No. 94, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

State of South Carolina,

Plaintiff,

vs.

Donald T. Regan, Secretary of the Treasury of the United States of America,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO NATIONAL GOVERNORS' ASSOCIATION'S MOTION TO INTERVENE AS PLAINTIFF

T. TRAVIS MEDLOCK
Attorney General

GRADY L. PATTERSON, III
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211

(803) 758-3970

SINKLER GIBBS & SIMONS
Huger Sinkler
Karen LeCraft Henderson*

Post Office Box 11458
Columbia, SC 29211

(803) 765-1885

ATTORNEYS for Plaintiff.

*Counsel of Record.

TABLE OF AUTHORITIES

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This brief responds to the motion made on behalf of the National Governors' Association ("NGA") to intervene as a party plaintiff pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure. The plaintiff State of South Carolina opposes the motion on the grounds that follow.

1. The NGA does not present a claim that has not been made by South Carolina and, accordingly, no aspect of the action will be illuminated by the NGA's participation as an additional party plaintiff rather than as an amicus curiae.

The NGA contends that it contests "the constitutionality of the same federal statute as South Carolina, on the same constitutional grounds," and that the States whose governors it represents "will suffer the same injury...as South Carolina" if Section 310(b)(1) of TEFRA is upheld (Mot. 16). Assuming arguendo that the NGA's contention is correct, South Carolina submits that the NGA can instead assume the role of an amicus curiae, as have numerous other organizations to date, [1/] with as much effectiveness as an additional party plaintiff and with more convenience to the Court and the parties.

[1/] The National Association of Counties, the National Conference of State Legislatures, the United States Conference of Mayors, the Council of State Governments, the Municipal Finance Officers Association and the National Institute of Municipal Law Officers have filed amici curiae briefs.

First, fully half of the States whose governors the NGA represents have already formally appeared in the action as amici (Amicus Curiae Br. of Texas, Alaska, Arizona, Georgia, Indiana, Iowa, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin and Wyoming; Amicus Curiae Br. of, inter alia, West Virginia). These twenty-five States, represented by their attorneys general pursuant to Rule 36.4 of the Court, have clearly decided, then, that their interests can best be served by assisting as amici. In addition, the City of Baltimore, the Treasurer of Florida and the New York State Comptroller have appeared as amici.

Second, notwithstanding the NGA's assertions to the contrary (Mot. 16, 18), South Carolina's evidentiary showing will encompass, as it has already,[2/] the national

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[2/] Mot. for Prelim. Inj., Affidavits and Memo. 3-31 (dated May 9, 1983).

impact of the registration requirement of Section 310(b)(1) as well as the effect on the entire federal system of the loss of tax-exempt status of general obligation bonds. In its effort to request the Court to take original jurisdiction, South Carolina was effectively assisted by the amici States and the other amici through briefs and supporting affidavits and fully intends to seek and obtain the continued active assistance of its amici in developing the factual record before the Special Master. South Carolina would warmly welcome the NGA as an additional amicus and appreciate its assistance in making the States' evidentiary showing.

Third, as the Court noted in Allen Calculators v. National Cash Register Co., 322 U.S. 137, 141-142 (1944), in affirming the lower court's denial of the permissive intervention sought by a corporation in the same business as the original party:

> It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim

> or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court.

See also, British Airways Board v. Port Authority of New York and New Jersey, 71 F.R.D. 583 (S.D.N.Y. 1976) (town governments, inter alia, were not permitted to intervene as defendants where it appeared they would present no new questions in action by foreign airlines to challenge local ban on operation of supersonic passenger aircraft but were invited to participate by submitting briefs as amicus curiae if desired).

2. The NGA does not present a "claim" possessing a question of law or fact in common with the main action within the meaning of Rule 24(b)(2).

As its Complaint in Intervention alleges (Mot. 4), the NGA is an association whose membership includes the chief elected officials of the fifty States and of two Commonwealths and three Territories. But the NGA is not an issuer of general obligation bonds nor are its members. To be sure, as the

NGA observes (id. at 12, n. 2), the governors of some States have a decision-making role in the issuance of bonds but so too do other State officials. [3/] None of these officials, however, constitutes an issuer of registration-required obligations subject to Section 310(b)(1) of TEFRA. Moreover, if the challenged provision is invalidated and its enforcement enjoined, that relief will be available to the issuer States themselves as opposed to the chief elected officials thereof. Although the NGA submits that, "because there is no organization of States per se,... the task of advocating State interests [is left] to organizations of elected officials such as the NGA" (Mot. 14), the individual States themselves can advocate

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[3/] For example, in South Carolina, the State Treasurer approves the financial institution with which an escrow account is established and maintained in connection with the defeasance of bonds issued by any political subdivision of the State. §11-14-110, CODE OF LAWS OF SOUTH CAROLINA, 1976 (Cum. Supp.).

their interests as they have done here by bringing the action in the case of South Carolina and by participating as amici in the case of the other twenty-five States. 4/

3. The intervention of the NGA as a party plaintiff could unduly delay the adjudication of the original parties' rights.

While the NGA correctly notes that no evidentiary proceedings have been scheduled (Mot. 17-18), a schedule has been agreed to whereby South Carolina's proposed issues and witness list are due on July 31, 1984, and the defendant Secretary's proposed issues and witness list are due on August 31, 1984. If the NGA's intervention is permitted, responsive pleadings to its complaint in intervention will first have to be filed and

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4/ In this respect, the NGA's reliance on the Court's decision in Maryland v. Louisiana, 451 U.S. 725 (1980), allowing the State of New Jersey to intervene because its claim was identical to that of the original plaintiff States is misplaced. While the claim of a sister State would be identical to South Carolina's claim, the NGA's claim is not.

then the current schedule will perforce be altered in order to allow for the intervenor. Moreover, once the evidentiary proceedings begin, the NGA's evidence will be "merely cumulative, and in that respect an unwarranted delay will occur." Environmental Defense Fund, Inc. v. Costle, 79 F.R.D. 235, 244 (D.D.C. 1978) (permissive intervention by political subdivisions of States already parties denied); cf., U.S. Postal Service v. Brennan, 579 F. 2d 188, 191-192 (2nd Cir. 1978); (denial of permissive intervention by postal employees' union affirmed with criteria to be used in determining permissive intervention set forth).

South Carolina also questions the timeliness of the NGA's motion inasmuch as this action was begun over a year ago and the Court granted the motion for leave to file the complaint over four months ago. In NAACP v. New York, 413 U.S. 345, 366 (1973), the Court, noting that "[t]imeliness is to be determined from all the circumstances," affirmed the

denial of the NAACP's motion to intervene in a declaratory judgment action by the State of New York seeking an exemption from the applicability of the Voting Rights Act. The Court pointed out that the NAACP had been aware of the suit for some time (three months) without acting to protect its interests and that there were no unusual circumstances warranting intervention.

Perhaps the most eloquent and oft-quoted observation on the reason that permissive intervention should not be granted where it would result in merely accumulating evidence and thus cause undue delay is that found in Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F Supp. 972, 973 (D. Mass. 1943):

> It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like

> which tend to make the proceedings a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

In conclusion, South Carolina would encourage the NGA's active participation and support as an amicus curiae in this action. For the above-stated reasons, however, South Carolina opposes the NGA's motion to intervene as a party plaintiff.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

GRADY L. PATTERSON, III
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 758-3970

SINKLER GIBBS & SIMONS
Huger Sinkler
Karen LeCraft Henderson*

Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

ATTORNEYS for Plaintiff

*Counsel of Record.