In the

Supreme Court of the United States

EXXON CORPORATION, et al.,	No. 77-10
SHELL OIL COMPANY,	No. 77-11
CONTINENTAL OIL COMPANY, et al.,	No. 77-12
GULF OIL CORPORATION,	No. 77-47
and	and
ASHLAND OIL, INC., et al.,	No. 77-64
Appellants,	
v.	
GOVERNOR OF MARYLAND, et al.,	
Appellees.	

Washington, D.C.
February 28, 1978

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v. : No. 77-64

GOVERNOR OF MARYLAND, et al., :

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Washington, D. C.,

Tuesday, February 28, 1978.

The above-entitled matters came on for consolidated argument at 10:08 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
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM SIMON, ESQ., Howrey & Simon, 1730 Pennsylvania Avenue, N. W., Washington, D. C. 20006; on behalf of the Appellants.

FRANCIS B. BURCH, ESQ., Attorney General of Maryland, One South Calvert Street, Baltimore, Maryland 21202; on behalf of the Appellees.

THOMAS M. WILSON, III, ESQ., Assistant Attorney General of Maryland and Chief, Antitrust Division, One South Calvert Street, Baltimore, Maryland 21202; on behalf of the Appellees.

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 77-10, Exxon Corporation against the Governor of Maryland and the related and consolidated cases.

Mr. Simon, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM SIMON, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Appellants challenge the constitutionality of paragraphs (B) and (C) of Chapter 854 of the Maryland Statutes, to which I will devote 20 minutes, and paragraph (D) of the same Statute to which I will devote 10 minutes, under the commerce clause and the supremacy clause of the Constitution, respectively.

Paragraph (B) of the Maryland Act provides that "After July 1, 1974, no producer or refiner" may open a new service station in Maryland operated by company employees.

And paragraph (C) provides that: After July 1, 1975, no producer or refiner may operate an existing service station by company employees.

As of July 1, 1974, only six percent, 233 out of 3800, of the service stations in Maryland were company operated, and only 197 of those by refiners. No crude oil has ever been produced in Maryland, and it is unlikely that any ever will be.

There is no refinery in Maryland, and the State's ecology procedures are such that it is unlikely that there will be any refinery in Maryland, at least in this century. And thus all gasoline sold in Maryland is imported into the State in interstate commerce and all refiner marketers in Maryland are out-of-State firms.

To make the purpose of paragraphs (B) and (C) crystal-clear: In 1975, the Legislature enacted an amendment to the statute, which expressly provided that all service stations must be operated by dealers.

The statute's legislative history, the proceedings in the State courts, and the briefs in this Court all make crystal-clear that the purpose of the statute is to insulate major brand dealers from the competition of more aggressive, lower-priced merchants and to insure that Maryland motorists and those who travel into the State will not receive the benefits of service stations that are company operated and are price cutters, who sell at lower prices, and to eliminate that competition from the service station business in Maryland.

The two alleged purposes which the Maryland Court of Appeals gave to sustain the validity of the statute are: first, that it will prevent a monopoly, although they concede that this service station business is highly competitive and many Maryland as well as federal laws already prohibit monopolies in any line of commerce; and, secondly, that the statute would permit the fair and equitable rationing of gasoline in the event of emergencies, although paragraph (F) of this very Act so provides, and in 1973 the Congress passed the Emergency Petroleum Allocation Act under which the federal government, from that day to this, has allocated gasoline supplies to service stations.

QUESTION: Mr. Simon, there had been a declining number of retail outlets in Maryland, hadn't there, at the time this law was passed?

MR. SIMON: Yes, Mr. Justice Rehnquist, and, as I will point out later, the number of service stations of any kind and all kinds, whether or not this Act prevails, will continue to decline because the economics of high prices in gasoline going from the 25-cent range of the Fifties to the 60 and 65-cent range of current prices makes it essential that we have high-volume stations that can operate more economically and not have the inefficient marginal stations. So there will be a diminution of stations, no matter what.

QUESTION: You say it makes it essential, essential from whose point of view?

MR. SIMON: First, from the point of view of he who wants to compete for the motorist's business; and secondly for the motorist who wants to get the benefit of competition in the sale of his gasoline.

QUESTION: Well, so essential that it can override Maryland policy on that point?

MR. SIMON: Well, as I understand the decisions of this Court, a statute which burdens interstate commerce will be sustained only if the local benefits are so persuasive and so important as to override the restraint on interstate commerce which they impose. And we submit that this mere matter of fair allocation, which is already being done by the federal government and preventing monopoly which is already prevented by many statutes, does not justify the restraint on competition which this statute imposes.

And may I add, Mr. Justice Rehnquist, I don't suggest for one instant that there will ever come a time when independent major-brand service station dealers will go out of business. The fact is there are many people, I might add, including me, who would rather pay a higher price for the extra service and the personal attention you get in a conventional major-brand station. But there are also a lot of people who would rather forego those services and go into a low-priced no-service station and pump their own gas and save as much as eight cents a gallon.

And what we advocate is that free competition should prevail, that the motorist make the choice, and the mix of how many of each there will be will be decided by how many people want to go to each type of station.

QUESTION: Well, you advocated before the Maryland Legislature and they turned you down, and the question now, I suppose, is whether you have a constitutional claim.

MR. SIMON: Exactly.

QUESTION: Well now, traditionally, though, have not the price cutters -- so they were called by the majors -- have not the price cutters, the small independents who just bought their gas catch-as-catch-can, than the people who supplied a major share of price competition in the market -- I am not speaking of Maryland specifically, but of the country generally.

MR. SIMON: No, Mr. Chief Justice, the motorist may not know it, but the large share, certainly not all of it but over 50 percent, of the price-cutting gasoline is supplied by integrated refiner-suppliers. Ashland Oil is one of the appellants in this case. Ashland sells under its own brand in its home State area of Kentucky, but in Maryland it sells under the names "Bi-Lo", "Hi'Fi", "Payless", "Redhead", names that one would never identify with the Ashland Company, and those stations sell on a purely price basis, saving the customer a great deal of money.

The undisputed testimony below was that those stations can't operate unless the management can control not only operations of the station but the price, because price is their key factor. And those Ashland stations under those brand names --

QUESTION: When you say the management, you mean the man who is running the station?

MR. SIMON: Yes, sir. Tell them exactly how to run it so as to achieve the economies of scale, and tell them what to price.

QUESTION: Aren't there some areas where they buy the gas directly from the big companies?

MR. SIMON: I have no doubt that that is true, Mr. Justice Marshall, --

QUESTION: Delivered at night.

MR. SIMON: Sir?

QUESTION: Delivered at night in unmarked trucks.

MR. SIMON: Oh, I don't believe that there's any secret made about it, where it occurs.

QUESTION: That's right.

MR. SIMON: There is no secret about it where it occurs.

One of our problems is finding exactly just what is a major, but there are many companies that I think everybody would call majors who sell 50 percent of their gasoline for resale unbranded.

QUESTION: Right. Is that in the record?

MR. SIMON: No, sir. But it is in the record that Ashland, which has five refineries around the country, and it is in the record that there are 37 refiners in the United States who sell gasoline through service stations that they control, and give little or no service, pump your own gasoline, you get a low price. Five of those people do business in Maryland, and would be driven out of the State by this law, and the other 32 foreclosed from Maryland.

And the best example I can give you is the Hudson stations. There are 315 Hudson stations in the United States. In 36 States. Five of them in Maryland. Hudson is shown by this record to be one of the most vigorous price cutters in the country. The state, in its brief to this Court, refers to Hudson as one of the pure independent marketers. And yet, since the trial of this case, Hudson has acquired a refinery, and now that they have enhanced their position to compete, as Mary Hudson, the president of that company, testified when she appeared on the stand in this case. She said, "When I buy that refinery, if this law is upheld, I'm going to be driven from this State."

And so you have the most vigorous competitor in the country in the selling of low-price gasoline who, because she was successful enough to integrate backwards and get a refinery, is now driven from Maryland.

QUESTION: Well, is the State not entitled to prefer independently operated stations to the kind of perfect model of competition, without violating the commerce clause?

MR. SIMON: We say no, Mr. Justice Rehnquist, no more than North Carolina was entitled to prefer North Carolina apples over Washington apples in the Hunt case.

QUESTION: Well, Maryland isn't preferring Maryland oil over other oil in this case.

