

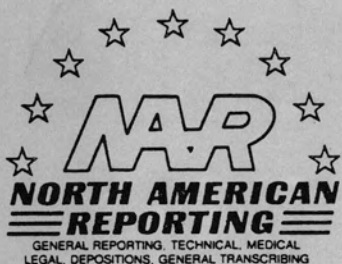
In the

# Supreme Court of the United States

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STATE OF MARYLAND, ET AL., :  
 :  
 Plaintiffs, :  
 :  
 v. : No. 83 Original  
 :  
 STATE OF LOUISIANA :  
 :  
 Defendant. :  
-----X

Washington, D.C.  
January 19, 1981

Pages 1 through 79



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5 v. :

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7 Defendant. :

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9 Washington, D.C.,

10 Monday, January 19, 1981

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:07 o'clock a.m.

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P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: The Court will hear  
3 arguments first this morning in the case of The State of  
4 Maryland v. The State of Louisiana, an original jurisdiction  
5 case.

6 Mr. Sachs, you may proceed whenever you are ready.

7 ORAL ARGUMENT OF STEPHEN H. SACHS, ESQ.,

8 ON BEHALF OF THE PLAINTIFFS

9 MR. SACHS: Thank you very much. Mr. Chief Justice,  
10 and may it please the Court:

11 This original action challenges the validity of  
12 Louisiana's first use tax on natural gas; and its companion  
13 measure comes to the Court on exceptions to two reports of  
14 the Special Master. In his report of May 14, 1980, the  
15 Special Master recommended among other things, that the Court  
16 grant the motions to intervene of the United States, of the  
17 17 pipeline companies, and of the State of New Jersey. In  
18 his report of September 15, 1980, he recommended denial of  
19 Louisiana's motion to dismiss and denial of the 8 Plaintiff  
20 States' motion for judgment on the pleadings. With the Court's  
21 permission, I would like to discuss the operation of the  
22 statutory scheme with particular emphasis on its facial and  
23 intended discrimination against interstate commerce; next,  
24 the Solicitor General will speak to the scheme's interference  
25 with the authority of the Federal Energy Regulatory Commission;

1 and finally, Mr. Peragine, on behalf of the Pipelines, will  
2 speak to their motion to intervene, as well as to certain  
3 commerce clause issues.

4           May it please the Court, this Court some 30 years  
5 ago, in *Dean Milk Co. v. Madison*, recognized that a state  
6 statute which -- would be clearly invalid, which -- and I  
7 quote the Court, "artlessly disclosed an avowed purpose to  
8 discriminate against interstate commerce". This, we respect-  
9 fully suggest to the Court is such a case, and it falls even  
10 more squarely within this Court's recent precedent of *Boston*  
11 *Stock Exchange v. The New York Tax Commission*, and the *City*  
12 *of Philadelphia v. New Jersey*. Because, Your Honors, nothing  
13 emerges more clearly from the 115 pages of legislative  
14 history which you have before you, and from the statutory  
15 scheme itself, than the compulsive concern of Louisiana to  
16 export this tax.

17           QUESTION: General Sachs?

18           MR. SACHS: Yes sir?

19           QUESTION: Before you get to the so-called merits  
20 of the case, is it your opinion that *Illinois v. Milwaukee*  
21 completely overruled *Ohio v. Wyandotte*?

22           MR. SACHS: No, Your Honor, it is not our opinion  
23 that *Illinois v. The City of Milwaukee* overrules *Ohio v.*  
24 *Wyandotte*, nor is it our opinion that this case is controlled  
25 by this Court's disposition of the application for original

1 jurisdiction of Arizona v. New Mexico. Those cases, Your  
2 Honor, were not exclusive, within the exclusive jurisdiction  
3 of this Court. Both the Illinois case and the Ohio case  
4 were cases within the original jurisdiction, but not con-  
5 trolled by Section 1251 of the Judiciary Act, which gives  
6 this Court exclusive jurisdiction.

7           Furthermore, may I say, Your Honor, that this case  
8 is far from the kind of case that impacts common law notions  
9 of nuisance as involved in one of those cases; it's far from  
10 the kind of case that impacts scientific testimony and scien-  
11 tific evidence that would have been required as Mr. Justice  
12 Harlan, I think, said in the Ohio case, and Mr. Justice  
13 Douglas, perhaps, in the Illinois case. This is a case which  
14 impacts 30 states of this union and which tests whether or  
15 not one state at a time of energy crisis can, in what we  
16 claim to be flagrant violation of the original principles  
17 of the commerce clause can impose its will on other states.  
18 And so, Your Honor, for both jurisdictional reasons as well  
19 as prudential reasons, we think this case is radically dif-  
20 ferent from both the Ohio case and the Illinois case.

21           And may I also add, Your Honor, if I may, that in  
22 Arizona v. New Mexico, there is not the slightest suggestion  
23 that we can find that the suggestion of whether or not the  
24 states can get an alternative hearing in some other form, is  
25 in any way overruled. And it's worth pointing out, I think,

1 Your Honor, that here we can go no place else. There is no  
2 other forum where Maryland, or her sister states who are  
3 Plaintiffs, can be heard. And so for all those reasons, Your  
4 Honor, we feel that this case is quite properly here.

5 QUESTION: Maryland is itself a consumer of  
6 Louisiana natural gas; not Maryland as *parens patriae* for  
7 Maryland citizens.

8 MR. SACHS: We are here in both capacities, Your  
9 Honor.

10 QUESTION: I realize that.

11 MR. SACHS: And we -- and I make the same assertion  
12 in both capacities. We are here very much like Pennsylvania  
13 was here some 50 years ago in its suit against West Virginia,  
14 in which very similar contentions were being made when one  
15 state thereby, by simply cutting off supply, was having  
16 impact on the state and its citizens.

17 QUESTION: Well, but do you disagree with the notion  
18 that there is some tension between *Pennsylvania v. West*  
19 *Virginia* and *Ohio v. Wyandotte*?

20 MR. SACHS: No, Your Honor, I do not. And the  
21 reason -- that is, I do disagree with the contention that  
22 there is tension between the two propositions, for the reasons  
23 that I began to indicate perhaps a moment or two ago. We  
24 are dealing here, as this Court did in *Pennsylvania v. West*  
25 *Virginia*, with a case that probes deep into the nature of



1 this union. I don't blush to say that here, two centuries  
2 after the foundation of this Republic, we are facing and we  
3 are asking this Court to face, precisely the questions of  
4 sectionalism, precisely the questions of the ability of one  
5 state to profiteer from its position, in this case, as a  
6 -- thwart a supply of a very important natural resource.

7           Those concerns, Your Honor, while I don't mean to  
8 denigrate the issues of nuisance, or the issues of pollution,  
9 or the issues that vexed the states of Illinois and Ohio in  
10 the two cases that we've been discussing -- while I don't mean  
11 to denigrate those, we respectfully suggest, Your Honor, that  
12 here we are dealing with something terribly different. This  
13 tax brings into the state of Louisiana three hundred million  
14 -- let me be conservative, \$250 million a year. And Louisiana  
15 statutory structure would give us, if we are successful, if  
16 we could get to their courts and if we could sue in their  
17 courts, they would give us six percent on our money. They  
18 are the kinds of reasons, Your Honor.

19           QUESTION: Yet ordinarily, a litigant suing on  
20 the basis that the tax violated the commerce clause or for  
21 some other reason was deficient constitutionally, would have  
22 his case reviewed in the district court, the Court of Appeals,  
23 and if it is as important as you say it is, in this Court by  
24 writ of certiorari or perhaps, one of the few remaining direct  
25 appeals. Here, you have a Special Master and it goes directly

1 to this Court. Given the importance of the case, I would  
2 think the prudential considerations mentioned in Wyandotte  
3 might be all the more important, in that you would get a  
4 more exhaustive review of your contentions in the ordinary lit-  
5 igative process, than you would in the original jurisdic-  
6 tion type of action.

7 MR. SACHS: I have two responses to that, Mr.  
8 Justice Rehnquist. The first is, I know nothing in the law  
9 that suggests that exhaustive is good; we don't believe we  
10 need an exhaustive review. We believe that, just as this  
11 Court found in Boston Stock Exchange, as it found in Phila-  
12 delphia v. City of New Jersey, this statute is facially  
13 offensive to the Commerce clause and as Mr. Smith will  
14 argue, to the supremacy clause. Exhaustion is not needed  
15 to determine -- and the second --

16 QUESTION: Well I don't mean exhaustion in the sense  
17 of exhaustion of remedies, but I mean review by several dif-  
18 ferent courts.

19 MR. SACHS: Nor, with all respect, Your Honor, do  
20 we believe that review by several different courts is essential  
21 to determine the claim here. We are not another plaintiff,  
22 we are not a litigant as appears in most of the courts of  
23 this country. We are sovereign states, and we are within the  
24 original jurisdiction put there by the founders of this -- of  
25 the Constitution, for it to be heard precisely because there

1 was concern that to be heard in the forum of a foreign state  
2 or to be heard elsewhere, would not do justice as between  
3 the parties. And so we are here because we are within the  
4 constitutional prescription, we are here in the exclusive  
5 jurisdiction because we're within the statutory prescription,  
6 and we are here -- as far as, I can argue to Your Honor, with  
7 on the right side of all of the prudential concerns, serious  
8 indignity of the claim is one of the pieces of language that  
9 comes, I think, from Mr. Justice Douglas' opinion for this  
10 Court in the Illinois case.

11 It's hard for me to imagine, I say, as an advocate  
12 certainly, but I say as a lawyer, it is hard for me to  
13 imagine a more serious and a more dignified claim to engage  
14 the constitutional attention of this Court than this claim  
15 which harks back to the very primal concerns which were  
16 present when the Constitution was written. And so it doesn't  
17 need in our respectful judgment, Your Honor, review by other  
18 courts, it doesn't need fact finding by any Special Master;  
19 what it needs is the judgment on the pleadings that we have  
20 sought and that we earnestly press on this Court's attention.

21 QUESTION: Philadelphia v. New Jersey, of course,  
22 came up through the regular court system, did it not?

23 MR. SACHS: It did, Your Honor, but significantly  
24 it was decided, as I recall it, on pleadings. And in Boston  
25 Stock Exchange v. The New York Tax Commission, all the more

1 significantly was decided on a motion to dismiss. Let me  
2 dwell on Boston Stock Exchange for a moment, if I may. The  
3 -- that case is very much like this one. There like here,  
4 it was decided on the pleadings; there like here, the legis-  
5 lative history which betrayed and which -- as Mr. Justice  
6 White in his opinion for a unanimous Court suggested --  
7 which betrayed a purpose to protect the in-state commercial  
8 interests in an impermissible way. There, in Boston Stock  
9 Exchange, like here, the claim was made that while there's  
10 a compensating -- that this is really a compensating tax,  
11 within the meaning of Henneford and the meaning of Hallibur-  
12 ton. But this Court said that the statute there did not  
13 support that characterization. And so here, this statute  
14 does not support that characterization. This is not a compen-  
15 sating tax, Mr. Justice Rehnquist, and members of the Court --

16 QUESTION: But that's the merits.

17 MR. SACHS: Well, it is the merits, but it's the  
18 merits of the narrow but fundamental question as to whether  
19 this statute facially discriminates and intends to discrim-  
20 inate against interstate commerce. Mr. Justice Rehnquist,  
21 you can't read the 115 pages -- that's all there are, 115  
22 pages which are Exhibit C to the last -- filing on behalf  
23 of the States -- you can't read that and the 10 or 12 pages  
24 of the statute without seeing and realizing that what the  
25 Louisiana legislature wanted to do -- and this is not

1 hyperbole on my part, it is theirs -- what it wanted to do  
2 was to make up for its frustration for years, much of which  
3 has been recorded in the annals of this Court, at its inability  
4 to profit from the rich deposits of natural gas on the  
5 Outer Continental Shelf in the federal domain. And in an  
6 effort to do that, what it determined to do was to impose a  
7 so-called first use tax on the first time this gas comes into  
8 the state. That may have been bad enough. We may have been  
9 here in any case. But they went way beyond that. They  
10 exempted every conceivable local incidence of the tax; the  
11 local domestic producers were exempted, local utility users  
12 were exempted, local commercial interests which would otherwise  
13 take from the tax were exempted. And what they did, as  
14 one of them said, if this tax is going to be passed it's  
15 going to be a passed-on tax, no doubt about it. And the  
16 history that you'll see when you read the legislative history  
17 was how that legislature was going to confront the problem  
18 of getting the benefits of the tax without having the local  
19 folks bear the burden.

