No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED

Whether the Court's original jurisdiction should be exercised where:

(a) movants have no standing because neither movants nor their citizens pay the New Hampshire nuclear property tax, and their interest, acting as *parens patriae*, is purely economic, which is insufficient to support standing for original jurisdiction;

(b) there is, established by law, an adequate administrative and judicial remedy in New Hampshire that has been bypassed, contrary to principles of comity and federalism;

(c) the factual claim that the tax burden will fall predominately on movants requires an extensive evidentiary proceeding, with particularized economic, tax and ratemaking projections, that should be conducted in the appropriate New Hampshire judicial or administrative forum;

(d) the matter is premature in that the first tax returns reflecting the impact of the tax have not been filed, and there has been no rate pass-through of tax costs to movants or their citizens;

and further where there is no merit in movants' allegations because:

(e) the nuclear property tax and tax credit apply evenhandedly at the *same* rate to *all* taxpayers, and there is not even the allegation that they are administered unfairly?

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STATEMENT OF THE CASE

A. Introduction

The State of Connecticut, Commonwealth of Massachusetts, State of Rhode Island and Providence Plantations (collectively, "movants" or "movant states") oppose the State of New Hampshire collecting a property tax from the public utilities that own the Seabrook Nuclear Power Station. In challenging the right of New Hampshire to tax property within its borders, movants claim that the tax unlawfully burdens interstate commerce, and seek to have the Court exercise its original jurisdiction. At present, the nuclear property tax is not being borne by movants or their citizens because the affected utilities have not attempted to have the tax reflected in retail rates.

The essence of New Hampshire's nuclear property tax and property tax credit is that each taxpayer be and is treated fairly and equally. Movants concede that the tax

"may appear even-handed" (M. Br. at 8), but they argue that it is nevertheless a "discriminatory scheme" (*id.* at 33) that "classifies taxpayers into two groups" (*id.* at 34) because the tax credits and exemptions "are not available to utility owners selling to out-of-state consumers." *Id.* at 33. This portrayal of the nuclear property tax pervades movants' brief. (*Id.* at 1, 2, 8, 25, 28-30, 32-35). Further, in significant part, movants base their claim on a tax structure that does not exist—a now repealed franchise tax that was limited to *intra*state sales of electricity—rather than the existing tax laws. *Id.* at 2, 8, 25, 32, 33).

These allegations misrepresent New Hampshire law. The nuclear property tax applies to *each* owner of nuclear property at the *same* rate, regardless of residency. App. 72A. The nuclear property tax credit is available to *each* owner in the *same* degree, resident and nonresident alike. *Id.* The franchise tax, which was applicable only to in-state utilities, was repealed as to *all* electric utilities. *Id.* 77A.

The merits of the complaint, however, need not be addressed by the Court, as there are three compelling reasons why the Court's original jurisdiction should not be exercised. First, movants are not the appropriate party to bring an action. They do not pay the property tax, nor do their citizens; it is the electric utilities that are subject to the tax. Collection of the property tax does not implicate the rights of the state as sovereign. Leave to bring the action is sought purely in furtherance of economic interests, which have not been shown to be substantial, and as such movants, acting as *parens patriae*, should not have standing to invoke the Court's original jurisdiction. Further, the states' claim of standing as consumers is insubstantial and, without more, is merely a "makeweight." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 498 (1945).

Second, the case is otherwise inappropriate for review because it requires extensive evidentiary hearings that should be conducted in an appropriate trial court. The matter cannot be disposed of by "documentary evidence

or by stipulation" (M. Br. at 13), as movants suggest, but instead would require expert economic and accounting projections as to future revenues and expenses for each owner, its business profits tax liability and the availability of nuclear property tax credits to offset such liability. In seeking an evidentiary proceeding, movants have bypassed the primary forum for adjudicating such tax matters—the New Hampshire administrative and judicial process (App. 75A)—and instead have requested this Court "awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971). There is no question that the New Hampshire courts would adjudicate fairly such a claim. *See Opinion of the Justices*, 118 N.H. 343, 386 A.2d 1273 (1978). Principles of comity and federalism require that the complaint first be presented there, with review available here, if necessary.

Third, the claims of injury are unsubstantiated and premature. The actual effect of the tax is not yet known because the first tax returns reflecting its impact will not be filed until 1992. Further, the tax-paying utilities have not yet passed through the tax costs to movants or their citizens, and thus the "seriousness" of injury that is a prerequisite to review, *Colorado v. Kansas*, 320 U.S. 383, 393 (1943), is a matter of speculation.

In addition to the inappropriateness of the exercise of original jurisdiction, the motion should be denied because there is no substance to the claim for relief. As indicated, each provision of the tax law is evenhanded in its treatment of residents and non-residents. This is entirely consistent with all statutory and constitutional requirements. Any alleged disparate impact from the tax would not be due to a "discriminatory" tax, but rather to an "adventitious consideration" of no constitutional significance, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981), such as an inability to use the property tax credit because of a small business profits tax liability. Further, as to movants' principal argument, the statute relied upon (15 U.S.C. § 391) applies to taxes on the generation and

transmission of electricity—not to a nuclear *property* tax. The statute is inapplicable on its face, and the expansive interpretation of it sought by movants should not be embraced.

There is no valid basis for the action, much less the request for the extraordinary form of review sought here.

