IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 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,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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JURISDICTION

By this action Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin challenge the constitutionality of the Louisiana First Use Tax on natural gas passing through Louisiana in transit to other states.

This controversy between the plaintiff states and the State of Louisiana is within the original and exclusive jurisdiction of this Court under article III, section 2, clauses 1 and 2 of the Constitution of the United States and 62 Stat. 927, Title 28, United States Code, Section 1251(a)(1) (1976).

QUESTION PRESENTED

Whether a challenge by plaintiff states to the constitutionality of the Louisiana First Use Tax, imposed on natural gas entering into and passing through Louisiana while in transit to other states, presents an appropriate case for this Court's exercise of its exclusive, original jurisdiction, where plaintiffs present facts which establish that:

I. The First Use Tax constitutes an unconstitutional, discriminatory burden upon interstate commerce.

II. The First Use Tax violates the supremacy clause of the United States Constitution.

III. The First Use Tax is an unconstitutional impost or duty on imports.

IV. The First Use Tax unconstitutionally impairs the obligation of contracts.

V. The First Use Tax denies equal protection of the laws.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

> the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, section 10, clause 2 of the Constitution of the United States provides as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

Article I, section 10, clause 1 of the Constitution of the United States provides as follows:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Section 1 of the fourteenth amendment to the Constitution of the United States provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as LA. REV. STAT. ANN. §§ 47:1301-1307), is set out in full in Exhibit A to the accompanying Complaint, pp. 1a-8a.

The First Use Tax on Natural Gas — Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West) (to be codified as LA. REV. STAT. ANN. § 47:647), is set out in full in Exhibit B to the accompanying Complaint, pp. 9a-12a.

The First Use Tax Trust Fund, Act No. 293, 1978 La. Sess. Law Serv. 480 (West) (to be codified as LA. REV.

STAT. ANN. § 47:1351), is set out in full in the Appendix to this brief, pp. 1a-4a., *infra.*

STATEMENT

The purpose of this suit is to set aside, on constitutional grounds, Louisana's First Use Tax on Natural Gas (hereinafter referred to as "First Use Tax").[1]

Effective April 1, 1979, the State of Louisiana intends to impose a First Use Tax at a rate of seven cents per thousand cubic feet ("Mcf") upon the first occurrence of any "use"[2] of natural gas within Louisiana, providing that such gas is not otherwise subject to a severance, production or import tax levied by any state, territory or by the United States. Since Louisiana imposes a severance tax upon all intrastate production,[3] the incidence of the First Use Tax is solely upon natural gas produced outside Louisiana, which, for practical purposes, means natural gas produced outside the territorial limits of the United States, from acreage controlled by the Federal Government.

The alleged purpose of the tax is to compensate Louisiana for damage to its waterbottoms, barrier reefs, and shorelines. § 47:1301. Contractual provisions that would place responsibility for state taxes on the producers of natural gas are declared to be "against public policy and unenforceable to that extent."

[1] First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as LA. REV. STAT. ANN. §§ 47:1301-1307). A copy of the First Use Tax is attached to the Complaint as Exhibit A.

[2] Under the Act "use" includes, among other activities, the sale, transportation or processing of natural gas, § 47:1302(8), but it does not include "natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." § 47:1303A.

[3] LA. REV. STAT. ANN. §§ 47:631-646 (West 1970 and Supp. 1978.) The severance tax on intrastate production of natural gas is also set at seven cents per Mcf. § 47:633(9) (Supp. 1978).

§ 47:1303C. Contemporaneous with the passage of the First Use Tax, the Louisiana legislature enacted a severance tax credit[4] which permits in-state producers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their severance tax liability.

The First Use Tax will be levied against substantial quantities of natural gas produced from the Outer Continental Shelf ("OCS"), a domain under the control of the Federal Government outside the seaward boundaries of the State of Louisiana.[5] Gas from this federally-controlled domain is transported through Louisiana by interstate pipelines.[6]

The Federal Energy Regulatory Commission ("FERC"), through the adoption of an automatic tracking mechanism,[7] has provided a procedure for

[4] First Use Tax on Natural Gas — Severance Tax Credit, Act No. 436, 1978 La. Sess. Law. Serv. 842 (West) (to be codified as LA. REV. STAT. ANN. § 47:647). A copy of the First Use Tax on Natural Gas — Severance Tax Credit is attached to the Complaint as Exhibit B.

[5] The Outer Continental Shelf is defined and delineated in the Outer Continental Shelf Lands Act, 67 Stat. 462-70, 43 U.S.C. §§ 1331-1343 (1976). The Submerged Lands Act, 67 Stat. 29-32, 43 U.S.C. §§ 1301-1315 (1976), passed several months earlier in 1953, draws the line of demarcation between state and federal domains.

[6] Each of these pipelines is a "natural gas company" as defined in section 2 of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. § 717a(6) (1976), and is regulated by the Federal Energy Regulatory Commission ("FERC") as successor to the Federal Power Commission. As part of the Natural Gas Act's comprehensive regulatory scheme, the purchase of natural gas from producers, its transportation in interstate commerce, and its sale to distribution companies must be made pursuant either to certificates of public convenience and necessity or rate schedules or tariffs issued or approved by FERC.

[7] State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed.

consumer reimbursement of any First Use Tax payments by pipelines. Although those charges are to be collected subject to refund, pending a final judicial determination of the constitutionality of the tax, the immediate burden and incidence of the tax will be passed directly to the ultimate consumers.

Based on the volumes of natural gas entering Louisiana from the OCS in 1977, it has been estimated by FERC that the First Use Tax will be imposed on approximately 3,190 million Mcf[8] resulting in the imposition of a 225 million dollars per annum charge on consumers.

Each of the eight plaintiff states is a significant consumer of natural gas, and each plaintiff state and its citizens will be substantially harmed by the First Use Tax and will suffer economic burdens and hardships.

Reg. 45,553 (Oct. 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60,438 (Dec. 28, 1978), *appeal docketed,* Tennessee Gas Pipe Line Co. v. Fed. Energy Regulatory Comm'n, No. 78-38-13, et al. (5th Cir. Dec. 26, 1978); and Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13,460 (Mar. 12, 1979).

[8] This estimate is based on total OCS production entering Louisiana in 1977 of 3,647, 513, 674 Mcf, less 220 million Mcf in shrinkage during processing, 100 million Mcf reserved for the producer's own use or direct industrial sales, and 140 million Mcf consumed in the production of fertilizer and anhydrous ammonia in Louisiana. See Complaint, paragraph 14, Fed. Energy Regulatory Comm'n v. McNamara, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978). The First Use Tax will also be imposed upon all volumes of natural gas that may be imported from foreign countries without severance taxes and imported through Louisiana.

