No. 94, Original

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF SOUTH CAROLINA, PLAINTIFF

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

BRIEF FOR THE DEFENDANT IN OPPOSITION TO MOTION TO INTERVENE

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The Solicitor General, on behalf of the Secretary of the Treasury, submits this brief in opposition to the motion of the National Governors' Association for leave to intervene as a plaintiff in this case.

STATEMENT

On February 9, 1983, the State of South Carolina requested leave to file a complaint invoking this Court's original jurisdiction and challenging the constitutionality of Section 310(b)(1) of the Tax Equity

and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 596. On February 22, 1984, this Court granted leave to file. On April 23, 1984, the Court appointed a Special Master with authority to receive additional pleadings and to supervise development of the factual record.

On May 17, 1984, the Special Master held a status conference at which the parties agreed on a schedule of further proceedings. It was agreed that the Secretary of the Treasury would file an answer on June 1, 1984, and the answer was filed on that date. It was agreed that each party would shortly submit a detailed statement of its position, an outline of its proposed proof, and an identification of its proposed witnesses; South Carolina's submission is currently due on July 31, 1984, and the Secretary's on August 31, 1984. It was also agreed that the parties would oppose intervention by other entities for the purpose of offering evidence and examining witnesses, but that the Master might permit the filing of briefs amicus curiae by such entities after the factual record had been established.

On June 22, 1984, the National Governors' Association (NGA) moved for leave to intervene as a plaintiff. The NGA is an association whose members include the chief executive officers of the fifty States, two Commonwealths, and three Territories (NGA Br. 4). The NGA seeks to intervene to "represent the collective interests of the States and to assist in the development of the complete factual record" (*id.* at 9-10). The Association acknowledges that it intends to challenge TEFRA's required-registration provision "on the same constitutional grounds" as South Carolina (*id.* 15-16), acknowledges that its claims are substantially identical to South Carolina's

(*ibid.*), and notes its expectation that South Carolina "will present convincing evidence of the adverse effects" of the challenged provisions upon South Carolina's finances (*id.* at 18). The NGA believes, however, that it, unlike South Carolina, is "in a position to speak for all of the States" and is "capable of providing a factual overview of the national effect" of the challenged statute (*ibid.*).

ARGUMENT

At the outset, it should be stressed that intervention in original cases in this Court is never a matter of right and, like the exercise of that unusual jurisdiction itself, is granted only "sparingly." *Utah* v. *United States*, 394 U.S. 89, 95 (1969). See *Maryland* v. *Louisiana*, 451 U.S. 725, 739 (1981); *Arizona* v. *New Mexico*, 425 U.S. 794, 796 (1976); *United States* v. *Nevada*, 412 U.S. 534, 538 (1973); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93-94 (1972); *Kentucky* v. *Indiana*, 281 U.S. 163, 173 (1930). The Court with some frequency has permitted intervention by other sovereign States (*e.g.*, *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21; *Texas* v. *New Jersey*, 379 U.S. 674, 677 & n.6 (1965); *United States* v. *Louisiana*, 354 U.S. 515, 515-516 (1957); *New Jersey* v. *New York*, 345 U.S. 369, 371 (1953)) and by Indian tribes (*e.g.*, *Arizona* v. *California*, No. 8, Original (Mar. 30, 1983), slip op. 8). On the other hand, "[p]rivate individuals and organizations ordinarily 'have no right to intervene in an original action in this Court.'" R. Stern & E. Gressman, *Supreme Court Practice* 619 (5th ed. 1978) (quoting *United States* v. *Nevada*, 412 U.S. at 538). And when the Court has occasionally permitted nonsovereigns to intervene in original suits, it has been

because they "ha[d] a direct stake in [the] controversy." *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (private corporations); *South Dakota* v. *Nebraska*, 434 U.S. 948 (1977) (private individuals); *Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (municipal corporation); *Oklahoma* v. *Texas*, 253 U.S. 465, 470-471 (1920) (private individuals).

