declared an appropriate remedy in private antitrust cases, as well as in Government cases. Compare *Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *McKeon Construction Co. v. McClatchy Newspapers*, 1970 Trade Cas. ¶ 73,212 (N.D. Calif. 1969). Defendants make a related argument that the relief sought by the tendered complaint would be "punitive and confiscatory." (Br. in Opp. at 23, n. 25.) But a federal court cannot be blocked from granting effective relief by such hyperbole. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189) (1943); *Schine Chain Theatres v. United States, supra; United States v. E. I. du Pont de Nemours & Co., supra*, 366 U.S. at 326.

[13]See "Motor Vehicles, Air Pollution, and Health," A Report of the Surgeon General to the U.S. Congress in Compliance with Public Law 86-493, June 1962, p. 9, *et seq.*

HC are emitted in three ways on uncontrolled automobiles. Most HC, generally about 60%, are emitted from the exhaust. Second, a significant amount of HC, averaging perhaps 20%, is emitted from the road draft tube, which is a vent from the crankcase into the open air. Any of the gases in the cylinder that are blown past the piston rings go into the crankcase, and out the road draft tube. These gases, popularly called "blowby," contain HC. Third, evaporative losses from the fuel tank and carburetor together account for perhaps another 20% of total HC emissions.

CO and NO_x result from the combustion of gasoline and air. These two gases emanate almost entirely from the exhaust.

Auto emission controls must therefore cure these pollution sources—(i) blowby emissions, (ii) evaporative losses, and (iii) the exhaust. Crankcase controls and evaporative controls have for all practical purposes eliminated both these sources of HC emissions on new cars. Exhaust emissions on new cars have been reduced but not eliminated by engine modifications.

Blowby Emissions. Starting with 1963 models, the domestic manufacturers have simply removed the road draft tube, and in its place run a line to carry the blowby back into the intake manifold of the engine. This is the so-called PCV (positive crankcase ventilation) system. On all 1968 and later models, total elimination of blowby emissions was accomplished by another line carrying excess blowby gases from the air breather cap at the top of the engine back into or below the air cleaner—the so-called "closed system."

Retrofitting of used cars to eliminate blowby emissions is not only possible, it is an established everyday

procedure which has been carried on since 1964 in California under the law of that state. California Health and Safety Code § 39129. The devices to accomplish this retrofit are all developed and awaiting only a court order requiring their installation.

It is important to note that such relief will go directly to one aspect of the violation charged in the complaint. The manufacturers' delay in installing these crankcase controls on their vehicles constitutes one of the principal charges before the Court.[14]

Evaporative Controls. Controls which substantially eliminate evaporative losses were introduced nationally on 1971 models. These controls consist essentially of a sealed gas tank cap, a carburetor with no external vents, and lines from each of these evaporation sources to a carbon canister or to absorptive surfaces of the crankcase, to channel the vapors which otherwise would be released to the atmosphere. Again, this is a simple mechanical system. *Amici* are prepared to demonstrate

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[14]Paragraph 17 of the complaint charges in pertinent part that the auto manufacturers:

"(c) agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment;

(1) in 1961 the defendants agreed among themselves to delay installation of 'positive crankcase ventilation' on vehicles for sale outside of California until the model year 1963, despite the fact that this antipollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers expressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) in late 1962 and extending into 1963, the defendants agreed among themselves to delay installation of an improvement to the positive crankcase ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory."

from documents now under protective order that the principles of this control have been known to the auto manufacturers for many years.

Exhaust Controls. Beginning with 1968 models, the auto manufacturers made minor modifications to their engines the primary effect of which is to permit them to run on leaner mixtures, that is, a higher ratio of air to fuel. This modification has resulted in reduction of CO and HC. Thus, while exhaust emissions are an auto pollution source which has not as yet been completely eliminated, they have been substantially reduced.[15]

The additional controls which are now needed on the exhaust system are precisely those which the manufacturers conspired to block. On April 2, 1971, General Motors advised the Environmental Protection Agency as follows:

> "The emission controls we have employed up to now generally have involved only the front side of the engine. * * * In evaluating the even more drastic reductions in emission levels required for the 1975 models, it is obvious that these engine modifications would have to be supplemented with control hardware on the exhaust side, which would do a final 'clean-up' job on both HC and CO.
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> * * *

[15]"The committee has found that the automotive industry has the capability for limiting the emissions of hydrocarbons and carbon monoxide from both the crankcase *and exhaust system* of gasoline powered motor vehicles * * *." (Emphasis Supplied.) *H.R. No. 728 on S. 780,* 90th Cong. 1st Sess., 1967 U.S. Code Cong. & Adm. News 1956, quoting S. Rept. No. 192, 89th Cong.

