

IN THE SUPREME COURT OF THE UNITED STATES

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 :
 CITY OF PITTSBURGH, :
 :
 Petitioner, :
 :
 v. : No. 73-582
 :
 ALCO PARKING CORPORATION, et al., :
 :
 Respondents. :
 :
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Washington, D. C.,

Monday, April 15, 1974.

The above-entitled matter came on for argument at
1:51 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM O. DOUGLAS, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RALPH LYNCH, JR., ESQ., City Solicitor, 313 City-
 County Building, Pittsburgh, Pennsylvania 15219;
 for the Petitioner.

LEONARD BOREMAN, ESQ., Baskin, Boreman, Wilner,
 Sachs, Gondelman & Craig, 1018 Frick Building,
 Pittsburgh, Pennsylvania 15219; for the
 Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-582, Pittsburgh against Alco Parking Corporation.

Mr. Lynch.

ORAL ARGUMENT OF RALPH LYNCH, JR., ESQ.,

ON BEHALF OF THE PETITIONER.

MR. LYNCH: Mr. Chief Justice, and may it please the Court:

I represent the petitioner, the City of Pittsburgh. The respondents are private persons operating off-street parking facilities in the City of Pittsburgh.

On February 20, 1970, the respondents filed a suit to enjoin enforcement of the City of Pittsburgh parking tax ordinance.

That ordinance imposed a tax on the privilege of engaging in off-street parking transactions for a consideration, and established the rate at 20 percent of the gross receipts derived.

That ordinance replaced a 1969 ordinance taxing the same privileges at the rate of 15 percent, and that ordinance had in turn replaced a 1963 ordinance taxing the same transactions at the rate of 10 percent.

The respondents are twelve in number and they operate 17,000 off-street parking spaces in the downtown area of the

city. There are another 1,000 spaces operated by private persons not party to this suit, and there are an additional 6,100 spaces operated by the Public Parking Authority of the City of Pittsburgh, a public municipal corporation.

The respondents allege basically that the competition of the Public Parking Authority, when combined with the 20 percent gross receipts tax of the City of Pittsburgh, serves to confiscate their profits without due process of law.

The issues raised, then, are two.

No. 1, whether or not the due process clause of the Fourteenth Amendment places any limit on the right of a legislative body to set the rate of a revenue tax.

QUESTION: In that connection, Mr. Lynch, did the city, could the city have prohibited private operation of parking lots anywhere in the city?

MR. LYNCH: The City of Pittsburgh does not have health powers, so from the standpoint of health in terms of, say, fumes or things of that nature, no.

From the standpoint of regulating traffic under its general police powers, the City of Pittsburgh does control parking operations in the City of Pittsburgh.

QUESTION: That is location and size?

MR. LYNCH: That is correct.

QUESTION: And ingress and egress, that sort of thing?

MR. LYNCH: That is correct.

QUESTION: But that's all; they don't prohibit.

MR. LYNCH: The City of Pittsburgh, I don't think, in the exercise of its police powers -- well, it could in terms of an emergency, I suppose, declare that, for example, that if there were excessive pollution in the city on a particular day, it might have to cooperate with the county, because it does not have directly the health power, that's a county function.

QUESTION: How about the zoning ordinances, Mr. Lynch, are there any which prohibit --

MR. LYNCH: The City of Pittsburgh can control parking by proper exercise of the zoning ordinance.

QUESTION: That is, prohibit commercial parking --

MR. LYNCH: Yes.

QUESTION: -- in certain sections?

MR. LYNCH: In certain sections, yes, Your Honor.

QUESTION: Getting back to my question, though, could the city, in view of the fact that it is in the business and the Authority is in the business, could the city have removed from private enterprise the operation of any parking facility in the City of Pittsburgh?

MR. LYNCH: I don't think that the City of Pittsburgh has, on its face, any specific power to totally prohibit parking in Pittsburgh, in the city, unless it --

QUESTION: Are you talking about State law?

MR. LYNCH: No, the city --

QUESTION: What about the question -- does the Federal Constitution prevent a city from forbidding private parking lots within the city limits?

MR. LYNCH: No, I don't think the Federal Constitution would.

QUESTION: And so it's just a -- if Pennsylvania Constitution or statutes themselves permitted Pittsburgh to do this, to prevent entirely private parking lots, you would think the Federal Constitution would permit it?

MR. LYNCH: No, I don't think it would.

QUESTION: Mr. Lynch, the city itself operates parking lots, does it not?

MR. LYNCH: The City of Pittsburgh operates a small number of lots, yes, sir.

QUESTION: Suppose it had been proved that the principal purpose, or a purpose of the city was to put the private lots out of business so that the public, city-owned lots would be able to make a higher rate of profit; would that give you any trouble constitutionally?

MR. LYNCH: I think there might be a problem there, Your Honor, but that is not the issue here. The issue here is whether or not there was any intent of the City of Pittsburgh to put the private operators out of business, or whether or not the City of Pittsburgh was merely exercising

its power to raise revenue by imposing the tax.

Now, there has never been a question in this case as to the power of the City of Pittsburgh to impose a tax on parking transactions for the purposes of raising revenue, and the City of Pittsburgh ordinance states on its face that it was to raise revenue. The record shows very clearly that revenue was raised. It shows very clearly that each time the tax was increased, additional revenue was raised.

So the issue here is not whether or not the City of Pittsburgh had power to force the private operators out of business while the public operation remained.

The issue is whether or not, under the due process clause, that the revenue measure on its face, designed to raise revenue, could be inquired into by the court simply because it was unreasonable, simply because it might believe to be -- you might believe it to be excessive, or even destructive of a particular business.

This Court has held on numerous occasions that if the power to tax exists, the extent of the burden is strictly a concern of the Legislature, no matter what the indirect effect of that tax.

QUESTION: Mr. Lynch, it's my feeling that your answer to that last dialogue at least confused me. Let's see if I can straighten it out in my own mind.

Is there anything in the Federal Constitution that

would bar the City of Pittsburgh from declaring, if it was by law, that it was going to have a monopoly on all public parking, just as it does over water and electricity and so on?

MR. LYNCH: No.

QUESTION: You have given an ambiguous answer, perhaps, that you didn't intend to.

