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TABLE OF CITATIONS

Supreme Court of the United States

October Term, 1954

No. 236

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

STEVE NELSON
Respondent.

BRIEF OF STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Pursuant to Paragraph 4 of Rule 42 of the Revised Rules of the Supreme Court of the United States, the State of Texas, acting through its Attorney General, John Ben Shepperd, respectfully files this brief as amicus curiae in support of the petition for writ of certiorari to the Supreme Court of Pennsylvania filed in the above cause by the Commonwealth of Pennslyvania.

I.

OPPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is reported in 172 Pa. Superior Ct. 125, 92 A. 2d 431. The opinion of the Supreme Court of Pennsylvania is reported in 377 Pa. 38, 104 A. 2d 133. The order of the Supreme Court of Pennsylvania denying the petition by the Commonwealth of Pennsylvania for reargument is noted in 377 Pa. 60.

II.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954. Its order denying the petition of the Commonwealth of Pennsylvania for rehearing was entered on April 27, 1954.

The jurisdiction of this Court is urged under 28 U.S.C. 1257 (3), the Pennsylvania Supreme Court having held the Pennsylvania sedition statute invalid on the ground that it was repugnant to and therefore superseded by Section 2385 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808, 18 U.S.C.A. 2385 (the Smith Act). Both the federal and State statutes are set out in the Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania beginning at page 5.

Futhermore, the Supreme Court of Pennsylvania has decided a federal question of substance not here-

tofore determined by this Court, and has decided it in a way probably not in accord with applicable decisions of this Court.

III.

QUESTIONS PRESENTED

The statement of Questions Presented for Review contained in the Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania, beginning at page 4 thereof, is referred to and adopted.

IV.

STATUTES INVOLVED

Section 2385 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808, 18 U.S.C.A. 2385, and Section 207 of the Pennsylvania Penal Code of 1939, 18 Purd. Penna. Stat. Ann. 4207, both of which are set forth in the Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania, beginning at page 5 thereof.

V.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania, beginning at page 9 thereof, is referred to and adopted.

VI

ARGUMENT

Point 1

A State may punish acts committed within its territory which advocate the overthrow of the government of the United States by force and violence.

Argument and Authorities

The majority opinion of the Pennsylvania Supreme Court in this case does not contend that State statutes outlawing acts of sedition against either the State or the United States, of which the State is an integral part, are in violation of any constitutional provision. In fact it assumes that they are unassailable insofar as any constitutional prohibition is concerned, as well it might in view of the many decisions by the United States Supreme Court itself clearly and unconditionally upholding such laws, including *Gitlow v. New York*, 268 U.S. 652 (1925), *Whitney v. California*, 274 U.S. 357 (1927), and *Gilbert v. Minnesota*, 254 U.S. 325 (1920). In the *Gitlow* case it is stated:

> " . . . And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means . . ."

And in the *Whitney* case it is stated:

> " . . . that a State in the exercise of its police power may punish those who abuse this freedom (of speech) by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. . . ."

These cases are discussed and quoted from in the Petition for Writ of Certiorari filed herein by the Commonwealth of Pennsylvania. Futher repetition would serve no useful purpose, especially since there is actually no dispute of this premise.

In *Dennis v. United States*, 341 U.S. 494 (1951), this Court has recently cited the *Gitlow* case with approval as authority for upholding anti-sedition legislation in general, and in the *Gitlow* case this Court upheld a New York State statute very similar in substance to the Smith Act, and in general similar to the Pennsylvania act involved in this case. It is clear that there would be no question of the authority of the States to act in this respect in the absence of the federal Smith Act.

Point 2

The federal Smith Act (18 U.S.C.A. 2385) does not supersede the Pennsylvania sedition statute (Sec. 207 of the Pennsylvania Penal Code of June 24, 1939).

This brings us to the only possible question in this case. It is admitted that the federal constitution neither cedes exclusive jurisdiction in the field of sedition to Congress, nor denies such jurisdiction to the States. Thus the only remaining proposition to be decided is whether the Congressional action in the form of the Smith Act has preempted the field. Preemption or suspension of inherent and unquestioned powers of the sovereign States is not a thing to be treated lightly. It can be effected only by Congressional specification or conflict.

