No. 116, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ALABAMA, *et al.*,
Plaintiffs,

v.

W.R. GRACE & COMPANY, *et al.*,
Defendants.

On Motion for Leave to File Complaint

BRIEF OF DEFENDANT EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED

Whether twenty-nine states, unwilling to pursue in their own courts fact-specific claims against twenty-six mostly non-diverse companies that produced or distributed asbestos-containing products found in state-owned buildings, may consolidate their state law claims and invoke this Court's original jurisdiction.

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 29.1 of the Rules of this Court, the Court is advised that Eagle-Picher Industries, Inc. is a publicly traded company, with no parent company, and with only wholly owned subsidiaries, except for the following partially owned subsidiaries: American Imaging Services, Inc., a Delaware corporation; Tri Sigma Corporation, an Arizona corporation; and Diehl & Eagle-Picher GmbH, a corporation organized under the laws of West Germany. Stock in these partially owned subsidiaries is not publicly traded.

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STATEMENT

Twenty-nine states ("States") seek to invoke this Court's original jurisdiction in a suit naming as defendants twenty-six companies involved in the manufacture, marketing or distribution of asbestos-containing products. Although styled as a single action, the claim of *each* plaintiff State stands alone. Indeed, each State's claim is in reality a bundling of building-by-building claims, against different companies, involving different

asbestos-containing products which vary among thousands of individual State-owned buildings.

The questions of (1) what, if anything, should be done about the presence of asbestos-containing products in buildings, and (2) who should pay the cost of anything that is done, are matters governed by state contract and tort law. State law often yields the conclusion that asbestos-containing products in buildings are not hazardous, or that the costs of safely maintaining such products if they become hazardous should be borne by the current owners of the buildings in question—in this case, the States—and not passed along to companies like the defendants.[1] But no matter what the ultimate outcome on the merits, the claims of each State will require a detailed inquiry into the particular product involved, the identification of the manufacturer of the product, the location and condition of the product, and the degree of hazard (if any) associated with the product.[2] Among other things, plaintiffs must confront the issue of product hazard against a growing body of scientific and regulatory literature counseling *against* removal for most installed products in the normal course, and against this backdrop, must prove the existence of a hazard in

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[1] For example, defense verdicts were returned in most of the so-called "asbestos-in-building" cases tried to a jury in 1989. *E.g., Benton Harbor Area Schools v. National Gypsum Co.*, No. 85-3008-NZ-Z (Cir. Ct. Berrien Cty., Mich., Mar. 28, 1989) (defense verdict); *Mt. Lebanon School Dist. v. W.R. Grace & Co.*, No. G.D. 83-13686 (C.P. Ct. Allegheny Cty., Pa., Oct. 13, 1989) (defense verdict); *3250 Wilshire Blvd. Building v. Metropolitan Life Ins. Co.*, No. 87-06048 (C.D. Cal. Nov. 20, 1989) (defense verdict); *Highline School Dist. No. 401 v. Turner & Newall PLC*, No. 86-2-16632-7 (Sup. Ct. King Cty., Wash., Dec. 15, 1989) (defense verdict). *But see Beavercreek Local Schools v. ABCO Insulations*, No. 85CV-367 (C.P. Ct. Greene Cty., Ohio, Aug. 17, 1989) (plaintiff verdict).

[2] The products come in different forms—from common floor tile, to fire-proofing sealed in walls, to various forms of ceiling products, to thermal insulation products found primarily in boiler rooms—and are composed of different types of asbestos fibers.

each building for which each State seeks recovery (some tens of thousands of buildings all told).[3]

The States' Motion overlooks the formidable procedural and administrative hurdles associated with the pursuit of claims of the type raised by the States. Litigation of such cases typically begins with a "product identification" phase, during which plaintiffs are required to identify the individual buildings that contain asbestos-containing products, the particular products located in various settings within those buildings, the manufacturer of such products and the quantity of each manufacturer's products within the subject buildings. Courts must then engage in extensive factfinding to determine which of dozens of different companies named in a complaint (or omitted therefrom) are responsible for particular products located in particular buildings.

In certain of the larger cases, these product identification issues alone may consume many months of trial time before special masters. The state courts have even at times found it necessary to establish *ad hoc* adjunct courthouses in which to adjudicate these basic issues. *E.g.*, *State of Maryland v. Keene Corp.*, No. 1108600 (Cir. Ct. Anne Arundel Cty., Md., June 9, 1989) (appointing four special masters to hear product identification and damages issues). Only after these threshold issues of product identification are resolved is there occasion to proceed to equally thorny questions regarding hazard, liability, appropriate remedial measures, and costs.