The "Statement" provided by movants is materially inaccurate, and a counterstatement is provided below.

B. The Seabrook I Nuclear Generating Station

The Seabrook I Nuclear Generating Station ("Seabrook") is located on the Southeastern tip of the New Hampshire coast, near the population centers of Portsmouth and Salem, New Hampshire. The plant is the only nuclear plant currently in New Hampshire, and is the last (and one of the largest) nuclear stations to be built in New England. The plant has engendered substantial civic anxiety and concern, resulting in 15 years of public demonstrations and protests, many involving arrests.

Seabrook was planned and built by a consortium of New England utilities, and each utility is a joint owner of the plant. Public Service Company of New Hampshire ("PSNH") is the largest owner, with a 35.5% ownership interest. The other two New Hampshire co-owners, the New Hampshire Electric Cooperative and EUA Power Corporation, have a combined 14.3% ownership interest, resulting in New Hampshire corporations owning 49.8757% of Seabrook.

Construction and completion of the plant was delayed due to regulatory changes in the wake of the Three Mile Island nuclear accident, spiraling construction costs, and lawsuits seeking to forestall the plant's operation because of concerns regarding its safety. The plant ultimately went into operation in 1990 at a cost exceeding $6 billion, which is more than seven times its original estimate. The construction delays and cost impacts ultimately pushed PSNH, the State's largest utility, into bankruptcy in 1988, and

later caused the other two New Hampshire joint owners also to declare bankruptcy.

C. The Tax on Nuclear Station Property

Enacted in 1991, the nuclear property tax levies a charge of 0.64% on every dollar of assessed valuation of nuclear property within New Hampshire. App. 72A; RSA 83-D:3.[1] The tax applies to each owner of nuclear property "in the proportion that such person's ownership interest bears to the entirety of the ownership in the property." App. 72A; RSA 83-D:5. There is no differentiation in rate or application as to in-state and out-of-state taxpayers. The tax applies only to electric utilities, not movants or their citizens.

D. The Business Profits Tax Credit

New Hampshire taxes the "business profits" of corporations doing business in the State (App. 27A-52A), including "unitary businesses" having interests in more than one state. App. 33A. The out-of-state owners of Seabrook are taxed as unitary businesses. There are various tax credits available to offset a business profits tax liability, as enumerated in RSA 77-A:5. App. 44A. In 1991, a property tax credit was added to allow an offset equal to the amount due under the nuclear property tax. App. 72A; RSA 83-D:6. All nuclear property owners are subject to the business profits tax, and the tax credit is available to each taxpayer incurring nuclear property tax liability. The property tax credit may be claimed for tax year 1991 and beyond, with the first tax return reflecting such credit due on January 15, 1992.

E. The Franchise Tax

Prior to 1991, all utilities selling electricity in the State were subject to a franchise tax in the amount of one percent on the gross receipts from sales of electricity *within* New Hampshire. App. 23A; RSA 83-C:2. Sales in

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[1] The New Hampshire Revised Statutes Annotated are referred to as "RSA ____."

interstate commerce were not subject to the tax, and there was no compensating tax imposed on utilities in New Hampshire selling in interstate commerce. In 1991, the franchise tax was repealed as to electric utilities. App. 77A. No owner of Seabrook is subject to it.[2]

F. These Proceedings

Movants brought this action seeking an evidentiary proceeding and injunctive relief under the Court's original jurisdiction. No administrative review action was lodged, and no judicial proceeding was brought, in New Hampshire. The affected utilities have not contested the tax, although they are liable for it and they may do so under established procedures. App. 75A; RSA 83-D:10, 83-D:11.

REASONS FOR DENYING THE MOTION

I. THE EXERCISE OF ORIGINAL JURISDICTION WOULD BE INAPPROPRIATE HERE

"It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' " *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). Original cases represent an "intrusion on society's interest in [the Court's] most deliberate and considerate performance of [its] paramount role as the supreme federal appellate court." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971). Original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute . . . ." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

The exercise of original jurisdiction is appropriate only where the "essential quality of the right asserted"[3] and the "seriousness and dignity of the claim"[4] require it and

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[2] Movants recite that the out-of-state owners of Seabrook received "no similar benefit" from the repeal (M. Br. at 8 n.3). This is because they bore no tax burden prior to the repeal, and therefore had an advantage over intrastate uitilities.

[3] *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939).

[4] *Illinois*, 406 U.S. at 93.

where there is no other forum "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois*, 406 U.S. at 93. It has long been accepted that original jurisdiction should not be exercised unless there is a showing of the "strictest necessity." *Wyandotte Chemicals Corp.*, 401 U.S. at 505. Movants have failed to make the required showing.

A. There Is No Injury To The States, Either As Sovereigns Or As *Parens Patriae*, And The Claim Of Harm To The State As Consumer Is A "Makeweight"

The grant of original jurisdiction recognizes that there are disputes between states that affect fundamental sovereign rights and are of sufficient importance and rarity that they may be heard directly by this Court. U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). The sovereign interests of a state ordinarily justifying the exercise of original jurisdiction include, *inter alia*, rights in water,[5] in state boundaries,[6] and other matters affecting the state as polity.[7]

The Court also has recognized that a state, acting as *parens patriae*, may have standing, but "only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer for the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *accord Oklahoma v. Cook*, 304 U.S. 387, 394 (1938). Such quasi-sovereign interests include protecting the "health, comfort and welfare" of the citizenry. *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-92 (1923). In such a case, the interest must affect "the gen-

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[5] *Wisconsin v. Illinois*, 278 U.S. 367 (1929), *superseded by* 388 U.S. 426 (1967); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Colorado v. New Mexico*, 467 U.S. 310 (1984).

