No. 119, Original

In The
Supreme Court of the United States
October Term, 1991

**STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS**

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

**Motion for Leave
To File A Complaint**

BRIEF OF AMICI CURIAE NEW ENGLAND COUNCIL AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF MOTION

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INTEREST OF AMICI

This brief is filed on behalf of The New England Council and the Associated Industries of Massachusetts (the "Amici"). Amici are organizations whose members and supporters include nearly all of the largest non-governmental employers and users of electric energy in New England. The New England Council is a non-profit business organization representing over 450 firms and institutions in the six-state region. The Council monitors and seeks to improve federal and state policies which affect the region's economic and business climate. Associated Industries of Massachusetts is a non-profit, state-wide organization of over 3000 members charged with improving the state's economic climate and supporting policies which will promote the prosperity of the state's citizens. Amici's members also include businesspeople and professional persons who are interested in the economic impact of electricity costs in New England and who are concerned about regional economic trends.

As representatives of New England's largest consumers of electricity which will ultimately pay the bulk of the tax at issue, Amici represent a viewpoint different from that of the states which are the plaintiffs and defendant in this action and different from the utilities that, in the first instance, pay the tax.

Pursuant to Supreme Court Rule 37.2, Amici have obtained consent for the filing of this amicus brief from counsel for the plaintiff states and from counsel for the defendant state of New Hampshire.

INTRODUCTION

Amici accept and incorporate by reference the Jurisdiction and Statement sections of the Brief In Support of Motion for Leave to File Complaint submitted by the plaintiff states (the "States' Brief").

ARGUMENT: WHY LEAVE SHOULD BE GRANTED

I. THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER THIS ACTION.

This case involves a dispute between three states which face the imposition of a burden upon them and their citizens and a fourth state which has created and will profit from that burden. Thus it unquestionably falls directly within the literal language of Art. III, §2, cl. 2 of the Constitution, which provides this Court with original jurisdiction over cases in which "a State shall be a party" and 28 USC §1251(a) which gives the Court "original and exclusive jurisdiction of all controversies between two or more states."

This is not a dispute between private citizens and a state in which the citizens have enlisted the good offices of their state to serve as a substitute champion. Rather, each of the complaining states here has already suffered, and will continue to suffer, financial injury both to its own proprietary assets and to those of its citizens as a result of New Hampshire's action in collecting the tax imposed by 1991 N.H. Law c. 354 (H.B. 64)(the "Seabrook Tax"). This case therefore presents a "proper controversy under [the Court's] original jurisdiction . . . " Maryland v. Louisiana, 451 U.S. 725, 735 (1981)(citations omitted).

The indisputable facts which demonstrate these conclusions are stated at pages 16 - 19 of the States' Brief. The Seabrook Tax has already affected electricity rates in the three southern New England states and, since the plaintiff states are major electricity users, the tax already is causing them direct financial injury. More generally, by raising the costs of electricity to the citizens of those states, the Seabrook Tax has already injured those citizens, both absolutely and in relation to citizens of New Hampshire. The Seabrook Tax has thus already allowed one state to achieve a favored economic position as a result of its discriminatory exercise of sovereign power.

II. THIS IS AN APPROPRIATE CASE FOR THE EXERCISE OF ORIGINAL JURISDICTION.

This Court has "substantial discretion . . . to make case-by-case judgments" as to whether individual cases are appropriate for the exercise of its original and exclusive jurisdiction. Texas v. New Mexico, 462 U.S. 554, 570 (1983). The standards the Court applies to reach those judgments are "prudential" and "equitable." California v. Texas, 457 U.S. 164, 168 (1982). This Court has considered such factors as the nature and seriousness of the claim, the availability of another forum in which the claim may be resolved and the interests of the United States in resolution of the claim. See, e.g. Maryland v. Louisiana, 451 U.S. 725, 744-45 (1981); Arizona v. New Mexico, 425 U.S. 794, 796-97 (1976).

Each of those factors supports the exercise of original jurisdiction here. As demonstrated in the States' Brief, there is a "serious" claim here that the Seabrook Tax violates the Commerce Clause, U.S. Const. art I, §8, cl. 3, and 15 USC §391. Furthermore, the essential "nature" of those claims, discrimination against out-of-state users of power, involves basic issues of federalism and the structure of the nation's electric system and so supports the States' position. This case also directly implicates significant federal interests, both in the efficient functioning of a national electric supply system as evidenced by 15 USC §391 and in the development of nuclear energy as evidenced by 42 USC §§2011-13.

As the States' Brief notes, at 23, n.11, there is serious doubt whether any court other than this one could hear this case at all. The utilities which are required to pay this tax may be barred from the federal courts by the Tax Injunction Act, 28 USC §1341. Furthermore, of course, since those companies can pass the entire burden of the tax onto their customers, their interest in litigating this matter will necessarily be limited.