MR. SIMON: No, but Maryland is preferring Maryland dealers, that the pinch on competition, the squeeze on interstate commerce comes at the retail level, and Maryland is preferring the local retailers against interstate sellers of gasoline at retail.

QUESTION: But are not the local retailers characteristically the price cutters?

MR. SIMON: No, sir, they are the high-priced people.

The local retailer, Mr. Chief Justice, is the man who say --

QUESTION: Perhaps we are not on the same wave length in terms of what they're called. I'm talking about the individual station, the independent who buys his gas wherever he can get it, including, as you suggest, 50 percent of the major producers' output frequently goes to these independents and it's sold without a brand name.

Now, do those people, selling with no brand name except one they invent, but may sell five different kinds of gasoline over a period of months under that name, are they not the price cutters in Maryland, as they are in most other States?

MR. SIMON: I can't answer your question yes or no, Mr. Chief Justice, because the people that you obviously think, as you drive down the street, as an individual station who is a price cutter, is more likely than not a part of a large chain. For example, I would assume that you would never have thought that a Bi-Lo station or a Redhead station on New York Avenue here, just beyond the bridge, is a station owned by Ashland Oil, which is a very large company and has hundreds of stations around the country under various names, selling low-priced gasoline with minimum service.

And what this Act is designed to drive out of Maryland is those people who are the majority of what you had described as the independents. They are independents, but they are chains of independents. And what the Act is designed to protect is the major-brand dealer who sells at four to eight cents a gallon above these price cutters, selling his well-advertised brand, fixing your tire, changing your spark-plugs, giving you many other services, and, because of those services, feeling that he's entitled to a higher price.

But those are the local people who have the local political influence that permitted -- that resulted in this statute being passed. And the --

QUESTION: Well, why is Shell appealing here? I mean, Shell strikes me as a prototype of the kind of person that you say would be protected by this Act.

MR. SIMON: Mr. Justice Rehnquist, it can be argued that Shell, that I represent, and Exxon and their like, would short-term be benefitted by driving out these large chains of price cutters. And I think in one sense they would.

They would also be disadvantaged, because it's important to them to be able to innovate with new types of stations, automated stations and many other kinds of stations that are new and innovative. But the real reason that Shell and Exxon and the likes of them oppose this statute is that this industry is over-regulated now. There is relatively little area of competition left, and what competition remains, we want to preserve. Because we can live with vigorous competition, but if regulation gets to the point where there is no competition, no oil company, in my judgment, will survive as a free enterprise company and we'll have public utility regulations.

QUESTION: Do you think the State of Maryland would be prohibited by the commerce clause from making the selling of gasoline a State monopoly?

QUESTION: As Virginia does with liquor?

MR. SIMON: Yes, sir. I hadn't thought of that question, Mr. Justice Rehnquist, but I would say that they would be.

QUESTION: They couldn't do what Virginia has done with liquor?

MR. SIMON: I think not, in my -- liquor is a particularly different question, because the amendment which repealed the Volstead Act gave the States a great deal of power over local distribution of whiskey. Indeed, the Constitution, under that -- I forget the amendment, but it's the amendment that repealed the Eighteenth Amendment; even gives them the power to have local option with one county prohibiting sale altogether, and another county permitting it only at tables, and another county at State monopolies. And so I think that the liquor situation would not be applicable and you could not have --

QUESTION: Mr. Simon, on the question of the interest of these big companies, is there anything in the record about the problem between leased stations and company-owned stations in Maryland?

MR. SIMON: No, sir. Only the fact that less than five percent of the major oil company stations in Maryland are company operated, and 95 percent of them are --

QUESTION: And nothing there about the problems that I read about in the newspaper?

MR. SIMON: No, sir, that is --

QUESTION: Mr. Simon, excuse me, would you tell me how the -- you're arguing the burden on interstate commerce. How does it burden interstate commerce? All the gas that may want to come into Maryland from out-of-State will still come.

MR. SIMON: Yes, sir. But it burdens it in two respects, Mr. Justice White. One, out-of-State refiner markets will be denied access to this market.

QUESTION: Well, which market?

MR. SIMON: The Maryland market. They will be prohibited from selling at retail in Maryland.

QUESTION: So how does that burden interstate commerce?

MR. SIMON: Because it denies them access, as this Court has said many times, that --

QUESTION: Well, let's say you have a company-owned station and you move -- you are supplying your own stations, and you have storage tanks at the station and you keep them full; and are you suggesting -- I guess you are -- that the sale by your company-owned station out of that supply, that storage supply, to a motorist is interstate commerce?

MR. SIMON: Certainly affects interstate commerce, and --

QUESTION: Well, it isn't, though, is it?

MR. SIMON: Well, there are many Sherman Act cases involving retail sales of gasoline where this Court has held that the --

QUESTION: I know, but that isn't -- that may be a Sherman Act matter of effect, but I'm talking about the constitutional burden on interstate commerce.

MR. SIMON: Well, the burden on --

QUESTION: Just because something affects interstate commerce doesn't mean it's an unconstitutional burden.

MR. SIMON: No, sir. No, sir. But may I give you this example? Just last week in Raymond Transport vs. Rice, this Court held that Wisconsin could not constitutionally limit Raymond Transport to 55-foot transports.

Now, there isn't any question they could use 55-foot transports to go through Wisconsin. Wisconsin didn't say "you've got to stay out of the state". But this Court said it was a burden on interstate commerce to tell them they couldn't go through Wisconsin with 65-foot transports, or anything over 55-foot, because Wisconsin was unable to show any local benefits that outweighed the restraint of the economies of operation and the --

QUESTION: Well, let me ask you: Are there any examples -- and I suppose there must be a lot of them -- where the out-of-State refiner or wholesaler sells directly to a consumer, other than through a company-owned station?

MR. SIMON: If you mean consumer literally, yes, Mr. Justice White.

QUESTION: Say there's a big truck line that uses --

MR. SIMON: Oh, yes.

QUESTION: -- gasoline, so you send your supply, your tank wagons directly to the -- from out-of-State directly to them?

MR. SIMON: Yes, sir. The Shell --

QUESTION: Does this law forbid that?

MR. SIMON: No, sir, this law relates solely to dealers, Your Honor. This law --

QUESTION: So you can be a dealer if you sell -- why does that exempt that?

MR. SIMON: This law applies solely to service stations, retail service stations, and --

QUESTION: Yes, but you're selling at retail to this truck line.

MR. SIMON: Yes, sir. But the law does not prevent it. The law would --

QUESTION: Well, then I ask you again: how does this burden interstate commerce? It just --

MR. SIMON: It burdens interstate commerce, Mr. Justice White, in two ways: one, it prevents an out-of-State refiner from operating a retail gasoline station --

QUESTION: And selling direct to the consumer.

MR. SIMON: And selling direct to the consumer.

And, secondly, it denies the consumer the benefits of competition furnished to him by out-of-State refiners.

Let me give you the most ridiculous example. Under this law, Sears, Roebuck will continue to be perfectly free to have a gasoline station in conjunction with a Sears, Roebuck store selling gasoline at retail. But Montgomery Ward will be prohibited from having the identical facilities. Because Montgomery Ward is a subsidiary of Mobile Oil Company, and therefore Montgomery Ward can't have that retail station in front of their store, but Sears, Roebuck can.

QUESTION: But the commerce clause isn't basically to protect consumers, it's to prevent barriers erected by one State to people who want to do business in it on the same terms as people who are already there.

MR. SIMON: Exactly, Mr. Justice Rehnquist, I couldn't have said it better.

We want to do business in Maryland at retail on the same basis as the local retail dealers. That's exactly what we want. We want to do business in retail on the same basis that they do. And this Act says we can't do it.

QUESTION: Well, all you have to do is sell your gas to an independent retailer.

MR. SIMON: Oh, but then we can't do business at retail. It denies us the right to sell gasoline at retail to motorists.

QUESTION: Well, critical to your argument, then, is that selling gasoline at retail to motorists in Maryland is a matter of concern to interstate commerce?

MR. SIMON: Yes, Mr. Justice White, because --

QUESTION: Within the meaning of the constitutional clause.

MR. SIMON: And having in mind that there are no refineries in Maryland, it's all out-of-State gasoline, having in mind that these refiners, like Ashland, sell a very substantial part of their refinery runs of gasoline through their own retail stations on a basis of low price, and they outsell these major-brand dealers four and five to one, because of their low prices. And this law would say, "You've got to get out of the State, and you either close down that station or lease it to someone, and have no control over the manner in which he operates."

