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No. 88, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA,
Plaintiff,
v.
STATE OF TEXAS, *et al.,*
Defendants.

ON MOTION FOR LEAVE TO FILE COMPLAINT

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

The Brief in Opposition filed by Texas (hereafter "Tex. Br.") contains much irrelevant material and many unsupported charges. We shall not respond to the incomplete and one-sided description of Howard Hughes' life (Tex. Br. 1-2), other than to note that, in the last thirty years of his life, Howard Hughes spent less than a week in his alleged "hometown" of Houston. Similarly, the Texas charge (Tex. Br. 16 n.12) that California's "true concern" is to reach a favorable settlement with the Estate without having to litigate the merits of its claim ignores the fact that it is California which has sought from the outset of the Hughes Estate litigation to obtain a neutral forum in which to try its domicile claim, first by filing *California* v. *Texas,* 437 U.S. 601 (1978), then by seeking a change of venue in the ensuing interpleader action, and, lastly, by renewing its motion for leave to file in this action.[1] Indeed, until the present stage in these proceedings, Texas has been the only party which has sought to frustrate the goal of litigating all the domicile claims in a single forum by opposing California's Motion for Leave to File in *California* v. *Texas,* and by contending in the lower courts that the interpleader action was barred by the Eleventh Amendment. Its present objective is transparent: to avoid at all costs having to defend its implausible domicile claim in any forum other than before a jury of Texas citizens.

We shall deal in this response with the attempt by Texas to distinguish and advocate the overruling of *Texas* v. *Florida,* 306 U.S. 398 (1939). In Part I, *infra*, we show that this case squarely meets the jurisdictional standard established by that decision because California can show a real and substantial risk of injury at the hands of Texas. In Part II, *infra*, we shall demonstrate that *Texas* v. *Florida* is not an aberration which should be overruled, but rather serves a vital function in the federal system by resolving controversies such as this. In Part III, *infra*, we demonstrate that there is no alternative forum in which this controversy between states can be resolved.

ARGUMENT

I.

THE ESTATE'S ASSETS ARE INSUFFICIENT TO SATISFY THE TAX CLAIMS OF BOTH CALIFORNIA AND TEXAS.

The principal argument advanced in the Brief In Opposition is the claim that this case presents no real controversy between California and Texas because "California cannot

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[1] The fact that California filed an alternative motion seeking to change the venue of the interpleader action to Los Angeles is not inconsistent with its desire for a neutral forum, since that motion was clearly stated as less preferable than transfer of the action to Colorado. *See* Petitioners' Reply Brief on Certiorari in *Cory* v. *White* (No. 80-1556) 9 n.10.

prove that the estate cannot . . . satisfy [the] death tax claims" of California, Texas and the United States. (Tex. Br. 11; *see also id.* at 6-12). This argument rests on a distortion of the legal standard applicable to California's motion and a markedly skewed assessment of the risk that California's tax claim will be left unsatisfied because of the competing tax claims of the United States and Texas. And it also rests on a demonstrably unsound factual premise: that the total federal and state tax claims are *less* than 100% of the Estate's assets. As will be explained, Texas is able to come to this conclusion only by assuming that while the "true" value of the Estate's assets is $1.1 billion, the Internal Revenue Service will levy an estate tax on the basis of a $468 million valuation. Both legally and factually, the Texas approach is incorrect.

At this juncture, *Texas* v. *Florida*, 306 U.S. 398 (1939), does not require proof that California's interest in collecting the full tax due from the Estate will be harmed if Texas collects the tax it claims; instead, the case requires only a showing that "conflicting claims are asserted and that the consequent risk of loss is substantial." *Id.* at 406. The invocation of the equity jurisdiction recognized in *Texas* v. *Florida* does not and cannot require a demonstration to a near certainty that the inconsistent claims will exceed the Estate's assets, for the very purpose of the jurisdiction is to "avoid[ ] . . . the *risk* of loss resulting from the *threatened* prosecution of multiple claims, ... " *Id.* at 410 (emphasis added). To stay the invocation of the jurisdiction, as Texas suggests (Tex. Br. 14), until the competing claims are reduced to judgment would frustrate that purpose, since to await those events would force California to suffer the risks and expenses of multiple adjudication where only one claim, under any circumstances, can be valid and only one litigation is necessary.