SUMMARY OF ARGUMENT

I. PLAINTIFF STATES HAVE STANDING TO CHALLENGE THE LOUISIANA FIRST USE TAX.

Plaintiff states are suing both in their proprietary capacities and as *parens patriae.* In their proprietary capacities, plaintiff states are themselves major consumers of natural gas subject to the First Use Tax and will be directly injured by that tax. A state may sue in its proprietary capacity. *Maryland v. Wirtz,* 392 U.S. 183 (1968). This Court is the only federal forum in which plaintiffs can assert their claim. 62 Stat. 927, 28 U.S.C. § 1251(a)(1) (1976).

Plaintiff states also sue as *parens patriae* to prevent the substantial harm that the First Use Tax would cause to the health and welfare of their citizens and to the economic vitality of the commercial activities of those citizens. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439 (1945).

The decision in *Arizona v. New Mexico,* 425 U.S. 794 (1976), in which this Court declined to accept an original action by Arizona challenging the constitutionality of an electrical energy tax imposed by New Mexico on utilities that retailed to Arizona customers, should not bar the filing of this case.

First, Arizona did not allege and did not face immediate harm from the challenged tax, because the Arizona utilities had refused to pay the tax and had challenged it judicially. In this case, however, the pipeline companies must pay the First Use Tax even before its constitutionality has been determined, and have been granted the right by FERC immediately to pass that cost on to consumers. Thus, the First Use Tax will have an immediate, direct impact on the rates paid for natural gas by plaintiff states and their citizens.

Second, whereas in *Arizona v. New Mexico* a subdivision of Arizona had joined in a pending New Mexico state court challenge to the tax, none of the plaintiff states or their subdivisions are parties to any pending judicial challenge to the First Use Tax. Neither the declaratory judgment action filed by the State of Louisiana in state court nor an action brought by FERC in federal district court and stayed pending the outcome of the state court litigation represent appropriate actions in which the plaintiffs can litigate their claim. The proper forum, under the Constitution, is the Supreme Court of the United States.

Third, this case raises issues of national significance and federal law — including the conflict between the First Use Tax and federal energy regulation — that were not raised by Arizona's challenge to the New Mexico electrical energy tax.

Finally, this case, unlike *Arizona v. New Mexico,* involves a challenge by a cross section of states that represent multiple regions of the country to the collection of hundreds of million dollars annually by a single state hundreds of miles away. If Louisiana is allowed to impose its First Use Tax upon natural gas in interstate commerce, other states could race to impose countervailing measures on comparable products and our national economy would regress into the precise interstate feudalism that our Constitution and our federal system were designed to prevent.

II. The Louisiana First Use Tax Raises Important And Substantial Federal Questions And Is In Conflict With Applicable Decisions Of This Court.

The First Use Tax offends multiple provisions of the United States Constitution:

A. The First Use Tax unconstitutionally burdens interstate commerce. The First Use Tax is applied to natural gas from a federal domain, and not to activities with a substantial nexus to Louisiana; it is not fairly apportioned; it discriminates against interstate commerce; and it is not fairly related to services provided by Louisiana. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

The flow of natural gas in pipelines from and to points outside the state constitutes interstate commerce, *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931), which a state may not tax. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954).

The "uses" taxed by Louisiana are not "separate local activities" that may permissibly be taxed. Nor do such uses as transportation or transfer or sale establish a sufficient nexus to Louisiana to justify the tax.

The First Use Tax is not fairly apportioned. It is not related to investment, receipts, or other indicia of a nexus with Louisiana. The tax exposes both natural gas from the OCS and imported natural gas to the burden of multiple taxation by other states through which the same gas would pass. *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954).

The First Use Tax discriminates against interstate commerce in several respects. First, it taxes OCS gas moving through Louisiana but does not tax gas produced in Louisiana (including gas produced from that part of offshore Louisiana that remains under state control) or gas produced in states that impose severance taxes, even though such gas enjoys the same protections, and causes the same alleged damages, as OCS gas. Second, the Louisiana Severance Tax Credit permits taxpayers to credit their First Use Tax liability against their liability for Louisiana's severance tax, thereby favoring pipelines that produce natural resources subject to the severance tax and burdening those that do not. Third, natural gas consumed in specified uses, such as production of sulphur, fertilizer, and anhydrous ammonia, is exempt from the First Use Tax if those activities occur in Louisiana, but not if they occur in other states.

The First Use Tax is not fairly related to services provided by Louisiana. The size of the tax, which will return more than $225,000,000 annually to the State of Louisiana, is utterly disproportionate to the minimal burdens which the taxed activity places upon the state or to the minimal privileges afforded by the state. Although the First Use Tax and Severance Tax have been set at equivalent rates, the latter is intended to compensate Louisiana for loss of its natural resources, a loss not caused by the "use" of OCS gas. The excessiveness of the First Use Tax is also shown by the limited proportion of the revenues collected that are earmarked for the statutory purpose of protecting the environment, by the collection of other taxes from the same taxpayers, and by the availability under the Coastal Zone Management Act of federal grants to compensate states harmed by OCS development.

B. The First Use Tax violates the supremacy clause. The Natural Gas Act, the Natural Gas Policy Act, and the Outer Continental Shelf Lands Act constitute a comprehensive and preemptive program for the regulation of natural gas.

More specifically, the First Use Tax, by voiding contractual provisions requiring reimbursement of the tax by producers, conflicts with numerous certificates of public convenience and necessity issued by FERC that incorporate the terms of underlying contracts containing reimbursement provisions. The First Use Tax conflicts with the requirement in the Outer Continental Shelf Lands Act that state taxation laws shall not apply to the OCS.

C. The First Use Tax is an unconstitutional impost or duty on imports. The tax on its face applies to imports and is imposed before the "original package" is broken and before the gas loses its status as an import. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931). The First Use Tax would create a special preference for domestic goods and conflict with the federal government's foreign trade policy. *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976). It could seriously inhibit the importation of natural gas from Canada and Mexico. And the tax would disturb harmony among the states. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

D. The First Use Tax impairs the obligation of contracts by nullifying provisions requiring producers to reimburse pipeline companies for the tax. This nullification clause serves no legitimate end, either by raising added revenue or by protecting Louisiana's environment. *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934). The nullification clause does not deal with a broad economic or social problem, does not cover an area already subject to state regulation, does not have merely a temporary impact, and is not aimed at a broad class of persons. *Allied Structure Steel Co. v. Spannaus,* ___ U.S. ___, 57 L. Ed. 2d 727 (1978).

