in the Supreme Court of the United States

OCTOBER TERM, 1972

No. 56 Original

COMMONWEALTH OF VIRGINIA, Individually And On Behalf Of All Other States Similarly Situated,

Plaintiff,

v.

INTERNATIONAL AIR TRANSPORT ASSOCIATION, *et al.*,

Defendants.

Motion for Leave to File AMICUS CURIAE Brief and Brief as AMICUS CURIAE on Behalf of The Metropolitan Washington Board of Trade

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Plaintiff,

v.

INTERNATIONAL AIR TRANSPORT ASSOCIATION, *et al.*,

Defendants.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Metropolitan Washington Board of Trade by counsel Herman F. Scheurer, Jr., respectfully moves for leave to file the attached brief in this case *amicus curiae.* The consent of the parties to this request to file said brief has not been obtained because such parties are so numerous as to make requests of them impractical.

The Movant is an organization composed of approximately 6,000 business, professional and civic leaders of Washington, D.C. which has been in continuous operation since 1889 and which has carefully studied and developed Washington's air transport needs since the early 1920's. Some of the Movant's members reside in the Commonwealth of Virginia in which is situated Dulles International Airport. Since it is alleged in Plaintiff's complaint that Defendants have been engaged in a combination and conspiracy which has thereby hindered the development of airports other than John F. Kennedy International Airport in New York, Movant clearly has an interest in Plaintiff's action.

The action brought by the Plaintiff is brought as a class action pursuant to Rules 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil Procedure on behalf of the Commonwealth of Virginia and on behalf of her sister states similarly victimized by the alleged conspiracy of defendants.

While Movant feels that some of its members have been victimized and wronged by Defendants' actions, it is not clear whether it is represented in the Plaintiff's class action inasmuch as some of its members are situated within the District of Columbia.

Furthermore, the action brought by the Commonwealth of Virginia was brought in her capacity as sovereign, *parens patriae,* quasi sovereign, and proprietor of state lands and properties. Movant submits that those of its members who reside within the Commonwealth of Virginia have been victimized in their capacity as citizens of Plaintiff state by actions of Defendants. However, while Movant agrees that a *parens patriae* suit is justified in this case and believes that those of its members who reside in the Commonwealth of Virginia should

be represented by Petitioner as *parens patriae,* it feels that the legal justification for a *parens patriae* suit should be more fully explored. Therefore, in order to protect The Metropolitan Washington Board of Trade and its individual members, Movant respectfully requests this Court to grant its motion.

Movant respectfully prays that it be accorded leave to file a brief *amicus curiae* in order to present arguments and viewpoints on the matters involved in the case which the parties themselves may not present.

SHANLEY & FISHER

By _____
Herman F. Scheurer, Jr.

In the Supreme Court of the United States

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COMMONWEALTH OF VIRGINIA, Individually And On Behalf Of All Other States Similarly Situated,

Plaintiff,

v.

INTERNATIONAL AIR TRANSPORT ASSOCIATION, *et al.*,

Defendants.

BRIEF AS AMICUS CURIAE ON BEHALF OF THE METROPOLITAN WASHINGTON BOARD OF TRADE

INTEREST OF AMICUS CURIAE

The interest of The Metropolitan Washington Board of Trade in this case arises from the fact that it is an organization composed of approximately 6,000 business, professional and civic leaders in the Metropolitan Washington, D.C. area which has been carefully studying and developing Washington's air

transport needs since the early 1920's. Interest further arises from the fact that some of the Board's members reside as citizens in the Commonwealth of Virginia. The Board is, therefore, seriously concerned that transatlantic air cargo rate structure not be unduly preferential to John F. Kennedy International Airport in New York and unduly prejudicial to Dulles International Airport in Virginia. The Board and its members are also concerned since restriction and suppression of competition among Defendants has hindered and would continue to hinder the development of air transportation in the Washington area.