The Court recognized as much in *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 532-33 (1967), when it held that a stakeholder did not have to wait until competing claims were reduced to judgment before invoking interpleader because, *inter alia*, such a "race to judgment" might be unfair to claimants. The present controversy demands the same response, as forcing California to obtain a judgment in its courts before seeking relief here would expose it to the real danger that the judgment which Texas obtained in its own courts could be perfected and satisfied in the interim, leaving California with insufficient assets with which to satisfy its claim.[2]

Texas v. *Florida*'s holding that the Court's original jurisdiction may be invoked by a showing that "the risk of loss" to the plaintiff state is "substantial" is not, as Texas would have it, "truly unique". (Tex. Br. 19). For example, in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), the Court rejected claims similar to those advanced by Texas here in determining to exercise original jurisdiction over a controversy between states concerning inconsistent water claims to a river. The Court held that because there was not enough water in the river to satisfy "the claims asserted against it" (*id.* at 610), the original jurisdiction was properly invoked despite the fact that there had prior to that time been sufficient water for the three claimant states. *Id.* Similarly, in the escheat cases (*Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), *Pennsylvania* v. *New York*, 407 U.S. 206 (1972) and *Texas* v. *New Jersey*, 379 U.S. 674 (1965)), states seeking to escheat abandoned funds were allowed to invoke the original jurisdiction despite the fact that no rival state had obtained an inconsistent judgment and, indeed, there was a substantial probability that there would never be any. *See* California's Memorandum in Support of Motion for Leave to File Complaint (hereafter "Cal. Mem.") 36-37 and n.17. California thus need not "prove" that it will be injured if Texas collects its claimed inheritance tax; it need only show a substantial risk of injury.

Texas contends that California cannot make the required showing. Because the three taxing authorities—California, Texas and the United States—have made different preliminary valuations of the Estate, Texas claims a likelihood that the ultimate taxes assessed by each authority against the Estate may be based on inconsistent valuations. It further contends

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[2] Forcing California to await the outcome of the Texas and federal valuation proceedings—which would be the only way totally to eliminate the possibility that inconsistent valuations might provide California with sufficient assets to satisfy its tax claim—has the same defect.

that, if the "true value" of the Estate is as large as the California Inheritance Tax Referee initially claimed, and not the substantially lower figure claimed by the IRS, the Estate will be able fully to satisfy all potential death tax claims against it.

This argument requires the Court to assume that the IRS has assessed the Hughes Estate at 42% of its "true value." Moreover, it ignores the fact that the uncertainty inherent in estimating the Estate's "true value" is a two-edged sword. The "true value" of the Estate will not be determined by unilateral declarations of the several taxing authorities but through lengthy judicial or administrative proceedings between each taxing authority and the Estate or arm's-length negotiations. The disparity which presently exists between the Estate's valuation, that of the Internal Revenue Service, and that of the California Inheritance Tax Referee, will undoubtedly be minimized or eliminated when the issue is subject to the adversary process of litigation and negotiation. If the Estate's ultimate "true value" is determined by the federal and state courts, there is no reason to suppose that these valuations will be wildly disparate and it is even less likely that the Estate would agree to different valuations with different taxing authorities.

But even if the three jurisdictions ultimately conclude their tax proceedings with markedly different valuations, there is no reason to suppose, as Texas does, that this discrepancy will diminish the likelihood that California's tax claim will remain unsatisfied. It is equally likely that one or more of the taxing jurisdictions may *overvalue* the Estate, which would only exacerbate the problem. And, as we shall soon show, the Texas argument ignores a crucial factor—interest on the tax claims —which all but assures that California will be unable to recover its full tax claim regardless of any discrepancy in valuation.

