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In the

Supreme Court of the United States

CARL M. AUSTIN, et al., )  
 )  
 Appellants, )  
 )  
 v. )  
 )  
 STATE OF NEW HAMPSHIRE, et al., )  
 )  
 Appellees. )

No. 73-2060

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SUPREME COURT, U. S.

Washington, D. C.  
January 15, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

CARL M. AUSTIN, et al.,

Appellants,

v.

STATE OF NEW HAMPSHIRE, et al.,

Appellees.

No. 73-2060

Washington, D. C.,

Wednesday, January 15, 1975.

The above-entitled matter came on for argument at  
11:19 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN: Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CHARLES W. SMITH, ESQ., 199 Main Street, Saco,  
Maine 04072; on behalf of the Appellants.

CHARLES G. CLEVELAND, ESQ., Assistant Attorney  
General of New Hampshire, Office of the Attorney  
General, State House Annex, Concord, New  
Hampshire 03301; on behalf of the Appellees.

C O N T E N T S

ORAL ARGUMENT OF:

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Charles W. Smith, Esq.,  
for the Appellants.

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Charles G. Cleaveland, Esq.,  
for the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-2060, Austin against New Hampshire.

We will wait for a moment, counsel. We'll wait for a moment until the room gets a little quieter.

I think perhaps we can proceed now, Mr. Smith, whenever you're ready.

ORAL ARGUMENT OF CHARLES W. SMITH, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SMITH: Mr. Chief Justice, and may it please the Court:

This case arose out of a petition for declaratory judgment brought by three Maine citizens and residents against the State of New Hampshire and the taxing authorities of that State, questioning the constitutional validity of the so-called commuters income tax in that State, both on the basis that it was a violation of the United States Constitution and a violation of the constitutional provisions of the State of New Hampshire.

It was reported as a, what they call in the State of New Hampshire, a reserve case, to the Supreme Court of that State, and that court found that the petitioners had standing, that the vehicle for getting there, the declaratory judgment method, was the proper vehicle, but denied the relief requested; and, as a result, it comes before this Court on appeal from



that decision.

There are two constitutional issues which are raised in the case.

One is that the New Hampshire statute is violative of the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution of the United States; and of the Fourteenth Amendment, Equal Protection Clause in that Amendment.

QUESTION: Mr. Smith, before you get into that, if you prevail here, what do you gain?

MR. SMITH: If we prevail here, I presume that what our people gain is the payment of tax in their own State. We get to a question, I think that you're raising, may it please the Court, the question of standing, which is a corollary issue in this case, which --

QUESTION: Well, I'm not at all, personally, worried about the question of standing. But aren't you asking only to pay the same tax dollar to the State of Maine rather than the State of New Hampshire?

MR. SMITH: Yes.

QUESTION: And therefore, --

MR. SMITH: We're asking that they pay the same tax dollar to the State of Maine rather than the State of New Hampshire, because they would get the benefits of the payment of their tax dollar in the State of Maine that they do not

get in the State of New Hampshire, may it please the Court.

QUESTION: But isn't this a legislative decision by the Maine Legislature?

MR. SMITH: Would you repeat the question, may it please the Court, so that I understand it?

QUESTION: Isn't that a decision that the Maine Legislature itself has made?

MR. SMITH: I do not believe that that's a question of the Maine Legislature, and I think we get into what the Privileges and Immunities Clause was designed to prevent, we get into what we call retaliatory legislation. If one State starts to retaliate against another State because of the taxing statutes of that particular State, may it please the Court.

QUESTION: But hasn't the Maine statute, in effect, provided and recognized the propriety of this payment to the State of New Hampshire?

MR. SMITH: I do not believe that the Maine statute, or the Legislature has recognized the propriety of the payment to New Hampshire. Simply the Maine statute, as most income statutes, most State income tax statutes, gives a credit, may it please the Court, to taxes paid on income in other jurisdictions in the State of Maine; they give it against the Maine tax. And that is --

QUESTION: A credit or a deduction?

MR. SMITH: Pardon?

QUESTION: Is that a credit or a deduction?

MR. SMITH: It's a credit against the tax.

QUESTION: A credit, yes.

QUESTION: I guess another way to phrase my question is whether this isn't just a lawyer's lawsuit?

MR. SMITH: No, I think these people feel very strongly about this, and this is why we are in this Court.

QUESTION: Well, the taxpayers may, but their Legislature has permitted it by --

MR. SMITH: Their Legislature -- I am sure their Legislature could change it by --

QUESTION: Sure.

MR. SMITH: -- doing away with the credit and then we get into all the retaliatory legislative processes against -- one State against another, which this Court has said the Privileges and Immunities Clause was designed to prevent.

QUESTION: Of course, their Legislature, too, might feel that even though they could exact full measure of the Maine tax, there would be an element of unfairness in the eyes of that Legislature to these procedures.

MR. SMITH: I presume that that's the reasoning or the rationale behind it, may it please the Court.

We get to --

QUESTION: Well, it might end up with the proposition, however, that if you prevail here your clients are out the same amount of dollars.

MR. SMITH: They're out the same amount of dollars, but they're going to have those amount of dollars spent in their State, under the provisions of this statute, where they receive the benefits of those amount of dollars spent, either by way of reduction of taxation in their State, because of an additional amount of income in their State, or by the benefit of the services that they can receive.

QUESTION: Then the answer to that is that the Maine Legislature, if it chooses to do that, can change its statute.

MR. SMITH: If it changes its statute, if that -- it could simply do away with the credit, and then, of course, as Mr. Justice Rehnquist just pointed out, it would impose an additional burden on all of the Maine taxpayers that are working out of the State and having income taxes imposed -- in other words, they'd be subject to double taxation, which would be unfair.

QUESTION: Well, that happens all over the country.

MR. SMITH: We have double taxation, I will agree to that; but I think that would be one of the impositions that result.

