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Supreme Court of the United States

OCTOBER TERM, 1979

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

ON MOTION FOR JUDGMENT ON THE PLEADINGS

BRIEF OF STATE OF LOUISIANA IN RESPONSE TO BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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I. INTRODUCTION

At the outset, the State of Louisiana must register dissent to the basic assumptions that mark the vigorous efforts being made to secure a judgment of constitutional proportions on the barebone pleadings in this original action. Those assumptions, each of which has been found unworkable by this Court, are:

(1) The assumption that this Court sits, in exercise of its original jurisdiction over controversies among two or more States, to invalidate a new and untested statute of a sovereign State without according that State a full opportunity to develop the necessary factual and statutory predicates. But as this court has often observed, in original actions the Court, "passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas,* 339 U.S. 707, 715 (1950).

(2) The assumption that this Court sits in exercise of its great function as the final arbiter of the constitutionality of state statutes, as the initial tribunal to determine the meaning and scope of a new state statute and to determine the precise facts to which the statute has been applied. But this Court has steadfastly refused to accept such an assignment. It has consistently stayed both its original and appellate powers of constitutional adjudication where an unconstrued state statute is susceptible of a construction and application by the state judiciary "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison v. N.A.A.C.P.,* 360 U.S. 167, 177 (1959). See also *Bellotti v. Baird,* 428 U.S. 132, 146-147 (1976); *Elkins v. Moreno,* 435 U.S. 647, 661 (1978).

(3) The assumption that this Court sits to resolve the validity of state statutes upon the complaint and arguments of those who are not real parties in interest and who have not been directly injured or affected by the application of that statute. But it is too late in the day to mount challenges to the settled doctrine that constitutional adjudication is legitimate only when necessitated by a "real, earnest and vital controversy between individuals," *Chicago & G.T.R. Co. v. Wellman,* 143 U.S. 339, 345 (1892), upon complaint of one "whose rights are directly affected," *Hendrick v. Maryland,* 235 U.S. 610, 621 (1915), by application of the statute.

(4) The assumption that the Louisiana state courts,

wherein pends a tax refund suit by the real parties in interest raising the identical constitutional issues put to this Court, cannot be trusted to provide an expeditious and adequate remedy and cannot be trusted to respect and apply relevant federal constitutional doctrines in that suit. Suffice it to say that this Court does not indulge in any such notion that state courts are unable or unwilling to give effect to the supremacy of the Federal Constitution.

These various misassumptions find their ultimate expression and reincarnation in this case in the zeal with which the pending motion for judgment on the pleadings is being pursued. It is a motion for a judgment of constitutional proportions filed by eight States that have alleged and shown no direct interest or injury resulting from an application to those States of the Louisiana First Use Tax statute. It is a motion that protests the constitutional rights of certain private taxpaying entities that in no way can be considered agents or representatives of any of the eight States. It is a motion filed by States that have alleged no constitutional right of their own, no cause of action, with respect to their concern as consumers with increases in the costs and taxes that the manufacturer or transporter of a commodity has succeeded in passing on to all consumers. In short, the motion epitomizes the incredible assumption of the complaint that one State, posing as the consumer of products that have somehow been taxed by another State, can act as the National Enforcer of the constitutional obligations of the taxing State.

The instant motion, moreover, is one that seeks to compel this Court to perform the initial duty of the Louisiana Supreme Court, i.e., to make an initial authoritative construction of this new statute and to determine the precise circumstances to which this statute was intended to apply, and was in fact applied. Those who seek to fasten that function upon this Court apparently hope that the pending tax refund suit in the Louisiana courts, wherein the statute will be authoritatively construed and applied in the light of the taxpayers' constitutional claims, will somehow be forgotten or ignored by this Court.

Basically, the motion for judgment on the pleadings is being pursued as though the Louisiana First Use Tax statute could be constitutionally assessed in a vacuum, without regard to its various possible interpretations or the various circumstances to which it might be applied. The motion assumes that there are only constitutional or legal issues to be decided and that those issues can be derived from reading the plain words of the Louisiana statute. But merely reading the words of the statute reveals the speciousness of that assumption. Such a reading, for example, calls forth a variety of unresolved problems of statutory interpretation and application:

> (1) What construction is to be given each of the eight different "uses" mentioned in LSA R.S. 47:1302(8), "uses" which can lead to the imposition of the tax in question?
>
> (2) Which of the eight "uses" has led to the imposition of the tax in any given instance? Which "use" or "uses" have the Louisiana tax authorities deemed controlling?
>
> (3) Do all eight "uses," once they have been defined and related in terms of the interstate flow of gas, necessarily evoke identical federal constitutional problems? Is it possible that the Louisiana Supreme Court might so define some of these "uses," or so limit their applicability, as to change if not eliminate some or all of the constitutional questions now being asked?
>
> (4) What nexus with Louisiana do these various "uses" have? How fairly is this use tax related to various services performed by Louisiana for the taxpayers? How are the problems of apportionment and discrimination dealt with in this statute? Is apportionment necessary or is discrimination even possible under a proper interpretation of this statute? What are the problems and premises

that the Louisiana legislature had in mind when it imposed this tax on "uses?"

(5) What is the purpose and the construction to be given to the severance tax credit provisions of LSA R.S. 47:647, and the provisions of LSA R.S. 47:1303C relating to the enforceability of certain contracts respecting reimbursement or refund of the first use tax paid by owners of gas? How do these provisions fit into the overall scheme of levying the first use tax on the prescribed "uses?"

Given such unanswered factual and statutory problems, it is impossible to accept the movants' assertion (Brief in Support of Motion for Judgment on the Pleadings, p. 39) that "it is obvious that all of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found authoritatively by this Court, or are otherwise subject to its judicial notice." The answers to these various problems, which are the predicates to the delineation and resolution of precise constitutional questions, have not been and cannot be "found authoritatively by this Court." And the answers certainly cannot be found by resort to the judicial notice syndrome.

What is most disturbing about the movants' assertion, however, is the claim that Louisiana has admitted in its answer most if not all the facts material to a constitutional determination. Just what facts Louisiana has admitted are not detailed or described, though it would appear critical to the success of the motion that they be brought to the attention of this Court. It is hornbook law that all the allegations in the pleadings of the movant must be deemed false, while all the facts and reasonable inferences in the opposing party's pleadings are assumed to be true. *National Metropolitan Bank v. United States*, 323 U.S. 454, 456-457 (1945). In other words, the legal inadequacy of the presumably true denials and assertions in the opposing party's pleadings is the measure of whether the motion for judgment on the pleadings should be granted.

But in this case, the eight States have avoided a description or analysis of Louisiana's answer by resort to the pejorative. The careful denials in that answer of the material facts asserted in the complaint and the numerous affirmative allegations of fact in that answer are brushed aside as "pro forma denials or contradictions" and as "mock denials, contradictions, or assertions." (Brief, p. 39). Nothing is said about the presumed truth of those denials and assertions, nor whether they relate to material facts.

This, then, becomes a perfect illustration of why federal courts have generally been reluctant to grant motions for judgment on the pleadings. Predicating any kind of adjudication on the moving party's heated assessment of his opponent's initial pleading is not consistent with the adjudicative functions of federal courts. Such a "hasty or imprudent use of this summary procedure by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his claim or defense." 7 Wright and Miller, *Federal Practice and Procedure*, 690 (1969).

It is precisely because such a motion operates to deny Louisiana's right to a full and fair hearing on the merits of its defense to its use tax statute that Louisiana continues to insist upon such a hearing, either before a Special Master appointed by this Court or preferably in the fact-finding forum in the state courts of Louisiana. But wherever held, such a hearing is essential if the broad constitutional questions here posed are ever to be refined and confined to adjudicatory size.

It may well be, that the modern notions of notice pleading have increasingly rendered judgments on the pleadings a slim and inadequate reed upon which to rest the heavy burden of constitutional assessment of a controversial, complex and unconstrued state statute. Perhaps some of Louisiana's denials were "pro forma," though none were intended to be "mock." But often that is all an answer is supposed to be under current pleadings practice. And to hold a defendant to have admitted all facts to which he entered a "pro forma" denial serves no adjudicatory policy. It can only unfairly deprive the defendant of his factual day in court.

