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NO. 88, ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1981

* * *

STATE OF CALIFORNIA,

Plaintiff,

V.

STATE OF TEXAS, et al.,

Defendants.

* * *

ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

PETITION FOR REHEARING

* * *

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The State of Texas respectfully moves this Court for an order (1) granting rehearing of the decision granting California leave to file a bill of complaint, and (2) denying leave to file the complaint. As grounds for this motion, Texas would respectfully show the Court as follows:

STATEMENT

Four years ago the Court unanimously rejected the original action which five Justices now permit California to file. *California v. Texas,* 437 U.S. 601 (1978). While

this startling about-face is attributed to "changed circumstance(s)"—primarily the companion decision of *Cory v. White,* _____U.S._____, 50 U.S.L.W. 4621 (June 14, 1982)—in reality California and Texas are no closer to potential conflict than when the Court denied the previous motion.

The Court's opinions in this case and in *Cory v. White, supra,* strongly reflect a desire to accomodate irreconcilable interests. The Court evidently harbors sympathy for the Hughes estate's situation which might someday result in double taxation, but refuses to allow that sympathy to override well established and important protections afforded the states by the Eleventh Amendment. The Court has seemingly accomodated these competing concerns by providing a remedy for the Hughes estate in the form of this original action. Unfortunately, by decreeing this well-intentioned remedy, the Court swings a broad scythe through established principles of federalism and federal court jurisdiction as fundamental and valued as those protected in *Cory v. White, supra.* Texas would respectfully submit that the decision in this case (1) rests on the incorrect view that changed circumstances since 1978 have created the jurisdictional prerequisite of a controversy between states; (2) dramatically expands the scope of this Court's original jurisdiction by eliminating the enhanced showing of harm heretofore required of a Plaintiff state; (3) contravenes the Court's own limitations on its original jurisdiction regarding the nature of the Plaintiff state's claim and the availability of an alternative forum where the issue tendered here can be resolved, but (4) fails to provide a general rule for the protection of estates faced with possible multiple taxation.

I.

NO CHANGE SINCE 1978 HAS CREATED A JUSTICIABLE CONTROVERSY BETWEEN CALIFORNIA AND TEXAS

The Court explains its present decision by reference to "changed circumstance(s)" concerning "uncertainties that affected the case" in 1978. The Court therefore recognizes that no justiciable controversy existed in 1978 between Texas and California but believes that some event or events since then has created such a controversy. While time has passed, the uncertainties involved have not. No controversy between California and Texas existed in 1978, and none exists now.

The main event emphasized by the Court as a significant change since 1978 is its decision in *Cory v. White, supra,* holding that a statutory interpleader action cannot be brought under these circumstances. The Court apparently feels that that opinion satisfies the "precondition for the exercise of original jurisdiction" by showing that no alternative forum exists. But *Cory v. White* changed nothing with respect to the availability of the statutory interpleader; rather, it merely reaffirmed the Eleventh Amendment holding of *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937). While some may have been misled by the concurring opinions in *California v. Texas, supra,* in 1978, this Court surely was not. The Eleventh Amendment foreclosed statutory interpleader in 1978 just as it does now in 1982, and this Court's reaffirmation of that in no way changes the situation presented to the Court in 1978. It seems inconceivable that what the Court required in order to exercise original jurisdiction was a subsequent decision of its own that merely restates what the law has been for more than forty years. *Cory v. White* cannot be a change since 1978 that justifies the Court's reversal of its prior decision not to exercise original jurisdiction. Nor does any other change justify that reversal.

In fact, the material circumstances stand now as they did in 1978. Both California and Texas assert a claim against the Hughes estate for death taxes, but neither state has any claim against the other. No controversy—in any sense of the word—now exists between California and Texas. The possibility of any such controversy arising between the two states with respect to the Hughes estate is as remote as ever. Because the domicile issue has not been resolved in states other than Texas due to federal court injunctions in the interpleader action following this Court's decision in 1978, numerous questions concerning the estate's state tax liability also remain unresolved in various state courts. While the HHMI "lost will" has been finally defeated in Nevada, the summary judgment holding it invalid in Texas is still on appeal. Numerous other wills are still in dispute, and numerous heirship questions remain, pending the resolution of the intestacy questions. The estate and the IRS are involved in litigation in Tax Court concerning the valuation of the estate for federal estate tax purposes, which will have a tremendous impact on the amount of funds remaining in the estate to satisfy any state death tax claims. Neither Texas nor California has released its final valuation of the Hughes estate. Until such time, the magnitude of the state tax claims cannot be determined. And, most importantly, California has been restrained from pursuing domicile litigation in her own state courts and therefore is no closer than in 1978 to having any judgment which might conflict with the Texas domicile judgment.

