EM

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
and NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al., Appellants, v. ORRIN W. FOX CO., et al., Appellees.	No. 77-849

Washington, D. C.,

Wednesday, October 4, 1978.

The above-entitled matters were resumed for argument at 10:05 o'clock, a.m.

BEFORE:

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

APPEARANCES:

[Same as heretofore noted.]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume in 837, and, Mr. McCall, you have about five minutes remaining.

ORAL ARGUMENT OF JAMES R. McCALL, ESQ.,

ON BEHALF OF APPELLANTS IN 77-849 -- Resumed

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

At the close of Court yesterday I was discussing the fact that the private conduct which is authorized by the California statute could in no sense be considered a violation of the antitrust law, because it does not involve conduct which has been declared illegal under the antitrust laws. Far from it, the conduct is protected by the Noerr-Pennington political action exception.

I also would stress that the Act itself, even if it did authorize conduct which was not political action, which could conceivably be held to violate the antitrust laws but for the statute itself, would still constitute State action under the test.

QUESTION: Mr. McCall, are we as free in dealing with an appeal from a judgment of a three-judge District Court to consider a matter that was not passed on by a three-judge

District Court as we would be in considering a petition for certiorari in a Court of Appeals?

MR. McCALL: I must confess some ignorance as to that, Mr. Justice Rehnquist. I assume that is the case, but I did not research that particular point.

Just quickly, because the point is made, I think, in appellants' reply briefs, under the standards that this Court has come down with in the five or six cases, really, in the last four or five years, the conduct here of making a protest to the Board would be clearly authorized by a State statute exhibiting a clear intent to remove this operation of this particular industry from "competition", and, therefore, from the application of the Sherman Act, and there's a clear intent in the statute to substitute State regulation. As established, I think, in the briefs, this distinguishes it from Goldfarb, Cantor, Lafayette Power and the Schwegmann case of 1951.

QUESTION: Do you agree that the contract clause issue is no longer in the case?

MR. McCALL: Yes, I do.

I would, in closing, like to make several general comments about the Sherman Act issue here, and also the commerce clause issue, which the appellees have tendered by way of footnote.

I think that as far as the preemption issue is concerned here, appellees' argument has an Alice in Wonderland

quality to it. You have a statute which does not authorize illegal conduct under the Sherman Act, and which does have adequate State supervision.

To extend the idea --

QUESTION: Mr. McCall, on that question of adequate State supervision, you said it's just like these other cases where the Parker v. Brown exception can apply, but here, what kind of State -- what does the State do other than to say that the nearby dealers shall be protected from competition? That's all it says.

MR. McCALL: Well, the statute provides that, of course, there will be a Board hearing, as to whether or not there will be any permanent prohibition of putting in the new franchise. The State also controls the time during which the temporary order will be in effect, because the Board can hold a hearing quickly or it can wait the full sixty days. It must hold a hearing within sixty days.

QUESTION: But it's just a yes-or-no situation, either the new dealership can open or it can't, there's no continuing regulatory supervision of any kind.

MR. McCALL: That's correct. That's correct. There's no continuing --

QUESTION: And the sole State interest is in protecting the old dealer from additional competition, right?

MR. McCALL: I would phrase it slightly differently.

I think it's to prevent overloading in a particular area.

QUESTION: To prevent too much competition, in other words.

MR. McCALL: That might deprive consumers of warranty facilities through business failure, and things of that type, yes. I think --

QUESTION: You don't describe this as protecting consumers, do you?

MR. McCALL: I think it is in part designed to that, yes. Certainly to the same extent the State of Maryland's law was in the Exxon case.

QUESTION: But nothing in our opinion suggested the State of Maryland law did anything for the consumer, did it?

MR. McCALL: It didn't seem to be crucial to the opinion, no.

I would lastly say that it seems to me that the antitrust laws yoked with the supremacy clause is a poor vehicle to be used to strike down statutes which may be unpleasing to manufacturers. Essentially, GM complains it's a bad law, and they don't like it. I think that's quite questionable. Congress and other State Legislatures have passed similar laws.

