

In the

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

--VS--

STATE OF NEW JERSEY,

Defendant.

No. 68 Original.

Washington, D. C.
December 3, 1975

Pages 1 thru 42

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IN THE SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF PENNSYLVANIA, :
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Plaintiff, :
 :
v. : No. 68 Original.
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STATE OF NEW JERSEY, :
 :
Defendant. :
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Washington, D. C.,

Wednesday, December 3, 1975.

The above-entitled matter came on for argument at
11:28 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:

LAWRENCE SILVER, ESQ., Deputy Attorney General of
Pennsylvania, Department of Justice, Capitol Annex
Building, Harrisburg, Pennsylvania 17120; on behalf
of the Plaintiff.

STEPHEN SKILLMAN, Assistant Attorney General of New
Jersey, State House Annex, Trenton, New Jersey
08625; on behalf of the Defendant.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 68 Original, Commonwealth of Pennsylvania against the State of New Jersey.

Mr. Silver, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE SILVER, ESQ.,

ON BEHALF OF THE PLAINTIFF

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

MR. CHIEF JUSTICE BURGER: We hope you will bear in mind that you have a narrow question to present here today, merely on the question of leave to file a bill of complaints.

MR. SILVER: We're aware of that, Your Honor.

But I think in order to fully understand the issues relating to that, some explanation has to be made of the underlying tax statute. But I will be brief as to that.

In 1971, Pennsylvania --

MR. CHIEF JUSTICE BURGER: You mean the statute that derives from Austin v. New Hampshire?

MR. SILVER: The statute similar to the one declared unconstitutional in --

MR. CHIEF JUSTICE BURGER: Well, of course, we have some familiarity with that.

MR. SILVER: Of course.

Pennsylvania, in 1971, passed a domestic income tax,

and, in response to that, New Jersey passed its commuter's tax, known as the Transportation Benefits Tax Act. It taxes both Pennsylvania citizens who cross over to New Jersey and New Jersey citizens who cross to Pennsylvania. But immediately exempts those persons, and in fact even does not require the filing of a return.

The issue, therefore, is whether or not that statute falls squarely within the holding in Austin, and we think it does.

The issue before the Court, raised by New Jersey's motion in opposition, is whether Pennsylvania, as a State, has standing to sue, first, for declaration that that statute is unconstitutional, and injunctive relief which should follow.

And the second issue, whether or not it has standing to seek the retroactive application of such determination, and an accounting and repayment for the funds collected by New Jersey.

QUESTION: Your case, then, is different from Maine v. Massachusetts, in that in your case it hasn't been established the New Jersey tax is unconstitutional?

MR. SILVER: There is no court declaration as to that. We have two aspects. We have a first hurdle to get over -- they already have the Austin case, which we don't. In the first instance, we would ask the Court, first, to take jurisdiction to determine whether or not the statute is or is not

constitutional.

I might add that the issue -- I hope to explore the issue, to be so clear as to really require a summary disposition of that matter by the Court.

QUESTION: Well, what standing does Pennsylvania have to challenge a New Jersey tax, insofar as it bears on Pennsylvania citizens? In Austin the challenge was by individual taxpayers claiming violation of privileges and immunities.

MR. SILVER: Mr. Justice Rehnquist, we assert several issues of standing, as to our first count.

The first issue, and I think the most important one, is that, perhaps with the exception of the commerce clause, what keeps the nation together is the privileges and immunities clause, and that it is our contention that Pennsylvania, as a State, suffers a trespass against it when its citizens' privileges and immunities are violated.

The support for that proposition, first, I think, is in Ward vs. Maryland. Also, in footnote 5, Mr. Justice Marshall's opinion in Austin, where James Madison requested information, and what is to prevent the trespasses of one State against another State? The answer was the privileges and immunities clause.

That Pennsylvania has been independently harmed by the fact that there is a violation of the privileges and immunities of its citizens.

And I might add, in support of this proposition, this Court's opinion in Travis vs. Yale and Towne Manufacturing Company; there it was a corporation whose act was nothing more than withholding the money of its employees. And this Court permitted that corporation to assert the privileges and immunities of its employees. Now, Pennsylvania -- and I would like to --

QUESTION: But it was acting as a withholder, and as a conduit of the money, at least, in the Yale & Towne case.

MR. SILVER: Yes, but it did not allege that its privileges and immunities were being violated, but that its employees' privileges and immunities were violated, and their standing to raise that was sustained by this Court.

Now, I would add also, I think the answer is contained in Mr. Justice Marshall's opinion, at 662, in which it is said that the issue -- that privileges and immunities, in terms of maintaining the peace between the States, that the Constitution seeks to establish, is such an important issue that it has the high degree of judicial inquiry.

That is language that I believe to be the converse in terms of the required level of standing.

Now, Pennsylvania also asserts its interest, parens patriae, to seek, to represent its citizens, stand in the shoes of its citizens to seek a declaration that a statute of a sister State is unconstitutional.

QUESTION: Well, can you do that in a case where the other defendant is a State, under the Eleventh Amendment?

MR. SILVER: Oh, I think so, Your Honor, because in Pennsylvania vs. West Virginia, West Virginia passed a statute which said that before you export natural gas to any other State, you must insure that the demands of West Virginia are first satisfied.