MR. LYNCH: No.

A second issue in this case --

QUESTION: Mr. Lynch, one more question there. Does the record disclose whether there was any resistance complaint when the rate was 10 percent and then later when it was 15 percent, or did the resistance come only when it went to 20?

MR. LYNCH: When the rate was set for the first time at 10 percent in 1962, effective for the year 1963, the revenue measure was challenged. That's the 10 percent rate. And in 1964, in a per curiam decision, the Pennsylvania Supreme Court validated the 10 percent tax. At that time the opinion shows that there were 5,100 parking authority spaces, the public spaces, in existence at the time of that suit as compared to the 6,100 in existence now.

QUESTION: Is there any evidence in the record at all as to whether this tax could be passed on, or was being passed on?

MR. LYNCH: That raises one of the second basic issues in this case,--

QUESTION: Oh, all right, you're going to get to that, then.

MR. LYNCH: -- Your Honor, and that is the issue, assuming that judicial inquiry is proper, do the facts show that property was taken without due process of law.

Now, the Chancellor sitting in equity, he validated the ordinance and the tax, and he found among other things that demand for parking exceeded supply, that when the tax had been increased in 1969, that gross receipts had increased during the same year after payment of the tax, and that there had been no effort to pass the tax on.

The Supreme Court, when it reversed the Commonwealth Court, as well as the Chancellor in Equity, determined as a matter of law that the respondents did not have to attempt to pass the tax law. And, in fact, at the time of trial, there had been no attempt to pass the tax law.

QUESTION: Is there a spread, a very large one, between what the private lots charge and what the municipally operated lots do?

MR. LYNCH: There is on the average, in many cases the rates being charged in the publicly owned garages are lower than the rates being charged in the private garages.

QUESTION: Much lower or --

MR. LYNCH: Well, there is a whole range of rates --

QUESTION: Yes.

MR. LYNCH: -- from whether it's for a half-hour to an hour to all day. So that you can say that generally they are lower.

QUESTION: Yes. And this has always been so?

MR. LYNCH: Yes.

QUESTION: And have the rates for the private lots gone up in larger percentage than the rates for the publicly operated lots?

MR. LYNCH: There is nothing in the record to show that. However, I think that if there is a disparity and rates are changed percentagewise, then the disparity might increase.

However, it's one of the fundamental errors that we believe that the majority below made, was to conclude that under the circumstances here the tax couldn't be passed on. This is one of the fundamental issues in this case, because the record shows, the undisputed facts are that demand exceeds supply by 4,000 spaces. And --

QUESTION: But, Mr. Lynch, that is a factual question, isn't it, on which the Commonwealth Court found a particular way, and certainly the Supreme Court of Pennsylvania didn't upset that finding. How free are we to make our own factual inquiry into something like that?

MR. LYNCH: Well, we have an issue here, Your Honor, which deals with the Fourteenth Amendment of the Constitution, and you are free to examine the facts yourselves to determine whether or not there has been a constitutional violation.

QUESTION: Even on strictly historical facts?

MR. LYNCH: Yes -- because I don't think it's a fact, a finding that you did not have to make, that the respondents did not have to make an attempt to pass the tax on in the form of price increases is really not a finding of fact, it's a conclusion which goes against the facts of record, which are quite --

QUESTION: Oh, I agree with you on that. Then the very next, in a parenthetical expression right after they say that, in the Supreme Court of Pennsylvania, they say: Although it's previously noted the Commonwealth Court found this was not possible. So at least you have an opinion by the Pennsylvania appellate court that the tax couldn't be passed on. And are we free to upset that?

MR. LYNCH: Yes, I think you are, Your Honor, because that goes to the constitutionality of the ordinance, which is being tested as a violation of the Fourteenth Amendment. And this Court has permitted that in prior cases. And I --

QUESTION: But even if it weren't to be passed on,

is there a finding of unprofitability on the part of any company?

Or the fact -- is there a finding that any company went out of business, or was forced out of business?

MR. LYNCH: The record does not indicate that one company has gone out of business, the record indicates that at the time of trial all the respondents had paid their tax.

There was a statistical compilation of income versus expenses, and that compilation shows that nine of fourteen of the operators -- the projected expenses for the year 1970, when compared to projected income, that nine of fourteen operation studies would show a loss.

But that does not in any way show confiscation. That just is taking one standard. There's no study as to the amount of the salaries that were involved in the operating expenses, as to whether or not they could be considered return on investment.

But I want to return, Your Honor, to the question, the conclusion that you could not pass the tax on.

The factual situation shows that 25 percent of the supply is controlled by the public body, charging lower prices. The record also shows that the public, the so-called public competitor, charging lower prices, is full at all times. It's completely full at all times.

With the demand exceeding supply by 4,000 spaces,

that's another fact of record. And as Justice Pomeroy points out in his dissent, I don't know how you can say it better: "An entrepreneur who controls 71 percent of the supply in a market of unsatisfied demand need not concern himself with a low-cost competitor, the Parking Authority, who controls 29 percent of the supply, has no excess capacity, and cannot service demand which the 71 percent competitor might drive away through price increases."

Now, with all due respect to Justice Roberts and the majority opinion, I think that when demand exceeds supply and the low-cost competitor is at capacity, to conclude that you do not have to attempt to pass on the tax in the form of a price increase is just sheer economic nonsense.

I think at the very least, as Justice Pomeroy also pointed out in his dissent, at the time he wrote his dissent the respondents had indeed raised their prices. And he stated, at the ver- least you could go back and look at the effect of that.

You're talking about confiscation of property and to establish confiscation the facts should show -- there should be no doubt in anybody's mind that confiscation took place. No doubt in anybody's mind. And I would submit that it is impossible not to have a doubt in these facts.

I think another question in this case is the extent to which the Pennsylvania Supreme Court in the majority

opinion attempts to set forth competition, the direct competition of the governmental body, as something unique in this area of the law.

The question of competition by a governmental body and taxation at high rates was before this Court over a century ago in the Veazie Bank Note case, and in that case this Court held that a 10 percent tax on bank notes, admittedly excessive, for the purpose of driving out State bank notes which were in competition with the federal notes being issued by the federal government, was proper. That the Fourteenth Amendment does not permit judicial inquiry into the rate of the tax designed to raise revenue. That was a matter for the Legislature.

