Office-Supreme Court, U.S.
FILED
JUL 6 1984
ALEXANDER L. STEVAS,
CLERK

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,
Defendant.

ON BILL OF COMPLAINT

REPLY BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION IN SUPPORT OF MOTION TO INTERVENE

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TABLE OF AUTHORITIES

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REPLY BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION IN SUPPORT OF MOTION TO INTERVENE

The Secretary of the Treasury concedes that States have intervened in original cases "with some frequency" (Sec. Br. 3), but argues that an association of State governors cannot intervene to protect the States' collective interests. South Carolina acknowledges the importance of this case to the States, yet contends that the other States must voice their collective interests only through South Carolina. At bottom, the original parties argue that this action must proceed with a single State deciding what evidence shall be presented, which factual arguments shall be made, and what legal theories this constitutional challenge shall be based upon. The power the original parties would arrogate to South Carolina, however, is inappropriate in view of the gravity of the State interests involved in this suit. "Unquestionably, the manner in which a State may exercise its borrowing power is a question that is of vital importance to all fifty

States." *South Carolina v. Regan*, No. 94, Orig., slip op. 13 (Feb. 22, 1984).

At an earlier stage of this litigation, the Court recognized the importance of this case to the States, noting that 23 States had joined in an *amici curiae* brief urging the Court to exercise its original jurisdiction. *See South Carolina v. Regan, supra*, slip op. 13. The motion of the National Governors' Association ("NGA") for leave to intervene represents the considered decision of the chief executives of the fifty States that the interests of the States must be heard in this case. The NGA is not a frequent litigant in this Court and did not make this decision lightly. Indeed, the last case in which the NGA appeared as a party before the Court to speak on behalf of the interests of the States was *National League of Cities v. Usery.*

A. The Secretary does not seriously dispute the Court's observation that "[i]t is not unusual to permit intervention of private parties in original actions." *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981). Indeed, the Secretary acknowledges that Federal Rule of Civil Procedure 24 is simply a guide to the Court's discretion in determining whether to grant leave to intervene, and that this Court's exercise of its original jurisdiction is informed by an array of legal and prudential considerations that extend beyond Rule 24 itself. *See* Sec. Br. 4, 7; *see also* Supreme Court Rule 9.2; *Arizona v. California*, No. 8, Orig., slip op. 8 (March 30, 1983). Relying on a narrow interpretation of Rule 24, however, the Secretary argues that the NGA cannot intervene because, not being a "State," it could not have brought this action in the first instance.[1]

[1] The Secretary does not deny that the NGA seeks to intervene in its capacity as a representative of the States, nor that the representation of the many interests of the States by a single party is procedurally efficient. Instead, likening the NGA to a city, the Secretary argues that a non-State cannot appear as a party in an origi-

The Secretary does not, and cannot, cite any decisions of this Court to support his theory. The lower court decisions the Secretary relies upon are divided at best,[2] but do not support his position in any event. The Secretary contends that it would unduly expand federal jurisdiction to permit the NGA to intervene in this case. *See* Sec. Br. 5-8. Yet the Secretary cannot deny that the NGA could bring its claims directly against the Secretary under 28 U.S.C. § 2201 in a separate action in district court. *See, e.g., National League of Cities v. Usery*, 426 U.S. 833, 836 & n.7 (1976) (NGA brought Tenth Amendment challenge to 1974 Fair Labor Standards Act amendments); *see also South Carolina v. Regan, supra*, slip op. 1 (O'Connor, J., concurring) (Tax Anti-Injunction Act does not bar suit for declaratory relief by non-taxpayer). The question the NGA's motion raises, therefore, is not whether its claims should be heard in the federal courts; it is only whether the NGA's claims should be consolidated with South Carolina's in this suit, or whether they should be heard in a second, district court proceeding.[3] And, in

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nal case. *See* Sec. Br. 6 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)). The Secretary's analogy fails, of course, because in contrast to being a political subdivision of a State, the NGA directly represents the interests of all fifty States. Indeed, the NGA's role as a surrogate of the States is proven by the letters sent to the NGA by other organizations of State and local governments and elected officials endorsing the NGA's motion to intervene. These letters accompany this brief as Appendix A.