And we say that's a restraint on interestate commerce, exactly like in Pike vs. Bruce Church, exactly like in Hunt vs. Washington Apple, exactly like in Raymond Transport vs. Rice, exactly like in Cottrell vs. A&P, all very recent cases of this Court, all to the same effect.

Now, if I may, I would like to switch to paragraph (D) of the statute, which we attack on the bases of its being repugnant to and frustrating Sections 2(a) and (b) of the Robinson-Patman Act.

QUESTION: I take it your only attack on the sections you've been talking about is the burden on interstate commerce?

MR. SIMON: Yes, Your Honor.

QUESTION: You're not claiming a privilege and immunity to be able to seel at retail if Maryland people can sell at retail?

MR. SIMON: No. No, Mr. Justice White.

QUESTION: Well, one of the appellants is relying on the due process clause of --

MR. SIMON: Yes. Continental relies on the due process clause, but I believe, Mr. Justice Stewart -- and their basis is that, as to (C) which applies to stations already in existence. They say, "If you don't want us to build any more, we can live with that; but if you want us to tear down our existing stations, that deprives us of due process."

QUESTION: Right.

MR. SIMON: That is, I think, another way of saying what I have said under the commerce clause. But --

QUESTION: But it is another argument under the -- under a different provision of the Constitution?

MR. SIMON: Yes, it is, Mr. Justice Stewart.

MR. CHIEF JUSTICE BURGER: Mr. Simon, we've been taking up a good deal of your time, and perhaps we'll do the same with your friends, we will enlarge the time for ten minutes for you, and that will enable the Attorney General to give his colleague equal time, if he wishes to; you will each have an additional ten.

MR. SIMON: Thank you, sir.

On paragraph (D), the Maryland statute provides that if a supplier reduces his price to one customer, one dealer customer, he must grant that price reduction to every dealer in the State. And that means if you have a competitive controversy in Baltimore, which requires you to reduce your price in Baltimore, you must make that price reduction throughout the entire State of Maryland.

And we believe that to require a supplier to make a Statewide price reduction, if he grants a local, individual price reduction, is contrary to the pro-competitive rights which this Court has held a seller has under Section 2(b) of the Robinson-Patman Act to meet competition in individual competitive situations, and must therefore be invalidated under the doctrine of Perez vs. Campbell and Jones vs. Rath Packing Company.

The Act, Section (D), also is in conflict with Section 2(a) of the Robinson-Patman Act, which makes unlawful price discriminations only where they injure competition. This requires the Statewide lowering of price without regard to injury to competition. And Section 2(a) makes unlawful a primary line price cut, which injures a competitor of the seller, which is likely to be triggered and caused when we reduce our price Statewide and thereby extend a Baltimore price war to Cumberland, Maryland, let's say, where there had been no price war previously.

QUESTION: Mr. Simon, can you give me an example of compliance with the Maryland statute that would violate the Robinson-Patman Act?

MR. SIMON: Yes. The example I just gave, Mr. Justice --

QUESTION: If there's a uniform price throughout the State, you don't have a price discrimination.

MR. SIMON: Well, let's assume for the moment that you have a price war in Baltimore --

QUESTION: Whatever caused it, as long as your price is uniform throughout the State, you don't have a price differential to even trigger to it.

MR. SIMON: Well, you have two problems, Mr. Justice Stevens. One is that Maryland borders the District of Columbia, Virginia, --

QUESTION: Are you talking about differential between the State of Maryland and nearby States?

MR. SIMON: Yes, and I'm talking about Silver Spring, too.

QUESTION: Well, don't you always have, where you have different taxes and that sort of thing, isn't there typically a price differential when you cross State lines?

MR. SIMON: There are, there are typically differentials. But where a price war gets the differential to six, seven, eight, nine cents a gallon, that is not the kind of differential that is typical, and you can have the problem of a differential with a dealer across the street at the State line, particularly in the State of Maryland, which borders so many States, and where there are so many cities, like Washington and Wilmington, that are literally across the street from Maryland.

QUESTION: Only a remote possibility, isn't there, six or seven-cent differential between a uniform price throughout the State of Maryland and prices across the State line?

MR. SIMON: Well, I must confess to you, Mr. Justice Stevens, that I am positive in my own mind that the authors of this bill intended to make giving a price assistance to a dealer so costly that it would never be done.

QUESTION: Doesn't the State have the power to do that?

MR. SIMON: Well, --

QUESTION: Say that in Maryland you've got to charge uniform prices? And if you do charge uniform prices, you don't violate the Robinson-Patman Act.

MR. SIMON: Not at all. It is contrary to the philosophy of the Robinson-Patman Act. The Robinson-Patman Act, in the Standard Oil case, was --

QUESTION: Well, contrary to 2(b) of the Robinson-Patman Act, but the basic philosophy of the Robinson-Patman Act is very similar. It also is an anti-competitive statute. I don't like it at all, but I don't see the inconsistency.

MR. SIMON: But, Mr. Justice Stevens, I'm sure you know that this Court has many times sought to balance the anti-competitive problems of Robinson-Patman with the Sherman Act, and this Court's opinions in Robinson-Patman have sought to strike a fine balance between the anti-competitive aspects of one and the pro-competitive aspects of the other. And everything this Court has done in that regard is wiped out by Marcyland, by saying, "We just aren't going to have competition in this State in the sale of gasoline. We're going to have one price."

QUESTION: Supposing Maryland said gasoline will be sold at 75 cents a gallon in our State, period. Would that be unconstitutional?

MR. SIMON: Oh, I think so. I think that's exactly what this Court said in Mr. Justice Burton's opinion in the first Standard Oil case, that it would not construe Robinson-Patman as permitting. The Court said in the first Standard Oil case that Robinson-Patman was intended to protect competition not competitors, that Robinson-Patman was intended to promote competition not prevent competition, that Robinson-Patman would not require a seller to ruinously lose his biggest customer because he couldn't meet the competition, and then be forced to raise his price to remaining customers to make up for that volume.

You will recall there are many discussions in Mr.

Justice Burton's opinion there, in which he says, "We don't construe the Act as a congressional intent to eliminate this competition." Now, you see, Congress --

QUESTION: Well, you're saying that although Congress says you don't violate the Robinson-Patman Act if you lower your price to meet the price of the competitor, you're saying that a State may not have a contrary rule? A State may not say that "you may not lower your prices to meet the price of a competitor"? Are you suggesting that?

MR. SIMON: Yes, I believe, as I say, that frustrates the congressional intent --

QUESTION: Well, it was just saying -- all Congress has said is thatyou don't violate the Robinson-Patman Act if you do that.

MR. SIMON: But the Robinson-Patman Act represents, Mr. Justice White, a congressional policy.

QUESTION: It doesn't say,Robinson-Patman doesn't say you have to.

MR. SIMON: No, sir, but --

QUESTION: Well --

MR. SIMON: -- but in 2(b) this Court --

QUESTION: And the State just says you can.

MR. SIMON: But in 2(b) this Court has held that Congress gave sellers an absolute right to reduce their price to meet competition.

QUESTION: Well, a minute ago you said how Robinson-Patman had been so tempered by the Sherman Act, and now you say it's a fundamental congressional policy.

MR. SIMON: Well, I don't suggest for a minute that this Court has amended the Robinson-Patman Act in any of its decisions. What I said to Mr. Justice Stevens was that in interpreting the Robinson-Patman Act, this Court has consistently tried to reconcile it with the Sherman Act, and to give it that construction which would permit both to live side by side. And that national policy, which is reflected in the Robinson-Patman Act, guarantees one the right to reduce his price in individual competitive situations to meet the lower price of a competitor, which this statute would take away from him.

QUESTION: It simply says he doesn't violate the Robinson-Patman Act if he does that.

MR. SIMON: Yes. And that is a statute which represents congressional policy and which the State of Maryland, we say, cannot enact a law under this supremacy clause to deprive us of the rights given by the Robinson-Patman Act.

QUESTION: Well, you say, then, the Robinson-Patman, which the Court has viewed as kind of an intrusion on the Sherman Act, nonetheless preempts the field when it comes to State legislation.

MR. SIMON: I would not go so far as to say the Court has viewed it as an intrustion. I know that what Mr. Justice Stevens was referring to was that many commentators have said the Acts are inconsistent. But this Court has never gone that far. And all that I can say this Court has done is say that, "we're going to construe Robinson-Patman consistent with the policy of promoting competition."

And I say that is federal policy which is frustrated by this Maryland statute.

