arg. 3/29/78

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 76, ORIGINAL

* * *

STATE OF CALIFORNIA,

Plaintiff,

V.

STATE OF TEXAS,

Defendant

* * *

ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court's original jurisdiction extend to suits brought by a state on behalf of private parties pursuant to a contract to obtain the Court's jurisdiction?

2. Do the actions and agreements of California and the estate bar relief in this case under the doctrine of unclean hands?

3. Does a state's claim based upon a contract with private parties provide an adequate basis for the exercise of this Court's original jurisdiction?

4. Is the possible damage of California of such a contingent and speculative nature as to render this case premature?

5. Should *Texas v. Florida* be extended to cases in which a state has not abdicated its soverign jurisdiction?

6. Should this Court defer to the ongoing state court proceedings and abstain from exercising jurisdiction in this case?

STATEMENT

Howard Robard Hughes, Jr., was born in Houston, Texas on December 24, 1905, to parents domiciled in Texas. His father was an inventor and manufacturer. His mother was a member of a prominent family that settled in Texas in 1856. Hughes' mother died in 1922, his father in 1924. A Houston court removed the disability of minority from the nineteen-year-old Hughes and allowed him to take control of Hughes Tool Company (hereinafter "Toolco"), which manufactured oil well equipment.

In June of 1925 Mr. Hughes married Ella Botts Rice, a member of the distinguished Houston family for whom Rice University is named. Mr. Hughes developed interests in film making and aviation and began making trips to Los Angeles, California to pursue those avocations. By 1929, when Ella obtained a divorce in Houston, Mr. Hughes had begun to spend a considerable amount of his time in southern California. For the next two decades he traveled extensively, spending much of his time making cross-country test flights. While Mr. Hughes based his aviation and movie activities in California, he spend much of his time elsewhere during this period.

In 1940 Mr. Hughes registered with a Houston draft

board and was given a deferment to continue his airplane and armament manufacturing in Texas and California during World War II. In sworn testimony in 1947 before a Senate committee investigating claims of profiteering on wartime contracts, he gave his residence as Houston, Texas and stated that his company was headquartered there. Mr. Hughes claimed that any profit he may have made came from selling drill bits and beer to Texans and expressed disdain at the attempt to impugn his integrity, stating, "I believe I have the reputation in that respect which most Texans consider important. That is to say, if I may use a corny phrase, I believe people consider my word to be my bond." Testifying in a state court civil trial in California in 1952, Mr. Hughes stated that although he was then staying at the Beverly Hills Hotel, his domicile was Houston, Texas.

From 1950 until 1966 Mr. Hughes spent most of his time in California, although he was also in Nevada, Florida, Canada and the Bahamas for significant periods of time. The majority of his time in California during this period was spent at the Beverly Hills Hotel, where he rented rooms on a day-to-day basis.

In 1966 Mr. Hughes traveled to Boston, Massachusetts and then to Las Vegas, Nevada. He stayed in the penthouse of the Desert Inn in Las Vegas until November of 1970, when he went to the Bahamas. On February 17, 1972, Mr. Hughes went to Managua, Nicaragua. He then traveled to Vancouver, British Columbia for five months, back to Nicaragua for four months, and to London for a year. On December 20, 1973, he left England and returned to the Bahamas. He remained there until February 11, 1976, when he and his traveling party moved to Acapulco, Mexico. On April 5, 1976, Mr. Hughes was placed on a private jet, bound for Methodist Hospital in Houston, Texas. He

died en route shortly after the plane passed over Brownsville, Texas. Mr. Hughes was buried next to his parents in Houston's Glenwood Cemetery. He had maintained this family burial plot since his father's death in 1924 but did not finally purchase a perpetuity deed thereon until 1973, soon after he had undergone major surgery in London for a hip injury that was to keep him bedridden for the remaining three years of his life.

The death of Mr. Hughes triggered an immediate search for a valid will which would dispose of his vast empire. On April 14, 1976, probate proceedings were begun in California, Texas and Nevada. Summa Corporation, comprised of the remainder of Toolco after the sale of the oil tool division in 1972 and owned solely by Mr. Hughes, filed suit in Delaware on May 4, 1976, seeking a determination of the ownership of its stock and naming as defendants the Controller of California and the Texas Comptroller of Public Accounts. A purported will of Mr. Hughes, dated March 19, 1968 (the "Mormon" will), containing substantial bequests to several charitable organizations (including the University of Texas and Rice University), surfaced in late April of 1976 and was offered for probate in California, Nevada and Texas. Subsequently, the Howard Hughes Medical Institute ("HHMI"), a nonprofit corporation, appeared and asserted that Mr. Hughes had executed and never revoked a valid will (the "lost" will) leaving his entire estate to HHMI.

The defense of the Delaware lawsuit prompted an investigation by the Texas Attorney General of the life and death of Mr. Hughes. Numerous facts were uncovered indicating that he never abandoned his original Texas domicile. For example, Mr. Hughes paid his poll tax in Texas until 1952 and never registered to vote in any other jurisdiction. Throughout his lifetime

he filed his federal income tax returns in Texas and listed Houston, Texas as his residence.

Mr. Hughes was required to pay California income tax at the resident rate, but nevertheless filed nonresident returns and noted thereon that he was a legal resident of Texas. He thus obtained no financial benefit from such declarations. After Mr. Hughes' move to Nevada in 1966, California administratively determined that he was not a resident for tax purposes[1] and never again required him to pay the California personal income tax. (A-1).