E. The First Use Tax denies equal protection of the laws, because it establishes a classification treating taxpayers who are engaged solely in interstate OCS natural gas activity differently from taxpayers who are also engaged in in-state natural resource production.

ARGUMENT

I.

PLAINTIFF STATES HAVE STANDING TO CHALLENGE THE LOUISIANA FIRST USE TAX.

A. *Plaintiff States Have Standing In Their Proprietary Capacities To Challenge The Louisiana First Use Tax.*

Plaintiff states are major consumers of natural gas subject to the First Use Tax, including gas used for space and water heating in public buildings, and as such will be injured directly in their proprietary capacities. Plaintiffs estimate that the imposition of the First Use Tax will cost them at least 1.5 million dollars annually.

If, in addition, the direct incremental cost of the tax to the political subdivisions and educational institutions of plaintiff states is considered as well, the anticipated financial burden would be significantly greater. Injury to these subdivisions and educational institutions, as consumers, constitutes injury to the states themselves for purposes of this Court's original jurisdiction. *Arkansas v. Texas,* 346 U.S. 368, 370 (1953).

It is well established that a state may bring an action in its proprietary capacity, *Maryland v. Wirtz,* 392 U.S. 183 (1968); *Oklahoma v. United States Civil Service Commission,* 330 U.S. 127 (1947), and that this Court has jurisdiction over such an action when brought against a sister state. *North Dakota v. Minnesota,* 263 U.S. 365, 373-74 (1923); *Pennsylvania v. West Virginia,* 262 U.S. 553, 592 (1923). In the present instance this jurisdiction is exclusive, 62 Stat. 927, 28 U.S.C. § 1251(a)(1) (1976), and the plaintiff states have no federal forum other than this Court in which to assert their claim. *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972).

B. *Plaintiff States Have Standing To Challenge The Louisiana First Use Tax As Parens Patriae Of Their Citizens Who Are Consumers Of Natural Gas.*

The total direct economic cost of the First Use Tax on the citizens of plaintiff states will exceed 120 million dollars, excluding the multiplier effect on the economy generally, which should increase that burden significantly.

States may sue as *parens patriae* in an original action, *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 257-59 (1972), and this case presents an appropriate exercise of that doctrine. *See Pennsylvania v. West Virginia,* 262 U.S. 553, 591-92 (1923);[9] *Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439, 447-51 (1945).[10] A principal

[9] In a suit to enjoin the enforcement of a West Virginia conservation statute threatening to cut off the supply of natural gas flowing from West Virginia fields, Pennsylvania was found to have standing, not only as a proprietor of public institutions which used the gas, but also "as the representative of the consuming public whose supply will be similarly affected." 262 U.S. at 591. Where matters of health, comfort and welfare are concerned, the state, "as the representative of the public, has an interest apart from that of the individuals affected." *Id.* at 592.

[10] This Court upheld the right of Georgia to bring an original suit as *parens patriae* to enforce the civil remedies of the antitrust laws, on an allegation that the economy of Georgia and the welfare of her citizens had suffered serious injury from a conspiracy of the defendant railroad companies. Addressing the issue of discriminatory rates, the Court compared the damages alleged in *Georgia* to those alleged in Pennsylvania v. West Virginia, *supra,* note 9, and other traditional original jurisdiction cases:

> If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old

objective of plaintiffs in bringing this suit is to avoid the direct and substantial harm that would be imposed on their citizens and on commercial activities by imposition of the discriminatory First Use Tax. The situation here is directly analogous to that which pertained in *Georgia v. Pennsylvania Railroad:* The First Use Tax would cause serious injury to the health and welfare of the citizens of plaintiff states and would threaten the viability of their gas-consuming industries. The tax would insidiously harm the economic prosperity of entire regions of the country.

C. *This Suit Is Not Barred By The Decision In Arizona v. New Mexico.*

This Court has original and exclusive jurisdiction over disputes between two or more states, and "it has a responsibility to exercise that jurisdiction when it is properly invoked." *California v. Texas,* ___ U.S. ___, 57 L. Ed. 2d 464, 467 (1978) (per curiam) (Stewart J., concurring opinion).

In *Arizona v. New Mexico,* 425 U.S. 794 (1976), this Court declined to accept an original action by Arizona challenging the constitutionality of New Mexico's electrical energy tax imposed on utilities that retailed to Arizona customers; this case, however, differs in several important respects and should not be governed by that decision.

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industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. Such a charge at least equals in gravity the one which Pennsylvania and Ohio had with West Virginia over the curtailment of the flow of natural gas from the West Virginia fields.

324 U.S. at 450-51. The Court went on to affirm Georgia's standing to sue. In this action plaintiff states are in a similar position.

First, as Justice Stevens' concurring opinion in *Arizona v. New Mexico* pointed out, Arizona was "not sufficiently affected" by the challenged tax "to justify its invocation of the 'original and exclusive jurisdiction' of this Court," because Arizona had not alleged that the electrical energy tax had "some impact on the rates paid by consumers of electricity in Arizona." 425 U.S. at 798. Indeed, the refusal of the Arizona utilities to pay the New Mexico tax protected Arizona and its citizens from any injury pending resolution of the challenges to the tax. That is not the situation here, however. Because FERC has allowed the pipelines to pay the First Use Tax to Louisiana (under protest) and to collect and escrow the tax from their customers, the First Use Tax will have an immediate impact on the rates paid by consumers of natural gas who are citizens of the plaintiff states, as well as on the rates paid by plaintiff states for their own consumption. Thus plaintiff states will begin to suffer injury on April 1, 1979, even while judicial challenges to the tax are pending.

Second, none of the plaintiff states, and none of their political subdivisions, are parties to any pending suit in any other jurisdiction. In *Arizona* v. *New Mexico,* a political subdivision of Arizona had joined a challenge to the tax in a New Mexico state court. Two actions concerned with the constitutionality of the First Use Tax have been filed in Louisiana, but neither represents an appropriate vehicle either for participation by plaintiffs or for ultimate review by this Court. The first suit, a self-seeking action filed in Louisiana state court by the State of Louisiana,[11] seeks a declaratory judgment that the First Use Tax is constitutional. Not only is it inappropriate for plaintiff states to be required to litigate their claim in the state court system of the

[11] Edwin W. Edwards v. Transcontinental Gas Pipe Line Corp., No. 216867 (19th Judicial District Court, La., filed Sept. 22, 1978).

defendant state, but that action is a request for an advisory opinion and does not present a case or controversy that would be reviewable by this Court.[12] The second suit, brought by FERC in federal district court,[13] has been stayed pending the outcome of the state court litigation.[14] Moreover, intervention by plaintiff states in that action would divest the district court of jurisdiction.[15] Thus, plaintiff states — unlike Arizona — have no adequate alternative forum.