Pennsylvania, by itself, as well as on behalf of its citizens, parens patriae, together with Ohio, commenced original actions in this Court seeking a declaration that the statute was a violation of the commerce clause. And this Court permitted Pennsylvania, in that case, to seek a declaration that a sister State statute was unconstitutional.

Now, the question that you raise, in addition to the one that I think I tried to answer, is the other aspect, and that is the Eleventh Amendment. The Eleventh Amendment only precludes, as I understand it, money judgments as against the sister State, except in the areas -- and the exception, of course, is Ex Parte Young. But that only --

QUESTION: But Ex Parte Young doesn't involve any judgments of any kind against the State, --

MR. SILVER: No, but --

QUESTION: -- it involves judgment against State officials.

MR. SILVER: -- it's an injunction. But I would

assert that, first of all, that the Eleventh Amendment only precludes suits -- does not preclude all suits against States, but only suits by individuals against States.

QUESTION: Well, but wouldn't it preclude a suit where the State is really not suing in the classical boundary sense, or water diversion sense, that instead really on behalf of its own citizens in a parens patriae capacity?

MR. SILVER: Your Honor, I think that -- first of all, as I said, that Pennsylvania -- that a trespass of the privileges and immunities clause as to its citizens is an independent and separate trespass of Pennsylvania. Which I think the opinion in Austin supports that proposition.

QUESTION: But it certainly doesn't say so.

MR. SILVER: No, not in -- and I agree, not in that clear language. But I think that the history of the privileges and immunities clause, and this Court's treatment of it, would certainly support that proposition.

In addition, I don't think that when a State -- the Eleventh Amendment problem comes up in the New Hampshire case, New Hampshire vs. Louisiana, where the State is really not acting in its sovereign capacity, but seeks an avoidance of the Eleventh Amendment; and there cannot be an assertion that Pennsylvania is trying to walk around the Eleventh Amendment by some act of an assignment of claims, bond claims, as there was in New Hampshire vs. Louisiana.

QUESTION: But, nonetheless, it's perfectly clear that a group of citizens of Pennsylvania couldn't get together and sue New Jersey in a federal court.

MR. SILVER: For two reasons. First of all, they could not -- they may be able to sue an officer --

QUESTION: Right. But not the State of New Jersey.

MR. SILVER: -- and that's an Eleventh Amendment problem.

That resolves the Eleventh Amendment problem, Mr. Justice Rehnquist, it does not resolve the problem created for those people under 28 U.S.C. 1341, the Anti-Tax Injunction statute, which precludes a citizen from utilizing the federal courts to enjoin a tax in federal courts, unless there's a plain speedy remedy.

QUESTION: Well, but those are two reasons, then, why citizens of Pennsylvania can't sue the State of New Jersey.

MR. SILVER: That's correct.

QUESTION: And we certainly shouldn't, under our original jurisdiction, simply allow that to be circumvented in a kind of a dressed up original action here.

MR. SILVER: Your Honor, I do not think it's a dressed up original action in the sense that 28 U.S.C. 1341 specifically limits its operation to the district courts, implying, I think, the congressional intent that where there is a dispute as between the States, that the State may clearly

go to this Court. That to suggest that it's an end run is to assert the jurisdiction -- to stand the jurisdiction of this Court on its head; and that this is the perfectly proper place to go because Pennsylvania, as I intend to demonstrate in the argument, has suffered an injury in addition to the injury suffered by its citizens.

QUESTION: Mr. Silver, somewhere in your argument, would you refer to Massachusetts v. Missouri? This is heavily relied upon by New Jersey, and not cited in your brief. And I want to be sure I know your answer to that one. It doesn't have to be now; whenever you get to it.

MR. SILVER: Okay.

I would assert also that I think that once the only -- as to the merits of the case, in terms of the -- once the Court reaches the issue, New Jersey has conceded with one exception that their statute is precisely similar to the statute declared by this Court to be unconstitutional in Austin, except with one aspect. And that aspect is that the use of the money is to go to transportation purposes.

Now, the -- this Court, in a long line of opinions, has said there are really two aspects to any tax: the first aspect is the imposition, the second aspect is the use. And the Court has said that whatever the use is, if the use is improper, we would enjoin the use. But an improper use will not declare unconstitutional a proper tax; and likewise I would

assert the only assertion by New Jersey to distinguish their act is one that is really irrelevant.

Going back to the issue of the original jurisdiction of this Court in terms of the retroactive relief that we seek, the Pennsylvania gave a tax credit to all -- does give a tax credit to all of its citizens who pay income tax to another State.

I might add that every State which surrounds Pennsylvania has a domestic income tax, with the exception of New Jersey.

QUESTION: This is a tax credit, not a --

MR. SILVER: This is a tax credit, Your Honor.

QUESTION: Yes.

MR. SILVER: Now, we do provide for a tax credit as to all States.

I think that Pennsylvania has, within its constitutional powers, as was stated by Mr. Justice Marshall in Austin, has the power to -- and the authority to grant such an exemption -- such a tax credit.

The fact that its tax credit also creates harm for it, does not preclude it from complaining for, one, retroactive relief, and a money judgment in this Court.

QUESTION: Mr. Silver.