Notwithstanding his extensive international travels during the last decade of his life, Mr. Hughes had no valid passport during this period. His last passport was issued in 1938 and it, as well as all of his previous passports, listed him as a resident of Houston, Texas. The only paper evidences of his many border crossings, an entry card into Vancouver signed by Mr. Hughes in 1972 and a United States Customs declaration signed by him in Florida in 1972, list Houston, Texas as his permanent residential address. In late December of 1975, only three months before his death, Mr. Hughes began negotiating the purchase of a $1.5 million penthouse complex atop a high-rise condominium in Houston.

Mr. Hughes maintained banking ties in Houston throughout his lifetime, always keeping personal checking accounts in Texas Commerce Bank. Loan transactions of Mr. Hughes and Toolco with Houston banks totaled tens of millions of dollars. The oil tool manufacturing plant in Houston was the principal

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[1]California requires payment of its personal income tax at the resident rate from every individual who is either (1) present in California "for other than a temporary or transitory purpose" or (2) domiciled in California but "outside the State for a temporary or transitory purpose." CAL. REV. & TAX. CODE §17014.

source of revenue for Mr. Hughes throughout his lifetime. Approximately $745 million of before-tax profits were generated by Toolco during the time Mr. Hughes owned it. He received approximately $150 million when he sold the Houston operation to the public in 1972 to raise funds to satisfy the T.W.A. judgment, which was later reversed by this Court. It was the steady flow of funds from Houston that enabled this modern day Odysseus to pursue his business interests and travels elsewhere.

Upon learning many of these facts about Mr. Hughes, the Texas Attorney General entered an appearance for the State of Texas in the Houston probate proceeding on June 10, 1976, asking the Court to determine the validity of any purported will of Mr. Hughes and to declare Texas his domicile at the time of death. After extensive discovery a trial of the issues of domicile and the validity of the Mormon will was set for September 12, 1977. The temporary co-administrators[2] of the Hughes estate sought and received a continuance of that trial, which was reset for November 14, 1977. On November 8, 1977, the estate filed its second motion for continuance, which was denied.

On Friday, November 11, 1977, California Controller Kenneth Cory held a press conference, announcing that he had reached an agreement with the heirs and representatives of the Hughes estate and that he was filing this lawsuit. (B-1). On Monday, November 14, 1977, the temporary co-administrators filed their third motion for continuance in the Texas proceeding, this time based upon California's suit in this Court. On that same day, California filed its Application for Temporary Restraining Order and for Preliminary

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[2]Annette Gano Lummis, Mr. Hughes' aunt and an heir under the intestacy laws of Texas, and her son William Rice Lummis are the temporary co-administrators in Texas.

Injunction with this Court, the submission of which was contingent upon the Texas court's denial of the estate's motion for continuance. (C-1). The honorable Pat Gregory, judge of Harris County Probate Court No. 2, denied the motion for continuance, and the trial commenced.

During the Christmas recess of the trial, the estate asked the Texas court to approve its agreement with California. William Rice Lummis, who until Mr. Hughes' death was a partner in the law firm that now represents him as heir and administrator, testified on December 19, 1977, that an additional agreement exists between California and the estate. (A transcript of the relevant portions of Mr. Lummis' testimony is attached as Appendix "D"; a copy of the primary agreement is attached as Appendix "E"; a copy of the letter agreement is attached as Appendix "F").

SUMMARY OF ARGUMENT

The actions and agreements of California and the Hughes estate reflect that this suit was brought on behalf of the estate and thus is not within this Court's original jurisdiction. The estate entered into these agreements in order to have this suit filed, while California did so for the opportunity of receiving tax money from the estate without having to rely on the validity of its own tax claim. For these reasons, the doctrine of unclean hands bars this collusive attempt to buy and sell this Court's equitable jurisdiction.

This Court's decision in *Texas v. Florida* does not require, and should not be extended to permit, exercise of original jurisdiction in this case. The existence of several contingent events, none of which were present in Colonel Green's estate proceedings, but all of which must occur here before California might possibly be

harmed, render this suit premature. California simply cannot show that it will be harmed by the actions of Texas and therefore lacks standing to bring this suit. Furthermore, this Court's exercise of jurisdiction in *Texas v. Florida* was unprecedented and constituted a singular intrusion into the traditional rights of states to distribute the local property of a decedent's estate and to administer their own tax laws.

Ongoing state court proceedings provide adequate alternative forums for the resolution of any dispute which might arise between California and Texas. The resources of this Court therefore need not be committed to an adjudication of questions of fact and issues of state law which may be without conclusive effect.

