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 FOR DEFENDANT ARMSTRONG WORLD INDUSTRIES, INC., IN OPPOSITION

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QUESTION PRESENTED

Whether this Court has jurisdiction of an original action by a number of states against corporate defendants most of which are, by virtue of their places of incorporation, citizens of one or another of the movant states.

STATEMENT PURSUANT TO RULE 29.1

Armstrong World Industries, Inc., owns 40 percent of Inarco Limited of India and otherwise has none but wholly-owned corporate subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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This brief is filed on behalf of Armstrong World Industries, Inc., in opposition to the motion of 29 states to file a complaint against Armstrong and 25 other proposed defendants. This brief is devoted solely to demonstrating that the Court lacks jurisdiction of the proffered complaint because it names as defendants corporations that are citizens of some of the movant states. For the further demonstration of why the motion for leave to file should be denied even on the assumption that the complaint is within the Court's jurisdiction, Armstrong relies on the comprehensive joint brief in opposition of American Biltrite, Inc., and 15 other named defendants and the separate briefs in opposition of other defendants.

STATEMENT

Twenty-nine states have filed a motion for leave to file a complaint against 26 corporations. They seek to hold the defendant corporations liable for costs the states say they have incurred and may incur in the future in removing materials containing asbestos from state-owned buildings or otherwise responding to the presence of such materials in the buildings. The first of the two questions the states say their motion presents is "whether this Court should exercise its jurisdiction in a case" they propose to bring when "no other adequate forum is available to grant comprehensive and uniform relief." (Motion Papers i.) It is the burden of this brief that the proper question is not "should" but "can" and that the answer, dictated by the constitutional prescription and limitation of the Court's original jurisdiction, is "no."

The Court may nonetheless be assured that its mandatory "no" answer will not cause the slightest injustice or inequity to sovereign states of the Union. To give that assurance entails an exposure of the flawed premises that underlie the states' tendentious statements of the questions presented by their motion and the development of the questions in their brief. Our exposure can be summary because the details and documentation are set forth in the other briefs in opposition.

The first flawed premise is that there is "a case" involving the 29 states and the 26 corporate defendants. There is no such single "case." Accepting the theory of liability that is proposed by the states, there are a multitude of cases—potentially one for each state-owned building. A state might reasonably want to join all of its buildings into a single statewide case or groups of its buildings into a few cases. However, the trial of any such case would still necessitate the development of the facts relating to each building. The facts differ from building to building: where and in what form asbestos-containing materials were used in the construction of

the building, what company or companies manufactured or supplied them, what the present condition of the materials is. Those are only some of the building-specific factual issues that, as documented in the joint brief in opposition, have been contested in the asbestos-in-schools cases that have been tried.

Moreover, beyond the evidentiary facts, the parties will differ from building to building. The states have named 26 defendants and branded them as the "Asbestos Companies" (Complaint ¶ 4, Motion Papers 5), but there is no such *in solido* group of companies as the designation implies. The 26 defendants are a varied group of companies that once manufactured or distributed some particular product or range of products occupying a place on the wide spectrum of building products that contained asbestos. The potential liability of each defendant as to any building is peculiar to it, dependent in the first instance on whether it supplied any material containing asbestos that went into the building and further on the kind of product it supplied and whether that product releases asbestos fibers into the air.

Furthermore, each state's case or cases will turn on the law of the particular state. There is no applicable federal law. Contrary to what the states do not quite assert but manage to imply, there is not even any federal regulatory requirement that asbestos be removed from all buildings. So far as the governing state law is concerned, there is no uniformity among the state courts on the legal principles applicable to the decision who will pay for asbestos abatement. Whether on the facts or on the law, defendants have won as many of the school building asbestos cases as plaintiffs.

For all these reasons, there could be no "uniform relief" such as the states profess to seek from this Court. The possibility of "uniform relief" is thus another flawed premise of the states' case. Where the facts and even the parties vary from building to building and the law

from state to state, there is no such possibility in this Court or in any other forum.

Nor could the Court in this case grant the "comprehensive . . . relief" the states also speak of in both their questions presented. Only a little more than half of the 50 states are represented on the motion. Any relief this Court granted could not be "comprehensive" enough to include 21 other sovereign states. It could not comprehend the owners of private buildings that outnumber by orders of magnitude the public buildings of 29 states.

Because any relief could not be comprehensive, there could be no such "equitable apportionment of the limited resources of the Asbestos Companies" as the states call for in the second of their questions presented. The faulty—and arrogant—premise of this argument, in the first place, is that the defendants, all of them, are liable. That is the very question that would be for resolution after trial on the states' complaint. Furthermore, if the defendants were held liable and their resources were insufficient to satisfy their liability fully, an apportionment limited to the 29 movant states would be a most *in*equitable apportionment. Such an apportionment would ignore the other 21 states, the private building owners, the owners of public and private schools. And that is to say nothing of the thousands of private litigants who have made personal injury claims against the named defendants and other companies that at one time mined asbestos or manufactured or distributed materials containing asbestos.