The State of New Hampshire has raised before this

Court the question of standing, and we would say that -- we answer that very simply, we've answered it in our brief, but we say that this is the case of a taxpayer which is questioning the imposition of a tax -- or questioning the statute which imposes the tax upon the taxpayer, and not the question that has so often come before this Court of a taxpayer questioning the spending of taxpayers' funds.

And we submit that that is quite a difference. We feel that the taxpayer always has a right to challenge the constitutional validity of a statute under which he is taxed, and we think that we have precedent in this Court in the Allied Stores case, which is cited in our brief, which was an Ohio case which is similar in almost all respects, except that that was not an income tax, that was an ad valorem tax in that case.

And the very question, I think, that was raised a moment ago here by the Court, was decided in that case. That was a case where Allied Stores of Ohio was a resident corporation, and they were taxes on merchandise in storage, and under the provisions of the Ohio statute merchandise that was kept in storage by non-residents were not taxed. And under the Equal Protection Clause, they brought it to this Court.

They brought it to this Court after the Supreme Court of the State of Ohio had denied standing, saying that it



didn't make any difference to the taxpayer in that case, that if they struck out that proviso as to the non-resident proviso, that, nevertheless, they would be subject to the same amount of tax.

And this Court said that they had standing to raise the issue, and then went on and decided the constitutional issues in the case.

We say that we're in exactly the same standing.

We also say that we have a -- were subject to injury under this statute, because the petitioners here, the appellants in this case, as I have pointed out, would get the benefit of their tax dollar in the State of Maine, or a reduction of taxes in the State of Maine, if their tax dollar was retained by that State.

I think we have to understand the background of standing as we're talking about it. We have to understand something about the New Hampshire statute.

The New Hampshire statute does not tax the income of the residents of New Hampshire in that State. It pretends to tax the income of New Hampshire residents working in another State, but I say, I use the word "pretend" because they make two exemptions which literally destroys the taxation provision, because they make the first exemption: that if the other State imposes a tax, then that New Hampshire resident is not subject to an income tax in the State of New Hampshire, and

if the other State does not impose a tax on income, then, likewise, the New Hampshire resident is not subject to a tax in the State of New Hampshire.

So that under no conceivable condition can a New Hampshire resident be taxed on his income in the State of New Hampshire. This tax is only imposed -- this income tax is only imposed against non-residents. It's a flat four percent tax in excess of the first \$2,000 of income; or, stated another way, there's \$2,000 exempt, and it's a flat four percent.

Then they adjust the tax. They say that if, in the State of non-residence, the tax would be lesser, then they impose the lesser tax.

QUESTION: In that respect, Mr. Smith, suppose that Maine didn't have an income tax at all, would that mean that New Hampshire would --

MR. SMITH: Then they would pay no tax in the State of New Hampshire.

QUESTION: They would what?

MR. SMITH: They would pay no tax in --

QUESTION: They would pay no tax?

MR. SMITH: -- in the State of New Hampshire.

Theoretically, under the law, they would pay a tax, but they would get it back. But that's not the way they work in practical effect in the State of New Hampshire.

They would pay no tax. If Maine had no income tax in the State of Maine, they would -- there would be no income tax imposed in the --

QUESTION: Is it your statement, then, as to the effect of that purported tax on New Hampshire residents earning income out of the State, that it simply categorically doesn't affect a single person in that classification, by reason of --

MR. SMITH: I would have to make that categorical statement. I can't conceive of any condition --

QUESTION: A gimmick, in other words?

MR. SMITH: It --

QUESTION: A sham.

MR. SMITH: It's a sham, that's exactly what I say, I said it was a pretext, but that's exactly what I'd say. I can't conceive of any condition where a New Hampshire resident working out of State is going to be taxed on his income in the State of New Hampshire.

No possible way.

And it is because of this credit and because of the -- that the State of New Hampshire says that the petitioners do not have standing. I think I have covered that fairly well, as I go along here, both from the point of view of prior pronouncements of this Court and of the pocketbook issue.

I would point out one other thing, that as a result

of this New Hampshire statute, non-residents of the State of New Hampshire, working in New Hampshire, of course, are subject to criminal penalties under the income tax law where the residents of New Hampshire are not subject to any penalties at all in this respect.

They raise one other question which is a corollary issue, and I think that I should address just a moment of my time to that.

And that is that we have not overcome the presumption of constitutionality of the statute, of the taxing statute in the State of New Hampshire. And we say that that presumption disappears, recognizing that there is a presumption of constitutionality, we say that that presumption disappears, first of all, because this Court has said, in the Mullaney case, cited in our brief, that the mere imposition of the tax does not constitute that the statute is a valid statute.

And, secondly, because of what this Court said in the case of Bailey vs. Drexel Furniture Company -- and it's a case not cited in my brief, and I timely gave this case to counsel for the State of New Hampshire -- found in 259 U.S. 20, which was --

QUESTION: What's the cite?

MR. SMITH: 259 U.S. 20, may it please the Court.

QUESTION: Thank you.

MR. SMITH: This was a case of a child labor tax, and it was a federal statute rather than a State statute that was in question, and this Court said -- but I cannot see that that makes any difference. But this Court said, the presumption of validity cannot prevail because proof of the contrary is found on the very face of its provisions.

In other words, in that case, they said: On the face of that statute itself, it is unconstitutional on the face of the provisions of the statute, and therefore it cannot prevail.

Getting down to the matter of the constitutional invalidity, on the two questions that I mentioned, the two issues that I mentioned a moment ago, I think that the State of New Hampshire, the appellees in this case, misread the case of Shaffer vs. Carter, on which they seem to bottom their argument that their tax is within constitutional limits.

In that case, -- there were two cases decided at the same time by this Court, that case and the Travis vs. Yale & Towne Manufacturing Company case -- and in that case, which was an Oklahoma case, it established only that a State might impose an income tax on non-residents. That was the thrust, main thrust of that case.

But in that case, Oklahoma also had an income tax against its residents, and the burden was not more onerous on non-residents than it was upon residents.



