No. 104, Original

In The

Supreme Court of the United States

October Term, 1985

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STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEVADA
THE NEVADA PUBLIC SERVICE COMMISSION
AND THE CITY OF LAS VEGAS, NEVADA,

Defendants.

—o—

BRIEF ON BEHALF OF PLAINTIFF NEW JERSEY IN OPPOSITION TO MOTION BY DEFENDANT LAS VEGAS TO DISMISS COMPLAINT FOR LACK OF STANDING

—o—

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STATEMENT OF THE CASE

The State of New Jersey brought this action against the State of Nevada, the Nevada Public Service Commission ("PSC") and Las Vegas, Nevada claiming that they are improperly preventing the shipment of several trainloads of low level radium-contaminated soil being removed from residential properties in New Jersey to a licensed disposal site in Beatty, Nevada. New Jersey claims that the defendants improperly imposed new regulatory requirements on the transportation of the soil after opposition to the shipment developed in Nevada, including a

PSC emergency order and a Las Vegas ordinance which require permits to transport the soil. New Jersey claims that those added regulatory burdens are preempted by the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et seq., and the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021 et seq., and that they impose an unreasonable burden on interstate commerce in violation of the Commerce Clause in the U.S. Constitution.

New Jersey filed its complaint and motion for leave to file the complaint on September 19, 1985 together with a motion for a preliminary injunction and a motion requesting expedited consideration of both motions. By an order entered on October 21, 1985 the Court denied the motion to expedite consideration of the motion to file the complaint but also granted leave to file the complaint. It also denied the motion for a preliminary injunction and allowed the defendants 60 days to answer. Nevada filed an answer dated December 19, 1985, and the Nevada Public Service Commission served an answer on December 16, 1985. Nevada denied New Jersey's allegation that it has fully complied with Nevada law, but did not specify in what respects it is not in compliance. Las Vegas did not file an answer but instead filed a motion to dismiss on the ground that New Jersey lacked standing to challenge the new Las Vegas ordinance in issue because the ordinance requires transporters or carriers of hazardous materials rather than shippers such as New Jersey to obtain the new permit.

The status of this matter has not changed significantly since the suit was filed. While it is not a matter of record in this action, New Jersey's $8 million project to remove

the radioactive soil from residential properties in Northern New Jersey remains suspended with some residential properties partially excavated, some residents still living in temporary housing, and drums of contaminated soil temporarily stored in various locations including some of the residential neighborhoods from which it is being excavated. Various alternatives to store the contaminated soil on a temporary or permanent basis have been and are being explored, but none has been successful to date. One of the steps being taken is that New Jersey's carrier, the Union Pacific Railroad on December 5, 1985 filed an application for the newly required Nevada PSC permit which is being challenged in this action. The PSC has not acted on the application. The Nevada PSC did schedule a prehearing on the application for December 23, 1985, but when the Union Pacific's attorney arrived from Sacramento he found the door locked and a note saying simply that the hearing was cancelled, until January.

The two suits in the United States District Court in Nevada arising out of this controversy which are identified in the State's complaint remain pending, but in addition three more suits arising out of the controversy have been filed since then. As noted in the Las Vegas motion, New Jersey's carrier, the Union Pacific Railroad, on October 29, 1985 filed an action in the United States District Court in Nevada challenging the Las Vegas ordinance in issue in this suit, and the District Court has had under consideration a motion for a preliminary injunction since December 6, 1985. Second, a New Jersey homeowner who was living in temporary housing because the clean up of his property has been delayed filed an action in the United States District Court in Nevada against the defendants

named in this action, asserting many of the claims as asserted in this action. The District Court in that action has had under consideration a motion for a preliminary injunction and a motion to dismiss since November. Finally, a suit has been filed against New Jersey in its state courts by municipalities and residents where the contaminated soil is being excavated. They are demanding that the clean-up be completed and that the contaminated soil now being stored temporarily in the neighborhoods be removed. A motion for a preliminary injunction is under consideration in that action as well.

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ARGUMENT

NEW JERSEY HAS STANDING TO CHALLENGE THE LAS VEGAS ORDINANCE WHICH PLACES REGULATORY BURDENS ON THE TRANSPORTATION OF NEW JERSEY'S RADIUM CONTAMINATED SOIL BECAUSE THE ORDINANCE HAS PREVENTED THE SHIPMENT AND BECAUSE NEW JERSEY IS ASSERTING FEDERAL RIGHTS INTENDED TO PROTECT PARTIES UTILIZING INTERSTATE COMMERCE.