MR. SILVER: Yes, Mr. Justice Powell?

QUESTION: Perhaps it had the power, but certainly

it was not required to grant the tax credit, was it?

MR. SILVER: No. No, Your Honor, it is not.

QUESTION: So it was voluntary political action on the part of Pennsylvania.

MR. SILVER: That is correct.

QUESTION: And can a controversy within the meaning of the Constitution, between States, arise by a State voluntarily, not under any constitutional compulsion, brings about what you now call as a controversy?

MR. SILVER: I think so, Your Honor. If a State has the power to do something, it need not release that right and power to accommodate the unconstitutional acts of the sister State.

And if Pennsylvania has the right to act properly in this way, and does act within its power, and by that -- by the exercise of its proper power is harmed by the unconstitutional acts of another State, I think that it does create a controversy. Pennsylvania need not accommodate or surrender its proper rights to accommodate the unconstitutional acts of a sister State.

Now, the alternative that Pennsylvania could do -- Pennsylvania could say, could amend its statute and say, We will give you a tax credit for every State except New Jersey, because we think their statute is unconstitutional. That's the very type of conduct that the privileges and immunities

clause was designed to prohibit: retaliatory actions by one State against another State.

And, in fact, I would even suggest there's a possibility that if we passed such a tax exemption, exempting only New Jersey citizens, that Pennsylvania would also be in violation of the privileges and immunities clause, if not of the equal protection clause, by singling out New Jersey. But until New Jersey's statute is declared unconstitutional, Pennsylvania has, of course, the right to give such a tax credit; that it may be harmed as a consequence does give it the right to complain in a court.

Now, the reasons for the retroactive application are set forth in our brief, but New Jersey was clearly on notice, certainly at the time of the passage of the Act, certainly at the time of filing of the Austin case, and certainly at the time of this Court's issuing its Austin decision. And it is a constitutional tortfeasor and should not be permitted to maintain the benefit that it has achieved by reason of its unconstitutional acts.

And therefore we would assert that it is not only within the power, but the proper power of this Court, to say to New Jersey: You have unconstitutionally collected a tax, and you must not -- may not be able to keep that tax.

To do otherwise would basically encourage States to come so close to violating the privileges and immunities clause

that if they are wrong, they get to keep the bounty, which, in Pennsylvania's case at this point, is approximately \$29 million.

I would say that, if I may --

QUESTION: Well, aren't the individual taxpayers entitled to eat into that bounty that they get back?

MR. SILVER: Your Honor, they took a tax credit for which -- in Pennsylvania, for which they were relieved of tax liability in Pennsylvania.

QUESTION: Well, if they get their tax back from New Jersey, isn't that taxable income in Pennsylvania when they get it back?

MR. SILVER: We would asser that it is -- well, it requires -- whether it's taxable income is not an easy question, but we would assert that it would require an amendment of the prior return, because the prior return would show a tax credit.

QUESTION: Well, maybe the statute of limitations will have run by that time.

MR. SILVER: We should hope not, Your Honor. It's a three-year -- I believe it's a three-year statute of limitations.

QUESTION: Well, if Pennsylvania should succeed in its efforts in this Court to get the money back, could New Jersey plead the judgment of this Court in an action by individual taxpayers of Pennsylvania, seeking to recover moneys, as were done by the individual taxpayers in Austin?

MR. SILVER: I should think so, Your Honor.

QUESTION: Why?

MR. SILVER: Well, because -- first of all, the judgment of this Court, if we would get all of the relief that we request, would first have to determine Pennsylvania's prior right to the tax moneys.

QUESTION: Right.

MR. SILVER: And that judgment, therefore, --

QUESTION: But then you want money, too, don't you?

MR. SILVER: Certainly.

QUESTION: And you want money, not to go back to the individuals who have paid the New Jersey tax, but you want money to go into the coffers of the Pennsylvania State Treasury.

MR. SILVER: That is correct, Your Honor, because it is the coffers of the Pennsylvania State Treasury which effectively has been diverted to New Jersey.

QUESTION: But then why, when the individual taxpayer comes and sues the State of New Jersey, and says your tax is unconstitutional, and New Jersey says, Well, we've already paid money into the general fund of Pennsylvania; why shouldn't he be able to answer and say, Fine, that's great for the State of Pennsylvania, but this came out of my pocket and I got a right to get it back in my pocket?

MR. SILVER: Well, as I said, I think the judgment of this Court would determine that Pennsylvania has, since the funds were diverted from it, and the judgment of this Court

would have to make that determination in order for us to be successful, but that judgment could be pleaded, that they do -- the individual taxpayers do not have the right, following a judgment of this Court.

QUESTION: How could we foreclose individual taxpayers who aren't parties to this action?

MR. SILVER: Well, the notion of -- I guess it's the notion of, I think, collateral estoppel, Your Honor.

QUESTION: Well, it's a rather unique version of collateral estoppel.

QUESTION: I'm not sure it would be that, it might be that they wouldn't state a cause of action.

MR. SILVER: That's right. I'm sorry. I think you're right, it is not collateral estoppel.

But they have not stated -- I think you're right, Mr. Justice White, and that is that they do not have the right to the money, and that this Court would determine that Pennsylvania's right to --

QUESTION: But your idea is that the money would never end up in their pocket, it would either end up in New Jersey's or Pennsylvania's pocket.