But the remedy in that case is not before this Court, it is before the State Legislatures, and the automobile

manufacturers lack neither the sophistication nor the resources to get an adequate hearing in the State Legislature.

I would like to reserve whatever time we have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

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

ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,

ON BEHALF OF THE APPELLEES

MR. COLEMAN: Good morning, Mr. Chief Justice. May it please the Court:

The basic issue here is whether, under the Fourteenth Amendment, a State may grant private individuals the unrestrained use of State power to exclude selectively other private individuals from enjoying the common occupations of life for substantial periods of time.

Such a grant of State power to private individuals ought to be particularly suspect, since, once exercised, whether individually or collectively, it results in a horizontally opposed restraint on trade, long held, per se, legal, under the Sherman Antitrust Law.

Now, let me make crystal-clear that appellants do not challenge the power of the State to regulate business activities within its borders through active State supervision. What it does challenge is the ability of an existing franchise dealer to use State power collectively, arbitrarily,

and capriciously to prevent other equally competent and qualified franchise dealers from enjoying their franchise. The existing franchise dealers can do this, because the State issues, even though the statute is a for-cause statute, a temporary injunction in favor of the existing dealer, without any notice, any hearing, or even the slightest consideration by any State official.

Such a total application of State power to private individuals lies at the heart of the matter. It's not only unreasonable, I really submit it's outrageous.

QUESTION: Mr. Coleman, the three-judge court in this case, as I understood it, held that, and I think quite clearly, perhaps implicitly, that the State could do precisely this so long as sufficient procedural due process was afforded. Isn't that correct?

MR. COLEMAN: Yes, sir.

QUESTION: In your opening statement I think you posed the question as to whether or not the State could do it at all, with or without procedural due process.

MR. COLEMAN: No, the State could not do it in this manner, where they put in the hands of private individuals the uncontrolled power to keep another person out of business.

QUESTION: Can't do it at all or can't do it without?

MR. COLEMAN: Well, what you're saying, Your Honor,

I think you'd have a different question. If what you're saying is that the State would determine that in California, for example, there were a sufficient number of business dealers, and we are not going to let any other business dealer in, I think you've got a completely different question there.

But what we claim here is the particular wrong, is that the State abrogated its power and instead says, "We'll do nothing, but if any private competitor, the one person that has an interest adverse to the interest of the other person, objects, you then have this injunction issued."

In other words, I'd like to say here that this ought to be clear. Under this statute, once General Motors entered into the franchise agreement with Muller and Fox, and each of them already had a State license, at that point, under this statute, the State was powerless to do anything.

In the first place, if the franchise was set more than ten miles -- not in the 314-mile area, no one could do anything. If it were within this area, as you pointed out, Justice Stevens, and no one objected, my clients had an absolute right to open. And it's only because there's somebody in that area, which I think everybody here has to agree has to be the one person that I cannot depend upon to give me a fair, unbiased determination as to whether there is a violation of the statute, that's the one person that can prevent me from going ahead with the fruits of my contract.

QUESTION: Is that a constitutional argument you're making?

MR. COLEMAN: Yes, sir.

QUESTION: Lack of procedural due process?

MR. COLEMAN: Lack of procedural due process and a State statute, No. 1; No. 2, a State statute which gives private individuals the uncontrolled right to affect my liberty. And that is strictly the Eubank vs. Richmond case, Your Honor, where the Court said there that you can't have a statute which says that the landowners, if two-thirds of them decide where the property line should be, that ends the matter, that's where you put the property line.

QUESTION: Well, what if General Motors and your client, or General Motors and the new franchisee have an agreement to open up at a particular place, but it's zoned residentially?

MR. COLEMAN: Well, sir, we don't have that problem here because in this case the places which were selected were already used as automobile places.

QUESTION: Yes, but what if it were?

MR. COLEMAN: Well, if you had a general law, a general law applicable to everybody, not a law where only my competitor can bring it into force, and a law where, when he brings it into force prior to any State hearing, he gets all the relief that he's trying to get. And that's what the wrong

is here.

What you're saying is, can you have a general statute, a regulatory statute saying that in a particular area, if you don't -- if that doesn't qualify, that there can be a hearing or you could object, and the State independently determines I will or I will not; that's completely different.