And I think that that is a complete thrust of that case, as I have read it. They went into some other matters, but I think that's the thrust of it, because, at the same time of that court, we came down with the case of Travis vs. Yale & Towne Manufacturing Company, which was the -- the New York statute was in question, and I'm sure this Court is familiar with the case. We cited it in our brief. Where non-residents were not granted the same exemption as residents.

And in that case they said that there was not -- that this was a violation of the Privileges and Immunities Clause of the United States, that they were not granted -- non-residents working in that State were not granted the same --

QUESTION: Was that Yale & Towne?

MR. SMITH: Yale & Towne.

-- were not granted the same privileges as the taxpayer in the State of New York, the resident taxpayer in the State of New York.

This statute is not -- yes?

QUESTION: Let me back up a little bit, Mr. Smith.

MR. SMITH: Surely.

QUESTION: You -- at least I thought you said earlier that the Maine residents are subject to criminal penalties in New Hampshire if they work there and don't pay their taxes, but that for the nonpayment of the same kind

of a tax by a New Hampshireman, in New Hampshire, he's only subject to civil penalties?

MR. SMITH: New Hampshire doesn't have a tax, so that New Hampshire residents couldn't, under any condition, be subject to a tax.

QUESTION: Well, then, I did misunderstand you.

MR. SMITH: Yes, I'm sorry, I -- New Hampshire does not impose a tax upon its residents of any kind, and therefore there could be no criminal penalties against any resident of the State of New Hampshire.

QUESTION: Now, as to that point, what provision of the Constitution do you say that offends?

MR. SMITH: I say that that only goes -- I am only pointing that out on the question of standing, may it please the Court, but I didn't go to a constitutional --

QUESTION: Don't you think it offends any other provisions of the Constitution?

MR. SMITH: I presume that it does, but I'm not a -- I have to tell you, sir, that I'm not a constitutional lawyer. But I would suspect that it would offend both the Privileges and Immunities Clause and the Equal Protection Clause.

QUESTION: Well, you got here. You got here.

QUESTION: And you've been doing all right.

MR. SMITH: Yes. [laughing].

QUESTION: But when we note a case, it's usually

a constitutional lawyer who has set up something to persuade us to do it.

But, to pursue that a moment, the Equal Protection Clause is at least one of the candidates that might be violated by this provision?

MR. SMITH: We say so. That this is our -- this is our argument, may it please the Court, because, first of all, it doesn't -- we say it's completely arbitrary as to its classification, and that the -- has no fair or substantial relationship to the object of the legislation.

This is not, by the way, a statute which has dedicated revenues, it is not a statute which says that non-residents working the State of New Hampshire constitute some peculiar or particular source of evil, as was talked about in the Toomer case which is cited in our brief.

It just goes in, the moneys just go into the General Fund of the State of New Hampshire, and they try to justify this, the New Hampshire Supreme Court, by saying that its practical effect is offset because they do have a tax in the State of New Hampshire which non-residents do not participate in, on unearned income over the sum of \$600. But many States have that same kind of a tax, and the reason that you do not tax non-residents in that kind of taxing scheme would be that you would dry up capital in that particular State, of flowing into the State of New Hampshire.

And I'm sure that that can't offset in any respect the --

QUESTION: Mr. Smith, does the record show how much we're really talking about, in dollars, in this case?

MR. SMITH: No, it does not. The amicus curiae brief filed by the State of Maine and the State of Vermont indicates that we are talking in -- as far as the State of Maine is concerned -- in the neighborhood for that year of 1970, because this is the first year of the law, immediately attacked, of \$400,000, may it please the Court, for that particular year.

What it is at the current time, I do not know.

QUESTION: In other words, Maine loses that amount of money?

MR. SMITH: Maine loses that amount of money. Now, my only authority for that is in the amicus curiae brief, which is filed in this Court.

Now, there is one other peculiar feature about this law, that I want to point out -- we've pointed it out in the brief, but I would like to discuss it for just a moment -- and that is that it treats non-residents unequally, because of this tax credit.

In other words, the State of Maine and the State of Vermont and the non-residents of the State of Massachusetts, all working at the same job, contribute, because of their own

State statutes, taxing statute, contribute in different sums of money, although they might have the same job, the same income, the same amount of exemptions and dependents. They would all be treated differently.

In fact, the non-resident coming from a State which imposes no income tax would pay no income tax in the State of New Hampshire at all, although he's working at the same job, getting the same income in the State of New Hampshire as other non-residents are.

So that it treats, among non-residents, it treats them unequally and unfairly.

QUESTION: A non-resident coming from a State which imposes no income tax would pay no New Hampshire income tax?

MR. SMITH: That is correct, may it please the Court. No New Hampshire income tax at all.

The State of Massachusetts, as a matter of fact, would pay a far greater tax because of their taxing structure than the resident of the State of Maine. We've set forth some illustrations in our brief.

But it doesn't even treat the class --

QUESTION: How about Vermont residents working in New Hampshire?

MR. SMITH: Vermont pays a different tax, and I've forgotten whether it's more or less. I think it's more



than the State of Maine, because I think their tax rate is --

QUESTION: Vermont does have an income tax?

MR. SMITH: Yes, Vermont does have an income tax.

QUESTION: Yes.

QUESTION: A very high one.

MR. SMITH: Very high -- a fairly high tax, and I'm sure that --

QUESTION: That's a resident of Vermont suggesting that.

MR. SMITH: So they would pay -- they would pay a tax that's even higher than the State of Maine, but it treats -- the point is that it treats all of this classification of non-residents unequally, the taxing structure itself; which again we say is violative of the Privileges and Immunities Clause of the United States, and again it's violative also of the Equal Protection Clause.

I don't think that --

QUESTION: Well, on the other hand, Mr. Smith, --

MR. SMITH: Yes.

QUESTION: -- if New Hampshire did tax its own residents at this four percent rate, at their income, then you would have no constitutional case at all, would you?

MR. SMITH: We would have no constitutional case. We wouldn't be here, maybe.

QUESTION: Even though, with respect to non-residents,

there would still be this same unequal incident, --

MR. SMITH: Well, I'm not sure --

QUESTION: -- depending upon whether or not they lived in Vermont, Massachusetts or Maine?