[2] *Compare Usery v. Brandel*, 87 F.R.D. 670, 681 (W.D. Mich. 1980); *TPI Corp. v. Merchandise Mart of South Carolina, Inc.*, 61 F.R.D. 684, 690 (D.S.C. 1974); *United States v. Local 638, Enterprise Association of Steam, Etc., Pipefitters*, 347 F. Supp. 164, 168 (S.D.N.Y. 1972); *and Pace v. General Electric Co.*, 55 F.R.D. 215, 217 (W.D. Pa. 1972) *with Blake v. Pallan*, 554 F.2d 947, 955-56 (9th Cir. 1977) *and Moosehead Sanitary District v. S.G. Phillips Corp.*, 610 F.2d 49, 52 n.5 (1st Cir. 1979). *See also Wichita Railroad & Light Co. v. Public Utilities Comm'n*, 260 U.S. 48, 53-54 (1922).

[3] The authorities the Secretary relies upon are inapposite since they involve only the question whether a claim cognizable in state

any event, the intervention of the NGA here would not expand federal jurisdiction.

Interests in the efficient resolution of controversies clearly support the NGA's intervention. The Court has observed that South Carolina has raised issues "of vital importance to all fifty States" (*South Carolina v. Regan, supra*, slip op. 13), yet at present the Court and the Special Master will hear the evidence of only a single State. The intervention of the NGA in this action, however, would assure that the interests of all fifty States are represented without expanding this case "to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. 369, 373 (1953). Interests in judicial economy also are served by the NGA's intervention. Because the NGA otherwise would have the right to proceed in district court, its intervention here eliminates the possibility of duplicative litigation and waste of judicial resources.[4]

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court should be heard in federal court. *See Moosehead Sanitary District v. S.G. Phillips Corp., supra*, 610 F.2d at 52 n.5 (State of Maine denied leave to intervene where there was no federal question or diversity of citizenship); *Blake v. Pallan, supra*, 554 F.2d at 955-56 (California Corporations Commissioner, possessing no federal claims, may not intervene as pendent party to original plaintiff's state claims, nor assert his own non-federal claims). *See also Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975) (leave to intervene denied where intervenors' claims "could not have been asserted in the federal court in the absence of the main action"); *Beach v. KDI Corp.*, 490 F.2d 1312, 1319-20 (3d Cir. 1974) (intervention denied for counterclaim for money damages where there was no diversity jurisdiction); *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 542 (8th Cir. 1970) (intervention denied in diversity action where intervenor did not allege jurisdictional amount).

[4] *See South Carolina v. Regan, supra*, slip op. 3 (Blackmun, J., concurring) ("Exercise of our original jurisdiction is discretionary and, though the Court has exercised it sparingly, we are not prohibited from doing so by the fact that the original party may have an alternative forum.").

The wooden construction of Rule 24 the Secretary urges is inconsistent with the flexibility the Court traditionally has shown toward cases brought by the States in the original jurisdiction of the Court. In contrast to actions between private parties, cases within the Court's original jurisdiction implicate important State interests that are not protected elsewhere in the Constitution and deserve the Court's special attention.[5] *See South Carolina v. Regan, supra,* slip op. 13-14 (O'Connor, J., concurring); *California v. Arizona,* 440 U.S. 59, 65-66 (1979); *Georgia v. Pennsylvania Railroad,* 324 U.S. 439, 450 (1945);