QUESTION: Mr. Simon, let me put it this way: -- because I'm slightly confuse -- are you arguing that there is a constitutional right to engage in conduct that is protected by the 2(b) defense?

MR. SIMON: Well, I think the short answer is yes; a little longer answer is that under the supremacy clause of the Constitution we say that the State of Maryland cannot deprive us of a competitive right which the Congress has granted under 2(b), which this Court in 1951, in Standard Oil, said was an absolute defense to a charge of price discrimination, no matter how serious the results -- the harm and the injury were that it caused.

QUESTION: Well, it just seems to me that you're arguing that there is a constitutional right to engage in something that's protected by a 2(b) defense. I'm not sure that that follows, but maybe I misunderstood your argument.

MR. SIMON: Well, I think, Mr. Justice Blackmun, we have exactly the problem that was in Perez, where the Bankruptcy Act said that if you go through -- you're discharged in bankruptcy, you don't owe anybody any money any more. And the State of Arizona which says if you have a judgment against you for negligence in operation of an automobile, you may not get a driver's license until you pay that judgment.

And this Court held, in Perez, that the Arizona law was unconstitutional because it conflicted with the federal Bankruptcy Law which said that once you've gone through bankruptcy, you didn't owe the money. The same thing is true in the Rath Packing case decided just this last term by this Court, where California passed a statute saying that packaged meats had to be measured by their weight at the place where they were sold. And federal law said packaged meats had to be measured by their weight at the place where they were packed. And of course, depending on the moisture of the climate, the meat will either gain weight or lose weight after it leaves the factory, and the California law was held invalid because it conflicted with the federal law and one could not comply with the federal law and the State law, as --

QUESTION: Yes, but the Robinson-Patman Act doesn't require anybody to lower his price to meet a competitor.

MR. SIMON: But the one thing, I believe it does --

QUESTION: And all it does is permit them to do it without violating the Robinson-Patman Act.

And you're saying Maryland cannot prevent meeting competition that way.

MR. SIMON: But federal law, federal policy which is reflected not only in the Sherman Act but in the Robinson-Patman Act as well, is pro-competition, it's more competition. And anything that says if you reduce your price to one customer in Balitmore you've got to reduce it to every customer as far west as --

QUESTION: That certainly is the effect of the law, that's right.

MR. SIMON: It's anti-competitive, Mr. Justice White, it seeks to make the price of reducing your cost --

QUESTION: It costs you, it's really going to cost you.

MR. SIMON: It seems to make the cost so high --

QUESTION: That you're not going to lower your price.

MR. SIMON: -- that nobody will do it. And certainly if they passed the law and said you couldn't reduce your price, that would be unconstitutional.

QUESTION: Would you mind if I went back to your first argument just for a moment?

MR. SIMON: No, sir.

QUESTION: I take it the Maryland law does not forbid just change of wholesalers, a wholesaler who owns a chain of service stations, to operate in Maryland.

MR. SIMON: As introduced, it did.

QUESTION: Yes, but it doesn't now.

MR. SIMON: And the wholesalers have a --

QUESTION: Well, let's assume -- well, however it came about, let's assume I have a wholesaling chain of service stations, the headquarters are in Pennsylvania, and they buy their gasoline from producers or refiners and have their own delivery system, and outside the State, into Maryland, they have a string of stations in Maryland. Now, that's not forbidden by this?

MR. SIMON: So long as you do not integrate backward and buy a little refinery, you are not.

QUESTION: So it's a discrimination against producers and refiners, it's not a -- it can't be -- why does it become a burden on interstate commerce?

MR. SIMON: Because --

QUESTION: All that kind of commerce is going to --

MR. SIMON: Because the record shows that it is the out-of-State refiners who produce the competition in the marketplace in Maryland, and that it is that very competition which the Legislature sought to eliminate to protect the high-priced major-brand dealers, so they wouldn't have to compete with these lower-priced people.

QUESTION: Well, interestate -- the Constitution doesn't say that every burden on competition is bad, it says they -- it forbids burdens on interstate commerce.

MR. SIMON: Yes, sir, but I can only say, Mr. Justice White, that this burden is far greater than that one in Hunt or in Raymond Transport or in Cottrell or in the Bruce case, the cantaloupe case in Arizona. There is far greater restraint on competition here than in any of those cases.

QUESTION: Well, but they weren't -- they didn't turn on competition, they turned on commerce, didn't they? The movement of --

MR. SIMON: Right. But in each of those cases the restraint on commerce was much less than that here. In the Rice case last week, as I say, all it required is that the fellow runs a smaller truck, it didn't say he couldn't run through there, it just says he's got to use a 55-foot truck going through there.

QUESTION: But, in the long run, the same amount of gasoline is going to come in and out of -- going to come into Maryland, isn't it?

MR. SIMON: But it's going to cost the Maryland motorists a lot more money, a lot more money.

QUESTION: Well, that may be.

MR. CHIEF JUSTICE BURGER: You're getting into your rebuttal time now.

MR. SIMON: I appreciate the extra time, and I realize I have extended it. Thank you, Mr. Chief Justice.

QUESTION: May I ask you one question before you sit down? Do you happen to recall if during the -- back in, I think, either the Thirties or the Twenties, when a lot of States were enacting legislation prohibiting chain stores from coming in. were those statutes ever challenged on this sort of a ground, do you know?

MR. SIMON: No, sir, at least not in the oil industry.

QUESTION: I'm talking about the, you know, the retail grocery business, largely.

MR. SIMON: I do not know of any challenge. I do know that there was a graduated tax on the number of units you have.

QUESTION: Yes.

MR. SIMON: And I do not know whether they were -- I remember them well, but I don't --

QUESTION: I know you would, that's why I asked you. Thank you.

MR. SIMON: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney general.

ORAL ARGUMENT OF FRANCIS B. BURCH, ESQ.,

ON BEHALF OF THE APPELLEES

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

I think that Mr. Justice Rehnquist and Mr. Justice White have really hit the nail on the head. This is not a case of any burden on interstate commerce. The Maryland statute simply says that an independent refiner, marketer may not operate at retail. That's all it says. It doesn't say anything about gas going into or out of Maryland. The same amount of gas is going to come into Maryland, whether the company-operated store operates or not.

QUESTION: Well, are you suggesting that engaging in business at retail is not commerce?

MR. BURCH: No, I am not suggesting it's not commerce, I'm just simply saying that it certainly comes to rest when the gas comes into Maryland.

It may still be in commerce, in the sense that you go through commerce from the very beginning, right up to the nozzle. But it is not a burden on commerce, it is not commerce within the sense that decisions in this Court have addressed itself to.

As a matter of fact, both the lower court in this case and the Court of Appeals of Maryland have found that there is no burden on commerce, and indeed said that if there is any burden at all it is purely speculative, and is so minimal and so infinitesimal as really not to have any burden on commerce whatsoever.

Now, I want to go to, if I may, remarks that Mr.

Simon made with respect to the background of this Act. It is far deeper than he would have this Court believe.

Back in 1973, we had a very serious problem with the allocation of gasoline during the gas shortage. The company-owned stations were getting all of the gas that they needed. The independents were not getting the gas. There was one chain of independent stations, I think by the name of Midway, because it was relying upon the spot market, which is the gasoline that is delivered either by the majors or by the independent refiners to those who are in the marketplace in competition with them. They didn't give them the allocation of gas to which they were otherwise entitled, as they had in the past. They saved it all for themselves.

They saved it first for their company-operated stores, and then, after that, for their independent dealers.

QUESTION: Mr. Attorney General --

MR. BURCH: They saved it for their company-operated --

QUESTION: Mr. Attorney General, supposing that Maryland noticed that the Hudson Company, for example, had gotten a very large share of gas when it was in short supply, could they pass a statute and say that Hudson should not be permitted to operate in the future because in the past they got too much gas?

MR. BURCH: Because of what, sir?

QUESTION: Because in the past they got too much gas when it was in short supply.

MR. BURCH: You might say there's an area of discrimination there.

QUESTION: Would that justify -- pardon me?

MR. BURCH: You might approach a possible area of discrimination there. But this is not the situation we had in Maryland.

QUESTION: Well, that's what I thought you were saying. I thought you were saying these people got too much gas in 1973, so we won't let them do business here any more.

