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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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STATE OF ARKANSAS,

v.

STATE OF OKLAHOMA,

*Plaintiff*

*Defendant*

---

**MOTION FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE OUT OF TIME  
AND BRIEF OF AMICUS CURIAE**

---

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STATE OF OKLAHOMA,  
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**MOTION FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE OUT OF TIME**

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Pursuant to Rule 36 of the Rules of this Court, the Commonwealth of Pennsylvania, by its Attorney General, its General Counsel and its Chief Counsel for the Pennsylvania Department of Transportation, Spencer A. Manthorpe, asks leave of this Court to file a brief as amicus curiae out of time, in support of the State of Arkansas, Plaintiff in this action.

The Commonwealth of Pennsylvania respectfully states as follows:

1. The State of Arkansas has filed a Motion for Leave to File Complaint and Complaint seeking to invoke the original jurisdiction of this Court, requesting that this Court declare unconstitutional and enjoin the enforcement of certain statutes and regulations promulgated by the State of Oklahoma imposing retaliatory taxes on Arkansas based motor carriers operating in Oklahoma.

2. The Attorney General of Pennsylvania is authorized by Pennsylvania law to sponsor a brief on behalf of the Commonwealth of Pennsylvania as *amicus curiae*, and under the Rules of this Court may do so as a matter of right.

3. The Commonwealth of Pennsylvania did not become aware of the Arkansas Motion for Leave to File Complaint and Complaint until after the date on which the brief in opposition to the Motion for Leave to File Complaint was filed—the date by which a brief as *amicus curiae* should have been filed.

4. Contemporaneously with the filing of the instant Motion, the Commonwealth of Pennsylvania has filed a Motion for Leave to File Complaint with Complaint and with Brief in Support thereof, seeking to invoke the original jurisdiction of the Supreme Court against the State of Oklahoma, requesting that the Supreme Court declare unconstitutional and enjoin the enforcement of the same statutes and regulations which are the subject of this action. The issues presented by Pennsylvania in its Motion for Leave to File Complaint Against Oklahoma are:

Whether the exercise of original jurisdiction is appropriate in this case which raises the substantial federal question of whether an Oklahoma tax which is imposed only upon motor carriers registered in Pennsylvania, solely because Pennsylvania imposed a certain tax on all motor carriers travelling in Pennsylvania, discriminates against Pennsylvania and those motor carriers registered in Pennsylvania in violation of the Commerce Clause?

Whether Pennsylvania has standing in its sovereign capacity to challenge Oklahoma's retaliatory taxes?

Whether Pennsylvania has standing to challenge Oklahoma's retaliatory taxes as *parens patriae* of its citizens?

5. The Commonwealth of Pennsylvania has an interest in the outcome of this Court's ruling on Arkansas' Motion for Leave to File Complaint, inasmuch as the decision on the Motion of Arkansas may be dispositive of the Commonwealth of Pennsylvania's Motion for Leave to File Complaint.

6. A copy of the Brief which the Commonwealth of Pennsylvania seeks to file in this case is attached to this Motion.

WHEREFORE, Commonwealth of Pennsylvania respectfully requests that this Court grant its Motion for Leave to File Brief as Amicus Curiae Out of Time in support of the State of Arkansas.

Respectfully submitted,

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**BRIEF OF AMICUS CURIAE**

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**INTEREST OF AMICUS CURIAE**

Contemporaneously with the filing of the Commonwealth of Pennsylvania's Motion for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae, Pennsylvania has filed with this Court a Motion for Leave to File Complaint, with Complaint and Brief in Support of Motion. Pennsylvania in its own Motion for Leave to File Complaint has raised issues regarding the constitutionality of Oklahoma's retaliatory tax law identical to those raised by the State of Arkansas in the instant case. Therefore, this Court's decision in regard to Arkansas' claims regarding standing to sue and constitutionality of Oklahoma's retaliatory tax law, may be dispositive of Pennsylvania's claims.

Therefore, the Commonwealth of Pennsylvania respectfully requests that this Court consider its Brief as Amicus Curiae in support of the State of Arkansas.