Again, more recently, in the Puget Sound case, cited in our brief, there the issue was a three percent gross receipts tax imposed by the City of Seattle. The tax was imposed upon a light company with which the city was in direct competition. This Court held that the Fourteenth Amendment does not immunize, does not immunize a private person from competition by the government, even though the government is also levying a tax on the competitor.

Now, if the power to compete exists, and the power to tax at a rate exists, I do not see how two rights can make the wrong. We eventually get right back to a question of: what rate of tax is reasonable or burdensome?

And that issue is for the Legislative Body.

The majority opinion also places some weight on a dissent in the Magnano vs. Hamilton case, and that dissent states that: It would be conceivable that a revenue measure on its face was only a mere disguise, that it was so arbitrary that it was obvious that the intent wasn't to raise revenue but that the attempt was to exert another power, perhaps a forbidden power, such as confiscation.

Well, obviously, you couldn't determine that question on rate, because in the Magnano case it was admitted that the rate of tax, 15 cents a pound on oleo, was going to drive the oleo companies out of business.

So you can't look to rate to determine whether that's the unusual circumstance involved.

And this revenue measure, it is impossible to conclude that the measure is a disguise for -- to disguise the attempted of the City of Pittsburgh to confiscate the property of the respondents. The measure on its face says it's raising revenue. It did raise revenue.

So if the Court is going to engage in speculation, as to what the intent was, if it doesn't accept the measure on its face, there's no reason to conclude that confiscation was the intent; I think it would be more reasonable to conclude that the City of Pittsburgh had successfully raised revenue before by imposing a parking tax; that it was reasonable for

the city to assume that when it increased the tax, revenue would increase. It would also be reasonable to assume that since it's a parking tax and I think that we can all agree that parking in the downtown metropolitan area is somewhat of a luxury, that it would not be unreasonable to believe that if the price was raised in some of the areas involving these entire 24,000 spaces in downtown Pittsburgh, that some of these people coming in from the suburbs might continue to come in and pay an additional tax.

I think that would be the fair conclusion from an examination of this record, and the unfair conclusion would be to conclude that the City of Pittsburgh didn't intend to raise revenue at all, it intended to confiscate the respondents' businesses.

QUESTION: Does the City of Pittsburgh have any income taxes levied on people who work there?

MR. LYNCH: One percent. It has a ten percent occupation tax on non-residents and a one percent tax on residents.

QUESTION: What's the ten percent occupation tax on?

MR. LYNCH: Excuse me, ten dollars.

QUESTION: Oh, ten dollars.

MR. LYNCH: That's a ten-dollar occupation tax. That's for the privilege of working there.

QUESTION: Do you have any comment about the curious

provision as to making the Authority taxable in the ordinance? And, as I understand it, the Authority has challenged this, and --

MR. LYNCH: Yes, Your Honor.

QUESTION: -- what is the status of that litigation?

MR. LYNCH: Yes, Your Honor. The respondents in this case, the very people who claim that the City of Pittsburgh is out to confiscate their property and to favor the Authority -- and to favor competition by the Authority, have instituted litigation successfully to eliminate the 20 percent tax which is being imposed by the city, or was being imposed by the city on the Authority, since its inception, since the inception of the tax in 1963.

And the Commonwealth --

QUESTION: Well, isn't that just another pocket of the city?

MR. LYNCH: No, Your Honor, it's not just another pocket of the city. And even if it were, I submit that the way to attack that problem, if the City of Pittsburgh is using the Authority to compete unfairly, or if the Authority is competing unfairly, then appropriate proceedings could be brought in the State court.

There need be no reason to attack the tax, which is being placed directly on the Authority and would tend to equalize the burden, rather than to further discriminate.

QUESTION: You say a private parking group brought the litigation which invalidated the tax against the Authority?

MR. LYNCH: Right.

QUESTION: When was this?

MR. LYNCH: That litigation was commenced about a year and a half ago, and the Commonwealth --

QUESTION: What was the rate at that time?

MR. LYNCH: Twenty percent.

QUESTION: And the Authority was paying twenty percent?

MR. LYNCH: The Authority was paying twenty percent, and operators operating on behalf of the Authority were paying twenty percent; those operators claimed the statutory exemption from taxes set forth in the Authority's Act against the will of the Authority -- they overcame preliminary objections filed by the Authority, so using that exemption these very respondents have been successful in having the twenty percent tax eliminated from the operations of the public parking authority.

QUESTION: While they still have to pay it -- or would have to pay it if you prevail.

MR. LYNCH: If --?

QUESTION: The private operators will have to pay it if you prevail here.

MR. LYNCH: The twenty percent tax in this case, if we prevail?

QUESTION: Yes.

MR. LYNCH: Yes, Your Honor.

QUESTION: Is that other litigation final now? That's all through?

MR. LYNCH: There is a petition for certiorari pending in the Pennsylvania Supreme Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Boreman.

ORAL ARGUMENT OF LEONARD BOREMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS.

MR. BOREMAN: Mr. Chief Justice, and may it please the Court:

I think it is necessary at the outset to pose the issue in this case which the Supreme Court of Pennsylvania posed in the opening paragraph of the opinion.

And that is, where a city imposes a twenty percent excise tax, a parking tax, and there is combined with it governmental operation of the exact identical business, does that constitute a taking under the Fourteenth Amendment, or, rather, I should say under the Fifth Amendment, made unlawful by the States under the Fourteenth Amendment.

Now, that is the issue. The issue is not whether a tax standing by itself is unconstitutional. And the issue is not

whether the city has the power to impose an excise tax on these parking operators. And the issue is not whether the city has the power to compete with the parking operators in conducting a parking business.