MR. BURCH: No, they were saying -- they had control over the aberration of the truly independent. Because they are the ones who supplied them the gasoline. The independent doesn't have the refiner. The only place he can get his gasoline is either from the majors or from the independent refiner marketer. He can either buy it at wholesale, or he can buy it in the spot market. If he buys it in the spot market, it then becomes the cheapest price that that gasoline will be sold at the wholesale level. Much cheaper in many instances than the majors themselves, or the independent refiners will be able to sell it to their dealer operators.

QUESTION: Well, all I'm questioning is what is the relevance to this allocation problem? You don't have gas in short supply now, do you?

MR. BURCH: The relevance is that I was getting myself to the point of saying that because of this the Governor of the State of Maryland, trying to determine whether there was truly a shortage of gasoline in Maryland, as had been alleged, asked the Comptroller of the State to do an analysis, to do research on the subject and send out questionnaires. When the Comptroller did that, he went into other areas, indeed, dealing with pricing, the price controls, the price fixing. And as a result of that he prepared a report which was submitted to the Governor.

He also sent out questionnaires to the major oil companies and the independent refiner marketers, and again asked them with respect to the practices. On the basis of all that information that came in, he then submitted it to the Governor, and the Governor then had -- he recommended that the Comptroller had a bill prepared to correct the situation: one, to maintain competition in the marketplace; and, two, to provide for appropriate allocations.

The Legislature held hearings, there were approximately 15 witnesses, there was a hearing in the Senate, there was a hearing in the House. About half of the witnesses were from the industry and the other half were for others who said that, in effect, the Act was good, where the industry said the Act was bad.

After that, and after the Senate passed this bill without a single dissenting vote, and after the House passed the bill by a clear majority, before the Governor signed the bill, because of the complaints of the industry, he said, "I will have something that I very rarely ever do, I will have another hearing", and he sat there and had a hearing with again about 15 witnesses that came in, and they addressed themselves to the problem.

And the Governor was persuaded, as was the Legislature, that in order to prevent the problems with respect to allocation in the State of Maryland, and in order to prevent the problem with respect to pricing in the State of Maryland, it was desirable that the bill be enacted into law, and he signed the bill.

Now, if, indeed, there is any contact with commerce whatsoever within the framework of this case, all we have to do is look at Raymond, which was decided a week ago today, and all we have to do is look at the Brotherhood case and the Pike case, and all of the cases, and the one thing that comes out clearly with respect to those cases is, as the Court said in its concurring opinion in Raymond, if safety justifications are not illusory, if they are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.

A suggestion has been made, well, there are other ways of solving this problem.

QUESTION: Well, Maryland isn't advancing a safety justification here, is it?

MR. BURCH: I don't think it makes any difference. I think what the Court has said and what the opinion said in this -- the concurring opinion in effect said was that the same rule applies here as we have always enunciated it, as we enunciated it in Pike and Bruce, as we enunciated it in the Brotherhood case; and that is, unless there is an illusory reason given, which does have a punitive effect in so far as the local community is concerned, unless it is completely illusory and unless there is a tremendous burden on commerce, we would not substitute our judgment for that of the Legislature.

QUESTION: Well, you wouldn't suggest for a moment there's not an effect on interstate commerce?

MR. BURCH: I would say if it has any effect whatsoever, and I think the Court of Appeals in the --

QUESTION: Well, I know, but you wouldn't say there isn't any effect?

MR. BURCH: It is so minimal that it is hardly worth talking about.

QUESTION: Well, you wouldn't say -- do you deny that Congress, by a law, could tell Maryland not to do this?

MR. BURCH: Tell Maryland not to --?

QUESTION: Do you think that they could preempt this law of Congress by -- in the name of regulating interstate commerce?

MR. BURCH: I have serious reservations in a situation such as this, because there is not that significant amount of commerce.

QUESTION: Do you think Congress could regulate the sales of gas at retail, the price?

MR. BURCH: Yes, I believe under the --

QUESTION: You know they do, don't they?

MR. BURCH: And I have -- I probably would retreat somewhat from the point I just made.

QUESTION: Yes, I would think so.

MR. BURCH: I think Congress does have the power, under the commerce clause, so long as the retail --

QUESTION: The retail sale of gasoline does have an effect on interstate commerce.

MR. BURCH: Yes, I would say so.

QUESTION: But that doesn't follow that this Maryland law burdens interstate commerce from the meaning of the Constitution?

MR. BURCH: Exactly, it doesn't. It does not indicate that it /burden interstate commerce. It doesn't burden commerce. It's a lot of elaborate, if I may be excused the use of the word, it's a --

QUESTION: Well, do you suppose -- what do you have? Do you have 3,000 -- how many gas stations are there?

MR. BURCH: There are about 35, 36 hundred.

QUESTION: Thirty-six hundred. Supposing Maryland passed a statute that says "we will only have a thousand gas stations from now on"; would that burden commerce?

MR. BURCH: I'm not sure that it would.

QUESTION: Suppose it said a hundred?

Supposing it said the price of gas would be ten dollars a gallon, would that burden commerce?

MR. BURCH: I think it would reach a point when it becomes so --

QUESTION: So anti-competitive, that it affects the flow of commerce.

MR. BURCH: And reaches the point where it would affect the gas coming into the State, that then it becomes a true burden on commerce.

QUESTION: Isn't it almost inevitable --

MR. BURCH: It's a matter of degree, and that's what this Court has said.

QUESTION: Isn't it almost inevitable that if you get the price high enough you will restrict the flow, restrict the quantity that comes into the State?

MR. BURCH: Yes, but I don't want this Court to --

QUESTION: Well, unless you assume that the demand is inelastic, totally inelastic.

QUESTION: There is no such thing.

[Laughter.]

QUESTION: The history in the last three years shows that the demand for gasoline is pretty close to it.

QUESTION: But not totally inelastic, I don't think.

MR. BURCH: I wouldn't want this Court to have the impression from what has been said here today that because of the Maryland statute the price of gas is going to go up to the consumer. Quite to the contrary, the --

QUESTION: But isn't it perfectly clear that if you make it illegal to cut prices in individual situations, the price level is going to stay higher than it otherwise would?

MR. BURCH: It is not so. Under (B) and (C) -- and Mr. Wilson will address himself to subsection (D), dealing with the Robinson-Patman Act and the voluntary allowances. But under (B) and (C) it doesn't have anything to do with what the price of gasoline will be, except that it assures a free market, or insures a free market.

QUESTION: But doesn't the record -- doesn't the stipulated record show that there's vigorous competition anyway?

MR. BURCH: There's vigorous competition up to a point. The independent marketer refiners are what they call proved efficient refiners. They rely upon the major oil companies to get their crude petroleum in order to refine it. And the major oil companies have an economic control over them. If they get out of line by raising their prices, or cutting their prices four, five, six or seven cents, all of a sudden they're going to find that their crude petroleum supply dries up and they're not going to get the crude in order to refine it and in order to sell it in the marketplace.

The differential is not four, five, six or sevent cents, as Mr. Simon said, I think the record will indicate that the differential among the independent refiner marketers in the marketplace in Maryland is between 1.7 and 2.2 cents per gallon. And they maintain that, they stabilize the market. What did the independent refiners do in Maryland within the past five years?

I'll tell you what they did. They used their company-operated stations to control the price. They had it under price control. They also became involved in relative price fixing, with respect -- at least one of them did, Crown Central Petroleum -- with respect to the dealers and not company-operated stores, but the dealers that were handling their product. And had it not been for the fact that the dealers were involved, it would never have been picked up that Crown Central, Ashland, Kayo, PMC, and all of them were engaged in a horizontal pricing conspiracy in order to maintain a stabilized level of pricing so that they wouldn't be cutting each other up.

And the District Court for the United States District Court of Maryland found each and every one of them, other than Continental, I believe, and Crown Central Petroleum, found them guilty of horizontal price fixing and fined them the maximum fine, 17 billion --

QUESTION: Was this statute -- is this statute in the form of legislative punishment for what the industry did?

MR. BURCH: No. Our Act was passed before the Legislature -- I think before they were found guilty of the horizontal price fixing.

But I'm simply saying 17 billion gallons of gasoline had arbitrary pricing because of the horizontal price conspiracy which was made effective through the vertical price control, through the stations.

Also, what does the effect of the statute have?

QUESTION: Well, Mr. Attorney General, let me be sure I understand your argument. There are how many company-owned stations in the -- I mean, how many refiner and producer-owned stations in the State?

Something like four or five percent, wasn't it?

MR. BURCH: I would say 205, 210, somewhere in there.