[6] *Ohio v. Kentucky*, 410 U.S. 641 (1973); and cases cited in *North Dakota v. Minnesota*, 263 U.S. 583 n.1 (1924).

[7] These matters are discussed extensively in *Maryland v. Louisiana*, 451 U.S. 725, 760-771 (1981) (Rehnquist, J., dissenting).

eral population of a State in a substantial way." *Maryland*, 451 U.S. at 737. Movants acknowledge that "a state may not invoke this Court's original jurisdiction as a nominal party on behalf of individual citizens" (M. Br. at 17), but assert their standing primarily on the basis that the tax causes a "significant injury to most of the citizens of these states." M. Br. at 18.

The character of the "injury" alleged here, however, is merely economic, does not implicate the state as a political entity, and does not affect the health and welfare of the citizenry. If original jurisdiction could be invoked to pursue an economic interest affecting "most of the citizens," virtually any tax or regulation on utilities or other providers of basic services would require this Court's attention, resulting in a vast and unwarranted expansion of its caseload.

This pure economic interest is readily distinguishable from the claims brought in *Pennsylvania v. West Virginia* and *Maryland v. Louisiana*. (*Compare* M. Br. at 18). *Pennsylvania v. West Virginia* involved a potential cut-off in the supply of home heating fuel, thereby threatening the "health, comfort and welfare" of the citizenry. 262 U.S. at 591-92. The tax in *Maryland v. Louisiana* "implicate[d] serious and important concerns of federalism" (451 U.S. at 744) because it concerned the "paramount rights" of the United States in gas extracted from its lands (451 U.S. at 730), and "interfere[d] with the FERC's authority to regulate . . . the sale of natural gas to consumers." *Id.* at 749.[8]

Finally, movants have no standing as consumers of electricity. Movants have referred to their gross electric bill payments, but have not suggested that they are currently paying higher rates from the tax, and have not estimated what the rate increases might be. M. Br. at 16. There is

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[8] The Federal Energy Regulatory Commission has not "entered the controversy" here (M. Br. at 21), and its only role would be to consider the pass-through of the tax costs in rates, just as it would any cost of service.

no assertion that the charges would be of "serious magnitude," as required. *Alabama v. Arizona*, 291 U.S. 286, 292 (1934). Without more, the claim of consumer standing is simply a "makeweight." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

B. Prompt And Appropriate Relief Is Available In Other Fora

There is no necessity, "strictest" or otherwise (*Wyandotte Chemicals Corp.*, 401 U.S. at 505), that the Court accept jurisdiction because there is "another forum where there is jurisdiction" to hear the matter. *Illinois*, 406 U.S. at 93. New Hampshire provides the right to administrative review of the property tax (App. 75A; RSA 83-D:10), and to judicial review in the New Hampshire courts. App. 75A; RSA 83-D:11. Residents and non-residents may seek review. There is no question that the New Hampshire courts would responsibly consider any complaint by out-of-state interests. *See Opinion of the Justices* 118 N.H. 343, 386 A.2d 1273 (1978). Moreover, the state has an undeniable interest in "setting its own house in order." *Ohio Bureau of Employment v. Hodory,* 431 U.S. 471, 480 (1977).

Movants suggest they might not have standing to sue in New Hampshire because they do not pay the nuclear property tax, nor do their citizens. M. Br. at 23 n.11. As indicated, this apparent lack of standing is what makes the exercise of original jurisdiction inappropriate,[9] and surely if they lack standing in New Hampshire that cannot serve as a basis for the action here. In any event, movants have not even sought relief in New Hampshire and should not be heard to say that it is unavailable. Otherwise, original jurisdiction could be obtained simply by bypassing the state forum, and then claiming it to be unavailable or

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[9] *See Arizona v. New Mexico*, 425 U.S. 794, 797-98 (1976) ("we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities"). *Cf. Kansas v. Utilicorp,* 110 S. Ct. 2807 (1990) (antitrust action must be brought by utility, not state acting as *parens patriae*).

inadequate. It is noteworthy that the principal authority relied upon by movants, *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), followed the ordinary path of review through the state courts after this Court declined to accept original jurisdiction because the state court "provides an appropriate forum in which the *issues* tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (emphasis in original). Moreover, the right to review in New Hampshire is available to the taxpaying utilities,[10] and if they fail to pursue their rights, their state regulators could take appropriate action to shield ratepayers from any unnecessary costs.[11]

C. An Extensive Trial Would Be Required, And It Necessarily Would Draw Resources Away From The Court's Appellate Docket

This matter cannot be resolved merely by "documentary evidence or by stipulation" (M. Br. at 13), as movants suggest. The *factual* issue raised, *i.e.*, whether the tax burden falls "almost entirely" on out-of-state interests (M. Br. at 6), if pursued, would require expert testimony of a technical nature, such as economic, tax and ratemaking projections as to the revenues and liabilities of each Seabrook owner, forecast over a period of years; the projection of the "business profit" of each owner, and the portion of such profit attributable to New Hampshire interests; and projections as to possible offsets from the property tax credit or other tax credits, such as the investment tax credit. These projections would be offered by qualified experts, on the record, with an opportunity for cross-ex-

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[10] On October 4, 1991, the joint owners of Seabrook sought confirmation from New Hampshire that if an administrative appeal of the tax were sought by the joint owners, it could be commenced after January 15, 1992.

