

In the  
**Supreme Court of the United States**

Boston Stock Exchange, Et Al.,

Plaintiffs-Appellants,

v.

State Tax Commission, Et Al.,

Defendants- Appellees.

No. 75-1019

1976 OCT 9 AM 9 13

Washington, D. C.  
November 2, 1976

Pages 1 thru 42

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-----:  
BOSTON STOCK EXCHANGE, ET AL., :

Plaintiffs-Appellants, :

v. :

No. 75-1019

STATE TAX COMMISSION, ET AL., :

Defendants-Appellees. :

-----:  
Washington, D. C.,

Tuesday, November 2, 1976.

The above-entitled matter came on for argument at  
11:36 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
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  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROGER PASCAL, ESQ., 7200 Sears Tower, Chicago,  
Illinois 60606; on behalf of Appellants.

ROBERT W. BUSH, ESQ., Assistant Attorney General of  
New York, Albany, New York; on behalf of Appellees.

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
Roger Pascal, Esq., on behalf of the Plaintiffs-Appellants	3
Robert W. Bush, Esq., on behalf of the Defendants-Appellees	19
Roger Pascal, Esq. - Rebuttal	38

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1019, Boston Stock Exchange v. State Tax Commission.

Mr. Pascal, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ROGER PASCAL, ESQ.,

ON BEHALF OF PLAINTIFFS-APPELLANTS

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

This case raises the constitutionality of a 1969 amendment to the New York Stock Transfer Tax which discriminates against interstate commerce by taxing stock transactions involving sales of stock outside New York far more heavily than similar transactions involving sales within the State of New York.

Our clients, the plaintiffs-appellants in this case, are the principal stock exchanges in the United States located outside the State of New York, located in the States of Massachusetts, Illinois, Pennsylvania, Ohio. These exchanges compete, Your Honors, with stock exchanges located within the State of New York and indeed with each other to provide efficient, fair and orderly markets for the purchase and sale of securities.

Indeed, the Securities Act Amendments of 1975



recognize explicitly the public interest and fair competition among exchange markets to provide the fair and orderly markets that I have referred to.

In the record of this case, there is evidence, albeit not at a trial, in a legislative history of section 270-a, of competition in specific securities. In 1968, the year in which this statute was passed, 88 percent of the share trading on the exchanges who are plaintiffs here was in securities listed on the New York Stock Exchange. In 1968, that same year, and prior to that time, the Governor and Legislature of New York perceived what I would suggest as a peril, a competitive peril of what one legislative witness characterized as the "competitive problems from non-New York exchanges." In 1968, New York reacted to that peril by enacting a statute which added section 270-a to the New York Stock Transfer Tax.

In his message of approval, the Governor cited -- and I am quoting again -- "the greatly expanded capacity of the regional exchanges to challenge the New York exchanges for business." Regional exchanges are what people in the business in New York call exchanges outside of New York.

The Governor also stated that section 270-a had as another of its purposes to provide -- and I am quoting again -- "long-term relief from some of the competitive pressures from outside the state." The non-New York exchanges filed suit in the New York state courts -- in the state courts because of the

antitax injunction statute -- for a declaration that section 270-a was repugnant to the commerce clause and other clauses of the United States Constitution. The defendants named were the state agency charged with enforcing that statute, collecting the tax and the members of the agency.

The trial court denied a motion to dismiss, which was the defendants' response to the complaint, and under New York procedure that denial of the motion to dismiss was appealable as a matter of right, was appealed, and the Appellate Division of the New York Supreme Court reversed, order the complaint dismissed, and the New York Court of Appeals affirmed that dismissal, holding section 270-a to be constitutional and not to violate the commerce clause and other clauses of the Constitution under which it was challenged in the complaint. This case is here on appeal.

The question presented here, Your Honors, is whether a state tax on sale, transfer or delivery of securities -- stocks in this case -- which discriminates on the basis of whether the sale portion of a taxable transaction takes place inside or outside the State of New York violates the commerce clause, especially where, as here, it is uncontested, indeed proclaimed by the defendants, that the avowed purpose and the actual effect of the statute was to confer a state created advantage on local stock exchanges at the expense of their out-of-state competitors.

QUESTION: The challenge here is only on the commerce clause, is it?

MR. PASCAL: That's correct.

QUESTION: Whatever else is relied on in the state court, is that it?

MR. PASCAL: That's correct. We have dropped the other two claims in the complaint which were the privileges and immunities clause and the equal protection clause.

The discrimination which I have been referring to, Your Honors, was I would suggest a direct result of New York's reaction to the peril of competition, and the mechanism of discrimination was to add two tax reductions in two large areas -- and I say large because very little is left of the pre-1968 scheme after the addition of these two areas.

The first was the inclusion in section 270-a of a new limited or maximum tax of \$350. Actually, it was more than \$350 when it was passed, but it was gradually reduced to \$350 by the year 1973. Since 1973, therefore, no matter how many shares of stock one sells, one is subject to a maximum tax of \$350 if and only if -- this is the only variable -- the transaction takes place, the sale part of the transaction on the stock exchange takes place inside the state and not outside.