## SUMMARY OF ARGUMENT

In this action, Plaintiff, State of Arkansas, challenges the constitutionality of the Oklahoma retaliatory tax law, 47 Okl. St. Ann. §22.5j(K) (Supp. 1983), which authorizes the Oklahoma Tax Commission, in its discretion, to collect from non-Oklahoma registered motor carriers any tax that is "not the same or substantially the same as taxes" collected in Oklahoma. Arkansas levies a highway use equalization tax pursuant to Ark. Stat. Ann. § 75-817.3 (Supp 1983) on all motor carriers using the highways of Arkansas. The Oklahoma Tax Commission has begun to collect an amount equal to the Arkansas tax in "retaliation" from Arkansas motor carriers only. This tax is imposed solely because of, and in retaliation for, Arkansas' taxes which apply to all motor carriers including those registered in Oklahoma. The State of Arkansas seeks a declaratory order declaring the Oklahoma retaliatory tax law unconstitutional. It also seeks an injunction restraining Oklahoma from enforcing its retaliatory tax law.

Because the Oklahoma retaliatory tax law is imposed in differing amounts on different motor carriers, depending upon the tax structure of the jurisdictions in which they are registered, its imposition does not have a sufficient nexus to the State of Oklahoma. The Oklahoma retaliatory tax law is discriminatory as it is totally unrelated to services provided by the State of Oklahoma to Arkansas registered trucks travelling through Oklahoma.

The State of Arkansas has filed this action in its own right and as *parens patriae* for its citizens. Oklahoma's retaliatory taxes adversely affect Arkansas' ability to impose certain non-discriminatory taxes directly related to services which it provides motor carriers travelling on its roads. It, therefore, directly infringes Arkansas' sovereign rights to finance its operations in whatever manner it wishes, subject only to constitutional limitations. In addition, Oklahoma's retaliatory taxes adversely

affect the ability of Arkansas' citizens to participate in interstate commerce and does so in a manner which discriminates against those citizens. Thus, Arkansas properly brings this action *parens patriae* on behalf of its citizens.

This Court has exclusive jurisdiction in cases of this nature involving two states, and should exercise its jurisdiction here. The issues raised in this case are of such a serious nature that the granting of original jurisdiction is appropriate. Arkansas' claim against Oklahoma presents important concerns of federalism in complete accord with the purpose and reach of the original jurisdiction of this Court.

### ARGUMENT

#### I. THE STATE OF ARKANSAS HAS STANDING IN ITS SOVEREIGN CAPACITY TO CHALLENGE OKLAHOMA'S RETALIATORY TAXES.

Art. III, § 2, cl 2, of the Constitution provides for the Supreme Court's original jurisdiction over cases in which a "State shall be a Party". Congress has declared that such original jurisdiction shall lie exclusively in the Supreme Court for cases between two or more states. 28 U.S.C. § 1251(a) (Supp. 1983).

In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or as asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence."

*Maryland v. Louisiana*, 451 U.S. 725, 735 (1981).

The State of Arkansas is asserting an injury to its right as a sovereign to collect taxes to meet its particular needs. Arkansas seeks to protect its proprietary interests and the Supreme Court's exclusive and original jurisdic-

tion should be exercised to protect those interests. *Texas v. Florida*, 306 U.S. 398 (1939); *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

The power of a State to tax, basic to its sovereignty, is limited only if in substance and effect it is the exertion of a different and a forbidding power. . . .

*Bode v. Barrett*, 344 U.S. 583, 585 (1953); *rh. den.* 345 U.S. 931.

Arkansas has established certain taxes which it, in its capacity as a sovereign, has deemed necessary to meet its financial needs. Through Act 685 of 1983, the General Assembly of Arkansas enacted the Arkansas highway use equalization tax, Ark. Stat. Ann. § 75-817.3 (Supp. 1983), which places a tax on any motor vehicle with a declared gross weight of 73,281 pounds or more. Under this tax, out-of-state residents can pay the highway use equalization tax by one of three methods: they can pay \$175.00 annually per vehicle; they can pay \$8.00 for each 100 miles of travel, or pay \$.05 per each mile of travel in Arkansas.

The Oklahoma legislature has enacted a retaliatory tax law, 47 Okl. St. Ann. § 22.5j(K) (Supp 1983), creating the Oklahoma Tax Commission and giving it powers to create and enforce taxes in retaliation for taxes levied by sister states. On July 1, 1983, the Oklahoma Tax Commission commenced enforcement of taxes in retaliation for Arkansas' highway use equalization tax.