Of course, there is no question about any of those issues. But the issue is: Can the city impose a twenty percent tax, which the Commonwealth Court has declared by a unanimous vote to be excessive and unreasonable, and which the Supreme Court has said is excessive and unreasonable; and when combined --

QUESTION: Mr. Boreman, is that in the context -- were those holdings in the context of the Parking Authority itself being subject to the tax, or was this after the invalidation of the taxes and --

MR. BOREMAN: Let me explain that, Your Honor. The Supreme Court, Justice Roberts said, adverted to the invalidation of the tax against the Parking Authority, but he said that didn't influence his decision. He said by reason of the fact that the Parking Authority, outside of the parking tax, has total exemption from all property taxes, exemption from all income taxes, low-cost financing, long-term financing, the power of eminent domain under its statute, that these are such great advantages that they alone enable the Parking Authority to charge lower rates, and that adding the exemption of the parking tax makes it

even worse.

Now, may I explain this --

QUESTION: Do you think the 15 percent tax was unconstitutional, too?

MR. BOREMAN: I beg pardon?

QUESTION: When it was 15 percent, do you think that was unconstitutional?

MR. BOREMAN: I think it would be, Your Honor, yes, if the facts showed what we think this record shows, and what I propose to discuss --

QUESTION: How about ten percent?

MR. BOREMAN: There I think there might be a proper imposition.

QUESTION: Well, what about -- was the Parking Authority subject to the same tax or wasn't it?

MR. BOREMAN: Yes. Let me explain that, Your Honor, because I'm counsel in the case which invalidated the parking for these -- for some of these same plaintiffs, but there are others, there are some very large interests who are not plaintiffs in this case.

This is the way the Parking Authority works. The Parking Authority was created by the Legislature of Pennsylvania by the Act of 1947. It authorized municipalities to set up parking authorities. The City of Pittsburgh set up a parking authority.

The Parking Authority went out and with the low-cost financing and long-term financing, due to tax exemption, issued bonds to build the structures. They then proceeded to lease these garages to private operators.

Now, under the terms of the lease, these private operators pay a flat rate.

QUESTION: Every one of them leased to a private operator?

MR. BOREMAN: Yes, Your Honor.

QUESTION: Every one?

MR. BOREMAN: Yes, Your Honor.

QUESTION: I see.

MR. BOREMAN: The Parking Authority operates a few small lots where they have parking meters, I think, by themselves, but most of them are leased.

Now, these operators pay a rent which is enough to cover the amortization of the bonds, and then they share the profit with the Parking Authority, fifty-fifty.

Now, these private operators, when I say share the profit fifty-fifty, that's after all expenses. So that the burden of the expenses are on these private operators, even though they're operating the Parking Authority garages.

If there is a profit, the Parking Authority shares fifty percent of the profit.

Consequently, if this tax remains valid against

the Parking Authority, these private operators must add to their expenses the amount of the parking tax.

So they went into court, and I acted as their counsel, and the Commonwealth Court has so held, and I might say that it is completely under Pennsylvania precedent, it is cited in Justice Roberts' opinion, that they went into court to have it declared -- to have the exemption in favor of the Parking Authority declared, and the Commonwealth so declared. The case is now on petition for --

QUESTION: Why couldn't you pass it on?

MR. BOREMAN: I beg pardon, sir?

QUESTION: Pass the tax on.

MR. BOREMAN: The tax can't be passed on, for several reasons, Your Honor.

No. 1, there is testimony in this record by a number of these plaintiffs -- who, by the way, are probably the most experienced parking operators in the United States. One operator, the operator of Alco Parking, and the others -- may I just go on with this, Your Honor, and I'll explain why.

-- is the largest parking operator in Pittsburgh, has been an operator for over fifty years.

QUESTION: Now, might he be operating some of Parking Authority under lease as well as --

MR. BOREMAN: Yes, Your Honor.

QUESTION: -- independent leases.

MR. BOREMAN: Yes, Your Honor.

The other one, operating Stanwix Auto Park, is a member of the board of directors of the National Parking Association. These are experts.

They have testified that in their experience as parking operators, if they are charging and getting as much as they can get, they say, and they testified, they charge the highest rate. They'd be a fool not to get more if they could.

Now, with the competition of the parking authority garages sitting --

QUESTION: How many more spaces could you use right now?

MR. BOREMAN: Well, the --

QUESTION: Is that 4,000 figure correct?

MR. BOREMAN: It is a misleading figure, Your Honor. It comes --

QUESTION: But is it correct?

MR. BOREMAN: Well, not being an expert on the subject, I can't say --

QUESTION: Well, is there anything there to contradict it in the record?

MR. BOREMAN: There is no actual testimony, no. It is a figure given by Wilbur Smith, who did a study for the Parking Authority. He --

QUESTION: It's in the record.

MR. BOREMAN: It's in the record. And he came --

QUESTION: And there's nothing in the record to the contrary?

MR. BOREMAN: No, Your Honor, because there is no expert testimony that contradicts it, and I wouldn't want to contradict that. But I would want to explain it, Your Honor.

I say that it is a misleading figure. If you read that record in which that 4,000 figure is given, it says it is an over-all average for the whole city, based on the examination of traffic congestion, on needs, and so forth.

Now --

QUESTION: But it's the best figure we have so far.

MR. BOREMAN: Yes, Your Honor, but it is the --
it is --

QUESTION: Well, what else do we have to go on except the best we now have?

MR. BOREMAN: Well, I think it needs -- it requires and deserves explaining, Your Honor. That 4,000 deficiency is --

QUESTION: Well, you explain away the facts, I'll listen.

MR. BOREMAN: Good. At two o'clock, as these studies will show, and it's in the record, at two o'clock

there is this capacity. And, by the way, it isn't capacity, because the record shows, and we've set it forth in the brief, the record shows that capacity goes up to 120 percent and not the 99 or 102 percent that the Parking Authority garages have.

Now, at four o'clock, and at six o'clock, and in the evening and on weekends, there is no such deficiency, Your Honor. That 4100 spaces is only at the peak hour of two o'clock in the afternoon, and possibly twelve o'clock on some occasions.

Now, if you will look on page 640, you will see that at other times there is not that peak demand and that deficiency of 4100 spaces. That is an estimate by Wilbur Smith Associates, in making the study, that the City of Pittsburgh over-all could use 4100 spaces. That doesn't say that the Parking Authority garages are filled twenty-four hours a day. In no sense. And they are not.

QUESTION: Well, I don't know of any Parking Authority any place in the blamed world that's filled twenty-four hours a day.