ARGUMENT

THE COMMONWEALTH OF VIRGINIA'S ACTION REPRESENTS A VALID *PARENS PATRIAE* SUIT AND THE COURT SHOULD TAKE JURISDICTION

The Constitution of the United States gives to the Supreme Court original jurisdiction over all actions or proceedings brought by a state against the citizens of another state or against aliens. Article III, §2 of the Constitution of the United States and 28 U.S.C. §1251(b)(3). However, it has been made clear by this Court that it will not accept jurisdiction of those cases that involve only a political controversy but will take jurisdiction only of those cases that present a justiciable issue. *Luther v. Borden,* 7 Howard 1 (U.S. 1849); *Massachusetts v. Mellon,* 262 U.S. 447 (1923); *Colegrove v. Green,* 328 U.S. 549 (1946). In this respect the Court's jurisdiction extends only to civil suits where damage has been inflicted or the threat of such exists. Its jurisdiction does not extend to the enforcement of penal statutes. *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 297-300 (1888); *Oklahoma ex rel. West v. Gulf, C. & S.F.R. Co.,* 220 U.S. 290 (1911).

While these aspects of the Court's jurisdiction have been clear for some time, it has not always been clear that the Court would take jurisdiction over suits brought by states in their capacity as *parens patriae* and more particularly over antitrust suits brought by states in such capacity.

The term *parens patriae* first had expression in England in its constitutional system. Malina & Blechman, *Parens Patriae Suits for Treble Damages Under The Antitrust Laws,* 65 Nw. U.L. Rev. 193 (1970). (Hereinafter Malina & Blechman) In the system's feudal beginnings, the King was thought to possess certain obligations and powers which were collectively known as the "royal prerogative". These duties and powers he exercised in his capacity as "father of the country", or "parens patriae". Malina & Blechman, 197.

The King, under this concept, was thought to be responsible as the guardian of all infants, idiots, and lunatics and to be supervisor of all charitable uses. 3 W. Blackstone, *Commentaries,* 47.

In the United States, the royal prerogative and "parens patriae" function of the King passed to the State. However, it was not until near the turn of the 20th century that the term was given its Americanization in the case of *Louisiana v. Texas,* 176 U.S. 1 (1900). It was this case and the series of *parens patriae* cases that followed it that eventually led to the landmark case of *Georgia v. Pennsylvania Railroad,* 324 U.S. 439 (1945), in which this Court first gave recognition to a *parens patriae* suit in the field of antitrust.

The term *parens patriae* in its American origin relates to suits by States to protect their own interest, or what is called its "quasi sovereign" interests. The quasi sovereign interests of a

state have been delineated and developed in a series of cases which concern themselves with the original jurisdiction of the Supreme Court in respect to controversies between a state and state or a citizen of another state.

It has been recognized for some time that a state could sue to protect its proprietary interests but it was not until the case of *In Re Debs,* 158 U.S. 564 (1895), that it was recognized by this Court that a government, in its sovereign capacity could in a proper case maintain a suit in behalf of its citizens for protection of their rights.

> ". . . while it is not the province of the government to interfere in any mere matter of private controversy between individuals or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties." 158 U.S. at 585

The question next arose in the case of *Louisiana v. Texas, supra,* as to when such a suit was maintainable. The question as it arose in *Louisiana v. Texas* and in later cases occurred in an action in which a state sought to invoke the original jurisdiction of the Supreme Court, pursuant to Article III, Section 2 of the Constitution.

While this provision does not, as will be shown, confer jurisdiction in every case in which a state elects to maintain a suit, it does, as the cases set out below make manifest, include those cases in which a state seeks to protect rights of its citizenry at large and is suing in their behalf.

This Court considered the quasi sovereign aspect of *parens patriae* suits in *Louisiana v. Texas* and quoted the language of *In Re Debs* as authority for allowing states to bring *parens patriae* suits in addition to suits involving their proprietary interests. The Court noted that the state of Louisiana presented itself in the "attitude of *parens patriae,* trustee, guardian or representative of all her citizens", *id.* at 19. It was recognized by this Court that the suit against the alleged quarantine of goods was an assertion by Louisiana of the right to seek relief for matters that affected its citizens at large.

