ORIGINAL

In the

Supreme Court of the United States

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al., Appellants, v. ORRIN W. FOX CO., et al., Appellees.	No. 77-837
NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al., Appellants, v. ORRIN W. FOX CO., et al., Appellees.	No. 77-849

Washington, D. C.
October 3 & 4, 1978

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Washington, D. C.,

Tuesday, October 3, 1978.

The above-entitled matters came on for argument at 2:37 o'clock, p.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:

ROBERT L. MUKAI, ESQ., Deputy Attorney General of California, 555 Capitol Mall, Suite 350, Sacramento, California 95814; on behalf of the Appellants in No. 77-837.

JAMES R. McCALL, ESQ., Professor of Law, U.C. Hastings; on behalf of the Appellants in No. 77-849.

WILLIAM T. COLEMAN, JR., ESQ., 611 West Sixth Street, Los Angeles, California 90017; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-837, New Motor Vehicle Board of the State of California against Fox, and 77-849, Northern California Motor Car Dealers Association against Fox.

Mr. Mukai, I think you can proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT L. MUKAI, ESQ.,

ON BEHALF OF APPELLANTS IN NO. 77-837

MR. MUKAI: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether a State must provide commercial enterprises, subject to its State regulatory capacity, a hearing prior to obliging those enterprises to delay consumation of certain commercial expectancies, pending State inquiry in the regulatory interest. This case arises from a partial summary judgment entered in the Central District of California declaring facially void and enjoining enforcement of a motor vehicle dealership establishment and relocation act of the State, which I shall refer to as the California Automobile Franchise Act.

The judgment of the three-judge court holds that the Act deprives franchisors and their business associates of liberty and property without due process of law.

Now, Your Honors, with the Court's permission, I

propose to focus my remarks principally upon the basic reason that we contend the District Court ought not to have decided this case at all.

Further, I propose, with the Court's permission, to defer to counsel for Appellants in No. 849, the discussion of the alternative grounds for affirmance which have been urged by the Appellee.

I would like to spend a few moments with the statute in question. That statute, in Section 3062 of the California Vehicle Code, provides that in the event that a franchisor seeks to establish or relocate a dealership within ten miles of one of its existing dealerships, then the franchisor must first notify the New Motor Vehicle Board of the State, an administrative agency, and each of the franchisors, existing franchisees in the same line-make, within ten miles of the prospective dealership site.

Any franchisee so notified, who is located within ten miles of the proposed site, may then file a protest with the New Motor Vehicle Board within 15 days. When a protest has been filed, the franchisor is prohibited from effectuating the proposed establishment for relocation until a hearing has been held by the Board.

The California Vehicle Code, Section 6032, implements this prohibition by requiring the Board, upon receipt of a protest, to notify the franchisor first that a timely protest

has in fact been filed; second, that a hearing is required to be held by the Board; and, third, that the franchisor shall not establish or relocate the proposed dealership until such time as the requisite hearing has been held, nor following the hearing, if the Board should determine that good cause exists not to permit the dealership.

And the Board notifications that were issued to General Motors franchising divisions in this case are found at pages 52 and 80 of the Joint Appendix.

I should add that the Act does require a full evidentiary hearing within sixty days after a notice of hearing has been issued by the Board. As the District Court itself noted, if the Board itself hears the protest, it must issue its decision within thirty days after holding the hearing, or else the franchisor's action for establishment or relocation is deemed approved by law.

QUESTION: If no protest is filed, is the approval automatically forthcoming?

MR. MUKAI: Your Honor, in the event that no protest is filed, there is no further step to be taken by the Board as an administrative agency, and the franchisor is permitted to go ahead with his plans.

QUESTION: What if the protest is filed and then is withdrawn before the hearing?

MR. MUKAI: If the protest is withdrawn prior to

the hearing, the Board issues a notice of dismissal of the protest, and the franchisor is permitted to consummate its plans.

QUESTION: So that the vindication of the public interest depends entirely on the activity of the protestor?