[11] Subsequent to the complaint, one Seabrook co-owner, EUA Power Corp., notified the State, by letter of December 13, 1991, that it will seek to have the United States Bankruptcy Court determine the constitutionality of the nuclear property tax before making another payment.

amination. Issues of credibility could be raised, if appropriate. *Compare* M. Br. at 13.

After receiving the evidence and procuring a master's report, the Court would be required "awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Wyandotte Chemicals Corp.*, 401 U.S. at 498. This "awkward" task, however, need not be undertaken here, because there is an adequate remedy available in New Hampshire. Moreover, as then-Justice Rehnquist stated in *Maryland v. Louisiana,* there are important prudential considerations militating against the expenditure of the Court's time and resources on such an inquiry:

> Over 40 years ago, when the Court's docket was considerably lighter than it is today, Chief Justice Hughes articulated the concern that accepting original jurisdiction cases "in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." Massachusetts v Missouri, 308 US 1, 19, 84 L Ed 3, 60 S Ct 39 (1939). The Court has recognized that expending its time and resources on original jurisdiction cases detracts from its primary responsibility as an appellate tribunal. "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." Washington v General Motors Corp. 406 US 109, 113, 31 L Ed 2d 727, 92 S Ct 1396 (1972).

451 U.S. at 762 (Rehnquist, J., dissenting).

D. The Request for Relief Is Premature

The request for relief is premature because the actual impact of the property tax is not yet known. The action is unripe (and movants' standing in question) because there has not been a measurable rate impact from the tax on movants or their citizens. Each taxpayer is a regulated utility that must receive state regulatory approval before passing through its expenses in retail rates (*i.e.*, rates to ultimate consumers). At present, none of the taxpaying utilities have requested approval to recover its tax costs. It is also unclear whether the appropriate state regulatory bodies would approve such a request.[12] At present, the utilities and their shareholders are bearing the tax costs, not movants or their citizens.[13] Moreover, the first estimated property tax payment was made in September 1991, but tax returns reflecting the tax payments or offsets from use of the property tax credit will not be filed until 1992, so that even the impact on the *utilities* is as yet unknown.

E. The Injury Complained Of Is Not Serious

Even if tax returns had been filed reflecting actual tax impacts, and even if there had been a retail rate pass-through, movants would remain obligated to show that the property tax had caused them injury of a "serious magnitude." *Alabama v. Arizona*, 291 U.S. 286, 292 (1934); *Colorado v. Kansas*, 320 U.S. 383, 393 (1943). This must

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[12] In such a rate proceeding, movants ordinarily would have standing to contest the inclusion of the tax costs in rates.

[13] Movants address the matter in a footnote (M. Br. at 17 n.7), but do not claim that there has been a rate pass-through of tax costs to consumers. Much is made of *wholesale* cost pass-throughs to other *utilities*, but there is no suggestion that a substantial number of ultimate consumers are bearing higher rates. *Id.* Movants also advert to a Connecticut regulatory commission decision (*id.*), which purports to estimate a tax "cost" to Connecticut ratepayers, but it does not say that a request had been made to pass the cost through to ratepayers. App. 65A.

be established by clear and convincing evidence. *New York v. New Jersey*, 256 U.S. 296, 309 (1920).

Movants primarily avoid the issue of seriousness of the harm alleged. Movants recite that the combined tax liability of the out-of-state utilities will be $14 million (M. Br. at 18), but do not factor in an offset for the property tax credit. Movants also provide a calculation of the gross electric rates paid by each state on a yearly basis (*id.* at 16), but do not calculate the actual rate impact *from the tax*.[14]

These circumstances are in sharp contrast to the potential harm demonstrated in cases relied upon by movants. In *Pennsylvania v. West Virginia*, the injury was a complete cessation of deliveries of natural gas, which threatened to cut off supplies of home heating fuel. 262 U.S. at 591-92. In *Maryland v. Louisiana*, the tax impacted gas supplies, had an economic impact of at least $150 million annually, and affected consumers in 30 states. 451 U.S. at 729, 731, 737. The injury alleged here does not compare and, moreover, as indicated, it is presently a matter of speculation as to what, if any, injury there will be.

Having failed to establish that this matter would be appropriate for original jurisdiction, the motion for leave to file the complaint should be denied.

II. THE MOTION FOR LEAVE TO FILE SHOULD BE DENIED BECAUSE THE ARGUMENTS RAISED ARE WITHOUT MERIT

Even should the Court find movants' interest of the kind warranting review, and that the New Hampshire courts

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[14] Movants also do not quantify the rate impact on their citizens, which is not likely to be "serious." For example, Connecticut's largest utility is a co-owner of Seabrook, and the impact of the tax on its rates may be calculated by dividing the estimated property tax due by units of electricity sold, which is then multiplied by the average electricity usage of a residential consumer. Even without an offset for tax credits, the resulting impact on such a Connecticut consumer is believed to be approximately 27 cents per year.

are unavailable for relief, the motion does not state a substantive claim meriting review. To prevail on the merits, movants must establish that the nuclear property tax is imposed disproportionately on interstate commerce and, in turn, that this results in an unlawful and discriminatory burden on such commerce. Alternatively, they must establish that the nuclear property tax discriminates against interstate commerce, pursuant to 15 U.S.C. § 391. The movants fail in both efforts and thus fail to allege a cause of action from which the Court may grant relief.