20 QUESTION: Could Maryland itself have gone into  
21 a United States District Court in Louisiana, and made this  
22 same claim?

23 MR. SACHS: No, Your Honor, for two reasons. The  
24 first is, because it is our belief, and we think the cases  
25 are ample, Illinois v. City of Milwaukee indirectly says

1 it, we're in the exclusive jurisdiction of the Supreme  
2 Court. We cannot go into the courts of Louisiana to sue  
3 Louisiana or its official officials, and get that kind of  
4 relief. But secondly, and let me say all of this at once  
5 lest I be misunderstood, we, because we were not the tax-  
6 payers -- that is not the same thing as saying we do not have  
7 standing here in this Court -- but that because we were not  
8 literally the taxpayers in Louisiana, we could not have  
9 engaged in the refund proceedings which only the pipeline  
10 companies could have engaged.

11 QUESTION: Who support you in this case.

12 MR. SACHS: They do indeed support us. They came,  
13 they asked to intervene, and their position and ours are  
14 certainly similar on the merits. Ours and many commentators  
15 who have reviewed these matters, Professor Hellerstein among  
16 them, have indicated the facial unconstitutionality of this  
17 Louisiana tax.

18 I'd like to address, if I may, what we think --  
19 the only thing that we believe troubled the Special Master  
20 on this aspect of the case, namely the facial unconstitution-  
21 ality as far as discrimination against interstate commerce  
22 is concerned. What Mr. Davis, the Special Master, did was to  
23 say -- he almost did it, you can't read his opinion without  
24 feeling that another inch or two and perhaps we would have  
25 been there. But he didn't do it, and on this aspect of the

1 case he didn't, because he was concerned that perhaps the  
2 actuality of operation of the tax would disclose that it had  
3 a bona fide compensating tax, kind of a justification. And  
4 with all respect to the Special Master, we think he mis-  
5 conceived two things.

6 First of all, the whole notion of actuality of  
7 operation. The phrase of course, comes from this Court's  
8 opinion in Halliburton. But in no way, shape or form can it  
9 be said to be a call to trial. What actuality of operation  
10 meant there and what it meant in the seminal case of Henne-  
11 ford, the Cardozo opinion of many years ago, saying that a  
12 sales tax and a use tax can indeed be compensating was  
13 simply that you look at the way these statutes operate. It  
14 was not a statement that you need evidence, it was not a  
15 statement that you have to have a trial, it was a question  
16 of looking at the entire statutory scheme. It was not, I  
17 repeat, a call to trial.

18 Indeed, in Henneford itself, the opinion of Mr.  
19 Justice Cardozo that liberated us from some of the past --  
20 what was an earlier avoidance of taxation by semantics, may  
21 I say -- what Cardozo did in Henneford was to decide a case  
22 with, there is no evidence, it is basically a facial judgment  
23 he made in the Henneford opinion, which makes super clear  
24 to us that actuality of operation is not necessarily a call  
25 to trial.

1           And then the second thing that the Special Master,  
2 we think, misperceived, was that there is a very, very sig-  
3 nificant difference between the sales tax/use tax/compensating  
4 tax analysis, and the kind of compensation claimed here.  
5 What is being claimed here is compensating in the sense of  
6 we don't like the fact that we can't tax OCS gas, and we want  
7 to do better. It's much like -- in Boston Stock Exchange,  
8 they said we don't like the fact that the regional stock  
9 exchanges are out hustling us or out advertising us, or  
10 drawing business away from us, in that sense, one can say that  
11 the New York statute was compensating. But as this Court  
12 unanimously said, that's not what compensating means for  
13 purposes of tax analysis. What compensating means as Mr.  
14 Justice Cardozo said in the Henneford case, in the famous  
15 metaphor there, is that the dweller from within and the  
16 stranger from afar have to be treated even handedly. Even-  
17 handedness, he said, is the theme that has to run through  
18 the statutes. And may I respectfully suggest to this Court  
19 that when you examine this statute and the legislative  
20 history, you will see that it makes a mockery of the notion  
21 of even-handedness, what they did here. What they did is,  
22 every step of the way -- read, if you read no other page,  
23 Your Honor, read page 82(c) of the legislative history as  
24 reprinted here in our last filing, which is simply a summary,  
25 it's only one line and it's not the best quotes, but it's



1 one line in which you can -- one page in which you can see  
2 that they were saying we're taking care of everybody locally  
3 who could possibly get hurt. And when one state does that,  
4 when one state attempts to profiteer from its position --  
5 for a rich source of national energy. When one state does  
6 that, it impacts, we respectfully suggest, the very concerns  
7 that led the founders of this republic to write the Commerce  
8 Clause and to -- and it offends the very notion of a free  
9 economy and an open economy, and of comity between the states  
10 that the Commerce Clause is all about.

11           When you read that legislative history you will  
12 see the xenophobia, you will see how they are upset about  
13 what Montana is doing. You will see how they are upset about  
14 the protection the Easterners get. You will see how this is  
15 a part of a growing national sectionalism over how we're going  
16 to afford energy and who's going to pay for it.

17           And as I said before and as I say in closing, that  
18 is precisely the kind of offense, that is precisely the kind  
19 of parochialism that the Commerce Clause, we respectfully  
20 suggest, was put into the Constitution to prevent. I'll  
21 reserve the rest of my time, with your permission, Mr. Chief  
22 Justice.

23           MR. CHIEF JUSTICE BURGER: Very well, General  
24 Sachs. Mr. Smith.

25           ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

1 ON BEHALF OF THE UNITED STATES

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

4 I think it can be stated with assurance on an  
5 examination of the Special Master's report and on the statute  
6 that this, Louisiana's first use tax on natural gas is aimed  
7 at what is called OCS gas, or Outer Continental Shelf gas.  
8 It essentially exempts all gas for which a severance tax is  
9 paid, either in any other state or in Louisiana. It also is  
10 aimed in part on federal enclave gas; that is, the gas that  
11 is extracted from federal -- enclaves owned by the federal  
12 government.

13 The Federal Energy Regulatory Commission has, as  
14 the Court has said in numerous opinions, exclusive juris-  
15 diction over the sale and -- rate making over the sale or  
16 transportation of gas moving in interstate commerce. There  
17 can be no doubt that this gas is moving in interstate commerce.  
18 From the well head to the burner tips, the cases are legion  
19 that that movement is interstate commerce. The Federal Energy  
20 Regulatory Commission objects principally to Section 47:1303(c),  
21 which is set forth in full at page 6 of our brief; that is,  
22 the last brief we filed, styled Exception of the United States.  
23 And that provision states any agreement or contract by which  
24 an owner of natural gas, at a time a taxable use first occurs  
25 claims a right to reimbursement or refund of such taxes from

1 any other party in interest other than a purchaser of such  
2 natural gas, is hereby declared to be against public policy  
3 and unenforceable to that extent.

4 QUESTION: Mr. Smith, if we accepted either your  
5 argument or that of General Sachs, this Louisiana tax would  
6 be invalid, would it not?

7 MR. SMITH: That is correct, Mr. Justice Stewart.

8 QUESTION: It wouldn't be necessary to accept both  
9 of them at all?

10 MR. SMITH: No, as a matter of fact, it wouldn't be  
11 necessary to accept both of them. And in fact, the Louisiana  
12 statute, Section 4(2) of the statute, the Louisiana legisla-  
13 ture thought that this 1303(c) was so important and such a  
14 core provision to the tax, that it states that if that tax --  
15 if that provision is held unconstitutional, the entire  
16 statute falls. If the Court accepts --

17 QUESTION: Mr. Smith -- and your argument is the  
18 constitutional argument, insofar as it relies on the supremacy  
19 clause?

20 MR. SMITH: Right. If the Court accepts that argu-  
21 ment, the entire statute falls and the Court need not reach  
22 any other argument.

23 QUESTION: Mr. Smith, FERC would have had no diffi-  
24 culty in suing Louisiana in a federal district court in  
25 Louisiana, would it?

1 MR. SMITH: FERC would have had no difficulty  
2 suing Louisiana, and in fact, there is a suit which has been  
3 brought in the Middle District of Louisiana, but the states  
4 cannot be parties to that suit as General Sachs has pointed  
5 out, so the prudential considerations indicate that the states  
6 cannot be heard in that suit.

7 Secondly, that suit, the District Court in that  
8 suit, has abstained from deciding the matter and indefinitely  
9 postponed it, pending a resolution of the suits brought by  
10 Louisiana officials in the Louisiana court. And the Louisiana  
11 court has indefinitely postponed consideration of its suit to  
12 which the states cannot be parties as well, pending a resolu-  
13 tion, you know, disposition by this Court, of the matter.

14 QUESTION: Well so that all that revolves around  
15 our original jurisdiction in here, does it not?

16 MR. SMITH: It does, it does. I think that the  
17 point simply is that those -- both of those forums are inappro-  
18 priate forums for the resolution of what we think are these  
19 major constitutional questions because 1) the states cannot  
20 be heard in those suits, secondly -- in fact, Louisiana in  
21 the state action recently sought to move things along, or to  
22 give the appearance of moving things along by seeking a rule  
23 to have the states "invited" into the suit. And the state  
24 court refused. So you know, those suits are offtrack, and  
25 they're really not going anywhere. The only --

1 QUESTION: But the only reason they're offtrack  
2 is because of this original action.

3 MR. SMITH: I don't think so, Mr. Justice. I think  
4 the reason they're offtrack -- well, let me point out one  
5 other thing with respect to the state suits which we pointed  
6 out in our brief amicus in support of the complaint about  
7 a year and a half ago in this Court, and that is that the  
8 -- that that state suit is a declaratory action, by state  
9 officials against the pipelines, and producers, and it more  
10 or less asks the Court to hold the tax valid in anticipation  
11 of possible challenges of invalidity. I would suggest to the  
12 Court that that is probably not an Article III case or contro-  
13 versy since it asks that Louisiana court for an advisory  
14 opinion about a tax in anticipation of the challenge that,  
15 you know, in other court that hasn't occurred yet.

16 QUESTION: Mr. Smith, you say that these other  
17 courts are "inappropriate". Don't you need a better word  
18 than inappropriate?

19 MR. SMITH: I really, I suspect that they are  
20 really not capable of the kind of constitutional resolution --

21 QUESTION:

22 MR. SMITH: No. And I think that the prudential  
23 consideration that dictated the Court deferring, or dismiss-  
24 ing -- or denying the motion for a bill for leave to file a  
25 complaint in Arizona v. New Mexico, simply don't apply here,

1 because there the New Mexico suits were capable of the kind  
2 of resolution -- in fact, the Special Master in his report  
3 of May 14th, in this case, pointed out that the -- one of  
4 the utility companies in the Arizona v. New Mexico case,  
5 was in privity with Arizona because it was a political sub-  
6 division of Arizona. So essentially a state could be heard  
7 in the New Mexico court. And here, here the sovereign states  
8 cannot be heard. And that seems to be plain, and I don't  
9 think that anybody really could take serious dispute of that,  
10 that's why we think that the prudential considerations really  
11 speak in favor of the Court's original -- employment of the  
12 original jurisdiction, in this context, because of the fact  
13 that the cases in which the Court has declined are really  
14 distinguishable.