The legal issues posed in these cases are no less complicated than the factual problems. Principles of state contract and warranty law, for instance, may limit the

[3] Asbestos "building" cases like the present action, which involve very low levels of asbestos fiber, should not be confused with another species of asbestos case which involves persons who have come into contact with very high levels of asbestos fibers through sustained occupational exposure over long periods of time.

scope and reach of warranties associated with some or all of these building products. Because the claims concern pure economic loss, tort theories may not be applicable. *See generally East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (no negligence or strict liability claim lies in admiralty when commercial party's only alleged injury is economic loss). Statutes of limitations and repose may present a bar to recovery.[4] Even the unusual legal theory invoked by the States here, premised on section 115 of the Restatement of Restitution, has been rejected as a matter of law in some jurisdictions, including the highest state court of Illinois, a party to this action. *See Board of Educ. v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 597-98 (1989). Although the States seek to avoid the issue (State Br. 23),[5] the laws of the twenty-nine states bringing this action vary dramatically on the question of who, if anyone, should bear the costs associated with the removal or melioration of asbestos-containing products in buildings.

In sum, the States have brought this original action because they are unenthusiastic about the likely results and burdens of pursuing these cases, as other states have, in their own court systems.[6] Although there is no precedent to support such a result, the States invite the Court to reject existing state law governing these claims and adopt a federal common law standard that the

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[4] *See, e.g., State of Maryland v. Keene Corp.* (Maryland statute of repose may pose bar to State of Maryland's claims); *Board of Educ. v. Celotex Corp.*, No. 84-429634-NP (Cir. Ct. Wayne Cty., Mich., Feb. 5, 1988) (barring claims under Michigan statute of limitations).

[5] Citations to "States Br." are to appropriate pages of plaintiffs' Brief in Support of Motion For Leave to File Complaint.

[6] As discussed below, states which have commenced asbestos-in-building cases in their own state courts include Kentucky, Maryland, Minnesota, Mississippi, Pennsylvania, South Carolina, Virginia, and West Virginia.

States believe will untangle the difficult factual and legal issues underlying their complaint. *See* States Br. 23 ("legal issues presented . . . are not dependent upon the local law"). Moreover, the States ask the Court to undertake a consolidated factfinding effort so broad and unmanageable that the States concede that individual prosecution of these actions would be "prohibitively expensive." *Id.* at 24. Thus, lurking behind the States' deceptively simple complaint is a massive series of litigation problems unlike anything this Court—or any other single court—has previously confronted.

There is no basis for the assertion of Article III jurisdiction in this case. Even apart from the jurisdictional deficiency, only the most compelling reasons would justify the Court undertaking such a Herculean endeavor pursuant to its original jurisdiction. As we demonstrate below, no such reasons exist.

SUMMARY OF ARGUMENT

1. The Court's original jurisdiction only encompasses suits between states and citizens of *other* states. U.S. Const. Art. III, § 2. This grant of original jurisdiction was not intended and does not permit states to prosecute claims against their own citizens in the Supreme Court. The States' action, which includes claims by various states against their own citizens, thus does not fall within the Court's grant of original jurisdiction.

2. Even if jurisdiction were proper, this Court would have to decline to exercise it here. The grant of original jurisdiction in actions brought by a state against a citizen of another state was designed to provide the states with an impartial forum in which to pursue claims against persons who could *not* be sued in their own state courts. It was not intended to allow a state to avail itself of the offices of this Court when—by virtue of modern long-arm statutes—the state has available its own courts to pursue its claims against a non-citizen.

This Court is also ill-equipped to adjudicate the factually intricate and scientifically complex controversies comprising this action. The Court is not being asked to resolve any legal issues of federal consequence, and it is poorly suited to the task of applying the governing state law of twenty-nine different states to these myriad claims. Moreover, the Court would be ill-served by investing its scarce time and resources on complex, fact-bound actions of this type. Simply put, this Court, far from being the *only* available forum (as the States suggest), is in fact the most inappropriate forum for adjudication of the States' grievances. The States should therefore be left to their own courts for adjudication of their claims.

For these reasons, as more fully set forth below, the States' motion for leave to file their complaint should be denied.

ARGUMENT

I. THIS ACTION IS NOT WITHIN THE COURT'S ORIGINAL JURISDICTION.

In bringing this action, the States rely on that portion of Article III of the Constitution that extends this Court's original (but not exclusive) jurisdiction to "Controversies . . . between a State and Citizens of another State . . . ." U.S. Const. Art. III, § 2. *See also* 28 U.S.C. § 1251(b)(3) (1982) (codifying grant of original jurisdiction). Notwithstanding that this jurisdiction is "limited and manifestly intended to be sparingly exercised," and not "expanded by construction" (*California v. Southern Pacific Co.*, 157 U.S. 229, 261 (1895)), the plaintiff States seek to pursue claims against their own citizens in this Court. Thus, Delaware has joined in the bringing of this action despite the fact that no less than fourteen citizens of Delaware are named as parties defendant. All told, no less than twenty of the twenty-six defendants named in this action are citizens of at least one plaintiff State. The States maintain that this poses

no jurisdictional problem because the Court may construe the jurisdictional grant to require only "minimal diversity," leaving plaintiffs free to join any defendants in an original action "regardless of their citizenship." Complaint ¶ 4.