Even though the Court did not take original jurisdiction of the case, its decision was important because it acknowledged the validity of a *parens patriae* suit and pointed out for future cases two prime ingredients of any *parens patriae* suits. First, the quasi sovereign interests involved in the suit must relate to obligations which the state has to its citizens; and second, the wrongs complained of must "affect the public at large". Malina & Blechman at 205.

Shortly following this decision, the Court expressly held that a state suing as *parens patriae* was entitled to injunctive relief to protect its quasi sovereign interest. *Missouri v. Illinois,* 180 U.S. 208 (1901). Missouri had sought injunctive relief against the pouring of sewage and filth through a drainage canal by artificial arrangements into the Mississippi River which it claimed constituted a continuing nuisance dangerous to the health and welfare of its people.

This Court, after reviewing cases involving the exercise of original jurisdiction by it, noted that it previously had taken original jurisdiction of cases involving boundaries and jurisdiction over lands and their inhabitants, and of cases directly affecting the property rights and interest of a state. However, it further noted that these cases did not encompass the entire field of controversies for which there was a constitutional remedy and stated in disposing of the demurrer: "But it must surely be conceded that, if the *health and comfort* of the inhabitants of a state are threatened, the state is the proper party to represent and defend them", 180 U.S. at 241. (emphasis supplied) See also *New York v. New Jersey,* 256 U.S. 296, 301-302 (1921).

The Court reiterated what had been stated in *In Re Debs* when it said that the mere fact that a state had no pecuniary interest in the controversy would not defeat original jurisdiction of the Court. *id.*

Later that year, the Court permitted Kansas to maintain a suit against the diversion of waters from the Arkansas River by Colorado citizens. The Court relied heavily on the Missouri decision and quoted its language of "health and comfort" as authority for a *parens patriae* suit by Kansas. *Kansas v. Colorado,* 185 U.S. 125 (1902). See also *Kansas v. Colorado,* 206 U.S. 46 (1907) and *North Dakota v. Minnesota,* 263 U.S. 365 (1923).

In *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907), the Court exercised its jurisdiction over a suit to enjoin a corporation from another state from discharging noxious gases over its territory from their works where it appeared that the fumes caused and threatened to cause damage to forests and vegetable life which could affect the health of its people.

Justice Holmes, in his opinion for the Court, delineated an important principle of a *parens patriae* suit:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi sovereign. In that capacity, *the state has an interest independent of and behind the titles of its citizens,* in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." 206 U.S. at 237 (emphasis supplied)

Thus, it was made clear that the interest which a state asserted as *parens patriae* must be independent of the interests of individual citizens.

This principle of a *parens patriae* suit, that a state must have an interest in the matter apart from the individual interests of its citizens, was utilized by the Court in reaching a decision in *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). In that case a West Virginia statute required producers of natural gas in the state to supply West Virginia customers prior to supplying out of state customers. The Court established first that the suit involved a controversy in the sense of the Judiciary Article of the Constitution, and then stated it was a legitimate *parens patriae* suit making use of the by then familiar words "health and comfort":

> "The private consumers in each state not only include most of the inhabitants of many urban communities but constitute a substantial portion of the states' population. Their *health, comfort, and welfare* are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, *has an interest apart from that of the individuals affected.* It is not merely a remote or ethical interest, but one which is immediate and recognized by law. *id* at 592 (emphasis supplied)

This language drew a distinction between the interests of the people as a whole and those of each citizen as an individual and has been expressed in a series of Supreme Court cases which have held that a state cannot bring a suit for the benefit of particular individuals.

In *New Hampshire v. Louisiana* and *New York v. Louisiana,* 108 U.S. 76 (1883) (Consolidated cases), the Court established the principle that a state may not seek relief in the Federal courts on behalf of individual's interests by denying the state's right to collect claims against another state as assignees of private parties. This principle was followed by the Court in the case of *Kansas v. United States,* 204 U.S. 331 (1907), when the Court refused to permit Kansas to maintain a suit as trustee for the railroad since the real party in interest was the railroad.

