No. 119 Original

In The
Supreme Court of the United States
October Term, 1992

State of Connecticut, *et al.*,
Plaintiffs,
v.
State of New Hampshire,
Defendant.

On Exceptions to the Final Report of the Special Master

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No. 119 Original

STATE OF CONNECTICUT, *et al.*,
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STATE OF NEW HAMPSHIRE,
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EXCEPTIONS OF INTERVENORS TO THE FINAL REPORT OF THE SPECIAL MASTER

This case involves a challenge to the New Hampshire "Tax on Nuclear Station Property" (N.H. Rev. Stat. Ann. Ch. 83-D) (the "Seabrook Tax") and an accompanying credit for payment of that tax against liability for the New Hampshire Business Profits Tax (N.H. Rev. Stat. Ann. Ch. 77-A:5). Intervenors challenge these tax measures as violating the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, and the provisions of 15 U.S.C. § 391. The Special Master agreed that the tax and credit, operating together, are unlawful on both grounds. The Special Master concluded, however, that the Seabrook Tax by itself is valid. Final Report 19 n.11, 26 n.17. Intervenors except to the latter conclusion.[1]

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[1] The plaintiffs are the States of Connecticut, Massachusetts, and Rhode Island. Intervenors are the United Illuminating Co., New England Power Co., Connecticut Light & Power Co., Canal Electric Co., Montaup Electric Co., and Taunton Municipal Lighting Plant. Intervenor The Connecticut Light and Power Company does not participate in this filing.

For purposes of Sup. Ct. R. 29.1, see the Motion for Leave to Intervene and accompanying Complaint of Intervenors.

A. The New Hampshire Legislature, seeking to address growing financial concerns, enacted the Seabrook Tax in 1991. 1991 N.H. Laws c. 354 (to be codified at N.H. Rev. Stat. Ann. (RSA), Chapter 83-D) (the "Seabrook Tax").[2] The Seabrook Tax is an *ad valorem* tax imposed upon "nuclear station property," defined by the statute as "the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." Ch. 83-D:2. It is undisputed that the Seabrook Nuclear Station is the only facility in the State subject to this tax. Stip. ¶¶ 3.2 & 3.3. In particular, no other facility generating electricity in the State is subject to this special tax. *Id.* ¶ 3.3.[3]

The revenues derived from the Seabrook Tax are considered part of the general revenues of the State, expendable on a current basis. Stip. ¶ 11.5. They are not accumulated, or otherwise segregated, in a special fund for future use; nor are they designated in any way for particular purposes. The State addresses concerns specific to Seabrook through other, additional measures: *e.g.*,

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[2] At the same time, the Legislature provided that the Seabrook Tax would be an offset against liability for a second tax: the New Hampshire Business Profits Tax. 1991 N.H. Laws c. 354:2 (to be codified at RSA ch. 77-A:5, VI). Pursuant to the New Hampshire statutes, any payment of the Seabrook Tax may be taken as a credit, dollar-for-dollar, against tax owed on New Hampshire business profits. The effect of the Seabrook Tax thus varies with respect to each owner, according to the extent of New Hampshire business profits that it earns. We agree with the Special Master's conclusion that the tax and credit, which the Legislature declared nonseverable, are discriminatory in violation of both the Commerce Clause and 15 U.S.C. § 391.

[3] The Seabrook Nuclear Station, like other facilities generating electricity in New Hampshire, is subject to local property taxes. Stip. ¶ 3.3. No statewide property tax is imposed on other generating facilities. *Id.* ("Stip." refers to the stipulated record developed before the Special Master.)

it requires Seabrook owners to pay a nuclear decommissioning financing charge of more than $1.6 billion over the life of Seabrook station (Ch. 162-F:14 *et seq.*; Stip. ¶ 13.2), and to bear the costs of preparing, maintaining, and operating the State's emergency nuclear response program (Ch. 107-B). The revenues from the Seabrook Tax, by contrast, are not dedicated to similar purposes. In fact, a significant portion of those funds simply replace funds lost by the State when, in the same statute that imposed the Seabrook Tax, New Hampshire repealed its Franchise Tax insofar as it applied to (in-state) sales of electricity. 1991 N.H. Laws c. 354:3.