QUESTION: Well, you can get an immediate injunction, can't you, in most States if a person simply opens up a use that is not permitted under the zoning law?

MR. COLEMAN: Well, sir, based upon the wisdom of your own rules, you don't get immediate injunctions in the federal court. What you do is you file a piece of paper, you file a pleading, you have an affidavit, and then the most independent person of all, a federal district judge passes upon that. And I've won some and I've lost some, Your Honor.

QUESTION: Well, how about a State court?

MR. COLEMAN: Well, I'm pretty sure that if any State court reads Justice White's opinion in the North Georgia Finishing Company case, I think that a State court ought to be constitutionally under the same restrictions. That's what the whole line of those cases is about.

QUESTION: So your problem would be cured here if the California law said that you can put in the dealership unless some -- unless there's an objection filed. If there's an objection filed, "we shall hold a hearing and you won't be

prevented from putting it in until the hearing is over" and if it goes against you. Let's suppose that's the scheme. They have the hearing and they decide that the objection is valid, we're not going to permit another dealer in this area. Would your problem all be over?

MR. COLEMAN: Well, that's a different case. If what you're saying is that if it were a statute under which, before the State power was exercised, that we obtained a hearing, then obviously we could no longer argue the due process issue. We may have other issues in the case, but we wouldn't have this one.

QUESTION: So your problem is devoted to the period before there is a hearing and a State decision?

MR. COLEMAN: That's right, yes.

QUESTION: Although, in my example, the State procedures would never be engaged unless some private party filed an objection.

MR. COLEMAN: Well, I think that's a more difficult case. I think that what usually happens, I think that the statute ought to read that a State, independently or upon objections -- I mean, you know, for example, where most statutes say that if you file and someone has standing and in due course makes an objection, or the State independently, and I think that one of the wrongs in this statute is the State independently can never act, that it can only act if a

competitor comes on. I think that it's clear in this case since there is no hearing, that under your cases of this Court, that the statute is clearly unconstitutional. If you say there is a hearing, then obviously you don't have the constitutional issue, but you might have other issues, if you say that there will only be a hearing if a competitor is the one that asks for the hearing. I just think that's a different case.

With respect to Fox, the record is clear that Fox had a franchise agreement, he had a license, all he wanted to do was to add another line to the place, the place of business. It's equally clear that under State law, having the license, his only duty was to indicate to the State officials where the location was going to be. At that point the State gave him an entitlement. He had the right to go forward. And the only thing that prevented him from going forward was this particular statute, enacted lately, which said, "We'll wait, if a competitor objects, you can't go forward."

He doesn't have to give me any reason whatsoever, all he has to file -- if you look at the record on page 77, you will see the objection. It just says "I object". And based upon that, Fox was held up for over eleven months. He lost an entire season of sale.

We think that's what is wrong with this statute.

I think I made it clear as to what I think the

liberty interest is. I think that every American citizen has an absolute right to go into business and he or she cannot be interfered with, except under a State statute which either regulates somebody generally, applying to every one, or one which first applies for a type of hearing.

QUESTION: Now, you rely for your basic constitutional liberty upon cases such as Meyer v. Nebraska, don't you?

MR. COLEMAN: Among ten or twelve others we have cited.

QUESTION: Well, among ten or twelve others. It was that case that the three-judge court particularly relied on. And in that case the Court held that all the hearings in the world wouldn't have made that statute valid. That wasn't a procedural due process case, was it?

MR. COLEMAN: That's right, Your Honor. You have made the point I've been trying to make dramatically better than you can -- with all due respect. Well, Justice Rehnquist at some time said that because after Meyer a statute permits a certain type of substantive regulation, that means that Meyer has been overruled, and there's no liberty interest. It doesn't, it just means that there's still a liberty interest, but the Court will permit State action to affect that.

But what we're saying is that one way you can affect it, in this type of statute applying only to a competitor, is without requiring a hearing.

QUESTION: But the Meyer case and that line of cases, Pierce v. Society of Sisters, and so on, those are not procedural due process cases.

MR. COLEMAN: That's right. We use Meyer only to establish that we have a liberty.