Still another evil emerges from this attempt to secure a summary constitutional adjudication. By rejecting as "pro forma" and "mock" all the opposing party's denials and assertions, the movant is free to engage in his own factual and statutory analyses, adding whatever additional facts and assertions may suit his purpose. That is precisely what has happened in this case. Both the plaintiff States and the *amici* have totally ignored all of Louisiana's denials and assertions, and have constructed their own factual and statutory structures. They have created their own interpretations and versions of the Louisiana First Use Tax statute under the rubric of reading the plain words thereof. And they have assumed, often incorrectly, the nature of the constitutional facts and circumstances upon which Louisiana has imposed this tax.

These are some of the more obvious difficulties and problems created by any attempt to construct, out of the initial pleadings in an original action before this Court, the facts and the issues appropriate to assessing the constitutional validity of a new and complex state tax statute. Those difficulties and problems are ultimately ascribable to the fact that this type of case, which needs the helping hand of a state court delineation of the facts and a state court interpretation of the state statute, is one that should come here on appeal or certiorari from the highest state court. This case really belongs on the appellate docket, not the original docket. And if the case were to come here on the appellate docket, it would come with all the facts fully developed, the issues refined, and an authoritative construction of the state statute already provided.

As the Court noted in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971), "This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." Add to that consideration the fact that the role of this Court in the federal-state system of government does not permit it to sit in judgment in the first instance on the meaning and validity of a statute of one of the sovereign States. In combination, these factors render inappropriate and unwise any further pursuit of this attempt to convert this Court into a surrogate fact finder and state statute interpreter.

That conclusion is in no way impaired by the unattended assertions of the *amici* (Brief, p. 54) that there is "a compelling need for a prompt decision on the merits in this case . . . [since] millions of natural gas consumers face the prolonged imposition of very substantial additional costs, with little hope of recompense for the economic burdens imposed by such costs." The plaintiff States have added additional and undocumented assertions that the Louisiana First Use Tax has imposed a "mammoth economic burden" directly on those States, and has harmed "the economic prosperity of entire regions of the country." (Brief in Opposition to Motion to Dismiss, pp. 4, 5.)

Such self-serving prophesies of economic doom cannot do service as reasons why this Court should abandon its appointed role as the appellate arbiter of the constitutional validity of state statutes. Assumption of the role of initial fact finder and interpreter of state statutes on the ground of economic expediency is unjustified by any constitutional or jurisdictional principle. If the complaining parties in interest want to expedite resolution of any legitimate constitutional claims, they need only reactivate and expedite the pending tax refund suit in the Louisiana courts.[1]

Under the circumstances, all that the State of Louisiana can do in this brief is to point to the *amici* brief as an example of how treacherous it is to attempt to initiate in this Court the groundwork for assessing the constitutional validity of a state statute. The brief will attempt to show how constructing that groundwork solely from the initial pleadings breeds a host of questionable and unreliable facts and analyses. Motions and briefs only add further confusion.

This brief will then conclude with an attempt to show how the constitutional arguments of the *amici*, based as they are on a total absence of any factual record, become exercises in futility. Many of those arguments become illusory and imprecise without any authoritative construction of the Louisiana statute to draw from. In response to such arguments, Louisiana can do little more than suggest what its answers might be were it given the opportunity to develop the facts and were the Louisiana Supreme Court allowed to proceed to render a definitive interpretation of the First Use Tax statute.

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1. For the convenience of this Court, a copy of the relevant portions of the complaint in that tax refund suit is attached as an appendix to this brief. The suit, which was filed on June 22, 1979, is pending in the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, under docket Number 225,533, Section "D", and is captioned "Southern Natural Gas Company, Transcontinental Gas Pipe Line Corporation, Columbia Gas Transmission Corporation, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company (a division of Tenneco, Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Trunkline Gas Company, United Gas Pipe Line Company, Sea Robin Pipeline Company, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, and Mississippi River Transmission Corporation v. Shirley McNamara, Secretary, Louisiana Department of Revenue and Taxation, The Louisiana Department of Revenue and Taxation, and the State of Louisiana."

II. THE ABSENCE OF A FACTUAL RECORD

This Court has long followed the "salutary principle that the essential facts should be determined before passing upon grave constitutional question." *Polk v. Glover,* 305 U.S. 5, 10 (1938).

But that principle is difficult to follow in an original proceeding before this Court, where there has been no opportunity to develop a factual record in some lower court. And the principle is especially difficult to follow where the plaintiffs ask this Court to find the "essential facts" from the initial pleadings and from what the plaintiffs conceive to be factual matters reflected in statutory language or in items supposedly entitled to judicial notice. On numerous occasions this Court has found that a factual record structured solely or primarily from untested pleadings is too fragile, too uncertain, and too unreliable a base upon which to proceed to resolve grave constitutional issues. See *Borden's Co. v. Baldwin,* 293 U.S. 194, 211-213 (1934); *Hammond v. Schappi Bus Line,* 275 U.S. 164, 168-172 (1927).

These difficulties become even further compounded when the constitutional issues at stake require the Court to examine the factual and economic impact of a challenged statute. Thus in this proceeding the Court is being asked to declare the Louisiana First Use Tax invalid under the Commerce Clause because the economic impact shows that it is discriminatory in nature. Such factual and economic complexities, as the Court noted in *Borden's* case, 293 U.S. at 210-211, make it "the more imperative that the Court in discharging its duty . . . shall not proceed upon false [factual] assumptions."

The likelihood that "false assumptions" and incorrect analyses may ensue from reliance upon a party's untested pleadings and briefs is well illustrated by an examination of the brief filed herein by the *amici.*

EXAMPLES OF QUESTIONABLE AND UNRELIABLE FACTS AND ANALYSES WITHIN THE *AMICI* BRIEF

(All references are to pages of the *amici* brief)

AMICI ASSERTIONS	*ACTUAL FACTS TO BE SHOWN BY FACT-FINDING PROCEDURES*
1. "The Act . . . imposes a tax on the first 'use' of natural gas in Louisiana originating outside of that state that moves in interstate commerce . . ." (Pp. 4, 5, 44 and 45)	1. The gas subjected to the tax is not moving in interstate commerce at the time the taxable incidences occur.
2. "The principal impact of the tax is on gas . . . ." (Pp. 4 and 8)	2. The tax is not imposed "on gas" but upon local activities or uses allowed or permitted by the owners thereof to be performed in Louisiana.
3. "[T]he tax is on gas . . . imported from abroad [foreign countries] . . . ." (Pp. 4, 8, 9, 16 and 25)	3. Natural gas imported from foreign countries is excluded from the imposition of the First Use Tax.
4. "[F]irst 'use' is defined so broadly as to include even the measurement of gas flowing in interstate commerce . . . ." (P. 4)	4. Section 1302(8) does not define "measurement of gas" as a use subject to the tax.
5. "If the federal government's lessees are compelled to pay the First Use Tax, the revenues received by the United States from these leases could be significantly affected . . . ." (Pp. 4 and 5)	5. By definition only owners of gas subject to the uses are liable for the First Use Tax and the federal government lessees are not owners of approximately 80% of the gas and not subject to the tax by the statute, but, may be liable by virtue of contracts placing tax liability on themselves. Where lessees are

	owners the tax is susceptible to being passed on under the NGPA to ultimate consumers upon the approval of FERC.
6. "[T]he Commission has been forced to promulgate regulations . . . ." (P. 5)	6. The regulations in question were an exercise of the discretionary authority of the Commission pursuant to an application for same by potential taxpayers — natural gas companies — under the ratemaking jurisdiction of the Commission.
7. "[T]he Louisiana tax has imposed substantial administrative and regulatory burdens upon the Commission." (P. 6)	7. The First Use Tax imposes nothing upon the Commission. Its administration and regulatory activities are imposed by federal statutes.
8. "The First Use Tax imposes a volume tax of seven cents per thousand cubic feet . . . upon the first 'use' within Louisiana of any natural gas . . . ." (P. 6)	8. The tax is imposed upon the use of the natural gas within Louisiana and the rate of measurement is not the tax.
9. "[W]hile Louisiana has prohibited the purchasers of gas subject to the tax from shifting it to the producer, it does not prohibit purchasers of gas subject to its severance tax from shifting all or part of the tax to the producer . . . ." (Pp. 18, 36, 41, 49 and 52)	9. The Louisiana First Use Tax and the Louisiana severance tax places the tax liability upon the owner of the natural resource subject to the tax at the time of the occurrence of the taxable incident. The producer of natural resources in Louisiana is normally the owner at the time the natural resource is severed, subject to royalty interest owners. The First Use Tax statute prohibits the

owner of natural gas [not the purchaser of natural gas] subject to the tax from seeking reimbursement of its liability from any party other than a purchaser of the gas.