15 QUESTION: Well the solar power district in Arizona  
16 is in privity with the state of Arizona only in the sense  
17 that there's an enabling statute alive to be formed.

18 MR. SMITH: Yes, but that makes a big difference.  
19 Essentially the Court said in its per curiam opinion that  
20 the solar power company was a political subdivision of  
21 Arizona. That means essentially that the State of Arizona  
22 had a mechanism by which it could be heard in the New Mexico  
23 Courts. And the State of Maryland, and the eight other  
24 states involved in this case really don't have that, they  
25 don't have that opportunity. The jurisdictional provision

1 1251a(1) is really an exclusive one, and for the State of  
2 Maryland to complain here in its capacity as consumer and  
3 as *parens patriae*, the original jurisdiction is devised for  
4 that very purpose of giving the state an absolutely objective  
5 forum for the resolution of what are very complicated and  
6 touchy constitutional questions that really go to the heart  
7 of really the federal system, I think.

8 QUESTION: Would you say the same thing if the State  
9 of Maryland itself was not a direct purchaser of Louisiana  
10 gas? If it's simply suing *parens patriae*?

11 MR. SMITH: Well I think I would say the same thing,  
12 but of course I don't have to say that here because it's --  
13 much, we have a much -- the State of Maryland has a much  
14 stronger case because it is a consumer of natural gas in the  
15 same way that the federal government is.

16 QUESTION: Granted. But I was asking you --

17 MR. SMITH: I think that the *parens patriae* thing  
18 is compelling in the sense that, you know, you've got a  
19 bunch of consumers, you know, who basically on the basis of  
20 this tax which is really, you know, for want of a better  
21 expression, exploited, you know, fiscal greed, are going to  
22 have to pay higher utility bills and the chances of people  
23 like that bringing a suit to complain in the proper forum are  
24 really remote. And for the state to act as *parens patriae*  
25 in that kind of capacity, it seems to me, is in the best

1 traditions of the parens patriae jurisdiction.

2 QUESTION: Well where is the limitation, then?  
3 Isn't the state capable of acting as parens patriae in almost  
4 any suit that any of its citizens are affected by?

5 MR. SMITH: I suppose that's so. But you know  
6 here, where the fiscal states are so large and where Maryland  
7 also is suing in its capacity as consumer, I don't think  
8 that, you know, the Court need wrestle with those difficult  
9 questions of what would happen if the state was only here  
10 as parens patriae.

11 I think I would like to talk in my remaining time,  
12 about the complaint of the Federal Energy Regulatory Commis-  
13 sion here. And that is essentially Section 1303(c) the  
14 language I read, essentially prohibits a pass-back of the  
15 tax to the producer.

16 QUESTION: May I interrupt you just for a moment,  
17 Mr. Smith, to ask if each of the eight plaintiff states is  
18 itself a consumer of gas?

19 MR. SMITH: I think that's correct, and I think  
20 that's alleged in the complaint, and I don't think there's  
21 any dispute about that.

22 QUESTION: All right.

23 MR. SMITH: Now what that means, essentially, by  
24 prohibiting the pass-back, Louisiana has responded to the only  
25 articles of concern here, that the producers would complain



1 about this tax. And what they did essentially, was the same  
2 thing that Texas did in the Michigan Wisconsin case, in which  
3 the Court struck down that Texas gathering taxes as violative of  
4 the Commerce Clause. Louisiana wanted to protect the pro-  
5 ducers which owned the residual hard liquid and liquefiable  
6 hydrocarbons. And the Commission has taken the position  
7 over the last 25 years that the cost of processing and trans-  
8 portation, the very kind of taxable use that Louisiana sets  
9 out in its statute, that that cost is a cost to be borne by  
10 the producers, because it is essentially a cost of extracting  
11 the liquid hydrocarbon that the producer retains or gets  
12 back when the gas is processed.

13 QUESTION: Mr. Smith, do they treat all producers  
14 alike? There are only about what, 15 percent of the pro-  
15 ducers who own the gas when it is first processed?

16 MR. SMITH: I think that's right, but the rest of  
17 them, you know, get it back, I think. Essentially, the  
18 mechanism as -- the mechanics of the process, as the Special  
19 Master set forth in his findings, are based on Louisiana's  
20 process there is no quarrel about that mechanism, is essen-  
21 tially that the producers retain or get back the liquid and  
22 liquefiable hydrocarbons. The Commission has taken the  
23 position that that is -- that the costs associated with that  
24 process ought to be borne by the producers --

25 QUESTION: But that won't prevent passing back to

1 the producer this tax, whether or not he still owns the  
2 gas at the time the tax is first applied?

3 MR.SMITH: Right, because the producer, in effect --  
4 in all cases, retains the liquid and liquefiable hydrocarbons.

5 Now the Commission has taken the position, and  
6 the Commission has sole and exclusive authority to allocate  
7 costs, the Natural Gas Act is clear on that, that that is a  
8 cost to be borne by the producers. But the Louisiana statute  
9 says no, that any allocation that requires that pass-back is  
10 to be abrogated and can't be enforced. Now that sets the  
11 Commission and Louisiana on a collision course that we claim  
12 violates the Commerce Clause. And in that, in support of  
13 that, we need look no further than the Court's opinion in  
14 Northern Natural Gas v. Kansas Commission, where this Kansas  
15 Commission tried very much the same sort of thing and in  
16 fact, it was really arguably even more benign. Because what  
17 the Kansas Commission tried to do was to impose a ratable  
18 taking over a number of wells, and the Court -- and the  
19 Court said no, you cannot invade, that is the exclusive  
20 jurisdiction of the Commission. Now as to that, Louisiana  
21 says, -- or the Special Master says, well, let's see, let's  
22 take some evidence and see whether -- as to the degree of  
23 conflict that there really is between the Commission and the  
24 Louisiana statute.

25 QUESTION: Who made the motion for judgment on the

1 pleadings?

2 MR. SMITH: The Plaintiff states.

3 QUESTION: And how about the FERC?

4 MR. SMITH: We intervened, we have a motion pending  
5 to intervene as Plaintiff --

6 QUESTION: Was there any --

7 MR. SMITH: -- which the Special Master, in his  
8 report --

9 QUESTION: Was there any evidence, was there any  
10 kind of affidavits or anything else, or is it strictly on  
11 the pleadings?

12 MR. SMITH: Strictly on the pleadings, strictly on  
13 the pleadings, on the basis of --

14 QUESTION: Well would you treat this as a motion for  
15 summary judgment, or what would you treat it as?

16 MR. SMITH: Essentially it's a motion for --

17 QUESTION: Would you say it's a -- only if there  
18 were evidence offered outside the pleadings?

19 MR. SMITH: That's right. Well the evidence out-  
20 side the pleadings is the --

21 QUESTION: You don't think there has to be any?

22 MR. SMITH: There doesn't have to be any evidence.  
23 I mean, the nature of the -- you know, the decisions are  
24 there, the statute is there, and what the Special Master  
25 said was, let's take some evidence to see what the degree

1 of conflict really is. Perhaps the Federal Energy Regula-  
2 tory Commission could accomodate itself to Louisiana. So we  
3 submit that that's -- that stands the Supremacy Clause on  
4 its head. It's not the Commission that has to accomodate  
5 itself to Louisiana; it's Louisiana that has to accomodate  
6 itself to the Commission because of the Commission's exclusive  
7 jurisdiction.

8 QUESTION: Well you know, you wouldn't -- what if  
9 the Commission put out an order in a specific case allocating  
10 these costs?

11 MR. SMITH: If the Commission put out an order  
12 allocating these costs? Well let me say this, and my time  
13 is --I don't want to entrench upon the time of the pipelines,  
14 but let me simply say that the Commission -- it is not neces-  
15 sary to consider what would happen if the Commission put out  
16 an order because in our view the mere fact that Louisiana  
17 has trenched upon the exclusive jurisdiction of the Commission,  
18 the Commission could agree with Louisiana, but that's not the  
19 point. Louisiana cannot speak to the allocation of cost,  
20 because that function is a judgment for the Commission to  
21 make and the Commission's to make alone. And to that extent,  
22 let me close by simply referring to the Court the language  
23 in Northern Natural Gas that we think answers this contention  
24 decisively. The Court said it may be true as the State  
25 Commission urges, that accomodation on the part of the

1 Federal Power Commission could avoid direct collision. But  
2 this argument misses the point. Not the federal but the  
3 state regulation must be subordinated when Congress has so  
4 plainly occupied the regulatory field. Thank you.

5 MR. CHIEF JUSTICE BURGER: Mr. Peragine.

6 ORAL ARGUMENT OF FRANK J. PERAGINE, ESQ.,

7 ON BEHALF OF THE PIPELINES

8 MR. PERAGINE: Mr. Chief Justice and may it please  
9 the Court:

10 I speak on behalf of the 17 interstate natural  
11 gas pipeline companies that have sought to intervene in this  
12 case. Those pipelines are all regulated by Federal Energy  
13 Regulatory Commission. We are involved in this case because  
14 it is we who buy the offshore gas, bring it into Louisiana  
15 in our pipeline systems, and take it beyond Louisiana in most  
16 cases, approximately 97-and-a-half percent. We are the owners  
17 of the offshore gas as we bring it into the state of Louis-  
18 iana, and we are the owners when it is subjected to the  
19 so-called uses, which trigger the first use tax.

20 QUESTION: Mr. Peragine, you have actually commenced  
21 a refund suit, have you not?

22 MR. PERAGINE: Yes we have, sir. We have sued  
23 because we are required to, in the sense that if we don't sue  
24 for refund of the taxes that we have paid under protest,  
25 then it's -- we've lost that money. So the Louisiana statutory

1 procedure provides that if you're going to contest this tax  
2 you must pay it under protest and sue for a refund, and that's  
3 what we have done, sir.

4 QUESTION: And if you lost in the Louisiana court,  
5 this Court would be open on certiorari?

6 MR. PERAGINE: If we -- presumably, yes. Yes sir,  
7 I can't disagree with that, sir. We are, as owners of the  
8 gas, the tax of course is imposed on us. We are subject to  
9 severe penalties if we do not pay the tax, including seizure  
10 of the gas as contraband. And as I've already mentioned,  
11 we're paying it under protest.

12 Meanwhile, meanwhile, the FERC has permitted pass-  
13 through of most of the tax that we pay through our juris-  
14 dictional customers; in other words, we have a tracking  
15 mechanism and we can get that tax back as -- the money paid  
16 for that tax, we are recovering it now from the ultimate  
17 customers, in other words.

18 QUESTION: Well why isn't that sort of an accomoda-  
19 tion by the Commission to the Louisiana tax?

20 MR. PERAGINE: Well, you speak of it as an accomo-  
21 dation, sir?

22 QUESTION: Well Mr. Smith said it isn't up to the --

23 MR. PERAGINE: Well, if I may address that point,  
24 Justice White, for a moment? You have here, let's say, the  
25 Commission does issue an order saying we're not going to pay

1 any attention to this non-pass-back provision, which is the  
2 brunt of the government's argument here as to 1303(c). What  
3 we have there in that situation, sir, is the wording of the  
4 Louisiana statute comes into play. It says only if 1303 is  
5 declared to be unenforceable by a final judgment of a court,  
6 then, if it is, then the entire statute self-destructs. But  
7 in the situation which Your Honor poses, sir, you would not  
8 have a final, unappealable judgment of a competent -- of a  
9 Court of any -- of jurisdiction. You would have merely a  
10 regulatory order, and therein lies the problem. Because the  
11 Louisiana statute attempts to infringe upon the area reserved  
12 exclusively for Federal Energy Regulatory Commission --

13 QUESTION: So you say it's just a Northern Natural  
14 Gas situation?

15 MR. PERAGINE: That is correct. Yes.

16 QUESTION: An infringement, an invasion of the  
17 specificity --

18 MR. PERAGINE: Yes, under the -- we are here seeking  
19 to intervene as parties to assert our own interests as the  
20 taxpayers directly affected, and to support the Plaintiff  
21 states in attacking the tax on statutory and constitutional  
22 grounds.