MR. SMITH: I think perhaps I -- if all of the -- if all of the -- yes, I have to withdraw what I said. I think we'd still have a constitutional imperfection among non-residents in that respect, although New Hampshire residents were taxed.

But we do not quibble here that if all non-residents and all residents were taxed alike that we'd have no constitutional --

QUESTION: Right, you'd have no case at all.

MR. SMITH: We'd have no case at all, and that's not -- that's not our quarrel.

QUESTION: That's not this situation, but I'm trying to see what your attack is.

MR. SMITH: Yes, my thought would be because you're still using non-residents -- treating non-residents unequally.

QUESTION: Well, you're treating -- assume there were a four percent tax on residents of Maine --

MR. SMITH: Residents, right.

QUESTION: -- which I know there is not, but let's assume there is.

MR. SMITH: Yes.

QUESTION: And also a four percent tax on non-resident commuters to come to New Hampshire to work, but with the same provisions as still now exist; that would mean some non-residents would get a better break than others.

MR. SMITH: That is correct.

QUESTION: But you wouldn't have the same constitutional attack you now have, would you?

MR. SMITH: I think -- I think -- under that posture, I think we would, because non-residents -- non-residents -- If it just fell on, an occasional burden fell on some taxpayer, on the single taxpayer, then we perhaps would have no constitutional question.

But here we have a classification of taxpayers, so that you have within -- your sub-classes, you have unequal treatment. And I think that would be violative, certainly violative of the -- you're taxing the brown-eyed people with one tax, and you're taxing the blue-eyed people at another tax, may it please the Court.

QUESTION: But none of them would be taxed higher than would be the residents of New Hampshire.

MR. SMITH: No, but that -- that wouldn't affect, in my opinion, the constitutional infirmity of the taxing structure.

QUESTION: Well, I grant you, you have at least a -- not so strong an attack as you now have.

MR. SMITH: We wouldn't have as strong an attack as we now have. We have, we think, a very strong attack at this time, may it please the Court.

QUESTION: Your Privileges and Immunities argument would stand, though, wouldn't it, even though all non-residents were treated alike, simply because of the difference in treatment between non-residents and residents.

QUESTION: Right. Sure.

MR. SMITH: That is correct, may it please the Court. That -- I think this Court has spoken several times that just residency alone, the citizenship alone, as this Court has said in these cases, is not a -- is an arbitrary classification unless there's something more, unless that group constitutes some particular or peculiar source of evil to the -- which the statute is designed to correct, may it please the Court.

QUESTION: Well, the Privileges and Immunities would reach only the discrimination between residents and non-residents.

MR. SMITH: That is correct, yes.

QUESTION: And the other is an Equal Protection argument.

MR. SMITH: The other is the Equal Protection Clause, which will -- which only State residents can take advantage of, but non-residents can also take advantage of,

may it please the Court.

QUESTION: In other words, if the tax structure of Vermont, Massachusetts and Maine were precisely the same, so that the effect was precisely the same on all non-residents, nonetheless, you'd have a Privileges and Immunities attack because there's no tax at all on New Hampshire wage-earners.

MR. SMITH: That's correct. That's right.

QUESTION: And that's the heart of your case, I take it.

QUESTION: That's the heart of it, right.

MR. SMITH: That's the heart of our case, may it please the Court.

QUESTION: Mr. Smith, you're familiar the federal estate tax system, aren't you?

MR. SMITH: I'm not an estate tax lawyer, we have other people in our firm that do that; I'm familiar with it generally, yes.

QUESTION: Under the federal estate tax system, there is, or at least used to be, a credit for State inheritance and estate taxes paid, and many States, because their inheritance tax would not eat up the twenty percent credit, passed an estate tax to take up the slack. And I guess I'm asking whether that doesn't afford a precedent to precisely what New Hampshire is doing here.

MR. SMITH: Well, I'm not sure. There have been



some decisions by this Court, and I'm not familiar with all of them. I'm not sure that that would be precisely the same question that we have here.

It sounds to me, as you expound the question, that it would be the same; but I'm not sure that in the --

QUESTION: It wouldn't be a Privileges and Immunities argument.

MR. SMITH: I don't think that it would be in that case. You have there, at most, an Equal Protection violation.

QUESTION: Or a Due Process violation.

MR. SMITH: You might have Due Process, right.

I have nothing further, may it please the Court, unless the Court has other questions.

Thank you.

MR. CHIEF JUSTICE BURGER: You may save your remaining time for rebuttal, Mr. Smith.

Mr. Cleaveland.

ORAL ARGUMENT OF CHARLES G. CLEAVELAND, ESQ.,

ON BEHALF OF THE APPELLEES

MR. CLEAVELAND: Mr. Chief Justice, and may it please the Court:

In our view, this case does not involve any novel issues of constitutional law, although it may be said to raise some familiar principles in a new configuration.

It's my objective here today to demonstrate that

this new configuration is not an occasion for this Court to depart from those familiar principles, and that a logical application of these principles compels the conclusion that the decision of the New Hampshire Supreme Court should be affirmed.

Now, the principal contention which we urge upon this Court, and have set out in the brief, is that the appellants suffer no injury in fact by the imposition of the New Hampshire Commuters Income Tax.

We are asserting that this tax is in fact a balance provision, designed to reach non-residents for a ratable contribution in support of the government. This is the language which appeared in Shaffer v. Carter, and I think is a settled principle upon which a State can tax non-residents upon income earned within its jurisdiction.

I think it appropriate to say at this point that the appellants' description of the operation of the tax, although I frankly concede that the provision which he labels a sham in fact does not reach any State resident with any tax burden, yet I would stop short of labeling it a sham, because, if you read the taxing statute in its entirety, you see that in fact a tax is imposed -- sticking to the strictly legal effect of the word "imposed" -- a tax is imposed on residents and non-resident alike. And --

QUESTION: Mr. Cleaveland, --

MR. CLEVELAND: Yes, Your Honor?