The second aspect of section 270-a which we suggest discriminates openly on the basis of only where the sale takes

place is a new, what I have chosen to refer to as a non-resident discount, whereby non-residents of the State of New York pay precisely by 1973 and since that time one-half the tax they would pay if they were to execute their transactions, that is make their sales inside New York -- I'm sorry, they pay half as much if they execute inside New York, as if they sell their securities outside New York.

QUESTION: Mr. Pascal, sometime during your argument are you going to treat the effect of the enactment of section 28(d) of the Securities Act?

MR. PASCAL: Yes. In fact, let me move to that right now, Mr. Justice Rehnquist. Section 28(d), which is referred to in our reply brief as well as the appellees brief, had the effect of making transfers by registered transfer agent, non-taxable. The legislative history of 28(d) is that it was an accident, as we pointed out in our jurisdictional statement but did not repeat in our briefs. The Congress did not intend, nor did the President intend in signing it, to reduce the impact of the section about which we are complaining. The President made the statement that he was signing remedial legislation and both Houses of Congress, the Chairman of the appropriate committees made similar statements.

The fact is that the remedial legislation has not occurred as we stand here right now, and it obviously will not during this session of Congress. But section 28(d) clearly

does not moot the case.

Number one, the appellees themselves -- certainly I can speak for the appellants, they don't think it has been mooted or we would have so advised the Court.

QUESTION: But whether or not it moots it, it conceivably could have an effect on the burden that the New York tax does put on commerce?

MR. PASCAL: That's true, Mr. Justice Rehnquist, if there is just one registered transfer agent in New York, it will reduce the number of transactions that would otherwise be taxable and subject to this discrimination. There are certain categories, however, that are completely unaffected, for example deliveries to people living in New York, the large institutional purchasers, sellers of securities, deliveries by and to such persons are unaffected.

The appellees themselves have included I think appropriately in Appendix C in their brief, which consists of the opinion of their counsel, Mr. Crotty -- this is counsel to the State of New York Department of Taxation and Finance, quoting at page 31 of the appellees' brief, Mr. Crotty says -- this is an opinion dated December 1, 1975, in discussing the impact of the 1975 amendments, I think generally quite accurately: "However, where a sale, agreement to sell, memorandum of sale, or any other delivery or transfer takes place in New York State, the stock transfer tax due and owing thereon must



be paid." He is telling us that wherever transfers continue to take place and non-registered transfer agents, whenever there is a delivery, the same section 270-a and the rest of the stock transfer tax continues to apply.

So I would suggest that certainly Mr. Crotty, who has given what is a fairly brief but concise and definitive opinion of the New York Department of Taxation and Finance, of which, by the way, the defendant commission in this case is a part, I think he can be taken at his word, and I don't think we really have a dispute as to how 28(d) operates or the impact of section 270-a after the 1975 amendments.

QUESTION: Mr. Pascal, would you give an example or two of the deliveries of securities in New York that would not be affected by the amendment of the Act of '34 but would still be covered by the New York statute?

MR. PASCAL: Yes, Mr. Justice Powell. I might be basically trying to summarize one or two examples given on page 8 of our yellow reply brief. But the one that we give first and the one that I think is somewhat classic is an example of a New York life insurance company purchasing securities. It is either required by law to have a custodial agreement or to take possession of those securities. It is required, in other words, this hypothetical, New York Institutional Investor Life Insurance Company, the example I have given, to take possession of those securities. When it takes possession,

whether it takes possession from a registered transfer agent or from its own broker, the mere delivery is taxable under the transfer tax now, as always.

QUESTION: So even after the transfer, which would be exempt under the transfer on the books by the transfer agent, would be exempt under the federal act if the securities in the name of the life insurance company were delivered to it in New York, that would be a taxable transaction?

MR. PASCAL: That is correct. That is precisely the situation right now. A delivery is an important event and it is one that occurs frequently in New York and it is one that persists, and it is one that persists particularly with regard to the large institutional investors in New York. In fact, I would suggest, wholly aside from mootness, and even in terms of the significance of the fact, in terms of the kinds of considerations that the Court normally gives at the beginning of a case, in noting jurisdiction, that hasn't changed one bit.

We have on the books in New York, in the New York Court of Appeals right now, a decision with, in a state of enormous economic power, a very far-reaching decision that condones a discriminatory tax scheme I think unlike anything close to anything the Court has ever dealt with and found to pass constitutional muster under the commerce clause.

The appellees refer to the extensive regulations

promulgated by the defendants under transfer tax. They are indeed extensive, but I would direct the Court's attention to section 440.1(i)(12), a rather simple regulation, which just lists the number of different types of taxable transactions and, in further answer to Mr. Justice Powell's question, one of those types of transactions is the delivery of a certificate by the transferor or his agent -- meaning his broker -- to the transferee or his agent. That is unchanged.

QUESTION: Well, what type of transaction gets the benefit of the new 29(c) then?

MR. PASCAL: Well, the transaction where, for example, I suppose -- and I would suggest, Mr. Justice Brennan, that this was not intended, but it probably is the effect right now -- the transaction where delivery is not made in New York, that is some part of the transaction takes place there, but it is made outside New York, where no delivery is made at all, or delivery is made to I suppose a registered depository or clearing agency. But if delivery is made, that part is unchanged, and I would add that the policing of the transfer tax is done through the brokers in New York. So, again, you can see how the delivery still is something the state can and does get at and, according to the appellees' brief and Mr. Crotty's opinion, intends to get at.