MR. MUKAI: Not exactly, Your Honor. The Act utilizes the protest as the means for bringing the public interest to issue before the New Motor Vehicle Board. In this respect, California --

QUESTION: But after it's at issue, the protestor can take it -- can withdraw?

MR. MUKAI: The Board has, in the past, taken the position that although a protest may be withdrawn, the Board is not automatically deprived of jurisdiction to regulate. The order of dismissal ordinarily issues following the withdrawl of the protest, but it is not required by law to so issue.

QUESTION: Who may protest?

MR. MUKAI: Under the California statute, any dealer in the same line-make as the proposed dealership to be established or relocated.

QUESTION: So no stranger or member of the public may protest?

MR. MUKAI: That is true, Your Honor. However, members of the public may appear at the hearing and be represented, and produce evidence and be heard fully at the evidenti-

ary hearing prescribed by Section 3066 of the Vehicle Code.

QUESTION: So an existing Ford dealer, however, can protest a new Chevrolet agency?

MR. MUKAI: No, Your Honor, that could not happen under the Act. Only an intra-brand situation exists here, only a competitor in the same line-make can protest.

QUESTION: Oh, I see. That means only a Pontiac dealer can protest --

MR. MUKAI: Only a Pontiac automobile dealer.

QUESTION: A Chevrolet could protest the relocation of a Pontiac dealer?

MR. MUKAI: That is correct, Your Honor, yes.

QUESTION: But the Ford dealer could go and get one of his friends or a lot of his neighbors to go in, from what you say? Just as citizens.

MR. MUKAI: That is possible, Your Honor, to the extent --

QUESTION: What would the citizens be presenting? What's the basis of their appearing? Because there's too many automobile dealers around the neighborhood?

MR. MUKAI: That could certainly be one basis.

QUESTION: Well, that's a zoning matter, isn't it?

MR. MUKAI: It borders on a zoning matter in many instances, Your Honor, but the State's interest in this form of regulation can take on many different aspects.

There could conceivably be a situation where a disinterested, in the sense of purely private individuals could take an interest in the number or the location, perhaps the location of --

QUESTION: As a practical matter, do citizens have any -- have any citizens ever appeared?

MR. MUKAI: Your Honor, I can't answer that. I'm simply unaware of whether any citizens have ever appeared in these kinds of proceedings.

QUESTION: Could California pass the same law involving gasoline stations?

MR. MUKAI: Yes, Your Honor, it could.

QUESTION: Or any other business?

MR. MUKAI: Virtually any other business, I am sure, Your Honor, based upon, among other things, this Court's decision, clarifying decision in Exxon Corporation v. Governor of Maryland.

Your Honors, the District Court interpreted the Act as requiring the Board to set a hearing date concurrent with its issuance of the statutory notification to the franchisor. But even though, under this interpretation, the period of delay between invocation of the statute's prohibition and the time of a final decision on the merits is potentially as short as ninety days, the Court held that the Act's failure to provide a hearing before imposing any delay or to require a

hearing soon thereafter, constituted a deprivation of liberty and property without due process of law.

In the District Court, we cited the Chief Justice's dissenting opinion in the 1971 case of Wisconsin vs. Constantineau.

QUESTION: That won't help you very much, will it?

MR. MUKAI: That is exactly what Judge Ely said to me, Your Honor.

[Laughter.]

MR. MUKAI: But we cited it because we believed that that dissent, which was concurred in by Mr. Justice Blackmun, has now become the rule for application of Pullman abstention through this Court's more recent decisions in Harris County Commissioners Court v. Moore, decided in 1975, and the 1976 decision in Bellotti v. Baird, which was decided unanimously by this Court.

And that rule, we submit, is that the Pullman doctrine applies even to an unambiguous statute which appears to be in conflict with accepted notions of due process. If it is susceptible of a State Court ruling, which would either avoid the necessity of a federal constitutional decision or, in the alternative, substantially modify the federal issue involved.