The plaintiff States are mistaken as a matter of law. The Court has long held that a state "may not of course invoke the original jurisdiction of the Court in a suit against one of her citizens." *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 463 (1945). This is because the Court's original jurisdiction, by its terms, contemplates complete diversity, not minimal diversity. That is, an original suit cannot be maintained so long as a state joins even one of its citizens as a defendant. *See Louisiana v. Cummins*, 314 U.S. 577, 577 (1941) (per curiam) (denying leave to file complaint "for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana"); *Southern Pacific Co.*, 157 U.S. at 258 (refusing to exercise original jurisdiction because "it has never been held that the court could take original jurisdiction of controversies between a State and citizens of another State and its own citizens"); *Pennsylvania R.R. Co.*, 324 U.S. at 463 (noting that "[i]f either of the defendants . . . is a citizen of Georgia and is a necessary party, leave to file would have to be denied").

So far as we can tell, the Court has never in practice departed from this rule. *See Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 495-96 (1971) (original jurisdiction is properly invoked since "[d]iversity of citizenship is absolute"); *Texas v. Interstate Commerce Comm'n*, 258 U.S. 158, 164 (1922) (presence as a defendant of a citizen of the plaintiff state would preclude exercise of original jurisdiction); *Pennsylvania v. Quicksilver Co.*, 77 U.S. (10 Wall.) 553, 556 (1870) (same); *see also* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 304 (3d ed. 1988) (collecting cases which show

this to be the Court's "uniform[]" response "in actions by States").[7] Having joined their own citizens as defendants, the plaintiff States cannot maintain their case in this Court.

In an effort to overcome this jurisdictional defect, the States propose to reconstruct this case into twenty-nine state-specific claims under which each State will dismiss its own citizens from its claims. The result would be that this case would be broken down into numerous claims and subparts, each exclusively featuring States and non-citizens of those States. *See* Exhibit A to Complaint; States Br. 28. The States' proposal is, however, merely to abandon claims against defendant corporations *incorporated* under state law. This "solution" overlooks that a corporation is now generally considered a citizen of the state in which it has its principal place of business as well as a citizen of its state of incorporation. *See,*

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[7] The rule—that "a state may not join its own citizens in an action against citizens of other states"—"remains, . . . subject to the single exception that a citizen of the plaintiff state may be joined as a merely formal or nominal party." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (hereinafter "Wright & Miller") § 4046, at 214-15 (2d ed. 1988).

The States' reliance on *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523 (1967), is misplaced. That case held that the constitutional grant of federal court jurisdiction over "Controversies . . . between citizens of different States" and the federal interpleader statute, 28 U.S.C. § 1335, permitted district court jurisdiction over a case featuring only "minimal diversity." *Id.* at 530-31. This holding is inapposite to the present case, which involves not only a different constitutional grant of jurisdiction ("between a State and Citizens of another State") but this Court's original jurisdiction. Similarly, the dictum in *Utah v. United States,* 394 U.S. 89 (1969), suggests only that, in litigation brought by a state against the United States under a special jurisdictional statute, this Court's original jurisdiction might not be destroyed by joining a citizen of the state as an intervenor. *Id.* at 96. Neither case involves construction of the constitutional grant of jurisdiction at issue in this case, which this Court's cases uniformly construe as requiring complete diversity.

e.g., 28 U.S.C.A. § 1332(c) (West Supp. 1989); *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 654 (2d Cir. 1979).[8] Thus, the present complaint, even as recast by the States, would continue to feature States suing their own citizens, a scenario incompatible with this Court's original jurisdiction.[9]

Moreover, the States' professed willingness to gerrymander their claims in this way exposes the consolidated effort before this Court for the contrivance that it is. The States complain, on the one hand, that it is necessary to proceed against *all* of the defendants together in a single action in order to obtain a comprehensive solution to their "problem." States Br. 21, 24. Yet each State could pursue this case against *all* of the defendants in its *own* court system, without the need to sacrifice *any* of its claims as to particular defendants, thus preserving the comprehensive solution. Only in this Court do jurisdictional constraints compel plaintiffs to drop claims against certain defendants—oddly, the defendants with respect to which each State has the *strongest* interest, its own citizens—thereby forcing the States to engage in the gerrymandering they now propose. Thus, even accepting the States' objectives on their own terms, it is clear that this Court is the *least* viable forum for adjudicating the kind of case that the States say they wish to pursue.[10]

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[8] The Court apparently has never squarely addressed this point in the context of its original jurisdiction. Defendant suggests, however, that Congress' decision to so regard the citizenship of a corporation (*see, e.g.*, 28 U.S.C.A. § 1332(c) (West Supp. 1989)) should be given substantial deference by the Court.