10. "While the Louisiana tax is characterized as 'upon the privilege of performance by the owner, of the enumerated actions comprising first use within Louisiana' . . . the provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use . . . ." (Pp. 18, 28, 44, 45 and 48)

10. Section 1302(8) defines use, among other things, as "processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment;" which activities are not mere transportation but are local activities performed by owners of the natural gas.

11. "The Louisiana First Use Tax requires 'out-of-state consumers to bear the entire burden of the levy.' " (Pp. 19, 41 and 50; see also pp. 9 and 51)

11. Only the Commission may authorize a cost of service to be passed on to consumers (Section 4 and 5 of the Natural Gas Act and Section 110 (a)(2) of the Natural Gas Policy Act). The First Use Tax does not require any person other than the owner of the gas subject to the tax to bear the burden of the entire tax. Consumers in Louisiana are also required to pay their portion of the tax, especially the ultimate consumers. The provisions of LSA-R.S. 47:11 (Act 599 of 1978) granting certain tax credits on other state taxes to certain Louisiana consumers are only applicable if the tax liability equals or exceeds $250.00

	annually to a maximum credit for all such consumers of two million dollars. The tax credit does not relieve the tax payer of tax liability.
12. "So long as the validity of the Louisiana tax remains unresolved, millions of natural gas consumers face the prolonged imposition of very substantial additional costs, ..." (P. 54)	12. The average residential consumers' "substantial additional costs" will be at the most approximately .07¢ per month or .84¢ per year.

The foregoing is necessarily incomplete. But there are evident enough conflicts with respect to crucial facts to make it impossible either to divine or to argue the precise constitutional issues at stake. No assurance can be given this Court that the facts essential to performance of its task of constitutional adjudication can be correctly divined from a mere reading of the pleadings, the statutes or whatever else is subject to judicial notice.

Indeed, the State of Louisiana suggests that its denials of the factual allegations in the complaint, combined with its own assertions of fact, and the facts that it is prepared to prove upon an evidentiary hearing, paint a totally different picture of the constitutional issues respecting the Louisiana First Use Tax. Louisiana's version of the facts would create quite a different approach by this Court both in the formulation and the resolution of the Commerce Clause and Supremacy Clause problems that have been raised in the motion for judgment on the pleadings.

This case is simply not ripe for final constitutional adjudication. The rush to judgment on the pleadings can only result in a hasty use of advisory opinions on sets of facts having no firmer base than disputed allegations in the complaint and the questionable analyses made by the supporting brief writers.

Given such an inadequate state of the record, the State of Louisiana still feels obliged to attempt to provide this Court with some idea of the constitutional arguments Louisiana could make were the issues ever to be defined or refined in light of a properly developed factual record.

III. THE ALLEGED VIOLATIONS OF THE COMMERCE CLAUSE

The *amici* brief utilizes several threads of Commerce Clause analysis to promote its argument that the Louisiana First Use Tax statute is facially invalid under that Clause.

A. *The "flat prohibition" argument*

The first stand taken by *amici* centers on the traditional notion that the Commerce Clause "flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed" (Brief, p. 44). Citation is made to *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954); *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 290, n. 11 (1976). This point is supplemented by an earlier claim (Brief, p. 28) that the interstate flow of natural gas is steady and continuous from the well-head to the consumer burner tips, not being interruptible by any processing that may occur along the interstate way. Authority for that point apparently rests upon dicta appearing in the *Michigan-Wisconsin* opinion, 347 U.S. at 163, and in a lower court opinion in *Deep South Oil Co. v. F.P.C.,* 247 F.2d 882, 888 (5th Cir. 1957).[2]

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2. Cf. The dissent of Circuit Judge John R. Brown in the *Deep South* case, 247 F.2d at 893, protesting that this notion of the ever-constant movement of natural gas from well-head to burner "is to mix Boyles and Phillips law to come up with the startling legal-statutory interpretation law that because gas, once released is in a constant state of movement, that *movement,* from the very moment it first started, is characterized (intra or interstate) by its final destination."
The majority dictum in *Deep South* that gas moves constantly from well-head to burner and is not interrupted by processing has never been cited by any other federal court.

The *amici* then proceed to press their own version of the facts and of the language and impact of the Louisiana statute in order to force the statute squarely within the "flat prohibition" area roped off by this Commerce Clause analysis. By dint of their own *ipse dixit*, the *amici* read the Louisiana statute as necessarily imposing the tax "upon gas that is in transit through Louisiana in interstate commerce" (Brief, p. 44). And they further read the clear language of the statute imposing the tax on the various processing "uses" within Louisiana as a total subterfuge, incapable of overcoming various judicial comments made in other contexts that appear to say that the continuous flow of interstate gas is not interrupted by processing along the way.[3] Therefore, say the *amici*, no amount of factual development or state court interpretation and characterization of the taxable incident can alter the hard fact that the "real nature" of this tax is a constitutionally forbidden one. It is a tax on gas while in its uninterruptible interstate stream.

As a technique for achieving a Commerce Clause condemnation of a state tax statute, this seeming *tour de force* of the *amici* leaves several things to be desired. Factually and legally, it is not at all clear that for purposes of state taxation the interstate stream of natural gas must be deemed uninterruptible from well-head to burner, the flowing gas to be deemed

3. The remark in the *Michigan-Wisconsin* opinion (347 U.S. at 163) that the "entire movement of the gas, from producing wells through [the processing] plant and into the . . . pipeline to consumers outside Texas, is a steady and continuous flow" was merely a description of the physical continuity of the flow of gas from well-head to consumer. It was not a description of the portion of that flow that is describable as interstate commerce and thus immune from state taxation. The actual holding in *Michigan-Wisconsin* was that the state tax there involved was impermissible levied upon an incident (a "taking" of the gas from the processing plant) that occurred "beyond the step where production and processing have ceased and transmission in interstate commerce has begun." 347 U.S. at 167. In other words, the Commerce Clause tax concern was only with the interstate transmission of gas from the processing plant.

impervious to any local event outside the stream that processes, alters, or changes the very nature or content of the flowing gas. Indeed, this Court's decisions in *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 108-111 (1975), and in *Memphis Natural Gas Co. v. Stone,* 335 U.S. 80, 84-85 (1948), clearly indicate there can be taxable local activities "apart from the flow of [interstate gas] commerce" that serve to maintain, keep in repair, and otherwise protect the facilities that make possible the interstate flow. A local processing plant that extracts by-products from the well-head gas and thereby changes the chemical content of the gas so that it becomes usable by consumers would appear to be even more of a local activity "apart from the flow of commerce" than those referred to in *Colonial Pipeline* and *Memphis Natural Gas.*

Moreover, the *Michigan-Wisconsin* case, so heavily relied upon by *amici,* suggests an even more intriguing factual definition of that kind of interstate flow of gas that is subject to the "flat prohibition" of state taxes where it appears from the fact, as it did in *Michigan-Wisconsin,* that a substantial processing event occurs during the physical flow of gas from the well-head to consumer, then the interstate journey with which the Commerce Clause may be said to commence at the point where both "production and processing have ceased and transmission in interstate commerce has begun." 347 U.S. at 167. Then a state tax is "flatly prohibited" only if its incidence occurs after the gas has been processed and the interstate journey has thereupon commenced.[4] See also *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 675 (1954), describing

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4. Of course, if the processing involves nothing more than removing dirt and foreign particles from so-called "dry gas," there may not be a sufficiently local incident to justify describing the interstate movement, for Commerce Clause tax purposes, as commencing only as the gas leaves the processing facilities. See *Interstate Natural Gas Co. v. F.P.C.,* 331 U.S. 682, 685, n. 7 (1947).

the interstate flow of gas as that which "flows from the processing plant through an outlet pipe . . . [and] then continues its flow through the interstate pipeline system until delivered in other states."

The *amici* have thus confusedly equated the physical, continuous and uninterrupted movement of gas from well-head to consumer with those portions of such movement that can fairly and factually be described as purely interstate in nature for purposes of immunizing the movement from state taxation. Then too, the *amici* have shown no awareness that the terminal points of an interstate movement of gas may be described quite differently for purposes of assessing the scope of federal regulatory power than for purposes of defining the scope of state power to tax or regulate local incidents apart from, though related to, the purely interstate flow. See *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965)), defining the interstate movement of gas for Natural Gas Act regulatory purposes as extending "from well-head to ultimate consumer."