Third, this Complaint raises issues of national significance and federal law not raised by Arizona's challenge to the New Mexico electrical energy tax. For

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[12] An action by state officials to have a state statute declared constitutional is not maintainable in the Louisiana courts. Louisiana v. Bd. of Supervisors, 228 La. 951, 84 So. 2d 597 (1955). Furthermore, because Louisiana law prohibits state courts from granting relief to defendant taxpayers, LA. REV. STAT. ANN. § 47:1575 (1975), the existing state case, even if maintained, will result in a decree that is advisory in nature and not reviewable by this Court. Muskrat v. United States, 219 U.S. 346, 361-63 (1911). Whether or not a state court is empowered to render advisory opinions, this Court may not review a state court proceeding that does not present an article III case or controversy, Doremus v. Board of Education of Hawthorne, 342 U.S. 429, 434 (1952).

[13] Fed. Energy Regulatory Comm'n v. McNamara, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978).

[14] *Id.,* Order of Judge West, Jan. 26, 1979, *appeal docketed,* Fed. Energy Regulatory Comm'n v. McNamara, No. 79-1403 (5th Cir. 1979). Three of the plaintiff states filed an application in that case for *amicus curiae* status and for inclusion on the service list, but that application had not been ruled on at the time the action was stayed.

[15] *See* State Water Control Bd. v. Washington Suburban Sanitary Comm'n, 61 F.R.D. 588 (D.D.C. 1974) (intervention by Maryland would convert action to a suit between two states and thereby destroy district court's jurisdiction). Note also that the tax-injunction statute, 62 Stat. 932, 28 U.S.C. § 1341 (1976), would bar the federal district court from enjoining collection of the First Use Tax on behalf of the plaintiff states, although it would not bar an injunction on behalf of FERC.

example, the First Use Tax burdens *federal* OCS gas, not merely the intrastate generation of electrical energy. As such it conflicts with a broad federal regulatory scheme set forth in the Natural Gas Act and the Federal Energy Regulatory Commission's implementing regulations. Indeed, the historic compromise between the Federal Government and the states, and the entire legislative system for the control of the "tidelands" — defining which areas are under a seaboard state's control and which areas, farther at sea, are under federal control — would be set at naught by the devices Louisiana seeks to employ. New Mexico's electrical energy tax did not conflict with any similar federally preempted area of the law. In addition, as is alleged in the Complaint, the First Use Tax would impose a burden upon imported natural gas that would seriously affect this nation's foreign trade and foreign relations and violate the import-export clause of the Constitution.

Fourth, this case does not present a simple dispute between two neighboring states; rather, it involves the imposition by a single state of a burdensome tax upon more than half the states in the nation. Plaintiffs in this action are a diverse cross section of states, representing multiple regions of the country. Hundreds of millions of dollars will change hands each year if the First Use Tax is not enjoined. Plaintiffs and their citizens should not be required to pay these vast sums of money[16] while this case wends its way through the

[16] It is well established that "the possibility of refund[s] does not afford [consumers] sufficient protection [from illegal rates.]" Fed. Power Comm'n v. Hunt, 376 U.S. 515, 524 (1964). In addition to the irreparable damage to the economies of plaintiff states that would be triggered by price rises to natural gas consumers, "the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and . . . the transient nature of our society . . . often prevents refunds from reaching those to whom they are due." Fed. Power Comm'n v. Tennessee Gas Transmis-

Louisiana state court system,[17] when the Constitution provides the plaintiffs with an immediate, exclusive access to a decision in this Court.

Finally, this action is in a very real sense a test case critical to the nation's economic health. If Louisiana is allowed to impose its First Use Tax upon natural gas in interstate commerce, legislatures in other seaboard states will be encouraged to race to impose countervailing measures on imported natural gas, oil, and other products, and landbound states will seek to tax comparable products while in transit within their borders. At a time when our domestic economic health cries out for inflationary restraint, and the energy crisis cries out for a consistent, rational, federal energy policy, this Court should stand as a guardian against balkanization of the states, destructive internecine warfare, and an unfortunate descent into the very interstate feudalism the Constitution was designed to prevent.

II.

THE LOUISIANA FIRST USE TAX RAISES IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This case raises substantial federal questions. Plaintiffs argue that the Louisiana First Use Tax, with an

sion Co., 371 U.S. 145, 154-55 (1962) (footnote omitted). Moreover, the six percent interest provided in the escrow provisions of LA. REV. STAT. ANN. § 47:1576A (West Supp. 1978) will not adequately compensate the interstate pipelines for the use of their money, a cost that may ultimately be borne by consumers in the event it is found by FERC to be just and reasonable under the Natural Gas Act.

[17] Moreover, this action is not likely to raise many, if any, disputed factual issues, making this Court's original jurisdiction particularly appropriate. Nor is there any possibility that a narrowing statutory interpretation of the First Use Tax by a state court would preserve the First Use Tax from constitutional attack, a possibility that might otherwise support abstention by this Court.

annual impact on natural gas consumers in the hundreds of millions of dollars, offends multiple provisions of the United States Constitution.

A. *The Louisiana First Use Tax Constitutes An Unconstitutional And Discriminatory Burden Upon Interstate Commerce.*

The grant of power to the Congress contained in the commerce clause also constitutes a withdrawal of power from the states, *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977), and the constitutionality of a state tax on interstate commerce depends upon its "practical effect." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978). Taxes will be sustained "that are applied to activity with substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State." *Id.* The Louisiana First Use Tax — which is designed to be, and unquestionably is, a tax upon interstate commerce — fails all four tests.

1. *The Louisiana First Use Tax Is A Tax On Interstate Commerce.*

In measuring the validity of a state tax against the commerce clause, the threshold question to be answered is, Does the tax reach interstate commerce? The First Use Tax clearly does. The flow of natural gas in pipelines to points outside the state constitutes interstate commerce. *United Fuel Gas Co. v. Hallanan,* 257 U.S. 277 (1921). Indeed, the transmission of natural gas by high pressure pipelines is a national, not local, activity, and constitutes interstate commerce whether within or without the state. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465, 470 (1931). Only when natural gas passes into low pressure distribution lines is the "original package" broken and the gas becomes a part of local rather than interstate commerce. *Id.* at 470-71.

A state may not directly tax the flow of natural gas in interstate commerce. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), the Court held that a state tax on gathering could not survive the commerce clause test:

> [A]s a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another.

