No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

STATE OF MARYLAND'S RESPONSE TO MOTION OF THE AUDUBON NATURALIST SOCIETY FOR REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

While Maryland recognizes that it is unusual at this stage of the proceeding for an amicus to raise the justiciability arguments that the Audubon Naturalist Society asserts, Maryland agrees with Audubon that no case or controversy exists supporting this Court's jurisdiction over this case. Indeed, the absence of any need for that jurisdiction to continue is confirmed by events that have occurred subsequent to this Court's decision to exercise original jurisdiction in this case, namely, the issuance to the Fairfax County Water Authority of a waterway construction permit whose previous preliminary denial "prevented construction of an offshore intake that Virginia believes is an 'essential public health initiative.'" May 2, 2000 Reply Brief of Virginia at 1.

ARGUMENT

I. NO JUSTICIABLE CONTROVERSY EXISTS BETWEEN THE PARTIES IN LIGHT OF THE ISSUANCE OF A WATERWAY CONSTRUCTION PERMIT.

As Virginia's Complaint states, the "present controversy" (Complaint at 8) in this case is grounded in the Maryland Department of the Environment's preliminary denial of a waterway construction permit sought by the Fairfax County Water Authority. Based on that preliminary denial, and the Authority's failure to secure such a permit in a Maryland administrative proceeding that it initiated, the Complaint in this case asserts that "[t]he Commonwealth of Virginia and more than 1.2 million of its people are suffering present irreparable harm from the actions of the State of Maryland . . . ." Complaint ¶ 1. *Accord* May 2, 2000 Reply Brief at 3-4 ("Virginia is suffering injury from Maryland's actions, including the denial of Potomac River access, continued exposure of its citizens to unnecessary public health risks, risk of an interrupted water supply, substantial unnecessary water treatment costs that can never be recovered, and interference with the plans of several governmental subdivisions to use the River as a drinking water source.").

After this Court granted Virginia's motion for leave to file its Bill of Complaint, however, the decision maker in that administrative proceeding issued a Final Decision on November 6, 2000, in which he ordered that a waterway construction permit be issued. While Maryland has appealed that decision to the Circuit Court for Baltimore City, and so deferred filing with the Special Master a dispositive motion on mootness grounds, subsequent events in that proceeding demonstrate that Virginia is not suffering any "actual or threatened injury amenable to judicial remedy." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982).

Virginia cannot argue that it is now being subjected to any action that "inflicts an actual, concrete injury," *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985), because on January 24, 2001, the Maryland Department of the Environment issued to the Fairfax County Water Authority the waterway construction permit that lies at the center of the "controversy" between Maryland and Virginia. That permit was issued in response to the January 16, 2001 decision of the Circuit Court for Baltimore City, which ordered the Maryland Department of the Environment to issue the disputed waterway construction permit "forthwith." In light of the issuance of this permit, Virginia can no longer claim that its citizens are suffering any present harm from the actions of the State of Maryland. This Court should thus withdraw its exercise of jurisdiction over this case, as that jurisdiction should be asserted "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made. . . ." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

Indeed, as Virginia has previously informed this Court, "[i]t was not until December 1997 that Maryland first denied any permit to any Virginia user," May 2, 2000 Reply Brief at 9, and that preliminary denial, along with the harm that it supposedly inflicted on Virginia and its citizens, has

now been reversed. This case thus raises only "abstract questions of political power, of sovereignty, of government," *Massachusetts v. Mellon*, 262 U.S. at 484-85, as the mere fact that a permit was preliminarily denied in the past is an insufficient basis for establishing a "real and immediate threat" of any future injury. *City of Los Angeles v. Lyons*, 461 U.S. 9, 111 (1983). Jurisdiction over this case is inappropriate, therefore, because the sole dispute that Virginia has used as a vehicle for filing its Bill of Complaint no longer even arguably gives rise to any injury demonstrating that Virginia "has suffered a wrong through the action of the other State, furnishing ground for judicial redress." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939).

II. AN ADEQUATE ALTERNATIVE FORUM EXISTS FOR RESOLVING THE DISPUTE UNDERLYING VIRGINIA'S COMPLAINT BECAUSE THAT DISPUTE IS NOW BEFORE THE MARYLAND COURTS.

This Court's continuing jurisdiction over this case is also no longer necessary because the Maryland trial and appellate courts "provide[] an appropriate forum in which the issues tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). Now that the permit case is pending before the Maryland courts and is no longer in an administrative forum, the case before this Court is no differently situated than others in which the Court has stated that it is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). While Virginia has previously accused the Maryland judiciary of being "parochial and biased," May 2, 2000 Reply Brief at 7, the Maryland circuit court's order to issue the waterway construction permit "forthwith" refutes any possible "assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). Maryland's compliance with that order by issuing the permit also refutes Virginia's prior misrepresentations that Maryland

legislative and executive officials have gerrymandered legislation in a manner that "guarantees" the permit application will remain pending "for many more years, and perhaps forever." Reply Brief at 1.

Much like Arizona was in *Arizona v. New Mexico*, 425 U.S. at 794, Virginia is directly represented in the pending Maryland proceeding because the Authority is a political subdivision created under the laws of Virginia. *See also Maryland v. Louisiana*, 451 U.S. 725, 743 (1981) (distinguishing *Arizona v. New Mexico* on the ground that "one of the three electric companies involved in the state-court action in New Mexico was a political subdivision of the State of Arizona. Arizona's interests were thus actually being represented by one of the named parties to the suit."); *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992) (stating that "no pending action exists to which we could defer adjudication on this issue" and that "[e]ven if such action were proceeding, however, Wyoming's interests would not be directly represented"). Indeed, Virginia is represented by the same private counsel in both cases. The mere presence of Compact claims in this case no more affects the adequacy of that alternative forum than did the existence of the constitutional claim in *Arizona v. New Mexico*, in which this Court refused to intervene and instead deferred to an ongoing State proceeding in which the same issue had been raised. *See also Louisiana v. Mississippi*, 488 U.S. 990 (1988).

In addition to underscoring the impartiality of the Maryland judiciary in addressing and resolving the dispute that underlies this litigation, the Maryland circuit court's order in the permit proceeding illustrates precisely why this Court should no longer exercise its jurisdiction "to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Neither the Maryland court nor the final decision maker relied on the Compact in ordering the issuance of a permit, but did so on State law grounds only. "The reign of

law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court" that obviates the need to resolve the federal issue. *Id.* Indeed, the Compact issues that Virginia raises are, as Virginia's complaint demonstrates, in "controversy" only because of the permit dispute now pending before the Maryland courts. Absent that dispute, Virginia is unable to identify any possible harm it will suffer as a basis for seeking judicial resolution of its Compact claims. Rather, as it has acknowledged, the Maryland permit case represents the only occasion in which a permit was ever preliminarily denied to a Virginia user. That denial has been reversed and the permit's issuance has been ordered by a Maryland court. There is simply no manifest need for this Court to continue to exercise its jurisdiction over this case.

CONCLUSION

For the reasons stated, Maryland agrees with the Audubon Naturalist Society that this case is not justiciable.

Respectfully submitted,

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