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No. 94, Original

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF SOUTH CAROLINA,

Plaintiff,

NATIONAL GOVERNORS' ASSOCIATION,

Plaintiff-in-Intervention,

v.

JAMES A. BAKER, III, SECRETARY OF THE
TREASURY OF THE UNITED STATES OF AMERICA,

Defendant.

MOTION FOR DIVIDED AND EXTENDED ARGUMENT

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**MOTION OF PLAINTIFF-IN-INTERVENTION
FOR DIVIDED AND EXTENDED ARGUMENT**

The National Governors' Association ("NGA"), plaintiff-in-intervention, respectfully requests that this Court grant extended and divided argument so that each side, plaintiffs and defendant, will receive 50 minutes at oral argument and further, that plaintiffs' 50 minutes will be divided between the plaintiff, South Carolina and the plaintiff-in-intervention, NGA.*

* South Carolina has informed the National Governors' Association that it is filing a parallel motion requesting extended and divided argument.

PRELIMINARY STATEMENT

On February 7, 1983, South Carolina sought leave to file an original complaint in the United States Supreme Court challenging the constitutionality of Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982; that Section provides that the interest paid on municipal bonds will be tax exempt only if those bonds are issued in registered, as opposed to bearer, form. The gravamen of South Carolina's complaint was that Section 310(b)(1), by effectively requiring the States to submit to the burden of issuing their obligations in registered form, violated the doctrine of intergovernmental tax immunity and the Tenth Amendment to the Constitution.

This Court granted South Carolina leave to file on February 22, 1984. *South Carolina v. Regan*, 465 U.S. 367 (1984). In doing so, it adverted to the important federalism issues raised by this case. Thus, Justice Brennan wrote for the Court that "[u]nquestionably, the manner in which a State may exercise its borrowing power is a question that is of vital importance to all 50 States." *South Carolina v. Regan*, 465 U.S. 367, 382 (1984). In addition to granting South Carolina's motion, the Court appointed a Special Master, the Honorable Samuel J. Roberts, to develop a factual record.

The NGA subsequently filed a motion for leave to intervene as a plaintiff. As an association of the States, the members of which are the chief executives of the fifty States, two Commonwealths and three Territories, the NGA represents the States in the federal system. Its motion to intervene was premised on the ground that the "members of the NGA [would] be bound by the judgment and have a substantial interest in the outcome." *Motion of the National Governors' Association for Leave to Intervene as Plaintiff* at 2. The NGA stressed that it would be able to provide the Court with a broad national perspective, drawing upon and demonstrating the impact of the Section on the fifty states. The Special Master recommended that the motion for leave to intervene be granted and in his Report found that the "NGA's

contribution to the fact-finding process has been substantial and has materially aided the Special Master in discharging his duties.” (Report at 4 n. 7).

I.

Divided Argument Is Essential To Represent The Now Divergent Views of Plaintiff and Plaintiff-in- Intervention

As this case has developed, NGA and South Carolina have adopted incompatible legal positions. This divergence of views makes divided argument essential to a full airing of the issues.

From the outset, South Carolina has asserted that Section 310(b)(1) imposes a federal tax on state debt obligations in violation of the doctrine of intergovernmental tax immunity.* At this juncture, the NGA argues that the single constitutional issue raised in this case is whether requiring the States to register their bonds is fundamentally antithetical to the notion of federalism contemplated by the structure of the Constitution and the Tenth Amendment.

While South Carolina clearly views Section 310(b)(1) as imposing a tax on the States, the NGA premises its entire argument on the notion that Section 310(b)(1) is not a tax, but a regulation in aid of Congress’ taxing power. *Exceptions of the National Governors’ Association to the Report of the Special Master and Brief in Support Thereof* at 23-24 (filed May 9, 1987). As a result, the NGA believes that this Court should not reach the tax immunity issue presented by South Carolina.

* South Carolina also agrees that Section 310(b)(1) raises a Tenth Amendment issue.

Because South Carolina and the NGA present divergent views as to whether the intergovernmental tax immunity issue is raised by Section 310(b)(1), NGA respectfully submits that argument should be divided to permit the full presentation of each point of view.

II.

The Complexity and Importance of the Question Presented Requires Extension of Time for Argument

The issues presented by this case are both complex and important. After appointment of the Special Master, the parties engaged in two years of discovery and three weeks of hearings before the Master. The intricacy of the issues is reflected in the Special Master's Report which required 193 printed pages to discuss and analyze the questions of fact and law presented.

In addition to the complexity of the questions presented, the case also raises important issues of law, one still unsettled and the other long-dormant. The case puts forward for the first time since *Garcia v. San Antonio Transit Authority*, 469 U.S. 528 (1985) the troubling question of the limits imposed by the Constitution on Congress' ability to regulate the States, and in particular, the ability of Congress to use state legislative and administrative resources to accomplish federal ends. Under NGA's approach, this case presents an important issue left open in *FERC v. Mississippi*, 456 U.S. 742 (1982): the extent to which Congress may constitutionally regulate the states in a manner that obliges them to enact new laws to meet a federal directive. Under South Carolina's approach, this case requires the Court to rule on the continuing vitality of the principle that interest on state governmental debt cannot be subject to federal taxation. See *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

The parties thus require an extended period of argument to adequately present the issues.

CONCLUSION

For the foregoing reasons, the NGA respectfully requests the Court to grant divided and extended argument.

Respectfully submitted,

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