ARGUMENT

I. THE AGREEMENTS BETWEEN CALIFORNIA AND THE ESTATE PRECLUDE INVOCATION BY CALIFORNIA OF THIS COURT'S ORIGINAL JURISDICTION

It is well settled that this Court's original jurisdiction over controversies between states does not extend to suits brought in the name of a state but for the benefit of individuals. *Oklahoma v. Cook*, 304 U.S. 387 (1938); *Kansas v. United States*, 204 U.S. 331 (1907); *see also Illinois v. Michigan*, 409 U.S. 36 (1972). The events immediately preceding the commencement of the Texas trial clearly show that California and the representatives and heirs of the Hughes estate are working in tandem to invoke this Court's jurisdiction. California's Motion for Leave to File Complaint was filed pursuant[3] to the agreement between the Hughes

[3]In sworn testimony during a hearing in Texas on December 19, 1977, Lummis stated, "The application with the Supreme Court has been filed pursuant to this agreement. You can't ignore this agreement." *See* Appendix "D". (D-23)

estate and California, which provides that California is to receive two per cent (2%) of the federal net taxable estate if this Court accepts jurisdiction and determines that Mr. Hughes was a domiciliary of Texas. California is to receive eighteen per cent (18%) of the federal net taxable estate if this Court decides that Mr. Hughes was domiciled *anywhere* other than Texas. Thus, the estate is effectively contracting to pay two per cent (2%) of the federal net taxable estate to gain that which it could not obtain on its own, jurisdiction in this Court to litigate a part of the issue of the decedent's domicile.

The letter agreement between California and the estate, which was discovered by Texas only after this Court's denial of California's application for injunctive relief, requires the estate to furnish to California copies of pleadings, depositions, documentary evidence relevant to the issue of domicile, indices of documents, and factual analyses prepared by the estate's attorneys supporting the claim that Mr. Hughes acquired a California domicile upon leaving Texas. If this Court accepts jurisdiction of California's complaint, the agreement obligates the estate to share with California all factual and legal analyses regarding the claim that Mr. Hughes was a Nevada domiciliary. In addition, the estate would be bound to make its attorneys available to California for consultation to aid California in its litigation against Texas. The letter agreement further provides that if California does not resist the motion of the Nevada co-special administrators to become a party to this proceeding, the administrators would align themselves with California and take no position inconsistent with that of California. And, finally, the agreement provides that if the estate cannot obtain the necessary probate court approval of the primary agreement to pay California the required two per cent (2%) in excess of the maximum allowable federal credit,

the heirs themselves will pay the remainder as sufficient funds are distributed to them from the estate.

California asked this Court to halt the Texas trial, which the estate had repeatedly attempted to postpone, even though that trial presented no danger of irreparable harm to California's legitimate interests. The estate has contracted to pay California two per cent (2%) of the federal net taxable estate, regardless of the merits of California's claim, in return for its obtaining a domicile determination by this Court. And since California will receive eighteen per cent (18%) of the federal net taxable estate if Texas is determined not to have been Mr. Hughes' domicile at death, California comes to this Court asserting claims *other than its own.* Indeed, the agreements referred to above clearly show that California's lawsuit in this Court could well be only a means by which the estate will attempt to prove that Mr. Hughes was a Nevada domiciliary. *Compare New Hampshire v. Louisiana,* 108 U.S. 76 (1883) *with South Dakota v. North Carolina,* 192 U.S. 286 (1904) (a state must proceed on the basis of its own claim). These actions and agreements of California and the Hughes estate indicate that this suit is one brought on behalf of the estate and thus is not within this Court's original jurisdiction. *Oklahoma v. Cook, supra.*

California did not provide this Court with a copy of its primary agreement with the estate until after Texas, which knew of the contents of that agreement, was granted an opportunity to respond to California's motion for injunctive relief. Texas did not learn of the existence of the letter agreement between California and the estate, which is dated November 10, 1977, until Mr. Lummis testified on December 19, 1977. For reasons best known to itself, California has not seen fit to disclose that agreement to this Court. Such secrecy is not surprising in light of the contents of those

agreements. California has attempted to exchange its key to the door of this Court for the opportunity of receiving eighteen per cent (18%) of the federal net taxable estate of Howard Hughes *without regard to the validity of its claim.* The original jurisdiction of this Court should not be allowed to be the subject of barter with individual litigants.

For this Court to exercise its original jurisdiction under these circumstances would merely condone such behavior and encourage states with weak domicile claims and high inheritance tax rates to enter into similar agreements with wealthy estates. Under the doctrine of unclean hands, this Court should not reward this collusive attempt to invoke and use its original jurisdiction by granting California's motion for leave to file its complaint, for a court of equity is the judicial vehicle for effecting the mandates of conscience and good faith. *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945).

II. CALIFORNIA'S COMPLAINT PRESENTS NO EXISTENT CASE OR CONTROVERSY BETWEEN CALIFORNIA AND TEXAS

A. *This Case Is Clearly Distinct From Texas v. Florida*

California's attempt to invoke this Court's original jurisdiction is based almost exclusively upon *Texas v. Florida*, 306 U.S. 398 (1939). The present posture of the Hughes estate proceedings, however, is quite different from the situation which prompted this Court to determine the domicile of Colonel Green. Probate proceedings in California, Nevada and Texas are focusing on the validity of the Mormon will, and the issues of the existence *vel non* and validity of the HHMI lost will are still pending. Under either of these alleged

wills, large percentages of the estate are to go to charitable organizations, and those bequests are exempt from federal, California and Texas death taxation. 26 U.S.C. §2055, CAL. REV. & TAX. CODE §13842; TEX. TAX.-GEN. art. 14.015(2). Tax claims would therefore be based on net taxable estates which would exclude the amounts of the charitable bequests, yet the amount of assets available to satisfy those tax claims would not be correspondingly reduced. Thus, if either the Mormon will or the HHMI lost will were admitted to probate, the combined tax claims of the federal government, California and Texas would be far less than 100% of the assets of the estate. In *Texas v. Florida* there existed no such contingency which would not have been resolved by this Court's determination of the domicile issue but which could have obviated any possible need for this Court to decide that issue.