In the present case, entirely apart from the suggestion that the California Court could invalidate the Act under the State Constitution, we have submitted that this statute is

susceptible of at least two constructions. One of which would avoid federal constitutional issue, and the other of which would substantially modify it.

First, as was the case in Constantineau, this Act could be construed to require a hearing before State action occurs at all. As California precedent for such a situation, we have cited to the Court the case of Endler vs. Schutzbank, involving a Real Estate Commissioner's case in California, and Rios vs. Cozens, heard in this Court, sub nom Department of Motor Vehicles vs. Rios.

Appellees point out in their brief that we have never affirmatively advocated this construction, and of course this is true, because we do not believe that the Act interferes with a liberty or a property interest, and because we do not believe that due process requires a prior hearing, even if some such interest is involved in this case.

QUESTION: As I understand it, Mr. Mukai, your fellow appellants have expressly abandoned the claim that the Court should have abstained on the Pullman matter; is that correct?

MR. MUKAI: Yes, Your Honor, as we understand --

QUESTION: I was looking at your reply brief.

MR. MUKAI: As we understand the appellants in the consolidated appeal, they believe that this statute is totally unambiguous.

QUESTION: Well, in any event, perhaps even though

the Court could have abstained, that it's almost moot now, and academic, since the Court did decide it on the merits, they asked us to decide it on the merits. That's the way I read their reply brief.

MR. MUKAI: That is my understanding, Your Honor, and that's why I feel that it's important that I bring at least one ambiguity to this Court's attention. And that is the second interpretation which we have advocated affirmatively, and it's the interpretation which would substantially modify the due process issue dealt with by the District Court.

That interpretation would hold that the Act requires the manufacturer to provide notice to the Board and to its franchisees before its commitment to its plans has advanced so far that the manufacturer simply cannot bear the delays of State regulation.

This interpretation focuses on the first words of Vehicle Code Section 3062, which is the crux of this case. Those words are: "In the event that a franchisor seeks to enter into a franchise establishing an additional dealership or relocating an existing dealership."

The interpretation which we have advocated would settle the time-related ambiguity these first words present, and the necessity of such an interpretation is demonstrated by the facts that the Fox enfranchisement and the Muller

relocation in this very case presented situations where, in neither case, did General Motors' notice of intent precede finalization of its plans with those dealers; and in both cases General Motors waited to give notice until after it had already entered into the franchises with its respective dealers.

In fact, in the case of Fox, General Motors didn't give notice at all until some three months after the franchise became effective.

Now, appellees' due process claim rests, at least in part, on the assertion of the protected property right by virtue of contractual arrangements regarding its franchise. If a State Court were to interpret this section to require the manufacturer to issue its notice at some time before these contractual arrangements are made and finalized, then there could be no basis whatsoever for the due process claim predicated on the existence of contract.

In addition, if some liberty or property interest is implicated by this statute, the determinants of what process is due would be completely different because of the nature of the so-called right that is being interfered with. In that situation --

QUESTION: Mr. Mukai, may I ask a question on this?

Supposing there's an existing Ford dealership at a given location, and General Motors is negotiating with that dealer to become a Chevrolet dealership, would the statute

apply if the Ford dealer switched to Chevrolet?

MR. MUKAI: Yes, it would, Your Honor.

QUESTION: So that you are, in effect, saying that you ask the statute be construed that before negotiations go too far, General Motors give notice to Ford that it's soliciting one of its dealers?

MR. MUKAI: We advocate the interpretation that this is what the statute requires, Your Honor, based upon the language, "In the event that" and "seeks to enter into". I think the language is clearly anticipatory.

QUESTION: Yes.

MR. MUKAI: If the Court please, I will reserve any remaining time I may have for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. McCall.

ORAL ARGUMENT OF JAMES R. McCALL, ESQ.,

ON BEHALF OF APPELLANTS IN NO. 77-849

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

Mr. Justice Stewart has accurately stated our position in reference to the abstention issue. It is the position of the dealer association appellants here that abstention of the Pullman variety is an equitable doctrine. At this point it serves no useful purpose to say the District Court should have abstained.