347 U.S. at 169.

More than three billion Mcf of natural gas from the OCS enters Louisiana annually and is resold in interstate commerce. The movement of this gas through Louisiana is continuous and unbroken to the Louisiana border. The gas remains at high pressure while inside Louisiana.

The "uses" taxed by the First Use Tax are not "separate local activities" that may permissibly be taxed. The sale of the gas, or transfer of possession, control, or title, does not take the gas out of interstate commerce. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931). *Accord, Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U.S. 498, 503-04 (1942). Nor may the tax be levied upon the transportation of the gas, or upon "other ascertainable action." Since the gas has not passed into the distribution system for delivery to consumers, it may not be taxed by the state.

2. *The Louisiana First Use Tax Is Applied On Certain Activities That Do Not Have A Sufficient Nexus With Louisiana.*

Many of the uses included in section 47:1302(8) are not activities with a sufficient nexus to the State of Louisiana to justify imposition of that state's taxing authority. A sufficient nexus is not established by transportation to the inlet of a processing plant,[18] or to the inlet of any measurement or storage facility,[19] or by transfer of possession or relinquishment of control at a delivery point in Louisiana.[20] And the basket category, "other ascertainable action at a point within [Louisiana]," is too vague to satisfy the constitutional nexus test.

3. *The Louisiana First Use Tax Is Not Fairly Apportioned.*

Contrary to the requirement of *Department of Revenue of Washington,* the First Use Tax is not fairly apportioned. It is not related to the taxpayer's investment in facilities, actual business activities, gross receipts, payroll, or other indicia of a concrete nexus with Louisiana.[21] The tax is a tax on the gas, not on local activities.

The First Use Tax is also unconstitutional because it exposes gas from the federally-controlled OCS and imported natural gas to the burden of multiple taxation. *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). If Louisiana is permitted

[18] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

[19] State Tax Comm'n of Mississippi v. Interstate Natural Gas Co., 284 U.S. 41 (1931).

[20] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

[21] *Cf.* Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 88 (1948) (tax properly apportioned to investment in state).

to impose this tax, every subsequent state will be invited to tax the volume of gas passing through its territory. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170 (1954), this Court held a tax on "gathering gas" unconstitutional for just this reason. There the taxable incidence was the taking of natural gas from the outlet of a processing plant, an activity similar in nature to several of the "uses" that trigger imposition of the First Use Tax. And many or all of the "uses" taxed by Louisiana recur in other states through which the same gas would pass.[22]

4. *The Louisiana First Use Tax Discriminates Against Interstate Commerce.*

The third test is that a state tax not discriminate, "either by providing a direct commercial advantage to local business, . . . or by subjecting interstate commerce to the burden of 'multiple taxation,'. . ." *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). The First Use Tax does both. It exposes natural gas flowing in interstate commerce to the threat of multiple taxation, and it unfairly discriminates against interstate commerce in three respects.

First, the tax is discriminatorily imposed only on gas imported into Louisiana (whether from a sister state or from outside the United States) and on gas produced from the OCS. Such gas is moving in interstate or foreign commerce at the time it is transported into Louisiana, and continues in interstate commerce, without interruption, until it is transported out of, or is sold at wholesale for ultimate consumption within, Louisiana. An equivalent tax is not imposed on gas produced in Louisiana or on gas transported into

[22] For example, there are measurement and storage facilities in most states, and gas there is frequently processed, exchanged, or subjected to analogous "uses."

Louisiana from a state that imposes a severance tax. Yet the post-production flow of such gas enjoys the same protections and privileges, and subjects Louisiana's environment to the same purported damages, as OCS and imported gas. In practical effect, what purports to be a tax on the "use" of natural gas within Louisiana is in fact a tax on the privilege of transmitting OCS and imported natural gas into and through Louisiana in interstate commerce.[23]

Second, the Louisiana Severance Tax Credit[24] permits taxpayers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their liability for Louisiana's severance tax, which is set at the same rate of seven cents per Mcf,[25] up to the amount of that liability. The First Use Tax, applied in conjunction with the Severance Tax Credit, discriminates against (and is

[23] Although natural gas produced in Louisiana is subject to a Louisiana severance tax at a comparable rate, the First Use Tax is not an added burden on interstate commerce that "compensates for a like burden on in-state sales, [or] neutralizes an economic advantage previously enjoyed by [interstate commerce]." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332 (1977). The severance tax is intended to compensate the state for the depletion of its natural resources, to which OCS and imported natural gas do not contribute. Thus the severance tax is not a "like burden." Moreover, Louisiana exempts from the First Use Tax natural gas subject to another state's severance tax, which gas will not be subject to any Louisiana tax.

In addition, the burden of the First Use Tax and the severance tax will not fall on similarly situated taxpayers. Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963). Louisiana law allows contract provisions that impose the severance tax upon the producer. LA. REV. STAT. ANN. § 47:633.1. Thus the buyer of Louisiana-produced gas may contractually impose the severance tax burden upon the producer, whereas the buyer of OCS gas is affirmatively prevented from obtaining reimbursement from the producer.

[24] First Use Tax on Natural Gas — Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West) (to be codified as LA. REV. STAT. ANN. § 47:647).

[25] LA. REV. STAT. ANN. § 47:633(9) (West Supp. 1978).

designed to discriminate against) interstate commerce because it favors pipeline companies that produce natural resources subject to the Louisiana severance tax and burdens those that do not.

Third, the First Use Tax discriminates against interstate commerce because it exempts from liability for the tax volumes of natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana. Volumes of natural gas subject to the tax consumed in similar uses in other states are not given an equivalent exemption. Louisiana has, therefore, favored certain in-state uses, such as production within Louisiana of sulphur, fertilizer, and anhydrous ammonia, to the disadvantage of similar out-of-state uses.

5. *The Louisiana First Use Tax Is Not Fairly Related To Services Provided By Louisiana.*

The First Use Tax fails the final test set forth in *Department of Revenue of Washington* because it is not fairly related to the services provided by the taxing state.

The size of the First Use Tax, which if sustained by this Court will return more than $225,000,000 annually to the State of Louisiana, is utterly disproportionate to the minimal burdens which the taxed activity places upon Louisiana or to the minimal privileges and protections afforded by Louisiana. This can be seen in several ways.

First, the First Use Tax and the severance tax have been set at equivalent rates, yet it is apparent that the latter is intended to compensate the state for the loss of its natural resource as the name, "severance," implies, a loss not present in the case of the "use" of gas produced outside Louisiana.

Second, less than one quarter of the funds collected by the tax will go to a "Barrier Islands Conservation

Account"[26] for financing capital improvement projects designed to conserve, preserve and maintain barrier islands, reefs and shores of the Louisiana coastline.