In *Texas v. Florida* the assets of Colonel Green's estate were comprised largely of stocks, bonds and other intangible property, "[p]ractically all of [which] had a readily ascertainable market value as of the date of decedent's death." Bill of Complaint at 13, No. 11, Original (1937). Federal and state death taxes could therefore be accurately calculated on the basis of a relatively precise valuation of the estate assets. Thus, it was clear to the states involved, and could be specifically demonstrated to this Court by the plaintiff therein (State of Texas), that Colonel Green's estate would be insufficient to meet all of the potential tax claims against it, and the defendant states so admitted. 306 U.S. at 404.

The majority of the assets in Mr. Hughes' estate, however, consists of the stock of Summa Corporation, a highly-diversified conglomerate which was always solely owned by him. Among the far-flung holdings of Summa are hotels and casinos in Nevada and the

Bahamas; a 1317-acre parcel of undeveloped land in the Playa del Rey area of Los Angeles County, California; and Hughes Airwest, a regional airline. The diverse activities of Summa include helicopter manufacturing, television broadcasting, ranching, land and ocean mining, and aircraft servicing. The value of such a heterogenous mixture of corporate assets is not readily determinable and has been the subject of much speculation and dispute.[4] Under these circumstances, the possibility that the three potential taxing authorities could reach significantly different valuations of the estate assets is quite real. The sum of the percentages of the maximum possible tax being slightly less than 101%[5], deviations in the amount upon which those percentages are to be applied could easily drop the total tax to less than 100% of the estate, as valued by two of the three taxing authorities (including both Texas and

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[4]The investment firm of Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") has billed the estate in excess of $400,000 for its efforts in rendering an opinion as to the fair market value of the estate assets. Merrill Lynch valued the entire estate at $166,800,140 for purposes of the federal estate tax return. California admits, however, that "[t]he actual values of the estate's assets may be significantly greater than as reported by the estate in its federal estate tax return. The Internal Revenue Service and California (and, presumably, Texas) are each in the Process of determining administratively the value of the estate...." Complaint at 25. Some estimates of Mr. Hughes' wealth at the time of his death range as high as two billion dollars.

[5]California's rate of tax on amounts in excess of $400,000 is 24%. CAL. REV. & TAX. CODE §13406. Texas' tax on amounts exceeding $1,000,000 is slightly less than 16%. TEX. TAX.-GEN. arts. 14.05, 14.12. The federal estate tax on amounts in excess of $10,000,000 is 77%, less a 16% credit for state death taxes. 26 U.S.C. §§2001, 2011.

California).[6]

At the present time no administrative determination of the value of the Hughes estate has been made by any of the potential taxing authorities. No administrative rulings have been made on the allowance of possible deductions which would not consume estate assets.[7]

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[6]*E.g.*,

	Hypothetical Valuations of Estate	Rate of Tax	Hypothetical Taxes
California	500,000,000.	24%	$120,000,000.
Texas	450,000,000.	16%	$72,000,000.
Internal Rev. Ser.	400,000,000.	61%	$244,000,000.
			$436,000,000.

California's alleged fear of being unable to collect a substantial amount of its tax is chimerical. It is interesting to note that even if that fear were legitimate, and each taxing authority's valuation and rulings on deductions were the same, California would still be able to collect over 23% of the net taxable estate out of its maximum tax claim of 24%. California asserts that a possible dispute as to this 1% of the net taxable estate creates an interstate controversy of sufficient moment to warrant the invocation of this Court's original jurisdiction. This claim of grave injury to be incurred by the possible loss of 1% of the net taxable estate appears rather disingenuous in light of California's agreement with the estate to relinquish 6% from their tax rate (from 24% down to 18%) if this Court ultimately determines that Mr. Hughes was not a Texas domiciliary at the time of his death.

[7]*E.g.*, In July of 1976, heirs of Mr. Hughes signed a settlement agreement which purports to determine the distribution of the estate assets in the event Hughes is found to have died intestate. Under this agreement Annette Gano Lummis, an aunt of the decedent, is given absolute discretion to distribute as much as 25% of the residuary estate to any charitable organization described by section 501(c) (3) of the Internal Revenue Code of 1954.

Also, to the extent that the assets of the estate are real or tangible personal property, only the situs state can constitutionally tax their transfer. *Treichler v. Wisconsin*, 338 U.S. 251 (1949); *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

Under these circumstances, it is impossible for California to show that it will be unable to collect all of its tax even if California and Texas both tax the estate.[8]

The very fact that here the estate is the sole owner of a large corporation distinguishes this case from *Texas v. Florida.* This estate is not a static entity, which can pay out only an amount equal to its value at the time of Mr. Hughes' death. Summa Corporation is an income-generating entity. The federal government and Texas (and, presumably, California) allow estate taxes to be paid over a ten year period when a closely-held corporation constitutes a major portion of the estate. 26 U.S.C. §6166A (Supp. 1977); TEX. TAX.-GEN. art. 14.16(A) (Supp. 1976). The purpose of this long term pay-out provision is to allow the corporation to pay the tax from its profits and thus save the corporation from forced liquidation. *See Lake Shore National Bank v. Coyle,* 419 F.2d 958, 962 (7th Cir. 1969). Thus, even if a 101% tax rate is imposed upon the estate, Summa could well generate ample funds to pay the resulting tax.