That's not in this case.

MR. BOREMAN: That's right, Your Honor, but --

QUESTION: The only thing we have in this case about passing on is that your people say, "We can't do it".

MR. BOREMAN: And the Supreme Court found that they

didn't have to do it, and the Commonwealth Court found that they can't do it.

And that's because at other times of the day, other than peak hours, the Parking Authority garage is not filled, and they charge lower rates, and if the private garages raise their rates at these other times of the day, that lessens their competitive ability.

For example, there are Parking Authority garages in the City of Pittsburgh standing on one corner, and there is the private operator's garage right next door. Now, anybody comes into the parking business will tell you that the bread-and-butter and the success of a parking garage depends on short-term parking. One, two, three and four hours.

If you look at our record, in Exhibit 3, you will see that for those short periods of parking, the Parking Authority's rates are fifty percent of the private operator's.

Now, if we were expected to pass it on, and charge more, we increase that disparity. So it is not a simple question of some statistical 4100 spaces, it is a question of the actual facts in the operation of parking garages in the city.

Now, Your Honor, I think it's important in discussing the nature of this tax that this tax that is imposed on these private operators is twenty percent, a tax that is greater than, to my knowledge, any tax in the lity of Pittsburgh or

in the nation. I know of no other twenty percent excise tax anywhere. Certainly no twenty percent parking tax.

It is a selective tax, it is not imposed generally on the City of Pittsburgh. It is imposed on this small group.

Now, in addition, in the City of Pittsburgh there is what is known as a business privilege tax, and it is taxed at the rate of six mills. These parking operators pay that tax also. So that the tax for the privilege of conducting business in the City of Pittsburgh, for the parking operators, is 206 mills, whereas every other business in the city pays six mills.

Also in the City of Pittsburgh there is a mercantile tax imposed on wholesale and retail vendors of merchandise at the rate of one mill.

Now, the disparity between the tax imposed on this selective group of parking operators as compared to all other businessmen is tremendous. The amount imposed on these people is 34 and a third times more than any other business.

On Exhibit 3 you will note that the mercantile tax in 1969, obtained for the city \$2 million; that's over all the merchants of the city, 7200 merchants. The parking operators, this small group, paid equally two million.

The business privilege tax all over the city brought in four and a half million; these parking operators paid two million.

Now, I might say at the same time that there are no extra benefits conferred on these parking operators for this money. There are no extra police, the record is replete with testimony that there are no extra police, there are no extra services, and there is no particular benefit advanced to them.

QUESTION: Is it your position that the city violates the Constitution when it simply imposes a gross receipts tax that has the result of reducing the number of customers for parking lot spaces?

MR. BOREMAN: Not if there weren't public competition, Your Honor. If the factor of public competition by the Parking Authority weren't here, I think we would have a different picture. I think we would have another question, but I wouldn't take that position at this point.

The position --

QUESTION: But how many public parking spaces were there, run by the Authority?

MR. BOREMAN: Six thousand.

QUESTION: And how many total in the city?

MR. BOREMAN: In the downtown section of the city, which is where the concentration is, 24,000 altogether. The private operators operate 17,600 spaces -- or 400 spaces. The Parking Authority operated 6100 spaces, and there are scattered individual lots in the area.

QUESTION: Well, I suppose it means that the tax

would probably -- might guarantee, as the price got higher and higher, that the spaces in the Authority lots would always be full.

MR. BOREMAN: If the private operators were compelled to increase their rates, which they can't do because if they do they make the competition with the Parking Authority that much worse.

QUESTION: Well, it can't get any worse than five or six thousand places, full places. But it can reduce the number of cars that come in to park.

MR. BOREMAN: Yes, it can, Your Honor, there is nothing to stop the Parking Authority from building new garages, exercising the power of eminent domain.

QUESTION: But that hasn't happened, though.

MR. BOREMAN: Yes, it has happened, Your Honor.

QUESTION: Yes, but that isn't what -- that isn't what -- I would suppose that it's the reduction in the number of people who want parking spaces that would get to you pretty fast.

Do you have any statistics in the record as to how many parkers there were over the years, as this tax got higher and higher?

MR. BOREMAN: No, --ut we have -- we don't have that statistic, Your Honor, but we do have the one statistic in the record, Meyers Brothers, a national parking

chain, one of the largest parking operations in the City of Pittsburgh, I believe their capacity is about over 2,000. When this tax became 15 percent, they tried to raise the rate. They found that their business decreased by about 25 percent. It's in the record.

Then they tried again to raise the rate at the end of 1969, and they had to close a whole floor because there were people that just quit coming in because of the raise.

QUESTION: Well, are there any statistics in the record as to what the average vacancy was in the Authority's parking lots?

MR. BOREMAN: Yes, Your Honor. There's no average vacancy, but there's a -- there's a -- on page 640 --

QUESTION: Were they always full?

MR. BOREMAN: No, Your Honor. No, they are not always full. They're full -- they're mostly full at peak hours, of twelve and two. But not at four and six in the evenings and on the weekends, no.

QUESTION: So their spaces were going begging, too, to some extent?

MR. BOREMAN: Yes, Your Honor.

Except for the peak hours.

QUESTION: Mr. Boreman, when Meyers tried to raise its rates at a time, as I understand you, when the tax was 15 percent --

MR. BOREMAN: Yes.

QUESTION: -- were the Public Authority lots also paying the 15 percent tax?

MR. BOREMAN: Yes, Your Honor, --

QUESTION: At that time.

MR. BOREMAN: -- they were.

QUESTION: Did they try to raise their rates?

Did they try to raise their rates at the public --

MR. BOREMAN: No, Your Honor, they didn't. As a matter of fact, one of the difficulties that exist today is that the public authority itself directs and fixes the rates for these lessees, and they have not permitted a raise in rates since 1952.

They just won't permit a raise in rates, and the loss is then absorbed by these lessees, because it isn't the loss of the Parking Authority.

QUESTION: Do you agree with your friend that there is nothing in the Federal Constitution to prevent Pittsburgh from taking over all of the parking lots --

MR. BOREMAN: I agree --

QUESTION: -- as a public utility?