Whereas the burden of the Franchise Tax fell on the in-state sale of electricity, the Seabrook Tax, which replaced it, was enacted with the intended effect of imposing a special tax burden on out-of-state business. Thus, from the inception of the tax, considerably more than a majority share—and now almost all—of Seabrook has been owned by companies doing the lion's share of their business outside New Hampshire. Stip. ¶¶ 3.5-3.18. Only those businesses are subject to this special statewide property tax. The other facilities used to generate electricity in the State are not subject to this or any other statewide property tax; those facilities are owned overwhelmingly by companies doing the bulk of their business in New Hampshire. Stip. ¶¶ 6.15-6.19.

That the Seabrook Tax targets out-of-state interests for a special burden, far from being coincidental, is a primary reason for its enactment. As Rep. Hayes stated in support of the tax, "[i]t raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time. Sixty-five per cent of this tax will be paid by out-of-state interests." Remarks of Rep. Robert Hayes, The N.H. House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. Rep. Hayes went on to point out that, taking into account the repeal of the franchise tax paid by local utilities, the entire net increase in taxes from the bill would be exported: "If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are [sic] financing this increase in the utility taxes that we're going to pay." *Id. See* Addendum to Brief in Support of Motion for Leave to File Complaint 66A-70A (reprinting remarks).

B. This case was brought by the States of Connecticut, Massachusetts, and Rhode Island to challenge the Seabrook Tax, both by itself and in conjunction with the accompanying credit provision. Intervenors are six utilities who, as owners of Seabrook, pay the Seabrook Tax. Granted permission to intervene (112 S. Ct. 2961 (1992)), the utilities likewise challenged the Seabrook Tax, by itself and in conjunction with the credit provision. For somewhat different reasons, both challenges alleged that New Hampshire has discriminated against interstate commerce in electricity, in violation of the Commerce Clause and 15 U.S.C. § 391.

As relevant here, the Seabrook Tax by itself was attacked on the ground that New Hampshire had illegally singled out for a special tax burden the one electricity-generating facility that is predominantly engaged in interstate commerce: New Hampshire does not subject other (sometimes competing) electricity-generating facilities to *any* statewide property tax (while all generating facilities, including Seabrook, pay local property taxes). This discriminatory effect, moreover, was fully intended—indeed, was a prime object of the Legislature. And the actual use of the revenues raised by the Seabrook Tax shows that the unique burden is not justified by any legitimate local purpose. Because the purpose and effect of the Seabrook Tax were to discriminate against interstate commerce in electricity, intervenors argued, the tax violates the Commerce Clause and 15 U.S.C. § 391.

The Special Master rejected this legal conclusion, though he did not disagree with the showings of discriminatory effect or purpose. The Master simply explained: "It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants." Final Report 26 n.17.

1. Intervenors except to the Special Master's conclusion that the Seabrook Tax is consistent with the Commerce Clause. Final Report 26 n.17.

2. Intervenors except to the Special Master's conclusion that the Seabrook Tax is consistent with 15 U.S.C. § 391. Final Report 19 n.11.

In support of the foregoing, intervenors submit the attached brief.

Respectfully submitted,

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OCTOBER TERM, 1992

No. 119 Original

STATE OF CONNECTICUT, *et al.*,
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STATE OF NEW HAMPSHIRE,
Defendant.

On Exceptions to the Final Report of the Special Master

BRIEF OF INTERVENORS IN SUPPORT OF EXCEPTIONS TO THE FINAL REPORT OF THE SPECIAL MASTER

JURISDICTION

The original and exclusive jurisdiction of this Court rests upon Article III, section 2, of the United States Constitution and upon 28 U.S.C. § 1251(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3, states that "Congress shall have Power . . . To regulate Commerce . . . among the several States."

Section 391 of Title 15, U.S. Code, states:

> **Tax on or with respect to generation or transmission of electricity.** No State, or political subdivision thereof, may impose or assess a tax on or with re-

spect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. 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.

STATEMENT

This case involves a challenge to the New Hampshire "Tax on Nuclear Station Property" (N.H. Rev. Stat. Ann. Ch. 83-D) (the "Seabrook Tax") and an accompanying credit for payment of that tax against liability for the New Hampshire Business Profits Tax (N.H. Rev. Stat. Ann. Ch. 77-A:5). Intervenors challenge these tax measures as violating the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, and the provisions of 15 U.S.C. § 391. The Special Master agreed that the tax and credit, operating together, are unlawful on both grounds. The Special Master concluded, however, that the Seabrook Tax by itself is valid. Final Report 19 n.11, 26 n.17. Intervenors except to the latter conclusion.[1]

1. *Background.* In 1991, the New Hampshire Legislature, seeking to address growing financial concerns, replaced one tax with another designed to raise more money. It repealed its Franchise Tax insofar as it applied to (in-state) sales of electricity. 1991 N.H. Laws c. 354:3. The same statute then enacted a special property tax on "nuclear station property"—the Seabrook Tax. 1991 N.H. Laws c. 354 (to be codified at N.H. Rev. Stat. Ann. (RSA), Chapter 83-D).[2] *See* Addendum

[1] Intervenor The Connecticut Light and Power Company does not participate in this filing.