That suggests the final and pervasive flawed premise of the states' motion. It is not true that the presence of asbestos-containing materials in buildings poses a public health problem that demands a massive removal program. What the states describe as the "asbestos crisis" or "the national asbestos problem" (Motion Papers 5, 13) is neither. The more the question of asbestos in buildings is studied, the less critical it appears. Details are in the other briefs in opposition.

SUMMARY OF ARGUMENT

I. The motion for leave to file must be denied for want of jurisdiction. When federal jurisdiction depends on a state's suing a citizen of another state and this Court's original jurisdiction on the presence of a state as a party, the Court lacks jurisdiction if there is a citizen of the party state on the other side of the case. In this case, 20 of the 26 proposed defendants are citizens of one or another of the movant states by virtue of being incorporated under its laws. The requirement of complete diversity in cases heard by this Court in the exercise of its original jurisdiction of cases in which a state is a party represents a construction of Article III of long standing that has never been questioned. The requirement is not affected by the fact that a separate head of Article III jurisdiction, that of controversies between citizens of different states, allows for jurisdiction in the district courts when there is less than complete diversity of citizenship.

II. The want of jurisdiction is not cured by the states' alternative proposal of each state's suing only non-citizens. Under the proposal, no plaintiff and no defendant would be dismissed from what would remain a single lawsuit. There would continue to be defendant citizens of some of the plaintiff states in that lawsuit, in violation of the rule that there is not complete diversity unless each plaintiff is diverse from each defendant.

ARGUMENT

I. BECAUSE THREE-QUARTERS OF THE NAMED DEFENDANTS ARE CITIZENS OF ONE OR ANOTHER OF THE MOVANT STATES, THE PROPOSED COMPLAINT DOES NOT DESCRIBE A CONTROVERSY BETWEEN A STATE AND CITIZENS OF ANOTHER STATE AND THEREFORE IS NOT WITHIN THIS COURT'S JURISDICTION.

The states by their motion would invoke the Court's original jurisdiction to hear and decide actions by a state against citizens of another state. That jurisdiction is conferred on the Court by Article III of the Constitution and confirmed by 28 U.S.C. § 1251(b)(3). The Article III conferral is in two parts. The first paragraph of Section 2 of Article III extends the judicial power "to Controversies . . . between a State and Citizens of another State." The second paragraph places "Cases . . . in which a State shall be Party" within the Court's original jurisdiction. Section 1251(b)(3) sums it up: the Court has original but not exclusive jurisdiction of "[a]ll actions or proceedings by a State against the citizens of another State." For more than a century this Court has held that a constitutional controversy "between a State and Citizens of another State" does not include a controversy in which one of the parties adverse to the state is a citizen of that same state.

The rule was laid down and thoroughly explained in *California* v. *Southern Pacific Co.*, 157 U.S. 229, 257-62 (1895). The Court there found precedent for its ruling on the meaning of Article III in *Pennsylvania* v. *Quicksilver Mining Co.*, 77 U.S. (10 Wall.) 553, 556 (1870). *See* 157 U.S. at 258. The constitutional limitation on the Court's jurisdiction that thus dates back 120 years prevails to this day, unquestioned.

The limitation of the Court's jurisdiction to cases in which a state is suing *only* citizens of another state requires the denial of the states' motion. For, by the

states' own admission, 20 of the 26 defendants, more than three-quarters of them, are corporate citizens of one or another of the movant states. Thus, W.R. Grace & Co. and Raymark Industries, both incorporated in Connecticut under Connecticut law, are named as defendants, and Connecticut is named as a plaintiff. Not surprisingly, more than half of the 26 named defendants are corporate citizens of Delaware, also a plaintiff. Citizens of three additional states among the 29 movant states are named as defendants.[1] And that count of 20 defendants as citizens of one or another of the movant states rests on the restrictive view that a corporation is a citizen only of its state of incorporation. *Cf.* 28 U.S.C. §§ 1332, 1441.