MR. BOREMAN: I agree on one basis, that that is actual condemnation, and I would say that constitutionally they would have to pay damages. By eminent domain they could certainly take them over.

QUESTION: Well, I don't mean taking them over, I mean simply decide that there would be nothing except public parking facilities, and then --

MR. BOREMAN: I would say that that itself is a taking.

QUESTION: Well, do you think it was a taking when the Eighteenth Amendment was passed, and saloons went out of business?

MR. BOREMAN: That, Your Honor, comes under the category of cases that I think Your Honor is quite familiar, the noxious substance cases.

I think the government could ban marijuana, it could ban alcohol, it could ban other drugs. I think they come under the noxious substance doctrine. United States v. Sanchez, for example, is an example. I don't think they are in the same category as these cases.

This is a legitimate business. As a matter of fact, it's a quasi-public business.

QUESTION: Well, isn't the liquor business a legitimate business now?

MR. BOREMAN: It is now because of the Eighteenth Amendment.

QUESTION: Yes.

MR. BOREMAN: I think. But possibly before, I think that -- as I recall it, I think there is a case cited in

Sax's article in the Yale Law Journal, in which a brewery was put out of business by a zoning ordinance, and that was upheld by this Court.

I think before the Eighteenth Amendment, I think that there might be basis for prohibiting businesses that might be called a noxious substance.

But this is a legitimate business.

And my position, Your Honor, is that what we have here is a taking.

Now, this Court has --

QUESTION: Was it a taking when it was 15 percent?

MR. BOREMAN: I think it was, Your Honor, I think anything in excess of ten percent --

QUESTION: But you didn't -- there was no complaint then.

MR. BOREMAN: Well, the tax only lasted a year. The parking operators wanted to see if they could live with it. You asked why they hadn't gone out of business today. They have been trying to see if they could live with it, all through this.

It started out at 10 percent in 1962, and they attacked them.

By the way, when it was attacked in 1962, there was no attack on the basis of confiscation or on the basis of a Public Authority competing. If you look at the opinion

which declared the '62 ordinance invalid, you will see that the Court said, We cannot say there is confiscation in here, because there's nothing in the record to substantiate. The plaintiffs didn't put any record in.

Now, they lived with the ten percent tax until '69. It was raised to 15 percent. They objected vigorously before the Council and so forth, but they decided to live with it. It lasted one year and then the city again came along and raised it to 20 percent. That's what broke the camel's back, and they come in and decided to fight it.

QUESTION: What is there in the record to show, using your language, that that broke the camel's back, are there any financial reports in here from any of your clients?

MR. BOREMAN: Yes, Your Honor. Yes, Your Honor. Exhibit 1 shows --

QUESTION: And which one shows that the camel's back is broke?

MR. BOREMAN: Page 48 of our brief, Your Honor, summarizes the whole --

QUESTION: I didn't see it.

MR. BOREMAN: -- the whole experience or the whole record of Exhibit 1. It shows --

QUESTION: Where is that now?

MR. BOREMAN: Page 48 of our brief. We have summarized what Exhibit 1 shows.

Now, Exhibit 1 is a compilation which we made from the books and records of these plaintiffs, in which we showed the actual record of '68 and '69, and the record for the first six months of 1970, projected on the same basis as '69, for the whole year of 1970.

QUESTION: And that shows for all of your clients?

MR. BOREMAN: Yes, Your Honor. It shows, if you will note that, on 46 locations it shows --

QUESTION: Well, I thought you had several thousand locations; where do you get 46 from?

MR. BOREMAN: Several thousand parking spaces, Your Honor.

QUESTION: Oh.

MR. BOREMAN: Forty-six locations, 17,000 spaces.

QUESTION: How many spaces -- how many locations do you have?

MR. BOREMAN: These 46 are the --

QUESTION: The total?

MR. BOREMAN: -- the total locations in the downtown area of Pittsburgh.

QUESTION: And you're just about bankrupt?

MR. BOREMAN: Yes. It shows a gross of eight million, and on the basis of that eight million, with the parking tax of twenty percent, there's a loss of \$270,000.

QUESTION: Yes.

MR. BOREMAN: And the figures in 1969 show that on the basis of seven --

QUESTION: When you keep going, I'm going to ask you about the other point, you know, about passing it on; so keep that in mind.

MR. BOREMAN: What is that again, Your Honor?

QUESTION: Passing the tax on.

MR. BOREMAN: Yes, Your Honor. Well, our position is that because the Parking Authority is in direct competition, standing right next door to many of these garages and lots, and charging fifty percent already less than what we have, for us to raise the rates, as the Supreme Court of Pennsylvania points out --

QUESTION: Well, why don't you make them raise their rates?

You'd have just as much right as what you're asking here.

MR. BOREMAN: Well, Your Honor, I wish that that were as easy as you --

QUESTION: You're not arguing equal protection at all, this is straight confiscation; is that all you have?

MR. BOREMAN: I want to say that under this --

QUESTION: Is that right?

MR. BOREMAN: Beg pardon?

QUESTION: You're just arguing confiscation.

MR. BOREMAN: No, Your Honor, I'm arguing that this is a taking. I'm arguing that this is a condemnation taking, under the Fifth Amendment, prohibited by the Fourteenth Amendment to the States and the cities, and --

QUESTION: And that's not confiscation?

MR. BOREMAN: Well --

QUESTION: Well, let's not get into words.

MR. BOREMAN: Well, part of the --

QUESTION: All I'm saying is, that's your only point; you're not arguing equal protection.

MR. BOREMAN: Oh, that's right, Your Honor. No, Your Honor.

QUESTION: That's all I meant.

MR. BOREMAN: No, I abandoned that argument, Your Honor, because I'm afraid that it's a hopeless attempt.

QUESTION: Mr. Boreman, the figure that's been mentioned here, and I think it's in the opinions of the court, is that 71 percent of the parking spaces available are privately owned and operated, --

MR. BOREMAN: Yes, Your Honor.

QUESTION: -- the city having 29 percent.

MR. BOREMAN: Twenty-five percent.

QUESTION: Twenty-five percent?

MR. BOREMAN: Yes, and there's four percent scattered around to small operators.