23 The Special Master has recommended our intervention  
24 because we satisfied all the traditional requirements for  
25 intervention as exemplified by the Federal Rules of Civil

1 Procedure and the applicable case law. Louisiana has raised,  
2 in that connection, a specter of 11th Amendment immunity.  
3 We submit, and as the Master implied in his report, the 11th  
4 Amendment doesn't really apply here because we are not suing  
5 the sovereign state of Louisiana; we are, however, seeking  
6 to intervene in a case properly brought by other sovereign  
7 states. Moreover, the whole purpose underlying the 11th  
8 Amendment is to protect the states from a tax on its  
9 Treasury. This is not -- that as the relief sought here  
10 is prospective only against the imposition of what is deemed  
11 to be an unconstitutional levy.

12           Moreover, and perhaps foremost, Louisiana has  
13 waived any 11th Amendment immunity because it has authorized  
14 any person contesting this tax or any state tax to come into  
15 its courts, in any federal court, any federal or state court,  
16 and make its case known.

17           QUESTION: Well why shouldn't Louisiana be able to  
18 impose some kind of a tax with respect to the processing of  
19 natural gas within its borders?

20           MR. PERAGINE: Yes Your Honor --

21           QUESTION: Suppose it didn't attempt to control who  
22 ultimately paid it? Suppose it didn't --

23           MR. PERAGINE: Oh, but it is, it is just that, Your  
24 Honor. And for this reason --

25           QUESTION: Well, I know. I know, you --



1 MR. PERAGINE: Processing, it's not a tax on  
2 processing. It's a tax on the so-called first use of the  
3 gas that is coming into Louisiana. Now --

4 QUESTION: Well a use just happens to be processing.

5 MR. PERAGINE: Well one of the uses happens to be  
6 processing; there are many others.

7 QUESTION: Well it's one of them. That's one of them.

8 MR. PERAGINE: Okay, but the -- yes, it is, sir.

9 QUESTION: Well, why shouldn't Louisiana be able  
10 to tax, impose a tax with respect to that processing-use?

11 MR. PERAGINE: Because, Your Honor, if you look  
12 at processing -- first of all, it is an integral part of the  
13 interstate transmission of this gas which began offshore at  
14 the well head. Now processing is so inter-connected or  
15 so integral with the interstate transmission of that gas,  
16 that it's necessarily a part of that interstate transmission  
17 process and it doesn't interrupt the uninterrupted stream of  
18 that gas as it comes into Louisiana and is transported --

19 QUESTION: Well you've just barely started to answer  
20 my question. So what if that's true?

21 MR. PERAGINE: All right, sir, what is your --

22 QUESTION: My question is, why shouldn't -- that's  
23 an activity going on within Louisiana, and I suppose Louisiana  
24 is giving it some protection?

25 MR. PERAGINE: But any activity --

1 QUESTION: Well, why shouldn't that part of the  
2 interstate movement have to pay its way?

3 MR. PERAGINE: Well because, I may say this, Your  
4 Honor, the processing is traditionally done by the producers  
5 who own the liquids and liquefiabiles, and they want to get  
6 those liquids and liquefiabiles out of the gas, so they attempt  
7 to do that.

8 QUESTION: Where do they do that?

9 MR. PERAGINE: But the tax is not imposed on them.

10 QUESTION: Where do they do that?

11 MR. PERAGINE: They do it in Louisiana, no question  
12 about that.

13 QUESTION: In plants, they have plants?

14 MR. PERAGINE: In plants, yes. Tremendous plants  
15 which do that. But this tax is not imposed on the processing,  
16 it's imposed on the natural gas -- and coming into that plant  
17 is the natural gas --

18 QUESTION: I thought you said it was imposed on the  
19 use?

20 MR. PERAGINE: Yes.

21 QUESTION: And that the use happened to be process-  
22 ing?

23 MR. PERAGINE: One of the uses is processing, sir.

24 QUESTION: Well, isn't that semantics in the same  
25 sense that General Sachs referred to Justice Cardozo's opinion

1 in Silas Mason Co. v. Henneford?

2 MR. PERAGINE: Well it may be semantics, Your  
3 Honor, but I think we have a battle of semantics here. This  
4 is a so-called first use tax on natural gas, but it really  
5 is --

6 QUESTION: Well, what if the state put on a certain  
7 rate of tax for every unit of processing, of gas that was  
8 processed, whether you speak in trillions or billions or  
9 millions, or whatever it is; why couldn't the state do that?

10 MR. PERAGINE: I don't know that the state could  
11 not do that, to put a tax on the processing of gas, Your Honor.

12 QUESTION: Within Louisiana?

13 MR. PERAGINE: Within the confines of Louisiana,  
14 and if that was a tax on processing itself, I don't know that  
15 that would --

16 QUESTION: Well but you say processing is part of  
17 interstate commerce.

18 MR. PERAGINE: Yes, it is, for processing--

19 QUESTION: But you concede that it -- that that  
20 kind of a tax might be, nevertheless, valid?

21 MR. PERAGINE: But you're talking about -- the  
22 effect of this tax is that it's transported beyond Louisiana's  
23 border, sir, because the only --

24 QUESTION: Now you're changing the case again.  
25 I want to put aside this requirement that they pass it on.

1     Couldn't Louisiana collect a tax on processing, even though  
2     that processing was of gas that was in the course of being  
3     transmitted out of the state?

4             MR. PERAGINE: Well I think -- I suppose the answer  
5     to that, Justice White, is that the Court would have to --  
6     would have to hold that the interstate commerce does not  
7     begin until the processing has been completed.

8             QUESTION: Why, why? Why is that? Interstate  
9     commerce pays its way?

10            MR. PERAGINE: Interstate commerce pays its way,  
11     Your Honor, but I don't believe that it has to -- that it  
12     must be -- well, let me get off that.

13            It is levied only as to OCS gas, this particular  
14            And even though it is processed, it is still that  
15     natural gas that comes through that plant; in practical  
16     effect, it falls only on the pipeline companies who transport  
17     the gas through and beyond Louisiana.

18            QUESTION: Well why do the states have any  
19     standing to object to it, if in practical effect it falls  
20     only on the pipeline?

21            MR. PERAGINE: Well because if it passes on the  
22     -- the pipelines pass it on and ultimately it falls on the  
23     customers of the pipeline companies. My time is up, Your  
24     Honor. Excuse me.

25            MR. CHIEF JUSTICE BURGER: Mr. Gressman.

1 ORAL ARGUMENT OF EUGENE GRESSMAN, ESQ.,

2 ON BEHALF OF THE DEFENDANT

3 MR. GRESSMAN: Mr. Chief Justice Burger, and may  
4 it please the Court:

5 It is the position of the State of Louisiana pri-  
6 marily as expressed in its pending motion to dismiss, that  
7 this suit simply does not belong at this juncture, and with  
8 the parties involved on the original docket of this Court.

9 There are innumerable jurisdictional, standing and  
10 prudential problems that plague this case. But the primary  
11 consideration that I think should control the disposition of  
12 the case is the prudential declination standard expressed  
13 in Ohio v. Wyandotte Chemicals Company and more particularly,  
14 Arizona v. New Mexico.

15 Now, Mr. Sachs has indicated that the Ohio v.  
16 Wyandotte principle, whereby this Court may in its discretion  
17 decline to exercise a case that is otherwise within the  
18 original jurisdiction of this Court, where there is an alter-  
19 native forum in which the identical issues can be brought,  
20 should somehow not apply in that branch of this Court's  
21 original jurisdiction between two or more states. Now granted,  
22 Ohio v. Wyandotte was a suit under the other branch of this  
23 Court's original but concurrent jurisdiction, as between a  
24 state and citizens of another state. But if any question were  
25 raised, as Mr. Sachs seems to have raised, that the same

1 principle of declination in terms of the very practical and  
2 jurisprudential considerations set forth in Wyandotte, if  
3 there's any question that those considerations apply equally  
4 to suits between two or more states, that was set to rest by  
5 the case of Arizona v. New Mexico, which is virtually on all  
6 fours with the situation that is presented to this Court  
7 today.

8 QUESTION: Well you don't suggest, then, -- I  
9 thought you were going to suggest this case was beyond our  
10 jurisdiction?

11 MR. GRESSMAN: It is, for various reasons. But I  
12 don't think we --

13 QUESTION: You aren't arguing that right now,  
14 you're arguing just the principle of discretionary --

15 MR. GRESSMAN: Discretionary declination which  
16 encompasses, in this case, additional considerations which I  
17 think put this case beyond the pale of this Court's original  
18 jurisdiction, even though it is nominally a suit between two  
19 or more states. I think one may start --

20 QUESTION: Well do you think there's a case or  
21 controversy between Maryland and Louisiana or not?

22 MR. GRESSMAN: Well, Your Honor, that is one of  
23 our basic propositions, that there is no controversy, no --  
24 between the sovereign interests of the State of Maryland and  
25 the sovereign interests of the State of Maryland --

1 QUESTION: That isn't quite what I asked.

2 MR. GRESSMAN: Louisiana.

3 QUESTION: I asked whether there was a case or  
4 controversy between the two, and doesn't have to be any  
5 conflict of sovereign interests, does it?

6 MR. GRESSMAN: Well, there does, in terms of invoking  
7 this Court's original jurisdiction.

8 Now, what the real controversy here is all about,  
9 and it's very simple; this is a suit involving a controversy  
10 over the tax refund claims of the private pipeline taxpayers  
11 and the State of Louisiana. And what has happened here is  
12 that the states, the Plaintiff states have sought to volunteer  
13 to adjudicate and secure relief in this Court for the private  
14 refund claims of the taxpayer, the pipeline companies.

15 Look for a moment at what this complaint filed by  
16 the State of Maryland asks. It asks that this Court declare  
17 unconstitutional the Louisiana first-use tax, and that it  
18 enjoin the collection of that tax from the private pipeline  
19 taxpayers and then, the last clause, in the relief paragraph,  
20 asks that this Court order the State of Louisiana to refund  
21 taxes paid to the pipeline companies. Now there is not one  
22 word --

23 QUESTION: They also want the statute declared  
24 unconstitutional?

25 MR. GRESSMAN: That is true, Your Honor.

1 QUESTION: Prospectively.

2 MR. GRESSMAN: Pardon?

3 QUESTION: At least that part of it would be  
4 prospective?

5 MR. GRESSMAN: Yes indeed.

6 QUESTION: Did they ask for an injunction on future  
7 collections?

8 MR. GRESSMAN: Yes, Your Honor.

9 QUESTION: And this complaint was filed, not just  
10 by the State of Maryland, but by eight states, was it not?

11 MR. GRESSMAN: That's true, there are -- eight  
12 states --

13 QUESTION: And each allege that it itself is a  
14 consumer of gas?

15 MR. GRESSMAN: That is true. But there is not one  
16 word in the relief asked that would go to the benefit of  
17 consumers.

18 QUESTION: Except in joining the --

19 QUESTION: Well, you don't suggest that this tax  
20 doesn't result in increasing the cost of gas to the states?

21 MR. GRESSMAN: No, there's no question that that is--

22 QUESTION: Does the State of Maryland have a  
23 stake in the controversy now, --

24 MR. GRESSMAN: No, not in the --

25 QUESTION: It... itself uses gas, doesn't it? It's



1 a user --

2 MR. GRESSMAN: That is true. But that is a pro-  
3 prietary interest, Your Honor. And this Court has so declared,  
4 and that brings us right back to the proposition that was  
5 stated as recently -- in Pennsylvania v. New Jersey -- that  
6 it has become settled doctrine that a state has standing to  
7 sue only when its sovereign or quasi-sovereign interests are  
8 implicated, and it is not merely litigating as a volunteer  
9 the personal claims of its citizens.