I would like to pass momentarily to the due process clause attack which was brought on the statute, and which was the specific ground on which the District Court held that the statute was facially invalid.

It is our position that there is no conceivable liberty or property interest which can be made out by General Motors or the other appellees. The long and short of it is that they assert the right to establish an automobile franchise or to become a franchise dealer whenever they want and wherever they want.

And we submit that this is not the type of liberty or property concept which has been given due process procedural protection by this Court, ever.

One other point with reference to the due process clause, and that is that the appellees in their brief have stated that if the due process procedural protections are not available to General Motors, Fox and Muller in this situation, then they have no protection whatsoever under the due process clause. That seems to be a statement which is hard to sustain. Clearly, there is a notion of substantive due process in the sense that all State regulations -- economic enterprises as well as other enterprises and other activity -- must be rationally related to legitimate end of government.

Clearly, we submit, and we have submitted this in our reply brief, this kind of legislation is indeed rationally

related to the legitimate end of government. The Automobile Dealers Day in Court Act on the federal level is an express recognition by Congress of the inadequate status at the bargaining table, if you will, which dealers have when they bargain with automobile manufacturers. The problem of overloading, in terms of putting in too many dealerships of the same line-make in one marketing area, has brought a number of States other than California to the same position. In other words, some form of legislation which limits the carte blanche authority of the manufacturer to establish a new or additional dealership in a given market area.

Nineteen States have statutes which are similar to California in that respect. Eleven of these States, of these nineteen, have a board or an official State body that passes upon or supervises or looks over, in some way, this decision by the manufacturer to put in an additional dealership in an area already served by a dealer carrying the same line-make.

QUESTION: But, Mr. McCall, isn't it true that some of the companies have arbitrations?

MR. McCALL: Yes, sir.

QUESTION: Like General Motors, I know has one; do the others have it, too?

MR. McCALL: As far as I know, Ford is the only manufacturer that has an arbitration, institutionalized arbitration arrangement, which is --

QUESTION: Well, General Motors has one.

MR. McCALL: Do they? I'm not familiar with it, if they do.

QUESTION: A former member of this Court --

QUESTION: Justice Whittaker.

QUESTION: -- had a position as, I think it was the arbitrator; maybe it was a different title.

QUESTION: He was promoted to arbitrator.

QUESTION: Yes, to resolve differences between General Motors on the one hand, and its distributors and dealers on the other. At least that was my understanding.

MR. McCALL: That would appear to be a recognition by the commercial entities involved as a need for some kind of regulation of this activity, and clearly Congress and the other State Legislatures have felt the same way. Other State Legislatures besides California.

I would like to pass to the supremacy clause argument which is made by General Motors in this case. It was not the ground on which Judges Ely and Gray and Takasugi relied down below, but it was urged to the District Court.

As I take it, the supremacy clause argument here is that since the California Act, Automobile Franchise Dealers Act, imposes some limitation upon the total freedom of General Motors to put a dealership in wherever and whenever they want to, that this somehow conflicts with the central policy of the

Sherman Act.

Now, at the present time I know of no case, and I certainly would stand corrected on this, where this Court has voided a State statute on the grounds that it conflicts with the Sherman Act. This Court has voided activities of price-fixing by attorneys, has said that monopolistic practices on the part of utilities, municipally owned and otherwise, are subject to the antitrust laws; but it has not struck down a State statute on the ground that it conflicted with the anti-trust laws.

The California Supreme Court has struck down its liquor fair pricing law recently, in a case which is cited in our reply brief, but, as far as I know, this Court has not.

I would make so bold as to postulate that there would have to be two steps in any such analysis, which would have to be undergone before a State statute could be struck down on the ground that it "violates the Sherman Act" or "violates the central policy of the Sherman Act".

First, it would seem to me it would have to be shown that the State statute authorizes conduct which, but for the State statute, would violate the Sherman Act.

And, secondly, that the statute authorizes conduct which is not "State action", as that phrase has come to be defined in a number of decisions which this Court has rendered.