This Court's Rules provide (Rule 9.2) that "the Federal Rules of Civil Procedure, * * * where their application is appropriate, may be taken as a guide to procedure in original actions." The Court has applied the principles of the Federal Rules in resolving motions to intervene (*e.g.*, *Arizona* v. *California*, slip op. 8; *Utah* v. *United States*, 394 U.S. at 95; *United States* v. *Louisiana*, 354 U.S. at 515-516) and in other contexts (*e.g.*, *Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386-392 (1980) (motion to dismiss for failure to join an indispensable party)). At the same time, the Court has emphasized that "the Federal Rules are only a guide to procedures in an original action" and that the appropriateness of their application may be affected by considerations arising from the unique nature of the Court's original jurisdiction. *Arizona* v. *California*, slip op. 8; *Utah* v. *United States*, 394 U.S. at 95.

We believe that the NGA's motion to intervene should be denied. This conclusion is dictated by principles developed under the Federal Rules, by principles evolved in this Court's original cases, and by fundamental principles of federal jurisdiction.

1. Intervention in the federal district courts is governed by Rule 24 of the Federal Rules of Civil Procedure. The NGA bases its motion to intervene (NGA Br. 15-17) on Rule 24(b)(2), which concerns "[p]ermissive [i]ntervention." That Rule provides

that "[u]pon timely application anyone may be permitted to intervene in an action * * * when an applicant's claim or defense and the main action have a question of law or fact in common." The Rule makes clear that intervention under it is "discretion[ary]" and directs the court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

It is of course clear that the NGA's claims "have a question of law or fact in common" with South Carolina's claims. Indeed, those claims are identical. But that does not end the inquiry, since permissive intervention under Rule 24(b) "is subject to existing federal jurisdictional limitations." 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.18[1], at 24-200 (2d ed. 1982). "The prevailing view of the federal courts is that the claims of permissive Rule 24(b) intervenors must be supported by independent jurisdictional grounds." *Blake* v. *Pallan*, 554 F.2d 947, 955-956 (9th Cir. 1977) (citing cases) (denying motion of California Commissioner of Corporations to intervene as plaintiff in federal securities action). Accord, *e.g.*, *Moosehead Sanitary District* v. *S.G. Phillips Corp.*, 610 F.2d 49, 52 n.5 (1st Cir. 1979); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1917, at 587, 590-595 (1972) ("[I]ntervention * * * must be denied, though all the requirements of Rule 24 are met, if the federal court cannot take jurisdiction with regard to the intervenor."); 3B J. Moore & J. Kennedy, *supra*, ¶ 24.18[1], at 24-199. The reason for this requirement is that "it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements" in the absence of con-

gressional action (*id.* at 24-200). Accord, 7A C. Wright & A. Miller, *supra*, § 1917, at 596. See Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts.").

The NGA cannot demonstrate independent jurisdictional grounds sufficient to support permissive intervention under Rule 24(b)(2). This Court's original jurisdiction extends to actions "in which a State shall be Party." U.S. Const. Art. III, § 2, cl. 2. The NGA, however, is not "a State," but an incorporated association (NGA Br. 4, 13). It is not even an association of States, but an association of chief executives elected, not only by States, but by Commonwealths and Territories (*id.* at 4, 13-14). The NGA alleges that its dues are paid by States (*id.* at 14 n.4), that its "purpose is to promote the interests of the States" (*id.* at 14), and that it is "much more than a simple association of governors" (*ibid.*). But that does not make the NGA "a State." And even if one were to accept the NGA's assertion that it is "an instrumentality of the States" (Br. 15 n.5)—a rather strained use of the term in our view—that would not help the NGA's position. In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court rejected the argument that Illinois' suit created a "controvers[y] between two * * * States" (28 U.S.C. 1251(a)) on the theory that the defendant cities were "instrumentalities of Wisconsin," holding that the "the term 'States' * * * should not be read to include their political subdivisions" for purposes of this Court's original jurisdiction (406 U.S. at 94, 98). Indeed, the Court held as early as *Texas* v. *White*, 74 U.S. (7 Wall.) 700, 719 (1869), that it

lacks original jurisdiction "of suits [brought] by any other political communities than [sovereign] States." [1]

It is of course true, as noted above, that the Federal Rules are only "a guide" to procedure in original cases. The requirement that permissive intervention be supported by an independent jurisdictional ground, however, not only represents a construction of Rule 24(b), but reflects basic considerations of federal jurisdiction. See 7A C. Wright & A. Miller, *supra*, § 1917, at 587. Application of that principle, which guards against an "unjustifiable expansion of federal jurisdiction" (*id.* at 596), is fully appropriate here, for "[i]t has long been this Court's philosophy that '[its] original jurisdiction should be invoked sparingly.' " *Illinois* v. *City of Milwaukee*, 406 U.S. at 93 (quoting *Utah* v. *United States*, 394 U.S. at 95).