The states scarcely deny that, on precedent, their proposed lawsuit is outside the Court's jurisdiction. The best they can do is to try to pass off *Southern Pacific* as a "mere incantation of" *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), "without the refined analysis of the necessary distinction between constitutional and statutory diversity" found in a later case (a case that, as we shall see, deals with a different, irrelevant issue). (Motion Papers 27-28.) To the contrary, the analysis in *Southern Pacific* is as refined as one could want and draws precisely the distinction between constitutional and statutory diversity. Indeed, the opinion does not even cite *Strawbridge* v. *Curtiss*. However, the Court that decided *Southern Pacific* was quite aware that *Strawbridge* v. *Curtiss* was a statutory decision. It knew that the statute construed in that case as requiring complete diversity did not necessarily exhaust the constitutional power of the federal courts to adjudicate controversies "between citizens of different States"—a head of constitutional jurisdiction separate from the one that determines the Court's jurisdiction here. *See* 157 U.S. at 259-60.

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[1] The states' list is in Exhibit A to the proposed complaint at page 9 of the states' motion papers.

The Court was quite aware too that Congress may "neither enlarge nor restrict the original jurisdiction of this court." 157 U.S. at 261, citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The Court summed up its ruling in the *Southern Pacific* case thus: "What Congress may have power to do in relation to the jurisdiction of Circuit Courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another State and of the same State." 157 U.S. at 261-62. The Court held that its jurisdiction could not be "expanded by construction," *id.* at 261, to embrace such a suit.

There have not been frequent occasions for applying the rule of the *Southern Pacific* case. The rule is a simple one, and, once it is laid down, a state can know that it will not be allowed to bring an action here in which one of its citizens is a defendant. A state tested the scope of the rule in *Louisiana* v. *Cummins*, 314 U.S. 577 (1941), asking the Court to excuse the presence as a defendant of a citizen of the movant state who was merely a proper or conditionally necessary party.[2] The Court was not persuaded and denied leave to file the complaint "for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana." In *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902), corporate citizens of the movant state were not named as defendants in its complaint but (as in the *Southern Pacific* case itself) were held to be indispensable parties defendant, and the Court consequently denied leave to file "as our constitutional jurisisdiction would not extend to the case if those companies were made parties defendant." *Id.* at 247.

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[2] See Bator, Meltzer, Mishkin & Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 304 (3d ed. 1988).

As the quotations from *Southern Pacific* and *Northern Securities* show, these were constitutional decisions. They were not narrow readings of a statute that could not, in any event, constitutionally restrict or expand this Court's original jurisdiction beyond what Article III itself provides.

The case in which the movant states find a "refined analysis" of the "distinction between constitutional and statutory diversity," *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 530-31 (1967), has no bearing on this case. The analysis, "refined" as it may have been, was analysis of an issue different from the issue here. The Court there held that Article III, in conferring on the federal courts jurisdiction of controversies between citizens of different states, enabled Congress to give the district courts jurisdiction of interpleader actions in which some of the claimants are citizens of the same state. The case has been taken as establishing that, under that head of jurisdiction, "complete diversity is not a constitutional requirement." *Owen Equipment and Erection Co.* v. *Kroger*, 437 U.S. 365, 373 n.13 (1978). But *State Farm* does not cast the least doubt on the Court's repeated decisions that the Constitution, when it speaks separately of federal jurisdiction of controversies between "a State and Citizens of another State" and of this Court's original jurisdiction of such controversies, *does* require that the controversy be between a state and a citizen of "another" state and not between the state and a citizen of that same state.

Where there may be room for argument is whether, as *Southern Pacific* indicated by way of dictum, there is no original jurisdiction in this Court when a state sues one of its citizens even though federal jurisdiction is founded on the presence of a federal question or derived from some other head of Article III jurisdiction unrelated to a state's suing a citizen of another state. 157 U.S. at 261. The *Southern Pacific* dictum has been the

basis of alternative holdings in *Texas* v. *ICC*, 258 U.S. 158, 164 (1922), and *New Mexico* v. *Lane*, 243 U.S. 52, 58 (1917), both federal question cases. Similarly, in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 463 (1945), a case that arose under the federal antitrust laws, the Court said that, if either of two defendants that claimed to be citizens of Georgia were such a citizen and were a necessary party, "leave to file would have to be denied." It was this debatable extension of the rule of *Southern Pacific*, not the rule itself, that led to an observation by the Court in *Utah* v. *United States*, 394 U.S. 89, 96 (1969), that the states mistakenly seize on (Motion Papers 28) as an indication that the rule itself is open for reconsideration after *State Farm*.

Utah v. *United States* in fact demonstrates the vitality of the rule of *Southern Pacific*. In that case, Congress directed that the Great Salt Lake be quitclaimed by the United States to Utah and provided for an action in this Court by Utah against the United States to determine the value of the quitclaimed federal interest. 80 Stat. 192, 349. The constitutional source of judicial power to entertain such an action was the provision of Article III extending the judicial power to "Controversies to which the United States shall be a Party." The action could be brought in this Court originally because the case was also one in which "a State shall be Party."