QUESTION: Those cases held that the State couldn't do what it did at all, with all the hearings in the world, it still couldn't do it.

MR. COLEMAN: Right. That's right. For one reason, because the person had a liberty interest. And we say that once you recognize that a liberty interest, then they can't do what they wanted to do here without a certain type of hearing.

We also say we have an entitlement, and Justice Powell, in his opinion in the Arnett v. Kennedy case, once again said that once you establish, either by the Constitution or by statute, that you have an entitlement -- and Justice Brennan, you in the Goldberg case -- once you establish that, then you have the right to say that the State cannot affect that without granting me a hearing. And even though Justice Rehnquist would say, and I think erroneously, that if that State -- if the same statute like in Arnett says to have hearings, but a different type of hearing, that somehow you read that back in to cut down on the liberty or entitlement.

Fortunately for me, six members of this Court have

held to the contrary, and I think, for that reason, that once I convince you that there is a liberty interest, then you have to determine: can this type of liberty interest be taken away by a competitor without a hearing? Once I demonstrate that there is an entitlement under the license, that I demonstrate to you that here the State license gave my client, including General Motors, this right, can that right be affected, not by the State acting independently but by a private competitor, without my first getting a hearing?

I don't think I have to argue the question of the hearing, because here there was no hearing at all.

QUESTION: Mr. Coleman, just to be sure I understand your submission, I take it you emphasize the absence of any governmental participation prior to the adverse impact on the liberty interest which you claim?

MR. COLEMAN: Yes, sir.

QUESTION: Which, if I understand you correctly, would mean that your argument would not cast any doubt on the validity of a statute which flatly prohibited new dealerships within the ten-mile radius of old dealerships? Or, alternatively, a statute which said you cannot open a new dealership without getting permission from an appropriate licensing agency, or something like that, and where you apply to a State agency for a new dealership?

MR. COLEMAN: Well, I think --

QUESTION: Either of those would be safe under your argument?

MR. COLEMAN: I say they are different problems.

QUESTION: But I'm saying your argument wouldn't --

MR. COLEMAN: My argument would not go to that, and I must be -- because I'm affected greatly by Justice Brandeis's opinion -- I mean, pardon me, Justice Brennan's opinion in Duval vs. Bursey case. The first paragraph of that opinion says: If you had a State statute which said that anybody that wanted to drive a car had to have automobile insurance, that statute would probably be constitutional. But if the State statute doesn't do that, and say that you drive and you don't have insurance, that if you thereafter get in an accident and if you don't pay up at a certain time, and therefore it's at fault, that we're going to keep you from enjoying this license, then, under those circumstances, you first have to have some type of hearing.

So we would have to say here that obviously if you drew a different statute, we'd have a different problem. But we think under this statute you don't have that type of problem, and it's clear that the State isn't thinking about barring all the automobile dealers. What it did was to put in the hands of the competitor this type of action, which we think is clearly unconstitutional.

Now, I would next like to turn to the antitrust and

supremacy arguments.

QUESTION: Let me ask you one other question, if I may, before you do. Could we view this statute as the equivalent of creating a legislative or statutory presumption that every new dealership within ten miles of an old dealership is contrary to State policy in some way?

MR. COLEMAN: No, sir.

QUESTION: And why not?

MR. COLEMAN: Simply because, under those facts, if you open up and a dealer within that area doesn't do anything, the State is powerless to act.

QUESTION: Is there experience under the statute as to how most of these disputes are resolved?

MR. COLEMAN: Yes, sir. In a footnote in our brief, sir, there were 117 cases --

QUESTION: What page is this, Mr. Coleman?

MR. COLEMAN: I think it's about page 33.

QUESTION: Thank you.

MR. COLEMAN: In a footnote in our brief, sir, there were 117 protests filed. Only one has ever been sustained.

QUESTION: Now, is that a matter of public record or in -- that's in the record?

MR. COLEMAN: It's in the record. And my good friend, one of the parties, wrote a letter and said it's in -- there's no doubt it's clear, I think.

QUESTION: I see.

MR. COLEMAN: So that should dramatically show to you --

QUESTION: So you would say the experience would demonstrate that the presumption runs the other way?