Third, and notwithstanding the disproportionate size of the First Use Tax levy, the State of Louisiana already receives substantial compensation for any alleged damage to its coastal areas. For example, Louisiana imposes other taxes upon interstate pipelines, such as *ad valorem* property taxes on interstate facilities, franchise taxes imposed as a condition of doing business in Louisiana, properly-apportioned income taxes, and sales and use taxes. These taxes fairly and properly raise money to support the services and protections provided by Louisiana.

More directly, the Federal Government, through the Coastal Zone Management Act,[27] has already provided for an assortment of grant programs, including a Coastal Energy Impact Fund, to compensate states harmed by OCS development activity. The expressed rationale of the First Use Tax is untenable where the Federal Government already provides for compensation made necessary by the transmission of OCS gas through Louisiana.[28]

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[26] First Use Tax Trust Fund, Act No. 293, 1978 La. Sess. Law Serv. 480 (West) (to be codified as LA. REV. STAT. ANN. § 47:1351), which is reproduced in the Appendix to this brief.

[27] *See* 86 Stat. 1280-89, 16 U.S.C. § 1451-1464 (1976), and especially 16 U.S.C. § 1456a, *as amended by* Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978). For example, 16 U.S.C. § 1464(a)(3) authorizes $130,000,000 annually for grants under just part of this program.

[28] Moreover, Louisiana has enacted its own Coastal Zone Management Act, Act No. 361, 1978 La. Sess. Law Serv. 704 (West) (to be codified as LA. REV. STAT. ANN. § 49:213.1-.21), under which pipeline companies must obtain coastal use permits.

Finally, if the First Use Tax is intended to be fairly related to the "services" provided by Louisiana through damage to its waterbottoms, barrier reefs, and sensitive shorelines, then the tax is seriously under-inclusive in a discriminatory and impermissible manner. An equivalent tax is not imposed on natural gas produced in Louisiana or on gas which passes through Louisiana but is produced in any other state that imposes a severance or production tax. Substantial volumes of natural gas produced in Louisiana and other states are transported into and through Louisiana *in the same facilities used to transport OCS and imported gas,* and these volumes of gas traverse Louisiana's waterbottoms, barrier reefs, and shorelines, creating similar risks and doing equivalent "damage." Yet these volumes are not subject to the First Use Tax.

B. *The Louisiana First Use Tax Violates The Supremacy Clause.*

Where federal legislation has preempted a field of enterprise, state law, whether or not in direct conflict with federal regulation, is void as a violation of the supremacy clause.[29] And a state law that directly conflicts with applicable federal statutes and regulations violates the supremacy clause whether or not the field has been fully preempted.

The Natural Gas Act,[30] the Natural Gas Policy Act of 1978,[31] and the Outer Continental Shelf Lands Act,[32] constitute a comprehensive scheme duly adopted by the Congress for the regulation, enforcement and promotion of the production of natural gas and the sale,

[29] Where, as here, the affected area involves interstate commerce, state legislation in the area preempted by federal regulation also violates the commerce clause.

[30] 52 Stat. 821-33, 15 U.S.C. §§ 717-717w (1976).

[31] 92 Stat. 3350, Pub. L. No. 95-621 (1978).

[32] 67 Stat. 462-70, 43 U.S.C. §§ 1331-1343 (1976).

transportation and pricing of interstate gas. Prior decisions of this Court make it clear that this federal legislation has preempted state regulation of all gas in interstate commerce, whether occurring before, during, or after transmission by an interstate pipeline. This legislation, in fact, was intended to plug the gap resulting from earlier judicial decisions prohibiting state regulation of the interstate natural gas business.[33] *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 682-83 (1954). *Accord, Northern Natural Gas Co. v. State Corporation Commission,* 372 U.S. 84 (1963).

Moreover, the First Use Tax has been preempted by federal regulation as well as by statute. The attempt of the tax is to reach, and coincidentally to regulate, gas that is dedicated to interstate markets by contracts and/or FERC certificates of public convenience and necessity issued pursuant to the Natural Gas Act.

More specifically, the First Use Tax violates the supremacy clause in two respects. First, it declares contractual provisions requiring reimbursement by producers of costs incurred by pipelines (including taxes) "to be against public policy and unenforceable to that extent." § 47:1303C. Section 7(c) of the Natural Gas Act,[34] however, provides that no person may sell or transport natural gas in interstate commerce for resale without first obtaining a certificate of public convenience from the Commission. These certificates generally are made in full recognition of, and incorporate the terms and conditions of, the underlying contract for the sale of natural gas. Numerous contracts contain provisions requiring the producer or gatherer selling natural gas to an interstate pipeline to reimburse the pipeline for all costs (including any taxes) incurred as a result of extracting natural gas, liquids or other

[33] *See, e.g.,* Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298 (1924).

[34] 56 Stat. 83, 15 U.S.C. § 717f(c) (1976).

treatment of the gas. The First Use Tax, by purporting to abrogate such provisions, conflicts with the federal regulatory scheme and violates the supremacy clause.

Second, Section 4 of the Outer Continental Shelf Lands Act[35] provides that "[S]tate 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 OCS. No amount of drafting semantics should permit Louisiana to thwart the explicit federal policy of developing OCS resources without state interference. Numerous federal statutes, and numerous decisions of this Court, have drawn a clear line of demarcation between the Federal Outer Continental Shelf and the state waters closer to shore. Louisiana should not be permitted to eradicate that historic line of demarcation.

C. *The Louisiana First Use Tax Is An Unconstitutional Impost Or Duty On Imports.*

Article I, section 10, clause 2 of the Constitution states:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . .

The purpose of the import-export clause are three:

> [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, [cannot] be implemented by the States consistently with that exclusive power; import revenues [are] to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States [may] be disturbed unless seaboard States, with their crucial ports of entry, [are] prohibited from levying taxes on citizens of other States by taxing

[35] 67 Stat. 462, 43 U.S.C. § 1333(a)(2) (1976).

> goods merely flowing through their ports to the other States not situated as favorably geographically.

Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-86 (1976) (footnotes omitted).

The Louisiana First Use Tax, which unquestionably reaches imports,[36] offends two of the three above-cited policy considerations. First, the First Use Tax prevents the Federal Government from dealing uniformly with foreign trade. Second, the First Use Tax disturbs the harmony among the states by exploiting Louisiana's favorable seaboard location. Each "offense" is sufficient to render the tax unconstitutional.[37]

1. *The Louisiana First Use Tax Reaches Imports.*

By its terms the First Use Tax applies to imported natural 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." § 47:1303A. The United States does not

[36] Of course, the constitutional prohibitions against state taxation will not apply after imported goods lose their status as imports. *Michelin, supra* at 286-87.