[2] Also in the same statute, the Legislature provided that the Seabrook Tax would be an offset against liability for a second tax:

to Brief in Support of Motion for Leave to File Complaint (reprinting statute).

The Seabrook Tax is an *ad valorem* tax imposed upon "nuclear station property," defined by the statute as "the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." Ch. 83-D:2. It is undisputed that the Seabrook Nuclear Station is the only facility in the State subject to this tax. Stip. ¶¶ 3.2 & 3.3. In particular, no other facility generating electricity in the State is subject to this special tax.

The tax is imposed at the rate of 0.64% of the value of the nuclear station property. Ch. 83-D:3. The 1991 Act itself set the maximum initial value of the Seabook Station at $3.5 billion, Ch. 83-D:9, but it provided for subsequent valuation by the commissioner of revenue administration. Ch. 83-D:4. The owners of Seabrook are liable for the tax in proportion to their relative shares of ownership of the facility. Ch. 83-D:5. Liability is several, not joint or joint and several. Stip. ¶ 3.5.

Each of the intervenors owns part of the Seabrook Nuclear Station. *See* Stip. ¶¶ 1.3-1.9.[3] The Seabrook Tax was imposed with an effective date of July 1, 1991, and

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the New Hampshire Business Profits Tax. 1991 N.H. Laws c. 354:2 (to be codified at RSA Ch. 77-A:5, VI). Pursuant to the New Hampshire statutes, any payment of the Seabrook Tax may be taken as a credit, dollar-for-dollar, against tax owed on New Hampshire business profits. The effect of the Seabrook Tax thus varies with respect to each owner, according to the extent of New Hampshire business profits that it earns. We agree with the Special Master's conclusion that the tax and credit together, which the Legislature declared nonseverable, are discriminatory in violation of both the Commerce Clause and 15 U.S.C. § 391.

[3] A complete listing of Seabrook owners, and their respective shares of ownership, is set forth in the Stipulation at ¶¶ 3.6-3.18.

payments for 1991 were limited to one-half of the amount that would be due on an annual basis. Stip. ¶ 4.1; *see* Ch. 354:21 & 83:D-9. For that six-month period, the Seabrook owners as a whole paid approximately $11.2 million in Seabrook tax. Stip. ¶ 4.2. Intervenors' share amounted to roughly $4.26 million (38%). *Id.* Based on the expected valuation of Seabrook for 1992—just under $3.75 billion (Stip. ¶ 4.3)—the total Seabrook Tax payments for 1992 would be approximately $24 million (Stip. ¶¶ 4.4-4.7), of which intervenors' share would be $9.125 million (38%). *Id.* Owners of Seabrook are already passing on the Seabrook tax in wholesale and retail rates charged to their consumers. Stip. ¶¶ 5.5-5.20.

The revenues derived from the Seabrook Tax are considered part of the general revenues of the State, expendable on a current basis. Stip. ¶ 11.5. They are not accumulated, or otherwise segregated, in a special fund for future use; nor are they designated in any way for particular purposes. The State does address concerns specific to Seabrook through other, additional measures: *e.g.*, it requires Seabrook owners to pay a nuclear decommissioning financing charge of more than $1.6 billion over the life of Seabrook Station (Ch. 162-F:14 *et seq.*; Stip. ¶ 13.2), and to bear the costs of preparing, maintaining, and operating the State's emergency nuclear response program (Ch. 107-B). The revenues from the Seabrook Tax, in contrast, are not dedicated to similar purposes. In fact, a significant portion of those funds simply replace funds lost to New Hampshire by its repeal, in the same statute that imposed the Seabrook Tax, of the Franchise Tax on in-state sales of electricity. 1991 N.H. Laws c. 354:3.