QUESTION: Out of 3500. And those are the ones that fix the prices for the whole market; is that what you're saying?

MR. BURCH: Some of them do and some of them don't. Many of them don't set --

QUESTION: But your argument, to be relevant to this statute, you have to be saying, in effect, that that small percentage of the stations is able to fix the price of the entire market.

MR. BURCH: But --

QUESTION: Otherwise it doesn't really relate to the legislative solution to the problem.

MR. BURCH: But let me tell you what happened. You have to understand how they operated.

Let's take an Exxon station that has a dealer over here. An independent dealer. They're not supposed to be subject to the will and the whim and the fancy of the suppliers, no, because if they do they violate the antitrust laws. They

????? travel with the TVA and they're not going to get caught. So they violate the antitrust laws.

Now, what Exxon does with its company-owned station,

???? it takes in all stations in what they call an alert, and it puts it across the street. Now, if the independent dealer gets involved in price cutting which is going to spread out in the community, which is going to be for the benefit of the consumer, all Exxon has to do now is take its company-operated store alert, reduce the price by five cents, which in effect puts the squeeze on the dealer across the street, which is the Exxon dealer, who is really the one who should be making the market. So what they do is, this prevents them from disciplining by eliminating the company-operated store, it prevents the majors and the independent marketer refiners from disciplining the independent dealers and other people in the marketplace, because they're the ones that are relied upon for their supply.

QUESTION: But your purpose, your over-all purpose, I take it, is just to prevent the independent dealer from being undersold; to protect him from competition?

MR. BURCH: No, it not only --

QUESTION: Isn't that the over-all purpose?

MR. BURCH: It's not necessary to protect him from competition, that's not the point, Your Honor.

QUESTION: What is it?

MR. BURCH: The point is that what it does is it gives true independence to that retail dealer, it lets him get out and say, "I can operate my station more effectively than you can, because I'm willing to work 16 hours a day, where you have to pay a man on the basis of two shifts of eight hours a day. I'm willing to get out and work later tonight, I'm willing to keep my station open all the time. I'm willing to do this and sacrifice that, because I, as an independent businessman, have the opportunity to make my own living. I may decide now that I'm going to reduce the price if there's a margin of eight center a gallon, that I'm willing to reduce my price by four cents a gallon."

QUESTION: Well, why didn't they prevent the retail chains, then?

MR. BURCH: Because the retail chains are not in the position of exercising the influence on the marketplace that the independent refiner is, because if he --

QUESTION: Well, I know, but if you're nothing but an employee of a retail chain, you certainly are not that independent businessman who is running his own business, he's probably working shifts of eight hours and then going home and there's another shift comes on.

MR. BURCH: There's a constitutional classification which the Legislature made, and that is that the independent refiner marketer is -- may not engage in a retail business. The -- Sears, Fisca, Pantry Pride, they can go out and they are truly the ones who make the market. They are truly the ones, but they don't have any -- they can go out and they buy on the spot market. They buy the excess of the gasoline that's available from --

QUESTION: Well, how many stations does Sears own in Maryland?

MR. BURCH: I wouldn't know, sir, but I'd suggest there's several.

QUESTION: Quite a few.

MR. BURCH: Does anybody -- five. Five Fiscas. But Midway has 14. Midway bought solely on the spot market, at their price. They were able to buy it cheaper than the oil companies could deliver it to their own stations, or to the dealers.

They became the competitive influence in the marketplace. They are the ones who are truly the price setters, the price makers. The company-operated Sears stores are the price makers. And, as has been said in the record, the independent refiner markets are the price takers. They take whatever price they can get for the crude from the majors who are in competition with them. And the majors control them. They control them through that device.

QUESTION: Mr. Attorney general, before we leave the point entirely. You described the incident of a major oil company with a private brand across the street from an independently owned station, cutting the price to discipline the dealer who didn't keep the price up. Is that sort of thing described in the record?

MR. BURCH: I believe you will find, yes, that Mr. -- Dr. Patterson, our expert, will indicate that this is one of the effects that --

QUESTION: He described the practice that actually went on --

MR. BURCH: I believe that particular practice is specifically described in the record.

QUESTION: Does the record tell us how many situations exist where there is a company-owned station right across the street from a station that's --

MR. BURCH: I'm not sure, but I can say this to you, Your Honor, that what they do is they put these company-owned stations next to their independent dealer-operated stations, where there is the greatest volume.

QUESTION: I'm just trying to make sure in my own mind whether you're talling me what you learned in other litigation or you're telling us what's shown by the record in this case.

MR. BURCH: I'm just telling you from what I think the record shows.

QUESTION: I see.

MR. BURCH: Basically from what the record shows.

QUESTION: The major producers in this case --

MR. BURCH: The best feature of -- excuse me.

QUESTION: There's a footnote somewhere indicating that one or two of them don't have any wholly owned stations, and the rest of them have very, very few.

MR. BURCH: That's correct.

QUESTION: Of the four. I can't find the footnote, but this couldn't, therefore, be a very widespread practice, the one you just referred to, in Maryland.

MR. BURCH: Right. One of the other things that gave rise to concern by the members of the Legislature and by the Governor was the fact that one of the large majors, BP Oil, which is owned, I think, by SOHIO, has embarked upon a program of converting all of its dealer-operated stations to company-operated stations. And Crown Central Petroleum, I think, was about to do the same thing; in fact they went into the State of Virginia, that did not have a law such as Maryland, and they converted all of their dealer-operated stations to company-operated stations. And in effect they put the dealers out of business in so far as their company was concerned.

And what is the problem with respect to that?

The problem is that there are fewer people who can determine whether or not there's horizontal price fixing, with a net-end result that the prices are going to go up because the majors get together and the independent refiner marketers get together and they can establish a price in the marketplace which is anti-competitive.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney General.

Mr. Wilson.

ORAL ARGUMENT OF THOMAS M. WILSON, III, ESQ.,

ON BEHALF OF THE APPELLEES

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

The purpose of paragraph (D) is to proscribe a practice known in the oil industry as granting of voluntary allowances. This practice was seen as an evil because it causes injury to intra-brand competition among retail service station dealers.

A voluntary allowance is a localized discount, which may always be identified by three constant factors: first, it is always granted in response to an individual competitive situation; second, it is never granted in response to a lower price actually offered by a dealer by another oil company; and, third, it always injures intra-brand competition.

Now, Mr. Simon has stated that the Maryland statute requires that one tank-wagon price be granted in Maryland to all gasoline dealers. This is not correct. If a price reduction can be given to one or more dealers, in such a way that it does not injure intra-brand competition, it misses one of the factors of being a voluntary allowance. And because it misses that factor, it is not a voluntary allowance, and need not be granted uniformly.

For instance, if Exxon had a dealer in Baltimore and it wanted to give Exxon a voluntary allowance, and it said to itself, "If I do that, I'm going to run afoul of the Maryland Act, and I'd have to give this voluntary allowance to everyone in Maryland", rather than doing that, "I will take the less restrictive alternative and give that voluntary allowance, or now that price reduction, to all dealers in competition with that one Baltimore dealer; in that way I would not injure intra-brand competition among those dealers, and because of that I would not have a voluntary allowance and I would not run afoul of paragraph (D)."

I think it's important to remember that the purpose of paragraph (D) is to get rid of this practice, not to make it Statewide.

Now, four of the appellants have --

QUESTION: Mr. Wilson, is the term "voluntary allowance" defined in the statute?

MR. WILSON: It is not defined in the statute, Mr. Justice Stevens, but it is defined by the Court of Appeals.

Now, the Court of Appeals literally defined "voluntary allowance" as the situation which this Court said was bad in its 1963 Sun Oil case. The Court of Appeals never added the additional words "which lower price is enabled by his supplier", but it's certainly implicit in the Court of Appeals decision that this was the situation that it had in mind, because it felt that it had to go on and answer the question that this Court left open in Sun Oil.

We think it also implicit in the Court of Appeals decision that injury to intra-brand competition is an absolute necessity, to have it be a voluntary allowance. I would say this for several reasons. One is that the Court of Appeals states that the purposes of the Robinson-Patman Act are identical with the purposes of paragraph (D). Unquestionably the purposes of the Robinson-Patman Act are to prevent intra-brand injury, intra-brand competitiveness. This is the same as the purpose of paragraph (D).