[9] Even under the alternative complaint, for instance, Illinois continues to assert claims against all defendants, despite the fact that United States Gypsum, a defendant, has its principal place of business in Illinois.

[10] The States suggest that they need to proceed with one single lawsuit in order to divide equitably "the limited resources of the

II. EVEN WERE JURISDICTION PROPER, THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THIS ACTION.

It is by now axiomatic that the Court's original jurisdiction—even when properly invoked—is discretionary, and "should be exercised 'sparingly.'" *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (quoting *United States v. Nevada*, 412 U.S. 534, 538 (1973)). *See also Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (the congressional grant of original jurisdiction, 28 U.S.C. § 1251, obliges the Court to exercise this power "only in appropriate cases"). That jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). The Court has been particularly mindful of the need to exercise "sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States." *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939).

Thus, the Court explained in *Ohio v. Wyandotte Chemicals Corp.* that, "as a general matter," it will "de-

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Asbestos Companies" (States Br. 21), thereby implying that assets of the defendants may be consumed totally in the cases that reach judgment first, leaving nothing for later lawsuits. But under the patchwork arrangement proposed by the States to circumvent the diversity requirement, it would be impossible for this Court to develop any kind of comprehensive remedy. Instead, the Court will have to proceed with twenty-nine different original actions and resolve them in due course without any ability to allocate relief among plaintiffs in different actions. Of course, the absence of twenty-one other states, numerous municipalities, school districts, and private parties—all of which would have equally plausible claims to the "limited resources of the Asbestos Companies"—completely undermines the premise of the States' argument that this Court realistically could apportion defendants' resources among appropriate plaintiffs.

cline to entertain a complaint brought by a State against the citizens of another State" where "(1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom . . . persuade us that this Court is an inappropriate forum" and that the Court properly should exercise its discretion to preserve its resources for its "other [*i.e.*, appellate] responsibilities." 401 U.S. 493, 499 (1971).

In exercising its discretionary authority, this Court has considered a number of factors, including the availability of an alternative forum; the technical and factual complexity of the subject controversy; whether the Court is institutionally equipped to resolve the issues presented; and whether the complaint raises "difficult or important problems of federal law." *Id.* at 504. *See id.* at 499-505 (declining to exercise original jurisdiction upon review of these factors); *Illinois v. City of Milwaukee*, 406 U.S. at 93 (enumerating factors); *General Motors Corp.*, 406 U.S. at 113-16 (same). In this case, the States have readily available to them a competent and proven alternative forum; this Court lacks the institutional wherewithal to supervise or conduct the formidable fact-based proceedings necessary to resolve the States' claims; this action involves no federal interests warranting the Court's protection; and the Court has no business undertaking the super-legislative role proposed by the States—to fashion a rule of decision that would supplant state law in an area traditionally left to the states. By all measures, therefore, this case does not warrant this Court's exercise of jurisdiction.

1. "[W]here the plaintiff has another adequate forum in which to settle the claim," this Court has routinely declined to exercise its original jurisdiction. *United States v. Nevada*, 412 U.S. at 538. *See Massachusetts v. Missouri*, 308 U.S. at 19-20 (declining original jurisdiction over action brought by Massachusetts to collect taxes from nonresidents given availability of Missouri state

courts); *Wyandotte*, 401 U.S. at 500 (declining leave to file original action where "[t]he courts of Ohio . . . have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy"); *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (same).

Recognizing the significance of this factor, the States assert, in passing, that they may be unable "to join defendants [otherwise] in one convenient forum" and that there is "no . . . tribunal to which they may turn" other than this Court. States Br. 22. This assertion conspicuously ignores the most appropriate tribunals to which the States "may turn"—namely, their own courts. The state courts not only can be, but have *in fact* been, the situs of at least eight actions brought by other states against companies which formerly manufactured asbestos-containing products (including the present defendants) seeking, as here, to recover the economic losses allegedly associated with abating the presence of asbestos-containing products in buildings.[11] The States' claimed "inability to join defendants" (States Br. 22) is belied by accepted principles of long arm jurisdiction and by the easy joinder of the present defendants in actions that other states are pursuing in their court systems.[12]