Whereas the burden of the Franchise Tax fell on the in-state sale of electricity, the Seabrook Tax, which replaced it, has the immediate effect of imposing a special tax burden largely on out-of-state business. Thus, from the inception of the tax, considerably more than a majority share—and now almost all—of Seabrook (and hence of the electricity produced at Seabrook) has been owned by companies doing the lion's share of their business outside New Hampshire. Stip. ¶¶ 3.5-3.18. The other facilities used to generate electricity in the State are not subject to the Seabrook Tax or to any other statewide property tax; and those facilities are owned overwhelmingly by companies doing the bulk of their business in New Hampshire. Stip. ¶¶ 6.15-6.19.[4]

That the Seabrook Tax imposes a special burden on out-of-state interests was far from unintended but, rather, was a primary reason for its enactment. Rep. Hayes, a key supporter, explained that the tax "raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time. Sixty-five per cent of this tax will be paid by out-of-state interests." Remarks of Rep. Robert Hayes, The N.H. House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. Rep. Hayes went on to point out that, taking into account the repeal of the Franchise Tax paid by local utilities, the entire net increase in taxes from the bill would be exported: "If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are [*sic*] financing this increase in the utility taxes that we're going to pay." *Id.* *See Addendum* to Brief in Support of Motion for Leave to File Complaint 66A-70A (reprinting remarks).

2. *This Litigation.* This case was brought by the States of Connecticut, Massachusetts, and Rhode Island to challenge the Seabrook Tax, both by itself and in conjunction with the accompanying credit provision. This Court granted leave to file the complaint and referred the case to the Special Master. 112 S. Ct. 1756 (1992). The Court subsequently allowed intervention by six utili-

[4] The Seabrook Nuclear Station, like other facilities generating electricity in New Hampshire, is subject to local property taxes. Stip. ¶ 3.3.

ties who, as owners of Seabrook, pay the Seabrook Tax. 112 S. Ct. 2961 (1992). Intervenors likewise challenge the Seabrook Tax both by itself and in conjunction with the credit provision. Both challenges allege (though for somewhat different reasons) that New Hampshire has discriminated against interstate commerce in electricity, in violation of the Commerce Clause and 15 U.S.C. § 391.

As relevant here, the Seabrook Tax by itself is attacked on the ground that New Hampshire has illegally singled out for a special tax burden the one electricity-generating facility that is predominantly engaged in interstate commerce: New Hampshire does not subject other (sometimes competing) electricity-generating facilities to the Seabrook Tax or to any other statewide property tax (while all generating facilities, including Seabrook, pay local property taxes). This discriminatory effect, moreover, was fully intended by—indeed, was a prime objective of—the Legislature. And the actual use of the revenues raised by the Seabrook Tax shows that the unique burden is not tied to, or justified by, any legitimate local purpose. Because the purpose and effect of the Seabrook Tax are to discriminate against interstate commerce in electricity, the tax violates the Commerce Clause and 15 U.S.C. § 391.

Under the Special Master's direction, the parties developed a stipulated record for decision on these claims. After briefing and argument, the Special Master agreed that the Seabrook Tax and the credit provision, operating *together*, are invalid on both constitutional and statutory grounds. Final Report 17-38. In a single brief footnote, however, the Master rejected the challenge to the Seabrook Tax itself, citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-25 (1981), and *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). Without disputing the showings of discriminatory effect or purpose, the Master simply stated: "It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants." Final Report 26 n.17 (rejecting Commerce Clause challenge). *See also* Final Report 19 n.11 (rejecting statutory challenge for same reason). Intervenors except to these conclusions.

SUMARY OF ARGUMENT

Although States have broad latitude in classifying property for purposes of taxation, *see, e.g., Nordlinger v. Hahn,* 112 S. Ct. 2326 (1992), the Commerce Clause —and, with respect to the generation of electricity, 15 U.S.C. § 391—limits the power of a State to discriminate against enterprises engaged in interstate, as opposed to intrastate, commerce. *See, e.g., American Trucking Ass'ns v. Scheiner,* 483 U.S. 266 (1987). Thus, while interstate commerce may be required to pay its own way, *see Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 288-89 (1977), a State is not free to single out, for peculiarly burdensome taxation, operations wholly or primarily serving interstate commerce, at least without demonstrating that the added taxation is designed to compensate for some special burdens attributable to those operations.