QUESTION: Have we any idea of the proportion of transactions in which there are deliveries that subject to the

tax and the proportion not subject to the tax outside New York?

MR. PASCAL: Do you mean after the impact of section 28 (d)?

QUESTION: Yes.

MR. PASCAL: No, I don't think we do. Indeed, I think you can tell from the date of Mr. Crotty's opinion, December of last year, things were still being worked out until fairly recently, and the record in this case has been frozen for a few years. There is certainly nothing in the record, and I really cannot add anything to it.

QUESTION: Mr. Pascal, do you think our decision in the Hughes case of last year has any bearing on this? Are you familiar with that case?

MR. PASCAL: Yes, Mr. Justice Blackmun, I am. I think it has bearing in the sense that while the Court and the opinion of the Court purports to be confronting a situation of first impression, according to the language of the opinion of the Court, and as reemphasized by Mr. Justice Stevens' concurring opinion, and that situation of first impression is not present here. The Court does reinforce what I would call some very steady consistent verities regarding discrimination against interstate commerce.

I think that the Court itself in Hughes made clear that it was dealing with a situation involving the state

itself, the State of Maryland in Hughes, really becoming the entrepreneur, if you will, and bidding up the price of hulks. I think, taking the language of the Court, which in the majority opinion said "Until today the Court has not been asked to hold that the entry by the state itself into the market as a purchaser" -- and it goes on to talk about the bidding up on hulks -- I think that distinguishes the case by itself, Mr. Justice Blackmun, because there is no suggestion here that that is what has been done.

Indeed, I would suggest that the State of New York could have, if the New York exchanges and their continued presence in New York were so important to the state and its continued economic viability, it could easily have done something like the State of Maryland did. It could have decided to subsidize by cash subsidies, as Mr. Justice Stevens suggested, or by real estate tax rebates. It could have done something that would not have impeded interstate commerce. What it couldn't do was pass a statute the whole purpose of which was to in essence shift the economic burden of keeping the exchanges located in New York to their out-of-state competitors, which is precisely the economic effect of what the State of New York did here.

The defendants and the Court of Appeals, the New York Court of Appeals have offered us what I would suggest are some excuses for the result reached in the Court of



Appeals and for section 270-a rather than avoidances, if you will. That is, there is nowhere in the Court of Appeals, indeed to the contrary, it is assumed that section 270-a does create a discrimination. I don't think that is an issue here.

One excuse suggested by the defendants but really not by the Court of Appeals is that somehow you can split up the various elements of the transaction. I don't think that that is a viable theory, nor has it been for quite a long time, at least since *Nippert v. Richmond* and cases of that kind, where the Court discussed the breadth of the mind of man in devising ways of fragmenting a transaction.

The motivation of protecting the local business is something on which we can agree. I would suggest that ever since *Baldwin v. Seelig*, the *Halliburton Oil Well Co. v. Reilly*, *Nippert v. Richmond*, the kind of discrimination we have here, whether it is tax imposed discrimination or regulatory imposed discrimination, it makes no difference. Indeed, *Freeman v. Hewit*, one of the cases cited by defendants, suggested that the tax type of discriminatory barrier could be worse.

I think that was reinforced in Mr. Justice Brennan's opinion in *Great Atlantic & Pacific v. Cottrell* last term also, in which the Court said that a state cannot erect economic barriers to protect local business from competition. I think that is one of the verities which I was referring to that

won't fly here.

What do we have here? We have statements in the briefs and motion to dismiss by the appellees that the purpose of section 270-a was to protect a major industry, to protect and preserve the state's securities industry, and this one, to make New York the financial center of the world. That is proclaimed in the motion to dismiss to be one of the purposes of section 270-a.

QUESTION: They didn't think it already was?

MR. PASCAL: I suppose they wanted to secure their position, Mr. Justice Rehnquist, and that is what is wrong with the statute.

The Court of Appeals also suggested that the -- and I must say it is an argument that is somewhat unique, so one cannot cite a string of cases -- the Court of Appeals suggested that the state was free to discriminate among different types of interstate transactions, that what was really being done here was discrimination among all kinds of -- a number of transactions, all of which were interstate.

Of course, we can go to Wallburton to see that in almost every case where that kind of situation occurred, where you had a discriminatory tax or regulatory burden, you could be comparing cases, all of which had interstate elements. What is important here, and what I think is really again undisputed, is that here we have a situation where the discrimination

operates based on whether a particular very important element of the transaction occurs inside or outside the state.

Again, the Court of Appeals suggests -- and this relates also to the protection of local business' point -- that it can neutralize the advantages of the place of origin, that is since New York has already imposed a tax, they can even up the odds, as it were, with the out-of-state businesses. That precise language virtually is what is used by the Court in *Baldwin v. G.A.F. Seelig* to say that you can't do it, and it was reinforced in *Halliburton*. Having imposed the tax, New York might subsidize its businesses, it might grant tax rebates, it could do a lot of things to help local business, but it couldn't neutralize the advantages of the other states and the securities markets located --

QUESTION: Impose a burden on those states of origin?

MR. PASCAL: They couldn't do it by --

QUESTION: On the states of origin.