"In our basic 1975 emission control system, the catalytic converter would handle this 'clean up'.

* * *

"We do not have a proven catalytic converter at this time."[16]

The other two manufacturers, Ford and Chrysler, have both echoed these two points—that a catalytic converter is needed and that neither company has such a device at this time suitable for mass application.[17]

Defendants' alleged inability to produce effective exhaust devices flies in the face of the fact that four such devices developed by other companies were certified by California in 1964, and would have been installed the following autumn on 1966 models had not the auto manufacturers blocked this advance by hurriedly proposing engine modifications. This was the basis for one of the explicit charges made by the federal government in its civil complaint.[18]

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[16]A Progress Report by General Motors Corporation to U.S. Environmental Protection Agency, April 2, 1971, pp. 6, 7, 9.

[17]Ford Motor Co., Technical Report on Compliance with the Clean Air Amendments of 1970, Submission to Environmental Protection Agency, April 5, 1971, pp. 3, *et seq.* "Catalysts, all of which require lead-free fuel, are planned and under continuing development for 1975 models," p. 3.

Chrysler Corporation—Progress Report: Technical Effort Aimed at Compliance with 1975-76 Emission Standards Established by December 1970 Clean Air Act, April 1, 1971, pp. 8, *et seq.* "No production designs available," p. II-14.

[18]Paragraph 14 of the federal complaint reads in pertinent part as follows:

"(3) in early 1964 the defendants agreed among themselves to attempt to delay the introduction of new exhaust pollu-

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To sum up, the claim of "complex factual issues" made by defendants is no more than a chimera which could largely be disspelled by any competent auto mechanic. Many of the technical problems of retrofit relief have already been answered, and relatively little need be done to solve much of what remains. Control devices are now in production, and others have been certified after extensive testing as long ago as 1964. What is now required is that this Court rule on the basically legal issues of liability and relief, and then, perhaps with the aid of a master, order the auto companies to provide the retrofit relief which is possible by existing solutions—and which they conspired to delay.

II.

THIS COURT SHOULD ASSUME JURISDICTION IN ORDER TO PROVIDE THE MOST EXPEDITIOUS SOLUTION TO THE PROBLEM.

The overriding consideration in this litigation is that it is of the greatest national importance and urgently requires the promptest possible solution. The seriousness of the massive violation charged against defendants is amply attested by the number of sovereign states petitioning as plaintiffs and *amici* for prompt relief.

As a matter of practical wisdom *amici* believe that the earliest resolution of this problem can be achieved by this Court's assumption of jurisdiction. The history

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tion control measures on motor vehicles sold in California until the model year 1967; despite the fact that all were capable of installing the improvement for the model year 1966, the defendants agreed to tell California regulatory officials that installation of exhaust antipollution measures would be technologically impossible before 1967, and only under regulatory pressure made possible by competing device manufacturers not in the automotive industry did the defendants agree to a California regulatory requirement that exhaust devices be installed for the model year 1966:"

of the Docket 31 litigation thus far demonstrates this point. Well over a year has passed since the district court cases were consolidated on April 6, 1970. In this period *amici* believe that the district judge has exercised his judicial responsibilities commendably and with great skill, but within the limitations inherent in his jursdiction. The best example is the delay created by defendants' §1292(b) appeal. We do not quarrel here with the district court's determination that its ruling on controlling federal questions should be accorded interlocutory review, but had the ruling on these questions been made by this Court, this interlocutory step would have been unnecessary. The points would now have been settled.

Defendants have admitted that if they are required to repair the injury charged against them this will cost "amounts undoubtedly exceeding a billion dollars." (Br. in Opp. 22-23, n. 23.) In the belief that their exposure to the expense of retrofit lessens day by day "as the proportion of post-1967 cars increases" (Br. in Opp. 21), defendants are seeking to stretch out this litigation to the limit by interposing every possible legal defense and by seeking painstaking review at every possible level. But the very delay which decreases defendants' exposure to the cost of retrofit increases the nationwide contamination which plaintiffs and *amici* are suffering and are seeking to prevent.

Each day's delay in requiring the defendants to control emissions from vehicles now on the highways takes a toll in human life, health and property.[19]

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[19]In addition to problems of health, economic loss from air pollution is established at more than $1,720,000,000 annually. This figure includes $5,000,000 in agricultural and livestock losses alone. Middleton, *Air Pollution Control—New Controls in the Law,* 59 Kan. L.J. 644, 645-646 (1970). These figures

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There is no doubt that polluted air can kill. The relationship between air pollution and the incidence and prevalence of cardiovascular, pulmonary and respiratory diseases is direct and devastating.[20] Pollutants are a significant factor in the genesis of cancer,[21] in the development and aggravation of emphysema,[22] bronchitis,[23] and asthma.[24] They increase the mortality

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do not include aesthetic and other incalculable losses such as those resulting from irreversible damage to our national forests. See *e.g.*, California Department of Agriculture, *A Survey and Assessment of Air Pollution Damage to California Vegetation in 1970* (June 1971), pp. 24-25.

