IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.,*

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

RESPONSE OF INDICATED PIPELINE COMPANIES TO LOUISIANA'S OPPOSITION TO THEIR MOTION FOR LEAVE TO INTERVENE

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STATEMENT

On August 28, 1979, seventeen interstate pipeline comanies[1] filed their joint motion for leave to intervene as plaintiffs in this action. In their brief in support of their

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[1]The pipeline companies seeking intervention, all interstate natural gas companies, are Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company, a Division of Tenneco Inc., Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company.

motion they advanced four basic reasons why they, as the persons upon whom Louisiana's First Use Tax on Natural Gas is levied, should be permitted to intervene, viz:

1. They have significantly protectable interests at issue in this case;

2. Their intervention is appropriate to permit their participation in the resolution of issues directly affecting their interests;

3. Their intervention is necessary in order that their interests be adequately represented; and

4. Decisions of this Court support the granting of such intervention.

On September 24, 1979, the State of Louisiana filed an opposition to the pipeline companies' motion, asserting that (a) the pipeline companies have no statutory basis for intervention and their interests were adequately represented by the eight plaintiff-consumer states; (b) the pipeline companies should not be permitted to intervene because there is no independent basis of jurisdiction with regard to their claim and they are actively asserting their interests in proceedings pending in the Louisiana state courts; and (c) their intervention in this action would be tantamount to a suit against the State of Louisiana in contravention of the Eleventh Amendment.

All contentions of Louisiana but the final one—the Eleventh Amendment issue—are fully and dispositively answered in the brief heretofore filed by the pipeline companies in support of their motion to intervene.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR INTERVENTION BY THE PIPELINE COMPANIES

The State of Louisiana has by statute expressly waived Eleventh Amendment immunity[2] in actions challenging the validity of taxes claimed to violate, *inter alia,* the Constitution of the United States. Moreover, intervention by the pipeline companies in this proceeding is consistent with the policy underlying the Eleventh Amendment because the relief sought is prospective and will not have any effect on the State's treasury.

A. Waiver

Louisiana's waiver is by virtue of La. R.S. 47:1576, which provides in pertinent part:

> **A.** A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax . . .
>
> **B.** This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising

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[2]The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

in the enforcement of this Subtitle as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

C. This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

It has long been established that a state may, by statute or otherwise, validly consent to be sued in federal court and thereby waive the immunity provided by the Eleventh Amendment. *See, e.g., Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275 (1959); *Ford Motor Co. v. Dep't of Treasury,* 323 U.S. 459 (1945). Unquestionably, Section 1576 represents a legislative decision to waive immunity to suit in federal courts regarding the subject matter of this case.[3]

Section 1576A provides aggrieved taxpayers with a procedural due process remedy to obtain relief from invalid or illegal taxes in federal courts. Section 1576B provides that it "shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter" for questions concerning the legality of a tax or the method of enforcement thereof. Section C repeats

[3]The Louisiana legislature is specifically empowered to authorize any suits against the State. La. Const. Art. XII, § 10(B) (1974).

the critical language concerning the creation of "a legal remedy in the state or federal courts" with respect to claims that a taxing statute is, *inter alia*, an unlawful burden on interstate commerce, or otherwise unconstitutional. The repeated authorization of suits in federal court is a clear indication of Louisiana's "intention to submit its fiscal problems to other courts than those of its own creation . . .",[4] *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944), thus meeting the test for a valid statutory waiver of Eleventh Amendment immunity as set forth in the *Great Northern* case. *Accord: Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946); *J. Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894).

The United States Court of Appeals for the Fifth Circuit has consistently recognized Section 1576 as constituting a valid waiver of Louisiana's Eleventh Amendment immunity. *See Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), (*cert. den.*, 390 U.S. 1014 (1968); *Mouton v. Sinclair Oil & Gas Co.*, 410 F.2d 717 (5th Cir. 1979), *cert. den.*, 398 U.S. 957 (1970); *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979)[5]

The waiver of immunity contained in Section 1576 is extremely broad—clearly broad enough to encompass the

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[4]Although no legislative history of La. R.S. 47:1576 (originally Act 330 of 1938) exists, it was apparently passed to eliminate the issuance of interlocutory injunctions. *See A. Sulka & Co. v. City of New Orleans*, 208 La. 585, 23 So.2d 224 (1945). Certainly, it is evident from the language of the statute that the legislature desired to confer rather than avoid federal jurisdiction.

[5]In *United Gas*, the court dismissed a Section 1576 suit on grounds which did not affect its recognition of that section as a waiver of Louisiana's Eleventh Amendment immunity.

pipeline companies and the subject matter of their intervention. The State of Louisiana has wholly failed to establish an Eleventh Amendment impediment to such intervention.

B. The Policy Underlying the Eleventh Amendment

Although originally the Eleventh Amendment was read literally, *e.g., Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824), courts later began to give primary consideration to the policies underlying the amendment, *e.g., Hans v. Louisiana,* 134 U.S. 1 (1890); *see* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism,* 89 Harv. L. Rev. 682, 684-85 (1976). The current policy is that reflected in *Edelman v. Jordan,* 415 U.S. 651 (1974). As set out in that decision, the Eleventh Amendment is directed against suits seeking to impose a liability which must be paid from the general revenues of a state rather than suits seeking prospective relief against unconstitutional actions, even though such suits may have an ancillary effect on the state's treasury. The result sought in the instant case comports with the policy inherent in the Eleventh Amendment because it avoids any economic effect upon the state treasury. The relief requested here is prospective only, and any taxes that have been paid are not in the state's treasury subject to appropriation by the legislature but rather are held in escrow, subject to refund.