Thus, while gas is often said to flow uninterruptedly to the burners of the consumers, for state tax purposes the interstate flow is said to cease once it passes into the local distribution systems in the terminal state prior to transmittal to the consumers' burners. *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931). And what seems to emerge from the *Michigan-Wisconsin* line of analysis is that, for state tax purposes, the interstate movement of gas commences at the "tailgate" of the processing plant, provided the processing significantly alters the chemical content of the gas. Put differently for state tax purposes the only gas that is totally immune from tax is that which has been refined for use by consumers, and then only when such gas is en route interstate from the processing facility to the local distribution facility.

It follows that judgment on the pleadings respecting the "flat prohibition" concept of the Commerce Clause cannot at this point be rendered against the State of Louisiana. The true contours of that concept are such that a full development of the facts and a definitive interpretation of the Louisiana Tax statute as applied to those facts must be had before a court can say whether the First Use Tax is consistent or inconsistent with the Commerce Clause. What is the nature of the flow of natural gas from the OCS well-heads to the consumers? What is the nature and extent of the processing that takes place in Louisiana? Does it so alter the chemical content of the offshore gas that the interstate stream of gas available for consumption does not commence until the processed gas leaves the "tailgate" of the processing plant in Louisiana? Is this processing "apart from the flow of commerce," *Colonial Pipeline Co. v. Traigle, supra,* or does the processing occur before the interstate journey has commenced, *Michigan-Wisconsin Pipe Line Co. v. Calvert, supra?* And precisely what part or "use" of the processing facilities constitutes the taxable incident within the meaning of the Louisiana First Use Tax statute?

Louisiana is entitled to an opportunity to prove what the true facts are with respect to the nature of the gas as it flows into and then out of Louisiana. It is entitled to a chance to prove how the incidents of processing fit into that flow, whether they interrupt or precede or are apart from the interstate flow. And the situation is such that only a definitive interpretation of the statute by the Louisiana Supreme Court can make clear which of the various "uses" related to the processing constitutes the critical tax incidence.

The allegations in Paragraph XXXV of the Complaint, from which the States and the *amici* seek to impose a summary judgment of Commerce Clause invalidity, are simply too imprecise, too factually questionable, and too unclear as to the impact of the First Use Tax to permit this Court to conclude that the

Louisiana statute is facially and clearly inconsistent with the Commerce Clause.

B. *The apportionment and discrimination arguments*

Alternatively, the *amici* suggest (Brief, p. 46) that the First Use Tax may be instantly declared invalid under the Commerce Clause "because it is not fairly apportioned and because it discriminates against interstate commerce."

Significantly, the apportionment and discrimination concepts put forth in the motion for judgment on the pleadings and supported by the *amici* are but two parts of the four-pronged Commerce Clause test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and *Washington Rev. Dept. v. Stevedoring Assn.*, 425 U.S. 734, 750 (1978). See also *Japan Line, Ltd. v. County of Los Angeles,* 60 L.Ed. 2d 336, 345 (1979). The theory of this Commerce Clause analysis, which substantially undermines the first argument of *amici* relative to the absolute bar on taxing interstate commerce, is that those who engage in interstate commerce are not relieved by the Clause from their just share of state tax burdens.

Accordingly, a state tax can survive a Commerce Clause challenge if, in practical terms, (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) the tax if fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the State. In short, a tax on interstate commerce is not "per se unconstitutional." *Complete Auto Transit,* 430 U.S. at 289. Rather, the validity of such a tax depends upon proof of compliance with the four-pronged practical test.

One of the major premises of this four-pronged test is that compliance therewith depends upon an assessment of the economic realities as to the impact of the challenged tax. For the most part, the burden of proving the factual realities rests upon those who would challenge the tax, for a state tax on commerce is presumed permissible unless and until there has been "developed . . . [a] factual basis on which to declare the [state] tax unconstitutional as applied." *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. at 751.

Each prong of this test, in other words, depends upon factual proof of the relevant economic realities. It is no longer possible, since the overruling of the *Spector* (*Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944)) decision in *Complete Auto Transit* (see 430 U.S. at 288-289), to assess the validity of a state tax solely in terms of the language used or not used by the legislative draftsmen. Whether a tax applies to an activity with a substantial nexus with the State, or whether the tax is to be considered properly apportioned and non-discriminatory, is to be divined from something more realistic than statutory phraseology, which may be largely talismanic if not poorly phrased. As was said in *Complete Auto Transit,* 430 U.S. at 288, there is "no economic consequence that follows necessarily from the use of the particular words [in the state tax statute], and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect."

What is so wrong about the approach of the States and of the *amici* to these apportionment and discrimination factors is the assumption that these factors can be determined solely by reading the words and the sections of the Louisiana First Use Tax statute. And the theory of the motion for judgment on the pleadings is that no factual development is necessary. Thus the motion, as demonstrated in the supporting briefs, is designed to choke off the factual development that this Court has declared is essential to the application of the four-pronged economic impact test. The initial pleadings, supplemented by a questionable reading of the words of the tax statute, are a totally inadequate substitute for the development of a factual basis for assessing the validity of the tax in light of economic realities.

Moreover, the motion for judgment as to the invalidity of the Louisiana tax under the Commerce Clause makes a further mistake in assuming that judgment can be rendered by considering in isolation only two of the four economic factors. Non-compliance with any one of the four requirements will invalidate a state tax. But the four factors must initially be developed and considered together. What may be deemed discriminatory or non-apportioned necessarily depends upon proof of an activity that has a substantial nexus with the State. It is a tax first found to be based upon that type of activity that is to be tested in terms of apportionment and discrimination.[5]

By ignoring the proof required with respect to the nexus of the taxed activity, the States and the *amici* have felt free to develop their own questionable notion of what is the taxable incident. Repeatedly they assert and assume, from nothing more substantial than their own reading of the statute, that the Louisiana First Use Tax is levied not upon any use or activity within Louisiana but upon the whole of the gas that is in interstate transit (Brief, p. 44). From that questionable and faulty premise, it becomes an easy exercise to assert, with the aid of a few references to other statutory language, that the effect of a tax on all the gas in interstate transit is discriminatory and non-apportioned.

But if it is factually demonstrable that the Louisiana First Use Tax is truly laid upon a local and one-time processing incident, occurring prior to the start of the interstate flow of processed gas useable by consumers, the apportionment problem would virtually answer itself. Then it could be said that "the

5. "The degree of 'connection,' 'contract,' or 'nexus' between the taxing state and the interstate commerce taxes is also the fundamental measure of whether or not a state tax violates the commerce and due process clauses. Therefore, to the extent that a state can point to a substantial connection with a particular aspect of interstate commerce, it can also demonstrate that its program is consistent with the commerce and due process clauses." L. Tribe, *American Constitutional Law* 346 (1978).

tax is not one which in form or substance can be repeated by other states" and that "[a]ll the events upon which the tax is conditioned . . . occur in [Louisiana] and not elsewhere." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 260 (1938). Apportionment would in that event be impossible and thus unnecessary even under the *Complete Auto Transit* methodology.

It ill serves the cause of constitutional adjudication before this Court to ignore the factual development that the Court has declared to be essential to the assessment of a tax levied by a sovereign State. The effect is to strip the State of the right to defend the validity of its statute on the terms specified in this Court's opinions.

Louisiana's tax statute cannot be declared invalid, on a motion for judgment on the pleadings under the Commerce Clause, where there has been no factual record established to show that the tax is either discriminatory or non-apportioned.

IV. THE ALLEGED VIOLATIONS OF THE SUPREMACY CLAUSE

The plaintiff States urge in their motion for judgment on the pleadings that the First Use Tax is violative of the Supremacy Clause under two premises. First, interference with the Natural Gas Act; and second, preemption by the Outer Continental Shelf Lands Act. The supporting brief of the *amici* (the United States and the Federal Energy Regulatory Commission) urges judgment on only the first of these premises: "The Louisiana First Use Tax conflicts with federal regulation of the sale and transportation of natural gas in interstate commerce [pursuant to the Natural Gas Act] and is therefore invalid under the Supremacy Clause of the Constitution." (Brief, p. 16)

At the start it should be noted that *amici* devote much of the content of their brief (pp. 4, 8, 9, 16, 19, 21, 22, 25, 26, 29, 30, 47, 49 and 52) to arguments concerning the effect of the First Use Tax on gas imported from foreign countries. In an effort to formulate the true issues for consideration by this Court, Louisiana has shown in its answer to the original complaint (paragraph LV, p. 19) what it conceives to be the proper construction and intent of the First Use Tax as respects gas imported from a foreign country, i.e., it is not subject to the tax. All gas characterized as an import from a foreign country is *subject to* the levy of an import tax or tariff by the United States by virtue of Article I, Section 10, Clause 2. The Louisiana Legislature has therefore made the First Use Tax applicable, in part, only to gas "which is *not subject to* the levy of any import tax or tariff by the United States as an import from a foreign country." LSA-R.S. 47:1303 A. Merely because gas imported from a foreign country is not presently the *subject of* a tariff or import tax is irrelevant, since the character of the gas as an import makes it subject to the taxing authority of the United States, i.e., *subject to* the levy of an import tax or tariff. It is therefore beyond the reach of the First Use Tax.