MR. PASCAL: They couldn't do it, exactly. And finally there is a suggestion in the Court of Appeals argument that the practical effect -- that is a quote of a phrase I believe from *Best v. Maxwell* -- the practical effect of the tax is somewhat *de minimis* because New York residents are likely to execute their transactions within New York. That, of course, is not only not borne out by the record, but it

flies directly in the face of the legislative history of those who passed it. The very assumption of section 270-a was that with a modern age, with modern telecommunications and computer systems, where everybody has access to the various markets instantaneously, and where the instantaneous communication may gain, especially a large institutional seller such as exist in New York, a particular advantage that all markets were open to everybody and therefore to suggest that, as a practical matter, the New York institutions and other sellers or buyers of securities would stay in New York because of geographic opinquity is something that is absolutely unsupported, in fact belied by the record.

QUESTION: Do these -- do the jurisdictions in which these regional exchanges operate impose no local transfer taxes whatsoever?

MR. PASCAL: That's correct, none of them do. In fact, I think the only other state in the Union which might impose a transfer tax similar to New York's is Florida, and I am not even sure of that one right now.

QUESTION: What is the PBW Stock Exchange?

MR. PASCAL: PBW? Well, the name has changed a few times. The PBW stands for Philadelphia, Baltimore, Washington. It is I think now the Philadelphia Stock Exchange.

QUESTION: Philadelphia?

MR. PASCAL: Yes, sir.

QUESTION: And are these names listed as plaintiff-appellants on the appellants' brief, all of the plaintiff-appellants?

MR. PASCAL: All six of them, that is correct.

QUESTION: All six.

MR. PASCAL: I will reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well. I think we will not ask you to spend a minute and a half. We will resume at 1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.]



AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Bush, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT W. BUSH, ESQ.,

ON BEHALF OF THE DEFENDANTS-APPELLEES

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

We should like to emphasize at the outset that this review constitutes in our judgment one of the most historic cases that has come before this Court, because it actually means the economic and fiscal solvency of the State of New York together with that of the City of New York.

QUESTION: Just this one tax will do all of that?

MR. BUSH: Well, part of this tax is earmarked to guarantee to the Municipal Assistance Corporation of the City of New York the federal loans which Congress has authorized to the city and to the big so-called "Big Mac" corporation under legislation that --

QUESTION: I suppose the figures are there. Is the aggregate amount of the tax shown in the record?

MR. BUSH: It is shown in the legislative history for the years under review.

QUESTION: What was the --

MR. BUSH: Well, it is in the neighborhood of \$200 million annually, although the volume has decreased since the

enactment of 28(d) last year of the SEC Act.

QUESTION: That is what your friend is complaining about, that that is a pretty heavy burden on interstate commerce, isn't it?

MR. BUSH: Well, we don't think there is any burden here whatsoever, Your Honor. As a matter of fact, the tax does not operate outside of the State of New York. There is no extra territorial tax imposed whatever either upon these plaintiffs or upon any of the shareholders who do not sell or buy or sell their securities in the State of New York.

The only tax that is imposed are for those local transactions involving sales and transfers occurring within the State of New York. Of course, these plaintiffs, as competing stock exchanges, are not taxed at all upon any business that is transacted on any one of those exchanges. The tax occurs only if there is a sale within the City of New York on one of our New York exchanges or whether there is a transfer made within the City of New York by a corporate transfer agent, limited solely by the enactment of 28(d) a year ago. But even there, that has only limited application here because --

QUESTION: Do you suggest that 28(d) is going to reduce the return? Could you suggest how much? If it was to have been about \$200 million annually roughly --

MR. BUSH: Well, that was roughly -- at the beginning of this law suit, that was the annual yield from our --

QUESTION: That will be the effect of 28(d)?

MR. BUSH: 28(d) would I think reduce it somewhere around \$60 or \$70 million a year.

QUESTION: To about \$130 million?

MR. BUSH: Somewhere in there. Now, in the committee report to the Big Mac assistance act of last year, Public Law 94-143, there is a table or index accompanying that Senate report which shows the annual yield during 1975 or the fiscal year ending last -- in '75.

QUESTION: Well, do you think the interstate commerce argument would be different in this case, Mr. Bush, if, instead of earmarking the tax proceeds for Big Mac, they earmarked it to raise Governor Carey's salary to \$5 million a year?

MR. BUSH: Prior to '68, Your Honor, the revenue from this tax went into the general state treasury. At the same time this 290-a was passed, the revenue was transferred to the City of New York for general purposes, and then during the fiscal crisis the revenues earmarked to guarantee to the federal government for the loans borrowed by the city, would be backed up in part by the revenue from the stock transfer tax, along with other revenue.

QUESTION: Other than your inspection fee type case, have our interstate commerce burden decisions ever given any intimation that the purpose for which the state uses the

proceeds of the tax affect the determination as to whether or not it burdens interstate commerce?

MR. BUSH: Well, my recollection of reading those cases, it varies from tax to tax. As long as the money is used for a public purpose by a state or one of its municipalities and is a legitimate function of government, it seems to me that a judicial adjustment has to be made case by case with the nature of the tax involved and the revenue used for which the proceeds may be put.

