

**In The
Supreme Court of the United States**

DEMERST B. SMIT, in his official
capacity as the Commissioner of the
Virginia Department of Motor Vehicles,

Petitioner,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

**REPLY BRIEF IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI**

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August 29, 2005

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER THE VIABILITY OF THE <i>PIKE</i> BALANCING TEST	2
II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE <i>PIKE</i> BALANCING TEST MAY BE USED TO PURSUE FACIAL CHALLENGES ALLEGING OVERBREADTH.....	4
A. The Lower Court Allowed a Facial Challenge Alleging Overbreadth	4
B. Facial Attacks Alleging Overbreadth Are Allowed in Only Limited Circumstances ...	5
C. When a Statute Does Not Discriminate Against Interstate Commerce, Facial Attacks Alleging Overbreadth Should Not Be Permitted.....	8
III. THERE IS NO ALTERNATIVE GROUND ON WHICH TO AFFIRM THE FOURTH CIRCUIT'S DECISION	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

<i>American Trucking Ass'n v. Michigan Pub. Serv. Comm'n</i> , 125 S. Ct. 2419 (2005)	3
<i>Ayotte v. Planned Parenthood</i> , 125 S. Ct. 2294 (2005)	9
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	9
<i>Barrows v. Jackson</i> , 346 U.S. 249 (1953)	6, 7
<i>Bendix Autolite Corp. v. Midwesco</i> , 486 U.S. 888 (1988)	1, 3
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	5, 7
<i>Chicago v. Morales</i> , 527 U.S. 41 (1999)	4
<i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	3
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)	8
<i>Ferguson v. Skrupa</i> , 372 U.S. 726 (1963)	3
<i>Healy v. Beer Inst., Inc.</i> , 491 U.S. 324 (1989)	9
<i>Itel Containers Int'l Corp. v. Huddleston</i> , 507 U.S. 60 (1992)	3

TABLE OF AUTHORITIES – Continued

	Page
<i>Lingle v. Chevron</i> , 125 S. Ct. 2074 (2005)	2
<i>Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration</i> , 113 U.S. 33 (1885)	7
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	6, 7
<i>Ohio v. Akron Ctr. for Reproductive Health</i> , 497 U.S. 502 (1990)	6
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	passim
<i>Sabri v. United States</i> , 541 U.S. 600 (2004)	6, 7
<i>Secretary of State of Maryland v. Joseph H. Munson Company, Inc.</i> , 467 U.S. 947 (1984)	7
<i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000)	7
<i>Steffel v. Thompson</i> , 415 U.S. 452 (1974)	4
<i>United States v. Raines</i> , 362 U.S. 17 (1960)	6
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	4, 5
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	4
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003)	5

TABLE OF AUTHORITIES – Continued

	Page
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	6
<i>West Lynn Creamery, Inc. v. Healy</i> , 512 U.S. 186 (1994)	3
 CONSTITUTIONAL PROVISIONS	
U.S. Const. art. I, § 8, cl. 3	3, 9
U.S. Const. art. III.....	6
 STATUTES	
<i>Virginia Code</i> § 46.2-1993.67(5)	8

**REPLY BRIEF IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI**

Demerst B. Smit, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles (“the Commissioner”), by and through his counsel, Virginia Attorney General Judith Williams Jagdmann, submits this Reply Brief.

This Petition asks this Court to consider whether the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), should be abandoned. In other words, when a State adopts legislation that does not discriminate against interstate commerce, either on its face or in its practical effect, should the federal judiciary second-guess that judgement by comparing incomparable interests. See *Bendix Autolite Corp. v. Midwesco*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (The *Pike* balancing test “is more like judging whether a particular line is longer than a particular rock is heavy.”). Additionally, this Petition asks this Court to consider whether the *Pike* balancing test may be used to pursue a facial challenge alleging overbreadth. Put another way, when a State enacts a statute that does not discriminate against interstate commerce, may a litigant raise hypothetical claims of parties not before the Court.¹

¹ Yamaha asserts that this Court should decline review of these important issues because the Commissioner “did not argue for abandonment or restatement of the *Pike* test either during trial or as additional grounds supporting the District Court’s judgment on appeal.” *Resp. Br. in Op.* at 16. The Commissioner’s Petition, however, seeks a shift in constitutional doctrine which only this Court can implement. In adhering to this Court’s precedent, the lower courts were bound to apply the *Pike* balancing test which the Commissioner now asks this Court to revisit.

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER THE VIABILITY OF THE *PIKE* BALANCING TEST.

Much of the *Brief in Opposition* focuses on the fact that the lower court was obligated to apply the *Pike* balancing test, *Resp. Br. in Op* at 10-12, and Yamaha's argument that the lower court applied it correctly. *Id.* at 5-13. However, the Commissioner concedes that, under this Court's decision, the lower court was bound to apply the *Pike* balancing test. Moreover, while the Commissioner believes that the court of appeals applied the test incorrectly, he does not ask this Court to review the application of the test to these facts. Rather, the Commissioner asks this Court to consider whether the *Pike* balancing test should be abandoned. In other words, when a state legislature enacts legislation that does not discriminate against interstate commerce on its face or in its practical effect, should the federal courts ever second-guess those judgments?