QUESTION: Right. Has that 25 percent remained fairly constant over, say, the last five to ten years, or has it --

MR. BOREMAN: No, not the last -- no, it's ten years.

Your Honor, let me say this, when the Parking Authority was organized there were three garages originally. It increased to eight. There are now fifteen. And in the last five years I think there have been about three or four parking garages organized.

Now, they all weren't in the downtown area, by the way. They were -- some of them were in what is known as a subsidiary business area, what we call East Liberty, for example, or Shadyside.

QUESTION: Is there an exhibit that shows the dates of the introduction of the government-owned parking facilities? What I'm trying to get at is --

MR. BOREMAN: Exhibit --

QUESTION: -- the rate of increase of the publicly owned garage and parking facilities in the downtown Pittsburgh area.

MR. BOREMAN: Yes. Exhibit 11, which I think is the study by Wilbur Smith, yes, gives those statistics, Your Honor.

QUESTION: Is that -- which volume is that in?

MR. BOREMAN: That commences on page 616 of the record.

QUESTION: Page 616?

MR. BOREMAN: And it -- it's quite a lengthy study, and I can't put my finger on the exact spot where it gives the number of parking authority garages, but, Your Honor, I don't think we have -- we have placed in the record all of them, because since this case was tried, there are several new ones.

I'm referring to the Wilbur Smith study, which is quite lengthy, and which was prepared for the Parking Authority in 1969.

I might add this, Your Honors, too, we have in Pittsburgh a nother public authority called the Auditorium Authority, and they are the Authority that built the Three Rivers Stadium, and also our Civic Arena, and they have in turn -- the Auditorium Authority, for example, has leased the parking space to the public Parking Authority itself, and the Authority in turn has leased it to one of these plaintiffs, Alco Parking, to operate for them.

So, in addition to the normal Parking Authority spaces in the downtown central location of Pittsburgh, the Three River Stadium Authority, which I think is over 2,000 or 3,000 spaces, is also run by a public authority leasing to the Parking Authority, and there are other public bodies

doing the same thing.

We have in Pittsburgh this Authority operation of public parking facilities, all in competition with private operators.

Now, I don't think that the question of whether the rate can be passed on is open to a factual determination by this Court, especially when the Supreme Court has so found it. And, although the Court of course is free to make it, I submit that it is a factual finding found by the Supreme Court of Pennsylvania in its finding.

I would like to say, Your Honor, that this Court on many occasions has not hesitated to declare a taking where the police power has been exercised, and I'm thinking of cases like Pennsylvania v. Mahon, and United States v. -- well, not -- cases like Pennsylvania v. Mahon and other cases which we have cited in our brief dealing with the regulation of the police power. Also cases like U. S. vs. Causby, the airline cases, Griggs vs. Allegheny County, and the case of Armstrong v. United States, where this Court determined that the immunity of suit privilege given to the United States does not protect it against a claim of a mechanic's lien holder.

Now, I say there is no reason in my mind why the same principle cannot be applied to a taxing statute. And I think the comment of -- or rather the study made by

Professor Sax in the Yale Law Journal is a very cogent treatment. The Supreme Court adverted to it, and I submit that it is a rational theory as to the fact that the excessive imposition of a tax can be equally a taking as the excessive and wrongful imposition of a police power statute.

QUESTION: Well, you think -- I suppose you think it would be a taking also if the City of Pittsburgh, if it didn't operate any parking lots of its own, simply imposed a minimum schedule of parking fees in order to limit the entry of cars into the downtown area, and they put the minimum price high enough so that people wouldn't pay it.

MR. BOREMAN: I don't know, Your Honor. I don't know whether that would be a taking or not, because it seems to me that unless --

QUESTION: Suppose it just -- suppose it just barred all downtown parking?

MR. BOREMAN: As a police power regulation?

That, Your Honor, seems to me to tie in with the Sax thesis. There you have -- there you don't have government enterprise, you don't have the government resource enterprise operating. It has not itself gone into an enterprise activity in competition; it has made a police power regulation in which it says that for the benefit of all, health-wise, let us say, we will bar parking.

That is a different story, and it might be under

Sax's rationale that that is a legitimate activity.

QUESTION: Well, suppose they do it to see to it that people come into the center of town on a publicly owned bus system or subway system or some such reason as that?

MR. BOREMAN: I think there they would have to pay compensation, because that's a resource activity. I think to place the burden of the cost of that on a small selective group is exactly the idea of the thing that ought to be prohibited.

There they take on a resource activity. But now I say that --

QUESTION: As long as -- the tax in this case, at first at least, was on until you managed to get it invalidated, was on the city activity and on the private activity also.

MR. BOREMAN: On the Parking Authority?

QUESTION: Yes.

MR. BOREMAN: Yes, Your Honor, the --

QUESTION: Well now, wait a minute, wait a minute. And when they put the tax -- and I'm sure before the tax went on, the rates were disparate also, because you say the Parking Authority has an advantage.

MR. BOREMAN: Yes.

QUESTION: Now, if they put a level tax on, the two remain disparate, but they both are suffering the burden to that extent, they're both paying the tax.

MR. BOREMAN: But the Parking Authority has --

QUESTION: I understand.

MR. BOREMAN: -- has other advantages which may -- enables it to charge lower rates.

QUESTION: But that was true before the tax went on.

MR. BOREMAN: Yes, and would still be true if they did what you say.

QUESTION: But why would you say that the government resource is enhanced, if they tax both the city and the private?

MR. BOREMAN: Because by reason -- because, No. 1, this tax is so excessive; and, No. 2, by reason of the other advantages, we still cannot compete.

QUESTION: Well, I know, but --

MR. BOREMAN: It is the excessive tax in addition. And you say if they put it on both, the Parking Authority still has the advantages of no real estate tax, no income tax, --

QUESTION: But they always had that, or they would never have put this special tax on. They always had those advantages, didn't they?

MR. BOREMAN: Yes. But now -- they always didn't have the twenty percent tax. Now, what --

QUESTION: And weren't they always full?

MR. BOREMAN: Beg pardon?

QUESTION: Weren't the public parking lots always full?