MR. SILVER: That's right.

QUESTION: They've got to pay the tax to one or the other jurisdiction.

MR. SILVER: That is correct. That was the point of

Mr. Justice Blackmun's dissent in Austin.

QUESTION: Even though in Austin, the individual taxpayers got the money back.

MR. SILVER: That remains to be seen, Your Honor; I am not sure that that did occur. I will allow --

QUESTION: In any event, even if you can't get the money, you want to stay in court and have the law invalidated?

MR. SILVER: Certainly. We certainly want, first, the prospective relief to enjoin the statute. And I just might add that if this Court would grant leave, at least as to what I consider to be the easier issue, as to the declaratory and injunctive relief, we would file, then, a motion for preliminary injunction to enjoin possible retroactive question after January 1st of this year. Because at that time again the returns will start being filed for the tax year of 1974.

And in order to avoid a much more difficult collection problem than already exists, would file at that time a motion for preliminary injunction.

Now, I think the question, although I really have not addressed it, Mr. Justice Blackmun, in those terms, in your request that I address myself to Massachusetts vs. Missouri, has really been answered in the dialogue between Mr. Justice Rehnquist, Mr. Justice White and myself, in that the question in Massachusetts vs. Missouri was the mutual exclusiveness of the claims.

And what I think we have been talking about is whether or not the claims of the taxpayers and the claims of Pennsylvania are mutually exclusive.

We claim that they are. That once -- that since the moneys were diverted from the Treasury of Pennsylvania, and, as a matter of fact, if the Court is going to have retroactive relief in terms of the New Jersey -- the Pennsylvania taxpayers, just the administrative problem of returning it to 60,000 Pennsylvania taxpayers over a period of three years, would be much easier served than Pennsylvania's additional attempt to collect that money if the money went to the pocket from which it was taken, and that is the Pennsylvania Treasury.

And that really what the issue involved in Massachusetts vs. Missouri is an issue relating to mutual exclusiveness, and what I think the Court's decision in that case was, that the issue between the States couldn't be resolved by this Court, because both courts could come up with inconsistent judgments, those inconsistent judgments were not necessarily mutually exclusive.

The only other question that is raised, I believe, by New Jersey's brief that I wish to deal with is the issue as to whether or not this Court can give a money judgment; and I think that it has, in the case of Virginia vs. West Virginia, which is not cited in our brief, at 238, 202; and has ordered a judicial sale for the purpose of satisfying a possible

judgment in South Dakota vs. North Dakota, at 192, 286.

Also, I think the -- there's always the -- this Court has always been troubled, I believe, over its ability to execute judgments in original actions. And I think that I would refer to this Court's opinion in Griffin vs. Thompson, which Mr. Justice Daniel said, at 43 U.S. 244, that there is an inherent power in every court to exercise and execute upon its judgments.

And frankly, I think -- he says: Without this power courts would be wholly impotent and useless.

And that this Court has the power under its original jurisdiction to establish whatever necessary common law requirements there are to effectuate a judgment.

And I think the assertion that there is an inability to effectuate this Court's judgment is a red herring in the case. I think once we get -- let's get the judgment, I think, and then worry about how to execute it. I think that even -- there's an argument that New Jersey's public officials, who have to obey the Constitution and the laws of the United States, would have to, under their oath, obey the judgment of this Court.

I would reserve any remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Silver.

Mr. Skillman.

ORAL ARGUMENT OF STEPHEN SKILLMAN, ESQ.,

ON BEHALF OF THE DEFENDANT

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

This matter is before the Court on a motion for leave to file an original action. The sole issue properly before the Court, therefore, is whether the Court has original jurisdiction over this matter.

It is the position of New Jersey, briefly stated, that this matter does not lie within the original jurisdiction of the Court because the State of Pennsylvania has no cause of action against New Jersey.

Its brief in support of the motion for leave to file relies exclusively upon the equal protection clause of the Fourteenth Amendment and Article IV, Section 2 of the Constitution.

It is clear that these clauses afford protection only to individuals -- in this case, individual taxpayers -- and not to States.

If anyone's rights under these clauses have been violated, it is the Pennsylvania residents who have paid the New Jersey commuter benefits tax and not the Commonwealth of Pennsylvania.

Nor may the Commonwealth pursue this matter on behalf of its citizens as parens patriae.

It's been suggested by counsel for Pennsylvania that if there has been some type of violation of the constitutional rights of the citizens of Pennsylvania, that there has therefore been a trespass of some sort upon the Commonwealth of Pennsylvania.

No cases are cited for this proposition, and its consequences would be rather breathtaking. This Court has had hundreds upon hundreds of interstate tax cases come before it through the years, not only under the privileges and immunities clause but under the equal protection clause, and of course most frequently in the business context under the commerce clause.

If this case comes within the original jurisdiction of the Court because there has been a violation of the constitutional rights of the citizens of Pennsylvania and therefore a trespass upon the Commonwealth of Pennsylvania, it would be difficult to see how all of the rest of the interstate tax cases involving, not just the privileges and immunities clause but also the equal protection clause and commerce clause, would not also come within the Court's original jurisdiction. And greatly expand that jurisdiction.