[5] The Secretary attempts to distinguish the Court's decisions allowing private parties to intervene in original cases on the ground that those decisions involved parties who could have intervened as of right under Rule 24(a). However, the cases do not fit into the Secretary's construct. As a threshold matter, there is no evidence that the intervenors in those cases proceeded under Rule 24(a). Moreover, the decisions defy neat categorization into "permissive intervention" and intervention "of right" precisely because the Court's "own rules make clear that the Federal Rules are only a guide to procedures in an original action." *Arizona v. California, supra,* slip op. 8. In *Maryland v. Louisiana,* 451 U.S. 725 (1981), the intervening pipeline companies contesting the Louisiana tax did not shoulder the economic burden of the tax themselves, but simply passed along the higher costs (with FERC approval) to consumers. The tax "while imposed on the pipeline companies, [was] clearly intended to be passed on to the ultimate consumer." *Id.,* at 736. The pipeline companies' intervention, therefore, is appropriately viewed as permissive. On the other hand, in *Utah v. United States,* 394 U.S. 89 (1969), Morton Salt attempted to intervene in an original action to protect its property interest in the land that was the subject of the dispute, an almost classic instance of intervention of right. Nonetheless, Morton was denied leave to intervene on the grounds that the original parties, by stipulation, had so narrowed the issues in the case that Morton's intervention was unnecessary. *See* 394 U.S. at 92. Under the Secretary's formulation, Morton's motion to intervene would have been one which the Court had no discretion to deny. *See* Fed. R. Civ. P. 24(a) (intervention of right "shall be permitted"). In commenting upon Morton's motion, however, the Court noted only that the motion would have had a "substantial basis" absent the stipulation. 394 U.S. at 92.

Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); *Ames v. Kansas*, 111 U.S. 449, 464-65 (1884).

B. South Carolina and the Secretary contend that South Carolina alone will be able to develop a complete factual record, but neither party explains how South Carolina plans to compile evidence of Section 310(b)(1)'s effect upon all fifty States.[6] South Carolina bases its opposition to the NGA's motion on the bald assertion that it intends to make such a showing. Br. 3-4. Beyond that, South Carolina argues simply that the NGA, if it wishes to assist in developing the record, should do so only as an *amicus curiae*. The traditional role of an *amicus curiae*, however, does not include participation in evidentiary proceedings. *See, e.g., Allen v. County School Board of Prince Edward County*, 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961). Where, as here, the Court has recognized the importance of a well-developed factual record by appointing a Special Master to conduct evidentiary proceedings, it is clear that the limited participation available to an *amicus curiae* could not possibly give the States an adequate voice in the case. Moreover, even if the NGA were to confine its efforts to assisting South Carolina, the ultimate decisions as to the evidence to be presented, the factual arguments to be made, and the legal basis of this

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[6] We understand that South Carolina has attempted to gather information about the States' experience under Section 310(b)(1) by sending letters directly to the States and by placing notices in publications sent to State government officials.

The Secretary believes (Sec. Br. 10-11) that direct evidence of the impact of Section 310(b)(1) upon the States' internal deliberations is unnecessary to this Tenth Amendment challenge, counseling instead that the evidentiary record could be based upon the testimony of the "underwriters, investment bankers, brokers, and dealers in the major financial centers." The Secretary does not explain, though, how these financial institutions will illuminate the record on the effect Section 310(b)(1) has had upon the decision-making processes of State government. *See National League of Cities v. Usery, supra*, 426 U.S. at 849, 851.

challenge ultimately would lie with South Carolina alone. In the event of a conflict between the NGA and South Carolina, the collective interests of the States would be subordinated to those of South Carolina. The record developed before the Special Master would neither represent the interests of the States as a whole nor contain the full range of evidence essential to a complete review of the constitutionality of Section 310(b)(1). South Carolina's own interests would dominate the record despite "the 'serious magnitude' of the federalism concerns at issue." *South Carolina v. Regan, supra,* slip op. 18 (O'Connor, J., concurring).

Nor does South Carolina's approach to this case adequately represent the interests of all fifty States. South Carolina states in its brief that its evidentiary case will be limited to showing the effects of a loss of tax-exempt status upon the States' issuance of general obligation bonds. *See* Br. 4. However, the constitutional questions raised by Section 310(b)(1) encompass much more than general obligation bonds alone. Section 310(b)(1) amended Section 103 of the Internal Revenue Code in a manner that applies to all types of tax-exempt bonds, including revenue bonds and industrial development bonds. Indeed, according to one source, in 1982 only 28 percent of the tax-exempt bonds issued by States and their political subdivisions were in general obligation form. *See* Public Securities Association, *1982 Statistical Yearbook of Municipal Finance* 14. The remaining $55.2 billion of tax-exempt bonds issued in 1982 consisted of revenue bonds, industrial development bonds, and other types of obligations. In terms of economic significance, consequently, general obligation bonds are only one part of the broader array of tax-exempt bonds. However, South Carolina has expressed no intention to pursue this aspect of the case, although it is of enormous importance to the States.