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[8]This Court should attach no credence to the unverified, hypothetical figures attached as Appendix "A" to California's Complaint. The erroneous legal assumptions used by California to derive the greatly differing taxable estates under federal, Texas and California law are no less striking than the obvious mistake in arithmetic. A mere glance at the three sets of statutes providing for allowable deductions reveals the absurdity, if not the intentional misrepresentation, of the vast differences in deductions in California's Appendix "A". *Compare* 26 U.S.C. §§2053, 2055 *and* TEX. TAX.-GEN. arts. 14.015(2), 14.10 *with* CAL. REV. & TAX. CODE §§13842, 13983, 13986, 13988.

Indeed, if California's figures were accurate, the taxes to be imposed by the federal government and California alone would exceed the estate assets by almost $13,000,000, and be approximately 125% of the federal net taxable estate. Surely all true Californians with a net worth in excess of $10 million do not have their estates similarly taxed.

Furthermore, in *Texas v. Florida* it was alleged and shown that the amount of estate assets situated within the borders of the complainant state (Texas) was negligible and insufficient to pay its tax. *Id.* at 403. Such a showing was essential to this Court's exercise of jurisdiction. Since each state has exclusive jurisdiction over the property within its borders, the existence of assets within a state sufficient to satisfy that state's tax claim would bar that state from claiming harm to it by virtue of another state's tax. California has neither alleged nor shown[9] that its local assets are insufficient to satisfy its tax claims and therefore lacks standing to argue that it is being injured at the hands of Texas. *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939) (complaining State must have suffered a wrong through the action of the other State).

A final judgment by the courts of Texas that Mr. Hughes was a Texan at the time of his death would have a direct effect only on estate assets located in Texas. Any attempt by Texas to levy on estate assets outside its borders would necessarily involve action by the situs state. *Riley v. New York Trust Co.*, 315 U.S. 343 (1942). At that time California could present its own judgment for full faith and credit and have the merits of the two judgments reviewed by the courts of the neutral state. Thus, if indeed there should be insufficient assets to satisfy California's tax, that situation would not be the result of wrongful action by Texas but rather would

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[9]Such a showing would be difficult, as the estate owns 1317 acres of land in Playa del Rey, which constitutes the only large contiguous tract of undeveloped land in Los Angeles County. Although state land use restrictions could conceivably lower its value to a private purchaser, it would be virtually priceless to California.

result from the weakness of California's own claim.[10] *Massachusetts v. Missouri, supra.*

B. *The Uncertainties and Contingencies Involved in California's Complaint Make This Suit Premature*

Many contingent events must occur before California would be unable to collect all of its death taxes. The courts of both California and Texas would have to reach a final determination that Mr. Hughes died domiciled in their own state. Delaware would then have to refuse to credit California's judgment in its entirety. *Riley v. New York Trust Co., supra; see Parker v. Los Angeles County,* 338 U.S. 327, 332 (1949). The Mormon will and the HHMI lost will would have to be defeated. And as previously noted, differences in valuations and rulings on deductions and extended pay-out periods could even then result in sufficient assets to satisfy all tax claims.

> The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing.

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[10]The weakness of California's claim is directly related to its agreement with the estate and the limited relief sought from this Court. That California is not proceeding upon the strength of its own claim is illustrated by its unprecedented request for an advisory opinion that Texas was not the domicile of Mr. Hughes at time of death. Of course the states in *Texas v. Florida* asserted only their own statutory rights, and none sought to utilize the equitable jurisdiction of this court to collect funds without regard to the justness of its claim. By virtue of the agreement, the contrary situation would persist here even if California amends its Complaint.

Eccles v. Peoples Bank of Lakewood Village, California, 333 U.S. 426, 432 (1948). California's claim of harm is simply premature, and this Court should conserve its "judicial energies for litigants who have some real need of official dispute resolution." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3532 at 238. Especially where jurisdiction may ultimately hinge on particular theories of valuation, "[r]ulings on these questions would plainly be rulings upon 'hypothetical situations that may or may not [arise].' *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954)." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 146 (1974).

Moreover, since this Court's original jurisdiction is governed by Article III, Section 2 of the Constitution, a decision to grant California leave to file its complaint is itself the resolution of a constitutional issue. If any of these contingencies fail to occur, the necessity of deciding that issue will vanish.

> No rule of practice of this Court is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33, 39; Mr. Justice Brandeis, concurring, in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341.

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 71-72 (1961).

California contends that the existence of these contingencies is unimportant since some uncertainties were also present in *Texas v. Florida*. In addition to glossing over the striking substantive differences in the contingencies involved here, this argument ignores the

fact that in more recent years[11] this Court has become much more aware of its finite judicial resources and much more alert to appropriate opportunities to avoid unnecessary expenditures of those resources. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Poe v. Ullman*, 367 U.S. 497, 502-09 (1961); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-75 (1947).

III. TEXAS V. FLORIDA CONSTITUTES A HIGHLY QUESTIONABLE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION AND SHOULD NOT BE EXTENDED TO THIS CASE.

As demonstrated above (Section II), this Court's decision in *Texas v. Florida* is distinguishable on several grounds from California's complaint. Texas would go further, however, and show that *Texas v. Florida* stands alone in the constitutional law of this nation. Neither before nor since has this Court accepted jurisdiction over a purported cause of action so clearly a matter of state rather than federal jurisdiction. It should not provide the basis of this Court's doing so in this case.