The retaliation of Oklahoma is a direct attack upon the sovereign power and proprietary interests of Arkansas. In *Kansas v. Colorado*, 206 U.S. 46, 95 (1907), this Court found that "Neither state can legislate for, or impose its own policy upon the other". Oklahoma's retaliatory tax is an attempt to legislate what taxes Arkansas, and other states, may assess.

It is well established that in the absence of Congressional pre-emption, each state retains the power to develop

its own mix of taxes and fees to insure that interstate commerce pays its own way. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977); *Capital Greyhound Lines v. Bruce*, 339 U.S. 542 (1950). Oklahoma's retaliatory taxes bear no relationship to the costs of providing services to Arkansas trucks. It is not an attempt to make Arkansas trucks "pay their own way". Oklahoma does not levy an equalization tax upon Oklahoma trucks. Indeed, the only trucks in the United States upon which Oklahoma levies the equalization tax are trucks registered in Arkansas. Arkansas trucks are no different from trucks registered in other states, except that they are registered in Arkansas. The retaliatory tax assessed by Oklahoma upon Arkansas trucks bears no relationship to their activities in Oklahoma. The only reason Arkansas trucks are assessed a retaliatory tax is because Arkansas, acting in its sovereign capacity, levied taxes and fees upon *all* trucks travelling through Arkansas. The sole purpose of Oklahoma's taxes is retaliation. Oklahoma has no interest in whether these taxes actually raise revenue to meet Oklahoma's financial needs.

Oklahoma seeks to compel Arkansas (and other states) to adhere to Oklahoma's tax structure, even though Arkansas' needs for revenue may be different. If Arkansas does not tax at the same rate as Oklahoma, then Arkansas trucks must bear the burden of double taxation when travelling through Oklahoma. This burden of double taxation must be borne not because of a trucker's private decision to travel through Oklahoma, but because of the public decision of Arkansas to finance its particular needs.

As a result of Oklahoma's retaliatory taxes, trucks which had been registered in Arkansas may now seek registration in other states. This is now occurring in the Commonwealth of Pennsylvania as a result of Oklahoma's retaliatory taxes. Arkansas may now lose revenue from

fewer registration fees. The result Oklahoma seeks may be achieved. Arkansas may seek revenue from another source, other than truck taxes and fees. However, Arkansas will have lost its sovereign power to tax to the extent, and in the manner, it sees fit, a power which is indispensable to its continued existence.

Oklahoma is using the threat of economic isolation as a weapon to force sister states to adopt taxes which Oklahoma finds desirable. Such a practice was condemned by this Court in *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 379 (1976), where health standards were used as such a weapon by the State of Mississippi. Arkansas must vindicate its sovereign interests in determining what tax mix is suitable to Arkansas' needs.

## II. ARKANSAS HAS STANDING TO CHALLENGE OKLAHOMA'S RETALIATORY TAX AS PARENS PATRIAE OF ITS CITIZENS.

The Motion for Leave to File Complaint should also be permitted because it has been filed to protect the general welfare of the citizens of the State of Arkansas.

A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. . . . But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way.

*Maryland v. Louisiana*, supra, at 451 U.S. 737.

The Oklahoma retaliatory tax results in double taxation of Arkansas trucks. This creates higher operating costs for Arkansas trucks travelling through Oklahoma. Ultimately, these higher costs must be passed on to Arkansas consumers.

Also, this double taxation directed by Oklahoma toward Arkansas trucks may cause trucks which had been registered in Arkansas to seek registration elsewhere. The

result could be a substantial loss to Arkansas in the form of lost jobs and commerce. Such a loss will have a pervasive effect on the general population of Arkansas, leading to unemployment and loss of revenue.

Standing to sue may exist if the injury alleged "fairly can be traced to the challenged action of the defendant, and not injury that results from an independent action of some third party not before the court". *Maryland v. Louisiana*, supra, at 451 U.S. 736. In this case, the injury is traced directly to the retaliatory taxes of Oklahoma. Arkansas is not advancing the claim of a limited number of its citizens. It is the general population that will be adversely affected by Oklahoma's retaliatory taxes. The sole purpose of the Oklahoma tax is to retaliate against Arkansas taxes. It is unrelated to the benefits provided by Oklahoma, and is constitutionally infirm.