Justice Stewart's concurring opinion in 1978 and Justice Powell's dissenting opinion here clearly demonstrate that *Texas v. Florida*, 306 U.S. 398 (1939), was wrongly decided. But right or wrong, *Texas v. Florida* does not mandate jurisdiction in this case. The uncertainties and contingencies surrounding the Hughes estate that did not exist with respect to Colonel Green's estate—who had an estate of an immediately

and specifically knowable dollar value, with no will contests and no intestacy or heirship disputes affecting the amount of state death tax claims, and stipulated tax claims in excess of the value of the estate—make any controversy in this case infinitely more conjectural and remote than that in *Texas v. Florida.* No change since 1978 has brought the two states any closer to potential conflict. A desire to remedy a hypothetical problem the Hughes estate might face cannot logically be transmuted into an exercise of original jurisdiction which exists only to protect a *state* from injury by a sister state. No such controversy between states exists here.

II.

THIS DECISION WILL DRASTICALLY EXPAND ORIGINAL JURISDICTION BY ELIMINATING THE ENHANCED SHOWING OF HARM HERETOFORE REQUIRED OF A PLAINTIFF STATE

Even if the Court remains convinced that the present circumstances, although speculative and uncertain, constitute a controversy between states, the exercise of original jurisdiction should be withheld because to exercise it here will cause a radical expansion of the Court's original jurisdiction. This Court has long required an elevated showing of harm—both its magnitude and imminence—by a Plaintiff state before the Court would exercise its unique and awesome power to control the conduct of one state at the instance of another. *See Colorado v. Kansas,* 320 U.S. 383, 393, (1943); *Washington v. Oregon,* 297 U.S. 517 (1936); *Alabama v. Arizona,* 291 U.S. 286, 292 (1934); *Connecticut v. Massachusetts,* 282 U.S. 660, 669 (1931); North Dakota v. Minnesota, 263 U.S. 365 (1923); *New York v. New Jersey,* 256 U.S. 296, 309 (1921). Just as the Eleventh Amendment provides states with protection from being brought to federal court in numerous situations, the enhanced showing of

harm required of a Plaintiff state in an original action provides states with an appropriate right to be free from control by the federal judiciary absent a strong showing that such interference is necessary. The requirement of enhanced demonstration of harm also assists this Court in keeping its original docket to a manageable size by eliminating those cases in which potential conflict resolves itself and never requires judicial action.

For this Court to exercise original jurisdiction based on the hypothetical harm which may befall California *if* it should get a judgment that Hughes was a California domiciliary and *if* the estate should be insufficient to satisfy the tax claims of California, Texas and the United States, would make a farce of the long-standing principle cited in the cases above. California has not and cannot show that it will ever be harmed by any action by Texas, nor can it show the magnitude of any harm if some should occur. The action of the Court in granting leave to file subjugates the substantial and present interest of the State of Texas in the domicile finding it obtained in state court after two years of litigation and a three month jury trial to the conjectural interest of the State of California in taxes of which it may never be deprived, and where the predicate for which, a finding of domicile, has never been secured.

It is crucial to recall that even in *Texas v. Florida* leave to file a complaint was initially denied until figures were included showing that the total of all death tax claims exceeded the value of Colonel Green's estate. *See Texas v. New York,* 300 U.S. 642 (1937); Bill of Complaint in No. 11, Original (1937). Those figures could be accurately calculated, and the insufficiency of Colonel Green's estate clearly demonstrated, because his estate was primarily comprised of stocks and bonds, "[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). By contrast,

California's motion here can merely assert, without foundation or substantiation in fact or figures, that "*it is likely* that California will be irreparably injured by being unable to satisfy its judgment for taxes and interest." (Motion for Leave to File Complaint, at 7) (Emphasis added).

It is incongruous to state that *Texas v. Florida* involved risks no more speculative than those in this case and then immediately acknowledge that *all* of the competing states in *Texas v. Florida* "conceded that the estate was insufficient to satisfy the total amount of taxes claimed." There is no such concession by Texas here. The partial excerpt from *Texas v. Florida* quoted by this Court in footnote 1, when fully stated, reads:

> The risk that decedent's estate might constitutionally be subjected to conflicting tax assessments in excess of its total value and that the right of complainant or some other state to collect the tax might thus be defeated was a real one, *due both to the jurisdictional peculiarities of our dual federal and state judicial systems and to the special circumstances of this case.* (306 U.S., at 410) (Emphasis added)

Three sentences later, still at page 410, the Court in *Texas v. Florida* added:

> The equity jurisdiction being founded on avoidance of the risk of loss resulting from the threatened prosecution of multiple claims, the risk must be appraised in the light of the circumstances as they are in good faith alleged *and shown to exist* at the time when the suit was brought. (Emphasis added)