C.1. There is little risk that the NGA's intervention would precipitate a host of similar motions from other

associations of State or local governments or officials. To date, the NGA has received letters from, or has spoken with, most of the organizations that represent State and local governments and government officials. Several of these groups participated as *amici curiae* at an earlier stage of this case; however, to our knowledge, none now intends to intervene.[7] Indeed, the NGA's motion to intervene has been welcomed by these groups, many of whom have offered their assistance.

2. The original parties argue that the intervention of the NGA would delay adjudication of this case because the Special Master has set July 31, 1984, as the date upon which South Carolina will be required to submit its list of witnesses and proposed issues. The NGA is mindful of this schedule and of the Special Master's intention to expedite evidentiary proceedings. If permitted to intervene, the NGA is prepared to adhere to any schedule set by the Special Master for South Carolina.

Respectfully submitted.

LEWIS B. KADEN
Attorney for the National Governors' Association

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4850

July 5, 1984

[7] The NGA has received letters from the Academy for State and Local Government, the Council of State Governments, the International City Management Association, the National Association of Counties, the National Conference of State Legislatures, the National League of Cities, and the United States Conference of Mayors stating that they have no present intention to seek to intervene in this case.

APPENDIX A

THE ACADEMY FOR
STATE AND LOCAL GOVERNMENT

The State and Local Legal Center
444 N. Capitol Street, N.W., Suite 349
Washington, D.C. 20001 (202) 638-1445

GOVERNED BY:

Council of State Governments
International City Management Association
National Association of Counties
National Conference of State Legislatures
National Governors' Association
National League of Cities
U.S. Conference of Mayors

June 26, 1984

Mr. Richard Geltman
National Governors' Association
444 North Capital Street, NW, Suite 250
Washington, D.C. 20001

Dear Dick:

In response to your inquiry, the State and Local Legal Center does not intend to intervene in *South Carolina v. Regan.*

Sincerely,

/s/ Lawrence R. Velvel
LAWRENCE R. VELVEL
Chief Counsel

LRV/fed

[LOGO]

COUNCIL OF STATE GOVERNMENTS
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444 North Capitol Street
Washington, D.C. 20001 (202) 624-5450

NORMAN BECKMAN
Washington Office Director

CARL W. STENBERG
Executive Director
Headquarters Office
P.O. Box 11910
Lexington, Kentucky 40578

July 2, 1984

Mr. Ray Scheppach
National Governors' Association
Suite 250
444 North Capitol Street
Washington, D.C. 20001

Dear Ray:

I am writing to advise you that, while the Council of State Governments is supportive of the National Governors' Association's intervention in *South Carolina* v. *Regan*, we will not intervene in the case. As you know, last September, CSG joined an *amicus* brief filed in this case by the State and Local Legal Center. However, NGA is the most logical public interest group to intervene at this juncture, given its resources and involvement with the case.

The Council of State Governments stands ready to assist NGA as appropriate, in gathering necessary information to assist you as the case progresses.

Sincerely,

/s/ Carl Stenberg
CARL STENBERG

INTERNATIONAL
CITY
MANAGEMENT
ASSOCIATION
1120
G Street
Northwest
Washington DC
20005

Area Code 202
626-4600

June 26, 1984

Mr. Richard Geltman
National Governors' Association
400 N. Capitol St., N.W., Suite 250
Washington, DC 20001

Dear Dick:

The International City Management Association is pleased that the National Governors' Association has decided to intervene in the South Carolina v. Regan case. ICMA feels that NGA will be able to convey the facts and the concerns of the state and local government associations effectively.