10 QUESTION: Well, it's litigating its own claims,  
11 in part at least; it's litigating its claims, because it uses  
12 gas and is paying more than it should for its gas.

13 MR. GRESSMAN: Yes, but the interest that it is  
14 asserting there, that is the cost, the burden of the tax that  
15 has somehow been passed on by reason of some authority other  
16 than the State of Louisiana -- the State of Louisiana has not  
17 insisted, in its tax statute that this tax be passed on, this  
18 tax could have been absorbed by the taxpayers. Or it could  
19 have been passed on to some other entity, but with the appro-  
20 val and authority of the federal energy authorities, it has  
21 been passed on to the consumer.

22 Now, the fact is that the State of Maryland and  
23 the other states, have only the common interest that every  
24 consumer has when he purchases a product. In other words,  
25 the interest that the State of Maryland asserts here is --

1 as a consumer of gas, is no different, is no more sovereign  
2 in its characteristics than the interest of the Maryland  
3 housewife who purchases gas from the same pipeline operations.  
4 In fact, they are suing precisely on behalf of all the gas  
5 consumers, personal gas consumers in the State of Maryland.  
6 Now, I suggest that that does not -- that standing has a  
7 -- as a proposition of invoking the very serious jurisdiction  
8 of this Court, under Article III, over controversies between  
9 two or more states, simply does not encompass a controversy  
10 where no sovereign interest of the state, of the Plaintiff  
11 state, are involved in the litigation. And it is --

12 QUESTION: Mr. Gressman, I have an awful problem  
13 with saying that money is not an interest of a sovereign.  
14 I mean a sovereign can't operate very well without money,  
15 can it?

16 MR. GRESSMAN: Of course not, Your Honor.

17 QUESTION: So it is a part. And when they use that  
18 money for gas they can't use that same money for police, fire  
19 or any other --

20 MR. GRESSMAN: No.

21 QUESTION: -- services.

22 MR. GRESSMAN: But the same could be --

23 QUESTION: That's a question.

24 MR. GRESSMAN: It is, obviously, a burden, but it's  
25 a burden that consumers have had to pay from the year one.

1 There's no getting around it. Now the question is, how can  
2 you invoke the original jurisdiction of this Court.

3 QUESTION: Because the state is involved.

4 MR. GRESSMAN: Well, the state --

5 QUESTION: The state's money is involved. The  
6 State's lifeblood is involved, you could use a whole lot of  
7 beautiful phrases.

8 MR. GRESSMAN: Well, I understand exactly what  
9 you're saying, Justice Marshall. The point, however, is that  
10 that money, that injury or burden, as you will, has never  
11 been elevated so far as I know into any kind of a cause of  
12 action. A consumer simply does not have any recognizable  
13 cause of action for bringing suit against some other state  
14 who happens to have imposed a tax upon a taxpayer or a manu-  
15 facturer of a product --

16 QUESTION: Which is being passed on to him.

17 MR. GRESSMAN: -- which then the manufacturer, by  
18 economic forces or otherwise, passes on to the consumer. We  
19 purchase, today, everything we purchase as a consumer is  
20 literally composed of hundreds if not thousands of hidden  
21 taxes that have been passed on to us as consumers. And to  
22 open the door of the judiciary to suits brought by consumers  
23 with no greater interest than that, I think, would bring  
24 chaos upon the federal court system. And it would be doubly  
25 chaotic to open the doors of this Court's original jurisdiction

1 over suits between states simply because a state which pur-  
2 chases hundreds of thousands of products in the course of  
3 its operations, happens to find a hidden tax, so-called, in  
4 one of the products that it purchases for its use in heating  
5 the state capitol building, and therefore can bring a suit  
6 before this Court challenging the constitutionality of the  
7 taxing state's statute.

8 This is precisely the kind of controversy that  
9 this Court said, in Ohio v. Wyandotte, should not be involved  
10 in the original docket of this Court. Justice Harlan, in  
11 pointing out that -- some of the prudential factors that  
12 underlie the principle of declination expressed in Wyandotte,  
13 pointed as a prime example the innumerable suits that exist  
14 in this country, innumerable controversies let me say, between  
15 private citizens and a taxing authority. And if you open  
16 the door of this Court's original jurisdiction to the -- any  
17 state acting solely as a consumer to come before you and  
18 assault and adjudicate the constitutionality of a state  
19 statute of a sister state, a state tax statute of a sister  
20 state, I suggest that this would be disruptive of this Court's  
21 valuable time and energies which, as Justice Harlan so well  
22 pointed out, are as a matter of national policy and judicial  
23 policy much better devoted to cases on its appellate docket.

24 QUESTION: Mr. Gressman, it is true is it not, that  
25 there are more federal interests in this particular

1 controversy than in most of the cases that you're describing,  
2 because of the source of the gas and the special federal  
3 statutes and all?

4 MR. GRESSMAN: Of course. There are.

5 QUESTION: It's sort of a unique case.

6 MR. GRESSMAN: There are. But perhaps an answer,  
7 that can be given to all those interests lies in the various  
8 causes of action that are pending and available in other  
9 courts. It is significant that there is a tax refund suit  
10 in the state of Louisiana brought by the taxpayers, the  
11 pipeline companies. It is significant that there is a suit  
12 in the federal court in Louisiana brought by the federal  
13 authorities where they can assert all the federal interests  
14 that they claim are at issue here. Indeed, there is a  
15 plethora of suits brought by -- both by the State of Louisiana  
16 and more particularly, by the various pipeline companies and  
17 tax paying interests in Louisiana.

18 QUESTION: Mr. Gressman, when would you predict that  
19 the issue would be finally resolved if the alternative route  
20 is taken, rather than a ruling on the motion for summary  
21 judgment; assuming that the judgment on the pleadings -- motion  
22 for judgment on the pleadings has merit?

23 MR. GRESSMAN: Well --

24 QUESTION: There's quite a difference in time and  
25 in interest and --

1 MR. GRESSMAN: Yes, of course, that involves a host  
2 of other considerations as to whether this case could ever be  
3 disposed of on the basis of the pleadings, without any kind  
4 of an evidentiary hearing. But the point is --

5 QUESTION: I'm just making that assumption for  
6 purposes of comparing the relative value of the two different  
7 procedures.

8 MR. GRESSMAN: Right. Well, in comparing the value  
9 of the two forum -- or sets of forums that are available,  
10 let me say there is no comparison. I think every consideration,  
11 every prudential, every judicial, every wise principle of  
12 judicial administration would suggest that -- there's far  
13 greater chances of securing a meaningful kind of adjudication  
14 of these constitutional issues in the state courts or in the  
15 federal courts, in Louisiana.

16 QUESTION: Didn't it take approximately 20 years  
17 for the State of Arizona, for the case of Arizona v. California  
18 to be finally decided?

19 MR. GRESSMAN: Yes, there are cases on this original  
20 docket where you have to involve yourself in evidentiary  
21 hearings before a Special Master, can well take many, many  
22 years. Now I have no way of estimating how long it would  
23 take here, but let me say this --

24 QUESTION: Of course, the evidentiary hearings would  
25 probably be rather brief if you grant the judgment --

1 MR. GRESSMAN: Well that's true. But that suggests  
2 another proposition; it may be so brief as to be untrustworthy,  
3 as a method of serious constitutional adjudication, determining  
4 the validity of the state tax on the basis of the pleadings --

5 QUESTION: Well just take one example, if Mr.  
6 Smith's argument is valid, what do you need all the evidence  
7 for? I mean, I don't know, maybe it isn't valid, maybe  
8 it's not as simple as he says; but on the other hand,  
9 suppose it is?

10 MR. GRESSMAN: We heartily disagree that you  
11 can even define, let alone resolve the constitutional issues  
12 by looking at this very complex, and in many respects,  
13 ambiguous statute. The very basic thing that one is missing  
14 in the litigation before this Court is any kind of author-  
15 itative state court interpretation of what this statute  
16 means or what sections of it have been and are applied and  
17 therefore, are ripe for adjudication. And there are other  
18 state law questions that have been raised in the lower courts  
19 that might be dispositive of this entire litigation without  
20 ever reaching the constitutional issues that --

21 QUESTION: I get the impression it's really fairly  
22 simple, if the tax is imposed on the gas that comes from the  
23 Outer Continental Shelf and is not consumed in Louisiana.

24 MR. GRESSMAN: Well on the contrary, Your Honor,  
25 there are various difficulties in determining which section

1 of the statute has been applied. There are eight alternative  
2 uses that might be --

3 QUESTION: Most of the gas goes through a processing  
4 plant and is then shipped out of state, isn't it?

5 MR. GRESSMAN: That is true, but the taxpayer --

6 QUESTION: The taxes are applied on all that gas.

7 MR. GRESSMAN: But there are other kinds of uses.

8 QUESTION: Isn't that right?

9 MR. GRESSMAN: It depends on your definition and  
10 then what method is selected by the state tax authorities  
11 to impose it. Now maybe it's at the processing plant, or is  
12 it on the -- on the gas as it comes off the shelf?

13 QUESTION: In those situations, the amount of the tax  
14 is equal to the severance tax that's imposed on the gas that  
15 originates in Louisiana.

16 MR. GRESSMAN: Well, but much of the problems of  
17 consideration of the discriminatory nature of this tax,  
18 whether there is indeed any --

19 QUESTION: It is clear, isn't it, that there is no  
20 tax on processing of gas that originates in Louisiana?

21 MR. GRESSMAN: Not on --

22 QUESTION: The only -- if you call this a processing  
23 tax, the only time it is imposed is on the gas that originates  
24 out of state and is consumed out of state?

25 MR. GRESSMAN: Well that involves --



1 QUESTION: That's the only processing tax the state  
2 seeks to impose?

3 MR. GRESSMAN: That's right, but the problem is --  
4 can be, under this statute, as to which of various processing  
5 uses are being attacked? Now -- and out of -- once that is  
6 determined --

7 QUESTION: And determined entirely by the source  
8 and the destination of the gas, rather than the character of  
9 the processing.

10 MR. GRESSMAN: Not necessarily, Your Honor. It may  
11 depend upon contracts, it may depend upon what the state tax  
12 authorities conceive of as the use that is being exercised  
13 or utilized by the assessor and how the -- well, various  
14 other propositions --

15 QUESTION: Mr. Gressman --

16 MR. GRESSMAN: -- which -- yes?

17 QUESTION: -- is there any hint in the Constitution,  
18 Article 3, or in our previous cases that there is some bifur-  
19 cation in our original jurisdiction, between cases that can  
20 be decided on the pleadings and cases that require evidentiary  
21 hearings?

22 MR. GRESSMAN: Not in jurisdictional terms, no. I  
23 can't -- yes, there -- I could conceive of a case in this  
24 original category that might be decided on the pleadings, but  
25 that doesn't go to jurisdiction or -- it might go to some

1 prudential requirement or consideration as to whether you  
2 should cut off evidentiary hearings rather than go forward  
3 on a summary basis. One of the best -- the closest example  
4 I can find of that nature is Pennsylvania v. West Virginia,  
5 where West Virginia had enacted this statute which cut off  
6 all exportation of natural gas from West Virginia into Penn-  
7 sylvania. Now, the day after that statute was enacted,  
8 Pennsylvania and Ohio were in this Court seeking a declar-  
9 ation of the invalidity of that tax -- of that West Virginia  
10 statute, before it even became effective, which ultimately  
11 raised a good deal of concern on the part of Mr. Justice  
12 Brandeis, but nonetheless, the Court did take the case and  
13 did decide it, presumably on the basis of a reading of the  
14 statute.