Texas' argument is an ill-disguised attempt to obscure the central fact in this case: that at any given value, the combined tax claims of California, Texas and the United States will substantially exceed the value of the Estate. This can be demonstrated as a matter of simple arithmetic, since the relevant effective rates of tax exceed 100%.[3]

Assume, for example, that the three taxing authorities ultimately conclude that the value of the gross Estate is identical to that found by the IRS, or $468,085,903. As shown in Appendix A, in that event the combined effective tax rates would exceed 100% (60.7% + 24% + 16%), and the taxes imposed without accounting for interest would equal $404,586,316, exceeding the federal net taxable estate of $398,466,699 by over six million dollars.[4]

Such calculations, however, minimize the shortfall because they leave out one critical fact: Howard Hughes died over five years ago and all three tax claims have been steadily accruing interest since nine months after the date of death. The interest factor makes it even less likely that the Estate's assets will be sufficient to satisfy all three tax claims. Assume, for example, that each jurisdiction secured a final judgment on its tax claim a year from now, in July, 1982.[5] At that date, more than six years since Hughes' death and approximately five and one-half years since the several taxes became due and interest started running, the Texas tax would be increased by an interest factor of

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[3] This is so because, as long as the Texas valuation is not substantially greater than that of the IRS, the effective Texas rate of tax will be equal to the federal credit for state death taxes of roughly 16%, which, when added to the California tax rate of 24.0% and the federal tax rate of 60.7%, produces a total effective tax rate of 100.7%. Texas admits that this situation is likely to occur, since it states that its valuation will be closer to that of the IRS than to California's. (Tex. Br. 10)

[4] The federal net taxable estate is the proper baseline by which to measure the availability of assets left to satisfy California's tax claim since the dollars expended by the Estate for expenses recognized as deductions on the federal estate tax return will obviously not be available to satisfy California's claim.

[5] This assumption is undoubtedly optimistic, for there is no realistic possibility that California—which has been enjoined from litigating domicile in its own courts since July, 1978— could achieve and perfect a final judgment in a year. The actual effect of interest on the tax claims will thus be greater than shown in Appendix A.

35.5%,[6] the federal estate tax by 48.6%[7] and the California tax by 66%.[8]

Applying these interest factors to the outstanding tax claims clearly shows the extent to which the Texas tax claim poses a threat of irreparable injury to California. If all three taxing jurisdictions were to reduce their tax claims to judgment by July, 1982, the net estate available to satisfy these claims ($398,466,699) would not even be sufficient to satisfy the claims of the federal government and the state of Texas. California's tax claim would be entirely wiped out. Because the federal tax claim enjoys a statutory priority over that of California (31 U.S.C. § 191)[9] and because Texas has obtained a judgment in its state courts before the states were enjoined by federal district court from proceeding in other forums, the likelihood is great that California will be left high and dry.[10]

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[6] The Texas tax rate was 6% until January 1, 1980 and 7% thereafter. *Compare* TEX. TAX-GEN. ANN. art. 14.17 (1971) with *id.* (Supp. 1980). Applying these rates to the five and a half year period between January, 1977 (nine months after Hughes died) and July, 1982, gives an approximate rate of 35.5% ((3 x 6%) + (2½ X 7%)).

[7] The applicable federal rate of interest was 7% until February 1, 1978, 6% from then until February 1, 1980 and 12% thereafter. *See* 8 CCH STANDARD FEDERAL TAX REPORTER ¶ 5519K.02 (1981). Interest on the federal tax, like that of the two state taxes, started running on January 5, 1977. 26 U.S.C. §6075(a). Assuming that the federal rate remains at 12% until July, 1982 (which is not an unrealistic assumption given today's interest rates), the applicable federal interest rate is thus approximately equal to (7% X $1\frac{1}{12}$) + (6% X 2) + (12% X $2\frac{5}{12}$) or 48.6%.

[8] The California tax accrues at an interest rate of 12% which, when applied to the five and one-half year period between January 1977 and July, 1982, gives an interest rate of 66%. CAL. REV. & TAX. CODE §14211 (Supp. 1980).

[9] This statute contains an exception for proceedings under the Bankruptcy Act, where the statutory priority in favor of the United States does not apply. But the Estate cannot invoke the protection of that Act, since an estate is not a "person" (as defined in 11 U.S.C. § 101(12)) which can be the subject of bankruptcy proceedings. 11 U.S.C. § 109; 2 COLLIER ON BANKRUPTCY, ¶ 101.30, p.101-65 (15th ed. 1980).