Now, there also is a significant Eleventh Amendment aspect to the attempt by the Commonwealth of Pennsylvania to bring this case as an original action, insofar as they seek a judgment for money damages against the State of New Jersey.

It is clear that under the Eleventh Amendment the individual Pennsylvania taxpayers could not bring suit in federal district court for the collection of any retroactive tax benefits.

It therefore should be equally clear that the Commonwealth of Pennsylvania cannot dress this matter up as an original action and circumvent the bar of the Eleventh Amendment and seek a money judgment against the State of New Jersey.

Now, it was essentially for these reasons --

QUESTION: Your brother cited us a couple of cases which he says -- cases of original jurisdiction in this Court, I think, one in 238 U.S. and another at 192 U.S. -- in which he says the Court has entered money judgments against the State.

But I suppose those were not -- the plaintiff in that case was the State suing on its own behalf, and not on behalf of its citizens. Is that it?

MR. SKILLMAN: That's correct.

The main precedent on that particular point is the case of Virginia vs. West Virginia --

QUESTION: Right.

MR. SKILLMAN: -- where, at the time the State of West Virginia was established, there was an allocation between the two States of the then existing bonded indebtedness of the State of Virginia.

QUESTION: Yes.

MR. SKILLMAN: Clearly a cause of action of the State of Virginia, and the Court did recognize that a money judgment might be entered under those extraordinary circumstances.

Here, however, --

QUESTION: That's in 238 U.S., is it? Do you remember?

MR. SKILLMAN: I believe that that is the latter of the two cases, in 238.

QUESTION: Yes.

MR. SKILLMAN: The other case is South Dakota vs. [sic] North Carolina case, where, I believe, over a sharp dissent, South Dakota was permitted to take an assignment by way of gift of the bonded indebtedness between certain of its citizens and the State of North Carolina [sic] and to sue under that.

Again it was at the point that the completed gift was made, it was --

QUESTION: An obligation --

MR. SKILLMAN: -- an obligation between the State and the other State.

Here, on the other hand, it's clear that the obligation, if any, is an obligation that would run between the taxpayers of the Commonwealth of Pennsylvania and the State of New Jersey.

So that extraordinary form of relief is not available here.

QUESTION: Yes.

MR. SKILLMAN: New Jersey relies very heavily, as indicated in its brief, upon Massachusetts vs. Missouri, which -- where the Court found that the interstate tax conflict involved there did not fall within its original jurisdiction.

The Court specifically held that no justiciable controversy was presented by Massachusetts' contention that the Missouri taxing authorities had improperly refused to exempt the assets of the estate of a Massachusetts domiciliary from the Missouri taxes.

A very similar situation to the one we have here, where the Commonwealth of Pennsylvania is claiming that, notwithstanding the credit provisions of its own laws, that the State of New Jersey should not have enacted a statute which would bring those credit provisions into play.

QUESTION: But the underlying hypothesis, as I understand it, in Massachusetts v. Missouri, was that each of the States could tax the particular estate consistently with the Constitution. Here, I take it, Pennsylvania takes the position that New Jersey can't, consistently with the Constitution, impose this tax on citizens of Pennsylvania.

MR. SKILLMAN: Well, I don't think there's any question under the Travis and Shaffer cases that two States could impose

a tax upon the same income. And I think that what the Court was referring to there in terms of legal mutual exclusivity was one where the Constitution bars double taxation.

Here we have no constitutional bar against double taxation. We have an argument that there may be a violation of the privileges and immunities clause by virtue of the imposition of New Jersey's tax because of the particular tax structure of New Jersey. But no inherent or intrinsic constitutional bar against double taxation.

And I think that that is the main response to that.

QUESTION: You think Massachusetts v. Missouri, then, turned on the concept of the bar of double taxation, or the claim that two States couldn't tax the same estate?

MR. SKILLMAN: I think partly on that, and also, I think that the opinion also should be read partly as an attempt to explain what the Court had held only a few months before in Texas vs. Florida, where they had entertained an original action in a case involving five different States seeking to tax the estate of a single decedent. And I think that the mutual exclusivity also was meant to deal with that problem, and to try and limit the parameters of that rather unusual case, which Justice Frankfurter, in dissenting, had expressed fear might greatly expand the number of original actions being brought before the --

QUESTION: The Hettie Brown estate or something --

Hettie somebody ---

QUESTION: Hettie Greene.

QUESTION: --- Hettie Greene.

MR. SKILLMAN: Greene, I think, is the name that comes to mind.

QUESTION: But, nevertheless, the claim here is that the Constitution prevents New Jersey from imposing the tax in this case?

MR. SKILLMAN: That is certainly Pennsylvania's claim, yes.

It is true and recognized that the constitutional claims which Pennsylvania seeks to advance on behalf of its citizens would, if sustained by this Court, result in an increase in the tax revenues of the Commonwealth of Pennsylvania. But this would be equally true in almost any case in which a State taxation provision were declared invalid, because credits and deductions for taxes paid to other taxing authorities are so commonplace in the taxing schemes of all States that this is a very -- would be a very frequent consequence of any declaration of unconstitutionality of a tax.