Las Vegas by its motion contends that New Jersey lacks standing to challenge the new Las Vegas ordinance which imposes added regulatory burdens on the transportation of hazardous materials through Las Vegas, but the only contention raised in the motion is that New Jersey lacks standing because the ordinance requires transporters or carriers of hazardous cargoes rather than shippers to obtain the new pemit, and that New Jersey's complaint

alleges that it contracted with an interstate rail carrier, the Union Pacific Railroad, to transport the soil, so that it is the Union Pacific Railroad rather than New Jersey which must apply for the permit.* New Jersey contends that it does have standing to challenge the new ordinance because it has been directly injured by the ordinance in that the ordinance together with the new regulatory requirements of Nevada and the Nevada PSC have prevented it from shipping the contaminated soil in interstate commerce and because the federal rights which it asserts are intended to protect parties such as New Jersey which utilize interstate commerce.

To meet the standing requirements imposed by Article III of the Constitution a party must demonstrate an actual or threatened injury traceable to or caused by the conduct of the defendant which is being challenged in the lawsuit. *Village of Arlington Hts. v. Metro Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Furthermore, the plaintiff must show that if the relief sought is granted, the injury will be redressed. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976). To satisfy the prudential standing requirements a party must show that it is asserting its own rights and not those of third parties, and that such rights fall within the "zone of interests" covered by the statute or constitutional guarantee in question. *Valley Forge Christian College v. Americans United, etc.*, 454 U.S.

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* New Jersey's complaint against Nevada is different in that Nevada requires New Jersey itself to obtain a permit to dispose of the contaminated soil at the licensed facility in Beatty, Nevada, and Nevada is treating its objections to the transportation of the soil as conditions of the disposal permit.

464, 474-475 (1982). In addition, the claims asserted must be more than "generalized grievances" pervasively shared and most appropriately addressed by the legislative branch of government. *Ibid.* Finally, in considering a motion to dismiss for lack of standing, a court should accept as true all material allegations of the complaint, construing them in favor of the plaintiff. *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 109 (1979); *Warth v. Seldin, supra,* 422 U.S. at 501.

Similar requirements apply to complaints brought in the original jurisdiction of this Court. As stated by Justice White in a case between states in this Court's original jurisdiction, *Maryland v. Louisiana,* 451 U.S. 725, 735-36 (1981):

> In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Massachusetts v. Missouri,* 308 U.S. 1, 15, 84 L.Ed. 3, 60 S.Ct. 39 (1939). See *New York v. Illinois,* 274 U.S. 488, 490, 71 L.Ed. 1164, 47 S.Ct. 661 (1927); *Texas v. Florida,* 306 U.S. 398, 405, 83 L.Ed. 817, 59 S.Ct. 563, 121 ALR 1179 (1939).

See also the discussion of New Jersey's standing to bring this action and citations in New Jersey's original motion for leave to file its complaint in this action, at pages 7-20.

Finally, a party to have standing to assert a claim need only demonstrate an actual or threatened injury traceable to or caused by the conduct of the defendant as op-

posed to third parties. It is not necessary that the injury be caused in any particular manner or that the defendant's actions operate directly against the plaintiff. As stated by Justice Powell in speaking for the majority in *Warth v. Seldin,* 422 U.S. 490, 505 (1975):

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. E.g., *Roe v. Wade,* 410 U.S. 113, 124, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973).

Justice Powell went on to note that where an injury is suffered as an indirect consequence of a defendant's actions it may be more difficult to show that the injury was due to the defendant's actions as opposed to the actions of third parties, but the point is that an indirect injury will support a claim if it is traceable to the defendant's actions.

The same principal has been applied in a suit within this Court's original jurisdiction, in *Maryland v. Louisiana,* 451 U.S. 725 (1981). This Court held in that case that several states could assert claims against Louisiana under the Supremacy and Commerce Clauses for imposing a tax on off shore natural gas which passed through Louisiana to other states even though the tax was assessed against "first users" including pipeline companies. The Court said (451 U.S. at 736):

> Louisiana asserts that this case should be dismissed for want of standing because the Tax is imposed on the pipeline companies and not directly on the ultimate consumers. Under its view, the alleged interests of the plaintiff States do not fall within the type of "sov-

> ereignty" concerns justifying exercise of our original jurisdiction. Standing to sue, however, exists for constitutional purposes if the injury alleged "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41-42, 48 L.Ed.2d 450, 96 S.Ct. 1917 (1976). See *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 72-81, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1978).

The Court in *Maryland v. Louisiana* held that the plaintiff states did have standing to sue Louisiana because they were substantial consumers of natural gas, because the tax was intended to be passed on to ultimate consumers so as to directly affect them in a real and substantial way and to place a burden on them. See also *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923).

