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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 135

PANAMA REFINING COMPANY ET AL.,
Appellants,

vs.

A. D. RYAN, S. D. BENNETT AND
J. HOWARD MARSHALL,
Appellees.

REPLY BRIEF

We desire to reply briefly to the elaborate brief and argument of counsel for respondents. At the outset they state that the National Industrial Recovery Act is an exertion of power by Congress under the commerce clause of the Constitution to remove obstructions to the free flow of interstate commerce. But the complaint is that Congress, in order to obtain that result, has resorted to a method that exceeds the power conferred upon it by said clause in that it has attempted to subject to its jurisdiction and regulation, through a delegation of its power to the President, matters that are purely local and exclusively within the jurisdiction of the states as contemplated by the Constitution and the Tenth Amendment thereto.

Counsel frankly state that the question to be determined in this case is whether Congress, under the power conferred upon it by the commerce clause of the Constitution, may control the production of petroleum within the borders of the several states, which production is clearly not commerce. **Champlin Refining Company vs. Corporation Commission, 286 U. S. 210.** They conclude that Congress has this power. Their conclusion, as we gather it, is based upon the assumption that Congress has the power to enact any legislation that will result in the maintenance of a fair price for articles moving in interstate commerce, and in order to maintain a fair price, the production of the commodity must be controlled. Consequently, control of the production of the article comes within the jurisdiction of Congress. The question then arises, are counsel correct in this assumption?

The brief of counsel is replete with statements and assertions by various magazine writers and others who claim to have expert knowledge as to the conditions that now prevail and have prevailed for a number of years in the oil industry and the abuses that have been practiced by those engaged in the industry. The purport of the articles by these writers is that the practices followed by those engaged in the oil business for the last seventy-five years must be changed, as well as the nature of the ownership of oil and gas as has been determined and followed by the courts of this land for a like period of time. The sum and substance of the alleged abusive practices consists in this: That when a great oil field, such as the East Texas field, is discovered, where the quality of the oil is of the highest and the cost of production is the lowest, that those that are fortunate enough to own oil wells in such a field or pool immediately avail themselves to the greatest extent possible of the national and foreign markets of petroleum and its products; that those so situated can readily take away from the owners of small or "stripper" wells the national and foreign market that they had held before the discovery of the flush pool, because of the ability of the owners of the wells in the flush pool to produce more cheaply. This, it is said, results in the owners of the small or stripper wells being forced to close down their wells, for they cannot, by pumping from one-fourth of a barrel to a barrel of oil per day, compete with the owners of wells that are capable of producing from 5,000 to 10,000 barrels per day. It is stated by the experts referred to by counsel, that the owners of these stripper wells could continue to produce their wells if a price could be maintained that would justify their production, and that by their continued operation many millions of barrels of petroleum could still be recovered from these small wells; but by permitting the owners of wells in the flush pools to utilize the national and foreign markets, by reason of their ability to produce more cheaply than the owners of the stripper wells, all of the oil still in the ground in the stripper pools will probably remain there and never go into commerce.

From these alleged facts, counsel assert that Congress is authorized by the commerce clause to exert its power to the end that the oil still remaining in the stripper pools will be produced and go into interstate and foreign commerce. And in order to accomplish that result, the owners of wells in the flush pools must be restrained in their production to the extent that a scarcity of petroleum commodities will be maintained so that the price therefor will be sufficiently high to enable the owners of stripper wells to continue operations and supply their portion of the interstate and foreign market to the same extent as if the newly discovered or flush pool were likewise a stripper pool. As stated above, counsel assert that the states, for selfish reasons, refuse to enact uniform legislation so as to equalize these natural conditions that prevail, which results in unfair competition and brings about the direful results pointed out by the magazine writers referred to in their brief. Of course, this argument ignores the privilege of one owning a large well being entitled to produce more oil than one owning a small well. Standard Oil Company vs. United States, 283 U. S. 163.

But this question arises: From where did Congress obtain the power to equalize natural conditions in the several states so as to eliminate unfair competition between citizens of the states? It was held by this court in Hammer vs. Dagenhart, 247 U. S., p. 273, that no such power was conferred upon Congress by the commerce clause. As to this, it said:

> "There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress the general authority to equalize such conditions. In some states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulation; surely this fact does not give Congress power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress. The grant of power to

Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution. * * * It may be desirable that such laws be uniform, but our federal government is one of enumerated powers; 'This principle', declared Chief Justice Marshall, in McCullough vs. Maryland, 4 Wheat. 316, 'is universally admitted.' A statute must be judged by its natural and reasonable effect. Collins vs. New Hampshire, 171 U. S. 30. The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases, 234 U. S. 548, 560. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters intrusted to the nation by the Federal Constitution."