The *Pike* balancing test, like the test recently abandoned in *Lingle v. Chevron*, 125 S. Ct. 2074 (2005), raises "serious practical difficulties" and undermines the "reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions." *Lingle*, 125 S. Ct. at 2085. The *Pike* balancing test has no place in our constitutional law as it is entirely subjective and produces inconsistent results. The inherent subjectivity of the test is demonstrated in this matter, where the benefits exceeded the burdens for the district court, but not for the court of appeals. The *Pike* balancing test currently allows the judiciary to engage in a balancing of interests, precisely the type of policymaking process that is properly a legislative function. *See Lingle*, 125 S. Ct. at 2085. To

allow the federal judiciary, rather than the democratically elected state legislatures, to decide policy undermines the fundamental democratic ability of voters to hold policy-makers accountable for their decisions.

The purpose of the Dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, can be satisfied without the federal judiciary wading into state legislative waters. If the *Pike* balancing test is abandoned, a state statute that discriminates against interstate commerce, on its face or in its practical effect, would remain subject to the virtually *per se* invalidity standard. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). See also *American Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2426 (2005) (Scalia, J., concurring); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., joined by Thomas, J., concurring); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78-79 (1993) (Scalia, J., concurring); *Bendix Autolite Corp.* 486 U.S. at 897-98 (Scalia, J., concurring). Thus, the constitutional values inherent in the Dormant Commerce Clause – prohibiting the States from enacting legislation that discriminates against interstate commerce on its face or in its practical effect – would be protected. In contrast, if the States' experiments in economic regulation are neutral toward interstate commerce, then those statutes should not be subject to second-guessing by the federal judiciary. See *Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963). As this case illustrates, the *Pike* balancing test leaves legislators needing to enact economic legislation with little choice but to pass such laws blindly and hope for the best.

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE *PIKE* BALANCING TEST MAY BE USED TO PURSUE FACIAL CHALLENGES ALLEGING OVERBREADTH.

Review should also be granted to determine if the *Pike* balancing test might be used to pursue facial challenges alleging overbreadth. Stated differently, if this Court is going to continue to employ the *Pike* balancing test to judge the constitutionality of neutral state statutes, should the litigants challenging the statute be able to assert the hypothetical claims of parties not before the Court.

A. The Lower Court Allowed a Facial Challenge Alleging Overbreadth.

The lower court applied the *Pike* balancing test and declared that the statute was facially unconstitutional. In other words, it declared that the “law is ‘invalid *in toto* – and therefore incapable of any valid application.’” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)). Generally, a successful facial challenge requires that the party challenging the statute actually demonstrate that the statute has no valid application. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Indeed, “before declaring a statute to be void in all its applications . . . , [this Court has] at least imposed upon the litigant the eminently reasonable requirement that he establish that the statute was *unconstitutional* in all its applications.” *Chicago v. Morales*, 527 U.S. 41, 77-78 (1999) (Scalia, J., dissenting) (emphasis in original). However, the “doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial

challenges.” *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). Instead of requiring a showing that a statute is unconstitutional in all circumstances, *Salerno*, 481 U.S. at 745, the overbreadth doctrine merely requires a showing that the law punishes a “substantial” amount of protected activity, “judged in relation to the statute’s plainly legitimate sweep,” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). If so, then the law is declared invalid in all circumstances.

In this situation, the lower court did not require Yamaha to demonstrate that the statute was unconstitutional in all respects. In fact, the Fourth Circuit implied that the statute might be constitutional as applied to challenges within forty miles. *See Pet. App.* at 23. Nor did the court of appeals require Yamaha to demonstrate that the statute was unconstitutional as applied to this situation. Indeed, given the proximity between the location of the existing dealer and the proposed new dealership (twenty-six miles), it is likely that the lower court would have found the statute constitutional as applied. Rather, the Fourth Circuit focused on a hypothetical situation where an existing dealership challenges the establishment of a new dealership “some 500 miles away from the other end of the state.” *Pet. App.* at 24. In other words, the court of appeals engaged in a form of “overbreadth” analysis and determined that because the statute might be unconstitutional in *some* circumstances, it must be declared invalid in *all* circumstances.

B. Facial Attacks Alleging Overbreadth Are Allowed in Only Limited Circumstances.

In the past, this Court has “recognized the validity of facial attacks alleging overbreadth (though not necessarily

using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence.” *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (parenthetical original). Indeed, facial attacks alleging overbreadth have been allowed only where the claims involved heightened scrutiny and/or questions regarding the Sovereign’s power to legislate on a particular subject matter. *Id.* at 609-10 (listing cases).