[37] In addition, the First Use Tax fits within the category the status of which was explicitly reserved in Dep't of Revenue of Washington v. Ass'n of Washington Stevedoring Companies, 435 U.S. 734 (1978). There this Court decided that an otherwise unobjectionable tax is not made objectionable because it applies to goods in transit, so long as the tax does not fall on the goods themselves, but reserved "the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit." 435 U.S. at 757 n.23.

The First Use Tax is such a tax. It applies to natural gas in transit — indeed, two of the definitions of "use" refer explicitly to transportation. And it is a direct tax on volume — it is measured simply by the volume of gas subject to the taxed uses.

Therefore, even if this Court were to sustain the First Use Tax under the *Michelin* criteria, a traditional analysis should void the tax as an unconstitutional direct tax upon imports in transit.

now impose "any import tax or tariff" on natural gas imported into the United States.[38]

Moreover, the First Use Tax is imposed upon, *inter alia,* the sale, transportation, transfer of possession or control, "or other ascertainable action at a point within the state." § 47:1302(8). In this way the First Use Tax "intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state." *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 443 (1827). Only when natural gas passes into the local distribution system, is no longer at high pressure, and is divided into the many small streams that connect to consumption outlets, is the "original package" broken, *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465, 470-71 (1931), and the gas sufficiently "incorporated with the general mass of property" to lose its status as an import. *Brown,* 25 U.S. (12 Wheat.) at 443.

2. *The Louisiana First Use Tax Would Complicate The Federal Government's Foreign Trade Policy.*

The first prong of the *Michelin* test is whether the First Use Tax offends the requirement that this country have a consistent foreign trade policy: "The Federal Government must speak with one voice when regulating commercial relations with foreign governments." 423 U.S. at 285. The First Use Tax fails this test.

In contrast to the ad valorem tax assessed in a non-discriminatory manner against inventory, which was upheld in *Michelin,* the First Use Tax does "create special . . . preferences for certain domestic goods" — namely, for natural gas produced in Louisiana — and its application will discourage importation of a product

[38] Natural gas is imported into the United States free of any customs duties, 76 Stat. 72, 19 U.S.C. § 1202, Schedule 4, Part 10, Item 475.15 (1976).

governed by federal regulation in a manner inconsistent with that regulation. *Michelin,* 423 U.S. at 286. If the Louisiana First Use Tax is applied to imported natural gas, seaboard states, and states bordering on Canada and Mexico — for other states will be free to follow — will be "allowed to exercise their own initiative in the regulation of foreign affairs." *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534, 556 (1959).[39]

3. *The Louisiana First Use Tax Would Disturb The Harmony Among The States.*

The third prong of the *Michelin* test is whether the First Use Tax offends the need for interstate harmony:

> [H]armony among the States [may] be disturbed unless seaboard States, with their crucial ports of entry, [are] prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

423 U.S. at 285-286. By imposing the First Use Tax, Louisiana, a seaboard state, has attempted to do just that. As this Court noted in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 754 (1978), "the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause." Thus the tests are similar; a tax passes constitutional muster under the import-export clause "if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the

[39] For example, in addition to current imports of substantial quantities of natural gas from Canada, the possible importation of natural gas from Mexico is now the subject of delicate negotiations at the federal level. *See, e.g.,* N.Y. Times, Mar. 19, 1979, § D, at 5, col. 5. The First Use Tax may pose a serious threat to those very real negotiations.

State." As has been shown in the preceding section, the First Use Tax does not satisfy any of these tests.

D. *The Louisiana First Use Tax Unconstitutionally Impairs The Obligation Of Contracts.*

Article I, section 10, clause 1, of the United States Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

Traditionally, in determining consistency with the contracts clause, the analysis has focused on "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 438 (1934).

Allied Structure Steel Co. v. Spannaus, ___ U.S. ___, 57 L. Ed. 2d 727 (1978), decided last term, set forth four considerations that allow a state law to survive a contracts clause challenge. First, the law should "deal with a broad, generalized economic or social problem." Second, it should "operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken." Third, it should "effect simply a temporary alteration of the contractual relationships of those within its coverage." Finally, it should be aimed broadly and not at a narrow class of persons. 57 L. Ed. 2d at 740.

The First Use Tax declares unenforceable contractual provisions that otherwise would apply to provide reimbursement by producers to pipelines for taxes imposed by operation of state law. § 47:1303C. The effect of this nullification will be to increase the cost of natural gas to plaintiff states and their citizens above the level permissible by contract. Whether it is analyzed under traditional legal principles or under the more recent *Spannaus* criteria, the nullification clause cannot be sustained.

Under the traditional test, it is clear that the nullification clause does not address a "legitimate end." There is simply no social or economic reason for a provision that impairs reimbursement provisions in existing contracts. It does not increase the revenue raised by the tax; a reimbursement provision would redistribute the tax burden but leave revenues to the state unaffected. If the tax is truly intended to protect Louisiana's environment and compensate its citizens for damage done to waterbottoms, barrier reefs, and shorelines, that purpose will be served just as well by monies collected from producers as by monies from pipelines. Of course, local political realities may have dictated the need for a nullification provision insulating the producers from the effects of the tax,[40] but that is not such a "legitimate end" as to justify the impairment of contracts.

Applying the *Spannaus* criteria, the nullification clause similarly fails to pass constitutional muster. First, it does not "deal with a broad, generalized economic or social problem" —in fact, the nullification clause does not purport to deal with any generalized problem at all, other than the existence of reimbursement provisions. Second, the reimbursement of costs and taxes is clearly not "an area already subject to state regulation at the time the company's contractual obligations were originally undertaken," because the area of rate and cost regulation has been preempted by the federal government. (See Section B, *supra*.) Third,

[40] Because federal regulation imposes statutory ceilings upon the price of natural gas, the large oil producers that produce natural gas in the OCS may not be able to pass along fully the increased costs that would be occasioned by imposition of the First Use Tax upon producers (by virtue of reimbursement clauses in their contracts with pipeline companies). Moreover, there is no certainty that a proceeding under the Natural Gas Act would result in a fully-passed-on cost. This is yet another illustration of how the First Use Tax interferes with the federal regulatory system, and why the tax must be declared to be unconstitutional.

the nullification clause does not temporarily alter contractual relationships, but works a "severe, permanent, and immediate change in those relationships — irrevocably and retroactively." Finally, the nullification clause is aimed only at a narrow class of persons, the pipeline companies. *Spannaus,* 57 L. Ed. at 740.