MR. BOREMAN: No, Your Honor. No. They're full at certain peak hours, but at other --

QUESTION: Well, weren't they always full at certain peak hours, just as yours are full at certain peak hours?

MR. BOREMAN: Generally, yes. Generally, yes.

QUESTION: So how is the fact that they don't pay you, they're not going to the other place, there's no room in there from twelve to two. Am I right?

MR. BOREMAN: That may be right, for that --

QUESTION: So how are you going to lose from twelve to two if you raise your rates from twelve to two?

MR. BOREMAN: Because your business doesn't just go on for two hours a day, Your Honor, it goes on for twenty-four hours.

QUESTION: All right, but that's the only two hours I'm talking about. So you could raise them those two hours, couldn't you, because you'd have no place to go?

MR. BOREMAN: Well, how much could you raise it? The record shows --

QUESTION: I don't know; that's your problem.

MR. BOREMAN: Well, the problem has been solved, Your Honor.

QUESTION: You don't want me to solve --

MR. BOREMAN: The problem has been solved in amount.

QUESTION: Well, let me solve your legal problem; you take care of your economic problem.

MR. BOREMAN: Well, let me point this out, that the record shows by the testimony of the City Treasurer that in order to overcome this twenty percent tax you've got to raise your rates 25 percent.

Now, how much can you raise it, even in that peak time?

QUESTION: Twenty-five percent.

MR. BOREMAN: That's for the two hours.

QUESTION: Yes.

MR. BOREMAN: That's not for the rest of the day.

QUESTION: Well, that would get you further away from the pauper, --

MR. BOREMAN: Yes, it would help, Your Honor.

QUESTION: -- which you claim you're going to be.

MR. BOREMAN: May I point out another factor: it is not only the Parking Authority. --

QUESTION: You just want business as usual.

MR. BOREMAN: No, Your Honor, we want business that's fair. It isn't only -- it isn't only the Parking Authority being fifty percent of the rates, don't forget hundreds of thousands of shoppers, if their rates get too

high and it becomes too expensive to come in town aren't going to come in town; they're going to stay away and go out to the shopping centers. This is a business decision that we've got to consider, too, in raising rates.

In other words, you just don't say, Well, there's a tax of 20 percent, raise it 25, and everything will be hunky-dory.

It's a serious business decision.

Now, what I'd like to say -- I think it answers your question, Mr. Chief Justice -- is that it isn't -- and Mr. Justice Brennan -- it isn't just the Parking Authority existing, it's the combination of this very excessive rate plus the competition. A parking rate of, say, five percent or six mills or ten mills or ten percent, plus the competition, might not be a taking. It's the unheard-of, unequalled anywhere in the country, of twenty percent.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Boreman.

Mr. Lynch, do you have anything further?

REBUTTAL ARGUMENT OF RALPH LYNCH, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. LYNCH: Yes. May it please the Court:

With respect to the question of this Court reviewing the facts, you stated in Fiske vs. Kansas City:

"This Court will review the finding of fact by a State court ... where a conclusion of law as to a Federal

right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Furthermore, it is really incorrect to state that the majority of the State Court found that the tax could not be passed on in the form of a price increase, because the four-three decision, Justice Eagen concurred in the result only.

So I don't think you can infer necessarily that Justice Eagen -- excuse me, Justice O'Brien concurring in the result also concurred in the conclusion that the tax couldn't be passed on.

I think it's only fair to say that three of the Justices, of the seven Justices of the Pennsylvania Supreme Court, concluded that the tax couldn't be passed on.

Reference is made to the inability to persuade the Authority to raise rates after the tax was increased.

There is nothing in this record to show that any approach was made to the Parking Authority, and that a request for rate relief was refused. Nothing in this record on that.

With respect to the confiscation and the growth of the Authority into the private area, at the time of McGillick, in 1964, that case was a case stated, and among the stipulated facts were that there were in existence at that time 5,100 Authority spaces.

And now in 1970, in September at the time of trial in this case, there were in existence 6,100 spaces. Hardly a record of a wildly spawning Authority operation at the expense of private industry.

Reference is made to Professor Sax. I think it should be clear, from a reading of the majority opinion, that great weight is placed upon the opinions of Professor Sax about government acting in an entrepreneurial capacity rather than as an arbitrator.

Interestingly enough, in a later article, Professor Sax states, and I quote, "I am compelled however to disown the view that whenever government can be said to be acquiring resources for its own account, compensation must be paid. I now view the problem as considerably more complex."

So we have a decision where Professor Sax wrote originally that his opinions did not square up with the decisions of this Court. The court below in the majority opinion adopts Professor Sax's theory, even though they don't square up with the decisions of this Court; and now Professor Sax disowns his theory.

With respect to the question of whether or not supply exceeds demand, Mr. McNeil, a witness for the respondents, was asked: "What is the shortage?"

"There is a present deficiency of about 4,100 spaces in the survey area."

"That is in downtown Pittsburgh?"

"Answer: That's in the central business district, which will increase to approximately 7,500 spaces based on developments that are currently underway."

Reference is made to the exhibit in the respondents' brief on page 48a, and I think this illustrates the point the petitioner makes with respect to the quality of the evidence presented in the court below.

There, Justice Kramer of the Commonwealth Court, in his dissent, put in tabular form the findings that the engineer had compiled to show the income versus expenses of the respondents. And if you look at that exhibit, to see how easy it is to manipulate this type of evidence, these first seven companies, the record shows, are owned by one man, one man owns seven companies. The first two companies show losses, dropping down to the fifth company, it shows a profit of 16,126, and then another company shows a loss of 5,384. So if you combine companies one, two and five, with company No. 4 -- one, two and six with company No. 5, two of the unprofitable operations in the study would be eliminated. And the remaining one still would be profitable.

So, evidence like this clearly is subject to manipulation.

QUESTION: Mr. Lynch, what was the citation to that -- that -- Professor Sax's more recent article?

MR. LYNCH: That's contained in the respondents' brief, the citation is Sax, Takings, Private Property and Public Rights, 81 Yale Law Journal 149.

QUESTION: Okay. Thank you.

QUESTION: 81? The other one is in 74.

MR. LYNCH: In 74, yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 2:53 o'clock, p.m., the case in the above-entitled matter was submitted.]

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