A. The Nuclear Property Tax is Consistent With 15 U.S.C. § 391 and Does Not Discriminate on Any Basis

In claiming that the nuclear property tax violates 15 U.S.C § 391, movants ask the Court to ignore the plain meaning of the statute and, instead, focus on the operation of other provisions of the New Hampshire tax system. In doing so, they ask that the Court provide an unprecedented interpretation of the statute. Movants argue that "[b]y repealing the Franchise Tax and establishing a credit against [the] Business Profits Tax . . ., the Seabrook Tax violates [15 U.S.C. § 391]." M. Br. at 25.

Section 391 provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers or consumers of that electricity.

The statute goes on to define discrimination:

> For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

15 U.S.C. § 391.

To be barred by 15 U.S.C. § 391, a tax must, in the first instance, apply "to the generation or transmission of electricity" and also impose a disproportionate burden on electricity in interstate commerce. Section 391 of 15 U.S.C. does not apply to the nuclear property tax, but if it did, neither the nuclear property tax nor any combination of New Hampshire taxes discriminates against interstate commerce. Thus, movants reliance on 15 U.S.C. § 391 is misplaced.

1. Section 391 Does Not Apply To The Nuclear Property Tax

Section 391 of 15 U.S.C. applies to taxes "on or with respect to the generation or transmission of electricity." 15 U.S.C. § 391. The provision was "directed specifically" to taxes on *generation* or *transmission,* "not to the entire tax structure" of a state. *Arizona Public Service Co. v. Snead,* 441 U.S. 141, 149 (1979). The tax was enacted specifically to invalidate New Mexico's tax law (*id.* at 147-48), which was "concededly a tax on the generation of electricity." *Id.* at 149.

The nuclear property tax is not a tax on the "generation or transmission of electricity." It is a tax on nuclear *property,* assessed as a percentage of the valuation of the property. The distinction is real and substantive. While receipts from a tax on generation or transmission vary with the output of a generation facility or the use of a transmission line, receipts from a property tax are fixed by the property's value. The nuclear property tax is applied to the value of property owned by a taxpayer, without concern for the address of the owner or where the electricity is ultimately sold. There is no requirement that the tax be paid by any entity other than the owner of nuclear property that, with appropriate regulatory approvals, is free to include the expense in the price of its product or to absorb the cost as it sees fit.[15] The amount

[15] The out-of-state Seabrook owners may choose to sell the electricity from Seabrook to one of New Hampshire's five electric utilities or three municipal systems, and thereby collect some portion of the tax obligation from New Hampshire citizens.

of nuclear property tax paid by any utility is controlled strictly by the amount of its investment in nuclear property in New Hampshire.

Movants ignore these distinctions, and argue that the nuclear property tax is "in effect" a tax on generation or transmission "notwithstanding that the tax takes the form of a tax on property." M. Br. at 26-27. There is no substance to this assertion, and it is precluded by the plain terms of the statute, which are conclusive. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989); *see Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). As the Court stated in *Snead*, "[t]o look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." 441 U.S. at 149-150. Section 391 simply does not apply.

2. Movants Fail To Allege Facts Establishing That The Nuclear Property Tax Violates The Anti-Discrimination Provision Of 15 U.S.C. § 391

Even if the Court were to apply 15 U.S.C. § 391, the nuclear property tax is consistent with its substantive requirements. The nuclear property tax is assessed on each owner of nuclear property in New Hampshire regardless of whether it is a foreign or domestic corporation. App. 72A. The same rate is applied to determine the tax owed by each taxpayer, and tax liability is controlled by the taxpayer's ownership interest in Seabrook. *Id.* All taxpayers have the same right to challenge the tax in New Hampshire. App. 75A. All taxpayers receive the same property tax credit against the business profits tax. App. 72A. None of the nuclear property owners is subject to the New Hampshire franchise tax. App. 77A.

Movants, however, allege that the tax credit and the repeal of the franchise tax facially discriminate against interstate commerce (M. Br. at 25) because, as a factual matter, the property tax will fall more heavily on out-of-state utilities than on New Hampshire utilities. *See* M. Br.

at 1, 6. As indicated, the tax and tax credit apply equally to all property owners, and thus 15 U.S.C. § 391 is satisfied. Moreover, what movants seem to suggest is an expansive interpretation of 15 U.S.C. § 391 that would be destructive to taxes on multistate generating units. For example, approximately 51% of the Seabrook plant is owned by out-of-state utilities, resulting in approximately 51% of all its costs, including taxes, included in the charges of electricity in interstate commerce.[16] The nuclear property tax applies in proportion to the ownership interest so that each owner bears its fair share of the tax. Movants' argument would preclude this, and would mean that the tax would, by definition, be discriminatory because it would fall more heavily on interstate commerce. Such a rule would place in question any tax levied on a generating plant that is more than 50% owned by out-of-state interests, and thus discourage multi-state cooperation in building large generating units.