[20]Zeidberg, *et al., The Nashville Air Pollution Study: Mortality From Diseases of the Respiratory System In Relation to Air Pollution,* Arch. of Environmental Health 15:214-224 (Aug. 1967); Legislative History of the Air Quality Act of 1967, 1967 U.S. Code Cong. & Adm. News, 1941-1944 (hereafter Legislative History); and see generally University of California Task Force Assessments, Vol. II, *Project Clean Air* (1970) (hereafter Project Clean Air).

[21]Epstein, *Potential Carcinogenicity, Mutagenicity,* and *Teratogenicity Due to Community Air Pollutants, Project Clean Air,* Appendix M; Lave and Seskin, "*Air Pollution and Human Health,*" Science, Vol. 169, No. 3947 (August 21, 1970), pp. 723, 730 (hereafter Lave and Seskin).

[22]U.S. Dept. of Health, Education and Welfare, Public Health Service, *The Effects of Air Pollution* (Washington 1967), p. 5 (hereafter 1967 HEW Report); See also, *Ishikawa, et al., The Emphysema Profile in Two Mid-Western Cities in North America,* Arch. of Environmental Health, 18: 660-666 (1969); *Motley, et al., Effect of Polluted Los Angeles Air (Smog) on Lung Volume Measurements, Journal of the American Medical Association.* Vol. 171, No. 13 (Nov. 28, 1959), pp. 1475-1476. The HEW study shows that the death rate from emphysema in polluted urban areas is double the rate in areas where the air is clean. Since emphysema is second only to heart disease as a disease of men under the age of 65, it is clear that elimination of vehicular emissions will save the lives and improve the health of large numbers of persons.

[23]*Project Clean Air,* pp. 2-7 through 2-10.

[24]Lave and Seskin at 732; 1967 HEW Report at 5-6; Phelps *et al., Air Pollution Asthma Among Military Personnel in Japan, Journal of the American Medical Association,* Vol. 175, No. 11 (March 18, 1961), p. 990.

rate and the severity of cardiovascular diseases.[25] Moreover, their effect falls most heavily upon those least able to cope—the very old and the very young, and those already weakened by disease.[26]

It has been responsibly estimated that in the Los Angeles area alone, where automotive emissions are responsible for 88 to 90% of all air pollutants,[27] 100 to 500 deaths are attributable to air pollution *annually*.[28] During a similar period, symptoms of 50,000 to 500,000 persons suffering from a variety of diseases will be aggravated and virtually the entire population will suffer some interference with its well-being.[29] A 1970 survey of the research to date concludes that the mortality rate for lung cancer could be reduced by 25% and the morbidity and mortality rates for bronchitis by 25 to 50% were a 50% reduction in air pollution accomplished.[30]

It is commonplace that justice delayed is often justice denied. In few cases, however, is delay so clearly tantamount to denial in disadvantaging one party while benefiting its adversary. For here plaintiffs and their citizens suffer injury each day that defendants' conspiracy to withhold anti-pollution devices is unremedied; meanwhile defendants benefit since their ultimate duty

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[25]Cohen, *et al., Carbon Monoxide and Survival from Myocardial Infarction,* Arch. of Environmental Health, 19:510-517 (October, 1969).

[26]Legislative History at 1941; See also, Kilburn, *Human Cost of Polluted Air, Medical Times,* Vol. 98, No. 9 (Sept. 1970), p. 161.

[27]Los Angeles County Air Pollution Control District, *Profile of Air Pollution Control* (1971).

[28]Goldsmith, *The New Airborne Disease: Community Air Pollution, California Medical,* Vol. 113, No. 5 (Nov. 1970) p. 19.

[29]*Id.*

[30]Lave and Seskin at 730.

to retrofit is reduced as more and more cars built during the conspiracy period are taken off the road. Prompt relief in this case is of such national importance that the probability that the case will be expedited by the exercise of original jurisdiction is itself a "reason of practical wisdom" (*Wyandotte,* 401 U.S. at 499) sufficient to warrant this Court's retaining original jurisdiction.

Conclusion.

For these reasons, *amici* respectfully urge that this Court grant petitioners' motion for leave to file their bill of complaint.

Respectfully submitted,

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