QUESTION: -- this Court has certainly gone a long way in saying that you can't be absolutely equal and that some differences will be tolerated in this sort of thing, but is there any single resident of New Hampshire that would -- you know, in existence -- that would pay a tax as a result of that provision?

MR. CLEVELAND: I don't think -- no, I think -- the short answer to that, Your Honor, is no. I think the counsel for the appellants' position is correct, that he can't conceive of one, I can't conceive of one.

The -- I think in my brief I have attempted to analyze the language of that provision for a tax upon residents, in the light in which it was intended, which is to create a category of taxation. In that light, the law of New Hampshire is of interest because we do not permit a disparate rate of taxation upon the same classification of property.

That is to say, we could not have a graduated income tax.

So, statutes in New Hampshire tend to pay close attention to the description of the classification of the income, or the classification, rather, of the property which in this case is income earned in a State not of the residence of the person earning it.

The point I'm trying to make is quite simple: that quite apart from the fact that the provision purporting to tax New Hampshire residents never in fact does so, nevertheless, the effect of that statute, of that part of the statute is that it does not alter the tax burden of any resident. Likewise, the taxing provision which reaches non-residents does not and cannot, under its own terms, alter the net tax burden of any non-resident.

And that is essentially the point I'd like to -- I would like to urge upon the Court in relation to the --

QUESTION: Well, if you didn't collect from the non-residents, the residents would have to pay something, wouldn't they?

MR. SMITH: I'm sorry, Your Honor, could you rephrase that?

QUESTION: Well, where would you get the \$400,000 that now you get from the Maine people?

MR. SMITH: There's no question but what the statute accomplishes a diversion of revenue to New Hampshire, Your Honor.

QUESTION: Right. But you said that it wouldn't change the New Hampshire people. I submit it would. They'd have to raise that tax from the New Hampshire people.

MR. SMITH: Well, Your Honor, I think that would be a -- that is -- well, at least it's a political decision, I'm

not, certainly, authorized to state. But --

QUESTION: Well, it's often been said that the best political move you can make is to tax somebody else other than the people that vote for you.

[Laughter.]

MR. SMITH: They've been doing it for a long time, Your Honor. I don't -- don't dispute that.

QUESTION: Well, isn't part of your answer that this is a political question, which the Maine Legislature has resolved?

MR. SMITH: I hasten to point that out, Your Honor. That would be my next point, to be sure, that the -- it is a little bit awkward to see taxpayers in here, urging, as an injury, a loss of revenue by the State of Maine.

We are urging here that the injury which the appellants attempt to set up, if there is indeed any, which is cognizable in terms of its substantiality, runs to the State of Maine and not to these appellants.

QUESTION: Do you think the Maine law would be acceptable politically or constitutionally, or any other way, if it said, We allow credits for all payments, all income tax payments made in other States except Vermont -- except New Hampshire?

MR. SMITH: I'm not sure that -- well, I think to answer the question candidly, Your Honor, I think that if the



Maine law were to be phrased in that terms, it may be subject to a challenge, but it would certainly be -- the answer would be, then, that the New Hampshire tax --

QUESTION: I know, but the legislative solution requires -- if that isn't acceptable, then the legislative solution requires denying credits to everybody.

MR. SMITH: I don't think that that is the case, Your Honor. I think the Maine Legislature could certainly politically take the position that we consider the New Hampshire tax to be, for instance, unconstitutional; and in terms, both for that reason and in terms of reciprocity, they could grant a credit only where the other State neglects to tax, or chooses not to tax Maine residents.

That's what reciprocity is all about.

QUESTION: Why is it --

MR. SMITH: Excuse me.

QUESTION: I could go back to Madison's notes of the debates in the Constitutional Convention, on the Privileges and Immunities Clause, and find that that is just the sort of thing they had in mind, that they didn't want the States to be doing.

MR. SMITH: Well, Your Honor, I think the -- I'll bring this point up, then, out of order in my argument; I intended to make it last, but it's just as appropriate now.

A recent case in New Jersey considered the New

Jersey's Counterpart Fee Act, that case was brought here and was recently dismissed by this Court for want of a substantial federal question. The holding in that case, out of New Jersey, was: in the case where a fee was assessed by the State of New Jersey on trucks operating in interstate commerce, which were not registered in New Jersey, the fee is assessed to the extent that, and in the amount that, the State of registration of that truck would tax a New Jersey truck.

And the Court went into great lengths and great detail in discussing the question of so-called retaliatory statutes, and hinted that maybe that was an inappropriate label for such a statute. Because, in fact, the effect of them is to further and encourage reciprocity and comity between States.

I think the New Hampshire statute has a considerable element of that nature to it.

In fact, Section 6 of the New Hampshire Act provides that the taxing administrator may enter into a reciprocity agreement with any other State which, under which we would cease to tax the non-resident from that State if they would cease to tax residents of New Hampshire working in that State.

Under that -- under those terms, since Maine now taxes New Hampshire residents, we would be in a position to

say: If you stop taxing New Hampshire residents, we will stop taxing Maine residents.

And then everybody would be free to go home and tax their own people, and that would be the end of that.

So I think -- that is the direct answer to your question, I think, Your Honor -- this statute, the New Jersey statutes, as illustrated in the brief filed by the State of New Jersey, all operate to encourage reciprocity.

In the meantime, I do not deny, obviously, that they raise revenue for the State of New Hampshire. Nor would, I suspect, New Jersey deny that they raise revenue for the State of New Jersey.

But the force behind them, and one of the theories upon which they can be sustained, is that they do encourage comity and they do encourage reciprocity.

The history of the New Jersey statute is very enlightening in that respect, because it started off on the basis of reciprocity and was converted by the State of New York changing its credit arrangements.

Moving on, we suggest that the facts adduced by the brief filed by the State of Maine refer to the citizens, all the citizens of Maine and not just those subject to the Commuters Income Tax. Thus, it shows that even that impact, that injury, if there is any, is secondary, having first passed through the treasury of the State of Maine.