15           But what is significant even there was that the  
16 Court felt compelled even in terms of just reading this  
17 brand new statute to appoint a Commissioner who held exten-  
18 sive hearings in Pennsylvania and West Virginia, prolonged  
19 this emergency kind of review of the face of the statute for  
20 some two years before this Court ultimately decided and it  
21 utilized a great deal of evidence accumulated during those  
22 hearings, in reading the face of the statute. And you will  
23 find much of that evidence in the initial part of that opinion.

24           But ultimately, I think that these various problems  
25 need not be confronted or resolved, particularly these

1 difficult matters of statutory interpretation, need not  
2 be resolved, because of the overriding concern expressed  
3 in Ohio v. Wyandotte, that this Court has committed a major  
4 part of its resources to the overwhelming burden that we all  
5 know exists with respect to appellate docket matters.

6 Now, the consideration, the vital consideration in  
7 determining when that Ohio v. Wyandotte principle applies  
8 is the pendency of some kind of state court action that  
9 provides an appropriate forum in which the issues tendered  
10 here may be litigated. Now, as expressed in Arizona v.  
11 New Mexico, the emphasis is on the identity of the issues  
12 that are presented here in an original complaint, with those  
13 that are available for adjudication in the alternate forum.

14 And if there is an identity of those issues, then  
15 that can be adjudicated and if any federal constitutional  
16 issue survives the state court forum review of the matter,  
17 then of course they can be brought here on certiorari or  
18 appeal on the appellate docket.

19 Now, it is an undenied fact that every issue that  
20 is being put to Your Honors by the Plaintiff States as  
21 supported by the United States and the pipeline companies,  
22 are identical to the jot and tiddle with the issues that are  
23 involved in pending litigation in the state courts and federal  
24 courts of Louisiana. And those cases therefore, make it  
25 appropriate, the pendency of those cases makes it appropriate

1 for this Court to stand back and say, well, why should we  
2 devote any more of our attention to this case in and apart  
3 from the -- what I call the spurious, jurisdictional alle-  
4 gations here, in terms of the interest asserted on behalf  
5 of the consumer states. Why do we even have to address those  
6 problems? Why do we have to address the complicated statu-  
7 tory provisions and try to define and predict what the state  
8 court might interpret them to mean, and thereafter extract  
9 out the relevant constitutional considerations when all of  
10 this is going forward in the state and federal courts in  
11 Louisiana?

12 MR. CHIEF JUSTICE BURGER: You are taking some of  
13 your colleague's time.

14 MR. GRESSMAN: I appreciate that, Your Honor, and  
15 I will simply conclude by saying that the Arizona v. New  
16 Mexico case is entirely in point and is the controlling  
17 authority for what I deem to be the appropriate -- the  
18 disposition of this case, a declination, a refusal, a dis-  
19 cretionary determination by this Court that, let us wait until  
20 all of these issues arise and come up to us through the  
21 regular appellate process. Now let me add one other pruden-  
22 tial consideration that weighs against continuing the case,  
23 this constitutional adjudication in this case.

24 Let me say, this gets back to some of the jurisdic-  
25 tional problems that Justice Rehnquist has mentioned. In a

1 real sense, once you understand whose real interests are  
2 involved in this case and they are the real -- and the tax-  
3 payers, the private taxpayer citizens are the real parties  
4 in interest in this suit in this Court to obtain a tax refund  
5 on, for their benefit, I suggest that they are not only the  
6 real parties in interest but they are indispensable parties  
7 to any kind of effective relief or adjudication that this  
8 Court could render. And yet they cannot become parties to this  
9 Court without destroying its jurisdiction, because once a  
10 private party is -- comes in as a party Plaintiff under the  
11 original jurisdiction of this Court, state v. state, and  
12 that private party comes through intervention but whatever  
13 the means, joins the case as party Plaintiffs, then that  
14 would be in direct violation of the 11th Amendment which  
15 withdraws from this Court and every Court, jurisdiction over  
16 a suit by a private citizen against a sovereign state.

17 Now I suggest that there has been no waiver here,  
18 the State of Louisiana has never consented to be sued under  
19 the original jurisdiction of this Court, I doubt if it would  
20 be effective if they made one because I think this Court's  
21 Article 3 grave -- type of jurisdiction over -- between  
22 states is not easily waivable by any state. But be that as  
23 it may, we simply do not have the real parties in interest,  
24 the real parties to this controversy as parties before this  
25 Court. They are parties down in Louisiana. They can consult

1 to their heart's content, and litigate down there their real  
2 interests. Now, the other thing is that the Plaintiff states  
3 I might say, if they have this consumer interest which they  
4 do, I think, can express that interest in the ongoing litiga-  
5 tion in the Louisiana courts. And I think we are entitled,  
6 on behalf of the Attorney General of the State of Louisiana,  
7 to extend to the State of Maryland, et. al, the precise type  
8 of invitation that the Attorney General of Missouri extended  
9 to the State of Massachusetts who was desirous of litigating  
10 a controversy.

11           And at page, 308 U.S. at page 20, the Attorney  
12 General before the bar of this Court, Attorney General of  
13 Missouri said that it would see that Massachusetts should be  
14 able to bring a suit against the trustees for collection of  
15 its taxes in either a Missouri state court or in a federal  
16 district court in Missouri, and that such a suit would in  
17 Missouri constitute a case or controversy. So too, I think  
18 the State of Louisiana, will not oppose any effort by the  
19 State of Maryland to present its interest in some manner  
20 before the pending litigation.

21           QUESTION: What assurance do we have as to that,  
22 Mr. Gressman?

23           MR. GRESSMAN: You have the assurance of the Attor-  
24 ney General of the State of Louisiana.

25           QUESTION: Where?

1 MR. GRESSMAN: I --

2 QUESTION: Are you making it now?

3 MR. GRESSMAN: I am making it now, and I -- it has  
4 also been made before the state courts in Louisiana.

5 QUESTION: That litigation down there has been  
6 dormant for a long, long time, hasn't it?

7 MR. GRESSMAN: Yes, because --

8 QUESTION: No progress whatsoever?

9 MR. GRESSMAN: No, that is not entirely correct.  
10 There has been a good deal of pretrial efforts; we have filed  
11 requests for admissions, various other pretrial information  
12 has been sought. But the basic trouble is that the Plaintiff  
13 taxpayers are in the saddle-seat as Plaintiffs and they are  
14 fully capable at any moment to move forward with their liti-  
15 gation.

16 QUESTION: I thought that we were told earlier  
17 by one of your colleagues that a Louisiana court had declined  
18 to issue that invitation?

19 MR. GRESSMAN: Now that is -- that is not correct,  
20 Your Honor. And Mr. Pugh, my co-counsel will straighten  
21 that matter out.

22 QUESTION: If he has time.

23 MR. GRESSMAN: That's right. So, without further  
24 ado, I will --

25 QUESTION: And he has very few minutes left, I must

1 say.

2 MR. GRESSMAN: -- I will give Mr. Pugh his time.

3 Thank you, Your Honor.

4 MR. CHIEF JUSTICE BURGER: Mr. Pugh.

5 ORAL ARGUMENT OF ROBERT G. PUGH, ESQ.,

6 ON BEHALF OF THE DEFENDANT LOUISIANA

7 MR. PUGH: Mr. Chief Justice, and may it please

8 the Court:

9 QUESTION: What about this -- the trial court did  
10 or did not refuse to --

11 MR. PUGH: Absolutely correct, it refused to  
12 this extent, if I may, Your Honor. We moved that they be  
13 invited because we thought it was important for them to  
14 be there. In that connection and admittedly, our statutes  
15 do not have a procedural method by which an invitation may be  
16 extended from a court. However, we wanted to determine  
17 whether or not the pipelines had some objection to their  
18 presence in that litigation. We found the answer to that in  
19 that they raised all of the questions concerning whether or  
20 not there could be an invitation under the laws of Louisiana  
21 to someone to join in one of the proceedings. The Court  
22 said that it would welcome them, but the Court did acknow-  
23 ledge that we had no procedural vehicle to specifically invite  
24 them in.

25 I suggest to the Court that --



1 QUESTION: Well where does that leave it?

2 MR. PUGH: Your Honor, we have an ongoing procedure  
3 that has not been indefinitely postponed.

4 QUESTION: Well may I ask this?

5 MR. PUGH: Yes, Your Honor.

6 QUESTION: The fact that the Attorney General of  
7 Louisiana is willing to extend the invitation, does it or  
8 does not bind your courts?

9 MR. PUGH: We're absolutely bound, well, whether or  
10 not there's a procedural vehicle to accept an invitation  
11 issued by an Attorney General to another state. I will  
12 state, Your Honor, that we will not oppose --

13 QUESTION: Well I know you won't oppose, but what  
14 will your courts do?

15 MR. PUGH: Our courts will not oppose the inter-  
16 vention because the Court has already said it would welcome  
17 them upon their request. That's in the record in Louisiana.  
18 And lets speak of those actions, if I may.

19 First of all, immediately after the act was passed,  
20 it was Louisiana that filed the suit. It filed a declaratory  
21 judgment proceeding not only against the pipelines, but also  
22 the other parties in interest, the producers. One of the  
23 difficulties with the factual aspects of this case is these  
24 so-called contracts which is supposed to trigger everything  
25 that hasn't surfaced. We don't know who owes what to whom

1 and under what circumstance. To that extent, we made the  
2 producers as well as the pipelines parties Defendants in our  
3 proceeding. Within a week, FERC filed a suit in the  
4 federal court, and our suit was removed. The federal court  
5 on a motion to remand, remanded our suit and at the same time  
6 on a motion to stay or dismiss, stayed the federal suit.

7 QUESTION: And when was that?

8 MR. PUGH: That was September the 29th. That liti-  
9 gation was filed.

10 QUESTION: Of what year?

11 MR. PUGH: Of 1978, and it was tied up for a full  
12 five months, based on --

13 QUESTION: Is it still tied up?

14 MR. PUGH: To this extent, Your Honor, they appealed--

15 QUESTION: Is it still tied up?

16 MR. PUGH: Yes sir, the federal court --

17 QUESTION: Of course, I'm going to ask you next,  
18 when is it set for argument?

19 MR. PUGH: It is -- it was set for argument in the  
20 Fifth Circuit, Your Honor.

21 QUESTION: Well when is it set for trial now?

22 MR. PUGH: The federal case is not set for trial,  
23 Your Honor.

24 QUESTION: When is the state case set?

25 MR. PUGH: We're prepared to set the state case

1 immediately --

2 QUESTION: It isn't set; neither one is set?

3 MR. PUGH: Neither of those proceedings have been  
4 set for trial, but if I may follow it through your Honor?

5 QUESTION: That's over two years.

6 MR. PUGH: Yes sir. We first filed the suit in  
7 September of 1978. Now, when this suit was filed, the Fifth  
8 Circuit said that they would, that they -- the day of the  
9 argument, said they would wait to see what this Court did.  
10 To that extent, they didn't stay it, but they put it, if you  
11 will, on the back burner. Now, what we have done in the  
12 state court proceeding, Your Honor, is we have moved to con-  
13 solidate and the pipelines say that they don't object to  
14 the consolidation of the state court suit that we filed, and  
15 their refund suit that they filed, so that all of the  
16 parties, that is to say, both the pipelines and the producers  
17 are -- will be before the Court at one time. It is to that  
18 proceeding that we believe that the Plaintiff states, if they  
19 wish to do so, may join us, and we welcome them. At that  
20 point, we may have a complete state court adjudication about  
21 a most difficult --

22 QUESTION: Don't you think that could have been  
23 the reason for the original jurisdiction provision in the  
24 Constitution; that the state didn't have to go down to a local  
25 state court of another state? Don't you think that might have

1 been the reason?