Obviously State action itself cannot be illegal under

the Sherman Act, and that dates from Parker vs. Brown, and that is a concept never questioned by this Court, subsequently.

So what we are talking about here is an attack on the only private conduct which is really authorized by this Act, and that is the right of a dealer to protest to this Board. That is the only conduct undertaken by a private party.

Now, we submit --

QUESTION: Is that quite right, Mr. McCall? Isn't it correct that the private party could -- all the dealers within ten miles of the new location could agree with one another that they would let General Motors open a new dealership, provided General Motors paid them a certain amount or gave them some consideration, couldn't they? Without any State involvement at all.

MR. McCALL: Mr. Justice Stevens, that's not authorized by the Act. That's not conduct which is authorized by the statute. It might be undertaken, certainly.

QUESTION: As I understand it, basically what the Act does is give any dealer within the ten-mile radius the right to say, "You cannot open the dealership without paying the amount of money involved in conducting an evidentiary hearing of some kind." And if, instead of doing that, the dealers said, "Well, if you just give us $5,000 apiece, you go ahead." The public wouldn't care then, would they?

MR. McCALL: I think there would be problems under

the antitrust laws, with the --

QUESTION: Well, you admit, then, there would be a problem under the antitrust laws?

MR. McCALL: Oh, yes, the collective agreement, sure, between them, to engage in such extortion or shakedown. Certainly. I think that could be cognizable under the antitrust laws and perhaps under some other laws.

QUESTION: Would it be illegal for General Motors to adopt a policy in California that when they open a new dealership they give notice to all the dealers that "if you don't protest, we'll hand you $10,000", they send out a notice of that kind?

MR. McCALL: It would be a unilateral act.

QUESTION: And then they all decide: well, that's better than going through the cost of hearings.

MR. McCALL: Well, each of the dealers decide on their own that yes, they will take the $10,000? I see nothing wrong with General Motors adopting that --

QUESTION: That would be consistent with the policy that this statute is indicating, isn't it? Namely, protecting those dealers from excessive competition.

MR. McCALL: If the dealers felt that excessive competition was worth --

QUESTION: More than $10,000, they'd say, "Well, we won't take the ten, but give us fifteen."

MR. McCALL: Right.

QUESTION: Is the antitrust issue here? Or the pre-emption issue, the supremacy issue?

MR. McCALL: Yes. As I understand it, that's what --

QUESTION: That is the appellee urges that for affirmance?

MR. McCALL: Yes, Your Honor.

QUESTION: And was that presented in the District Court?

MR. McCALL: Yes, it was. It was one of the grounds in the motion for summary judgment.

QUESTION: But it was not dealt with by the District Court?

MR. McCALL: No. The District Court specifically said it didn't have to reach that issue, because it was going off on its notion of procedural due process.

QUESTION: Isn't that somewhat unusual when the District Court is presented with both a statutory claim and a constitutional claim, for it to decide the constitutional claim in preference to the statutory claim?

MR. McCALL: Well, of course, the statutory claim is based on the supremacy clause. It would seem to me --

QUESTION: But we've classified the supremacy issues for purposes of this policy with statutory issues.

MR. McCALL: Well, it would seem unusual to me, yes.

QUESTION: Well, what -- do you suggest that if we must deal -- if that issue is in the case, that we pass on it here, or that we remand it?

MR. McCALL: My position -- I would prefer to have this Court pass on it, myself. At this point. It seems to me the precedents are clear, and it's a point that could be passed on under the precedents that you have. Because it was urged to the lower court.

If I may proceed on my concept that the conduct here would not be illegal, even if there were no statute, the conduct authorized, that is, a right to protest to the government.

I would call to the Court's attention or remind it of the cases, the decisions it has rendered in Noerr and in the Pennington case, Cal Motor Transport, and other subsequent cases, holding that the --

MR. CHIEF JUSTICE BURGER: We will resume there at ten o'clock in the morning, gentlemen.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Wednesday, October 4, 1978.]

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