[10] Texas admits that the table set forth in its brief (Tex. Br. 10) fails to account for the interest accruing on the unpaid tax claims. It implies, however, that this factor is offset by the "tremendous increase in the value of the estate attributable to the profitability of Summa Corporation during the five years since Hughes' death on April 5, 1976." (Tex. Br. 10-11 n.6). This

(footnote continued on following page)

For these reasons, there is every likelihood that the Estate, which faces a federal tax lien entitled to statutory priority and a Texas judgment already on appeal, will be substantially, if not totally, depleted by the time California is able to obtain a state court judgment on its tax claim. Although Texas posits hypothetical circumstances which could reduce this shortfall, its brief admits that it has no "hard figures" (Tex. Br. 11) on the only factor which could, at best, minimize the shortfall: the profitability of Summa. Its speculation that the controversy between it and California will be eliminated by the remaining state court litigation over the "lost will" (which has been rejected by a final judgment in Nevada, *see* Complaint ¶ 17) and heirship claims by persons contending with no discernable basis in fact to be widows and children of Hughes, is unfounded. And with each passing day, the aggregate interest accruing on all the tax claims increases the likelihood that California will be left unsatisfied. All these factors bring this case squarely within the original jurisdiction of the Court established in *Texas* v. *Florida*.[11]

(footnote continued from preceding page)
equation ignores the fact that the interest accruing against the Estate is certain and definite while Summa's profitability over the last six years is unknown, as even Texas admits that there are no "hard figures" on the profitability of Summa during the relevant period of time. (*Id.* 11). Indeed, there is evidence of the fact that Summa incurred substantial losses in the first two years following Hughes' death. *See* Reply to Brief in Opposition to Motion for Leave to File Complaint in *California* v. *Texas* (No. 76, Original) 6-7 and Ex. A. And whether Summa will make a profit in the future so that the Estate will be able to pay all three taxes if it utilizes an installment payment device (*see* Tex. Br. 11 n.7) is, of course, even more speculative. (Indeed, nothing in the record indicates that the Estate has qualified or can qualify for any discretionary or elective deferment of the estate tax through installment payments permitted under the Code. *See* 26 U.S.C. 6166A(a) and Treas. Reg. § 20.6161-1(b).)

[11] An additional factor which enhances the likelihood that California will be unable to collect the tax due it is the fact that California imposes severe limits on the deductibility of costs of administration and fees for attorneys, executors and administrators. While such expenses are deductible for federal estate tax purposes if they are authorized under state law and, in the case of attorney's and executor's fees, approved by a probate court, California limits deductibility to a small percentage of the estate's value for attorney's and executor's fees and permits deduction only of the ordinary costs of administration. *Compare* 26 U.S.C. § 2053 with CAL. REV. & TAX. CODE § 13998, CAL. PROB. CODE §§ 901, 910, and 18 CAL. ADMIN. CODE § 13988.6. The California tax claim is thus a somewhat greater proportion of the federal net estate than the 24.0% figure would indicate.

II.

TEXAS V. *FLORIDA* SHOULD NOT BE OVERRULED.

In California's initial memorandum, we showed that *Texas* v. *Florida* is not "a derelict on the waters of the law" (*Lambert* v. *California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting)), but merely an application of "accepted doctrines of . . . equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court." *California* v. *Texas*, 437 U.S. 601, 615 n.15 (Stewart, J., concurring). In particular, we demonstrated that *Texas* v. *Florida* stands squarely in a long line of cases decided both before and after 1939 which hold that a claimant possessing one of several legally inconsistent claims to a fund may invoke equity jurisdiction to compel both the stakeholder and the rival claimants to litigate their claims in a single forum. (Cal. Mem. 28-37).

The response of Texas to this line of argument is largely to ignore it. It does not dispute that since at least 1888 (the date of *Pacific National Bank* v. *Mixter*, 124 U.S. 721), claimants with inconsistent claims, as well as stakeholders, have been able to invoke the aid of equity to free themselves from the risk and expense of multiple litigation. Nor does it dispute that *Texas* v. *Florida*—and, indeed, this case—involve rival, inconsistent claims. Instead, it rests its opposition to *Texas* v. *Florida* on a series of propositions which are factually and legally irrelevant.