2 MR. PUGH: I'm satisfied that was the reason, Your  
3 Honor, but the problem here is, should there not be a state  
4 Court interpretation of its own acts? This Court has cer-  
5 tainly indicated so in the past. This Court, in the 'Ekridge'  
6 case, in the Kennedy case, in Virginia v. West Virginia, in  
7 the Pullman case, in a case resolving the very same question  
8 here, in the Great Lakes case. This Court in the Great  
9 Lakes case said that the refund procedure in Louisiana is a  
10 speedy, adequate remedy; approved its use, stayed its hand --

11 QUESTION: Mr. Pugh, what about the interest of  
12 FERC in the state court? It's not a party to the state court.

13 MR. PUGH: But it may be, Your Honor.

14 QUESTION: How?

15 MR. PUGH: It may -- Louisiana has a broad juris-  
16 dictional base.

17 QUESTION: Well how does it get in? You say it  
18 brought its own action, I gather, in the United States Dis-  
19 trict Court?

20 MR. PUGH: Yes, it did, Your Honor.

21 QUESTION: And that's still, this is the one now  
22 before the Fifth Circuit, is it?

23 MR. PUGH: Yes, Your Honor. The only place that --

24 QUESTION: Yes. Well now their issue, as I under-  
25 stand the argument, they make the statutory claim that under

1 the Supremacy Clause your statute has to fall anyway.

2 MR. PUGH: Well of course, we've --

3 QUESTION: That's their argument?

4 MR. PUGH: That's right, Your Honor.

5 QUESTION: How are they going to be heard in the  
6 state court?

7 MR. PUGH: They're going to go in and they're going  
8 to move to intervene, and we're going to say we'd love to  
9 have you, and at that time, we're going to have all of the  
10 parties in Louisiana and Louisiana is going to --

11 QUESTION: Well why do you think they brought their  
12 own federal court action?

13 MR. PUGH: Because they couldn't bring the action  
14 in Louisiana in the first place, Your Honor, but it doesn't  
15 mean they couldn't intervene in the pending action. That's  
16 the differential between the two. Because they couldn't  
17 bring the action in the state court.

18 QUESTION: Why couldn't they, by the way?

19 MR. PUGH: It is my appreciation that they couldn't,  
20 I could be in error in that, but it's my procedural --

21 QUESTION: Could they have been sued? Could you  
22 have made them defendants in your suit?

23 MR. PUGH: In our initial suit? Under our declaratory  
24 judgment act we could make any party who was affected by the  
25 outcome of the suit a defendant, I do not believe that we

1 could have, if you will, drug the United States of America  
2 into a state court proceeding --

3 QUESTION: Well, I'm not talking about the United  
4 States. I was talking about the Commission.

5 MR. PUGH: Well, it is an agency of the United  
6 States.

7 QUESTION: Wouldn't you have to start out before  
8 it?

9 MR. PUGH: Well as a matter of fact, Your Honor,  
10 if you're talking about before FERC?

11 QUESTION: Yes.

12 MR. PUGH: Well FERC actually has the same issue  
13 up. Right now, FERC is deciding whether or not -- see, they  
14 passed the tax through. They apparently felt that they had  
15 the jurisdiction to pass the tax through, and they did it.  
16 Right now, FERC is deciding whether or not they ought to  
17 change their mind about that and whether or not the producers  
18 ought to pay some or all of that tax. That's right now.

19 QUESTION: And of course, if they ordered the  
20 producer to pay some of this tax, you might -- your tax might  
21 be in a little bit of trouble, mightn't it?

22 MR. PUGH: But -- to be these problems -- but one  
23 thing that hasn't been thought of --

24 QUESTION: Well I gather, by a provision of your  
25 own tax law if that happened, your whole -- it would be

1 appealed, wouldn't it?

2 MR. PUGH: For the reasons it wouldn't, Your Honor,  
3 is that that self-destruct provision relates to processing  
4 and also to --

5 QUESTION: Well, suppose FERC were to change its  
6 mind now and say --

7 MR. PUGH: All right, sir.

8 QUESTION: -- we'll put the whole thing on the  
9 producer, would you -- would your statute then self destruct?

10 MR. PUGH: It would not self destruct until these  
11 contracts were presented to a Court of competent jurisdiction  
12 to find out whether or not under the terms of the contract  
13 either by a cost or a tax, that that would be passed back.  
14 Now FERC can do what it wishes, we have no control over it.  
15 They may pass that tax on or follow it, and we can't help it.  
16 If they pass it back and it affects --

17 QUESTION: Well when does your self destruct  
18 provision become operative?

19 MR. PUGH: It becomes operative if there is a  
20 judicial determination that either a cost or a tax, there are  
21 two paragraphs, are determined by a court, a final court --

22 QUESTION: By a court, all right.

23 MR. PUGH: -- that processing and also distribution  
24 -- no sir, I'm sorry, it's processing and separation are  
25 affected by that court decision. But the other usage, Your

1 Honor, that other usage -- there's the transfer of the gas  
2 itself to the end of those pipelines -- or the processing  
3 plant, that's another use that's not covered under these two.  
4 One of the problems with this case is the difficulty that  
5 all of these cases have had with defining as you well know,  
6 not only what processing means, what does distribution mean,  
7 what does gathering mean, because those three items are  
8 exempt from the statute. In fact, the natural gas policy --

9 QUESTION: Mr. Pugh, do you mean --

10 MR. PUGH: Excuse me, Your Honor?

11 QUESTION: In the refund action pending in the  
12 state court, is there any claim made that the tax is not  
13 due as a matter of state law?

14 MR. PUGH: Absolutely, Your Honor; there are three  
15 constitutional provisions, not the least of which is 74(b)  
16 of our Constitution, brand new --

17 QUESTION: Under the taxing statute itself.

18 MR. PUGH: Under the taxing statute?

19 QUESTION: Yes.

20 MR. PUGH: Is there what? Let me understand.

21 QUESTION: Is there a claim that the tax is not  
22 payable under the statute -- to the same standard --

23 MR. PUGH: Yes, because they claim they  
24 don't owe it, they say that they shouldn't be required to  
25 pay it, that the statute is unconstitutional. Under state



1 law as well as federal law --

2 QUESTION: But it's, the entire tax is on the  
3 validity of the statute?

4 MR. PUGH: That's true.

5 QUESTION: There's no argument about whether the  
6 statute applies to processing, or to transportation or anything  
7 like that?

8 MR. PUGH: It's based upon the validity of the tax  
9 refund, sir. But what's important is one of the issues that  
10 are raised in the state court below that can only be resolved  
11 in the state court, is the issue of whether or not -- it's  
12 really what they are claiming -- they're claiming it's a  
13 tax on natural gas, and we have a provision in our Consti-  
14 tution that says you cannot tax natural gas except as it  
15 relates to a service tax, severance tax. Now the validity  
16 there must be determined, to determine whether or not the  
17 state law applies. The Constitution of Louisiana may well  
18 resolve this problem for you and you'll never have to reach  
19 it.

20 And we suggest to the Court that it's important --

21 QUESTION: You do not confess error on the state  
22 law point, I don't suppose?

23 MR. PUGH: What is that, Your Honor?

24 QUESTION: You don't confess error on the --

25 MR. PUGH: Absolutely not, Your Honor, and I

1 appreciate your giving me those conservatory words, because  
2 we don't confess anything. However, we'd be pleased for  
3 them to prove it, and attempt to prove it, and they --

4 QUESTION: Mr. Pugh?

5 MR. PUGH: Yes, Your Honor.

6 QUESTION: If this is all that simple, why has it  
7 taken over two years?

8 MR. PUGH: How has it taken over two years?

9 QUESTION: Yes.

10 MR. PUGH: I could give to you one reason, Your  
11 Honor, because every other week I get another pleading in  
12 this case. I have the difficulty of keeping up, and there  
13 are lots of lawyers in Louisiana, but it's kind of juggling  
14 balls, as you go. We file a suit, they remove it. The  
15 Court remands it, they appeal their other suit, next thing  
16 we know we've got this suit, and every other -- two plead-  
17 ings have been filed since I left Shreveport; in this case.  
18 So -- we're busy. But I suggest to the Court and I submit  
19 to the Court, you send it back to Louisiana we're going to  
20 be in Court, now we've proven this. We're going to resolve  
21 this issue like we've tried to immediately after the act was  
22 passed. We tried to do it and we got stopped everywhere we  
23 went. We are concerned about the money, we need it. You  
24 raise the question, and thank you for doing so, Your Honor.  
25 You raise that point.

1 QUESTION: But you know you can't, Maryland can't  
2 be in there litigating with Louisiana?

3 MR. PUGH: In the state court, Your Honor?

4 QUESTION: Yes.

5 MR. PUGH: It's not my appreciation that they  
6 cannot. It's my appreciation that Maryland, if it chooses  
7 to do so, under our procedure, may intervene in that litiga-  
8 tion, Your Honor.

9 QUESTION: I would have thought, after Maine v.  
10 Thiboutot, Maryland certainly could litigate in the Louisiana  
11 courts about the constitutionality of a Louisiana statute.

12 MR. PUGH: I submit to the Court that as a matter  
13 of Louisiana law, they can! Of course, I am not a Maine  
14 lawyer, I do understand that decision; under the words of  
15 that decision, they could do that ~~---~~ under our procedure  
16 statute they can do the same thing and we'd welcome to do it.

17 Your Honor, you mentioned money, the phrase I  
18 think the Court used was government can't act without money;  
19 we have that same problem, Your Honor, we can't act without  
20 it. Do you know that 39 square miles of Louisiana goes in  
21 the water every year? It's gone. When we lose 39, federal  
22 control, OCS, picks up 39. We are losing land, and what we're  
23 losing it by, because there are a 124 of these processing  
24 plants.

25 QUESTION: Why should you make Maryland pay for that?

1 MR. PUGH: We don't want to make Maryland specif-  
2 ically pay for it.

3 QUESTION: Well that's what's involved in this  
4 case.

5 MR. PUGH: This gas is what's tearing up the  
6 coastline. The bringing of this gas, with 6,000 miles of  
7 pipe, we're criss-crossed from one end to the other, assum-  
8 ing it's 12 miles out, that would be 500 different pipes  
9 coming in there. Every time those pipes come in there, they  
10 are destroying our entire coastline. And we're doing what  
11 we can to furnish gas for this country, but we need some help.

12 QUESTION: Tell me why, or perhaps if I had studied  
13 your legislative history carefully enough I'd know, why the  
14 -- why there's the provision that the producer is not to pay  
15 any of this tax.

16 MR. PUGH: Well, first of all, Your Honor, I would  
17 like to say at this point, and I'll answer your question,  
18 is that when you talk about legislative history, we don't  
19 have any legislative history. What happened is some girl  
20 pushed the button down there --

21 QUESTION: So then it's all right to ask you?

22 MR. PUGH: Yes, Your Honor, it's all right to  
23 ask me. We have in Louisiana, unfortunately, we have a  
24 situation where we've got an act here that is the subject as  
25 many acts are, of competing interests. In Louisiana, about

1 the only thing we've had for years is the oil and gas indus-  
2 try, and they are powerful, they have been powerful. How  
3 else could a provision be in the Constitution that you  
4 couldn't tax the natural gas except for a service tax? We  
5 have got an act that has been, the wagon has been loaded on  
6 it. We only suggest to the Court that we need an opportunity  
7 to interpret our own mind. The producers are strong enough  
8 to put that provision in --

9 QUESTION: Well now, how about my question?

10 MR. PUGH: All right, Your Honor.

11 QUESTION: Do you remember what it was?

12 MR. PUGH: Well, in all candor, Your Honor, I have  
13 kind of gotten lost in my own verbatim. As I understand the  
14 Court's question, let me see, as I understood your question--

15 QUESTION: Well, I'll put it again. I'll put it  
16 again. What was the --what is the reason, if all Louisiana  
17 is trying to do is to raise some revenue, why does it require  
18 that, or forbid the producer to pay any of the tax?

