No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF THE MOTION TO DISMISS

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August, 1988
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QUESTIONS PRESENTED

1. Does a state have standing to bring an original action against another State to make a Commerce Clause challenge to a statute, where neither the Plaintiff State nor the citizens it represents as parens patriae, are engaged in the area of commerce allegedly affected.

2. Does a State have standing to make a Commerce Clause challenge to a statute when the Plaintiff State's injury is a decrease in tax revenue caused by a decrease in commerce by the industry affected by the statute?

3. May a State invoke the original jurisdiction of this Court to make a Commerce Clause challenge to another State's statute, when its domestic industry affected by the statute could

litigate the same issues in another forum?

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MOTION TO DISMISS

Defendant, the State of Oklahoma, moves the Court to dismiss the Complaint pursuant to Fed. R. Civ. Pro. 12(b), as authorized by Rule 9.2 of the Rules of this Court, on the ground that the Plaintiff, State of Wyoming, has no standing to bring the cause of action alleged in its Complaint and may, therefore, not invoke the original jurisdiction of this Court. The

specific grounds for this motion are as follows:

1. The State of Wyoming's Complaint alleges no direct injury to itself as a State allegedly caused by the Oklahoma Statute in question, but simply relies on an alleged injury to its domestic coal producers which may, in turn, result in a loss of some of its tax revenue;

2. The Plaintiff State of Wyoming has alleged no direct injury which generally affects the citizens it seeks to protect as parens patriae but instead alleges an injury to a small group of its citizens or corporations (Wyoming coal producers) and may therefore not bring this actions as parens patriae of behalf of its

citizens to invoke the original jurisdiction of this Court, and;

3. The State of Wyoming has no standing to make a Commerce Clause challenge to the Oklahoma Statute when neither the State of Wyoming nor the citizens it seeks to protect are engaged in the item of commerce allegedly affected by the statute.

For all of these reasons the State of Oklahoma respectfully urges that this Motion to Dismiss be granted.

Respectfully submitted,

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BRIEF IN SUPPORT
OF MOTION TO DISMISS

STATEMENT OF THE CASE

The State of Wyoming was granted leave to file its Complaint by this Court on June 30, 1988. The State of Wyoming is asking this Court to set aside an Oklahoma Statute which requires coal fired electric utility plants located in Oklahoma to burn a mixture of coal containing a minimum of

10% Oklahoma mined coal. Okla. Stat. tit. 45, § 939. Wyoming has alleged that this statute results in a loss of coal sales by Wyoming coal producers.

The State of Wyoming does not allege that it produces coal itself as a governmental entity and is therefore not directly injured by the Oklahoma statute. Its standing is solely based on the allegation that Wyoming coal producers will sell less coal because of the Oklahoma Statute and will therefore mine less coal. Since these producers will mine less coal the State of Wyoming will collect less of its severance tax on coal. The State of Wyoming also claims to have standing as "parens patriae" on behalf of all of its citizens because it alleges that local governments of Wyoming are the

ultimate recipients of the severance tax which goes to fund a variety of local governmental projects.

SUMMARY OF ARGUMENT

The State of Wyoming has no standing to bring this Commerce Clause challenge because it is not directly injured by Oklahoma's domestic coal statute and is not a participant in the interstate coal industry. It has no standing as parens patriae since the citizens it seeks to protect are not engaged in the coal business. Wyoming has no standing to bring this original action on behalf of a small group of its citizens (coal producers), especially when this small group has available forums to litigate the issues itself.

PROPOSITION I

THE STATE OF WYOMING HAS NO STANDING TO CHALLENGE OKLAHOMA'S DOMESTIC COAL STATUTE ON COMMERCE CLAUSE GROUNDS SINCE THE STATE OF WYOMING IS NOT A PARTICIPANT IN THE TYPE OF COMMERCE WHICH IT ALLEGES TO BE BURDENED BY THE STATUTE AND BECAUSE ITS ALLEGED INJURIES ARE SPECULATIVE AND INDIRECT AT BEST.