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[11] *See State of Maryland v. Keene Corp.*, No. 1108600 (Cir. Ct. Anne Arundel Cty., Md.); *In re State and Regents Building Asbestos Cases*, Nos. 99081, 99082 (Dakota Cty., Minn.); *Commonwealth of Kentucky v. United States Gypsum*, No. 85-CI-915 (Franklin Cty., Ky.); *Commonwealth of Virginia v. Owens-Corning Fiberglass Corp.*, No. LJ-414-3 (Cir. Ct. Richmond, Va.); *Commonwealth of Pennsylvania v. Congoleum Corp.* (Comm. Ct., Pa.); *State of Mississippi v. Flintkote Co.*, No. 89-5138(2) (Jackson Cty., Miss.); *State of South Carolina v. W.R. Grace & Co.*, No. 3:87-2879-0 (D.S.C.); *In re State of West Virginia Public Building Asbestos Litigation*, No. 86-C-458 (Monongahela Cty., W. Va.).

[12] Particularly disingenuous is plaintiffs' suggestion that "problems associated with personal jurisdiction via long-arm statutes" may foil their effort to sue defendants in their own state courts.

[Continued]

Those cases being pursued by state attorneys general within the state court systems involve claims identical to those at issue here, and are governed, just as this case is, by principles of state law, albeit principles that vary widely among the states. The plaintiff States here do not attempt to explain why the state court systems, deemed fully adequate by at least eight of their sister states, are inadequate to hear the present claims. The States surely would not argue that the judges of their courts are not competent to conduct the necessary factfinding or to decide the issues of state law presented.

It bears reiterating that the jurisdictional grant for cases between a state and citizens of other states was a grant of necessity. *See Louisiana v. Texas*, 176 U.S. at 15 (original jurisdiction was intended to be exercised only "when the necessity was absolute"). The Framers' decision to confer original jurisdiction in such cases was animated by two principal policies. *Wyandotte*, 401 U.S. at 500. *First* "was the belief that no State should be compelled to resort to the tribunals of other States for redress" in light of parochial factors which "might often lead to the appearance, if not the reality, of partiality to one's own." *Id. See also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475-76 (1793).[13] And

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[12] [Continued]

States Br. 24. Plaintiffs would be hard-pressed to offer an illustration of these "problems." Concerns of personal jurisdiction have not deterred states from joining countless asbestos manufacturers, including defendants here, in state court actions. *Cf. Wyandotte*, 401 U.S. at 500 (declining to exercise original jurisdiction since Ohio courts could resolve subject controversy "under modern principles of the scope of subject matter and *in personam* jurisdiction"); Wright & Miller, *supra*, § 4053, at 264 ("Current expansions of personal jurisdiction have made it possible in most cases to secure relief in the plaintiff state's own courts").

[13] It is not surprising that the Framers would have found disquieting the notion of one state having to pursue its claims in the courts of another state, with the possible prejudice that might attend such a scenario. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888) (noting "partiality or suspicion of partiality" that

second, in light of the difficulty, in 1789, of a state obtaining personal jurisdiction over a nonresident—and thus the impracticability of the state proceeding against the nonresident in *its* own courts—the Framers recognized the "necessity" for "a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State." *Wyandotte*, 401 U.S. at 500. The narrow policies underlying the grant of jurisdiction are simply not implicated here, where the States not only have alternative fora, but those fora are the States' own courts. This, in itself, should be dispositive of the States' attempt here to invoke the Court's jurisdiction.

In short, this Court was seen as a forum of suitable dignity and independence to entertain the claims of a sovereign state which did not have available its own courts in which to pursue its claims. The Framers did *not* confer jurisdiction on this Court with a mind to enabling states to bring cases here when the states' claims could be pursued in their own courts. Certainly, this Court should not provide a haven to states seeking to flee their own courts.

2. There are several reasons "for thinking that, as a practical matter, it would be inappropriate for this Court to attempt to adjudicate the issues" that the States seek to present in this case. *Wyandotte*, 401 U.S. at 501. Put simply, this Court is not equipped to adjudicate the fact-intensive and scientifically complex issues comprising asbestos building litigation in general, or the especially vast number of claims encompassed by this asbestos "controversy" in particular. It scarcely needs to be said that the Court is "structured to perform as an appellate tribunal. . . ." *Id.* at 498. As such, the Court is ill-served to the extent it employs its limited resources to delve into complicated factfinding projects. *See id.* (the Court is "ill-

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would arise "if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens").

equipped for the task of factfinding"); *Illinois v. City of Milwaukee*, 406 U.S. at 93-94 ("We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer"); *General Motors Corp.*, 406 U.S. at 115-16 (declining jurisdiction in light of fact-sensitive nature of inquiry).

