No. 63, Original

IN THE

Supreme Court of the United States

October Term, 1973

THE STATE OF GEORGIA,
Plaintiff,

v.

RICHARD M. NIXON,
President of The United States, *et al.*,
Defendants.

On Motion for Leave to File Complaint

BRIEF FOR *AMICI CURIAE*

State of Connecticut; State of Louisiana; Commonwealth of Massachusetts; State of Missouri; State of Minnesota; State of Oklahoma; Commonwealth of Pennsylvania; State of Texas; State of Vermont State of Washington *ex rel.* Frank B. Brouillet, Superintendent of Public Instruction; Campaign Clean Water, Inc.; National Association of Colleges of Podiatric Medicine; National Council of Community Mental Health Centers, Inc.

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STATEMENT OF THE INTERESTS OF THE *AMICI CURIAE*

Each of the *amici curiae* is a party in one or more cases pending in the lower federal courts involving executive impoundments of appropriated funds.[1] The interests of the *amici curiae* would obviously be affected by a decision of this Court to exercise its concurrent original jurisdiction over this action. First, such a decision would

[1] See Memorandum for the Defendants, Appendix 27-33.

probably retard the progress of impoundment cases through the lower courts since those courts would be reluctant to rule on issues pending before this Court. Second, despite distinctions between this case and many of our cases involving other programs, *amici* might well be affected in some manner by any decision on the merits in this action. Since we believe that this Court would be better able to decide those issues after they have first been fully considered and resolved by the lower courts, we have an understandable interest in seeing that the customary federal judicial process is not short-circuited by the Court's accepting jurisdiciton over this case.

Because both the plaintiff and the defendants in this action have urged the Court to permit the filing of the complaint, it is clear that neither the interests nor the legal position of the *amici curiae* will be represented by the parties. It is appropriate, therefore, that those interests and arguments be presented through this brief.

ARGUMENT

BECAUSE THIS ACTION IS INAPPROPRIATE FOR ORIGINAL CONSIDERATION, PLAINTIFF'S MOTION SHOULD BE DENIED

The beginning point of any discussion of whether this Court should accept jurisdiction over a suit between a State and citizens of another State must be the Court's recent observation that "[w]e incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972). See also *Washington v. General*

Motors Corp., 406 U.S. 109, 113 (1972). Thus, this Court has held that it may decline to entertain a complaint in such a case

> where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities.

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 499 (1971). An application of these criteria to the present case leads unmistakably to the conclusion that this Court should deny the plaintiff's motion for leave to file a complaint.

It is abundantly clear, first, that the policy underlying the Article III grant of original jurisdiction over suits by a State against a citizen of another State would not be advanced at all by the Court's permitting the filing of this complaint. As Justice Harlan noted in *Wyandotte Chemicals Corp.*, two considerations led the Framers to confer upon this Court original jurisdiction over such cases:

> The first was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. Chisolm v. Georgia, 2 Dall 419, 475-476 (1793); Wisconsin v. Pelican Ins. Co., 127 U.S. at 289. The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State.

401 U.S. at 500.

Neither of these considerations applies to the State of Georgia in this case since the State would obviously not be forced to petition an inhospitable court of another State for relief[2] or to go without relief for lack of another forum with jurisdiction over the defendants. Its action could have been brought in a federal district court in either Georgia or the District of Columbia, which would have jurisdiction under 28 U.S.C. sections 1331 and 1361. Thus, there exists "another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee, supra,* 406 U.S. at 93.

Second, "reasons of practical wisdom" militate against the Court's exercising its original jurisdiction over this action — reasons which bear directly on this Court's responsibility "to keep this [original jurisdiction] aspect of [its] functions attuned to its other responsibilities." *Ohio v. Wyandotte Chemicals Corp., supra,* 401 U.S. at 499. Those reasons are that (1) this Court would thereby deprive itself of the opportunity to review impoundment cases which have been fully developed and discussed by both a district and an appellate court; (2) this action would consume much of the time of this Court, thus diverting it from its primary

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[2] To the contrary, an unnamed official of the Office of Management and Budget was recently reported as saying that the Administration has fared poorly in the district courts because the judges of those courts "are inclined to rule for the well-being of their local citizens." Havemann, *White House Report/Congress and Courts Boost Budget, Rebuff Nixon's Cost-Cutting Methods,* 5 Nat'l J. Rep. 1277, 1279 (Sept. 1, 1973). Of course, this somewhat jaundiced view cannot explain away the fact that a number of impoundment cases have been brought successfully by States in the United States District Court for the District of Columbia, where no such parochial biases would exist.

responsibility as the highest federal appellate tribunal; and (3) there is little guarantee that these considerable disadvantages will be offset by any appreciable expedition in this Court's ultimate resolution of impoundment-related issues or by the development of a more useful factual record upon which to ground such a decision.