Although, at this point in time, it is not clear what will be the full economic damage to Arkansas, as a result of Oklahoma's retaliatory taxes, this should not be a factor in determining if legal injury has occurred to Arkansas.

It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

*Maryland v. Louisiana*, supra, at 451 U.S. 759-760.

The State of Arkansas has standing in this cause as *parens patriae* to challenge Oklahoma's retaliatory taxes.

**III. THE EXERCISE OF ORIGINAL JURISDICTION IS APPROPRIATE IN THIS CASE WHICH RAISES THE SUBSTANTIAL FEDERAL QUESTION OF WHETHER AN OKLAHOMA TAX WHICH IS IMPOSED ONLY UPON MOTOR CARRIERS REGISTERED IN ARKANSAS, SOLELY BECAUSE ARKANSAS IMPOSED A CERTAIN TAX ON ALL MOTOR CARRIERS TRAVELLING IN ARKANSAS, DISCRIMINATES AGAINST ARKANSAS AND THOSE MOTOR CARRIERS REGISTERED IN ARKANSAS IN VIOLATION OF THE COMMERCE CLAUSE.**

This Court has construed the Congressional grant of exclusive jurisdiction (28 U.S.C. § 1251(a) (Supp. 1983)) as requiring the exercise of original jurisdiction only in "appropriate cases". *Maryland v. Louisiana*, supra at — U.S. 731; *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

. . . [W]hat is "appropriate" involves not only "the seriousness and dignity of the claim," but also "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."

*Maryland v. Louisiana*, supra, at 451 U.S. 739.

Arkansas is correct when it claims that the federal questions involved in this case are substantial and serious. Arkansas is presenting important concerns of federalism in complete accord with the purposes and reach of the original jurisdiction of this Court.

This Court has never before decided a challenge to a retaliatory tax based upon the Commercial Clause. In *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), the Court upheld a California retaliatory tax upon insurance companies. However, in reviewing the California retaliatory tax on foreign insurers, this Court acknowledged that the McCarran-Ferguson Act had removed the regulation and



taxation of insurance companies from any Commerce Clause restriction.

In *Western and Southern Life Insurance Co.*, the Court also held that the California retaliatory tax did not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution. However, the test for constitutionality under the Equal Protection Clause is substantially different from the test under the Commerce Clause.

Under the Equal Protection Clause, a states authority to exclude foreign corporations from doing business within its boundaries is constitutional so long as it bears "a rational relation to a legitimate state purpose". *Western and Southern Life Insurance Co. v. State Board of Equalization*, supra, at 451 U.S. 668. The test for determining whether a challenged classification is rationally related to achievement of a legitimate state purpose is:

(1) Does the challenged legislation have a legitimate purpose?, and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

The test for determining a violation of the Commerce Clause was established by this Court in *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977). That four pronged test was followed by this Court and restated in *Maryland v. Louisiana*, supra, at 451 U.S. 754, as follows:

The State's right to tax interstate commerce is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.

While this Court upheld the California retaliatory tax as constitutional under the Equal Protection Clause, it noted the possibility of such taxes being unconstitutional under the Commerce Clause.

Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. 4, § 2c, e.g., *Austin v. New Hampshire*, 420 U.S. 653, (1975), it is not clear how our federal structure is implicated.

*Western and Southern Life Insurance Company v. State Board of Equalization*, supra, at 451 U.S. 671.

Also see *G. D. Searle & Co. v. Cohn*, 445 U.S. 404 (1982), where this Court found a New Jersey statute of limitations constitutional under the Equal Protection Clause, but remanded the case for consideration of a Commerce Clause challenge.

It is apparent that under the test for constitutionality under the Commerce Clause, Oklahoma's retaliatory taxes do not pass muster. Under the first prong of the *Complete Auto* test, Oklahoma's retaliatory tax does not have a substantial nexus to that state. Oklahoma's tax is triggered, solely by the public decision of a sister state to enact taxes to meet its needs. There is no connection between the financial needs of a sister state and Oklahoma's taxation.

In applying the third prong of the *Complete Auto* test, it is clear that Oklahoma's retaliatory tax discriminates against interstate commerce.