MR. COLEMAN: Well, it certainly does. And if you just look at it, why should it be that if there's a business decision, that there should be an additional dealer selling Buicks? The statute says 314 miles. Don't you realize that every city -- that means that you can block people from going to any city more than once, other than Los Angeles and San Diego. Those are the only two cities.

QUESTION: Well, do you think a State could have a general statute, Justice Stevens asked you about -- you can't put in a dealership without permission. Suppose the State said, Before you can establish a dealership, you must give us notice and give us ninety days to investigate it. And meanwhile, you may not establish the dealership.

MR. COLEMAN: The State --

QUESTION: The State says that. That you must --

MR. COLEMAN: The State, one, did not do that here, sir.

QUESTION: Sir?

MR. COLEMAN: The State -- that's a completely different question.

QUESTION: Well, --

MR. COLEMAN: And what would happen, Your Honor, --

QUESTION: -- what about --

MR. COLEMAN: -- you had the privilege of --

QUESTION: Would you say you were denied procedural due process or some kind of due process?

MR. COLEMAN: What I would say is whatever my rights are, they are not in the hands of my private competitor.

QUESTION: Well, that may be true --

MR. COLEMAN: That they are in the hands of a public official --

QUESTION: That may be true, but you're being deprived of your liberty interest without a hearing for ninety days.

MR. COLEMAN: Well, sir, when you were in the Justice Department, you had matters of merger sometimes, and you had a certain time to act. But if people could come in to you and say, "Mr. Justice, I've got a problem, we want to" --

QUESTION: I know, but we're dealing with my example, not yours.

MR. COLEMAN: No, that's what I'm saying. I'm saying that the moment it's a State official, I, as a citizen, have the right to go to that State official, to explain to him my problem.

QUESTION: The State official says, You just give

us ninety days, and we're not talking to you for ninety days; just stay out for ninety days.

MR. COLEMAN: Well, if that's --

QUESTION: And we may give you permission and we may not.

MR. COLEMAN: Well, that's a completely different case, and if I could show that he was acting arbitrarily or something, I'd have a different problem.

QUESTION: But assuming that that would be good, assuming that would be acceptable, do you think putting it in the hands of the private party to trigger the delay is itself unconstitutional?

MR. COLEMAN: Yes, sir, I do. I think that's what the Richmond case holds. I think that --

QUESTION: And that isn't quite a procedural due process issue, is it?

MR. COLEMAN: Well, what really happened was that that -- your decisions developed that way even before you got to the due process. The due process issue is an additional reason. I mean, there are two separate -- that's why we mentioned the Richmond case, Your Honor, because long before you got to these later due process cases, the Court already recognized that this was improper. But then you add to the private --

QUESTION: Well, I really would like to get your --

I think, to me anyway, it would be important to have your view on whether you think the State could itself say: Delay for ninety days, and we won't talk to you meanwhile, but you've got to get our permission, and we're not going to give it to you for ninety days.

Now, if that is acceptable, then you must rely on the other branch of your argument.

MR. COLEMAN: Oh, no, sir. I don't. I think, even if that's acceptable, I don't have to -- if the State statute goes on and says: But I as a State have no concern in this. But I will only get concerned if a private competitor, who is within a certain area, files a paper.

I think that's a completely different case. That's what the wrong is, to trigger here -- particularly when I already have a license.

QUESTION: But I don't know why that makes it into a procedural due process case.

MR. COLEMAN: Well, because I think that there what the State has done is to say that: We're not going to decide this legislatively, we're going to decide this in an adjudicatory proceeding; and once you have an adjudicatory proceeding, which is based upon fault, then you have the rules of the game which says that you don't affect the person's right without first giving him some type of hearing.

Incidentally, that footnote is on page 10 of the

brief. I apologize.

I next would like to turn --

QUESTION: Before you go on, Mr. Coleman, would you say it's beyond the State power, taking Justice White's illustration in part, to say there must be a ninety-day waiting period while the State or the local authority as its surrogate checks into the traffic patterns, possible increased air pollution because of the greater frequency of cars and so forth; would that be unreasonable?