A. *Federal Regulation*

The motion for judgment on the pleadings is inappropriate for it requires the Court to resolve disputed factual matters and determine which of the several uses, defined as incidents of local taxation by Louisiana's First Use Tax, are at issue. Such factual determination can best be made by the Louisiana Courts, traditionally the first forum with the right of initial statutory interpretation of a state statute. Any such factual determination and statutory interpretation of Louisiana's First Use Tax will define which of the several uses, if any, are subject to the imposition of the tax. This Court will then have for consideration the refined issue of whether the tax as applied to the factually identified use or uses is violative of the Supremacy Clause. The absence of definitive facts before this Court negates the summary disposition of substantial and grave constitutional issues.

This portion of the brief will attempt to respond to the constitutional arguments posited by *amici* notwithstanding the absence of salient facts.

The plaintiff States and *amici* attempt to persuade the Court that the First Use Tax is in reality a tax either on the transmission of natural gas in interstate commerce or on the natural gas itself. From that questionable premise, the argument is made that the tax constitutes a regulation of the transportation and sale of natural gas in interstate commerce, and also constitutes a tax on the severance or production of natural resources on the Outer Continental Shelf. All of this is said to interfere with the ratemaking jurisdiction of the Commission and thus to be prohibited, directly or indirectly, by the Natural Gas Act, the Natural Gas Policy Act and/or the Outer Continental Shelf Lands Act.

1. *Section 1303 C*

Amici argue that Section 1303 C (LSA-R.S. 47:1303 C); first, "impinges upon the Commission's ratemaking authority under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c, 717d)" (Brief, p. 32); second, "interferes with the Commission's authority to control the terms on which natural gas is transported in interstate commerce through the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act (15 U.S.C. 717f)" (Brief, p. 37); and third, "interferes with the regulation prescribed by the Natural Gas Policy Act in two distinct ways" (Brief, p. 39); (a) as violative of Section 110 (a) (2) (Brief, p. 40) and (b) as violative of Section 121 (b) (Brief, p. 41).

Section 1303 C of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 293 of 1978, provides:

> "In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly

> Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchase of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest."

The Commission has exclusive jurisdiction under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. § 717c and 717d) for ratemaking and under Section 7 of the Natural Gas Act (15 U.S.C. 717f) for the issuance of certificates of public convenience and necessity, pertaining to natural gas dedicated or committed to interstate commerce and natural gas transported for sale in interstate commerce. Natural gas produced on the Outer Continental Shelf is such gas. Section 2 (18) (A) (i) of the Natural Gas Policy Act (15 U.S.C. 3301). However, dedicated or committed to interstate commerce is not synonymous with interstate commerce under the Commerce Clause (Article I, Section 8, Clause 2) of the United States Constitution.

> "[T]he result of our decisions is to make the sale of gas which crosses a state line at any stage of its move-

> ment from well-head to ultimate consumption 'in interstate commerce' within the meaning of the [Natural Gas Act]."
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> *California v. Lo-Vaca Gathering Co.,*
> 379 U.S. 366, 369 (1965)

This "interstate commerce" aspect of natural gas is the basis upon which the Commission establishes its jurisdiction for ratemaking and certification under Section 4, 5, and 7 of the Natural Gas Act (15 U.S.C. 717c, 717d and 717f).

This Court in *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), in considering the validity of a state tax levied upon a transfer of processed gas to a natural gas company, held that under the Commerce Clause of the Constitution, transportation in interstate commerce did not commence until the natural gas company took possession of the processed gas for ultimate delivery to the consumer. The gas in question had been dedicated or committed to interstate commerce by virtue of the certificate of public convenience and necessity previously issued by the Commission (the Federal Power Commission) allowing the natural gas company to transport and sell the natural gas in interstate commerce. For purposes of determining the appropriate constitutional standards, movement of natural gas in interstate commerce commences after the last step of preparing the gas for the first stages of distribution, has occurred, i.e., at the "tailgate" or outlet of the gathering and processing plant. Natural gas is considered in interstate commerce at the well-head for purposes of the ratemaking and certification jurisdiction of the Commission, and the Commission lacks jurisdiction over the natural gas between the well-head and the "tailgate" or outlet of the gathering, and processing plant as respect activities defined as uses by the First Use Tax which occur between those two points.

The contention of *amici* is that Section 1303 C of the First Use Tax statute is preempted by virtue of its conflict with the exclusive jurisdiction of the Commission. This position is taken in reliance upon alleged facts, i.e, the existence of contracts between the producers of natural gas and the natural gas companies which require the producers to bear all costs (including taxes) associated with the processing of the natural gas produced from locations on the Outer Continental Shelf. These facts are not established by the pleadings. The absence of such essential facts negate any possibility of the rendition of a judgment on the pleadings. In essence their position is that, when the First Use Tax declared certain provisions that may be contained in some contracts or agreements authorizing the party liable for the First Use Tax to seek and obtain reimbursement of the tax from any party other than another purchaser, the State of Louisiana adopted a "regulation" conflicting with the exclusive jurisdiction of the Commission. Such is not and cannot be the case.

A proper reading of Section 1303 C readily reveals that the contract agreement provision deemed to be unenforceable is only conclusively so in the event a final definitive judgment is rendered to that effect. LSA-R.S. 47:1303 C (Act 293 of 1978). For Section 1303 C to have any effect whatsoever upon the exclusive jurisdiction of the Commission there must be a showing that contracts or agreements were in existence containing provisions declared to be "unenforceable."

If such contracts or agreements were in existence they would be under the jurisdiction of the Commission as contracts forming the basis of certificates authorizing transportation services. The Commission may authorize the deletion of any such reimbursement provisions from contracts which are part of the certificates of public convenience and necessity and then only pursuant to the procedures set forth in the Natural Gas Act. 15 U.S.C. 717c (d) and (e), 717d (a).

The statute clearly places certain options upon those owner-taxpayers having a contractual or agreement right of reimbursement or refund from a party other than the purchaser of the gas. Those options are (1) seek to enforce the contractual or agreement provisions; (2) seek a judicial determination that the owner-taxpayer "is entitled to such reimbursement or refund;" or (3) seek a modification, change or amendment to the contract in conformity with the statute. The first two options would necessitate judicial action and the third option would necessitate the Commission's authorization.

This third option has in fact been exercised by certain owner-taxpayer natural gas companies and the Commission has in fact deleted all such reimbursement or refund provisions from those contracts in connection with the certificates of public convenience and necessity.[6] Thus, there exist no actual or potential conflict between the First Use Tax, more particularly Section 1303 C, and the exclusive jurisdiction of the Commission.

Notwithstanding the lack of a real and actual controversy because the Commission has modified all contracts and approved the pass on of the economic incidence of the First Use Tax, as a cost of service, to the ultimate purchasers and consumers of the gas, *amici* now throws out for consideration by this Court a "red herring" postulated as a "Catch-22" principle. This "red herring" is so postulated by *amici* on pages 5 and 6 of their brief, as follows:

> ". . . Because the First Use Tax falls principally on gas moving in interstate commerce, the Commission has been forced to promulgate regulations that would permit interstate pipelines to pass along in their rates the additional costs resulting from the imposition of the tax to their customers, subject to refund if the tax is ultimaely held to be unconstitutional . . . ."

6. See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978); Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978); Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed. Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

It is upon this premise that *amici* attempt to create factual predicates to support their legal conclusions by which they seek to have this Court nullify the Louisiana First Use Tax.