The requirement that the risk of harm be "shown to exist" at the time when the suit was brought was satisfied in *Texas v. Florida* by the initial pleadings of all claimant states conceding the insufficiency of the estate to satisfy all of their claims. *Texas v. Florida*, 306 U.S., at 404. No such showing has been made here and this totally distinguishes the instant case from the case before the Court in *Texas v. Florida.*

The wisdom and benefit of the traditional requirement that a Plaintiff state demonstrate by clear and convincing evidence that a threatened injury of serious magnitude will befall it unless original jurisdiction is exercised is well illustrated by this case. The State of Texas—following its concededly constitutional statutes and proceeding in a manner which the Court reaffirms violates no constitutional principles—obtained, at great expense and effort, a judgment in its own courts that Hughes died domiciled in Texas. California's attempt here to nullify that valid state court judgment and to prevent Texas from collecting its tax based thereon undercuts bedrock principles of comity and federalism expressed in the abstention doctrines, the Tax Injunction Act (28 U.S.C. § 1341), the doctrines of res judicata and collateral estoppel, and 28 U.S.C. § 1738. If this Court nonetheless is willing to strip a state court tax matter from the state court system, it should do so only after a clear-cut demonstration that such drastic action is absolutely necessary. Not a hint of such a showing has been made by California in this case.

If the Court is to continue to adhere to principled, articulated standards with respect to the parameters of its original jurisdiction, the exercise of such jurisdiction here would require the Court to take virtually any case brought to its steps by a state. Clearly, many such cases do not merit the Court's time or attention. *See, e.g., California v. West Virginia,* 102 S.Ct. 561 (1981). The Court should not, by taking a case as hypothetical

as this one, force itself either to abandon its ability to control its original docket or to adopt an unprincipled, "pick-and-choose" method of governing the exercise of its original jurisdiction.

III.

THE NATURE OF CALIFORNIA'S CLAIM AND THE EXISTENCE OF AN ALTERNATIVE FORUM IN WHICH THE ESTATE CAN PREVENT DOUBLE TAXATION PRECLUDE THE EXERCISE OF ORIGINAL JURISDICTION HERE

The Court emphasizes in its decision herein that it has established "prudential and equitable limitations" upon the exercise of original jurisdiction so as to restrict it to "appropriate" cases. The appropriateness of a case involves two considerations: (1) the seriousness and dignity of the claim; and (2) the availability of another forum where the issues tendered may be resolved. *Illinois v. City of Milwaukee,* 406 U.S. 91, 93-94 (1972). This case is an inappropriate one under both prongs of that test.

First, the nature and dignity of the claim California asserts is highly suspect. The claim is clearly one only for money, involving no rights unique to state sovereignty or state borders. It seems impossible to differentiate the claim California asserts here from the type of claim raised in *California v. West Virginia, supra.* In both cases California has asserted a claim for lost revenue due to the actions of officials of a sister state. The only difference in the claims is that it is impossible here to know whether California will ever be injured by Texas or to know the magnitude of any injury that might possibly occur.

California's claim here is based solely on the percentages of effective tax rates, as noted in this Court's opinion. It claims that since the "combined marginal rate

of tax" is 101%, it may be unable to collect 1% of its 24% rate of tax. Since California previously entered into a conditional agreement settling its claim for 18% of the federal taxable estate (down from its maximum claim of 24% of the taxable estate under California's own valuation), the grave injury to be suffered by California if Texas collects its tax also is exceedingly hard to discern. The alleged possible inability to collect some unknown portion of a future tax judgment, which California in all likelihood would be unable to obtain in its own courts anyway, does not constitute a claim of the requisite seriousness and dignity to justify the exercise of this Court's original jurisdiction.

Second, at least two alternative remedies exist which would obviate the need for this Court to expend its valuable judicial resources on this case. The Court could wait until California has accomplished what Texas has already achieved: a state court judgment that Hughes was its domiciliary at the time of his death. Execution of final judgments of domicile and tax proceedings in other states could be stayed pending the outcome of the California state court domicile trial to insure that California would not be harmed in the interim. In the unlikely event that California were to prevail on the domicile issue in its own state courts, then perhaps the Court would have more justification for considering an original action.[1] At first blush this may not appear judicially efficient, but in fact it is. If California fails in its own courts, not only would this Court be spared the time and effort of handling an original action, but the State of Texas would also be spared the enormous time

1. By that time, all the valuation issues should have been resolved so that the Court would know not only whether there were in fact conflicting state court adjudications of domicile but also whether the state tax claims based upon those domicile judgments, together with the federal estate tax claim, would exceed the value of the assets of the Hughes estate.

and expense of needlessly relitigating a question of state law which it has already resolved in its own courts. This approach has been effectively utilized in the past to allow state courts an opportunity to eliminate a potential conflict between states. *Arkansas v. Texas,* 346 U.S. 368 (1953).