So, again, if this is a foundation for the Commonwealth of Pennsylvania proceeding directly against the State of New Jersey, this same jurisdictional principle would extend to the great majority of interstate tax disputes that come before the Court, that have come before the Court through the years,

and with a few unusual exceptions, Massachusetts vs. Missouri and Texas vs. Florida, have been brought by the individual taxpayers, who claim that their individual constitutional rights had been violated.

Now, while Pennsylvania's proposed complaint only mentions the equal protection and privileges and immunities clauses, their supporting brief refers to the water diversion and street cases, where the Court has fashioned what it has called a federal common law in its role as arbiter of interstate disputes.

Now, the short answer to Pennsylvania's reliance upon those cases, I think I've already given, and that is, that neither Austin vs. New Hampshire nor any other State tax case, with the possible exception of Texas vs. Florida, has been decided on that type of a basis.

However, if the Court were to conclude that these cases were the appropriate jurisdictional framework for resolving this matter, we would ask that the matter, on its merits, also be treated as an interstate dispute, to be resolved in accordance with principles of federal common law.

In other words --

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

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

AFTERNOON SESSION

[1:01 p.m.]

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

ORAL ARGUMENT OF STEPHEN SKILLMAN, ESQ.,

ON BEHALF OF THE DEFENDANT - Resumed

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

I would like to comment briefly, if I may, upon the presentation and argument of the Commonwealth of Pennsylvania.

I think that the most salient feature of that presentation is that the Commonwealth relies upon the water division, the street cases, and other cases in which the Court has fashioned a general federal common law in its role as arbiter between the States in the federal system.

However, having established, as they conceive it, the jurisdiction of the Court under these cases, they then abandon them and on the merits, instead of relying upon principles comparable to those in the water diversion cases, or asking the Court to fashion principles similar to those in the water division or street cases, on the merits they then turn around and ask the Court to consider this case as one involving denial of constitutional rights of individual taxpayers of the Commonwealth.

The State of New Jersey would have no objection to

the Court entertaining under its original jurisdiction this matter under principles comparable to those that have been fashioned in the water diversion or street cases. I mean, it would require rewriting of a good deal of constitutional history, since these cases have previously, with one or two exceptions, been considered under the privileges and immunities and equal protection and the commerce clauses applicable to taxpayers.

But New Jersey would have no objection to this area of interstate tax dispute being reconsidered under those principles and under the original jurisdiction of the Court.

QUESTION: You mean just kind of transfer all disputes about the authority of States to levy taxes on interstate commerce from other courts to this Court under its original jurisdiction?

MR. SKILLMAN: At least to the extent that those cases properly may be viewed as involving a fight between the States as distinguished from essentially fights between taxpayers, which again goes back to the various cases.

QUESTION: Yes, but if this can be viewed as a fight between States, what interstate commerce taxation problem can't be?

MR. SKILLMAN: I think that that is the problem that the Commonwealth has in seeking to proceed in that fashion. All we are saying at this point is that we are asking them to

be consistent. If they are asking the Court to entertain original jurisdiction under the analogy of these other cases, then we would ask that the merits also be considered under the analogy of those cases; and we would urge that if the case were so considered -- and I'm stating this in the hypothetical, really, Mr. Justice -- that if the case were so considered, that the State of New Jersey would have a very persuasive case, and there's a tremendous outflow of money from New Jersey residents to the States of New York and Pennsylvania, and a very small inflow of money under the statutes that are -- under the statute that's involved in this case and in the comparable statute that's applicable to the State of New York.

QUESTION: Well, then we presumably would have kind of a -- not just New Jersey against Pennsylvania, but we'd have to join New York and Delaware and Maryland; so that everybody could be heard from.

MR. SKILLMAN: There are no such taxes comparable to those involved here applicable to Delaware and Maryland. There is a comparable tax under a different tax statute applicable to the State of New York. So it would be a case involving certainly the States of Pennsylvania and New York.

QUESTION: Suppose if we had granted originally the motion for leave to file, couldn't you be making much the same argument to support a motion to dismiss, or a motion for a judgment on the pleading?

If you had made one.

MR. SKILLMAN: On the jurisdictional point.

QUESTION: Well, no, on just dismissal of the -- for judgment in your favor on the grounds that, well, maybe they've got standing, but they just aren't entitled to have the judgment.

MR. SKILLMAN: That this plaintiff doesn't have a cause of action?

QUESTION: Yes.

MR. SKILLMAN: Yes. Yes, I definitely think that we would be making --

QUESTION: Maybe the same cause of action.

MR. SKILLMAN: Yes, we would be making the same argument.

QUESTION: And I suppose your paper, whatever you filed, you wouldn't object if we construed it to include a motion for judgment on the pleadings?

MR. SKILLMAN: No, I --

QUESTION: You haven't -- it's a motion to dismiss, really. But you haven't filed an answer.

MR. SKILLMAN: It is a cross-petition to their motion for a leave to file. But I don't --

QUESTION: But you haven't filed an answer, --

MR. SKILLMAN: We have not filed an answer.

QUESTION: -- because there hasn't been a complaint

filed.

MR. SKILLMAN: That's right. The motion for leave to file has not been acted upon.

QUESTION: Well, tell me, Mr. Skillman, if we were to disagree with you and we were to grant the motion for leave to file, what follows in this case?