This Court’s reluctance to allow facial challenges alleging overbreadth is grounded in large part on constitutional limits on the jurisdiction of federal courts to actual “cases and controversies.” *See New York v. Ferber*, 458 U.S. 747, 767 n.20 (1982). *See also Younger v. Harris*, 401 U.S. 37, 52 (1971) (“The power and duty of the judiciary to declare laws unconstitutional . . . does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.”). Absent adherence to the Article III case or controversy requirement, judicial review may entail hypothetical worst-case scenario analyses instead of claims of parties before the court. Courts would thus be put in the “undesirable” position of being required “to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.” *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Barrows v. Jackson*, 346 U.S. 249, 256 (1953)). *See also Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) (“The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur.”). Facial challenges alleging overbreadth conflict with the Article III case or controversy requirement because “[n]ot

only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand.” *Sabri*, 541 U.S. at 609. *See also Broadrick*, 413 U.S. at 610-11 (“[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.”); *Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (indicating that this Court “has no jurisdiction to pronounce any statute . . . void, because irreconcilable with the [C]onstitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies”). Relaxing such prudential limitations will “frustrate the expressed will of Congress or that of the state legislatures” by enjoining the enforcement of a law even in situations in which such enforcement is, or would be, constitutional. *Barrows*, 346 U.S. at 256-257.

Moreover, limiting facial challenges alleging overbreadth promotes the values of federalism. If a federal court ignores the claims of parties not before the court and limits its constitutional inquiry to the factual situation before it, then the court “fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.” *Ferber*, 458 U.S. at 768; *see also Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 976-78 (1984) (Rehnquist, J., joined by Burger, C.J., Powell & O’Connor, J.J., dissenting); *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., joined by Rehnquist, C.J., dissenting) (noting that the federal district court’s pre-enforcement

injunction of the challenged state law “denied each branch of Nebraska’s government any role in the interpretation or enforcement of the statute”). In short, “when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

C. When a Statute Does Not Discriminate Against Interstate Commerce, Facial Attacks Alleging Overbreadth Should Not Be Permitted.

When a statute is neutral toward interstate commerce, facial attacks alleging overbreadth should not be allowed. In such a situation, there is no need to apply heightened scrutiny and there is no question about the ability of the State to legislate. Consequently, there is no need to depart from the normal rules for facial challenges. If a litigant wishes to invalidate such a neutral statute on its face, then the litigant ought to have to demonstrate that the statute is unconstitutional in all of its applications. The fact that it is unconstitutional in some or even many applications is irrelevant.

Thus, if Yamaha wishes to have the federal courts find the Second Paragraph of *Virginia Code* § 46.2-1993.67(5) unconstitutional in every conceivable application, Yamaha should be required to show that this provision is in fact unconstitutional in every conceivable application. The mere fact that the statute might be unconstitutional as applied to a situation where a dealer in one corner of the State challenges the establishment of a dealership in another corner of the State is insufficient to invalidate the statute in all respects.

This Court has already agreed to decide if facial challenges alleging overbreadth are permitted in the context of abortion statutes. *See Ayotte v. Planned Parenthood, certiorari granted*, 125 S. Ct. 2294 (2005). This Court should also decide if facial challenges alleging overbreadth are permitted in the Dormant Commerce Clause context when the statute at issue does not discriminate against interstate commerce on its face or in its practical effect.

III. THERE IS NO ALTERNATIVE GROUND ON WHICH TO AFFIRM THE FOURTH CIRCUIT'S DECISION.

Although both the district court and the court of appeals correctly concluded that the statute at issue does not discriminate on its face or in its practical effect, Yamaha insists, “the judgment of the Fourth Circuit is independently supported by additional grounds.” *Resp. Br. in Op.* at 18. Yamaha appears to contend that this Court could affirm the Fourth Circuit by deciding that the Second Paragraph discriminated in its effect, a decision contrary to those of both the district and circuit courts. Quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), Yamaha states that the Second Paragraph “effects the same kind of ‘simple economic protectionism’ that this Court has routinely invalidated.” In *Bacchus*, this Court addressed a wholesale excise liquor tax exemption under Hawaii law for locally produced liquor – in other words, a law that discriminates on its face. *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), upon which Yamaha similarly relies, involves a Connecticut law that also discriminated on its face against interstate commerce. *See Id.* at 340-41. Yamaha’s reliance on *Bacchus* and *Healy* illustrates how Yamaha’s argument misses the point. Whereas regulation

that discriminates on its face or in its practical effect faces heightened scrutiny under the virtually *per se* invalidity standard, this Petition seeks review of whether the *Pike* balancing test should continue to be applied to statutes that are neutral towards interstate commerce. Dicta in cases involving statutes that discriminate on their face should not factor into this Court's consideration of the Commissioner's Petition since the Second Paragraph is neutral towards interstate commerce.



CONCLUSION

For the reasons stated above and in the Petition, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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