That singling out, however, is precisely what occurred with enactment of the Seabrook Tax. That tax is imposed on a single facility—one that, as the Legislature was well aware, was owned predominantly by "out-of-state interests." Other generating facilities, owned predominantly by local interests, are not subject to the Seabrook Tax or, indeed, any state-wide property tax. And, while it is true that the Seabrook Nuclear Station is the only nuclear facility in New Hampshire, the record belies any attempt to suggest that the tax is meant to compensate for unusual burdens occasioned by nuclear power: rather, the tax is a general revenue measure, expended on a current basis to replace revenues lost by repeal of the state Franchise Tax on electricity and to fund other, ongoing state programs. In short, the tax is just what it was meant to be: a measure crafted to support overall state activities by singling out a facility primarily serving interstate commerce. As such, it violates both the Commerce Clause and 15 U.S.C. § 391.

ARGUMENT

The Special Master correctly recognized one obvious respect in which the New Hampshire tax scheme is discriminatory. By crediting payment of one New Hampshire tax (the Seabrook Tax) against payment of a second New Hampshire tax (the Business Profits Tax), the State has favored companies doing substantial business in New Hampshire over companies doing equivalent business in other States. This Court has repeatedly struck down, on both constitutional and statutory grounds, just such efforts by States to protect businesses conducting in-state activities from multiple taxation, while leaving businesses conducting interstate activities at risk for multiple taxation. *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987) (Commerce Clause); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (Commerce Clause); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (Commerce Clause); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (Commerce Clause); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Commerce Clause); *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979) (15 U.S.C. § 391).

The Master failed to recognize, however, that the New Hampshire scheme is discriminatory in another respect as well. Even without regard to the credit provision, New Hampshire has improperly singled out a generating facility primarily serving interstate commerce for a tax not imposed on generating facilities serving local commerce, or indeed on any other facility in the State. This deliberate use of a general revenue measure—not tied to any unusual financial outlays by the State—to discriminate against interstate activities likewise violates both the Commerce Clause and the provisions of 15 U.S.C. § 391.[5]

I. THE SEABROOK TAX DISCRIMINATES IN FAVOR OF LOCAL COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

A. It is, by now, well-established as a "central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977)). Although States may impose taxes on businesses engaged in interstate trade, those taxes must meet standards of fairness and neutrality. In recent years, the Court has required state tax measures to satisfy a four-part test: a state tax is lawful under the Commerce Clause only if "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); *see Goldberg v. Sweet*, 488 U.S. 252, 260 (1989).

This challenge involves the third requirement: that a state tax "not discriminate against interstate commerce." "This antidiscrimination principle 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. at 754 (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 329). As one commentator has noted, "[t]he Supreme Court has traditionally recognized that a large part of the

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[5] We address the Commerce Clause issue first, largely because the relevant constitutional principles have been more fully developed in case law than the principles governing 15 U.S.C. § 391. *Cf. Commonwealth Edison Co. v. Montana, supra* (addressing Commerce Clause challenge before statutory challenge).

rationale for granting Congress control over interstate commerce 'was to insure . . . against discriminating State legislation.'" L. Tribe, *American Constitutional Law* § 6-17, at 453 (2d ed. 1988) (quoting *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280 (1875)).

This Court has reaffirmed, moreover, that the constitutional prohibition is not limited to discrimination that appears on the face of the state tax measure. Thus, as the Court recently observed in striking down a facially neutral "flat tax," "the Commerce Clause has a deeper meaning that may be implicated even though state provisions . . . do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 281 (footnote omitted); *Nippert v. Richmond*, 327 U.S. 416, 425-26 (1946); *see* L. Tribe, *supra*, § 6-17, at 455-56. The Commerce Clause bars discrimination, "whatever its form or method, . . . when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." *South Carolina State Highway Dep't v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185-86 (1938).

The reason for scrutinizing even facially neutral measures is not hard to fathom. It is the actual effect on interstate commerce (compared with intrastate commerce) that threatens the constitutional "guarantee of a free trade area among States" (*American Trucking Ass'ns*, 483 U.S. at 281); and the constitutional evil is present whether or not the state legislature has found a way to obscure its discriminatory aims and effects. Likewise, the concern repeatedly identified as underlying the need for constitutional scrutiny—the absence of normal political restraints to prevent exploitation of interests not fully represented in the state legislature—exists whether or not legislative discrimination appears on the face of the statute.[6]

In fact, this Court has expressed particular concern about narrowly targeted taxes, because such taxes "are easily tailored to single out interstate business and subject them to effects forbidden by the Commerce Clause." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 288 n.15. Observing that such taxes could take various forms —including property taxes—the Court said that "[a]ny tailored tax of this sort creates an increased danger of error in apportionment, *of discrimination against interstate commerce*, and of a lack of relationship to the services provided by the State." 430 U.S. at 288 n.15 (emphasis added). Given those dangers, the Court concluded, "[a] *tailored* tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden *effect* on interstate commerce." 430 U.S. at 288 n.15 (emphasis added).