MR. SKILLMAN: Well, I --

QUESTION: What kind of an answer can you give us that you haven't already given us in resisting the motion for leave to file?

MR. SKILLMAN: That would certainly depend on what the Court said as to Pennsylvania's status --

QUESTION: No, we grant the -- the bottom line is "the motion is granted."

QUESTION: And let's say that's the only line.

QUESTION: That's all we do.

QUESTION: Yes.

QUESTION: Just an order.

QUESTION: Just an order, then what happens?

MR. SKILLMAN: Well, I think that we would give a series of responses in the disjunctive. I think that the first response we would give would be comparable to the one that we've already submitted, on which --

QUESTION: The motion to dismiss, on which you'd say precisely what you now say.

MR. SKILLMAN: -- it has no cause of action. I think that we would have to, in order to cover ourselves --

QUESTION: What I'm trying to --

MR. SKILLMAN: -- would be for me to put it that way. Also to argue on the merits and distinguish the New Jersey situation from the New Hampshire situation involved in Austin, just on the contingencies that the Court might --

QUESTION: And these would all be arguments of law. Would there be any role for a Master to play, for example, in a case like this?

MR. SKILLMAN: Yes. I think that --

QUESTION: Oh, there would?

MR. SKILLMAN: I think that once the Court recognized that Pennsylvania has standing to raise the constitutional contentions of its taxpayers, or, if I may put it a different way, if we were -- if this case were brought in what we would conceive to be the proper forum, that there are a number of factual issues that would need development.

QUESTION: Can you suggest what they are?

MR. SKILLMAN: One is how New Jersey goes about funding the interstate transportation projects that it does fund with the revenues derived from this tax. The Court recognized in Toomer vs. Witsell that differential tax burden upon residents and non-residents, in a given tax, is not, per se, intrinsically, automatically unconstitutional; rather, if

there's some reasonable basis for it, some reasonable justification for the disparity, it may be apparent.

QUESTION: You don't think there would be any -- you don't think there is an area in between denying the motion for leave to file and a full-blown trial on the merits? You don't think there's any room for holding that they failed to state a cause of action?

MR. SKILLMAN: I do think there's room for that. I understood the inquiry to be: what our response would be if the Court were to grant leave to file, and ask us to address the merits, but not indicate any view on the standing --

QUESTION: But you might make the motion for -- to dismiss for failure to state a cause of action.

MR. SKILLMAN: As long as we were able to reserve the right to speak to the merits, should that motion be denied.

QUESTION: Or you might file an answer and ask for a judgment on the pleading.

MR. SKILLMAN: Yes.

But, as I say, I think we would cover that in the disjunctive, first of all as to Pennsylvania's claim of its own, which I think we'd be saying essentially the same thing we're saying now, but --

QUESTION: And it would be only if you lost out on all those motions, after all the pleadings were in, that we get to the point where we have to decide whether we'll point

them out.

MR. SKILLMAN: A number of -- and we have a number of factual issues. First of all, as to the allocation of the revenue --

QUESTION: New Jersey still doesn't have an income tax, does it?

MR. SKILLMAN: No. It's still trying, and --

QUESTION: It's trying awfully hard, but rather unsuccessfully.

MR. SKILLMAN: That day may eventually come, and it would be, I think, a rather --

QUESTION: I don't suppose you can say what New Jersey would do if Pennsylvania decided that it wouldn't give a credit?

MR. SKILLMAN: I think that would -- New Jersey would certainly have to reconsider its position on this tax very substantial --

QUESTION: But I suppose you could say there's one thing it wouldn't do, and that's to tax everybody?

MR. SKILLMAN: Well, --

QUESTION: Or would you? Is it a possibility, you would just quit exempting New Jerseyites, so that Pennsylvania would then --

MR. SKILLMAN: New Jersey would --

QUESTION: -- so that Pennsylvania would then give

the credit?

MR. SKILLMAN: New Jersey has been striving for the enactment of an income tax for a long time, so that would be -- it would be highly speculative as to what the consequence of that would be.

As to Pennsylvania's granting of the credit in this situation -- and I don't want to go into the merits further than I really should; but I should just note that this was not something that New Jersey conjured up in the middle of the night and did without consultation with Pennsylvania.

Before this tax was enacted, and it was enacted right around the same time that Pennsylvania enacted its income tax, there were discussions and conferences between the Governors of the respective States, their personal counsel and the Attorneys General of those States. So this is not the -- at least it wasn't initially -- the type of conflict or attempt by the State of New Jersey to raid Pennsylvania's tax revenues that may have been portrayed; and again that would be another area that, factually, would have to be explored if the Court were to reject our contention that the Pennsylvania does not have standing to pursue this matter on behalf of its taxpayers.

Thank you.

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

REBUTTAL ARGUMENT OF LAWRENCE SILVER, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. SILVER: I do, Your Honor, just very briefly.

I -- during the luncheon recess -- would like to further amplify my answer to Mr. Justice Rehnquist's remark, or questions to me.

There is no doubt that New Jersey did consult with Pennsylvania, and extended certain courtesies. But I think this Court should know that, first of all, their tax is almost a mere image of ours. In fact, to some of our embarrassment, the same type typographical and grammatical errors that appear in our Act also appear in New Jersey's Act.