Amici predicate their legal arguments upon the assumed factual basis that "the Louisiana Tax is on gas produced from . . . the Outer Continental Shelf" (Brief, p. 22). This factual assumption belies the clear and convincing language of the taxing statute and is supported by convoluted reasoning and the misapplication of legal precedents. Only a fact finding hearing can resolve the factual issue of what is being taxed by the Louisiana First Use Tax.

Further, *amici* assume factually "that such gas moves in interstate commerce" from the well-head to the ultimate consumer (Brief, p. 22). As heretofore shown, this factual assumption is contrary to both the law and the actual transportation of marketable gas in interstate commerce.

Amici further presume that there exists "exclusive federal regulatory jurisdiction over such gas" (Brief, p. 22) from the well-head to the ultimate consumer. This factual presumption negates the existence of Section 1 (b) of the Natural Gas Act.

On page 26 of the *amici* brief it is asserted that "Louisiana does not dispute the fact that each of the three categories of gas to which the First Use Tax applies — OCS gas, federal enclave gas, and imported gas, — moves in interstate commerce." This self-serving declaration of alleged undisputed facts is a misstatement of what is in Louisiana's answer. Louisiana, from the very inception of this matter, has denied that the First Use Tax applies to imported gas, a denial that for purposes of the present motion must be taken as true. Furthermore, Louisiana now reiterates its position that movement in interstate commerce of the natural gas consumed by the ultimate consumers only commences at the "tailgate" or outlet of the gathering and processing plant. Not only are non-existent facts being assumed but factual disputes are being ignored in an attempt to formulate a theoretical factual situation whereby application of contrived legal theories and conclusions would seemingly nullify the First Use Tax as violative of the Supremacy Clause.

The various factual fallacies upon which the legal conclusions of *amici* are predicated suggest the need for a complete and accurate factual finding. Only after a true and complete factual development can the legal and constitutional issues posited by the original complaint be considered and resolved by this Court.

2. *Applicability of NGA and NGPA*

The Natural Gas Policy Act (§110) reflects congressional anticipation of state enactment of taxes which may have an impact on the price of natural gas to be paid by the ultimate consumer. This Court has held that within ratemaking authority of the Commission (Federal Power Commission then, and now the Federal Energy Regulatory Commission) taxes could be allowed as a cost of service in adjusting rates pertaining to the transportation and sale of natural gas.

> "In our view what the Commission did here did not exceed the powers granted to it by Congress. One of its statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission . . . ."

FPC v. United Gas Pipe Line Co.,
386 U.S. 237, 243 (1967)

Section 110 (a) (1) of the NGPA provides that state severance taxes are to be allowed as an additional cost over the maximum lawful price for the first sale of natural gas. Further, Section 110 (a) (2) of this Act provides that the first sale price of natural gas may exceed the maximum lawful price "to the extent necessary to recover . . . (2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission."

The Commission is thereby granted the discretionary authority to determine those costs of service incurred by the natural gas companies which may be passed on through rate charges[7] to the ultimate consumers of natural gas. This discretionary authority does not prohibit state taxation of local incidences, and more particularly, it does not prohibit the application of the First Use Tax to the various local uses of the natural gas within the State of Louisiana.

Factually, each of the statutorily enumerated uses has occurred in Louisiana for many years prior to the enactment of the First Use Tax. The statute merely identifies those local uses as appropriate incidents of taxation. Each statutorily enumerated use (LSA-R.S. 47:1302 (8)) was and is occurring consistent with certificates of public convenience and necessity issued by the Commission under Section 7 of the Natural Gas Act.

To determine whether state action "invalidly invade[s] the federal agency's [the Commission] exclusive domain" (*Northern Natural Gas Co. v. State Corp. Com.*) under the Natural Gas Act, the standard is "whether state authority can practicably regulate a given area and, if we find it cannot, then [the Court is] impelled to decide that federal authority gov-

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7. The Commission may also deny the pass on of certain cost of services under its ratemaking jurisdiction. *FPC v. United States Gas Pipe Line Co.*, 386 U.S. 237 (1967).

erns." *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 19, 20 (1961).

This Court has consistently opined that the "production or gathering" of natural gas is exempted from the federal regulatory domain by the terms of Section 1 (b) of the Natural Gas Act and that "production" and "gathering" are "terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* and the cases cited therein, 372 U.S. 84, 90 (1963). "Natual gas" is not in a state suitable for marketing or distribution at the time of its production.[8] And Louisiana is prepared to show that until (1) the central gathering of the original gas stream is accomplished, and (2) the substantial physical activities or uses to which it must be subjected at facilities and properties on shores are completed, and (3) the refined commodity reaches the "tailgate" or outlet of the gathering and processing plant for transmission by a natural gas company, there can be no marketing or initial distribution

8. Examination of the contracts of sale executed between pipeline companies and producers, ostensibly approved in toto by the Commission, will reveal that what is purchased by the pipeline companies is not, and cannot, be delivered until the full gas stream as produced at the well, has been transported to shore and processed into the marketable commodity known by consumers as "natural gas." The consideration paid by the pipeline companies for this commodity is the price stated in the contract and approved by the Commission under the criteria of Sections 4 and 5 of the Natural Gas Act and/or the Natural Gas Policy Act as the just and reasonable price for each MCF of gas containing one million BTUs. The consideration paid to the producers for placing this commodity in a marketable condition is the value inherent in the liquefiables extracted and retained by the producers and/or processors. It is clear that the commodity purchased by the pipeline companies is dedicated to interstate commerce by virtue of its origin on the Outer Continental Shelf, albeit in globo with other definable commodities. It is equally clear that until this commodity, i.e., an MCF of gas containing one million BTUs and no corrosives, is deliverable and delivered the terms of the contract are not met and the marketing and initial distribution of the natural gas has not commenced.

thereof.[9]

The First Use Tax is imposed upon the following uses of natural gas in Louisiana: (1) sale; (2) the transportation in the state to the point of delivery at the inlet of any processing plant; (3) the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; (4) transfer of possession or relinquishment of control at a delivery point in the state; (5) processing for the extraction of liquefiable component products or waste materials; (6) use in manufacturing; (7) treatment; and (8) other ascertainable action at a point within the state. LSA-R.S. 47:1302 (8). Louisiana is prepared to show that at least the first five uses enumerated are physical acts or activities necessary in preparing the natural gas "for its first state of distribution," (*Northern Natural Gas Co.* and the cases cited therein, 372 U.S. 84), and thus exempt from the federal regulatory scheme under Section 1 (b) of the Natural Gas Act. Since the activities or uses subject to taxation are not within the comprehensive federal regulatory scheme, it cannot be said that the First Use Tax "invalidly invade[s] the federal agency's [the Commission] exclusive domain." *Northern Natural Gas Co. v. State Corp. Com.*, 372 U.S. 84. The First Use Tax thus does not conflict with the regulatory authority of the Commission and is not preempted by the authority of the Commission.

Furthermore, the First Use Tax does not mandate any action by natural gas companies as a result of the imposition of the tax, nor does the tax attempt to regulate in any manner, directly or indirectly, the prices of interstate wholesale of natural gas.

Neither the Natural Gas Act, the Natural Gas Policy Act, nor any other federal act, prohibit state taxation of local

9. *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); and *Interstate Natural Gas Company v. F.P.C.*, 331 U.S. 682 (1947).

incidences which may increase the price of the natural gas paid by the ultimate consumer.

B. *Outer Continental Shelf Lands Act*

Plaintiff States argue[10] that the First Use Tax is pre-empted by the Outer Continental Shelf Lands Act of 1953. Section 4 (a) (2) of the Act (72 U.S.C. §4(a) (2) (A) adopts state laws to the extent they are applicable and not inconsistent with federal laws and then concludes by providing that "[s]tate taxation laws shall not apply to the outer Continental Shelf." A review of the legislative history and the language of the entire section of the statute suggests that Congress intended the law to apply only within the physical limits of the OCS. House Report No. 413, 83rd Congress, First Session 1953, U.S. Code Congressional and Administrative News, 2180, does not use the statutory phrase, "shall not apply *to* the Outer Continental Shelf" but rather interprets it to mean, "cannot apply *in* these areas."

Even with this language in mind, plaintiff States attempt to justify and rationalize their contention that the incidences in Louisiana subject to the tax are in reality a tax on the severance or production of natural gas from the Outer Continental Shelf. This fanciful view of the tax cannot withstand scrutiny. The plain language of the Louisiana statute shows without doubt that the uses subject to the tax occur in the State of Louisiana. The tax does not reach any uses occurring in the Outer Continental Shelf.