Now, I say that, addressing the point that, to the extent that there is any additional tax burden upon the residents of Maine because of the loss of revenue by the State of Maine, it is, one, de minimis; the State of Maine itself produces the fact that -- off the record and in its brief -- that the net increase in burden, for instance, upon each citizen is forty cents.

I would submit that that simply does not rise to the level of injury which ought to permit this Court to overrule a taxing statute of a sovereign State, on the grounds, for instance, of Equal Protection or, for that matter, Privileges and Immunities.

QUESTION: Mr. Cleaveland, --

MR. CLEAVELAND: Yes, Your Honor?

QUESTION: -- may I ask this question: As I understand it, New Hampshire withholds at the rate of four percent.

MR. CLEAVELAND: That's correct, Your Honor.

QUESTION: And that the Maine tax has been three percent. Is that correct?

MR. CLEAVELAND: I believe the tax rate in the State of Maine will float with the income. I believe it's a graduated rate. But --

QUESTION: Well, at times it's less than the four percent?

MR. CLEVELAND: That's correct, Your Honor. I understand the point you're trying to illustrate.

QUESTION: Right. Would you concede that there is an injury where the Maine resident is having his taxes withheld in an amount in excess of what he might ultimately have paid in Maine?

MR. CLEVELAND: The withholding of the tax creates a situation where, for the moment, for the interim, the resident of Maine would have withheld a greater amount than he would ultimately have to pay in tax. The -- that, of course, is wiped out at the end of the tax year when everything is adjusted.

The tax imposed will never reach four percent for a -- excuse me, it may if the rate rises high enough in the State of Maine. But the adjustment will be made at the end of the year in that --

QUESTION: You haven't got any income.

MR. CLEVELAND: No, that's correct, Your Honor.

QUESTION: Because it's wiped out by that.

MR. CLEVELAND: The loss of the use of the money is without a doubt, it can't be denied. I still suggest that in these terms it's a negligible argument.

The case of Travis v. Yale and Towne --

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.



MR. CLEVELAND: Thank you, Your Honor.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

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## AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Cleaveland.

ORAL ARGUMENT OF CHARLES G. CLEAVELAND, ESQ.,

ON BEHALF OF THE APPELLEES -- Resumed

MR. CLEAVELAND: Thank you, Mr. Chief Justice; and may the Court please:

I believe I was in the middle of discussing, or finishing up on the point of the withholding tax, and the extent to which that accomplished an injury, cognizable injury to the appellants here.

I'm maintaining that it does not, in that it is de minimis, and it is part and parcel of the -- what the Court in prior decisions has labeled the necessary administrative burden of collecting, assessing and collecting a tax.

I should point out, in the case of a tax upon, on non-residents, that in fact the withholding provision is just about the only way that the State who is collecting the tax can be assured of getting it, since, if the cash is let out of the State, the collection then becomes an out-of-State proceeding, and it's very difficult.

The case of Travis v. Yale & Towne stood for the proposition that the withholding arrangements would not constitute a sufficient injury to result in either a violation

of Privileges and Immunities, or a deprivation of the Equal Protection.

Moving on, I assert that the injury which exists here, by virtue of the in-fact diversion of revenue, is an injury which belongs to the State of Maine, to be asserted by the State of Maine, if by anybody at all, and that to that extent this case brought by taxpayers is more in a nature of a political question, and an attempt by the taxpayers to litigate the interest of other parties.

QUESTION: Since you're making that basic argument, Mr. Cleaveland, you're telling us, in effect, that the Supreme Court of New Hampshire was wrong in finding standing, because that's the traditional and most elementary test of standing is: was the plaintiff injured? And you said no, in this case the plaintiff is not injured; no injury in fact.

And that's -- if there's no injury in fact, then the plaintiff was without standing, and to that extent your Supreme Court was mistaken. That must be what you're telling us.

MR. CLEAVELAND: You're right, Your Honor. I think I have the liberty here to say that I did argue against the standing of these plaintiffs in the Supreme -- in the New Hampshire Supreme Court, but, as noted in the footnote in Flast v. Cohen, the New Hampshire Supreme Court has one of the most liberal attitudes on standing in the country; they

will recognize the standing of just about anybody. Which is perhaps a reflection of the caseload that they carry, and I've noted in the brief time --

QUESTION: They're anxious to get business, I guess.

MR. CLEVELAND: I think maybe in my experience up there, this attitude is beginning to change.

But I --

QUESTION: It's true, as you know, I'm sure, in our cases, that often a State court will say: under State law you have standing. And this Court will say: Well, you don't have standing for our purposes. And vice versa.

MR. CLEVELAND: Right. I've pointed that out in my brief, Your Honor. There's no question but what this Court has different standards to apply when considering a question of standing.

Just to begin with, it must consider the fact that this Court's jurisdiction is limited by the Constitution to actual cases and controversies.

And I think that one of the elements which this Court should consider in deciding the extent to which this is really a case in which these plaintiffs have an interest is the fact that the expressions of interest in this case by other States, specifically Vermont, Maine, and New Jersey, is one measure of just how much an interest the States have in the outcome of this. And is again a measure of the extent

to which this is really a contest between various States for the right to collect revenues.

Moving on again, I think it follows almost immediately, in the wake of our contention that there is no injury in fact here, that, as we have been discussing, the appellants have no standing to prosecute this appeal.

Trying to condense this point slightly, I think it's hornbook law that standing to litigate a constitutional issue requires a demonstrable injury in fact, upon which the complaint may be founded.

This requirement, as I mentioned, is a part and parcel of the constitutional limitation with respect to cases and controversies.

But also I think reflects the fundamental fact that the Constitution is not designed to settle specific disputes, but, rather, provides certain broad rights and privileges.

Thus, a complaint under the Constitution is primarily a complaint about conduct which results in a deprivation or infringement of a right or privilege. In other words, if there is no injury, there is no deprivation; and the complaint should not -- a complainant, excuse me, should not be heard to say that there is.

This illustrates the extent to which, in my brief, I have tried to tie together the argument that there is no injury with the argument that there is no standing with the



argument that there is no deprivation.