Texas' first line of defense is that this suit is "over money, not domicile or the right to tax." (Tex. Br. 14). Texas argues that this suit presents no greater controversy between states than would be the case if each state were seeking to impose death taxes on bases which were not legally inconsistent or had altogether different claims. But, contrary to Texas' position, the legal inconsistency of the claims of California and Texas is not a matter of legal theory irrelevant to the injury suffered by California in this case. If and when Texas collects its death tax from the Estate, it will be collecting dollars *which should have gone* to California, because Hughes was a California domiciliary and not one of Texas. California, however, would have no such claim against Texas if the Texas tax were imposed upon the Estate on some other basis not inconsistent with California's domicile claim.

Moreover, as shown in California's initial memorandum, Texas and California are more than unsecured creditors seeking payment from a limited fund. This is so because each state claims a lien on the Estate's assets to secure payment of the taxes allegedly owed to it. What California seeks here is to remove the cloud which Texas has placed upon the title to California's lien in order to protect California's security interest in the Estate's assets. This form of relief is well known in equity. (Cal. Mem. 31).

Texas also argues that "the nature and magnitude of any potential injury to California do not warrant an exercise of original jurisdiction." (Tex. Br. 15). If Texas means to imply by this statement that original jurisdiction is unavailable over disputes between states which involve "only" money, it is simply incorrect. *See, e.g., South Dakota* v. *North Carolina*, 192 U.S. 286 (1904) (suit by one state on bonds issued by defendant state); *Virginia* v. *West Virginia*, 246 U.S. 565 (1918) (suit to force payment of a share of one state's debt assumed by another when the two states split up).

Nor, as Texas implies (Tex. Br. 15-16), is the size of the claim too insignificant to invoke the original jurisdiction. Even if California is able to collect 23% of its 24% tax claim, and even accepting the IRS valuation, the remaining 1% of this $400 million estate is $4 million, hardly an insignificant sum. And as shown above, there is a substantial likelihood that California's entire tax claim, which may well amount to as much as $164,000,000, will be completely wiped out.[12]

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[12] The quote from *Massachusetts* v. *Missouri* on page 15 of the Texas Brief is completely inapposite. As the context of the cited sentence makes clear, it merely stands for the principle that the Court will not exercise its original jurisdiction where the plaintiff state has available to it alternative forums. In that case, since Massachusetts was attempting to sue citizens of Missouri, the Court held that it could proceed either in the Missouri state courts or the federal district court in that state. In the present case, however, no alternative forum is available. (*See* Cal. Mem. 15-28 and pp. 13-15, *infra.*)

Next, Texas contends that resort to the original jurisdiction to resolve domicile disputes is unwarranted because it would deprive "the parties" of the right of jury trial. (Tex. Br. 16). The Texas Brief, however, identifies no source for such a "right," inasmuch as it recognizes that 28 U.S.C. § 1872 does not apply to suits between states. *Id.* But the Court's original and exclusive jurisdiction over controversies between states is not confined to actions in equity; and the potential loss of a state's right to have its claim tried before a jury elsewhere is entirely irrelevant.

Texas also argues (Tex. Br. 17-19) that this case is distinguishable from the escheat cases since only one state can escheat abandoned funds, while several states may constitutionally collect death taxes. *California* v. *Texas,* 437 U.S. at 612 n.13. Texas says that the logic of California's argument "would not only permit but require an original action in every . . . domicile dispute . . . ." (Tex. Br. 18).

This argument, too, is wide of the mark. California cited the escheat cases for the proposition that where two states possess rival, inconsistent claims, each may sue the other under the Court's original jurisdiction without waiting for a demonstrable certainty that the two states' claims will collide. Nothing in California's initial memorandum or in any pleading filed by it either states or suggests that each state *must* file an original action in every domicile dispute. Indeed, as Texas notes, California took the opposite view in the interpleader action. Nor does the logic of California's position require the Court to hold that its original jurisdiction may be invoked where the taxes claimed do not exceed the Estate's assets. For in that event, the dollars which go to each state do not deprive the other of the chance to collect on its tax claim and there is thus no controversy between states. It is precisely because the original jurisdiction depends on injury to the plaintiff state—and not injury to the taxed estate—that the original jurisdiction logically depends on depletion of the Estate's assets.[13]