The present action asks the Court to undertake a fact-finding mission of unprecedented magnitude. As a threshold matter, the States' action would require the Court to consider extensive testimonial and documentary evidence concerning whether and to what extent particular prodducts manufactured or sold by defendants are located in particular buildings owned or occupied by the States. This product identification phase alone has consumed nearly a year of trial time in the one state case which has proceeded to trial, and would consume still more time in a case such as this one involving hundreds of distinct products "used in approximately 3,000 commercial applications" (States Br. 13) in thousands of buildings in twenty-nine states.[14]

The Court would likewise be injected into a complex scientific debate concerning whether and to what extent hundreds of distinct asbestos-containing products pose any health hazard in various settings and conditions. Recent studies tend increasingly to conclude that—unlike occupational exposure to elevated levels of asbestos dust for prolonged periods[15]—the low levels of asbestos found in

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[14] The States concede the convoluted nature of the factual issues raised by their complaint when they argue that "manageability problems could preclude the certification of a class action in state courts." States Br. 24.

[15] Most estimates would put the measured concentration of asbestos in buildings at levels 10,000 times less than the levels experienced by workers in occupational settings. *See* Office of Pesticides and Toxic Substances, U.S. Environmental Protection Agency, *Guidance for Controlling Asbestos-Containing Materials in Buildings* 1-1 *et seq.* (1985).

buildings do not vary significantly from the levels of asbestos found in outdoor ambient air,[16] and do not cause increased risk to building occupants.[17] Moreover, different types of asbestos at different concentrations pose different levels of risk; indeed, the predominant fiber type present in buildings poses no perceptible risk to building occupants.[18]

It is evidence like this that has led courts to acknowledge that it is simply not accurate or appropriate to condemn asbestos-containing products, as the States do here, in "generic term[s]." States Br. 13 n.1. *See Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th

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[16] *See* U.S. Environmental Protection Agency, *EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* at 12 (1988) ("preliminary results appeared to indicate no difference between levels found in buildings with [asbestos-containing materials] and outdoor ambient levels . . .").

[17] For example, in the aftermath of a recent symposium entitled "Health Effects and Asbestos in Buildings" held at the Energy and Environmental Policy Center of Harvard University's John F. Kennedy School of Government, a panel of leading medical and scientific experts concluded:

> [T]he projected lifetime risk from exposure to mixed asbestos fibers is one death among a cohort of 100,000 [school] children. . . . The risk of 1 in 100,000 is far less than most other commonly experienced environmental health risks, such as those attributable to environmental tobacco smoke and radon.

J.D. Spengler, H. Ozkaynak, J. McCarthy & H. Lee, *Proceedings of Symposium on Health Aspects of Exposure to Asbestos in Buildings*, at 3-4 (1988). *See also* Mossman, Bignon, Corn, Seaton & Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, 247 Science 294-301 (Jan. 19, 1990) ("Available data does not support the concept that low-level exposure to asbestos is a health hazard in buildings and schools").

[18] *See* Davis & McDonald, *Low Level Exposure to Asbestos: Is There A Cancer Risk?*, 45 Brit. J. Indus. Med. 505-08 (1988) ("The available data and comparative risk assessments indicate that chrysotile asbestos, the type of fiber found predominately in U.S. schools and buildings, is not a health risk in the non-occupational environment").

Cir. 1985) (asbestos-containing products "cannot be lumped together in determining their dangerousness"); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1066 (Okla. 1987) ("the degree of risk arising from exposure to asbestos may differ not only depending on the form of the mineral encountered but on the form of the product in which it is encountered"). Instead, issues of hazard, like other issues in asbestos litigation, must be considered on a product-, building-, and location-specific basis.

The magnitude and complexity of the factfinding process contemplated by this case is well-illustrated by any one of the asbestos-in-building cases presently being pursued in state courts. For example, the State of Maryland is currently seeking recovery in Maryland state court against manufacturers of asbestos-containing products in a case involving Maryland public buildings. Commenced in 1984, the case has for the past year engaged the full time services of four special masters (all retired judges) appointed to take evidence and issue findings on seven discrete issues pertaining to product identification and potential damages. At the close of this first trial phase, the parties will proceed to a trial on liability, presently scheduled to begin in June 1990. All remaining issues will then be tried to a jury in a final trial phase expected to last many months.[19]

The foregoing trial process, monumental in the run-of-the-mill building case, would take on staggering proportions in the context of the literally thousands of products and buildings at issue in the States' complaint, each of which must be considered separately. The Court has in the past declined to exercise jurisdiction in much

[19] As in the State of Maryland case, the liability trial in this case would ordinarily encompass a right of trial by jury. Thus, were it to accept this case, this Court would likely have to manage a complex jury trial, or, at a minimum, wrestle with thorny seventh amendment problems associated with attempting to circumvent jury trial obligations.