In this particular circumstance, I think the whole thing turns on the question of the injury.

QUESTION: How do you distinguish deprivation from injury? Do you regard them as two different things?

MR. CLEVELAND: I think if there is conduct, for instance, an action by a State, Your Honor, which results in or trespasses upon a constitutional right, I think the conduct, in the first place, the action by the State results in, say, an injury which would be, say, a tax burden, an increased tax burden, a disproportionate tax burden.

That results in a deprivation of a constitutional right under certain circumstances.

Now, I think if -- what I'm getting at -- the negative predicate "therefrom" is that if there is no additional tax burden, for instance, then there is no injury to that particular person, which would -- could be said to result in a deprivation of a constitutional right.

I think that is the -- that's part and parcel of what standing in a case and controversy argument is all about.

The --

QUESTION: Well, what about the case -- Toomer v. Witsell, where South Carolina was charging a fee to non-residents, would it have been a sufficient answer there to tell this man that if had done his shrimping in North Carolina

waters, if that was where he lived, he would have had to pay a fee which North Carolina charged, so he really wasn't injured?

MR. CLEVELAND: I think Toomer v. Witsell, if I recall it correctly, Your Honor, is that it is just a fee case, a privilege case; and the disproportion of the assessments there was so radical as to practically wipe out any argument that there, for instance, were available -- or assessed upon residents other fees which would make the assessment uniform.

QUESTION: Well, of course, that's on the merits, and not on the standing.

MR. CLEVELAND: Correct.

QUESTION: Do you think it can be seriously maintained that the New Hampshire ten-dollar residency tax, or whatever else New Hampshire residents pay, is really an approximate equivalent of what the out-of-State people are paying?

MR. CLEVELAND: That's the starting point, Your Honor, but this Court, in prior decisions, has indicated that you needn't stop with simply State-assessed taxes. The proper inquiry is: What is the total tax burden upon the resident used to defray the expenses of government? And "government" includes both State and municipal subdivisions.

QUESTION: Well, can you make that argument here,

that there's rough equality?

MR. CLEVELAND: I can -- I can -- the more I have examined this case, the more I think that argument can be made. I think in the stance in which this case rests now, my argument is that it is conceivable that this is so, that there is some kind of a proximate balance, and it is sufficiently conceivable that that is so, that the plaintiff who wants to challenge this statute should have an affirmative burden to show that it is not.

QUESTION: Well, what if you do it for all out-of-State residents who work in New Hampshire?

MR. CLEVELAND: We do, Your Honor. If I understand your question correctly.

QUESTION: Well, not if they don't have an income tax.

MR. CLEVELAND: No, if the -- well, to that extent, all that reflects is a --

QUESTION: Well, you aren't trying to tax out-of-Staters for -- equivalently with in-Staters, because you just don't tax a lot of out-of-Staters.

MR. CLEVELAND: I'm not sure that there are very many out-of-Staters who work in New Hampshire who are not hit by this tax. The only instance in which an out-of-Stater is subject to the tax, would escape from it, is if his own State had no income tax.

QUESTION: Or didn't give a credit.

QUESTION: How long do you have to earn money in the State before you're subject to the Commuters Tax?

QUESTION: In other words, you have to be there three, four, six months, something like that?

MR. CLEVELAND: No, Your Honor, the --

QUESTION: Well, I know some Jersey residents who work summertimes at your resort hotels in New Hampshire, and New Jersey doesn't have any tax; I take it they don't have to pay the New Hampshire tax.

MR. CLEVELAND: That's probably the case, Your Honor. If there are -- that situation would obtain; but this reflects not so much an invidious discrimination as it is a recognition by the New Hampshire Legislature that where a State does not tax, it necessarily -- its own citizens, it does not tax our residents, we will not tax theirs.

That again is a reciprocity argument. It recognizes the interest in furthering reciprocity to that extent.

QUESTION: You -- New Hampshire really borders on three States, doesn't it?

MR. CLEVELAND: Correct, Your Honor.

QUESTION: Maine, Vermont, and Massachusetts. Do all of those have income taxes?

MR. CLEVELAND: Yes, they do, Your Honor, and that

accounts for far and away the bulk of the taxpayers under this tax.

QUESTION: Is there anything in the record that would indicate that people who do not reside in those three States may work in New Hampshire?

MR. CLEVELAND: I don't believe there is any data. I could be corrected on that, if my brother knows of some; but I'm not aware of any data which would indicate what proportion of the taxpayers are from other than those three States, or, for that matter, which are not subject to this tax.

QUESTION: They could even be from a different country, some could come from Canada, presumably, which is -- and might, and as --

MR. CLEVELAND: Presumably.

QUESTION: -- as my brother Brennan suggests, undoubtedly there are a good many people who have summer jobs in New Hampshire, from other States, other than the bordering States.

MR. CLEVELAND: It's my understanding, Your Honor, that they would be reached by the withholding provision. In other words, they would be taxed for that part of the calendar tax year, or the tax year that they worked.

I don't think that's an -- to the extent any question is addressed which raises the specter of a non-resident not



being taxed, that is certainly not anything about which that non-resident can complain.

QUESTION: No. And it's no part of your brother's case, either.

MR. CLEVELAND: No, it isn't. It isn't.

And moving along, the --

QUESTION: Well, what if the -- correct me, or fill me in: Assume -- what is the tax rate here, four percent?

MR. CLEVELAND: It begins at four percent, Your Honor, but it is automatically reduced to whatever rate the non-resident's home State would apply.

QUESTION: So it will never be higher than that?

MR. CLEVELAND: Never be higher.

At the end of the calendar year, after the returns are filed and adjustments made and rebates issued, the tax will be precisely the same as the taxpayer would have paid to his home State, in all cases.

QUESTION: On those earnings.

MR. CLEVELAND: On the same earnings. Of course, he may be -- nothing in excess.

QUESTION: Then he gets -- if there's anything withheld, he gets it all back?

MR. CLEVELAND: He gets it all back, if the withholding is in excess; which it may be in some cases, as I have

said.