Texas v. Florida was not an action in which the Court decided a matter of territorial jurisdiction such as a boundary question, *e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1837), nor in which "the action of one State reaches through the agency of natural laws into the territory of another State." *Kansas v. Colorado*,

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[11]Indeed, only three years before the decision in *Texas v. Florida*, Mr. Justice Brandeis could not muster the support of a majority of the Court for his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 341 (1936). That landmark opinion is now considered to be the bellwether of the policy against premature constitutional decision.

206 U.S. 46, 97 (1907) (water rights). It did not involve a constitutional question, *e.g.*, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), or the enforcement of an interstate agreement or compact, *e.g.*, *Virginia v. West Virginia*, 238 U.S. 202 (1915). It did not concern property owned by the complaining party. *South Dakota v. North Carolina*, *supra*; *Florida v. Anderson*, 91 U.S. 667 (1875); *Texas v. White*, 7 Wall. 700 (1868).

Furthermore, *Texas v. Florida* was dissimilar to the tandem cases of *Western Union v. Pennsylvania*, 368 U.S. 71 (1961), and *Texas v. New Jersey*, 379 U.S. 674 (1965), which are heavily relied upon by California. These cases concerned property which consisted of debts owed individuals which were commingled with general corporate funds. Each claimant state could assert that local funds of the corporation were in fact the property subject to escheat and "claim *in rem* jurisdiction over it." *Western Union v. Pennsylvania*, *supra* at 75. Collection of unconstitutional multiple escheats could thereby be effected. In order to protect the constitutional rights of the corporation, in *Texas v. New Jersey* the Court resolved the legal question of the location of the property for escheat purposes. Hence, acceptance of jurisdiction in *Texas v. New Jersey* did not conflict with the exclusive jurisdiction of any state over property within its borders. As in a boundary dispute, the question was which state had such jurisdiction. In *Texas v. Florida*, however, there was no question concerning the location of the various assets of Colonel Green's estate and thus no dispute as to which state could exercise *in rem* jurisdiction in the distribution thereof. There was no way by which tax collections could exceed the amount of the fund upon which the taxes were imposed and no prospective violation of constitutional rights. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); *cf. Complete Auto Transit*,

Inc. v. Brady, 430 U.S. 274 (1977) (states may tax upon the basis of benefits conferred).

A further comparison of *Texas v. Florida* and *Texas v. New Jersey* illustrates the inconsistency of the former with other adjudications of controversies between states. Escheat constitutes an exercise of property rights, *Georgia v. Stanton*, 6 Wall. 50, 73 (1867), whereas taxation is an exercise of the rights of sovereignty. *Case of the State Freight Tax*, 15 Wall. 232, 272 (1872); *McCulloch v. Maryland*, 4 Wheat. 316, 429 (1819). This Court has refused to exercise its jurisdiction for the protection of "rights of sovereignty." *Georgia v. Stanton*, *supra* at 77.

Similarly,

> [t]his court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 287-88 (1888). The nature of the sovereign right of taxation is such that one nation may impose inheritance taxes without regard to the tax laws of another. 2 D. O'CONNELL, INTERNATIONAL LAW 617 (2nd ed. 1970); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 523 (1967); *see United States v. First National City Bank*, 321 F.2d 14 (2nd Cir. 1963). Only recently have the political departments of various governments negotiated treaties in the matter. *United States v. First National City Bank*, *supra* at 24. Under existing treaties, determinations of citizenship and domicile are left to the courts of each nation. *International Enforcement of Tax Claims*, 50 Colum.

L.R. 490 (1950); *e.g.*, 8 M. WHITEMAN, *supra* at 524 (treaty between United States and Italy).

The framers of the Constitution did not intend for the original jurisdiction of this Court to supplant state court determinations of domicile in tax disputes. *Cf. Riley v. New York Trust Co., supra.*

> [I]ndividual States should possess an independent and uncontrollable authority to raise their own revenues . . . an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

THE FEDERALIST NO. 32 (A. Hamilton), Bicentennial Ed. at 193-94. *See also Matthews v. Rogers*, 284 U.S. 521, 525 (1932). Of course the Fourteenth Amendment restricted the states' authority on the basis of the constitutional rights of individuals, but nothing in the Constitution guarantees California that it will not suffer a loss of revenue from the proper administration of the laws of another state. *See Milwaukee County v. White Co.*, 296 U.S. 268 (1935).

In *Texas v. Florida*, the Court adjudicated claims based upon state law "previously considered to be exclusively in the jurisdiction of the state courts." 39 Colum. L.R. 1017, 1018 (1939); *Texas v. Florida, supra* at 432, n. 4 (opinion of Frankfurter, J.). The language of many cases decided by this Court demonstrates that *Texas v. Florida* represented a singular intrusion upon the exclusive jurisdiction of the various states to administer a decedent's local property and to prosecute tax claims under state law. A state has "full and absolute dominion" over property within its borders. *Rhode Island v. Massachusetts, supra* at 734.

> A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the state sovereignty as exclusively as powers exclusively delegated appertain to the general government.