The other factor is that the Court of Appeals says that a voluntary allowance in effect is whatever it is known to the oil companies to be. Now, there's one thing for sure, and I don't think Mr. Simon would argue this, a voluntary allowance is what an oil company says it needs to get away from violating Section 2(a) because it needs a 2(b) defense and if it doesn't get the 2(b) defense it has a 2(a) violation.

If that is the case then it has caused injury to intra-brand competition or it wouldn't have violated 2(a) in the first place, because the injury to competition is a requisite of section 2(a) liability.

Now, four of the appellants have challenged paragraph (D), the constitutionality of it on two grounds. First, on the grounds that it conflicts with the Robinson-Patman Act, and second, --

QUESTION: Mr. Wilson, could I stop you a minute to be sure I understand your argument?

MR. WILSON: Yes, sir.

QUESTION: Are you saying that if one dealer, one brand, has four or five stations in an area, and it treats those four or five stations alike, so there's no injury to intra-brand competition, it could grant a voluntary allowance because it wouldn't -- you don't have to worry about injury to the competition of dealers buying competing brands of gasoline?

MR. WILSON: Well, Mr. Justice Stevens, are you talking about under the federal statute or the State statute?

QUESTION: I'm talking about under the Maryland statute.

MR. WILSON: Under the Maryland statute, --

QUESTION: I thought you were saying that would not be a voluntary allowance.

MR. WILSON: It would not be a voluntary allowance, that's a localized price reduction which fits the first two prongs of the definition of voluntary allowance, but doesn't get the third, because it doesn't injure intra-brand competition. Therefore, the Maryland statute is not concerned with it.

That is something that the oil company can do under section 2(a) of the Robinson-Patman Act without needing a section 2(b) defense.

Similarly, it can do it in Maryland without worrying about paragraph (D). The purposes of the Act are synonymous.

QUESTION: Now, where do you say you get this construction of paragraph (d), from the opinion of the Court of Appeals?

MR. WILSON: From the opinion of the Court of Appeals.

QUESTION: Because paragraph (D) doesn't say anything about any such limitations or conditions --

MR. WILSON: What paragraph (D) says is that X must be extended uniformly. It does not define X, it just says voluntary allowance.

QUESTION: Right.

MR. WILSON: This was the job -- strictly a State law question, and this was the job of the Court of Appeals. And the way we read it is that it has those three factors.

Now, if we're reading it too narrowly, possibly we could certify the question to the Court; but I think that it's implicit in what the Court has ruled there.

The purpose of Maryland's statutory enactment was not to have one uniform tankwagon price in the State.

QUESTION: That may not have been its purpose, but that's what it seems to require on its face.

MR. WILSON: I see.

QUESTION: What you're saying, then, say where they talk about Baltimore and Salisbury, say a big company has one station in Salisbury, it can grant voluntary allowances there without worrying about this statute?

MR. WILSON: No, it cannot --

QUESTION: Or what would otherwise be a voluntary allowance --

MR. WILSON: What would otherwise be a voluntary allowance, that is correct, Mr. Justice Stevens.

QUESTION: That would not violate the statute.

MR. WILSON: That would not violate the statute.

QUESTION: So if they treat all their stations within a given market alike --

MR. WILSON: Right.

QUESTION: -- there's no problem under the Maryland statute.

MR. WILSON: And there are many other --

QUESTION: That's interesting, because there could be a problem under the federal statute.

MR. WILSON: Well, --

QUESTION: But, anyway, that's interesting.

MR. WILSON: -- the statutes don't do exactly the same things, Mr. Justice Stevens. We do catch purely intra-state sales under this statute.

QUESTION: Well, if you're only concerned with intra-brand competition.

MR. WILSON: That is correct. That is correct.

And the definition that the Court of Appeals used allowed what we consider to be the proper interplay between the policies of intra-brand price rigidity and inter-brand price flexibility in competition, by saying that the 2(b) defense is available in the situation where you have a shared customer.

The second ground that four of the appellants have attacked the constitutionality of paragraph (D) on is commerce. Now, Mr. Simon did not address the commerce question with regard to paragraph (D). I would presume that he has come to the same conclusion that I have, and that is that the question is not properly before the Court. The reason we say that is that paragraph (D) was struck down in summary judgment, and only on the grounds of conflict, not on the grounds of commerce.

Summary judgment was not moved on the grounds of commerce, only on conflict. It was reversed at the Court of Appeals solely on conflict. When the Court of Appeals issued its mandate to the lower court, at that time the appellants had the opportunity to move for trial on the commerce question with regard to paragraph (D). But they did not do so, so we presume that that appeal is waived.

However, we have responded to the question in our brief and have only responded to it today because we don't believe there is any undue burden whatsoever in interstate commerce.

QUESTION: Was the commerce question presented to the

Maryland Court of Appeals?

MR. WILSON: No, it was not. Not with regard to paragraph (D).

QUESTION: Was it ever presented in any way?

MR. WILSON: The only place, Mr. Justice White, that the commerce question was ever presented --

QUESTION: Does it appear in the record? Does the question ever emerge in the record?

MR. WILSON: Only from the bill of complaints. The entire statute --

QUESTION: Well, that's pretty important, isn't it?

MR. WILSON: The entire statute was claimed to violate the commerce clause, but when summary judgment was moved under paragraph (D), it was moved only on the grounds of conflict. But, at any rate, we do not at all assert that we have a commerce problem. We will respond to the question.

We believe, however, that if this Court is going to strike down paragraph (D) on the grounds of conflict with the Robinson-Patman Act, the Court must do two things: First, it must answer the question that it specifically reserved in its 1963 Sun Oil decision, and answer it in a way which upholds the 1967 Federal Trade Commission Policy Report, with respect to the oil industry.

And, second, -- and now we get back to Mr. Simon's point -- even if it does adopt that position, it must also hold that section 2(b) is a constitutional right, that it's an absolute right of constitutional proportions and not merely a defense to a section 2(a), 2(d) or 2(e) violation.

We submit that the answer to the question which this Court reserved in Sun must be that unless an oil company is offering a lower price to its dealer, in response to a lower price which has been offered to that dealer by another oil company, they are not entitled to the section 2(b) defense.

We say this also with regard to section 2(a), primary line liability, that is, liability between sellers. We know of no case except a situation that involved secret brokerages and vertical price fixing, we know of no case in which primary line liability has been assessed absent assured customers.

We strenuously submit that the FTC policy statement is wrong. The only thing that's offered to justify that statement is that there can be no denying that oil companies compete with each other. We don't deny that oil companies compete with each other, but we certainly do deny that oil companies are competitors with respect to their immediate customers. And again we think this is what section 2(b) requires.

Now, oddly enough, it appears -- and when it comes to other sections of the Robinson-Patman Act, section 2(d), and when it doesn't come to the oil industry, the Federal Trade Commission agreed with us. In 1969 it issued a policy statement with regard to meeting competition under sections 2(d) and 2(e), it amended that policy statement -- or, excuse me, with guidelines in 1972. Those guidelines are still in effect.

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They are commonly known as the Fred Myer guidelines and they are the advertising allowances and other merchandise opinions and services. It's section 240.16. And it says: A seller charged with discrimination and violation of section 2(d) or section 2(e) may defend his actions by showing that the payments were made or the services were furnished in good faith to meet equally high payments made by the competing seller to that particular -- excuse me, to the particular customer.

And we say that is the shared customer that we're talking about.

It goes on. It says: For instance, it is insufficient to defend the charge of violating either section 2(d) or 2(e) solely on the basis that competition in a particular industry is very keen, requiring a special allowance be given to some customers if the seller is to be competitive.

It seems to me that's exactly the position that the Federal Trade Commission has taken with respect to the oil industry.

QUESTION: But the appellants here are taking a position somewhat more precise than that, not just generally that the competition of the industry is very keen, but that they had a Robinson-Patman Act defense if they give a voluntary allowance in order to meet their competitor seller's price in that market to another service station.

MR. WILSON: Well, that isn't correct, Mr. Justice Stewart.

QUESTION: That's more precise than --

MR. WILSON: It is more precise. When I say meeting competition, that's too broad. One of the reasons we find fault with the FTC policy position is we think that what it does is that it takes an antitrust defense, section 2(b), and broadens it impermissibly, to a point where it becomes indistinguishable from the old meeting competition defense which section 2(b) was enacted to narrow.

But with regard to your specific question, we think that it is unmistakable that section 2(b) is a seller's right. And the way you determine whether you're looking at a seller's right is whether there's any benefit to the customer who receives this lower price.