B. If "careful scrutiny" is given to the Seabrook Tax, it is apparent that just such a singling out of interstate commerce, with discriminatory effects and a discriminatory purpose, has occurred in New Hampshire. The Nuclear Station Property Tax is a tax imposed on one facility, and only one facility: the Seabrook Nuclear Station. Moreover, at the time of enactment of the Seabrook Tax (and ever since), companies doing the bulk of their business outside of New Hampshire, including intervenors, have owned considerably more than a ma-

6 "Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, 'when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.' *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185, n.2 (1938); *see also Southern Pacific Co. v. Arizona*, 325 U.S. at 767-768, n.2." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

jority share of Seabrook.[7] *See also* Stip. ¶¶ 6.7-6.14. There are other facilities used to generate electricity within New Hampshire, but those facilities pay neither the Seabrook Tax nor any other statewide property tax.[8] And those facilities are owned overwhelmingly by companies that do the bulk of their business in-state (Stip. ¶¶ 6.15-6.19)—and that compete in the wholesale market with intervenors (*see* Stip. ¶ 5.1). Beyond question, then, the Seabrook Tax " 'is of such a character that its burden falls principally upon those without the state.' " *South-Central Timber*, 467 U.S. at 92 (quoting *Barnwell*, 303 U.S. at 185 n.2).

The fact that the Seabrook Tax falls largely on out-of-state interests is not happenstance, but, in fact, a primary reason for its enactment. Representative Hayes, the chairman of the legislative subcommittee that drafted the tax measure, stated in support of the tax: "It raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time.[9] Sixty-five per cent of this tax will be paid by out-of-state interests." Remarks of Rep. Robert Hayes, The N.H. House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. Rep. Hayes went on to point out that, taking into account the repeal of the franchise tax paid by local utilities, the entire net increase in taxes from the bill would be exported: "If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can

[7] The figure at the time of enactment was approximately 62%. Stip. ¶¶ 3.5-3.18. The acquisition of Public Service Company of New Hampshire (PSNH) by Northeast Utilities, and the transfer of its Seabrook interest to North Atlantic Energy Co., have raised that figure to close to 98%.

[8] Those facilities, as well as Seabrook, are subject to local property taxes. Stip. ¶ 3.3.

[9] The Act imposing the Seabrook Tax repealed the franchise tax on sales of electricity. *See* page 2, *supra*.

conclude that they are indeed are [sic] financing this increase in the utility taxes that we're going to pay." *Id.*

The discrimination against interstate commerce in electrictly thus not only is apparent from the inherent restriction of the Seabrook Tax to Seabrook, but is confirmed by the legislative history. A central concern of the New Hampshire legislature was to ensure that local interests would feel little or no effect from the tax package as a whole. Indeed, as Representative Hayes explained, the amount of the Seabrook Tax was deliberately set so that the excess of the new tax over the repealed Franchise Tax would largely be paid by out-of-state interests. Of course, if every State pursued such a course, the result would inevitably be an escalating series of retaliatory measures, with each State seeking to embrace for itself (in the words of Representative Hayes) "the New Hampshire tradition of finding some way for the other fellow to pay." N.H. Floor Debate, *supra*, at 25-26.

Although it is true that the Seabrook Tax is evenhanded in one sense—*i.e.*, that each owner pays tax at the same rate regardless of whether it serves interstate or intrastate commerce—the statute nonetheless works (as was intended) an overall discrimination against interstate commerce. It would plainly offend the Commerce Clause for a State to place two-thirds of its tax burden on interstate commerce by imposing a four percent tax on generating plants used for intrastate business and an eight percent tax on generating plants used for interstate business. Yet the statute at issue here, while admittedly less overt, has much the same effect. As this Court has pointed out, the fact that a State makes its discrimination more subtle, or less absolute, does not mean that it is free of constitutional restraints. *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 248 ("[t]he fact that [a] tax has the advantage of appearing nondiscriminatory . . . does not save it from invalidation") (internal quotes omitted). To impose unique burdens on a particular property owned largely by interstate businesses, rather than exclusively by interstate businesses, is less discriminatory, but it is discriminatory nonetheless. See *American Trucking Ass'ns v. Scheiner*, 483 U.S. at 286-87 (striking down discriminatory flat tax scheme even though some out-of-state companies fared better than some in-state companies under the scheme).