QUESTION: So it takes his money until the end of the year?

MR. CLEVELAND: It may take it until the end of the year.

QUESTION: So it's -- at least it deprives him of the use of the money during the year.

MR. CLEVELAND: I can't -- I can't -- you may say that, Your Honor; I just say that it's just a de minimis injury.

The --

QUESTION: But there is the additional injury that your friend mentioned, that there's money going out of Maine into New Hampshire, which never comes back to the State of Maine.

MR. CLEVELAND: Which is an injury, if anything, to the State of Maine, Your Honor.

QUESTION: Well, and who is the State of Maine except all the people in the State of Maine? Particularly all the taxpayers.

QUESTION: Well, except that it's bestowed by the State of Maine itself.

MR. CLEVELAND: It's given away, Your Honor.

QUESTION: Unh-hunh.

MR. CLEVELAND: I think I have to come back to that

point. The key to the loss of revenue on the part of the State of Maine is held by the State of Maine; it's their credit provision, Your Honor, if the Court please. That --

QUESTION: Well, the fact that it's a revolving fund, that it's a circular process, doesn't alter the fact that it goes out of the hands of the taxpayer, does it?

MR. CLEVELAND: It goes out of the hands of the taxpayer, but again that part of it is a political question. The State of Maine could solve that problem simply by phrasing the issue directly, by removing that credit. Then we would have, without question, a controversy.

QUESTION: Well, then, you'd be in much tougher shape to sustain your tax, wouldn't you?

MR. CLEVELAND: No question we would fall immediately into an Equal Protection problem, where we would necessarily have to get into the business of trying to balance the relative burden of taxation.

QUESTION: Or Privileges and Immunities.

MR. CLEVELAND: I think my contention is, in the scope of this argument, that the Privileges and Immunities and Equal Protection, in this type of case, are so closely entangled that it's pretty much impossible to take them apart.

QUESTION: Well, you do tax some non-residents different from others, if they work in Vermont -- in New

Hampshire?

MR. CLEVELAND: If the -- the principle to be applied, Your Honor, is that the State will not -- our State will not tax a non-resident in excess of the rate which his own State applies to him. And if that happens to create an inequality among non-residents, I don't think that rises to a constitutional --

QUESTION: Well, yes, but it has some relevance to your argument that all you're trying to do is to equalize the over-all tax burdens between residents of New Hampshire and non-residents of New Hampshire.

If you were trying to do that, you would tax non-residents in the same way.

MR. CLEVELAND: I'm not suggesting that we are affirmatively striving for that goal. It's something that has to be approximated, otherwise we have constitutional problems.

The principal objective is to do unto the non-resident taxpayer precisely as his State does unto him, the option for that State then being to cease to tax our own residents.

To the extent that, for instance, the State of Maine tries to say that our taxing their citizens at their rate is not rational, for instance, how then do they justify taxing New Hampshire residents at the same rate? They, in fact, do.

I submit, to the extent that the State of Maine can justify taxing New Hampshire residents at the Maine tax rate, and say that that is in any way a ratable contribution to the support of government, then, to the same extent can New Hampshire say that taxing Maine resident is precisely for that purpose and to the same extent a rational basis.

QUESTION: Mr. Cleaveland, do you have any situation where two people making \$20,000 a year are taxed on a different percentage basis, other than this?

MR. CLEAVELAND: Two people, same income, both working in New Hampshire?

QUESTION: Yeah.

MR. CLEAVELAND: If one of them came from --

QUESTION: Unh-hunh.

MR. CLEAVELAND: -- Maine and one of them came from Massachusetts, yes, they would be taxed, under our tax, at different rates --

QUESTION: Well, is there any other situation in the world like that?

Where two people doing the exact same job, getting the exact same money, are taxed differently?

MR. CLEAVELAND: I think disparate taxation is the fact of life all over this country, Your Honor. Double taxation exists. I'm not -- I'm not trying to dodge the question.



QUESTION: Do you know any one where two people, doing the exact same work, exact same place, exact same money, are taxed differently?

QUESTION: May I suggest, Mr. Cleaveland, that two government employees in this city, earning \$20,000 a piece, one living in Maryland and one living in Virginia, might have different income tax obligations.

MR. CLEAVELAND: I think that's a fair example. I hadn't --

QUESTION: But that's assessed by two different agencies.

But I want to know where the taxing authority, a single taxing authority taxes two people making the exact same money at different rates?

MR. CLEAVELAND: Every State, Your Honor, which has a graduated income tax with, for instance -- part of the graduation of which is --

QUESTION: But this, I say they're both making \$20,000.

MR. CLEAVELAND: Right. Let me finish, Your Honor.

QUESTION: Sure.

MR. CLEAVELAND: The part of the graduation of which involves various exemptions or deductions, is going to wind up taxing disparately.

QUESTION: But that's not the basic tax. The basic

tax is what --

MR. CLEVELAND: The rate -- your point is well taken, Your Honor, I'm --

QUESTION: So this is unique, isn't it?

I'm not saying it's unconstitutional, but it's at least unique.

MR. CLEVELAND: It may be indeed unique, except I'm not sure whether the State of New Jersey is in the same situation.

QUESTION: It's no more unique than taxing everybody but the residents.

QUESTION: Yeah.

QUESTION: It's no more unique than that.

QUESTION: But your point is that the New Hampshire resident, working right alongside and making the same income, doesn't pay anything; and that's what makes this unlike the Maine tax on non-resident New Hampshirites.

MR. CLEVELAND: Precisely. There's no---

QUESTION: It makes Maine impose the tax on its own people. And you don't.

MR. CLEVELAND: The irritation which the situation creates is obvious, Your Honor.

One more point -- one more reason why that is properly called a political question.

QUESTION: Right.

MR. CLEVELAND: If there are no more questions, I think my time has expired.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Smith?

MR. SMITH: Unless the Court has some questions to address to me, we have nothing further.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:21 o'clock, p.m., the case in the above-entitled matter was submitted.]

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