License Cases, 5 How. 504, 588 (1847). *See also Riley v. New York Trust Co.*, *supra* at 349; *Iowa v. Slimmer*, 248 U.S. 115 (1918); *Brown v. Fletcher's Estate*, 210 U.S. 82 (1908); *Arndt v. Griggs*, 134 U.S. 316, 320-21 (1890); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

Occasional conflicts between sovereign rights of states are an inevitable result of our system of government.

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield to its own views to none.

Kansas v. Colorado, *supra* at 97. Such conflicts do not require this Court to exercise its original jurisdiction absent an adverse effect upon property owned by or within the jurisdiction of an offended state.[12] Certainly

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[12]There are rare instances like *Texas v. New Jersey* where such a dispute causes a violation of an individual's constitutional rights, but it is difficult to imagine such an instance which would not involve a dispute as to the situs of property. No such constitutional rights are involved here. *Compare Western Union v. Pennsylvania*, *supra*, *with Worcester County Trust Co. v. Riley*, *supra*.

the proper distribution and taxation of a decedent's local property may be adjudicated by the various states without interference by the federal government.

> Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.

Mager v. Grima, 8 How. 490, 493 (1850). *See also Treichler v. Wisconsin*, *supra* at 256; *State Tax Commission v. Aldrich*, 316 U.S. 174 (1942); *Frick v. Pennsylvania*, *supra;* THE FEDERALIST NO. 32, *supra.*

An essential jurisdictional basis of *Texas v. Florida* was that only one state could properly tax the estate. This assumption is highly questionable in light of individual mobility in our society and the benefits a person such as Mr. Hughes had secured from the states in which he had lived and done business. *Texas v. Florida*, *supra* at 429 (opinion of Frankfurter, J.); *Baldwin v. Missouri*, 281 U.S. 586, 597 (1930) (opinion of Stone, J.). For example, under this Court's more enlightened approach to state taxation, *see Complete Auto Transit, Inc. v. Brady*, *supra*, Texas clearly provided sufficient benefits to Mr. Hughes to authorize its taxation of his estate, especially since Texas has not already taxed those benefits through income taxation. Thus even were a state such as California able to demonstrate a similar entitlement to taxation and thus monetary damage from the proper imposition of another state's taxes, this Court would have no basis for injecting itself into adjudications of state law in

derogation of the proper jurisdiction of the various states. *See In re Rapoport's Estate*, 26 N.W.2d 777 (Mich. 1947), *cert. denied, California v. Michigan State Board of Escheats*, 332 U.S. 764 (1947) (escheat of out-of-state decedent's property); *Nelson v. Miller*, 201 F.2d 277, 280 (9th Cir. 1952).

In light of the conflict of *Texas v. Florida* with these principles of law, as well as its dissimilarity to other original actions, this Court should not extend its application to cases in which the defendant state objects to federal litigation. Since all States in *Texas v. Florida* were apparently willing to have this Court adjudicate matters of their local law, that case need not and should not be extended to cases in which a state has not abdicated its sovereign jurisdiction. *Cf. Vogel v. New York Life Ins.*, 55 F.2d 205, 208 (5th Cir. 1932), *cert. denied*, 287 U.S. 604 (1932) (state jurisdiction must be affirmatively asserted).

IV. ABSTENTION DOCTRINES DEVELOPED BY THIS COURT SUBSEQUENT TO TEXAS V. FLORIDA IMPEL THE DENIAL OF CALIFORNIA'S MOTION FOR LEAVE TO FILE COMPLAINT.

State courts are effective forums for the adjudication of tax claims against local assets of an estate. Therefore, the abstention doctrine developed since *Texas v. Florida* requires this Court to leave the jurisdiction of those forums undisturbed out of "scrupulous regard for the rightful independence of the state governments." *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941). The proper distribution of local property of a decedent is an exercise of the power of "States and their institutions . . . to perform their separate functions in their separate ways." *Judice v. Vail*, 430 U.S. 327, 334 (1977), citing *Huffman v. Pursue, Ltd.*, 420 U.S.

592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971). This Court has refused to disrupt "suits by the State in its sovereign capacity" and thereby to imply a "negative reflection on the State's ability to adjudicate" when questions of federal law were at issue. *Trainor v. Hernandez*, 431 U.S. 434, 446 (1977). This case presents a stronger basis for absention since it involves only issues of fact and of state law, for

> State courts are quite as capable as federal courts of determining the facts, and they alone can define and interpret State law.

Schlesinger v. Councilman, 420 U.S. 738, 755 (1975); *Texas v. Florida*, *supra* at 431 (Opinion of Frankfurter, J.). A state's administration of a decedent's property, including distributions to satisfy valid tax judgments, is equally entitled to federal abstention as matters of domestic relations in *Williams v. Williams*, 532 F.2d 120 (8th Cir. 1976), for the former also "has traditionally been the province of the states." *Id.* at 122; *see Nelson v. Miller*, *supra*. Consequently, this case is one in which "federal judicial interference with state civil functions" is inappropriate. *Huffman v. Pursue, Ltd.*, *supra* at 603.

In *Ohio v. Wyandotte Chemicals Corp.*, *supra*, it was recognized that, with respect to cases between a state and a citizen of another state over matters such as a decedent's estate,

> [i]t would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies . . . [M]uch would be sacrificed, and little gained, by our exercising exclusive jurisdiction over issues bottomed on local law.