Counsel assert that Congress, under the commerce clause, has the power to regulate and control a purely intrastate business when such business is a part of a general scheme or combination to limit or obstruct the free flow of interstate commerce. No one questions the soundness of this doctrine. Chicago Board of Trade vs. Olsen, 262 U. S. 1; United States vs. Patten, 226 U. S. 525; Standard Oil Company vs. United States, 283 U. S. 163; Stafford vs. Wallace, 258 U. S. 495. And they also correctly state the rule that Congress may, in order to prevent discrimination as to interstate commerce, set aside an intrastate rate established by a state covering only intrastate transportation. H. E. & W. T. Railway Company vs. United States, 234 U. S. 342; Florida vs. United States, 292 U. S. 1. And Congress may authorize the abandonment of a line of railway wholly within a state when it is a part of an interstate system and its maintenance and continued operation is a drain upon such system and affects its operation in interstate commerce. Colorado vs. United States, 271 U. S. 153. Counsel again correctly assert that a conspiracy to restrain the movement of goods in interstate commerce so as to diminish the quantity of such goods in such commerce is within the purview of the Anti-trust Act of Congress. Local 167 et al. vs. United States, 291 U. S. 293. But we fail to perceive where these decisions have any application to the question here presented.

As to the power of Congress through its instrumentality, the Interstate Commerce Commission, to set aside an intrastate rate covering intrastate business conducted by an interstate carrier, Chief Justice Hughes in the State of Florida vs. United States, supra, said:

> "That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce and to provide for the execution of that power through a subordinate body. The Shreveport Case, 234 U. S. 342."

Here we have no question as to interstate instrumentalities or discrimination between intrastate and interstate business. Therefore the doctrine announced in this line of decisions does not apply.

There is no contention made that the producers of petroleum are conspiring with each other to diminish the amount of petroleum products that are to go into interstate commerce so as to receive a higher price therefor, but on the other hand it is contended that those engaged in the petroleum industry are in a race with each other to place as much of those commodities in interstate commerce as is possible and accepting therefor a price that is less than those expert magazine writers, referred to in the brief of counsel, believe such commodities should bring. Therefore, the doctrine announced by this court in Local 167 vs. United States, supra, as to the power of Congress to prevent combinations and conspiracies in restraint of interstate commerce, would hardly be applicable to the case at bar.

As to the acts of Congress known as the Stock Yards Act and the Future Grain Trading Act, sustained by this court in Stafford vs. Wallace, supra, and Chicago Board of Trade vs. Olsen, supra, respectively, those decisions disclose that the reason for holding those acts valid was because Congress had found from the evidence before it that the businesses there regulated had practiced abuses that directly affected interstate commerce. But here we have no finding by Congress in the act under consideration that abuses were being practiced by those engaged in the oil industry, which directly or substantially affect interstate commerce; neither have we any finding by Congress that the acquisition of the entire national and foreign market of petroleum products by those that are fortunate enough to own wells in a prolific pool resulting in the elimination from such markets of the owners of wells in stripper pools, results in a diminution of such products in interstate and foreign commerce or has a harmful effect upon such commerce; neither is there a finding by Congress that competition in petroleum and its products so that the price therefor is brought to a level below that which is required for the profitable operation of stripper wells, affects interstate and foreign commerce. In the absence of such findings by Congress, then the doctrine announced in Stafford vs. Wallace, supra, and Chicago Board of Trade vs. Olsen, supra, can have no application.

In Hill vs. Wallace, 259 U. S. 69, this court had under consideration the validity of an act of Congress of August 24th, 1921, known as the Future Trading Act, in which, after discussing the act, it said:

> "It follows that sales for future delivery on the board of trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon. United States vs. Ferger, 250 U. S. 199. It was upon this principle that in Stafford vs. Wallace, 258 U. S. 495, we held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, because Congress had concluded that through exhorbitant charges, dishonest practices, and collusion, they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through. So, too, in United States vs. Patten, 226 U. S. 525, it was held that though this court, as we have seen, had decided in the Ware & Leland Case (209 U. S. 405) that mere contracts for sales of cotton for future deliveries which did not oblige interstate shipments were not interstate commerce, an

indictment charging the defendant with having cornered the whole cotton market of the United States by excessive purchases of cotton for future delivery and thus conspired to restrain, obstruct, and monopolize interstate commerce in cotton, was sustained under the first and second sections of the Sherman Anti-trust Law. This case, like Stafford vs. Wallace, followed the principles of Swift & Company vs. United States, 196 U. S. 375. But the form and limitations of the act before us form no such basis as those cases presented for federal jurisdiction and the exercise of the power to protect interstate commerce."