Because, as this Court pointed out in its 1951 Standard Oil decision, Robinson-Patman policy -- and that is the policy which promotes intra-brand price rigidity and non-injury to intra-brand competition -- is no way furthered if a seller is denied the ability to meet a lower price which has actually been offered to his customer, because that customer is going to be getting -- going to get that price regardless, either from his present supplier or the one who offered the price.

In either event, competition, intra-brand competition is going to be injured.

But this is not true with regard to the oil industry. Captive customers, such as gasoline dealers, don't have competitors out looking for their business. An Exxon dealer does not enjoy the practical alternative of purchasing his gasoline from Shell if Exxon denies him a voluntary allowance, it just doesn't work that way.

And we think it's policy of promoting intra-brand price rigidity, because we're talking about sellers starting at the same point, promoting their policy, and dropping that policy only when there's no point keeping it any longer because you're going to have that injury regardless. At that time, it makes sense to say, "Fine. Robinson-Patman isn't going to be helped by holding on, give the seller this right of self defense, let him meet that price."

Now, with regard to the other question that we believe this Court would have to find in order to find that paragraph (D) would fall under conflict, is that section 2(b) is a right of constitutional proportions.

QUESTION: When you say constitutional proportions, do you include the supremacy clause?

MR. WILSON: Yes, I do, Mr. Justice Rehnquist.

QUESTION: Well, then, why -- this isn't anything new, then, what you're already said, is it?

MR. WILSON: Excuse me?

QUESTION: I don't know how it adds anything to what you've already argued.

MR. WILSON: Well, the only position that we have on that is that it's just an area that 2(a) doesn't cover, and there's no reason why a State can't cover it.

With respect to the commerce question, as we said, we don't believe it's properly presented, we think that if our interpretation of section 2(b) is accepted, then there can be no situation where any burden on commerce appears at the State line. And the reason we say that is that obeying the Robinson-Patman Act, as we understand it, would also be obeying paragraph (D), the situation would never come up.

If we're wrong, if this Court were to answer the Sun question in favor of the FTC, if it were to say that yes, 2(b) is an absolute right, then the situation we'd have is we couldn't determine what the burden would be, because this was summary judgment, nothing on the record whatsoever, and we'd have to go back to have a factual development.

QUESTION: Your claim is that meeting competition under section 2(b) is a defense to a federal statute but it's no federal right.

MR. WILSON: That is correct.

QUESTION: And Maryland can simply way, "We're going to, in our legislation affecting the gasoline retail business, we're going to reflect the basic policy of Robinson-Patman, but not give you that defense."

MR. WILSON: That is absolutely correct, and I think it serves two other purposes: one, is that it gives us a criminal provision where, under section 2(a) -- the criminal penalties under section 3 of the Robinson-Patman Act, but not 2(a) --

QUESTION: Not 2(a).

MR. WILSON: And the other is that with respect to other factors in the market, we also cover wholesalers. Anyone who is a wholesaler in Maryland under paragraph (D) who sells gasoline to stations must obey paragraph (D).

QUESTION: But not if he operates his own station, he can sell at any price he wants.

MR. WILSON: Well, if he operates his own station, Mr. Justice Stewart, it wouldn't even be a wholesale price, he would be selling at retail.

QUESTION: Well, no, because he might be a wholesaler in part of his business, but if he operates his own station he can charge the public any price he wants and where he wants --

MR. WILSON: Absolutely.

QUESTION: -- and have all kinds of differentiations in the various markets in the State of Maryland.

MR. WILSON: Absolutely correct. But we're talking about discriminations in wholesale price, strictly wholesale price.

I would add one point that the paragraph (D) was enacted at the same time that paragraphs (B) and (C) were. (B) and (C) were subsequently re-enacted. So we view, as far as the severability question goes, the three -- (B) and (C) standing together, and (D) standing by itself. And then of course the regular severability provision in Maryland law would be covered by (B) and (C) itself.

In short, we submit that the entire statute must be upheld in toto, and we think federalism demands no less.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

You have five minutes, I think, left, Mr. Simon.

REBUTTAL ARGUMENT OF WILLIAM SIMON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SIMON: Thank you, Mr. Chief Justice.

I'd like to say first, Mr. Justice Stewart, that we say that 2(b) is a statutory right, --

QUESTION: I understand, that's your difference.

MR. SIMON: -- that they cannot deprive us of.

Secondly, I would like to say that the statute provides on its face that every refiner shall extend all voluntary allowances uniformly to all service station dealers supplied. That is the language of the statute, with no definition. The Court of Appeals gave one definition of the statute, which we say is at odds with the clear language of the statute, and Mr. Wilson just gave you a definition that is at odds with both the statute and the Court of Appeals.

QUESTION: Well, there's no question that the Court of Appeals definition prevails then?

MR. SIMON: I'm sorry?

QUESTION: There's no question but what the Court of Appeals definition prevails in the case of those three contradictions?

MR. SIMON: Right. Yes, but we now have another definition which was just given that is contrary to the Court of Appeals definition.

We argued the case on the premise of the Court of Appeals definition.

QUESTION: Well, I think, by precedent, you are justified in doing so.

MR. SIMON: Yes, but I was merely pointing out that Mr. Wilson's definition just given to you is contrary to not only the statute but the Court of Appeals definition.

Attorney General Burch made much of price fixing by dealers, and I got the impression he was agin it; I know everybody is agin it. But what this statute does is makes it unnecessary to conspire to fix prices, because if every supplier, if everybody has to have the same price to all its dealers, or the same voluntary allowance, competition will get them to float to the same level, and if they've got to be Statewide the same, then you're going to have a legislatively mandated conspiracy.

We were told that Exxon uses alert stations to discipline dealers who don't do the right thing. The fact is there are four alert stations in Maryland and 532 Exxon stations in Maryland.

We were told that the independent refiners get their crude oil from the major oil companies and therefore are subject to their control. Not a scintilla of evidence in the record on that. And the fact is that since the enactment of the Emergency Petroleum Allocation Act of 1973, the federal government has been allocating crude oil, and since August 15, 1971, the federal government has been fixing the price of crude oil.

We were told that there was a minimal effect on interstate commerce by this Act, and I submit to you that an Act which forces from the State of Maryland all refiners who engage in the sale of gasoline at retail, an Act which bars the entry into Maryland of all refiners who seek to sell gasoline at retail, an Act which totally alters the distribution patterns of refiner suppliers, and an Act which increases the cost of operation, just like in Raymond Transport, increases the cost of operation of suppliers, has a substantial effect on commerce, particularly when it is in an industry of the size and magnitude of this industry.

And, finally, Mr. Justice --

QUESTION: Well, do you think it discriminates against interstate commerce as well as burdens it?

MR. SIMON: I think it burdens it, and what I think discriminates against interstate commerce, Mr. Justice White, is putting the dealer, the branded dealer, with the high price in this preferred position.

QUESTION: Well, it doesn't discriminate against the interstate wholesaler.

MR. SIMON: No, sir, it discriminates against the interstate supplier-retailer, and in favor of the branded dealer who is thereby insulated from the cut price of the refiner-supplier.

And, finally, I would like to say that Professor Patterson, whom Attorney General Burch referred to in his testimony, expressly testified that this Act was anti-competitive in preventing the refiner-suppliers from selling at retail, and he did not testify as Attorney General Burch said that the major companies use these practices that he described to discipline dealers; and that is not in the record.

Thank you.

QUESTION: Well, could I ask, was there any findings in the record anywhere about what the impact of this might be on the independent refiner who owns his own stations?

MR. SIMON: Yes, Your Honor. The trial court --

QUESTION: That it would put them out of business, that it was found it would have a disastrous effect on their operations?

MR. SIMON: Exactly, Your Honor. The trial court made exactly those findings. It didn't use the words "put him out of business", but the trial court made a finding that the purpose of this statute was to protect the local independent branded dealers, and --

QUESTION: Well, did he find that the independent refiner had no alternative, such as switching to independent stations?

MR. SIMON: He didn't find he had -- he didn't have that alternative, because at least he --

QUESTION: Well, if he found that the effect would be disaster economically if he did switch to independent stations, that's the same thing.

didn't

MR. SIMON: He/used the word "disastrous", but he did say it discriminated against the independent refiner, and he did say it substantially lessened commerce. Those are findings the district court made, and while the Court of

Appeals reversed the district court, they did not reverse those findings.

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

[Whereupon, at 11:33 o'clock, a.m., the case in the above-entitled matters was submitted.]

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