The State of Wyoming is asking this Court to declare an Oklahoma statute unconstitutional because it discriminates against interstate commerce. The novelty of Wyoming's Complaint is that Wyoming is not a participant in the interstate coal industry as a producer or consumer. It relies solely on the allegation that the State may lose some tax revenue if Wyoming coal producers sell less coal in Oklahoma. This alleged injury is so attenuated that it fails to meet the tests laid down by this Court to

determine standing in cases of original jurisdiction.

This Court has original jurisdiction over cases in which a State is a party. U.S. Const. Art. III, § 2. cl. 2. This Court has original and exclusive jurisdiction in suits between two or more states. 28 U.S.C. § 1251(a). For a true controversy to exist between two or more states it must be apparent that the Plaintiff State is suffering some direct injury from the action of the Defendant State. Maryland v. Louisiana, 451 U.S. 725, 735 (1981); Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976); Massachusetts v. Missouri, 308 U.S. 1, 15 (1939). As this Court stated in Maryland v. Louisiana:

> Standing to sue, however, exists for constitutional purposes if the injury alleged "fairly can be traced to the challenged act of the defendant, and not injury that results from the independent action of some third party not before the court." [citations omitted.]

451 U.S. at 736. There clearly must be a "case or controversy" that exists between two states before this Court will recognize its exclusive jurisdiction over such cases. Texas v. Florida, 306 U.S. 398, 405 (1939).

Even the State of Wyoming would have to concede that if any person or entity is directly injured or affected by the Oklahoma domestic coal statute it would be a Wyoming coal producer. It is the Wyoming coal producer that is engaged in interstate commerce. It is the Wyoming coal producer who may or may not lose some of its sales in

Oklahoma because of the statute. Of course, it is also possible that the Wyoming coal producer may lose no sales at all by selling coal to other markets. This serves to point out just how indirect and speculative the injury to the State of Wyoming really is. The State of Wyoming is not a coal producer and its severance taxes may not suffer if the coal producers mine the same amount of coal and sell as much coal as they did previously. This is certainly a possibility even in the presence of Oklahoma's domestic coal statute. In any event, Okalhoma's statute does not affect Wyoming's power to tax. If Wyoming does not act in the face of declining tax revenues its injuries would be "self-inflicted" and not

actionable. Pennsylvania v. New Jersey, 426 U.S. at 664.

Consider this hypothetical:

> An Alabama utility company has a contract to purchase one million tons of Wyoming coal for $10 million dollars. The Alabama utility company breaches its contract and refuses to purchase the coal. Would the State of Wyoming have standing to sue the Alabama utility company for breach of this contract because its tax revenues may go down if the sale is not consummated?

The answer is clearly "no" and Wyoming's claim of standing in the instant case is equally flawed. The interests that Wyoming seeks to advance in this case and the injuries it alleges are far weaker and far more indirect than those advanced by the plaintiff states in Maryland v. Louisiana. In that case several states challenged Louisiana's tax on the "first use" of natural gas imported

into Louisiana. The states that were plaintiffs in that case were substantial purchasers of natural gas and directly paid the tax they were challenging. All of the plaintiff states were participants in interstate commerce as consumers and were directly injured by the Louisiana tax.

The State of Wyoming's attempted challenge in this case is not materially different than what the State of Louisiana attempted to do in Louisiana v. Texas, 176 U.S. 1 (1900). That case arose out of a quarantine that a Texas State Health Officer placed on all goods imported from New Orleans, Louisiana. The quarantine was apparently rationalized by fear of yellow fever outbreaks. This Court first pointed out that its original

jurisdiction was only appropriate where a controversy existed between two states and not where a state was merely trying to vindicate the grievances of particular individuals. This Court did not take original jurisdiction of this matter and pointed out that states have no special position to vindicate interstate commerce claims when they are not engaged in the commerce. Id. at 19.