A private party claiming an interest in the bed of the Great Salt Lake moved to intervene. On exceptions to a decision of the Court's special master denying intervention, the Court sustained the decision. In that context the Court remarked that, if a citizen of Utah sought to intervene (the movant was not a citizen of Utah), "we would be required to decide the difficult constitutional question as to whether this Court may retain its original jurisdiction over an action in which complete diversity of citizenship no longer exists between the contesting parties." 394 U.S. at 96. That was

thought to be a "difficult constitutional question" even though federal jurisdiction in the first instance had nothing to do with diversity—an index to the strength of the *Southern Pacific* rule, not a weakening of it.

The master had said that jurisdiction would be lost if a non-Utahan intervened, relying on the *Southern Pacific* dictum. The United States, while urging that the master be sustained in his denial of intervention by the party that had actually sought to intervene, argued against his contingent jurisdictional ruling. The Government did not question in the slightest that, when jurisdiction depends on a state suing citizens of another state, all defendants must be citizens of some other state. It did question whether there should be a requirement of complete diversity when the plaintiff state raised a federal question or, as in the case at hand, was in a federal court because the United States was a party to its suit.[3]

In the Court's response, which deferred the issue as a "difficult constitutional question," there is no hint of what the states profess to see—a possible retreat from the requirement of complete diversity in the kind of case that clearly demands diversity, a case in which there is federal jurisdiction because a state is suing a citizen of another state. The possibility of such a retreat, moreover, cannot be squared with what the Court did and said two years later in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). Before proceeding to its much-quoted discussion in that case of whether it should exercise its jurisdiction as a matter of discretion, the Court carefully satisfied itself that it *had* jurisdiction to exercise because, *inter alia*, "[d]iversity of citizenship is absolute." *Id.* at 495-96. The requirement of "abso-

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[3] Memorandum for the United States on Report of Special Master and Exceptions Thereto by Morton International, Inc., Utah v. United States, No. 31 Orig., O.T. 1967, at 23-27.

lute" diversity in a case that demands diversity clearly remains a requirement.

II. THE STATES' ATTEMPTED CURE OF THE JURISDICTIONAL FLAW IN THEIR COMPLAINT DOES NOT AVAIL THEM.

The want of jurisdiction in this Court is not cured by the alternative pleading device the states put forward. They say that, as an alternative to an action by all the states against all the defendants, "this action is brought by each of the States against only non-citizen" defendants as listed in an exhibit to the proffered complaint. (Motion Papers 5, 9.) We are not told whether the alternative is with or without the reservation of the right of the home states to sue their own corporate citizens in some other forum. The states indicate by citation that they find authority for their alternative pleading in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 463-64 (1945). (Motion Papers 28.) That case is a commonplace application of the rule of indispensable parties. The Court believed that two defendants claiming to be citizens of the plaintiff state of Georgia were not indispensable and so, if found to be such citizens, could be stricken as defendants.

Of course, a single state suing citizens of other states, may, either when drafting a complaint or when a complaint is challenged, omit or delete its own citizens as defendants so long as they are not necessary or indispensable parties. That is no support for the alternative proposal of the states here. If we were dealing here with the statutory diversity jurisdiction of the district courts, the alternative proposal would fall under the traditional rule that "diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equipment and Erection Co.* v. *Kroger*, 437 U.S. 365, 373 (1978). There is no reason to think this Court's constitutional jurisdiction is properly inter-

preted any more expansively. Connecticut, Delaware, New York, Ohio, and Texas would remain plaintiffs under the states' alternative proposal. The two Connecticut corporations, the 14 Delaware corporations, the two New York corporations, the one Ohio corporation and the one Texas corporation would remain defendants even though their home states did not press claims against them. There would not be the required complete diversity in the proposed single lawsuit.

The states might go further and divide their single lawsuit into six separate lawsuits—five by the states just named against their selected defendants and a residual lawsuit pitting the other states against all the defendants. (And, for all we are told, other lawsuits before other tribunals might be contemplated if there were such a division: *e.g.*, Delaware against the 14 Delaware defendants in a Delaware state court.) But the states have not divided their lawsuit and do not ask the Court to found its jurisdiction on any such series of separate actions. Were they to do so, it would not really matter whether the Court had jurisdiction of the separate actions. Their very existence would render utterly implausible all that the states say about why the Court should exercise its jurisdiction to provide a forum for a single action that can afford a global solution for the national problem they perceive. We have said there is no such single action. The states' alternative pleading confirms that assertion.

CONCLUSION

For the reasons stated in this brief, the motion for leave to file should be denied for want of jurisdiction. If the Court disagrees as to its jurisdiction, the motion should be denied for the discretionary reasons stated in the other briefs in opposition.

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