In such Congressional specification the intent must be clear. It is admitted that the Smith Act contains no provision of exclusive jurisdiction, either express or implied. Moreover, not only is the intent of exclusive jurisdiction not apparent at all, much less clear, but Congressional intent to the contrary is apparent in the provision of Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948 (which includes the Smith Act) that

> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Add to this the testimony of the author of the Smith Act, Mr. Smith himself, that Congress did not intend that the act supersede any State sedition laws. Add also the fact that at the time of passage of the Smith Act there were numerous State sedition laws in effect, which Congress well knew. It is hardly possible that Congress would have intended to abolish such

a great mass of existing legislation of such importance by inference only and without explanation or even statement of intent, especially when there would inevitably be doubt at least of the validity of such supersession without affirmative provision therefor. If Congress had really intended to supersede the State laws, it could easily have said so, and surely would have said so in order to be sure to accomplish the desired result and remove any doubt.

This leaves only the possibility of "conflict" to support the decision of the majority of the Pennsylvania Supreme Court. Such conflict must be absolute to the point of repugnance, and impossible of reconcilement. As stated by Chief Justice Hughes in *Kelley v. Washington*, 302 U. S. 1 (1937),

> " . . . The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

It is difficult to conceive of any criminal statute of a State being in *conflict* with a federal criminal statute, since they merely permit prosecution by different sovereignties for crimes committed against each respectively, neither having anything to do with nor any effect upon the other. No regulations or administrative procedures are involved. And as pointed out by the Attorney General of Pennsylvania in his brief, it is believed that this Court has never held a federal criminal statute to supersede a State criminal statute.

It is submitted that *Gilbert v. Minnesota*, 254 U.S. 325 (1920), governs the case at bar. It was there held that a State statute prohibiting advocation of non-enlistment in the United States armed forces, and non-assistance to the United States in the prosecution of war did not conflict with and was not superseded by the federal Espionage Act of 1917, which contained substantially similar provisions. The majority of the Pennsylvania State Court brushed lightly over that case with the remark that it could be distinguished as merely permitting "a State's exertion of its conceded power to punish a breach of the peace." But the language of this Court was a lot stronger and went a lot further than that when it said:

> " . . . the State is not inhibited from making 'the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes."

Far from being in conflict, the provisions of the Pennsylvania sedition act are similar to those of the Smith Act. Both are designed for the same purpose. The Pennsylvania act certainly can be enforced without any effect one way or the other on the Smith Act. There is not only no conflict, but State enforcement of such a similar law would inevitably be an indirect benefit to the federal government's efforts by affording the State and local police a means by which to assist and cooperate with federal officers.

Even if the Pennsylvania Supreme Court majority did believe, as they apparently did, that exclusive

federal enforecment of security laws would be more effective than permitting simultaneous State enforcement, it is only a matter of opinion as to whether such exclusive federal jurisdiction would be more satisfactory and effective, and certainly mere opinion of comparative efficiency of the respective sovereignties, and even ascertainment of such comparative abilities, can never constitute reason or justification for applying the rule of supersession where there is no necessary conflict, not even any inconsistency, between the federal law and the State law. Administering punishment for commission of a crime against the State cannot conceivably interfere with the administration of punishment by the federal government for commission of a crime against it.

The Pennsylvania Supreme Court majority held in effect that because of the great importance of the subject of sedition, Congress must necessarily have intended to preclude State jurisdiction (even though Congress refrained from stating any such intention) for fear of the possibilty that State enforcement might sometime conflict with federal enforcement, as, for instance, by permaturely arresting suspects under federal investigation. But such remotely possible eventuality would not constitute such a direct and positive conflict as would be necessary to effect supersession of the State law. In 1941 this Court, in discussing the problem of supersession by federal over State law, in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, stated:

> "We deal . . . not with the theoretical disputes but with concrete and specific issues raised by

> actual cases. . . . 'Constitutional questions are not to be dealt with abstractly.' . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress. . . .
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> " . . .
>
> " . . . Futhermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.'
>
> " . . .
>
> " . . . It is not sufficient . . . to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights (provided by the federal law). . . ."