Wyoming's claims of injury in this case do not compare with those advanced by the States of Pennsylvania and Ohio in Pennsylvania v. West Virginia, 262 U.S. 553 (1923). In that case Pennsylvania and Ohio were challenging a West Virginia statute which would have had the effect of cutting off the supply of natural gas to those two

states from West Virginia. The plaintiff states were very dependent on this gas and were direct purchasers of this gas for its governmental buildings. This Court assumed jurisdiction in that case in large part because of this direct injury to the state.

> The attitude of the complainant states is not that of mere volunteers, attempting to vindicate the freedom of interstate commerce or to redress purely private grievances.

262 U.S. at 591. In the instant case Wyoming is a mere volunteer and is simply trying to invoke the original jurisdiction of this Court on behalf of a few of its domestic coal producers. It is attempting to bring a Commerce Clause challenge to a statute which does not injure them but which may or

may not injure its domestic coal producers.

This Court has been very hesitant to exercise exclusive jurisdiction over cases and has stated that original jurisdiction should be used sparingly. Maryland v. Louisiana, 451 U.S. at 739; Arizona v. New Mexico, 425 U.S. 794, 976 (1976). This Court has also stated that it will not take original jurisdiction absent a showing of "an absolute necessity." Alabama v. Arizona, 291 U.S. 286, 291 (1934); Louisiana v. Texas, 176 U.S. at 15. There is no "absolute necessity" for this Court to take jurisdiction of this case since a controversy, if any, would only exist between Wyoming coal producers and the State of Oklahoma.

This Court should dismiss this action since Wyoming has alleged no direct injury caused by the Oklahoma Statute in question but rather relies on its standing from an alleged injury to its domestic coal producers.

PROPOSITION II

WYOMING DOES NOT HAVE STANDING AS PARENS PATRIAE BECAUSE IT IS NOT ADVANCING CLAIMS OF GENERAL INJURY TO ITS CITIZENS BUT IS REALLY ADVANCING CLAIMS OF A FEW WYOMING COAL PRODUCERS.

Wyoming has also attempted to allege that it has standing as parens patriae in this case on behalf of its citizens. Its claim of parens patriae standing is based on their allegation that the severance tax it levies on the mining of the coal ultimately goes to local governments for local governmental projects. It alleges that lower severance taxes will injure the

local governments and therefore injure all of its citizens. This claim of parens patriae standing is just as attenuated as its allegations of standing in its governmental or proprietary capacity.

This Court has long recognized that states may invoke the original jurisdiction of this Court as parens patriae on behalf of its citizens in certain limited cases. The State may bring an action on behalf of its citizens:

> [W]here the injury alleged affects the general population of a State in a substantial way.

Maryland v. Louisiana, 451 U.S. at 737. However, this Court has held time and time again that a state may not bring an action as a "nominal party" to advance the claims of individual

citizens. Pennsylvania v. New Jersey, 426 U.S. at 665; Illinois v. Michigan, 409 U.S. 36, 37 (1972).

In Oklahoma v. Atchison, Topeka and Santa Fe Railway Co., 220 U.S. 277 (1911), the State of Oklahoma attempted to bring an action in this Court against a railroad alleging certain rate overcharges to its citizens. This Court refused to accept jurisdiction and found that the real controversy was between the railway company and certain Oklahoma citizens who shipped by rail. Since the State of Oklahoma was not shipping goods in its governmental capacity, it could not invoke the original jurisdiction of this Court.

This Court has not hesitated allowing states to sue on behalf of its citizens where the citizens of that

state are affected generally by the alleged injury. For instance, this Court held that a state could sue another state to enjoin activities in the other state which caused massive flooding in the plaintiff state. North Dakota v. Minnesota, 263 U.S. 365 (1923). A state could sue another state to prevent sewage being dumped into a river flowing into its state which had the potential to affect the health, comfort and prosperity of many of its citizens. New York v. New Jersey, 256 U.S. 296 (1921). This Court found that a state could sue certain foreign copper companies and maintain an original suit when it was alleged that the companies were discharging potentially poisonous gas flowing into its state. Georgia v.