This was not the intent of Congress in enacting 15 U.S.C. § 391. "The federal statute does not prevent a state from taxing the generation and transmission of electricity, but only requires that interstate and intrastate generation and transmission be treated equally." *Pacific Power & Light v. Montana Dep't of Revenue*, 773 P.2d 1176 (1989), *cert. denied*, 493 U.S. 1049 (1990). This is precisely what the property tax accomplishes.[17]

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[16] EUA Power Corp., a New Hampshire corporation, owns 12.1% of Seabrook, and sells its electricity in, essentially, the spot market because there is no "firm" market for the power. The percentage of EUA power sold in New Hampshire is unknown, as is the amount of Seabrook-generated electricity sold to New Hampshire utilities by the out-of-state Seabrook owners.

[17] If, instead of tenants in common, Seabrook were owned by a single corporation, with a consortium of utilities holding stock interests, the corporation itself would be liable for the nuclear property tax and the net expense would, presumably, be allocated to the utility shareholders on a per-share basis. There could be no claim of "discriminatory" burden in this circumstance. Under movants' argument, the constitutionality of the tax would turn on the form of corporate ownership, not

Finally, the nuclear property tax is not "virtually identical" to the tax in *Snead*. M. Br. at 29. The New Mexico statute allowed a tax credit only for "electricity generated inside [New Mexico] and consumed in this state." 441 U.S. at 143 n.4. Accordingly, the "tax-credit provisions . . . insure[d] that locally consumed electricity is subject to *no* tax burden . . ., while [interstate electricity] . . . is subject to a 2% tax, since it is sold outside the State." *Id.* at 149 (emphasis in original). In contrast, the New Hampshire property tax credit applies equally to in-state and out-of-state owners. There is no discrimination of any kind in its application. Similarly, the franchise tax does not apply to any electric utility.[18] The nuclear property tax bears no relation to the tax in *Snead*.

B. The Nuclear Property Tax Is Applied Evenhandedly, And In No Way Discriminates Against Interstate Commerce

1. The Nuclear Property Tax Is Consistent With Established Tests

It is well settled that "interstate commerce must bear its fair share of the state tax burden," *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620 n.9 (1981), and "may constitutionally be made to pay its way." *Maryland*

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on whether the tax and credits or exemptions apply evenhandedly to each taxpayer.

[18] In claiming injury due to the franchise tax repeal, movants invite the Court to consider what the State's tax code was or should be. It should be self-evident that a state may repeal a tax if doing so is appropriate. Permitting claims that such a repeal is "discriminatory" would require that the State, instead, broaden the tax so that all possible interests were taxed, which is not required. *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509 (1937). Indeed, the Court has stated that "[w]e could strike down this tax as discriminatory only if we substituted our judgment on facts of which we can be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems." *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 365 (1973). There is no reason for the Court to abandon this deference to the states. Similarly, the Court in *Snead* confined its inquiry "narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State." 441 U.S. at 150.

v. Louisiana, 451 U.S. 725, 754 (1981). "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden . . . ." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). A state may lawfully tax interstate commerce "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The New Hampshire nuclear property tax meets each test. The nexus with the state, *i.e.*, the property, is direct and substantial, and is not in dispute here. The tax is fairly apportioned. Each taxpayer pays only "in the proportion that such person's ownership interest bears to the entirety of the ownership in the property." App. 72A; RSA 83-D:5. There is no possibility of multiple taxation by different states. No other state could lawfully tax the Seabrook property.

The tax does not promote local business or discriminate against interstate commerce. Both local and interstate owners are taxed at the same rate. Each taxpayer may apply its tax liability as a credit against the business profits tax. App. 44A (RSA 77-A:5); App. 72A (RSA 83-D:6). No affected taxpayer is subject to the franchise tax, which was repealed as to electric utilities. App. 77A. No local business is favored. No out-of-state business is encouraged to move in-state or do business there.

The tax is fairly related to services provided by the State. It helps defray the general expenses of state government, which pay for police and fire protection and for highways and bridges, and provide for an educated workforce, a judicial system, and maintenance of the general welfare. The tax also accounts for the unique burdens associated with the property, including the danger inherent in the production of nuclear energy, and its waste, as the Legislature so found. App. 71A-72A; RSA 83-D:1. After

the accidents at Three Mile Island and Chernobyl, there can be no serious question that the mere existence of a nuclear power plant places a unique burden on the host state.

2. Movants Have No Support In The Case Law

Movants contend that the nuclear property tax is not fairly apportioned, discriminates against interstate commerce, and is not fairly related to services provided by the State. Each argument is addressed in turn.

a. Movants state that the tax "is not fairly apportioned" (M. Br. at 33), but provide not the slightest explanation or authority in support thereof. In fact, the property tax is apportioned on the basis of each utility's interest in the Seabrook nuclear station (App. 72A; RSA 83-D:5), and nothing in this is unfair. There is no possibility of multiple taxation by different states. *See Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). The property is located solely within New Hampshire, and no other state could properly tax it.

b. Movants concede that the nuclear property tax "may appear even-handed" (M. Br. at 8; *see id.* at 32), but argue that the tax credit and franchise tax repeal create a "discriminatory scheme" that is "precisely the same" as that in issue in *Maryland v. Louisiana*. M. Br. at 33. The argument does not withstand close scrutiny.