MR. COLEMAN: Well, that would be a completely different statute. And if what you're saying is that if the State had said that before anybody could go into business, you have to file a piece of paper with the State, and the State, for a certain period of time, will suspend any hearing on that to develop the proper type of evidence, that obviously because we live in an organized society where it takes time to decide something, you have to recognize that public officials can't act the next day.

Certainly, Justice White, you're talking about a statute of general application, and I think that makes all the difference in the world. I mean, this case is quite clear, if you're talking about generally where you affect --

QUESTION: Well, this is general about automobile dealers is all, it says that if you're going to establish another dealership within a ten-mile radius, if you're going

to have more than one, you must give us notice, and you've got to wait ninety days.

MR. COLEMAN: Yes, but that's not this statute.

QUESTION: Well, I know that's not this statute. But how about that statute, would it be acceptable or not?

MR. COLEMAN: Well, that statute would raise other problems, it wouldn't raise the problems we have here.

QUESTION: Well, how would you solve that problem?

MR. COLEMAN: Well, I'd solve the problem --

QUESTION: Would it be constitutional or not?

MR. COLEMAN: Well, I'd have to read the statute first, sir, you don't --

QUESTION: Well, I've just given it to you.

MR. COLEMAN: Well, today -- the reason why I'm not being more forthcoming to you than I normally would be, sir, I've had experience in this field, and you just don't get statutes drawn that simply. And I'd have to read the statute. I don't want anybody to say that I've conceded that any statute --

QUESTION: Well, I know. But you would concede, wouldn't you, that your present argument would not apply to that statute?

MR. COLEMAN: That's right. I'd say that's a different case. It may be GM will get a different lawyer to argue that one, but on this particular one, that's not my

problem, and I think that's a completely different case.

As I said, I'd like to turn to the antitrust and supremacy argument.

GM entered into an agreement with Fox to sell Buicks. After reviewing the facts and making a determination that the Pasadena location would comply with Section 3063 of the Act. But two competing dealers, who also had a GM agreement, jointly protested. The Act conferred upon them the power, without any independent State decision, to prevent Fox, as a competing dealer, from locating in the territory because it is within the 314-mile area.

And, Mr. Justice Marshall, when you indicated that there was an umpire plan, that has been changed, and it was changed because of, in part, the decision of the Third Circuit in the Holiday Inn case, and GM felt that perhaps it might be a problem if you would permit some of the existing dealers to object to a new dealer coming in. And so, therefore, with respect to this type of decision, there is not an umpire plan.

But that is the reason why it seems that this statute has to be bad, because if you say that GM with its dealers cannot make this type of arrangement, then clearly a competing dealer, merely by saying "I protest", ought not, for a period of ninety days to a year and a half, to be able to impose what is basically a horizontal trade restraint.

As I understand the law, the Sherman Act says that any statute, State statute, which permits a private competitor to do this is invalid. That's what I think your decision in Schwegmann says. In Schwegmann, the liquor distributor had a valid contract for retail price maintenance with some local retailers.

The Louisiana statute, however, attempted to arm a private competitor with the ability to extend this contract by making such price-fixing enforcible against non-signing retailers. Because this extension conflicted with basic antitrust principles, the Louisiana statute was preempted by the Sherman Act.

In Schwegmann, this Court never inquired into whether any private individual had violated the antitrust law. For all horizontally imposed restrictions to restrain trade are patently pernicious and are per se violations of the federal antitrust laws.

QUESTION: But, Mr. Coleman, don't you have a problem with the fact that here, if there's an agreement between the existing dealer who objects and General Motors, the agreement is one which permits the new company, the new dealership to open. The existing dealer can object without agreeing with anybody. So where do you get the conspiracy element of the Sherman antitrust law?

MR. COLEMAN: But you do, sir, the same way in

Schwegmann. The fact is that you have a State statute which permits --

QUESTION: But that gave effect to a vertical agreement between the liquor company and its wholesaler or its retailer. There was an underlying agreement there, which you don't have here.

MR. COLEMAN: Well, sir, what you have here, you have a State statute which permits an individual to bring about the same type of conduct --

QUESTION: That acting alone --

MR. COLEMAN: -- that normally he could only bring about by way of an agreement. And, you know, suppose you had a State statute which says --

QUESTION: What you're saying is a State statute replaces the conspiracy element of the Sherman Act?