Admittedly, Louisiana cannot directly tax the severance of natural gas from the OCS. That is not the same, however, as

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10. Apparently neither the Solicitor General nor the Commission have any faith in this argument for they refuse to even make mention of the spurious contentions by plaintiff States that the First Use Tax reaches the territorial boundaires of the Outer Continental Shelf.

saying that Louisiana and other States are forever prohibited from imposing any economic incidence upon items of commerce produced from the OCS.

Nothing in the Outer Continental Shelf Act, moreover, indicates broad preemptive intent, or intent to establish a comprehensive scheme to regulate natural resource development and distribution from the shelf. The goal of the statute, rather, was to assert American territorial ownership of the Shelf, and to permit the Secretary of the Interior to lease tracts for private natural resource development. Breeden[11] emphasizes that such state legislation as zoning and pollution laws are strictly local matters that are "peripheral concerns" with respect to the intended federal scheme and cites the following passage from the *San Diego Bldg. Trades Council* case, at footnote 184:

> "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal regulation]."
>
> *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 at 254 (1959)

Under this principle, state taxation, such as the First Use tax aimed at compensating the State for environmental damage, governmental costs, and other impacts *on state land* is clearly a concern "peripheral" to the federal scheme. Therefore, there exist no basis to support plaintiff States' contention of preemption in this regard.

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11. R. Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources,* 28 Stan. L. Rev. 1107, 1147 (1976).

CONCLUSION

Enough has been said to demonstrate how unripe this case is for any definitive constitutional assessments of the validity of the Louisiana First Use Tax. Any judgment on the merits of the constitutional claims set forth in the motion for judgment on the pleadings could amount to nothing more than an advisory opinion with respect to possible facts and possible interpretations of the Louisiana statute.

The short of it is that the pending motion must be denied. To grant it would compel this Court to perform functions that are inappropriate and unnecessary, i.e., to interpret and to invalidate a state statute which is presently pending before the state court for definitive interpretation and application.

All the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 5th day of December, 1979, I served copies of the foregoing Brief of State of Louisiana in Response to Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae on Motion for Judgment on the Pleadings by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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All parties required to be served have been served.

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Of Counsel

APPENDIX

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

SOUTHERN NATURAL GAS COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, COLUMBIA GAS TRANSMISSION CORPORATION, FLORIDA GAS TRANSMISSION COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, TENNESSEE GAS PIPELINE COMPANY (a division of Tenneco, Inc.), TEXAS EASTERN TRANSMISSION CORPORATION, TEXAS GAS TRANSMISSION CORPORATION, TRUNKLINE GAS COMPANY, UNITED GAS PIPE LINE COMPNAY, SEA ROBIN PIPELINE COMPANY, CONSOLIDATED GAS SUPPLY CORPORATION, EL PASO NATURAL GAS COMPANY, NORTHERN NATURAL GAS COMPANY, PANHANDLE EASTERN PIPE LINE COMPANY, and MISSISSIPPI RIVER TRANSMISSION CORPORATION,

Plaintiffs

v.

NO. 225,533

SECTION "D"

SHIRLEY McNAMARA, Secretary, Louisiana Department of Revenue and Taxation, THE LOUISIANA DEPARTMENT OF REVENUE AND TAXATION, and THE STATE OF LOUISIANA,

Defendants

PETITION FOR REFUND OF TAXES PAID UNDER PROTEST

Appearance Clause		Omitted from this copy.
¶¶ 1 and 5	Plaintiffs' status	Omitted from this copy.
¶¶ 2, 3 and 4	Defendants' status	Omitted from this copy.
¶¶ 6, 15, 16, 17, 18, 19, 20, 21 and 22	Description of Louisiana's First Use Tax Statute	Omitted from this copy.
¶¶ 7, 8, 9, 10, 11, 12, 13 and 14	Plaintiffs' liability for, and payment of, the taxes	Omitted from this copy.

23.

Petitioners assert that all "uses" contemplated by La. R.S. 47:1302(8) occur at some point in the transportation of gas owned by Petitioners in interstate commerce into or through the State of Louisiana and that none of such "uses" outlined in the statute can be constitutionally taxed, all for the following reasons:

Invalidity of the First Use Tax

24.

The First Use Tax statute, sometimes in conjunction with other Louisiana statutes, unfairly discriminates against interstate commerce in violation of the Commerce Clause, Article 1, Section 8 of the United States Constitution, for the following reasons, among others that may be proven at trial:

(a) The First Use Tax statute discriminates against owners of natural gas on which no severance tax or tax on the volume of production has been paid, which is produced in or outside of the boundaries of the State of Louisiana and which is moving in interstate commerce, by subjecting such gas to the First Use Tax, even though such gas undergoes the same uses within the State of Louisiana as does gas upon which a severance tax or tax on the volume of production has been paid, which is produced in or outside of the state and which therefore is not subject to the First Use Tax.

(b) The First Use Tax statute exempts gas used or consumed in Louisiana for certain purposes or by certain taxpayers from liability for the tax, but denies these exemptions to other owners of gas or to gas transported through the State and used or consumed for similar purposes in other states, as described in paragraph 19 hereof.

(c) The First Use Tax statute, in conjunction with credit provisions contained in other Louisiana statutes referred to in paragraph 20 hereof, confers discriminatory tax advantages to owners of oil and gas produced within the boundaries of the State of Louisiana who also own gas subject to the First Use Tax, and discriminates against owners of gas subject to the First Use Tax who do not also own oil or gas produced within the boundaries of Louisiana or who do not have sufficient production within Louisiana to receive the same tax advantages.

(d) The First Use Tax statute, in conjunction with other Louisiana statutes referred to in paragraph 20 hereof, provides consumers and distributors of gas situated in Louisiana with a credit in the amount of increased costs attributable to the First Use Tax, against liability for other state taxes in the exact amount of such increased cost, thereby discriminating against consumers and distributors similarly situated in other states. Therefore, Petitioners' out of state customers will ultimately bear the burden of the First Use Tax, whereas consumers and distributors similarly situated in Louisiana will not.

25.

The First Use Tax statute unfairly burdens interstate commerce, is not fairly apportioned, tends to create multiple burdens on interstate commerce, is not based upon a sufficient nexus between Louisiana and the property or activity sought to be taxed to justify its imposition, and is not fairly related to any cost or burden imposed upon Louisiana by the interstate commerce subject to the tax or to the value of any services or benefits provided by the State to such interstate commerce, in violation of the Commerce Clause, Article 1, Section 8 of the United States Constitution, and the Due Process Clauses of both the Fourteenth Amendment to the United States Constitution and Article 1, Section 2 of the Louisiana Constitution of 1974, for the following reasons, among others that may be proven at trial:

(a) The effect of the First Use Tax statute is to tax the gas itself as it moves in interstate commerce or, alternatively, to tax the privilege of transporting the gas in interstate commerce, rather than to tax the use of such gas, because the tax is imposed upon the owner of the gas rather than the person subjecting the gas to a "use" *qua* user, because the gas itself is subject to forfeiture for noncompliance with the statute, and because the tax is an unapportioned levy on a volume of gas transported in interstate commerce.

(b) The First Use Tax statute creates the risk of correlative taxation by other states resulting in multiple tax burdens on natural gas destined for consumption at the end of its interstate journey beyond the State of Louisiana because the tax is imposed on "uses" which are an integral part of the transportation of the gas in interstate commerce, some or all of which recur in every state through which the gas is transported, and because the tax is an unapportioned levy on a volume of gas transported in interstate commerce. The threat of such multiple burdens discriminates against the owners of interstate gas upon which no severance tax or tax upon the volume of production has been paid and which is transported beyond the State of Louisiana and discriminates in favor of the owners of interstate and intrastate gas consumed within Louisiana.

(c) The First Use Tax is imposed upon a volume of gas which is transported in interstate commerce, and is not apportioned so as to relate only to the adverse impacts upon or benefits derived from the State of Louisiana as a result of the facilities or activities of each Petitioner within the State of Louisiana.

(d) The incidence of the First Use Tax is not realistically related to the expressed purposes of the statute; that is, compensating the citizens of Louisiana for damages to the coastal areas of Louisiana and preventing the physical and economic waste of Louisiana's natural resources.

(e) Some of the Petitioners receive natural gas from onshore federal enclaves located within the boundaries of the State of Louisiana. Because no severance tax or tax upon the volume of production has been paid on such gas, it is subject to the First Use Tax, even though the imposition of the tax on this gas is not related to the expressed purposes of the statute.