Although the Pennsylvania Court's decision was expressly limited to holding invalid only that portion of the State law prohibiting seditious acts against the federal government, its stated reasons apply equally to acts against the State government. If the Supreme Court of the United States should uphold that decision, the result would be invalidation of all of the numerous presently existing State treason and sedition laws. Then where would the line be drawn? Wouldn't it be just as logical to say that because of the prime importance and actual necessity of collecting taxes to maintain and operate the federal government, federal tax statutes would necessarily and automatically supersede State taxing statutes, unless otherwise provided, since enforced collection by the State would or might impair the ability of the citizen to pay the federal government?

The majority of the Pennsylvania Court did not disapprove of the *Gitlow* case, supra, and *Whitney v. California*, 274 U. S. 357 (1927), but simply ignored them on the ground that there was no federal sedition act in effect at such times, the 1918 act having been repealed, and therefore the question of preemption could not have been raised. However, as pointed out by the Attorney General of Pennsylvania in his petition herein, at page 19, there was a federal statute in effect, the original act of 1917, minus only the provisions of the act of 1918, which had added an amentment to the 1917 act, and which amendment alone had been repealed. This would seem to take all of the props out from under the Pennsylvania Court's decision, as under these actual circumstances, the *Gitlow* and *Whitney* cases, both by this Court, are unimpeachable authority for sustaining the Pennsylvania statute.

The Pennsylvania Court relies heavily on *Hines v. Davidowitz*, 312 U. S. 52 (1941), and in fact it is really its only affirmative authority. But its analogy will not stand close scrutiny. The *Hines* case invalidated a Pennsylvania Alien Registration Act on the ground of supersession by the federal Registration Act of 1940, even though the federal act did not so declare. That decision was undoubtedly correct, within its proper sphere of application, but has no bearing on the case at bar. This Court itself in the *Allen-Bradley* case, supra, distinguished the *Hines* case on the fact that the Alien Registration Acts involved the handling of foreign nationals, and touched a field in which federal interest is so dominant as to preclude administration of State laws therein, which

could easily interfere with the federal administration. The handling of the same foreign affairs by 49 different and separate sovereignties would be so likely to cause international friction and lead to war that they must of necessity be left up to the federal government's control in behalf of all the States under an integrated system. No such disastrous results could possibly follow from enforcement of State treason and sedition laws, and therefore the *Hines* case has no application here. Again, the heaviest prop under the Pennsylvania Court's decision in the instant case seems to collapse.

Point 3

The defendant Steve Nelson has not been placed in double jeopardy in violation of the 5th amendment to the federal constitution.

Argument and Authorities

The prop of double jeopardy injected by the Pennsylvania State Court to support its decision in this case is similar to the drowning man's grasp for the straw. That Court cites no authority for its view, whereas numerous authorities are cited and discussed by Mr. Justice Bell in his dissenting opinion, and by the Commonwealth of Pennsylvania in its petition filed herein at page 46 thereof, to illustrate the settled rule that the prohibition of double jeopardy contained in the 5th amendment to the federal constitution does not apply to and restrict State court proceedings, but only those of the federal courts. This is made clear in *Gilbert v. Minnesota*, 254 U. S.

325 (1920), *United States v. Lanza*, 260 U. S. 377 (1922), *McKelvey v. United States*, 260 U. S. 353 (1922), and *Jerome v. United States*, 318 U. S. 101 (1943). In the *Jerome* case this Court stated:

> " . . . the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. . . ."

In any event, it is elementary that the defense of double jeopardy can be entertained only in a *subsequent* trial for the same offense, never in the first trial. Therefore, since the Pennsylvania proceeding complained of was first in point of time, there could not be any issue of double jeopardy.

VII.

CONCLUSION

It is respectfully submitted that this case is a proper one for review by this Court, and that the Petition for Writ of Certiorari should be granted.

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