Id. at 497. While *Wyandotte* did not concern a suit between states, the standard presented therein is

properly applicable to any original action. Abstention in this case "would not disserve any of the principal policies underlying the Article III jurisdictional grant and . . . the reasons of practical wisdom" supporting abstention are consistent with the proper allocation of this Court's resources. *Id.* at 499. As discussed above, disputes regarding state taxation are not within the policies underlying the Article III jurisdictional grant. Furthermore, the "reasons of practical wisdom" leading to a denial of jurisdiction are stronger here than in *Wyandotte.*

First, resolution of the issue of Hughes' domicile at death would require a substantial expenditure of time and resources by this Court. Even with the aid of a special master, the factual morass which must be traversed in order to decide this question of local law would inevitably sap a significant amount of the Court's energies.[13] As this Court has stated, by such an expenditure of time on factual determinations and issues of local law,

> we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.

Id. at 498.

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[13]The ongoing trial in Houston was preceded by seventeen months of discovery during which Texas gathered, organized and reviewed for trial more than fifty thousand documents relevant to Hughes' domicile. Scores of motions were filed, briefed and ruled upon; numerous hearings were held; countless witnesses were interviewed; and more than fifty depositions were taken. In preparation for trial, approximately twenty-five thousand documents were marked by the various parties for possible use as evidence. With nation-wide subpoena power at the parties' disposal, a trial before this Court can reasonably be expected to entail the production of considerably more evidence and no fewer procedural disputes for the Court's review.

Second, an exercise of jurisdiction by this Court would not obviate the necessity for state court proceedings to distribute local assets of the estate. In the instant case four states are in the process of exercising their well established power to distribute local assets of a decedent. These actions are at lease in part *in rem. E.g., TEX. PROB. CODE* §2(e). This Court should deny leave to file, for it is fundamental that "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other." *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *United States v. Bank of New York Co., 296 U.S. 463 (1936); Rosseau v. United States Trust Co. of New York*, 422 F.Supp. 447 (S.D.N.Y. 1976). *See Judice v. Vail, supra* at 335. Furthermore, in light of these proceedings, this Court's resources would be committed

> to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory . . . bodies are actively grappling with on a more practical basis.

Ohio v. Wyandotte Chemicals Corp., supra at 503. The trial level capabilities of this Court, when forced "awkwardly to play the role of factfinder without actually presiding over the introduction of evidence," *Id.* at 498, are such that the state courts are better equipped to decide this domicile issue.

A decision of this Court regarding the domicile of Mr. Hughes could affect only the power to tax the succession of intangible assets of the estate. *Treichler v. Wisconsin, supra; Frick v. Pennsylvania, supra.* As discussed above, these intangibles consist primarily of stock in a Delaware corporation. The corporation has brought an interpleader action in the courts of Delaware in order to

ascertain the proper distribution of the stock. This pending action provides an opportunity for all interested parties to present their claims to a neutral arbiter, thus satisfying one of the "principal policies underlying the Article III jurisdictional grant...." *Ohio v. Wyandotte Chemicals Corp.*, supra at 499; *Chisolm v. Georgia*, 2 Dall. 419, 475-76 (1793). Accordingly, Delaware provides an alternative and more effective forum "in which the *issues* tendered here may be litigated," and this court should decline to exercise its jurisdiction. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976); *Ohio v. Wyandotte Chemicals Corp., supra; Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 464-65 (1945); *Massachusetts v. Missouri, supra.*

The administration of Texas law by its courts and officers is entitled to deference by this Court. Incident to the orderly administration of Mr. Hughes' estate, Harris County Probate Court No. 2 must decide the question of domicile at time of death. Such a determination is a jurisdictional prerequisite to the original probate of any will, as well as the ascertainment of the proper distribution of property located in Texas. *See Holland v. Jackson*, 37 S.W.2d 726 (Tex. 1931); *In re Estate of Bills*, 542 S.W.2d 943 (Tex.Civ.App.-Texarkana 1976, writ ref'd. n.r.e.). If that court determines that Mr. Hughes was a Texas domiciliary at the time of his death, Texas law would require its officials to collect inheritance taxes. TEX.TAX.GEN. art. 14.01; *see* TEX. PROB. CODE §410. Where state law requires an officer to pursue a tax claim, this Court should not "disable him from performing his obligations to the State." *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 108 (1861). This principle is especially applicable to the present case since any decision by this Court which would affect the duties of Texas officials would be based upon an unwarranted determination of Texas law by

this Court at the behest of a state which does not seek recovery on the basis of its own sovereign claim. Just as another state's judgment for taxes cannot "demand priority over domestic claims for taxes," *Milwaukee County v. White Co.*, *supra* at 276, this Court should not require Texas to give priority to a mere contractual claim of another state. *See also Thompson v. Whitman*, 18 Wall. 457 (1873).

CONCLUSION

The well established rights of the states to administer the local assets of a decedent's estate and to prosecute state tax claims in their own courts merit the continued respect and protection of this Court. An abridgement of these rights must not be permitted on the basis of allegations that harm of some unknown magnitude *might* occur at some future time, especially at the behest of a state which is not proceeding solely upon the basis of its own sovereign claim. Due to the posture in which California comes to this Court, and for all of the foregoing reasons, California's Motion for Leave to File Complaint should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lee C. Clyburn, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Defendant. I do hereby certify that nine copies of the foregoing Brief in Opposition have been served on Plaintiff by placing three copies of same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 13th day of January, 1978, addressed to each of the following:

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