QUESTION: Well, does the federal question turn on how worthy we regard the cause to which the proceeds are put?

MR. BUSH: I think in part it does, Your Honor. I don't think that the --

QUESTION: Well, let us assume that all taxes are for a good purpose and that all taxes of money that the state needs -- don't we assume that?

MR. BUSH: I would assume so.

QUESTION: Well, what good is this argument?

MR. BUSH: Well, I don't think that the Constitution contemplates, especially in this case, the death nail of the sovereign State of New York through fiscal collapse, which is --

QUESTION: Do you mean if the State of New York loses \$30 million, it is gone?

MR. BUSH: It may be gone if we can't --

QUESTION: Then somebody has been telling some lies in the newspapers. They said you needed a whole lot more than that.

MR. BUSH: Your Honor, we need every nickel we can get and --

QUESTION: Well, why not --

MR. BUSH: -- part of it is from this source.

QUESTION: Why not put a head tax of \$100 on everybody?

MR. BUSH: Well, I think --

QUESTION: I mean, the fact that you need the money doesn't seem to me to help you protect you against the constitutional infirmity of a statute. If the statute is constitutionally infirm, the fact that you need the money won't help you.

MR. BUSH: Well, it is our position, Your Honor, that the statute is not infirm constitutionally.

QUESTION: Well, that is the argument that has been raised here.

MR. BUSH: There is no burden imposed on any commerce, interstate or otherwise whatsoever.

QUESTION: I submit that that is the argument we are here to listen to.

MR. BUSH: That's right, that is the question before this Court. But part of that --



QUESTION: And we will assume that New York needs the money.

MR. BUSH: We need it desperately, no question about it. But I mention this public assistance because at the same time that was passed last year, the Congress had before it the consideration of the amendments to the SEC Act, one of which was this amendment 28(d), but that did not divest the State of New York of its taxing power in other areas on transactions within the State of New York in the sale of securities. 28(d) merely limited the tax or exempted the tax for transfers within the State of New York, not on other types of transactions within the state. That power was not affected by Congress whatsoever.

Now, I don't really -- the question was asked earlier about the relevancy of this Hughes decision that was handed down last June. As I read the opinion there, it constitutionally was sustained because it was a legitimate purpose of the State of Maryland for the protection of its environment to do something about ridding itself of those junk automobiles.

If it is important from an environmental point of view to preserve the State of Maryland, I think for the same reason it is important to the State of New York for its economy to remain wholesome for the same reasons. And that the cases relied upon by the plaintiffs here were all reviewed and passed upon in the Hughes opinions of last spring, and also

in the earlier case of the Atlantic & Pacific Company case that was handed down the first part of last year. The cases relied upon therein are precisely the same as those which are relied upon by the plaintiffs here.

Now, in the A&P case, this Court found that the very same cases were controlling as to the facts there involved. But when it came to the Hughes case four or five months later, the same cases were rejected by the majority here. So that our position is that all of these cases the plaintiffs cite have got to be distinguished upon their facts and upon the legal principles involved.

Now, some of those involve a license to engage in interstate commerce, which has been forbidden under the commerce clause, or there was a gross receipts tax on the gross proceeds from interstate commerce, and others involved other types of situation.

Now, none of those cases are in point here because we are not licensing anyone here and we are not imposing upon a privilege for someone to engage in sales transactions within the State of New York. Every stockholder in this country is free to sell and buy and sell his stock on any exchange. The tax is only applied by New York where there is a sale within the State of New York or a subsequent transfer within the state by a corporate transfer agent.

Unless those events occur, no tax is paid by anybody,

regardless of where the sale may be made, whether it is on plaintiffs' exchanges or off the counter or over-the-counter type of transaction. And it seems ironic to us that the plaintiffs are complaining that the competitive standing of our New York state stock exchanges in comparison to theirs and that the state ought to offer bounties or subsidies to our own exchanges, similar to what was done in the Hughes situation, merely begs the question. New York has done something to equalize the competitive standing and it did so by the enactment of the special tax inducement provision of section 270-a of the tax law, to encourage out-of-state investors to continue to engage within the State of New York, and they offered non-resident citizens a tax reduction in order to do that, and it offered on the other hand the large block sale investors special tax inducements if they traded within the State of New York.

However, they are still free to trade anywhere where there is a market for them. And we don't think that is any burden upon interstate commerce. In fact, it is a direct inducement to engage in interstate commerce.

Now, the plaintiffs concede in their briefs submitted here that the state has the taxing power to impose this tax. They only complain because we reduced the tax.

QUESTION: Mr. Bush, might I interrupt you?

MR. BUSH: Yes, sir.

QUESTION: Am I correct though in understanding that there is one rate of tax paid if the transaction is over the exchange and a different rate if it is not, if it is over the New York Stock Exchange?

MR. BUSH: If it is done within the State of New York, we offer non-residents a reduced tax, if they sell within the State of New York.

QUESTION: Over the New York Stock Exchange?

MR. BUSH: Over the New York State residents. New York State residents, if they do business within our exchanges, they are taxed at the former rate, at a higher rate.

QUESTION: How much difference in rate is there?

MR. BUSH: Well, it is a graduated, beginning back in '68, down through '73, roughly now 50 percent less for out-of-state non-residents.