A similar rationale was used by the Court in reaching its decision in *Oklahoma v. Atchison, Topeka and Santa Fe Railway,* 220 U.S. 277 (1911), when the Court held that the state could not sue as *parens patriae* for injuries to its citizens shippers resulting from unlawful freight rates. The Court was of

the opinion there that the Constitution did not confer jurisdiction upon it in every case in which a state was a plaintiff and was seeking redress for wrongs committed against some of its people, or was seeking to enforce its own laws or public policy against wrongdoers generally (at 288).

In 1938 the Court in keeping with this rule rejected the propriety of a *parens patriae* suit to enforce the claims of a bank's creditors and depositors. *Oklahoma ex rel. Johnson v. Cook,* 304 U.S. 387 (1938).

Examination and analysis of the foregoing cases reveal that there are two prerequisites to a state maintaining an action in its *parens patriae* capacity: first, in the words of Justice Holmes, the "state must have an interest independent of and behind the titles of its citizens", *Georgia v. Tennessee Copper Co., supra* at 237. It "must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest", *Oklahoma v. Cook, supra* at 396. Second, a substantial portion of the state's citizens must be adversely affected by the wrongs committed by the defendants. ". . . state as *parens patriae,* trustee, guardian or representative of all her citizens . . . .", *Louisiana v. Texas, supra* at 19. Thus, assuming that a *parens patriae* suit in the field of antitrust is cognizable, then if a substantial number or considerable portion of Virginia citizens are adversely affected by the alleged acts of the Defendants and the wrongs alleged constitute a legitimate concern of the State, then Virginia would have the requisite standing to maintain a suit as *parens patriae* on behalf of its total citizenry.

The cases reviewed above establish the right of a state to sue as *parens patriae* to prevent or repair harm to its quasi sovereign interest and additionally provide the background for

the entry of *parens patriae* suits in the field of antitrust. The landmark case in this area was decided by this Court in a five to four decision in *Georgia v. Pennsylvania Railroad, supra,* when this Court upheld the right of a state to sue as *parens patriae* for an injunction pursuant to the antitrust laws. The State of Georgia alleged that the defendant railroad had conspired to fix rates in discrimination against Georgia's ports and that this constituted a quasi sovereign interest for which it could seek redress in the Supreme Court. The Court agreed and made it clear that remedies for the wrongs complained of could be pursued in the Supreme Court:

> "Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative." (324 at 450)

The fact that the United States could bring criminal prosecutions or suits for injunctions under the antitrust laws did not persuade the Court that Georgia could not bring the suit. The Court found that Georgia was a person within the meaning of the Clayton Act and was thereby authorized to maintain a suit to restrain violations of the antitrust laws. The Court also recognized that the suit was not precluded by the fact that the ICC had authority to remove rates which were discriminatory against a state.

The principle established by earlier cases that suits by states for the benefit of private parties did not constitute a valid *parens patriae* suit was reaffirmed by the Court. In this respect the Court found it necessary to specifically mention the case of *Oklahoma v. Atchison, supra,* and to distinguish it from the case then under consideration. In so doing the Court stated:

> "This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers", 324 U.S. at 452.

Thus, the argument of the defendant railroad that the Oklahoma decision was dispositive of the case and required a decision in its favor was rejected. The quasi sovereign interest of Georgia in this case was perceived by the Court as emanating from the fact that the alleged discriminatory rates unduly prejudiced Georgia in her markets, restricted and hindered her development, and reduced her to an inferior status amongst her sister states. The Court saw this as a matter of grave public concern in which Georgia had "an interest apart from that of particular individuals" who might have been affected, *id.* at 451.

The decision in *Georgia v. Pennsylvania Railroad* is most significant for it demonstrated that the principles applied by previous courts in *parens patriae* suits in other areas of law could also be applied to the antitrust field. It established that a state's interests as *parens patriae* in its economic development and in the prosperity and welfare of its citizens also included the protection of the state and its citizens against discriminatory transportation rates.