simpler matters to avoid being snared in such controveries, which by their nature would hamper the Court's ability to perform its primary function of appellate review. Indeed, this concern has figured prominently in the Court's repeated refusal in recent years to adjudicate scientifically complex and fact-sensitive problems of the modern age. *See Wyandotte*, 401 U.S. at 504-05 ("this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage" in light of the "skills of factfinding, conciliation, . . . and close supervision of the technical performance of local industries" such cases require). Here, in addition to manifest factfinding difficulties, the Court would be presented with innumerable issues of state law as to which the Court can claim no expertise.[20]

This case is thus infinitely more imposing than *Ohio v. Wyandotte Chemicals Corp.*, in which the Court was asked by the State of Ohio to assume jurisdiction over a nuisance action seeking an order, *inter alia*, "declaring the introduction of mercury into Lake Erie's tributaries a public nuisance." 401 U.S. at 495. In declining to exercise jurisdiction, the Court explained:

> We already know, just from what has been placed before us on this motion, that Lake Erie suffers from several sources of pollution other than mercury; that the scientific conclusion that mercury is

[20] This action is beset by the additional problem of involving plaintiffs and buildings in twenty-nine different states. To resolve this matter, therefore, the Court, unlike the state courts hearing other state-initiated asbestos removal actions, cannot decide this case by reference to a single state's law. Rather, the Court would be forced to ascertain and apply the widely disparate laws of the several states in which those buildings are located, and to cope with the difficulties in interpretation and case management that such a project would entail. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117 (1988). This Court should be reluctant to accept the invitation of the attorneys general to try its hand at dabbling in the basic tort and contract law of twenty-nine states.

> a serious water pollutant is a novel one; that whether and to what extent the existence of mercury in natural waters can safely or reasonably be tolerated is a question for which there is presently no firm answer . . . Indeed, Ohio is raising factual questions that are essentially ones of first impression to the scientists. The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic.

Id. at 503-04.

The task posed by the present action dwarfs that contemplated in *Wyandotte*. Whereas *Wyandotte* involved the perceived danger posed by a single by-product in a single lake, this action would require the Court to consider questionable hazards posed by scores of distinct asbestos-containing products at various exposure levels located in hundreds of sites in thousands of buildings. The Nation would be ill-served by having this Court devote its limited resources to such a project.[21] *See General Motors Corp.*, 406 U.S. at 114, 116 (the nature of the relief requested, which "necessarily must be considered in the context of localized situations," together with the availability of local forums "suggest we remit the parties

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[21] The foregoing difficulties are severely compounded in this case by the presence of numerous governmental bodies already considering the very issues presented here. Indeed, the complaint itself goes to great lengths to emphasize "the strong congressional interest in the issue of asbestos in buildings" (States Br. 17), the "public policy dialogue" initiated by the Environmental Protection Agency "on the issue of federal regulation of asbestos in public and commercial buildings" (*id.* 18), and the "many lawsuits [filed] to date" alleging the very claims making up the States' complaint (*id.* 14-15). As in *Wyandotte*, then, permitting the States to prosecute this action in this Court "would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis." 401 U.S. at 503. Such piecemeal problem-solving has no place on this Court's docket.

to the resolution of their controversies in the customary forum").[22]

3. This action does not confront the Court with any federal issues, much less "serious and important concerns of federalism." *Maryland v. Louisiana*, 451 U.S. at 744. *See Wyandotte*, 401 U.S. at 504 (declining jurisdiction where "we are not called upon by this lawsuit to resolve difficult or important problems of federal law"); *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924) (declining jurisdiction where controlling questions were matters of Tennessee law best resolved in state courts). This is not

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[22] The States have put forth no "practical" arguments that counsel in support of accepting jurisdiction in this case. For example, the States assert that a single forum is required so that an "equitable allocation of the Asbestos Companies' resources" can be achieved and the "States [can] avoid interstate competition for the limited resources of the Asbestos Companies." States Br. 21, 26. Given plaintiffs' mixed success on the merits in "asbestos-in-building" claims (*see supra* at p. 2 n.1), concerns over the equitable liquidation and distribution of defendants' resources appears premature, to say the least. And the absence of all of the other potential plaintiffs who might wish to make claims on the assuredly limited resources of the defendants (*see supra* at pp. 9-10, n.10) precludes any serious suggestion of distribution of assets.

Equally absurd is the States' argument that the assumption of jurisdiction now will conserve this Court's resources by "severely reduc[ing] the number of cases subsequently appealed to this Court." States Br. 23. The States do not, and cannot, explain why litigation on these *state law issues*, no matter how voluminous, will affect the caseload of this Court.