On the other hand, the individuals and businesses that will ultimately bear the burden of the Seabrook Tax face a number of obstacles. First, the Eleventh Amendment, U.S. Const. amend XI, prevents a direct challenge by individuals to the state of New Hampshire. Even if creative pleading could avoid that barrier, individual plaintiffs would still face the Tax Injunction Act. Finally, individuals would have no cause of action in their home state courts against New Hampshire because the tax has no direct extraterritorial effect.

Thus both the utilities that pay the tax and the individuals who bear the ultimate burden would likely be forced to resort to the New Hampshire state courts for adjudication of the constitutionality of a state law under which New Hampshire would annually realize $14 million in tax revenues paid almost exclusively by out-of-staters. There is no need to cast aspersions on the courts of New Hampshire because, as the drafters of the Original Jurisdiction clause understood, there necessarily will always be "suspicions of partiality" when one state's courts are asked to adjudicate an issue where that state's interests directly conflict with the interests of other states. See Massachusetts v. Mellon, 262 U.S. 447, 481 (1923).

III. PRUDENTIAL CONSIDERATIONS FAVOR THE EXERCISE OF ORIGINAL JURISDICTION.

In addition to the factors the States cite in their brief which warrant the exercise of original jurisdiction, Amici wish to note several other factors which also support this Court's exercise of its discretion to hear this case pursuant to its original jurisdiction.

First, self-serving bad ideas spread fast. At least two other New England states which house nuclear power plants are already considering retaliatory legislation modelled after the Seabrook Tax that would enable them to export some of their tax burden to citizens of other states. And, of course, there is no reason why

economic Balkanization need be limited to nuclear power stations. So long as New Hampshire can successfully use its position astride a regionally important asset to extract tribute from other states, legislators in other states will look for similar opportunities, whether that involves upstream water or air resources, major regional employers, transportation bottlenecks or any other asset that might be creatively exploited.

While some, perhaps most, of these stratagems would ultimately be found illegal, that would come only after expensive litigation and significant economic dislocations. If, as Amici believe, this Court's prior decisions demonstrate that such laws would be "precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states," New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982), this Court should act speedily to remove the incentive states now face to gamble that, despite those precedents, they can nonetheless find a "free lunch." The fastest way would be to hear this case now, rather than waiting years for some party to struggle through the lower federal courts or those of the state of New Hampshire.

Second, the longer this litigation lasts, the more money will be irretrievably transferred from the three southern New England states to the state of New Hampshire. Unquestionably, the Eleventh Amendment will bar utilities from using the federal courts to recover money paid pursuant to the Seabrook Tax. See, e.g., Papasan v. Allain, 478 U.S. 265, 278 (1986); Edelman v. Jordan, 415 U.S. 651 (1974). Any retroactive state court remedy that would allow the utilities to recover taxes they paid and return that money to their ratepayers is speculative at best.

Third, Amici believe the Seabrook Tax poses particularly serious harm to the region's economy because its consequence is to drive New England's energy costs, already the nation's highest, still higher. A region already struggling through the deepest economic slump in half a century should not be saddled with an

illegal, extraterritorial burden on the cost of an essential resource for the many years it make take for this case to wind through the lower state or federal courts.

Finally, the Seabrook Tax stands as a present barrier to rational regional planning in energy and other areas. Indeed, so long as New Hampshire is perceived as successfully asserting its local interests over those of neighboring states, regional cooperation on virtually any issue will be made more difficult, if not impossible. Amici, who represent the major businesses in the New England region, believe that it is already difficult enough to site regional waste facilities, new airports, prisons or any other project that annoys or disturbs a minority of citizens. The Seabrook Tax is simply the affirmative statutization of the beggar-thy-neighbor principal more commonly seen in its negative form as the "NIMBY" (not in my back yard) syndrome. A decision in favor of the States in this case would be a strong blow against local economic parochialism and in favor of the national market.

That last point may offer the single best reason why this case should be heard by this Court as soon as possible. In 1992, the historically divided nations of Western Europe will create a single market that stretches from the North Sea to the Mediterranean. Yet, the contrary process of dissolution is occurring elsewhere in Europe as the former Soviet Union and Yugoslavia fragment into smaller and smaller economic units. Like planets orbiting the sun, every economic system faces a constant tension between centripetal forces that work for increased economic coordination and centrifugal forces that work for protectionism and particularism. In this country, however, the balance between those forces was struck, once and for all time, by the framers of the Constitution when they chose to establish a single, national market in 1789. Amici suggest that this Court use this case to reaffirm that message.

IV. CONCLUSION

For the reasons stated above, Amici believe the Court should grant the motion of Connecticut, Massachusetts and Rhode Island for leave to file a complaint against the state of New Hampshire.

Respectfully submitted,

THE NEW ENGLAND COUNCIL and ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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