In this decade this Court reaffirmed the decision in the *Georgia Case* when it permitted the State of Hawaii to sue in its capacity as *parens patriae* to restrain defendants from fixing the price of gasoline sold in Hawaii. *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251 (1972). Although the Court held that a state could not recover damages in its capacity as *parens patriae,* this ruling does not seem to debilitate the validity of *parens*

patriae suits in the field of antitrust. The Court has made no further pronouncements in this area since the *Hawaii Case.*

It is in the context of the history presented, and holdings of the cases heretofore discussed that the complaint of Virginia, as *parens patriae,* must be examined and evaluated.

Virginia has alleged that Defendants have conspired to establish rates for shipment of transatlantic air cargo which creates an undue preference for John F. Kennedy International Airport in New York and undue discrimination as to all other airports located in other states. It is further alleged that as a result of such conspiracy, the development of Dulles International Airport in Virginia has been hindered, the development of Virginia's economy has been hindered, rates for transatlantic cargo shipments from Dulles have been made higher, competition among Defendants has been restricted and suppressed, and trade through Virginia airports has been curtailed.

In essence, these allegations are the same as those made in the *Georgia Case.* The overall result of the wrongs complained of here is that it is impossible for Dulles Airport to attract shipping and for Virginia to attract new industry all to the detriment of Virginia citizenry considered as a whole.

It can be seen almost immediately that the prerequisites established by case law for invoking the original jurisdiction of this Court by Virginia in its *parens patriae* capacity are met. While it is clear that there are individuals who have a greater interest in this action than others, it is also clear that the Commonwealth of Virginia has a legitimate interest and that that interest is above and beyond that of any interest of any of its individual citizens. This is not a suit to vindicate the grievances of particular individuals as was the case in *Oklahoma*

v. Atchison, supra. Virginia is concerned with restoring competition to its air transport shipping so that its economy and thus its citizens may develop and prosper. Denial of air transport trade to Virginia to which it has a legitimate right and its resultant effects upon Virginia economy and citizens, gives Virginia an interest which transcends any interest which individual citizens of Virginia might have. The prosperity of Dulles Airport affects the general welfare of all Virginia citizens.

The interests involved here are not private interests but interests which affect the whole economy of Virginia and, therefore, affect all of her people. Virginia's interests are not remote; they are immediate. Because of the Defendants' acts, Virginia's people have been deprived of markets and opportunities which might otherwise have come to Virginia.

Virginia's industries have been impeded in their progress. Because of Defendants' acts funds have not been invested, employment has not been created, resources have not been exploited, Dulles Airport has not been developed and utilized to the extent possible, and the state's economy has not been developed as it otherwise would have been.

In short, Virginia's growth and development as a state has been retarded and she has been reduced to an inferior economic status among sister states. The wrongs done and the harm caused to Virginia transcends that experienced by any of its individual citizens or groups of citizens; it affects all the people of Virginia.

The harm done to Virginia is incalculable and it is impossible to say how much business, opportunity, and employment have been lost as a result of Defendants' actions.

It is clear that the wrongs not only constitute a direct threat to the Commonwealth of Virginia's "quasi sovereign" interests but have injured the Commonwealth of Virginia in her *parens patriae* capacity.

The *Georgia Case* made it apparent that an antitrust violation could constitute an injury to a state's quasi sovereign interests, interests which this Court had held in numerous cases to be judicially cognizable. Virginia has brought a valid *parens patriae* suit to protect the welfare of its people. The antitrust laws make no provisions for a state's quasi sovereign interests. The matters brought to this Court's attention by Virginia are matters of grave public concern in the Commonwealth of Virginia. This Court alone can provide a remedy in such a situation.

CONCLUSION

Based upon the foregoing we respectfully urge this Court to accept jurisdiction of the action brought by the Commonwealth of Virginia in its capacity as *parens patriae* so that the wrongs complained of may be redressed with an appropriate remedy.

Respectfully submitted,

Herman F. Scheurer, Jr.

CERTIFICATE OF SERVICE

We certify that in compliance with Supreme Court Rule 33 we have this day served a copy of the foregoing Motion and Brief upon the Plaintiff and Defendants in this case by mailing a copy by first class or air mail, postage prepaid, to each of the following:

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Dated: September 19, 1972

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