Finally, the States cannot explain their belief (*id.* 24) that their own courts are impractical forums because they will not be able to establish "minimum contacts" over certain defendants. If, in fact, a defendant was doing business in a state by purposefully availing itself of that state's market for building materials, due process problems with the exercise of long arm jurisdiction are highly improbable. *See, e.g., McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Wyandotte*, 401 U.S. at 497 ("development of 'long-arm jurisdiction' means, in most instances, that no necessity" exists for "this Court to be held out" as a potential forum for most state claims against out-of-state residents).

a dispute between states such as might require instruction from a higher sovereign. Neither is there any question presented regarding navigable interstate waters or other matters which traditionally call for a federal rule of decision. Nor does this action present any issue as to which the federal government has primary authority—foreign relations, national defense or security, patent law, foreign trade, the activities of federal agencies or federal instrumentalities, and the like. This case, in short, features none of the "federal" attributes that have persuaded the Court to accept original jurisdiction in recent years. *Maryland v. Louisiana*, 451 U.S. 725 (state use tax impacts federal interests); *South Carolina v. Regan*, 465 U.S. 367 (1984) (interpreting Internal Revenue Code and Anti-Injunction Act).

This case instead presents an issue of whether building owners must themselves bear the cost of whatever repairs to their buildings they undertake, or whether they can shift those costs to defendants. This issue is presumptively governed by established state law—in particular, state principles of contract, tort, warranty, and strict liability. State law also provides the applicable statutes of limitations, statutes of repose, product identification requirements, and other limitations on the States' claim for recovery. It is difficult to discern, in short, what law, other than state law, should or could apply to such suits —*particularly* where the State itself is the plaintiff.[23]

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[23] The States have invoked section 115 of the Restatement of Restitution. But the Restatement is not some overarching source of legal principle. To the contrary: it is not even law. It becomes the law only to the extent that it is adopted as, or is deemed to reflect, the law of a particular jurisdiction. In the context of asbestos litigation, courts have concluded that causes of action premised on section 115, if recognized at all, are products of state law. *E.g., Hebron Public School Dist. No. 13 v. United States Gypsum*, 690 F. Supp. 866, 868 (D.N.D. 1988) ("The question of whether section 115 is applicable under North Dakota law is therefore an open one, and this Court must resolve the question as it believes the North Dakota Supreme Court would").

The States make repeated references to an amorphous "National Asbestos Problem" (*e.g.*, States Br. 13), and suggest that the existence of this "Problem" provides this Court with a general warrant to "federalize" this case by adoption of a Restatement standard.[24] But the practical significance of the issue presented does not militate in favor of the Court's exercise of jurisdiction. *E.g.*, *General Motors Corp.*, 406 U.S. at 112 (declining to exercise jurisdiction despite "important questions of vital national importance" raised by state complaint); *Wyandotte*, 401 U.S. at 505 (declination of jurisdiction should not "be taken as denigrating in the slightest the public importance of the underlying problem Ohio would have us tackle"). It is not this Court's function or prerogative to legislate solutions to "Problems," even problems of national import. And it is not the role of this Court to fashion overriding federal principles to supplant controlling state law simply because a "problem" extends beyond the boundaries of a single state.

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In sum, this action would enmesh the Court in fact-driven litigation on an unprecedented scale; would thrust the Court headlong into difficult scientific questions of first impression; and would require the Court to construe unfamiliar legal standards best understood by the plaintiff States' own courts. The result would be a "serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court . . . ." *Wyandotte*, 401 U.S. at 505. By accepting jurisdiction, moreover, the

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[24] Generally, in such interstate liability cases, the Court has "saddle[d] the party seeking relief with an unusually high standard of proof" and adopted only those legal principles "which [the Court] is prepared deliberately to maintain against all considerations on the other side." *Wyandotte*, 401 U.S. at 501 (quoting *Missouri v. Illinois*, 200 U.S. 496, 521 (1906)). Thus, it would be highly inappropriate for the Court to adopt the unsettled and expansive standard of liability articulated in the Restatement.

Court would be sending a dangerous signal—a willingness, generally, to hear "original" actions by states dissatisfied with existing remedies under their own laws. *See Massachusetts v. Missouri*, 308 U.S. at 19-20 (this concern animates decision not to take jurisdiction). Risking the establishment of such a precedent, and the attendant intrusion on the Court's time and resources, would be all the more senseless because it is wholly unnecessary: the state courts stand ready to resolve all of the States' claims. For all these reasons, the States have failed to establish the "strictest necessity" required to invoke this Court's original jurisdiction. *Wyandotte*, 401 U.S. at 505.

CONCLUSION

The States' motion for leave to file their complaint should be denied.

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