QUESTION: Well, now is your defense -- it is the differential then, depending -- now, what is your defense again, that these are not interstate transactions, is that it? I don't quite understand the --

MR. BUSH: Our stock transfer tax, we argue, is at the end of commerce, it is upon a sale or a transfer occurring within the State of New York after commerce has come to an end, but is not a direct burden on the flow of that commerce within the State of New York. We take the position that commerce has ended, the flow has ended and ceased and that the final act of

sale or transfer within the State of New York is purely a incident which the Court has sustained in the past against a constitutional tact as a burden --

QUESTION: And what is the reason for differentiating then for having two different levels of tax?

MR. BUSH: Merely as an inducement to bringing the out-of-state business into the State of New York.

QUESTION: It is intended to affect out-of-state business then?

MR. BUSH: Well, you mean affected by keeping it out of the state or bringing it in?

QUESTION: Is it intended to change the way in which out-of-state business would be done but for this particular tax scheme?

MR. BUSH: Well, the tax has no extra territorial effect if there is no later transfer within the State of New York. If the sale is made, say, on a Chicago exchange, the tax is not imposed on that. It is only if that stock is thereafter transferred within the state by a corporate transfer agent that the local tax is imposed on the transfer, but no tax is imposed on an out-of-state sale.

QUESTION: But is it correct that the act of the transfer agent generates one tax if the prior sale was made over the Chicago exchange and a different tax if it is generated over the New York exchange?



MR. BUSH: That's right.

QUESTION: So there is the discrimination, but you say it is not a burden -- now, why is it not a burden again? Doesn't it tend to discourage transactions over the Chicago exchange by companies, in stock of companies that have transfer agents in New York?

MR. BUSH: That is the allegation made by the plaintiffs.

QUESTION: Well, what is your answer to the allegation? That is what I haven't quite understood. That happens, doesn't it?

MR. BUSH: Well, I think it does happen, but the SEC has reported that the volume goes up every year anyway, so the tax itself I don't think has that much of an adverse effect upon, say, a regional exchange located in Chicago.

QUESTION: What did the New York Legislature indicate was the purpose, along the lines of Justice Stevens' question?

MR. BUSH: The purpose was to retain the New York state stock exchanges within the City of New York which at that time were threatening to move out of state because they could not afford to continue business within the state, and that is part of our legislative history which is shown in our brief and also in the jurisdictional statement. And as an inducement to keeping those exchanges within New York, it was agreed upon by the City of New York, the State Legislature, the Governor's

office and the New York Stock Exchange that something had to be done and one means of doing it was to reduce the tax for future years on this type of transactions, and as a consequence the exchanges agreed to stay within New York.

Now, the effect of their leaving New York would have meant loss of millions of dollars in local taxes which they had been paying up to then to the city, the loss of employees and the taxes engendered by them, and plus the rents and everything else which are involved in the operation of these exchanges.

Of course, New York City has been the financial center of the world. It is recognized by the Congress and the amendatory acts passed last year with respect to the SEC amendments that are involved here, all of which were enacted to preserve New York City as a financial center, not to embarrass it nor to impede its growth, but to retain it for the purposes of having adequate financial interests in the city and to provide the capital and everything else it needed in the growing economy.

QUESTION: Mr. Bush, before this reduction in tax, was the old rate such a burden on transfers on the exchange that the exchanges were suffering and this is why they wanted to leave New York, to escape the tax?

MR. BUSH: That was part of it. That was only a small part of it, Your Honor, that the stock exchange thought that,

because of this increased competition that it was receiving from these regional exchanges, something had to be done --

QUESTION: Well, was it losing business?

MR. BUSH: Yes, it was

QUESTION: And then the idea was to reduce the tax in the manner that it wasn't, this would not only retain the business that otherwise would be lost but also increase the amount of --

MR. BUSH: Hopefully it would bring in additional business into New York.

QUESTION: Was one of the reasons it was losing business that New York imposed a tax on transactions on the New York exchange and the other states didn't impose taxes on transactions on their exchanges?

MR. BUSH: Yes, we had two exchanges, the New York Stock and the Amex Exchange, both dealing with different listed securities, but the transfer tax was involved with both exchanges for all transactions on those two exchanges.

Now, in our legislative history that we have appended to our brief we show the economic statistics that are involved up to 1968 and the concern that was expressed by the State of New York if this business would be lost to it.

QUESTION: Well, what analogy do you draw to Judge Wachtler's opinion, in the Court of Appeals? It rests at one point, as I read it, kind of on the use tax analogy.

MR. BUSH: Well, that was the argument that we were making in the court below, that the transfer tax was similar to a local sales or use tax in the City of New York, and which has been constitutionally sustained in the past.

Now, the thrust of plaintiffs' argument changes from court to court as we proceed with this litigation. As we read the briefs that were filed in the courts below, their constitutional thrust on the interstate commerce question was not to themselves but to some stockholders or some investor who they were claiming was being jeopardized. Now, it is their own business primarily that they are aiming this constitutional --

QUESTION: Well, it would be a poor lawyer who, having lost in two appellate courts, didn't change his tactics.

MR. BUSH: That's right. That's right. And we are not embarrassed by that. We I think have met this head-on at every stage. As I say, to repeat myself, we don't see that there are any undue, unfair burdens imposed upon interstate commerce at all, especially here where none of these plaintiffs pay any tax at all and don't have to because our statute doesn't reach out to their exchanges.