Finally, Texas contends that if the Court were to exercise its original jurisdiction, it should divide the assets of the Estate between the states in proportion to the relative strengths of their claims. (Tex. Br. 14). It then argues that this "drastic remedy" should not be invoked until each state has obtained a judgment in its own courts. *Id.* This argument is an obvious *non-sequitur.* As shown in our initial memorandum (Cal. Mem. 30 n.14), the question of what rule might govern the resolution of this case once the original jurisdiction has been upheld has no bearing on the question of whether the jurisdiction should be invoked *ab initio.* Moreover, it is far from clear that such an equitable allocation—as opposed to a determination of which state's domicile claim was correct—would be appropriate. *Id.*

As for the suggestion that California should be forced to wait until it has secured a judgment in its own courts that Hughes was a California domiciliary, this would subject California to the very real risk that, prior to that time, Texas will have perfected and satisfied the judgment it has already obtained in the Texas courts. Thus, while *res judicata* would not bar California from continuing to press its domicile claim (*see California* v. *Texas*, 437 U.S. at 614 (Stewart, J., concurring)), there might simply be no assets available upon which California could levy. *See* pp. 6-7, *supra.*

Texas v. *Florida* should not be overruled. Its jurisdiction serves to protect states in those cases, thankfully relatively rare,[14] where the assertion of rival and legally inconsistent tax

[13] Of course, as Justice Stewart has recognized, the unfairness to the estate may be just as great or greater in the situation where it can afford to pay both tax claims as in the case where the estate is totally depleted. *California* v. *Texas*, 437 U.S. at 611 (Stewart, J., concurring). But unfairness to an estate cannot be a predicate for invocation of the Court's original jurisdiction over controversies between states.

[14] The Court need have no fear that accepting original jurisdiction in this case will open the floodgates to the Court's original jurisdiction. In the more than forty years since *Texas* v. *Florida* was decided, the Court has not been overburdened with double domicile litigation, since only one case—this

(footnote continued on following page)

claims by other states threaten to deprive them of millions of dollars in taxes which are rightfully theirs. It may be, as Texas claims, that such controversies will arise only with respect to "the estates of the most wealthy and most mobile persons." (Tex. Br. 17). But in such cases, the Court's original and exclusive jurisdiction should be available to protect each state from suffering a multi-million dollar injury at the hands of another.

III.

THERE IS NO ALTERNATIVE FORUM.

Part II of Texas' Brief in Opposition largely repeats the arguments already made by its Attorney General and Comptroller in their response to the Petition for Certiorari in *Cory* v. *White*, No. 80-1556. The California Petitioners have already responded to these arguments in their Reply Brief on Certiorari (hereafter "Pet. Rep. Br."), which the Court has indicated it will consider in tandem with this motion. A few additional points, however, are worthy of note.

Texas cites *Illinois* v. *Milwaukee*, 406 U.S. 91, 93-94 (1972) for the proposition that the Court's original and exclusive jurisdiction is obligatory only when no alternative forum is available. In that case, however, the Court held that the action presented was not a suit between states, but rather a suit between one state and political subdivisions of another, which were citizens of the latter state. That being the case, the suit was maintainable in a federal district court and the Court therefore declined to exercise its original jurisdiction. Nothing in *Illinois* v. *Milwaukee* stands for the proposition that the Court's exclusive original jurisdiction will not be invoked in a

(footnote continued from preceding page)
one—has arisen since that time. Moreover, as Texas points out, the recent reduction in the maximum federal estate tax has reduced the likelihood that such suits will recur in the future. (Tex. Br. 16-17). And the reaffirmation of original jurisdiction in this instance might serve to spur on those states—such as Texas—which have failed to enact mandatory arbitration statutes for the resolution of such controversies. *See, e.g.*, CAL. REV. & TAX. CODE §§ 14199-14199.13.

case such as this where, because of the original jurisdiction's exclusive character, no alternative forum exists.[15]

As just noted, the principal reason why interpleader jurisdiction is not available to resolve this controversy in the district courts is that this domicile dispute is a controversy between states within the Court's exclusive and original jurisdiction. *See* Cert. Pet. at 7-9; Cal. Mem. 23; Pet. Rep. Br. 1-6. Texas does not deny that the rival claimants in the interpleader action are the states of California and Texas, not their respective taxing officials. Indeed, Texas has conceded that the interpleader action is a controversy between states, since its motion to dismiss that action for lack of jurisdiction stated that "[t]he non-estate claimants here are in reality California and Texas." Brief in Support of Motion to Dismiss 5.