In sum, because the NGA is not "a State," it could have no independent basis for invoking this Court's

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[1] The NGA argues (Br. 15 n.5, quoting *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975)) that it has standing to sue because " 'an association may have standing solely as the representative of its members.' " This argument misses the point. The fact that the NGA might have standing to sue on behalf of its members in federal district court does not mean that it is "a State" capable of invoking the original jurisdiction of this Court. And even if one were to look through the NGA to its members, its members are not States either, but individuals elected by States, Commonwealths, and Territories. This Court made clear in *Texas* v. *White*, 74 U.S. (7 Wall.) 700, 729-732 (1869), that an original action may be maintained on behalf of a State only if authorized by competent executive authority. The NGA's brief does not reveal whether its governor members were unanimous in authorizing intervention on their behalf or, if so, whether each governor (rather than, say, an independently-elected attorney general) was competent to authorize such action on behalf of his State.

original jurisdiction in a suit against the Secretary of the Treasury. Because its motion to intervene is thus not supported by independent jurisdictional grounds, that motion cannot be justified by reference to Fed. R. Civ. P. 24(b)(2). Accord, Interim Report of the Special Master on Intervention at 12-13, *United States* v. *Alaska*, No. 84, Original (Jan. 10, 1984) (concluding that the absence of an independent jurisdictional ground precluded permissive intervention by an Indian tribe).

2. The NGA suggests (Br. 16-17), although it does not actually contend, that its intervention could also be justified under Rule 24(a)(2), which governs "[i]ntervention of [r]ight."[2] That Rule provides that "[u]pon timely application anyone shall be permitted to intervene in an action * * * when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to

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[2] The lower courts have generally held that an independent jurisdictional ground is not required for "intervention of right." See, *e.g.*, 7A C. Wright & A. Miller, *supra*, § 1917, at 597. Where this Court has permitted non-sovereigns to intervene in previous original cases, the intervenors' claims justified intervention of right, since they alleged a direct interest in "the property or transaction which [was] the subject of the action" (Fed. R. Civ. P. 24(a)(2)). See, *e.g.*, *Arizona* v. *California*, slip op. 8 (permitting intervention by Indian tribes who owned disputed water rights); *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (permitting intervention by pipeline companies that were required to pay disputed tax); *Texas* v. *Louisiana*, 426 U.S. at 466 (permitting intervention by city that had interest in disputed island claims); *Oklahoma* v. *Texas*, 253 U.S. at 470-471 (permitting intervention by landowners who claimed interest in disputed realty).

protect that interest, unless the applicant's interest is adequately represented by existing parties." This suggestion is meritless.

To begin with, the NGA does not have "an interest relating to the property or transaction which is the subject of [this] action." The subject transaction is the issuance of state bonds. The NGA does not issue state bonds, nor do its member governors issue (or have unilateral power to authorize issuance of) state bonds.

Even if the NGA could demonstrate a sufficiently direct interest, moreover, it must show that its interest is not "adequately represented by existing parties." Although the burden of proving inadequate representation "should be treated as minimal" (*Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)), it is nevertheless a burden that a would-be intervenor must bear. *E.g.*, *National Farm Lines* v. *ICC*, 564 F.2d 381, 383 (10th Cir. 1977). The courts have consistently held that where (as here) the would-be intervenor "has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the [intervenor] must demonstrate adversity of interest, collusion, or nonfeasance." *Virginia* v. *Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). Accord, *e.g.*, *Hoots* v. *Pennsylvania*, 672 F.2d 1133, 1135-1136 (3d Cir. 1982); *Stadin* v. *Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962) (Blackmun, J.). The NGA has not alleged any adversity of interest between itself and South Carolina; indeed, it contends that their interests are identical. Nor has it alleged either of the other two factors. Even in district court proceedings, these considerations would warrant denial of intervention; all the more should this be so in a case invoking the original jurisdic-

tion of this Court, which must be confined to truly exceptional circumstances. See, *e.g.*, *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972); *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 499 (1971).