Tennessee Copper Co., 206 U.S. 230 (1907).

Once again the allegations that serve as a basis for Wyoming's "parens patriae" standing do not measure up to the cases previously heard by this Court. Perhaps if most Wyoming citizens were coal producers themselves such an argument might be worthy of merit but the State of Wyoming is unquestionably bringing this action on behalf of a few of its coal producers. It alleges a speculative injury which may or may not trickle down to local governments which may or may not injure the citizens of Wyoming. These allegations do not satisfy the requirements for parens patriae standing and the Complaint should be dismissed.

PROPOSITION III

THIS COURT SHOULD DISMISS THE COMPLAINT AND REFUSE TO TAKE ORIGINAL JURISDICTION OF THIS MATTER SINCE THE ISSUES RAISED BY WYOMING'S COMPLAINT MAY BE LITIGATED BY THE REAL PARTIES IN INTEREST IN ANOTHER FORUM.

In deciding whether past cases were appropriate for its original jurisdiction this Court has considered "the availability of another forum" for the claims to be litigated in reaching its decision. Maryland v. Louisiana, 451 U.S. at 740. This Court has looked to see whether the named parties before them have alternative forums but has also looked at whether the issues could be litigated by other parties as well. Arizona v. New Mexico, 425 U.S. at 797. Arizona v. New Mexico is a case worthy of note in the instant case. In this case the State of Arizona attempted to

sue the State of New Mexico to challenge a New Mexico tax on electrical power generated in New Mexico. Because of tax credits the tax was only levied on utility companies generating their power in New Mexico but selling the power out of state. Coincidentally three Arizona utility companies had generating facilities in New Mexico which sold power in Arizona. Before Arizona attempted to institute the original action the three Arizona utility companies brought an action in State District Court in New Mexico raising the identical constitutional challenges that the state was urging before the Supreme Court. Even though the State of Arizona was not a party to the state case and was alleging in its

original action that the New Mexico tax directly raised its cost of electricity as well as its citizens, this Court refused to take jurisdiction. As stated previously this case is extremely relevant to the instant case since the Court refused to take jurisdiction, in part, because the issues were being litigated by the parties directly affected in another forum. This Court also pointed out that it was the Arizona utility companies that were being assessed the tax and could pursue their own challenges.

This Court made similar observations in Alabama v. Arizona. In that case the State of Alabama sued 19 states that had passed statutes banning or regulating the sales of products

made with convict labor. The State of Alabama had substantial operations in which it produced goods in its penitentiaries using convict labor. The State of Alabama did not market the products itself but had a contract with a private company located in Alabama. It was the company that marketed the products to the several states in interstate commerce. One of the reasons cited by this Court for refusing to take jurisdiction was the fact that the company holding the contract with the State of Alabama could litigate these issues in the various state courts in which it had a contract. If Oklahoma's domestic coal statute is to be challenged it should be challenged by those individuals directly affected by the statute, if

indeed they are affected at all. There is nothing to prevent a Wyoming coal producer or perhaps the association of coal producers that filed an amicus brief previously in this case, from instituting an action in the district courts of the State of Oklahoma to challenge the constitutionality of Oklahoma's domestic coal statute. This is, in fact, the most usual way for Commerce Clause cases to be litigated. See e.g. Hunt v. Washington State Apple Commission, 432 U.S. 333 (1977). The State of Wyoming's Complaint should be dismissed.

CONCLUSION

The State of Wyoming lacks standing to institute this action since it is not engaged in the sale of coal and is therefore not directly injured by

Oklahoma's domestic coal statute. It lacks standing as parens patriae because there has been no allegation that Oklahoma's domestic coal statute somehow injures the general citizenry of the State of Wyoming and in reality the Complaint is simply brought on behalf of a few domestic Wyoming coal producers. These coal producers, as the real parties in interest, should litigate their claims and prove their injuries, if they exist, in another forum. This case is inappropriate for the original jurisdiction of this Court and the Complaint of the State of Wyoming should be dismissed.

Respectfully submitted,

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