Furthermore, an alternative forum exists where the domicile issue tendered here can be resolved in a proceeding in which all parties to this original action have already appeared. Cause No. 139, 362, *In re the Estate of Howard R. Hughes, Jr., Deceased,* in Harris County Probate Court No. 2, has been pending since April 14, 1976. It is the ongoing proceeding in which the Houston Probate Court is determining all matters incident to the estate of Howard R. Hughes. In addition to the estate and all claimed heirs of Hughes, the taxing officials of both California and Texas have entered a general appearance in that proceeding.

The California taxing officials filed a motion with the Houston Probate Court in July of 1981 to withdraw certain original exhibits from the record in that case. This motion was granted by the Court, and the original exhibits were withdrawn. Under Texas law, the act of seeking affirmative relief by requesting the removal of original exhibits from the record constitutes a general appearance subjecting the California taxing officials to the jurisdiction of the Texas court. *See York v. State,* 73 Tex. 651, 11 S.W. 869 (1889); *Toler v. Travis County Child Welfare Unit,* 520 S.W.2d 834 (Tex. Civ. App.—Austin 1975, no writ); Tex.R.Civ.P. 75(b); *cf. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxires de Guinea,* _____U.S._____, 50 U.S.L.W. 4553 (1982); *Adam v. Saenger,* 303 U.S. 59 (1938).

The Houston Probate Court provides a forum in which all parties to this can simultaneously litigate their domicile claims. The right of the various parties to a

jury trial on this issue will be preserved, and full appellate review, including a review by this Court of any alleged violations of federal law, would remain intact. If the Court feels that the domicile issue should be resolved in a single forum, thus eliminating the possibility that the estate might be doubly taxed, the parties should be remitted to the Houston Probate Court for a final adjudication of the domicile issue. *Arizona v. New Mexico,* 425 U.S. 794, 796-97 (1976); *Illinois v. City of Milwaukee, supra; see also Texas v. Florida, supra* 306 U.S. at 431 (opinion of Frankfurter, J.).

IV.

THE COURT'S DECISION FAILS TO PROVIDE A GENERALLY APPLICABLE RULE FOR THE PROTECTION OF ESTATES FROM POSSIBLE MULTIPLE TAXATION

The Court's decision here, read together with the companion case of *Cory v. White, supra,* demonstrates the Court's apparent concern with potential mulitiple taxation of estates and the need for a federal forum to remedy such a problem. However, its choice of an original action in this Court will provide no relief for the vast majority of estates that are subject to multiple taxation. With the reduced federal estate tax rate and increased exemptions, it is unlikely that many estates in the future will be able to show that the combined marginal tax rate exceeds 100%. Consequently, it is highly unlikely that the jurisdictional prerequisite established by the Court in this case will be satisfied in future cases of multiple domicile-based taxation of estates.

If the impetus behind the Court's decision is the belief that multiple taxation of estates based upon domicile is fundamentally unfair, then this problem should be squarely addressed and resolved. If multiple taxation

on the basis of domicile is wrong, then *Worcester County Trust Co. v. Riley, supra,* should be overruled, thereby affording estates a federal remedy through interpleader jurisdiction. *See Cory v. White, supra,* (Powell, J., dissenting). If multiple taxation of estates on the basis of domicile is permissible, then the fact that the Hughes estate may be confronted with such a situation is simply a fact of life, and nothing more; it should not be the reason for this Court exercising its original jurisdiction in this case.

CONCLUSION

California's complaint presents no existing controversy between it and Texas and is beyond the original jurisdiction of this Court. Even if it were not, the hypothetical and conjectural nature of California's claimed injury cuts against all of the Court's self-formulated limitations for restricting the exercise of original jurisdiction to appropriate cases. Long ago, Justice Holmes wisely counseled that

> "[g]reat cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co. v. United States,* 193 U.S. 197, 400-401 (1904)(dissenting opinion).

The commendable desire to right the perceived unfairness of double taxation should not cause the Court to abandon or overrun the fundamental contours and precepts of its original jurisdiction. This jurisdiction,

which is so constitutionally precious and unique, is meant only to remedy serious wrongs against states, and not to be a catch-all jurisdictional basis for the Court to right any perceived wrong that involves two states. The State of Texas prays that the Court grant rehearing of its decision in this case and deny California leave to file its complaint.

Dated 8 July, 1982.

Respectfully submitted,

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CERTIFICATE

I do hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Rick Harrison

RICK HARRISON

PROOF OF SERVICE

I, Rick Harrison, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Petition for Rehearing have been served on each of the following by depositing the same in a United States post office, with first-class postage prepaid, certified, return receipt requested, on this 8 day of July, 1982, addressed as follows:

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