3. Besides being questionable under the Federal Rules, the NGA's proposed intervention is unsupportable in light of the special considerations that flow from this Court's original jurisdiction. This Court's cases indicate that a would-be intervenor who has no independent claim to invoke that jurisdiction must demonstrate a "compelling reason" for his participation. *Utah* v. *United States*, 394 U.S. at 95. The NGA has made no such showing.

The NGA's principal contention is that its participation will help develop the record by "providing a factual overview of the national effect" of the challenged statutory provisions (Br. 18). Although this contention has a patina of plausibility, it does not survive closer analysis. The only facts conceivably relevant (but see *South Carolina* v. *Regan*, No. 94, Original (Feb. 22, 1984) (Stevens, J., concurring in part and dissenting in part)) to decision of this case concern the increased costs—both transaction costs and interest-rate costs—allegedly imposed by TEFRA's requirement that States issue bonds in registered rather than in bearer form. As the NGA notes (Br. 11), such increased costs might flow from the added expense of paying transfer agents, from higher commissions paid to underwriters, or from diminished acceptance of the bonds in the marketplace. As the United States contends (Answer 2-3), such costs (if any) might be offset by savings from lower safekeeping, shipping, and insurance charges, from elimination of the coupon-clipping process, and from

adoption of more efficient systems made possible by registration.

The governors of the fifty States are not the exclusive, and certainly not the best, repositories of these facts. It is the underwriters, investment bankers, brokers, and dealers in the major financial centers—particularly on Wall Street—who are most familiar with the costs and benefits of required registration. It is they who bought and sold bearer bonds before, and it is they who buy and sell registered bonds since, TEFRA's enactment. South Carolina, obviously, is fully capable of drawing upon these individuals in presenting its factual case. And to the extent that the finance officers of the fifty States have useful facts at their disposal, South Carolina is fully capable of drawing upon them as well, with or without the NGA's help.

We do not mean to suggest, of course, that the question presented here is unimportant to the NGA and its members. Our position is simply that the Association should not be permitted to intervene simply to second arguments made by South Carolina. "[I]t is generally bad policy to encumber any case with unnecessary intervenors" (*New Jersey* v. *New York*, 345 U.S. at 375 (Jackson, J., dissenting)), since "[a]dditional parties always take additional time" (*Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)). Where a would-be intervenor "presents no new questions" and "merely underlines issues of law already raised by the primary parties," he "can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention" (*id.* at 973). It was this course that the Court followed in *South Carolina* v.

Katzenbach, 382 U.S. 898 (1965), 383 U.S. 301 (1966), an original case involving a constitutional challenge to the Voting Rights Act. "Recognizing that the questions presented were of urgent concern to the entire country, [the Court] invited all of the States to participate in the proceeding as friends of the Court" (383 U.S. at 307). Twenty-four States have already participated as friends of the Court in this case.

4. Finally, we share here the concern, expressed by the Court on previous occasions, that intervention by the NGA could provide a logical precedent for intervention by a host of other interested parties, "greatly increasing the complexity of this litigation." *Utah* v. *United States*, 394 U.S. at 95-96. See *New Jersey* v. *New York*, 345 U.S. at 373. As the NGA notes (Br. 11, 13), most of the tax-exempt bonds subject to TEFRA's registration requirements are issued, not by the States, but by "counties, municipalities, school districts, public authorities, and other political subdivisions" of the States. Briefs amicus curiae have already been filed by numerous associations of state and local officials, including the National Institute of Municipal Law Officers, the National Association of Counties, the National Conference of State Legislatures, the United States Conference of Mayors, the Council of State Governments, and the Municipal Finance Officers Association. These associations, no less than the National Governors' Association, seek to promote the interests of the States, and they, no less than it, have an indirect interest in the outcome. If the NGA's interest warrants its intervention, it would be hard to articulate a principled basis for denying intervention by those other groups. But "[t]o permit a multitude of such interventions [would] result in accumulating

proofs and arguments without assisting the [C]ourt." *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 141-142 (1944).

CONCLUSION

The motion to intervene should be denied.

Respectfully submitted.

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