No. 45 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF WASHINGTON, et al., *Plaintiffs,*

v.

GENERAL MOTORS CORPORATION, et al., *Defendants.*

Plaintiffs' Motion for Leave To File a Supplemental Memorandum After Argument

and

Supplemental Argument

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Pursuant to the provisions of Rule 9(2) and (6) and Rule 41(5) and (6) of the Rules of this Court, plaintiffs hereby move for leave to file a supplemental memorandum after argument in light of this Court's decision in *Hawaii* v. *Standard Oil Co.* (No. 70-49, decided March 1, 1972).

By clarifying the rules regarding actions brought by states under the antitrust laws on behalf of themselves and their citizens, the *Hawaii* case has a direct

and substantial impact on the present motion. In the memorandum, leave to file which is sought herein, plaintiffs will show that the need for this Court to exercise its original jurisdiction in order that the plaintiff states may obtain any meaningful relief in this litigation is even more urgent than appeared to be when this case was argued.

For the above stated reasons the plaintiffs' motion for leave to file a supplemental memorandum after argument should be granted.

Respectfully submitted,

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March 2, 1972

IN THE

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OCTOBER TERM, 1971

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v.

GENERAL MOTORS CORPORATION, et al., *Defendants.*

Plaintiffs' Supplemental Memorandum After Argument

This Court's decision in *Hawaii* v. *Standard Oil Co. of California* (No. 70-49, decided March 1, 1972) reinforces the need for this Court to exercise original jurisdiction in this case. In *Hawaii* this Court held that § 4 of the Clayton Act (the treble damage provision) is "notably different" from § 16 of the Act (which provides for injunctive relief) in that the former, although not the latter, requires a showing of injury to business or property. The Court also held that "the words 'business or property' * * * refer to commercial interests or enterprises." *Id.* p. 13. These holdings have important consequences for the present motion for leave to file a complaint.

Before *Hawaii* the retrofit relief sought here appeared to be the most adequate relief potentially available to repair the damage done by the defendants' antitrust conspiracy. In the light of *Hawaii,* moreover, it is the *only* relief adequate to repair such damage. This Court in *Hawaii* reaffirmed the breadth of § 16 of the Clayton Act, including suits by states, while at the same time narrowing the scope of treble damage actions which states can bring under § 4.

The result is that the equitable remedy sought here and the need for speed in order to obtain any adequate relief are now even more urgent than they were when this case was argued. As time goes on, the pre-1968 cars continue to pollute the air and thereby cause injury for which, under *Hawaii,* treble damages are largely not recoverable. Moreover, defendants' incentive to delay, already great,[1] is further increased by the substantial reduction in their exposure to treble damages.

Of course, these arguments would be beside the point if the retrofit remedy were obviously not feasible.[2] On that issue the recognition of the states' right to sue on behalf of itself and its citizens for injunctive relief under § 16 of the Clayton Act is highly significant. For the powers of a court of equity are far more

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[1] The number of cars which would be subject to retrofit is reduced at an annual rate of approximately 8 million cars (a reduction in retrofit cost to the defendants of an estimated $160 million per year).

[2] This is not the same question as whether the retrofit remedy will ultimately be deemed appropriate after proof of violation. Resolution of the latter question would be premature, since the case is presently before this Court on a motion for leave to file a complaint.

flexible where the state is seeking the injunction than it would be if private individuals were suing as representatives of a class. For, while this Court could not fashion a decree which would directly require individual users of pre-1968 automobiles to retrofit their cars, that power is by no means necessary to make a retrofit decree effective. The increased public concern for a clean environment, the widespread public anger over smog, and the fact that the defendants would be required to pay for the devices and their installation make it reasonable to expect that a great many citizens in the 34 states before this Court would voluntarily have their automobiles retrofitted. If, however, the Court believed that the effectiveness of the retrofit remedy would require more than the voluntary cooperation of citizens, it has the power to impose on any plaintiff state[3] the condition that within a reasonable time it enact mandatory retrofit legislation. In *Inland Steel Co.* v. *United States,* 306 U.S. 153, 156 (1939), this Court said:

> "A Court of equity 'in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as

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[3] As far as the nationwide effectiveness of such a decree is concerned, the 34 states now before this Court (plaintiffs and amici) represent 75% of the total population of the United States (152,524,192 people, resident population, 1970 census figures). Moreover, the remaining 16 states would undoubtedly seek to intervene prior to the conclusion of this action.

a court of equity, and has been exercised from time immemorial.'" (Footnote omitted.)

The question whether the imposition of such a condition is just and proper is, of course, one of federal law, specifically one of the application of § 16 of the Clayton Act. Indeed, in their supplemental memorandum on the source of law, filed after the possibility of this condition was suggested,[4] defendants concede that the questions in this case relating to the antitrust counts are covered by federal law.[5] The question does not cease to be such because it may involve a requirement that the state enact appropriate legislation. Cf. *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 434 (1964); *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 457 (1957).

Such a procedure is customarily followed in legislative reapportionment cases where, since *Reynolds* v. *Sims,* 377 U.S. 533, 586, it has been recognized to be most desirable for the state to enact its own legislative apportionment plan. In cases where that procedure is followed the court of equity postpones entering a final decree until the state has had reasonable opportunity to act. If the legislature does act, the court then determines, according to federal standards, whether the new legislation comports with its original decision; its

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[4] In his oral argument, counsel for defendants asserted that plaintiffs had conceded in the District Court that the retrofitting remedy would be appropriate only if the plaintiff states enacted legislation requiring retrofitting of used cars. Plaintiffs made no such concession. The entire statement of plaintiffs' counsel, which is completely consistent with plaintiffs' position here, appears at pp. 101-103 of the transcript of the District Court hearings which has been submitted to this Court, and was in response to an argument made at Tr. 95-97.

[5] Defendants' Source of Law Memorandum at pp. 2-3.

final decree then depends on whether that federal standard has been met. So here the Court could fashion a decree which would give the states a reasonable time to enact mandatory retrofit legislation. If adequate legislation were not passed, the obligation of the defendants could be terminated or appropriately modified.

Respectfully submitted,

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March 2, 1972