Instead, Texas argues that 28 U.S.C. § 1335 supersedes the exclusivity provision of 28 U.S.C. § 1251(a), citing *United States* v. *California*, 297 U.S. 175 (1936); *Case* v. *Bowles*, 327 U.S. 92 (1946); and *Minnesota* v. *United States*, 125 F.2d 636 (8th Cir. 1942). Our Reply Brief on Certiorari showed in some detail why these cases are inapposite. (Pet. Rep. Br. 2-6). Texas has made no effort to show that California's contentions in this regard are erroneous.

Finally, Texas attacks California's submission that the federal district courts are inappropriate forums for resolution of domicile controversies between states because such courts usually will be located, as they are in this case, in one or the other of the rival claimant states. But Texas' paean to the quality of justice dispensed by federal district judges in Texas, though undoubtedly well-deserved, is quite beside the point. The fact that federal diversity courts were intended to be "national

[15] Nor is *Arizona* v. *New Mexico*, 425 U.S. 794 (1976), any help to Texas. There the Court denied Arizona leave to file a bill of complaint, holding that resort to the original jurisdiction was unnecessary because the issues which Arizona presented to the Court were being litigated in the New Mexico state courts by private parties. In this case, however, California has no surrogates—like the Arizona utilities in *Arizona* v. *New Mexico*—to plead its case in some other forum, even if one were otherwise available. *See* California's Petition for Certiorari in *Cory* v. *White* (No. 80-1556) 8 n.8.

tribunal[s]" (*Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 289 (1888)), through which litigants could escape local prejudice, does not insure that a fair trial automatically can be had in every diversity case. While it may be assumed that federal *judges* will dispense even handed justice, there can be no conclusive presumption that local *juries* will be immune from parochial concerns. Should this Court remit this controversy to a federal district court, it will be the first time in our nation's history that a dispute between states has been tried in such a forum.[16] Such an extraordinary event demands an appropriate safeguard against the taint or even the appearance of local prejudice, a "neutral forum" which will normally be unavailable in interpleader actions of this kind. As presently constituted, therefore, federal interpleader jurisdiction under 28 U.S.C. § 1335 is an inappropriate means for resolving death tax controversies between states; indeed, for the reasons already mentioned here and in our initial Memorandum, interpleader jurisdiction is unavailable. The only means by which this controversy can be resolved is through the exercise of the Court's original jurisdiction.

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[16] *Arizona* v. *New Mexico, supra,* is not an exception to this statement. There the state court case which resolved the underlying dispute was a controversy between private utilities and a state, not between two states. *See* n. 15, *supra*, and *Arizona Pub. Serv. Co.* v. *Snead*, 441 U.S. 141 (1979).

CONCLUSION

California's Motion for Leave to File Complaint should be granted.

DATED: May 22, 1981.

Respectfully submitted,

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APPENDIX A

	Valuation of Gross Estate	Taxable Estate	Approximate Effective Rates of Tax	Tax	Applicable Interest Rate As of 7/82	Total Tax
U.S.	$468,085,903	$398,466,699	60.7%	$241,976,486a	48.6%	$359,577,058
California	468,085,903	414,218,015	24.0%	99,378,758	66.0%	164,968,738
Texas	468,085,903	398,466,699b	16.0%c	63,231,072	35.5%	85,678,103
			100.7%	$404,586,316		$610,223,899
		Net Estate				398,466,699
		Deficit				$211,757,200

[a] Source: Tex. Br. 10.

[b] We have assumed that Texas uses the same deductions as the federal return.

[c] Since the 15.0% Texas rate is less than the 16% "pick-up" rate, Texas would collect the "pick-up" tax if its valuation were identical to that of the IRS. Texas has calculated this tax as the amount shown in the table.