Perhaps the most costly effect of this Court's exercising its original jurisdiction over this action would be that the Court would thereby be effectively deprived of the opportunity to review other impoundment cases which have been fully considered by the lower courts. Of the thirty-seven actions listed by the defendants in the appendix to their brief, notices of appeal have already been filed by the Government in roughly a dozen cases; oral argument in some of these is scheduled for October.[3] When these cases reach this Court — as some almost surely will before the end of the current term — they will have been considered and discussed in opinions by district and appellate judges from a number of different circuits, and they will be accompanied by fully developed factual records. This Court should not lightly permit any departure from the usual federal judicial process, through which it is assisted in its scrutiny of a case not only by a district court judge who deals with the parties and the evidence on a first-hand basis, but also by "the shield of intermediate appellate review by a Court of Appeals." *United States v. Du Pont de Nemours & Co.*, 366 U.S. 316, 324 (1961).

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[3]Among the cases which are expected to be orally argued before courts of appeals in October are: *Campaign Clean Water, Inc. v. Fri*, 4th Cir. No. 73-1745 (to be argued October 2, 1973); *City of New York v. Fri.*, D.C. Cir. No. 73-1705 (expected to be argued in late October); *Minnesota v. United States Environmental Protection Agency*, 8th Cir. No. 73-1446 (to be argued during week beginning October 15, 1973); *Maine v. Fri*, 1st Cir. No. 73-1254 (to be argued October 4, 1973).

Another considerable cost of accepting this case would be that much of the time and energies of the Court would be consumed in its disposition, thus diverting the Court from its primary responsibility of serving as the nation's highest federal appellate tribunal. Naturally, almost any case on the original docket demands more of the Court's attention than does the ordinary appellate case, but this action is especially complex, both legally and factually. From a legal standpoint, this action is the functional equivalent of three lawsuits, since it involves three separate spending programs under three different statutes. As the defendants observe in their memorandum at page 19, "[t]he statutory questions are major and complex," and each of the three statutes presents its own difficulties to a construing court.[4] Not only do the statutory questions vary from one program to another, but because of factual differences between programs, even the constitutional issue raised by defendants cannot be dealt with uniformly.[5]

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[4] For example, the statute underlying plaintiff's third cause of action, 33 U.S.C. §§ 1251 *et seq.* (Supp. II 1972), features a legislative history that has been described by one district court as being "in the main unclear [and] politically charged ***" *Campaign Clean Water, Inc. v. Fri,* ____ F.Supp. ____ (E.D. Va. 1973), *defendant's appeal pending,* (4th Cir. No. 73-1745). The Federal Aid Highway Act's legislative history is also complex with respect to the impoundment issue. See *State Highway Comm'n of Missouri v. Volpe,* 479 F.2d 1099 (8th Cir. 1973).

[5] Defendents' principal constitutional defense, which was raised for the first time only recently in a few of the lower court cases, is that to the extent the expenditure of appropriated funds would require the exceeding of a statutory debt ceiling, the President may — pursuant to his constitutional duty to "take care that the laws be faithfully executed" — refuse to spend those monies. See e.g., *National Council of Community Mental Health Centers, Inc. v. Weinberger,* (D.D.C. Civ. No.