One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, (1959). See *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 329, (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the

Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra*. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

*Maryland v. Louisiana, supra*, at 451 U.S. 754.

Pursuant to 47 Okl. St. Ann. § 22.5j(K) (Supp. 1983), the Oklahoma Tax Commission has levied a tax upon Arkansas trucks in retaliation for Arkansas' highway use equalization tax. Oklahoma does not levy these taxes upon trucks registered in Oklahoma. Indeed, these taxes are levied upon no other commerce except that originating in Arkansas. Oklahoma's retaliatory taxes impose a burden of double taxation on Arkansas trucks. Arkansas trucks must now pay not only Arkansas' highway use equalization tax, but must also pay the same taxes to Oklahoma.

Oklahoma has placed a burden on out-of-state trucks which is not imposed on Oklahoma trucks. This taxation favors Oklahoma trucks at the expense of out-of-state trucks. Additionally, Oklahoma's retaliatory tax is an attempt to impose Oklahoma's standards for truck taxation upon sister states. That is to say, by double taxes on trucks from states with taxes different from its own, Oklahoma is attempting to coerce other states from adopting such taxes. The power to set national policy for truck taxation is reserved to the Congress.

Also, to permit Oklahoma's retaliatory taxation to stand, may invite taxation from sister states in retaliation for Oklahoma's retaliation. Permitting this taxation to build upon itself would impose an intolerable burden on interstate commerce.

The fourth prong of the *Complete Auto* test requires that the tax upon interstate commerce be "fairly related to the services provided by the State". But, Oklahoma's retaliatory tax is not even arguably related to the costs

of providing services to Arkansas trucks. As previously noted, Arkansas registered trucks are the only trucks in the United States upon which Oklahoma assesses a highway use equalization tax. Arkansas trucks do not require any additional services, such as police protection, than do Oklahoma trucks, or Pennsylvania trucks, or any other trucks. The sole purpose of Oklahoma's tax is retaliation. Whether or not any money is collected is immaterial to Oklahoma's financial needs.

The historical purpose of the constitutional provision for original jurisdiction of this Court is to offer a method of settling disputes between sovereign states, which disputes traditionally could be settled only by diplomacy or war. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Georgia v. Pennsylvania R. Company*, 324 U.S. 439 (1945); *North Dakota v. Minnesota*, 263 U.S. 365 (1923). The issues raised in this case are of such a serious nature that the assumption of original jurisdiction is appropriate. Oklahoma is attempting to create an economic war against Arkansas and other sister states whose needs require that they impose truck taxes higher than the taxes imposed by Oklahoma upon its own trucks. The concept of sovereignty which underlies this case requires that this Court exercise its jurisdiction and resolve the dispute by application of federal common law. See *Kansas v. Colorado*, 206 U.S. 46 (1907).

[P]roceedings under this Court's original jurisdiction are basically equitable in nature . . . (Ohio v. Kentucky, 410 U.S. 641, 648 (1973)) and, in actions between states, neither the statutes nor the decisions of either state can be conclusive. "For the decision of suits between States, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require."

*Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931). Accord, *Hinderlider v. La Plata River & Cherry Creek Ditch Company*, 304 U.S. 92, 110 (1938).

The Supreme Court has the authority to enforce a decision which adjudicates a conflict between two or more states. Such enforcement authority is inherent in the constitutional provision for original and exclusive jurisdiction over such controversies. *Virginia v. West Virginia* 246 U.S. 565, 591 (1918). Arkansas' claim against Oklahoma presents a justiciable controversy which is susceptible of enforcement under constitutional law, common law and equitable principles. At issue is Arkansas' sovereign right to levy and collect taxes to suit its needs, without interference from sister states.

Where a controversy between states is justiciable, and the necessity for action by this Court is absolute, as in the case at bar, original jurisdiction is available. *Illinois v. City of Milwaukee*, 406 U.S. 91, 95 (1972); *Alabama v. Arizona*, 291 U.S. 286, 291 (1934); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

# CONCLUSION

Commonwealth of Pennsylvania, as amicus curiae, respectfully submits that the State of Arkansas has standing to sue and that the constitutional questions involved in this case are so substantial as to warrant consideration under the original jurisdiction of this Court.

Respectfully submitted,

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