It is, in the end, the narrowness of the classification—one property—that makes the New Hampshire tax particularly subject to manipulation and, thus, particularly suspect as a constitutional matter. Unlike a broad-based tax, such as an income tax, that is applicable to a wide, largely indeterminate class of residents and non-residents alike, the Seabrook Tax focuses on one property and does so *because* that focus produces a special burden on out-of-state interests. When the actual purpose, and specific effect, of such a tax is to reach distinctively out-of-state commerce, the tax should be declared invalid.

C. The Special Master rejected this conclusion. Final Report 26 n.17. The Master cited two cases and gave one reason for his recommendation on this issue. But neither the cases nor the rationale is sufficient to validate the Seabrook Tax.

One of the authorities cited by the Special Master, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), sheds little light on the issue presented here. Not only did that case involve only the Equal Protection Clause, not the Commerce Clause, but the Court expressly declined to consider any claim of discrimination between in-state and out-of-state taxpayers, noting that the sole plaintiff lived *in-state* and thus could not assert any infringement of the right of interstate travel. Although the Court in *Nordlinger* did say that States have much leeway in classifying property for purposes of taxation, that uncontroversial principle provides only a starting point for the question here: whether, notwithstanding that principle, the Commerce Clause prevents States from subjecting interstate commerce to taxes that are discriminatory in purpose and effect.

The other case cited by the Special Master, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), is more relevant, but still ultimately beside the point. In *Commonwealth Edison* this Court upheld the Montana severance tax on coal against a Commerce Clause challenge based solely on the fact that most of the coal was shipped out of the State. Had New Hampshire simply levied a uniform tax on all electrical generating plants, and the electricity produced largely traveled out of state, its statute would have been the same as the Montana statute; but New Hampshire did not do so. Its statute—targeting the sole plant used primarily in interstate commerce—is thus more akin to a hypothetical Montana statute that singled out a particular coal mine, simply because the coal from that mine, unlike other coal, was sold in interstate commerce. That is very different from the statute actually before the Court in *Commonwealth Edison*, pursuant to which Montana had taxed *all* severance of coal and done so for a legitimate local reason—to compensate the State for diminution of an important natural resource—wholly independent of any purpose to discriminate against interstate commerce. Thus, *Commonwealth Edison* holds only that the mere fact that a tax falls predominantly on interstate commerce does not invalidate it. *Cf. Exxon Corp. v. Maryland*, 437 U.S. 117 (1978). That holding does not save a tax, like the Seabrook Tax, that deliberately singles out out-of-state interests for a special burden not imposed on comparable (and competing) in-state interests.[10]

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[10] This Court, in upholding property taxes as applied to interstate businesses, has repeatedly stressed that the taxes in such cases were equivalent to the property taxes imposed on intrastate businesses. *See, e.g., Cleveland C., C. & St. L. Ry. v. Backus*, 154 U.S. 439 (1894); *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688 (1895); J. Hellerstein & W. Hellerstein, *State and Local Taxation* 261-62 (5th ed. 1988).

Beyond precedent, the Special Master explained only: "It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants." Final Report 26 n.17. To the extent that this explanation rests on the notion that States are not always disabled from imposing taxes that fall more heavily on interstate than intrastate commerce, we agree: States clearly could impose additional tax burdens in order to compensate for some exceptional costs attributable to such activities, so that they are imposed not "because of" but "in spite of" their effects on interstate commerce. *Cf. Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). But, as explained, discriminatory *effects* trigger constitutional suspicion, and the inquiry must turn to the reasons for those effects. The statement of the Special Master, then, must mean that the constitutional challenge is properly rejected by presuming a "reasonable"—*i.e.*, a legitimate, nondiscriminatory—purpose for the Seabrook Tax. A mere presumption of that sort, however, will not suffice in the face of the compelling evidence that the Seabrook Tax was adopted precisely "because of" Seabrook's out-of-state ownership.