It should be emphasized that this case is not one for specific performance of a contract with a state, nor is it an application for a writ of mandamus requiring judicial

[6] *Ex parte Ayers,* 123 U.S. 443 (1887).

interference in state fiscal affairs.[7] There is no request fror the enforcement of a penal provision,[8] and no decision will require the expenditure of funds from a state treasury, directly or indirectly.[9] Thus, even had Louisiana not consented to suit in federal court, the nature of this suit does no violence to the policies exemplified by the Eleventh Amendment. The pipeline companies seek no more than prospective relief from the exaction of illegal taxes, a remedy consistently characterized by the Court as outside the Eleventh Amendment prohibition, *e.g., Georgia R. R. & Banking Co. v. Redwine,* 342 U.S. 299, 304 (1952).

II. INTERVENTION IS WARRANTED UNDER ALL APPLICABLE PRINCIPLES

In its brief (page 3) Louisiana chides the pipeline companies for failing to "label the requested intervention as one of right or permissive", but as the pipeline companies have shown in their brief in support of intervention (page 11), there is no express rule governing intervention in original actions in this Court. "Where their application is appropriate", the Federal Rules of Civil Procedure "may be taken as a guide to original actions in this Court". Rule 9(2) of this Court. Consequently, there is no need for the pipeline companies to show that intervention is either of right or permissive, rather it is sufficient that they show that intervention is appropriate on any basis and their brief in support of intervention clearly makes such a showing. Indeed, taking as their guide Rule 24 of the Federal Rules of Civil Procedure, establishing the requirements for

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[7] *Louisiana v. Jumel,* 107 U.S. 711 (1883).

[8] *Employees v. Dep't of Pub. Health & Welfare,* 411 U.S. 279 (1973).

[9] *Edelman v. Jordan, 415 U.S. 651 (1974).*

intervention in the district courts, the pipeline companies demonstrated, in their brief in support of intervention, that they unquestionably satisfy the policy considerations underlying Rule 24— both of right, as

> ". . .when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties," Rule 24(a) (2);

and permissively, as

> ". . .when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," Rule 24(b) (2).

Significantly, Louisiana raises no question about the adequacy of these showings. Consequently, it is not necessary to reiterate here the many practical considerations advanced by the pipeline companies in their brief (pages 11-18) which demonstrate their substantial proprietary and other interests which may be adversely affected unless they are permitted to intervene.

Louisiana also makes the bald assertion (page 3 of its brief) that the pipeline companies "have failed to assert inadequate representation", and it considers this supposed deficiency as "understandably so in that the Complainants

are presently represented by the combined efforts of eight Attorneys' [sic] General".

Although the ultimate objective of the plaintiff states in this action is the same as that of the pipeline companies—to have Louisiana's First Use Tax declared invalid—the attorneys general of those states do not, of course, represent the interests of the pipeline companies. Indeed, contrary to Louisiana's assertion, the pipeline companies clearly demonstrated (pages 19-22 of their brief) not only that their interests "are not adequately represented by [the] plaintiffs" but that the pipeline companies actually represent additional, distinct and in certain respects broader interests than do the plaintiffs, and that their participation should contribute significantly to the efficient resolution of this case.

The remaining contention of Louisiana, that the pipeline companies are already actively pursuing their claims in certain state court proceedings pending in Louisiana (page 3 of its brief), does not detract from the propriety of the pipeline companies' intervening in this proceeding. In so urging, Louisiana ignores the fact that it is the plaintiff states which are the principal plaintiffs here, and as to them, it is clear, as pointed out in the amicus brief filed by the United States and the Federal Energy Regulatory Commission (page 12), that such pending state court proceedings do not provide an appropriate vehicle for decision of the issues raised by them. On the other hand, since the issues raised by the plaintiff states overlap in some measure with those raised by the pipeline companies in the state court proceedings, the pendency of those actions is another good reason for permitting the pipeline companies to intervene here, where this Court is called upon to make

the ultimate disposition with respect to the validity of the tax in question. The proceeding in this Court provides a single, superior vehicle for the resolution of all disputes concerning all parties. If the pipeline companies are not permitted to intervene here, protracted, duplicative and unnecessary litigation will continue in the Louisiana courts.

Finally, the question is not whether the pipeline companies have an adequate remedy in another forum to challenge the constitutionality of the tax, but rather whether, given the existence of this suit in this Court, the intervenors' interests which must be affected are so critical as to require their presence. The answer is clearly affirmative. Adoption of Louisiana's argument that the pipeline companies should not be permitted to intervene in the very suit which ultimately will decide the constitutional questions affecting their rights and interests, and which will have a dispositive affect on the suits brought in Louisiana by the state *against* the pipeline companies and by the pipeline companies *against* the state, is tantamount to precluding the pipeline companies from protecting their rights and interests in any forum.

CONCLUSION

It is again respectfully submitted that the pipeline companies' motion for leave to intervene should be granted.

By their attorneys,

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CERTIFICATE OF SERVICE

I, Daniel F. Collins, a member of the Bar of this Court, do hereby certify that three (3) copies of the foregoing "Response of Indicated Pipeline Companies to Louisiana's Opposition to their Motion for Leave to Intervene" were served upon each other party separately represented in this proceeding by depositing said copies in the United States mail, properly addressed, with airmail postage prepaid, pursuant to Rule 33 of the Rules of this Court, this 9th day of October, 1979.

Daniel F. Collins