Counsel assert that the act of Congress under consideration merely manifests a different economic policy of Congress as to interstate commerce from that manifested by it in the enactment of the Sherman Anti-trust Act, in that under the Sherman Anti-trust Act it was the policy of Congress that commodities moving in that commerce could be purchased as cheaply as possible, while under the National Industrial Recovery Act Congress manifested a policy that it is for the best welfare of the nation that commodities moving in that commerce shall bring as high a price as possible. Counsel further state that Congress had the right to adopt either policy that it saw fit. In this doctrine we cannot acquiesce.

By the Anti-trust Act, Congress declared it to be its policy that monopolies and combinations which would result in the diminution of commodities and restraint of trade in interstate commerce should be prohibited. It is manifest from that act that the results sought to be obtained by Congress were two-fold. First, every American citizen has now and had at the time of the adoption of the Constitution, the natural right to engage in commerce, and it was for the protection of that right that the power to regulate it, in so far as interstate and foreign commerce is concerned, was conferred upon the national government. Therefore Congress, by the enactment of the Anti-trust Law, merely carried out one of the purposes of the delegation to it of the power to regulate interstate and foreign commerce by prohibiting monopolies and combinations that would prevent one from engaging in that commerce who, but for such monopolies and combinations, would be enabled to engage therein. The second result sought to be obtained by Congress by that act was, of course, to protect those purchasing commodities in interstate commerce from paying more for such commodities than they would be required to pay if such commodities moved free and without restraint. The Anti-trust Law was but the affirmance by Congress of the policy peculiar to America, upon which it had prospered and grown beyond the imagination of man, that competition should never be limited or restrained, and which policy had been followed by the states in matters within their jurisdiction for one hundred years. Northern Securities Company vs. United States, 193 U. S. 198. It is therefore inconceivable that Congress ever had in mind departing from the policy manifested by the Anti-trust Act. We fail to see anything in the act that warrants the conclusion that Congress intended that commerce in any commodity was to be restrained. On the other hand, the manifest purpose of the act was to increase the flow of commerce. This cannot be construed to mean that where commerce in a commodity is flowing freely and unrestrained in a certain area that a restraint must be placed upon the movement of the commodities in that area in order to permit like commodities to move that are produced in an area less favorably situated, where the cost of production is greater, and, as a consequence, cannot move in competition with the commodities produced in the favored area, unless the production of the commodities in the favored area is restricted to the level of production in the unfavored area.

It may be conceded that the ultimate purpose of Congress in enacting the act under consideration was to increase the flow of interstate commerce, as that would naturally follow the reemployment of labor and the resumption of the manufacture of goods. But to attain that end, Congress has resorted to a method beyond its power by assuming jurisdiction over and regulating the manufacture of goods, the production of minerals and the employment of labor and fixing the wages to be paid for such labor, none of which are within its jurisdiction. Cornell vs. Coyne, 192 U. S. 418; Browning vs. Waycross, 233 U. S. 16, 22; Delaware L. & W. Rr. Co. vs. Yurkonis, 238 U. S. 439, 444; General R. Signal Co. vs. Virginia, 246 U. S. 500; Hammer vs. Dagenhart, 247 U. S. 251, 272; Arkadelphia Mill Co. vs. St. Louis Southwestern Rr. Co., 249 U. S. 134, 151; Crescent Cotton Oil Co. vs. Mississippi, 257 U. S. 129, 136; Heisler vs. Thomas Colliery Co., 260 U. S. 245; Champlin Refining Company vs. Corporation Commission, 286 U. S. 210.

That Congress was actuated by the highest motive in its attempt to relieve depression and distress, cannot be doubted, but if it adopted an unconstitutional method to accomplish that purpose, which in the end would destroy our system of government, then, however high its motive and the good sought to be obtained, the act cannot stand. In Bailey vs. Drexel Furniture Company, 259 U. S. 37, Chief Justice Taft said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress but left or committed by the supreme laws of the land to the control of the states. We cannot avoid the duty, even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an

insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and national power, on the other, our country has been able to endure and prosper for near a century and a half. * * * Should Congress in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

Respectfully submitted,

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