Under the foregoing principles the allegations in New Jersey's complaint, which should be accepted as true on this motion and which are not disputed in the motion, demonstrate adequate standing to challenge the Las Vegas ordinance. Paragraph XII (page 27) alleges that on September 6, 1985 Las Vegas adopted the ordinance which imposed a new permit requirement for the transportation of New Jersey's contaminated soil. Paragraph XIII (page 28) alleges that the new requirements of Nevada and Las Vegas "represent a closure of Nevada's borders to the interstate shipment of contaminated soil by New Jersey, notwithstanding New Jersey's full compliance with all applicable federal requirements." Paragraph XIV (page 29) alleges that these new requirements are causing immediate and irreparable injury to New Jersey in that they are

depriving it of the right to transport the low-level radioactive waste to the disposal site in Beatty, Nevada, preventing the removal of the soil so as to expose residents to high levels of radon gas inside their houses, and subjecting New Jersey's clean-up efforts to delay and substantial additional costs. Paragraph XL (page 49) alleges that Las Vegas joined in the opposition to the transportation of the contaminated soil by initially filing a suit against the railroad to stop the shipment. Paragraph LVI (page 62) alleges that Nevada and Las Vegas by their new requirements "have blocked the shipment of the contaminated soil at their borders and are attempting to divert New Jersey's shipment to other jurisdictions, and because New Jersey is in compliance with all applicable federal packaging, labelling and shipping requirements, the new requirements of Nevada and Las Vegas serve no legitimate or lawful purpose."

New Jersey asserts claims under the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et seq.* which was enacted to provide for the regulation of the transportation of hazardous materials at the federal level. It is intended to improve the regulatory and enforcement authority of the United States Department of Transportation and to protect the Nation against the risks to life and property which are inherent in the transportation of hazardous materials in commerce. 49 U.S.C. § 1801. The Act is also intended to preempt inconsistent local regulation of the transportation of hazardous materials. The Act does allow the Secretary to exempt local regulations which are inconsistent if they provide for greater protection to the public, but only if they do not unreasonably burden commerce. 49 U.S.C. § 1811. See also 49 C.F.R.

§§ 107.101, 107.201, 107.203, 107.209, 107.215, 107.221. Plainly, Congress intended a general pattern of uniform national regulation and to preclude a multiplicity of State and local regulations and the potential for varying and conflicting regulations which could unnecessarily and unreasonably burden interstate commerce and effectively burden and prevent the transportation of hazardous materials in interstate commerce. *National Tank Truck Carriers, Inc. v. Burke,* 608 F.2d 819, 824 (1st Cir. 1979); *National Tank Truck Carriers, Inc. v. Burke,* 535 F. Supp. 509, 516 (D.R.I. 1982), *affirmed,* 698 F.2d 559 (1st Cir. 1983); *New Hampshire Motor Transport Association v. Flynn,* 751 F.2d 43, 46 (1st Cir. 1984); *Jersey Central Power & Lt. Co. v. Township of Lacey,* 772 F.2d 1103 (3rd Cir. 1985).

Clearly the Hazardous Materials Transportation Act, like the Commerce Clause under which New Jersey also asserts a claim, is intended to afford rights to those like New Jersey which seek to transport goods in interstate commerce. Plainly federal prohibitions against local regulations which unreasonably burden interstate commerce or which conflict with federal substantive law are calculated to protect the interests of those who use and depend upon interstate commerce, and not merely the carriers who actually transport goods. See, e.g., *Savage v. Jones,* 225 U.S. 501, 519-21 (1912). Nor should any party deprived of the right to transport goods in interstate commerce free of unreasonable and unnecessary local regulations and restrictions which are preempted under the Commerce Clause or federal statutes be forced to depend for the possible vindication of their rights upon actions which might be brought by third parties also affected. Such parties might

have a different or lesser interest in challenging invalid local regulations.

The limitations of the Commerce Clause and federal statutes such as the Hazardous Materials Transportation Act which preclude and preempt unreasonable and burdensome local restrictions on interstate commerce are intended to benefit those such as New Jersey which utilize interstate commerce. And in this case New Jersey's complaint is fully supported by affidavits which show that New Jersey has been prevented from shipping its contaminated soil in interstate commerce by the new regulatory requirements of Nevada and Las Vegas and not by any third parties such as the rail carrier or the operator of the disposal site at Beatty, Nevada. Thus, New Jersey has alleged and shown an actual injury traceable to and caused by the actions of both Nevada and Las Vegas and on this basis has standing to assert its claims against them.*

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* The regulation of the transportation of hazardous materials can also impose both indirect and direct burdens on shippers in connection with the transportation itself. The Las Vegas ordinance is not specific as to what is required, but it does make reference to the adequacy of containers which were procured and paid for by New Jersey here, and expressly requires a permit application to include a shipper's certification concerning the nature of the cargo. Section 9.36.060(D) and 9.36.070(B). See Exhibit 22 annexed to New Jersey's complaint, at 146a and 147a. Thus New Jersey is burdened by the new requirements, but it cannot determine the extent because the ordinance is not specific.

CONCLUSION

For the foregoing reasons, the motion to dismiss filed by Las Vegas should be denied.

Dated: January 9, 1986

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