I think it's essential and important to know that every single time we have changed the rate -- which has only been two times; initially it was 2.3 percent, New Jersey had it at 2.3 -- when we changed it to 2, New Jersey immediately changed theirs to 2.

And that I think in answer to your question, Mr. Justice Rehnquist, the target here has been Pennsylvania and not its citizens. And truly in support of this position, I would rely on Mr. Justice Blackmun's dissenting opinion.

One of the reasons, one might ask, is why hasn't a citizen attacked it? Because if he attacks the statute and is successful, he pays the same amount of money to Pennsylvania. By reason of what New Jersey has done, in terms of retaliation.

And it is Pennsylvania's Treasury that is being harmed by this statute, and perhaps --

QUESTION: Is it animus against Pennsylvania as a sovereign entity rather than just that it's there to collect as much as much money as possible?

MR. SILVER: Well, Your Honor, this statute does not tax all non-residents, and that's a point that I think should be emphasized.

This tax statute says: The Commissioner of Transportation shall select a border State, which is a critical transportation problem; and under this statute they didn't pick Delaware or New York, they only picked Pennsylvania. And the rate is the exact same rate as Pennsylvania's rate. It is -- and it was enacted right after our tax was enacted. So it is a raid by New Jersey -- courtesy, I agree, but, nonetheless, a raid upon the Treasury --

QUESTION: A courteous one.

MR. SILVER: A courteous raid, but, nonetheless, an unconstitutional one.

And it is -- and although we might have gotten into intellectual discussions about parens patriae, et cetera, the primary argument which I had in my brief and relied on, I think perhaps a more academic argument, but I think it's an argument that is meritorious. But I think the easier argument is Pennsylvania is the real party harmed --

QUESTION: Couldn't that be resolved in a taxpayers' suit raising the equal protection point that you seem to be hinting at?

MR. SILVER: Well, it might be, but New Jersey's courts could very easily adopt Mr. Justice Blackmun's position in his dissent, to say that you have no standing because you have no injury, because if you win you lose, because you pay the money --

QUESTION: If it was a constitutional decision, we could always take care of that, couldn't we?

MR. SILVER: Yes, Your Honor, in three years or so when the retroactive relief we would be seeking would be many more millions of dollars than it is already.

And I might add we have waited three years, and I think the answer is really contained in Mr. Justice Brennan's statement, there has been effort, substantial efforts to get New Jersey to pass an income tax. And I concede that if they tax their citizens the same way they are taxing our citizens, we would not have the same constitutional underpinnings for this argument.

It became abundantly clear in July, Mr. Justice Brennan, that New Jersey was not going to pass an income tax, and in August we filed our action.

And, Mr. Justice Rehnquist, if I just may say one more point, this is not a subtle attempt to utilize the

original jurisdiction of this Court to vindicate what is essentially a private right. This is not an attempt to -- like in New Hampshire vs. Louisiana -- to take an assignment of bonds, but it's an attempt to rectify and to protect Pennsylvania.

It is a direct interference with Pennsylvania's interest.

Now, to do that, they must assert its unconstitutionality, and upon that must be the infringement to its citizens or the infringement, as I suggested, to itself.

QUESTION: But, of course, Pennsylvania has had within its own power at all times to prevent that injury. How about the old common law maxim of volenti non fit injuria? That, you know, if you have it within your own power to prevent the harm, you can't come to court and complain about it.

MR. SILVER: Well, I think with that kind -- the kind of harm we could prevent is in the nature, I think, of a last clear chance, rather than if you have the constitutional power to do something properly and you exercise that power within your right, to avoid the unconstitutional acts of another.

I think that New Jersey has relied on what is a flood-gates argument, that if the Court opens itself up to this case, there will be a flood gate problem.

I think not. If you grant all of the relief that we

request, and even if you grant part of the relief; but I think the issue that we have said is that what must be prevented is for a State to enact a statute which so clearly comes close to constitutional violations that all we ask is that if a State does violate the Constitution, that it pay back the money that it has improperly got..

That is not a penalty, but that is a substantial deterrent to -- that States should, and I am sure you will consider in the enactment of legislation in the future, and by granting that relief, States will steer clear of the kind of constitutional violations that have been suffered in this case.

Now, I would -- just to respond to one matter that came up in argument after lunch -- I think that the matter, that their brief in opposition can be treated as a motion to dismiss. And I think that the arguments can be resolved on the merits at the present posture, on the legal issues.

Certainly if -- regardless of what New Jersey would do in terms of an answer, we would file a motion for summary judgment or an alternative judgment on the pleadings awaiting their answer.

But the issue as to the constitutionality of a tax is a legal question. This Court can look at the statutes without any reference to any facts; the statute is clearly there.

The only argument I just would remind -- not reiterate but just remind that I made it is that the fact that New Jersey may use this tax for transportation purposes does, if the taking is wrongful to being with, the use doesn't save it.

Even if the use were as a donation to the fisc of Pennsylvania, as meritorious as Pennsylvania would find that to be, we would still say that such a meritorious use, the donation to our Treasury, would not save the unconstitutional taking.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:15 o'clock, p.m., the case in the above-entitled matter was submitted.]

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