In *Maryland v. Louisiana*, Louisiana sought to impose a "first use" tax on natural gas that was produced off-shore on *federal* land, 98% of which was for resale in interstate commerce. 451 U.S. at 729. Louisiana had "no sovereign interest in being compensated for the severance of resources from the federally owned OCS land." *Id.* at 759. Further, through a series of facially discriminatory exemptions and credits which applied only to those doing business in Louisiana, the state sought to encourage in-state gas production and shield in-state consumers from the tax. These provisions included: (1) exempting off-shore gas from the tax if it was subsequently consumed *within* Louisiana (*id.* at 756); (2) allowing taxpayers with pro-

duction facilities *within* Louisiana to apply their first-use tax liability as a tax credit against state severance tax obligations, with the "obvious economic effect . . . to encourage . . . mineral exploration and development within Louisiana" (*id.* at 757); and (3) allowing consumers of gas or electricity *within* Louisiana to apply any increased costs due to the first-use tax as a credit against other tax liabilities. *Id.* at 757.[19]

Here, in contrast, the tax is levied on nuclear property located within New Hampshire, for the clearly stated purpose that the property poses unique risks and cost burdens on the State. App. 71A-72A. The tax is applied even-handedly to each owner in proportion to its ownership interest. App. 72A. The tax does not encourage companies to locate, or do business, in New Hampshire. The business profits tax credit is available to *all* taxpayers. App. 44A; App. 72A. The franchise tax was repealed, and is a non-issue. App. 77A.[20] There is no valid comparison with *Maryland v. Louisiana.*

c. Movants also state that the tax is not "fairly related" to services provided by New Hampshire, arguing that the "specific burdens" imposed by the plant are compensated adequately through other levies and funds. M. Br. at 33. This simply is incorrect.

The nuclear property tax is not a "user fee" or a "specific charge" for state services, but rather, like the severance tax in *Montana,* is "imposed for the general support of the government." *Compare* 453 U.S. at 621 *with* App.

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[19] The tax scheme found invalid in *Snead* likewise provided a tax credit only to "electricity generated inside [New Mexico] and consumed in this state." 441 U.S. at 143 n.4.

[20] Movants assert that a risk exists that other states will "attempt to retaliate," leading to "Balkanization." M. Br. at 33. The intent of this statement is unclear, but other states may lawfully tax their nuclear property, just as other property in the *situs* state, and there would be nothing ostensibly untoward in their doing so. Indeed, Vermont has, for 20 years, taxed its nuclear property, which is owned by most of the same out-of-state Seabrook owners. 32 Vt. Stat. Ann. §§ 8601, 8661.

72A. *See also* 453 U.S. at 624 ("a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs state"). Thus, the tax need not be limited, as movants' suggest, to recovering for "specific" burdens associated with the taxed activity, but rather the revenues may contribute to "the cost of providing 'police and fire protection, the benefit of a trained work force, and the advantages of civilized society.' " *Montana*, 453 U.S. at 624 (quoting *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 (1980)). "[I]nterstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit.' " *Id.* at 627 n.16 (emphasis in original).[21]

3. Movants' Factual Arguments Do Not State A Cause Of Action

The premise underlying movants' complaint is that a tax cannot be imposed if it primarily will be borne by interstate commerce. M. Br. at 1, 2, 6, 8, 10, 32; Complaint ¶ 29A. Movants argue that the tax burden "will fall almost entirely on out-of-state consumers" (M. Br. at 6), and that this indicates a Constitutional violation. *Id.* at 32; Complaint ¶ 29A. The premise is fallacious.

This Court has long rejected the notion that "a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Montana*, 453 U.S. at 618; *accord Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 258-259 (1922); *cf. Goldberg v. Sweet*, 488 U.S. 252, 265-66 (1989). It is the settled rule that so long as a tax, such as the nuclear property tax, "is computed at the same rate regardless of the final destination of the [power], and there

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[21] The "relevant inquiry . . . is not . . . the *amount* of the tax or the *value* of the benefits," but rather is whether the "*measure* of the tax [is] reasonably related to the extent of the contact." *Montana*, 453 U.S. at 625-626 (emphasis in original). Here, the property tax, like the severance tax in *Montana*, is measured as a percentage of the value of the property. *Compare* App. 72A *with* 453 U.S. at 626.

is no suggestion ... that the tax is administered in a manner that departs from this evenhanded formula," there is no constitutional infirmity. *Montana*, 453 U.S. at 618.

Further, in most cases, as here, the impact of a tax, and any associated credits, will vary in each year, depending on a number of factors, such as the taxpayer's income, if any, its deductions, the availability of other credits, carryforwards and carry-backs of the same, and other factors. Thus, a factual inquiry into the *source* of any disparity in tax burden would be cumbersome and complex, and the alleged "disparity" would often be due to "adventitious considerations,"[22] *not* the operation of the tax. For example, here it appears that *the most* that could be claimed is a "disparity" in tax liability where an out-of-state taxpayer does not have sufficient business profits tax liability to claim the full nuclear property tax credit. This would not be due to a "discriminatory" statute, but rather would occur because of the fortuity of a small business profits tax bill.