(f) The rate of the First Use Tax is the same as the rate of the severance tax on gas produced within Louisiana, but the impact, if any, resulting from any first "use" as defined in the statute within the State of Louisiana is wholly disproportionate to the impact resulting from severance.

(g) The impact of the First Use Tax is unrelated to (1) the activities of Petitioners in the State, (2) any possible adverse impact of such activities on the State, or (3) the benefits and services provided by the State, for all of which Petitioners pay other taxes, and/or for which the State of Louisiana has already been and will continue to be fully compensated pursuant to the Coastal Zone Management Act, 16 U.S.C. 1456(a).

(h) Neither the events giving rise to the application of the First Use Tax nor the natural gas subject to the tax have sufficient nexus with the State of Louisiana to

> justify imposition of the tax. The temporary presence, sale, exchange, transfer of possession or control, or transportation of the gas within Louisiana is not a sufficient nexus to justify imposition of a tax measured by the total volume of the gas moving through the State.

26.

Some of the Petitioners have executed contracts with parties other than purchasers of natural gas, which contracts grant those parties the right to process natural gas owned or transported by said Petitioners for extraction of liquids or liquefiable hydrocarbons. Many of these contracts require those parties to reimburse said Petitioners for costs of separation or processing of natural gas for extraction of liquids or liquefiable hydrocarbons incurred by said Petitioners and/or for taxes associated with such liquids and liquefiable hydrocarbons incurred by said Petitioners. The contracts entitle said Petitioners to be reimbursed (by parties other than purchasers of natural gas from Petitioners) for First Use Taxes paid by said Petitioners in conjunction with transportation of gas by said Petitioners to such processing or separation facilities.

27.

The First Use Tax statute directly violates the Impairment of Contract Clauses of both the United States Constitution, Article I, Section 10, Clause 1, and the Louisiana Constitution of 1974, Article 1, Section 23, because La. R.S. 47:1303C declares invalid and unenforceable provisions in contracts that would provide reimbursement to owners of gas subject to the tax from persons other than purchasers of the gas. The First Use Tax statute should thus be declared null and void.

28.

If this Court should determine that La. R.S. 47:1303C is unconstitutional, but that the section is severable from other provisions of the statute which are upheld, Petitioners aver that the provisions of 1978 La. Acts 294, Section 4, preclude their liability for the First Use Tax.

29.

Some of the Petitioners have executed contracts with parties other than purchasers of natural gas, under which those parties will be required to reimburse or refund to said Petitioners the Louisiana First Use Tax as a tax associated with the processing, for the extraction of liquid or liquefiable hydrocarbons, of the natural gas subject to such contracts. Said Petitioners will take appropriate action to enforce these contractual rights. In the event of a final and unappealable judicial decision upholding the enforceability of these contract provisions, 1978 La. Acts 294, Section 4(1) provides that no First Use Tax shall be due in respect to such natural gas, and that the taxes previously paid in respect thereto must be returned to said Petitioners, with interest as provided by law from the date the taxes were paid.

30.

Some of the Petitioners have executed contracts with parties other than purchasers of natural gas which require those parties to reimburse or refund to said Petitioners the Louisiana First Use Tax as a cost or expense incurred by virtue of separation or processing of natural gas. Said Petitioners will take appropriate action to enforce these contractual rights. Upon a final and unappealable judicial decision upholding the enforceability of these contractual provisions, 1978 La. Acts 294, Section 4(2) provides that the First Use Tax shall be null and void, and that all taxes previously paid must be returned to the taxpayers, together with interest as provided by law from the date the taxes were paid.

31.

The First Use Tax statute deprives each Petitioner of the equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States and under Article 1, Section 3 of the Louisiana Constitution of 1974 because it falls unequally on similarly situated taxpayers and similar uses, for the following reasons among others that may be proven at trial:

(a) Whereas the First Use Tax is directed entirely against natural gas pipelines, asserted damages to Louisiana's coastal areas, if any, will be shown to have resulted from many other types of activity by entities which receive the same services and benefits from the State of Louisiana as do the pipelines, none of which are burdened by the First Use Tax or any analogous tax.

(b) The First Use Tax statute discriminates in favor of owners of gas that is subjected to a first "use" in Louisiana as defined in the statute and on which a severance tax has been paid, and discriminates against owners of gas that is subjected to a first "use" in Louisiana as defined in the statute but on which a severance tax has *not* been paid. Nevertheless, the fact that a severance tax has or has not been paid bears no relation to the impact resulting from any first "use" within Louisiana.

32.

The First Use Tax statute is in conflict with and repugnant to federal statutes and is accordingly void under the Supremacy Clause, Article 6 of the United States Constitution, for the following reasons among others that may be proven at trial:

(a) Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333, provides that "state taxation laws shall not apply" to the Outer Continental Shelf. Notwithstanding the label given to it in the statute, the First Use Tax is, in economic effect, a tax on gas produced from the Outer Continental Shelf.

(b) The First Use Tax statute is in effect an attempt to regulate the transportation and/or sales of natural gas that is dedicated to interstate commerce by contracts and/or FERC certificates of public convenience and necessity pursuant to the Natural Gas Act, 15 U.S.C. 717, *et seq*. The sale and/or transportation of natural gas in interstate commerce is a matter within the exclusive jurisdiction of the Department of Energy and the Federal Energy Regulatory Commission and is beyond the reach of the State of Louisiana or any other state.

(c) The First Use Tax statute conflicts with and is repugnant to federal statutes, including the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*, the Natural Gas Act, 15 U.S.C. 717, *et seq.*, and the Natural Gas Policy Act of 1978, Pub. L. No. 95-521 (1978), which constitute a comprehensive, exclusive and preemptive federal regulatory scheme duly adopted by Congress for the regulation, *inter alia,* of the sale and transportation of natural gas in interstate commerce.

33.

To the extent that the First Use Tax statute imposes a tax on gas produced from federal enclaves within the State of Louisiana, the Statute violates Article 1, Section 8, Clause 17 of the United States Constitution.

34.

In the event the First Use Tax statute imposes a tax on gas imported into Louisiana from a foreign country on which the United States does not now levy any import tax or tariff (19 U.S.C. 1202, Schedule 4, Item 475.15), the statute violates the Import-Export Clause of the United States Constitution, Article

1, Section 10, Clause 2, and the Commerce Clause, Article 1, Section 8 of the United States Constitution.

35.

The First Use Tax statute is ambiguous and vague and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it does not describe the activities upon which the tax is imposed with sufficient certainty. For example, the statute defines "use" as, among other things, "other ascertainable action at a point within the state." La. R.S. 13202(8).

36.

The First Use Tax statute is an attempt to tax indirectly natural gas not otherwise subject to severance taxes imposed by Louisiana or any other State, as is stated in Paragraph 14 above. Since Article 7, Section 4(B) of the Louisiana Constitution provides that "[n]o further or additional tax or license [other than the severance tax] shall be levied or imposed upon oil, gas, or sulphur leases or rights," the First Use Tax statute is repugnant to and void under Article 7, Section 4(B).

37.

Therefore, for the foregoing reasons as well as other reasons which will be shown at the time of trial, each of the Petitioners is entitled to recover the amount of First Use Tax paid by it under protest for the month of April, 1979, as specified in Paragraph 11 above, and all other purported First Use Tax liabilities for succeeding months paid under protest, together with interest thereon, as provided in La. R.S. 47:1576.

WHEREFORE, Petitioners Southern Natural Gas Company, Transcontinental Gas Pipe Line Corporation, Columbia Gas Transmission Corporation, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company (a division of Tenneco, Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Trunkline Gas Company, United Gas Pipe Line Company, Sea Robin Pipeline Company, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company and Mississippi River Transmission Corporation, pray that Defendants Shirley McNamara, in her capacity as Secretary of the Department of Revenue and Taxation, the Louisiana Department of Revenue and Taxation, and the State of Louisiana be duly cited and served herein in accordance with law; that after due proceedings had, there be judgment herein in favor of each Petitioner and against said Defendants ordering and directing the refund to each Petitioner of all amounts of First Use Tax heretofore and hereafter paid under protest by each Petitioner together with interest as provided by law on all such taxes paid from date of receipt thereof under protest until the date of refund.

Each Petitioner further prays that Defendants be taxed for costs; and that the Court grant to each Petitioner such other and further relief as is just and appropriate in the circumstances of this case.

(Signatures of counsel omitted.)