A closer look at the New Hampshire tax scheme makes clear that the Seabrook tax is not targeted to solve any unusual problem traceable to Seabrook: notwithstanding the recitations in its "Declaration of Purpose and Findings," Ch. 83-D:1, the Seabrook Tax is, on its face and in its actual operation, nothing more than a general revenue measure. Revenues from the tax, like revenues from most taxes, are collected and expended on an annual basis; the State does not accumulate the funds, segregate them, or apply them to any particular purpose. Nor is the amount of the tax—$22 million in the first year—tied in any way to some identified burden imposed by the Seabrook facility on the State of New Hampshire. This lack of correlation is underscored by the fact that much of the tax (roughly $8 million, *see* N.H. Floor Debate, at 25-26), far from being necessitated by added costs attributable to Seabrook, was raised merely to replace revenues lost by repeal of the Franchise Tax on local sales of electricity. And there is no basis for thinking, in the absence of evidence to the contrary, that the remaining revenues (roughly $14 million) are somehow linked to specific state expenditures resulting from operation of Seabrook. Rather, the tax is precisely what it seems to be: a measure designed to fund general state programs by singling out a facility primarily serving interstate commerce. As such, it violates the Commerce Clause.

II. THE SINGLING OUT OF SEABROOK FOR SPECIAL TAXATION VIOLATES FEDERAL LAW (15 U.S.C. § 391)

The principles just discussed apply with even greater force with respect to the unambiguous prohibitions of Section 391. That statute prohibits "discrimina[tion] against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity," and it classifies as discriminatory any tax that "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."[11] A tax purposely singling out a generating facility owned primarily by "out-of-state" interests falls comfortably within those terms.

What New Hampshire has done is to divide generating facilities into two categories. In the first category, it has placed those generating facilities primarily serving New Hampshire customers; it has subjected those facilities to local property taxes and not a state property tax. In the second category, New Hampshire has placed a single gen-

[11] The statute specifically deals with taxes "on or with respect to the generation or transmission of electricity." As the Special Master concluded, the Seabrook Tax readily comes within that description. Final Report 18-19.

erating facility primarily serving out-of-state customers; it has subjected that one facility to local property taxes *and* a state property tax. That difference in treatment necessarily means that, on the whole, electricity sold in the interstate market bears "a greater tax burden" than electricity sold within the State.

As with the analysis under the Commerce Clause (*see* page 13, *supra*), the fact that the categories are not absolute—*i.e.*, only intrastate electricity in the favored class and only interstate electricity in the disfavored class—does not mean that they are established on a nondiscriminatory basis. The language of Section 391 makes clear that the relevant inquiry is not limited to the face of the statute but must take into account the *effects* of the tax at issue. The issue is not whether the tax appears to be neutral but whether, below the surface, it "results, either directly or indirectly, in a greater tax burden" for electricity sold in interstate commerce. The Seabrook Tax, enacted with interstate producers and consumers in mind, imposes just such a burden.

Finally, the discrimination practiced by the Seabrook Tax cannot be justified simply by making vague references to concerns about nuclear power. In the first place, it is by no means clear that Section 391, as opposed to the Commerce Clause (*see* pages 14-15, *supra*), allows a State to defend its decision to place a greater tax burden on electricity sold in interstate commerce: the statute says that "[n]o state . . . may impose or assess" a discriminatory tax, not that a State may impose a discriminatory tax provided that it has a satisfactory explanation for doing so. But, in any case, the State has given no satisfactory explanation. The State did not identify particular problems caused by Seabrook, and then commit the $22 million raised by the Seabrook Tax to redress them; instead, it has simply collected and spent the revenues (including as much as $8 million to replace revenues from the repealed Franchise Tax) on general state programs.

This lack of connection between the tax and specific state burdens is even more striking when viewed in contrast to other state obligations imposed on Seabrook owners. For example, the State requires the owners to pay a nuclear decommissioning financing charge to the State, Ch. 162-F:14 *et seq.*, which is *not* mingled with general state revenues or expended for general state programs on a current basis. *See* Stip. ¶ 13.2. Furthermore, the owners must pay the cost of preparing, maintaining, and operating an emergency nuclear response program for the State. Ch. 107-B. If any justification for discrimination were allowed under Section 391, it is only that sort of specific, targeted financing measure that might pass muster. The Seabrook Tax is wholly different; it is a general revenue measure, nothing more.

CONCLUSION

The Court should enter judgment for intervenors and against the defendant on their claims under the Commerce Clause and Section 391.

Respectfully submitted,

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