MR. COLEMAN: That's right, because it permits the private individual, acting by himself, to bring about exactly the same result that otherwise --

QUESTION: I don't think that any case has so held.

MR. COLEMAN: Well, I think --

QUESTION: Schwegmann, as I say, had a two-party agreement in it.

MR. COLEMAN: Well, I would ask you to re-read Schwegmann, because I think that Schwegmann does not depend upon any agreement which has in any way been determined to be

illegal or improper.

What Schwegmann says is that you can't use State power to bring about exactly the same results that otherwise you could bring about only by an agreement. And I think that the only thing that would save this statute would be the so-called Parker doctrine, but if there's anything clear from Cantor and your cases decided in the last two or three years, it is that the State has to do something in terms of active supervision before you say the Parker doctrine is applicable.

And here there is no active supervision whatsoever.

I didn't think I was going to get this far without Justice White asking me about the question he hased the other day about this question of whether, since we raised both issues below, and now the Court passed upon one constitutional issue, is there any problem with respect to the other.

I think, under the cases -- I think the cases you were referring to was Hogan vs. Levin, and as I read that case, or somebody read it for me last night and then I read it this morning, that case says that both issues were constitutional issues. Also what we're asking here is only what the Court did in Ohio Bureau of Employment vs. Hodory, which is 431 U.S. --

QUESTION: But haven't we said three-judge courts would normally reach the supremacy clause issue first?

MR. COLEMAN: I don't think that's what you said. But if they don't wish to reach it first, and they decide the

other issue, when they were both submitted -- and here they are both constitutional issues, which, in Hagan? you indicated that there's -- and we submitted both of them, and we argued both of them equally as vigorously.

Now, if the Court says -- as I look at the constitutional cases, dealing with the due process, that's so clear that I will resolve it on that basis, they give us the injunction, and I don't see how we can do anything else but accept it and wait, hoping that nobody will take --

QUESTION: Well, if we disagree with you on your first submission, what should we do with your supremacy clause issue, remand it?

MR. COLEMAN: No, sir, I think that you should resolve it here. I think that the facts are clear, the argument is clear, and my understanding is that's what you did in Ohio Bureau of Employment vs. Hodory?, and also in Sterling vs. Constantineau?.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Mukai.

REBUTTAL ARGUMENT OF ROBERT L. MUKAI, ESQ.,

ON BEHALF OF APPELLANTS IN NO. 77-837

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

Mr. Coleman suggested that the Schwegmann decision relieved the appellees of the necessity of demonstrating at

least some conduct violative of the federal antitrust laws.

I would ask the Court to refer to page 386 of that decision, reported in 341 U.S., in which Justice Douglas unequivocally stated that the scheme there questioned would be illegal, would be enjoined, and would draw civil and criminal penalties, and that no court would enforce it.

And that was the Louisiana statute which was struck down by this Court in Schwegmann.

So it is our submission that Schwegmann cannot relieve the appellees of stating an antitrust claim without showing predicate facts necessary to make out a violation of some federal antitrust statute.

With the Court's permission, Mr. Coleman has pointed out, or has characterized a right existing in appellees which depend, in large part, upon the view that the license granted to a dealer provides him with some unassailable right to locate wherever he wants. In effect, Mr. Coleman posits a portable property interest in the dealer, which he cannot be deprived of without a due process hearing.

This characterization is mistaken because a fixed geographical location is integral to the initial issuance and the continued entitlement to a dealer license under California law.

In Section 11712 of the California Vehicle Code, the Department of Motor Vehicles, the licensing authority, is

prohibited from issuing a dealer license to an applicant without an established place of business.

Section 11721 requires the automatic cancellation of a dealer license whenever a dealer abandons an established place of business. Section 11713 makes it a violation of the Code not to maintain an established place of business, and Section 40000.11 makes that violation a misdemeanor under the California law.

Your Honors, I see that my time has expired, and I thank the Court for its attention.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:42 a.m., the case in the above-entitled matters was submitted.]

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