QUESTION: I suppose in *Gibbons v. Ogden* that New York could have argued that they needed the revenues as much as you do here.

MR. BUSH: Well, in *Gibbons* and that line of case, Your Honor, I think that was more in the nature of a license

fee, for the privilege of engaging in interstate commerce or that no one was free to do it unless they had a permit to do it. We don't impose any such requirement here to engage in the stock transactions. Everyone is free to sell at any exchange, regardless of where he -- so long as that stock may be listed on our regional exchange. Limited by that, a stockholder is free to pick any plaintiff's exchange to buy or sell the stock. The problem becomes one if he has to transfer it within the State of New York and the corporate transfer agent is located here, the stock goes to New York to that agent to be transferred on the corporate books of the company in whose stock is issued, but even that is going to be eliminated under these SEC amendments because the recommendations are not to eliminate all stock certificates altogether and put it on a computerized tape situation, and if and when that occurs then there will be fewer paper transactions involving the transfer of stock certificates.

QUESTION: What about the deliveries that are affected by your --

MR. BUSH: Well, Your Honor, I think counsel --

QUESTION: Institutional deliveries.

MR. BUSH: -- counsel I think has misread that ruling of the counsel for the tax department. It is limited to the specific statutory provisions of 28(d) of the SEC Act, and all he is doing is rephrasing that language, and it says either



delivery or transfer within the state of New York, so those two types of transactions are now limited by 28(d). Any other type of transaction is still subject to the tax. And the committee reports that recommended this legislation was clear to make clear to the Congress that they were not intending to divest the State of New York of any other additional taxing power that it might have, commerce or otherwise. And they recognized, I am sure, that the transfer tax was merely a local tax which this Court has held in the past on certain local taxable incidents occurring within the State of New York.

QUESTION: Mr. Bush, do you challenge the standing of the respondents or the petitioners here?

MR. BUSH: Yes, we did up through the Court of Appeals of the State of New York.

QUESTION: And that was rejected?

MR. BUSH: It was rejected.

QUESTION: And what was your standing argument?

MR. BUSH: Well, I think that this Court of its own motion could --

QUESTION: Yes, but what was your standing argument?

MR. BUSH: Well, we urged at the very beginning that we had no standing to maintain the --

QUESTION: Let me understand what you are -- case or controversy or what?

MR. BUSH: They were not aggrieved because no tax was

imposed on them and they hadn't legal standing to question the constitutional --

QUESTION: You say they didn't suffer any injury in fact from these taxes?

MR. BUSH: That's right, and that is spelled out in our notice of motion on grounds which is in the jurisdictional statement, Mr. Justice White. But we felt that since the Court of Appeals decided the way it did, that it decided as a matter of state law that they do have standing to institute and maintain the law suit --

QUESTION: But that wouldn't bind us?

MR. BUSH: No, that's right, that is what I --

QUESTION: What have you got to say about it here, anything?

MR. BUSH: Well, I think we still maintain, Your Honor, that they have no standing to question the constitutionality of this statute, and we think that the --

QUESTION: What are the mechanics of paying the tax? Let's assume I live in Boston and I have a large block of stock to transfer and I call up my broker and tell him to sell it in Boston and he sells it and then I have to get it transferred to New York, so I will have to pay this tax. What are the mechanics?

MR. BUSH: Well, most of the --

QUESTION: I suppose I give my shares to my broker?

MR. BUSH: That's right, and he has been designated as a stamp issuer and affixes the stamps to the paper or it is sent in to New York and some bank or some other member firm affixes the stamps to the certificate. Refunds, of course, are provided under the statute in the case of an erroneous paid tax and funds are set aside every year to refund any taxes that might have been erroneously paid or collected. Now --

QUESTION: But I suppose if I do what I say in my example, I pay this tax in New York and I am talking to my brother in New York and he says why don't you send them down here the next time you have any and it will only cost you half as much, and I say I will do that and I tell my broker and he says, well, that is great except that now I don't get a commission.

MR. BUSH: Well --

QUESTION: Isn't that enough of a hurt to --

MR. BUSH: Well, Article 12 of New York State tax law provides for penalties in the event of evasion and things like that.

QUESTION: It isn't evasion. I just am trying to find out if there is some regional stock exchange really is hurt by this law. There is quite an incentive to not employ the services of the local stock exchange.

MR. BUSH: That's right. Well, I don't know to what extent a shareholder --

QUESTION: You hope it is terribly successful because you want to bring all the sales into New York you can.

MR. BUSH: That's right, and we want to retain what we ---

QUESTION: To the extent you are successful, to that extent the regional exchanges are hurt, aren't they?

MR. BUSH: Well, I read the reports of the SEC ---

QUESTION: Well, isn't that right or not?

MR. BUSH: No, because the SEC reports, annual reports show their volume going up every year.

QUESTION: Well, maybe they might have gone up more.

MR. BUSH: They might have gone up more, who knows, that is a matter of speculation.

QUESTION: Well, you know your tax system is devised to give people a break if they don't use the regional exchanges.

MR. BUSH: Well, all I can say is that ---

QUESTION: Isn't it? Isn't it?