As a result, ICMA will not intervene in this case. Rather, ICMA will send NGA any information that it may have to share. Please feel free to call on our staff if we may be of any assistance to you.

Sincerely,

/s/ William H. Hansell
WILLIAM H. HANSELL
Executive Director

NATIONAL ASSOCIATION OF COUNTIES
440 First St. NW, Washington, D.C. 20001
202/393-6226

July 3, 1984

Richard B. Geltman, Esquire
General Counsel
National Governors' Association
444 N. Capitol Street, Suite 250
Washington, D.C. 20001

Re: *South Carolina* v. *Regan*, No. 94, Original

Dear Mr. Geltman:

It is my understanding that the Solicitor General has opposed the intervention motion of the National Governors' Association in the above-referenced case. His opposition is based in part upon a concern that other potential parties might attempt intervention using your motion as precedent. The National Association of Counties has no intention to intervene as a party although NACo may attempt to later participate as an *amicus curiae.*

Recognizing the national scope of this litigation, NACo heartily endorses NG[A]'s intervention motion.

Sincerely yours,

/s/ Lee Ruck
LEE RUCK
Counsel

LR:lp

[LOGO]

[LOGO]

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Executive Director
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June 26, 1984

Mr. Richard Geltman
Counsel
National Governors' Association
444 North Capitol Street, N.W.
Washington, D.C. 20001

Dear Dick:

To follow up on our conversation of this date, the National Conference of State Legislatures (NCSL) has no present intention of seeking to intervene in *South Carolina* v. *Regan.*

Sincerely,

/s/ Lanny Proffer
LANNY PROFFER
General Counsel

/lan

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Frederick Simpich
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July 2, 1984

VIA MESSENGER

Richard B. Geltman, Esq.
General Counsel
National Governors' Association
444 North Capitol Street, N.W.
Washington, D.C. 20001

Re: *South Carolina v. Regan*, No. 94, Original

Dear Mr. Geltman:

We understand that the Solicitor General has opposed the motion of the National Governors' Association for leave to intervene as a Plaintiff in the above matter on the grounds, among others, that the granting of this motion would provide a precedent for the intervention of a host of other interested parties and thereby greatly increase the complexity of these proceedings.

As counsel to the National League of Cities I most respectfully disagree with the Solicitor General's conclusion. As you know, the NLC membership includes more than one thousand direct member cities, state municipal leagues and state league member cities. In all almost 15,000 cities, both large and small, are members of and participate in League activities. From time to time, and not infrequently, the NLC has undertaken various actions in the courts of this nation, including the United

States Supreme Court, designed and intended to defend and to protect the interests and concerns of municipalities and municipal governments.

The issues in *South Carolina v. Regan* clearly involve important and basic money raising authorities of city governments. Nevertheless, because of the identity of interests in these matters between states and cities, it is the League's intention to work with and through the National Governors' Association to bring these vital interests to the attention of the Supreme Court. The NLC does not intend to intervene as a party.

The answers to the questions presented by the State of South Carolina in this case are fundamental and far reaching, involving the effectiveness of all state governments and all their municipal instrumentalities. Accordingly, it seems both unfair and unwise to require one state to represent the vital interests not only of all states, but of all their respective political subdivisions as well. In these circumstances the League's concerns require representation; but representation by the National Governors' Association will meet this urgent need.

Very truly yours,

DAVIS & SIMPICH

/s/ Ross D. Davis
ROSS D. DAVIS
Counsel for National
League of Cities

RDD:ggg

cc: Mr. Alan Beals

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June 26, 1984

Richard Geltman, Esquire
General Counsel
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Re: *South Carolina v. Reg[a]n*

Dear Richard:

This is to confirm that to the best of my knowledge, my client, the United States Conference of Mayors will not be seeking to intervene in the referenced case.

I will need to confirm this with the Conference's Executive Director, John Gunther, in the morning, and I will call you once I have talked to him.

Best of luck in your efforts in this matter.

Sincerely yours,

/s/ Stephen Chapple
STEPHEN CHAPPLE