E. *The Louisiana First Use Tax Denies Equal Protection Of The Laws.*

An otherwise valid tax will be struck down if it deprives taxpayers of equal protection of the laws guaranteed under the fourteenth amendment to the United States Constitution. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949). The First Use Tax does precisely that.

By its Severance Tax Credit, Louisiana permits any taxpayer liable for the payment of the First Use Tax to credit such payments against any severance taxes owed by the taxpayer to Louisiana. § 47:647A. The Severance Tax Credit further provides that the credit against severance taxes is not allowed if the taxpayer "has an enforceable right to reimbursement from a third party." § 47:647B. The First Use Tax only applies to those taxpayers who have no liability under Louisiana's severance tax law.

The First Use Tax as intertwined with the Severance Tax Credit thus establishes a classification treating differently taxpayers who are solely engaged in interstate OCS natural gas activity from taxpayers who are also engaged in in-state production of natural resources. This classification is unreasonable and irrelevant to the purported purposes of the First Use Tax and results in a denial of equal protection of the law, in contravention of fourteenth amendment. This Court should not uphold a state tax having an unequal impact on interstate commerce where there is no political check against unduly burdensome state action. *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 444 n.18 (1978).

CONCLUSION

As has been demonstrated above, plaintiffs have raised serious issues relating to whether the Louisiana First Use Tax is an unconstitutional discrimination against and burden upon interstate commerce, a violation of the supremacy clause, an unconstitutional impost or duty on imports, an unconstitutional impairment of contracts, and a denial of equal protection. For these reasons, and because this case presents substantial federal questions the prompt resolution of which are critical to the national development of domestic energy and economic policy, it is respectfully submitted that leave should be granted to file the proposed Complaint invoking the original jurisdiction of this Court.

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APPENDIX

First Use Tax Trust Fund

ACT NO. 293

HOUSE BILL NO. 767

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated Chapter 16 thereof to contain a Part II containing Section 1351, to create and provide for the First Use Tax Trust Fund in the state treasury as a special and irrevocable trust fund for the proceeds to be derived from a first use tax and any new or alternate tax on the same resources; to establish certain accounts within said trust fund to be used for state debt retirement, redemption of outstanding debt, capital improvements of the barrier islands, reefs, and shores of the coastline; and to provide for reimbursement to the general fund for certain tax credits.

Be it enacted by the Legislature of Louisiana:

Section 1. Part II of Chapter 16 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 containing Section 1351 is hereby enacted to read as follows:

Part II. Use Proceeds

SUBPART A. FIRST USE TAX TRUST FUND

§ 1351. Creation

A. (1) The First Use Tax Trust Fund is hereby created in the state treasury as a special and irrevocable trust fund for the deposit of the proceeds, and investment income derived therefrom, of the first use tax imposed by law in 1978 or thereafter and any new or alternative tax hereafter imposed by law on uses of those resources subject to any such tax. Out of the first proceeds of the first use tax the treasurer shall pay into the State General Fund such amounts as are determined by the secretary of the Department of Revenue and Taxation to be necessary to fully reimburse the State General Fund for monies lost to that fund by reason of the tax credits granted by law which are related to the imposition of the first use tax. The remainder of such tax proceeds shall be credited to the following accounts, which are hereby created within the First Use Tax Trust Fund, and shall not be deposited in the Bond Security and Redemption Fund or the State General Fund.

(2) Distribution; debt accounts. Seventy-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Initial Proceeds Account and the Debt Retirement and Redemption Account, which are hereby created, in the following manner:

(a) Initial Proceeds Account. From this portion of the proceeds of the tax, amounts shall be credited to the Initial Proceeds Account until the sum of five hundred million dollars has been so credited. The sum of five hundred million dollars credited to this account from the proceeds of the tax shall be maintained in that amount at all times and, except for investment and except as provided in Paragraph C of this Section, monies in the Initial Proceeds Account shall not be used for any purpose. Monies in this account shall be invested, in accordance with law, and the investment earnings shall accrue to that account.

(b) Debt Retirement and Redemption Account. All proceeds of this portion of the tax over and above the amount required to be credited to and be maintained in the Initial Proceeds Account shall be credited to the Debt Retirement and Redemption Account. Monies in this account shall be invested, and the investment earnings shall accrue to that account. Except for investment, monies in the Debt Retirement and Redemption Account shall be used solely to purchase, in advance of maturity, on the open market any outstanding obligations of the state, or to call, pay, or redeem in advance of maturity any outstanding bonds, notes, or other evidences of state debt, or both. No purchase or redemption of state debt shall be made unless the purchase or redemption results in interest savings to the state. The methods by which this

Section shall be implemented shall be determined by the state treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session.

(3) Distribution conservation account. Twenty-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Barrier Islands Conversation Account. The monies in the Barrier Islands Conservation Account shall be invested and the investment earnings shall accrue to that account. Except for such investment, monies in this account shall be used exclusively to fund capital improvement projects designed to conserve, preserve, and maintain the barrier islands, reefs, and shores of the coastline of Louisiana. Only such capital improvements as are contained in the comprehensive capital budget adopted by the legislature each year shall be so funded.

B. The state treasurer shall invest all monies in the accounts created by Subsection A hereof in accordance with the laws governing the investment of idle funds of the state.

C. If the state treasurer determines that the best interest of the state would be served, but only if the Debt Retirement and Redemption Account is not funded or for any reason is depleted, the treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session, may expend such portion of the investment earnings in the Initial Proceeds Account as are not necessary to provide the balance of five hundred million dollars in the Initial Proceeds Account required by Subsection A hereof for any purpose for which the Debt Retirement and Redemption Account may be used.

D. The funds deposited in the First Use Tax Trust Fund shall be considered escrowed and shall not be used for any of the purposes enumerated herein until the proceeds of the first use tax are determined to be available for such uses by the treasurer, with concurrence of two-thirds of the members of the State Bond Commission acting in open session. If by final action of a court of last resort the tax held in escrow in the state treasury is held to be invalid as to any taxpayer who paid the tax, the taxes paid, with interest accrued thereon, shall be repaid to the taxpayer.

E. The secretaries of the Department of Wildlife and Fisheries, the Department of Natural Resources, and the Department of Transportation and Development shall meet and annually make recommendations to the governor as to capital improvement projects designed to conserve, preserve, restore, and maintain the barrier islands, reefs, and shores of the coastline of the state. The governor shall place such of those projects as he deems to be in the best interest of the state in the comprehensive capital budget for consideration by the legislature. Only those projects approved by the legislature shall be funded.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. The provisions of this Act shall remain in full force and effect unless expressly repealed.

Approved July 6, 1978.