Moreover, the entire discussion of the factual assertion is relegated to two footnotes (M. Br. at 9 n.4, 18 n.8), with only the unsupported assertion that "it is clear" that only PSNH would benefit from the tax credit. *Id.* at 9 n.4.[23] Based on an interpolation of 1991 tax data, it is projected, on information and belief, that PSNH will *not* be able to avail itself of the property tax credit for at least five years, and thus will bear *all* of its property tax in the interim, while most out-of-state utilities *will* be able to employ the credit and benefit therefrom starting with the first tax return in 1992. This, however, is not the

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[22] *Montana*, 453 U.S. at 618; *Heisler*, 260 U.S. at 259. *Cf. Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 78 (1989).

[23] Movants also extract selective quotes from the floor debates in purporting to demonstrate the "discriminatory nature and intent of the tax." M. Br. at 10 n.6. But "[w]hether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it." *Heisler*, 260 U.S. at 259.

issue. The property tax and the tax credit apply at the *same* rate and are available to *all* taxpayers. There is nothing in the Court's decisions proscribing this. Any factual inquiry may be addressed, if need be, in an administrative or judicial action in New Hampshire.

C. The Nuclear Property Tax Is Consistent With The Equal Protection Clause Of The Fourteenth Amendment

"The States . . . have broad powers to impose and collect taxes . . . [and] may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable." *Allegheny Pitts. Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 344 (1989); *accord Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (state "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes"). In taxing commerce, a state "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores v. Bowers*, 358 U.S. 522, 527 (1959). A state tax need only be "rationally related to achievement of a legitimate state purpose." *Western & S. Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981).[24]

Movants' "equal protection" argument is premised on the misrepresentation that the property tax "classifies taxpayers into two groups" because the "tax credits and exemptions . . . are not available to utility owners selling to out-of-state consumers." M. Br. at 33. This, as indicated, is simply false, as is plain on the face of the statute. App. 23A, 33A, 44A, 72A. The property tax applies to all owners at the same rate, the tax credit is available to all owners in the same degree, and the franchise tax, as re-

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[24] As with the Privileges and Immunities Clause (*see infra*), the Equal Protection Clause protects persons, not states, *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976), and movants' citizens do not pay the tax.

pealed, applies to no owner. Each taxpayer is treated equally.[25]

There is no contention that nuclear property is not a distinct class of property that may be taxed by the state. Instead, the argument is that the tax "does not further that interest" because its alleged "stated purpose"—to "compensate" the state for the "burdens caused" by nuclear power—is met by other funds and levies. M. Br. at 34.

The purpose of the tax is not to raise revenue for specific burdens, but rather "to help defray the public charges of government." App. 72A. These charges contribute to the provision of public roads and bridges, an educated workforce, a judicial system, and the protection of the general welfare. Further, the charges contribute to the provision of police and fire protection, including for public demonstrations and protests at Seabrook, participation by local officials in the development of a nuclear emergency response plan (App. 53A; RSA 107-B:1), regulations as to the transportation of hazardous materials within the State (RSA 21-P:11(I)), and investigations as to accidents caused by public utilities (RSA 374:37). The Seabrook owners clearly avail themselves of these general rights, services and protections, and there is nothing improper in levying a tax to insure they support their fair share of the costs of state government.

D. There Is No Privileges and Immunities Clause Issue

Movants assert a claim under the Privileges and Immunities Clause, Art. IV, § 2 (M. Br. at 35-36), but it does not appear that they have standing to do so. A state is not a "citizen" under the Clause, and has no right of action thereunder. *Pennsylvania v. New Jersey*, 426 U.S. 660,

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[25] For this reason, the argument that there is "no rational basis for distinguishing between in-state and out-of-state consumers" (M. Br. at 34) is also without merit, misstating as it does the operation of the tax.

665 (1976). The state may sue as *parens patriae* on behalf of its citizens, but the "citizens" of movants' states are *not* subject to the tax. *Compare id.* at 665. It is the utilities to which the tax applies, but they are corporations, and also are not "citizens" within the meaning of the Clause. *Western & S. Life Ins. Co. v. State Bd. Equalization*, 451 U.S. 648, 656 (1981); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177-78 (1869). If the tax-paying utility has no cause of action, there should be no derived right of action on behalf of its ratepayers.

There is no substance to the claim, even were the Clause to apply. The Clause ensures that "citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975); *accord Toomer v. Witsell*, 334 U.S. 385, 395 (1948). As indicated, each property owner, resident and nonresident, is taxed at the same rate, has available to it the business profits tax credit, and is not subject to the franchise tax.

III. THERE HAS BEEN NO PROPER REQUEST FOR PRELIMINARY RELIEF

The Complaint seeks a preliminary injunction or the escrowing of funds (p. 12), but the request is then orphaned. There is no motion for preliminary injunction or other relief (paralleling Fed. R. Civ. P. 65), as should be required. S. Ct. R. 17.2. There is no request for preliminary relief in movants' brief. *See* M. Br. at 37. There is not even the suggestion that irreparable injury could be shown, as the law requires. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506 (1959). In fact, any taxes found to have been wrongly collected would be refundable, with interest, under New Hampshire law (App. 75A; RSA 83-D:10), and the ratepayers, it is expected, could be reimbursed in rates for any overcollections. Further, there has been no showing that the other prerequisites to preliminary relief—likelihood of success on the merits, no harm to the defendant, and consistency with the public interest—are present. The matter has not been properly presented, and

would be insubstantial if it were. It should not be considered.

CONCLUSION

For the foregoing reasons, the motion for leave to file a complaint should be denied.

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