MR. BUSH: --- our revenue has fallen off in recent years from what it was back at the time this thing was first passed, I know that, as a matter of fact, although our record here does not clearly reflect that. For example, this table that was submitted with Public Law 94-143, the Big Mac assistance thing, shows estimated transfer taxes to the City of New York, on Appendix A, in the neighborhood of \$184 million, which is substantially less than the amount that we estimated back at the

time this law suit was started, which was in the neighborhood of \$250 million. So it has fallen off significantly and no doubt will as time goes on, especially if this 28(d) is not modified in some way next year by the next Congress.

QUESTION: Are you taking the position, Mr. Bush, that the congressional act here makes this case one less worthy of our consideration?

MR. BUSH: I think it does, since this legislation was enacted, because I think it indicates the unwillingness of Congress to preempt a field which under the Constitution I think it has the power to do. That has not yet been fully done, Your Honor, but I don't think the constitutional question is as significant today as it was three or four years ago when this thing was first started. I think the Hughes opinion sort of points that out also.

MR. CHIEF JUSTICE BURGER: I think your time is up, Mr. Bush.

Mr. Pascal, do you have anything further?

ORAL ARGUMENT OF ROGER, PASCAL, ESQ.,

ON BEHALF OF THE PLAINTIFFS-APPELLANTS -- REBUTTAL

MR. PASCAL: I will be brief, Mr. Chief Justice.

I would suggest --

QUESTION: How are your clients hurt, Mr. Pascal?

MR. PASCAL: Well, Mr. Justice Brennan, the injury in fact to which Mr. Justice White referred is the direct open



bald attempt by the state to take our customers away. It is competition standing and that is why the Court of Appeals as well as both courts below in New York rejected the defendant's standing argument, relying in the Court of Appeals, as I recall, upon *Camp Data Processing*, and also there really is no difference between New York and this Court's standing doctrine because the New York Court of Appeals cited it also.

QUESTION: Can you think of any case involving the burden on interstate commerce from this Court where we have permitted someone in the position of your client to raise the interstate commerce argument?

MR. PASCAL: I think that the elements have not come together in interstate commerce case that I know of, Mr. Justice Rehnquist. I think that the elements are there, that the competitor type standing in other cases involving the Comptroller of the Currency --

QUESTION: That is Administrative Procedure Act standing though. Conceivably you can carry it over if you want to into this area, but I don't think it follows as night to day.

MR. PASCAL: It doesn't follow as night follows day, but it has I believe been subsequently cited in non-Administrative Procedure cases. I think in a non-Administrative Procedure case, we have *Pierce v. Society of Sisters* which was, among other things, a standing case, and I think that that

is another case that would apply here, where you -- or *Truax v. Reisch*, where you have the employee whose employer is required to discriminate against aliens, the employee who is going to be the subject and who is really going to be burdened could complain. I am not suggesting that these exchanges are the only potential plaintiffs here. But if you compare the exchanges who are -- and this is I think a rare thing in state legislative history, Mr. Justice Rehnquist -- you actually have the targets of this legislation named in the legislative history that the defendants put in the record. They are named. They are actually foreseen as the targets of the legislation, the competitors of the local exchanges against whom the legislation is aimed.

I would suggest that --

QUESTION: Your clients are not the only ones who would raise it, I suppose, because the ones who get the break would never raise it.

MR. PASCAL: Well, they might theoretically, Mr. Justice White. They could say that it is a form of economic coercion, it reduces their choice as to where -- I referred earlier, for example, to competition between exchanges --

QUESTION: No, but all you have to do is complain a little more and you will have to pay the tax, a higher tax wherever you sell.

MR. PASCAL: That's right.

QUESTION: You are not about to complain that much, are you?

MR. PASCAL: Well, that is why the exchanges are the plaintiffs, I think that is right. I would suggest that the legislative history is an unusual source of material to dispose of any injury in fact problem here.

I would also like briefly to discuss the suggestion that the case may be less worthy of consideration, which Mr. Justice Blackmun mentioned. I don't think that the legal principle is any less worthy of consideration, regardless of how the dollar volume may have changed. And I would agree that section 28(d) really changes it much more than what we complain of here.

Finally, I would have to say that the Big Mac argument, if I can call it that, is one that just plain surprises me, but it is an easy one to respond to, because, to quote from the appellees' brief, on page 3, section 11, to which he referred, -- this is of the statute we challenge -- the possibility of this particular section being unconstitutional occurred to the New York Legislature. Section 11 requires the reimposition of the higher taxes, at the higher rates of taxation, without distinction between sales by non-residents or the large blocks if section 270-a is declared unconstitutional. We are doing New York a favor. There is no way it can lose.

QUESTION: How come they don't realize it?

MR. PASCAL: I am afraid that the time to ask that question has passed, Mr. Justice Rehnquist. I can't, because the only effect of the relief we seek would have would be to reinstitute the previous higher tax. We have never challenged in any court or even whispered the suggestion that we are attacking anything more than section 270-a of the transfer tax, which does not impose any tax. It merely creates a new discriminatory rate.

Thank you, Mr. Chief Justice.

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

[Whereupon, at 1:37 o'clock p.m., the case in the above-entitled matter was submitted.]

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