(Con't on P. 7)

Nor are the factual issues crystal clear — the defendants' request for the appointment of a Special Master alone demonstrates that. The evidence to be adduced by the parties will apparently not be limited to the facts surrounding the three spending programs in issue, but will mushroom into "a complete evidentiary record describing in some detail the federal budgetary process, the considerations leading to the imposition of spending controls in these programs, the ways in which the Executive Branch monitors and seeks to improve the state of the economy, and the nature of the working understanding between Congress and the Executive concerning the exercise of their shared spending responsibilities." Memorandum for the Defendants 23. Such a wide-ranging investigation would surely require months of discovery, let alone trial, as dozens of depositions would have to be taken, documents requested and produced, interrogatories filed and answered, and, of course, objections raised and ruled on. The complexity of this evidentiary byplay would surely be exacerbated by the participation of perhaps a score or so intervenors who, as parties to suits presently pending in the

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(Fn. 5 Con't from P. 6)

1223-73, decided Aug. 3, 1973). While this argument obviously is of doubtful validity generally, see 119 Cong. Rec. S 3808, S 3810 (daily ed. March 1, 1973) (reprint of memorandum by William H. Rehnquist, written when Mr. Justice Rehnquist was an Assistant Attorney General), it is especially questionable with respect to the highway and sewage plant construction programs involved in plaintiff's first and third causes of action, where actual expenditures are several years removed from the incurring of obligations, see Memorandum for the Defendants 22, and where, in the former case, the monies spent are drawn not from the general Treasury, but from the Highway Trust Fund.

lower courts, would surely seek to protect their interests in this Court.[6]

Although a special Master would preside over these marathon proceedings, appreciable amounts of this Court's time would also be required. The Court would, for example, bear the responsibility of making findings of fact, a task which it is unaccustomed and unsuited to performing.[7] More importantly, ancillary legal issues might well arise during these proceedings which could only be resolved by this Court.[8] In short, this case — or, more correctly, these three cases — would severely tax the resources of the Court if this action is accepted on the original docket.

Finally, there is absolutely no guarantee that, by hearing this case rather than one which has gone through the usual federal judicial process, this Court will be able to resolve impoundment issues any sooner or on the basis of a record that is of any greater utility; therefore, the considerable costs noted already would surely outweigh any possible benefit of accepting original jurisdiction over this

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[6] See Memorandum for the Defendants 24.

[7] "This Court is *** 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 fact-finder without actually presiding over the introduction of evidence." *Ohio v. Wyandotte Chemicals Corp., supra,* 401 U.S. at 498.

[8] Requests by plaintiff or intervenors for production of documents relating to the Office of Management and Budget's decision-making process might, for example, result in broad claims of executive privilege which this Court would surely be called upon to adjudicate. Or defendant Nixon might well move for dismissal—as he did in another recent impoundment-related case — on the ground that, as President, he is immune from judicial process. See *Minnesota Chippewa Tribe v. Carlucci,* 358 F. Supp. 973 (D.D.C. 1973). No such "hidden" issues lurk in the impoundment cases pending in the courts below.

case. Many impoundment cases are already before courts of appeals, and some will probably be ripe for consideration by this Court before the end of the current term. The proceedings before a Special Master appointed by this Court could easily last that long or longer, given the vast range over which defendants apparently desire to roam in laying the foundation for their defense.[9] Nor is it abundantly clear just how useful to the Court will be this mass of evidence regarding the federal budgetary process and fiscal management. Certainly neither the Department of Justice nor the district courts have found it to be essential in cases already decided by lower courts.[10]

In summary, this Court should deny plaintiff's motion for leave to file a complaint because the policies underlying the Court's original jurisdiction would not be thereby served, and because "reasons of practical wisdom" counsel against such action. The only "policy" that would be advanced by the granting of the pending motion would be the defendants' understandable desire to rush headlong into this Court with an impoundment case before they and other federal officials receive any further judicial rebuffs at the hands of the district courts and, especially, the courts of appeals. This Court should not be a party to this doubtful strategem in a case which is so clearly inappropriate for its original jurisdiction.

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[9] In this connection it cannot be overlooked that defendants' interests in an impoundment case are served by any delay.

[10] The defendants' argument that "[w]ith so many cases presently in litigation and presumably more to come, it is simply not feasible for the federal government to present the necessary evidence in thirty or more cases," Memorandum for the Defendants 23, is belied by the fact that no such evidence was offered in *State Highway Comm'n of Missouri v. Volpe*, 347 F.Supp. 950 (W.D. Mo. 1972), *affirmed*, 479 F.2d 1099 (8th Cir. 1973), although it was the only impoundment case pending in any federal court in the nation at the time it was tried.

CONCLUSION

For the reasons stated heretofore, the *amici curiae* ask this Court to deny the State of Georgia's petition for leave to file its complaint and to remit the action to an appropriate federal district court.

Respectfully submitted,

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