19 MR. PUGH: Well, what it's saying is if there's a  
20 contract, to pass back those provisions of it, then to self-  
21 destruct. It's in there, Your Honor, because it was lobbied  
22 in there.

23 QUESTION: Lobbied in there?

24 MR. PUGH: Absolutely, Your Honor; that's what I'm  
25 saying, they are powerful enough to do so, and they are doing

1  
2 QUESTION: Well that guarantees that the pipelines  
3 are going to pay, under Louisiana law, and then the pipelines  
4 maybe pass it on?

5 MR. PUGH: No sir, it depends on whether FERC  
6 tells them to pay it, Your Honor. If FERC tells them to pay  
7 it, then they pay it. We don't make FERC do that. Now if  
8 FERC wants to say tomorrow, we were wrong in that 10(a) or  
9 10(b), we want it now to be against the producers,  
10 then we got us a donnybrook, Your Honor, and we're going to  
11 have it in Louisiana and it's going to be between the pro-  
12 ducers and the pipelines and maybe that's what we ought to  
13 really be doing anyway, is to let that be aired, aired  
14 between those two parties because they are --

15 QUESTION: Well of course, the Commission is suggest-  
16 ing that you are infringing, Louisiana is infringing on its  
17 territory by even purporting to try to allocate these costs?

18 MR. PUGH: Well Your Honor, there's got to be taxes  
19 that can be passed on because the act says they can be passed  
20 on. The act says they can consider costs and that taxation  
21 is part of that -- there's an ad valorem tax that's been  
22 passed on; there's sales tax presumably being passed on;  
23 there's an apportionment tax from Louisiana all the way up  
24 to Maryland. Every state is collecting a tax on those pipe-  
25 lines going through there, and FERC is letting it all be done.

1 So the question is, why can't we have a tax and let FERC, if  
2 they want to, pass it on? If they don't want to pass it on,  
3 then we'll face up to what the statute says.

4 I would suggest to the Court again, that we do have  
5 a forum. We have a forum where everybody can be, and a forum  
6 that, which state law can be interpreted right down there where  
7 those processing plants are, right where all of these activ-  
8 ities are --

9 QUESTION: Mr. Pugh, what do you think the major  
10 factual issue that has to be decided is?

11 MR. PUGH: Well Your Honor, the biggest factual  
12 issue in my opinion, is when really does FERC get control?  
13 Do you understand? The Natural Gas Act talks about natural  
14 gas unmixed, now what is unmixed except that? It's on the  
15 outlet of the processing plant. You remember under the  
16 Michigan-Wisconsin case, the reason it was struck was  
17 because the tax was a gathering tax imposed outside of the  
18 processing plant on the outlet of the processing plant and  
19 Justice Clark went to great lengths to use the word after,  
20 to italicize it, he said it's after processing, it is after  
21 gathering, and it is after producing. So we've got a real  
22 question, we've got another question, Your Honor --

23 QUESTION: That's the major factual issue --

24 MR. PUGH: That's one of the major factual issues,  
25 another one is, is the Natural Gas Policy Act, says that

1 production includes transportation to the coast. Now, if  
2 the states, as the Natural Gas Act requires, have some  
3 control over production and over gathering, well the statute  
4 says --

5 QUESTION: So the Louisiana court can interpret  
6 that federal statute better than we can?

7 MR. PUGH: I did not suggest that for a moment,  
8 Your Honor.

9 QUESTION: I hope not.

10 MR. PUGH: I only suggest, Your Honor -- I would  
11 not do that, Your Honor, I only suggest, that to interpret  
12 one requires necessarily an appreciation of another. I don't  
13 think they just hang these two statutes up, Your Honor, and  
14 say this looks good, that looks bad or this looks good and  
15 that looks bad. We must have an underlying interpretation  
16 of the constitutional facts that are applicable to that sta-  
17 tute, whether or not it's the processing plant, whether or  
18 not it's transportation, whether it's not -- it's any one  
19 of these other uses, including sale. And the only thing we  
20 ask this Court to do is to give us an opportunity to resolve  
21 the problem in a forum best suited to make a determination  
22 of that statute.

23 If you do it elsewhere, you don't have the final  
24 state court determination anyway. It could be knocked  
25 down, but we'd still have the problem. This is a brand new



1 ballgame. We still have the problem of whether or not states,  
2 it's my appreciation, that another one is being considered  
3 by this Court. You have the problem about whether these  
4 states who are required to bear the economic burdens of  
5 what's happening to their state, whether or not those economic  
6 burdens, we should get some help from somewhere else. This  
7 is not the first or the last statute of this type that will  
8 be coming along. We only suggest that it's time, it's time  
9 to take a good look at what did Congress mean when it said  
10 that the states and the federal government should work to-  
11 gether.

12 MR. CHIEF JUSTICE BURGER: Your time has expired.  
13 now, Mr. Pugh.

14 QUESTION: Mr. Pugh, it sounds to me that what  
15 your argument really is, and -- is that we should -- rather  
16 than just let this case go on, we should really dismiss it  
17 here.

18 MR. PUGH: I'm not suggesting -- yes, that's  
19 absolutely correct, Your Honor. It should be dismissed here.  
20 I would suggest one other thing that the Court ought to con-  
21 sider, the intervention of the pipelines, because then, you  
22 have the 11th Amendment problem. But dismiss the case and  
23 let us try it; we'll try it, Your Honor. That's a commitment  
24 on the part of Louisiana. Thank you, sir.

25 MR. CHIEF JUSTICE BURGER: General Sachs. Let me

1 ask you this, sir. Once this case was filed here, the papers  
2 were filed here, is there anything unusual about having the  
3 state courts or any other federal court defer action until  
4 they knew where this case was going, if anywhere?

5 ORAL REBUTTAL ARGUMENT OF STEPHEN H. SACHS, ESQ.,  
6 ON BEHALF OF PLAINTIFF MARYLAND

7 MR. SACHS: You're asking, Mr. Chief Justice, whether  
8 there was something unusual about the fact that the Fifth  
9 Circuit, as it did, stayed the FERC action pending the outcome  
10 of this decision? I cannot purport to be an expert, Mr.  
11 Chief Justice; it does not strike me as unusual. This case  
12 is here, perhaps -- I would like to think it means that the  
13 Fifth Circuit feels that this case belongs here, but perhaps  
14 that asks too much.

15 QUESTION: But in any event they might like to  
16 know what we think about it?

17 MR. SACHS: I would certainly think so, Mr. Chief  
18 Justice.

19 QUESTION: Well what about the state courts?

20 MR. SACHS: Mr. Justice Brennan, we can't -- I must  
21 come back to what I said earlier, it is the position of the  
22 states, -- appreciate very much the hospitality of our friends  
23 from Louisiana, we enjoy being told come on down, we -- we  
24 are grateful for that. But we know that the original juris-  
25 diction, especially the exclusive aspect of the original

1 jurisdiction does not permit us to go there.

2           And secondly, the reason for the rule in the first  
3 place, ought not remand a sovereign state to the courts of  
4 another state for disposition of matters of this kind of  
5 consequence.

6           QUESTION: Mr. Sachs, supposing that the Attorney  
7 General of Maryland became convinced that a number of Maryland  
8 residents who had moved or retired to Louisiana, were being  
9 unconstitutionally taxed by Louisiana in the state tax pro-  
10 ceeding, could it bring an original action against Louisiana  
11 as parens patriae in this Court claiming that the  
12 Louisiana statute was unconstitutional?

13           MR. SACHS: Oh, I think probably not, Mr. Justice  
14 Rehnquist, because for the very reason that this case, for  
15 example, in Pennsylvania v. West Virginia -- are different  
16 from Pennsylvania v. New Jersey. That commuter tax situation  
17 that occupied this Court in Austin v. New Hampshire and then  
18 original jurisdiction declined, where a state is really act-  
19 ing as the surrogate for some of its citizens. And that's  
20 not this case, Mr. Justice Rehnquist. Not only are we there  
21 proprietarily, in a proprietary manner, we are there on behalf  
22 of all of the state institutions and all of the consumers in  
23 the State of Maryland as well as our sister states on behalf  
24 of their citizens, a pervasive --

25           QUESTION: Well, did you count heads to decide

1 whether you are *parens patriae*?

2 MR. SACHS: I think, with all respect, that cheapens  
3 the concept. But I think that pervasiveness, if you call that  
4 counting heads, then so be it. Pervasiveness across the  
5 state, cutting across all lines, can add up to a *parens*  
6 *patriae* -- it has to be something more than counting heads  
7 in the sense of the aggregate problem is greater than sum of  
8 the parts, but whether or not you have to find out how many  
9 parts there are to make the sum, I think it can make a differ-  
10 ence whether you are dealing with a thousand citizens or  
11 four million citizens. And I think the -- as Justice Marshall  
12 pointed out in the *Hawaii v. Standard Oil* case a couple of  
13 years ago, there is a recognized *parens patriae* role for the  
14 states to play, on behalf of their consumers.

15 I would like to point out if I could, something of  
16 what I have to characterize as the disingenuousness of the  
17 argument being tendered by Louisiana, and especially the --  
18 what I would characterize as the parade of the prudential  
19 horrors that Mr. Gressman raises for you. There is some-  
20 thing ironic for us to be told that we don't have standing  
21 when it is us who bear the tax. The pipelines pass on the  
22 tax. FERC sits and says, okay, you can pass on the tax.  
23 Louisiana passed the tax, knowing and expecting that it would  
24 go to the heart of the states who are bearing the tax, yet  
25 we are being told you are not injured, you are not the real

1 party in interest, you have not been hurt. And I respect-  
2 fully suggest to the Court that that runs counter to every  
3 notion of the reason for standing.

4 Standing rules in the first place, are there to  
5 insure that the party raising the issues will indeed press  
6 the issues, that they have a real stake in the matter. This  
7 is the essence of the case in controversy requirement. You  
8 may be rest assured, Your Honors, that --

9 QUESTION: General Sachs, every commodity that the  
10 state buys is filled with passed on taxes.

11 MR. SACHS: Indeed they are, Mr. Justice Stewart.

12 QUESTION: And as you, does the state as the pur-  
13 chaser of each of those commodities, require standing to  
14 attack the tax?

15 MR. SACHS: No sir, but the distinction here is that  
16 the unconstitutional event in the first place, as the legis-  
17 lative history will show you, is that Louisiana imposed this  
18 tax taking advantage of a mechanism, a conduit through  
19 the pipelines, a FERC mechanism, all of which happened exactly  
20 as they forecasted, precisely so that the tax would be borne  
21 as we bear it. That, I respectfully suggest, Mr. Justice Stew-  
22 art, must distinguish this kind of a situation for stand-  
23 ing purposes from a situation in which every consumer always  
24 bears, as part of a cost, every tax that's ever passed. I  
25 think that's true, but this is radically different from that.

1 I would like to respond, if I may, to a point  
2 raised by Mr. Justice White earlier, with respect to whether  
3 Louisiana could constitutionally tax processing. I want to  
4 concede that there are circumstances in which that certainly  
5 could happen. If we've learned anything from Complete Auto  
6 v. Brady and if we've learned anything from the Washington  
7 Stevedoring case, we have been liberated from the notions that  
8 there is some automatic per se rule that says you can't touch  
9 it if it's in interstate commerce.

10 But what we also know is, that a test must be  
11 applied. And included in that test is whether or not the  
12 statute discriminates against interstate commerce and whether  
13 or not it is apportioned, et cetera. And on this branch of  
14 the case, we are saying, much like Boston Stock Exchange and  
15 much like Pennsylvania -- City of Philadelphia v. New Jersey,  
16 it is possible to say that facially this statute does those  
17 things, so that we can live very comfortably, Mr. Justice  
18 White, in a universe that says Louisiana can find some tax  
19 that is not offensive to interstate commerce, and it can  
20 impose it on a thing called processing. It doesn't matter,  
21 now I get back to what you raised earlier, Mr. Justice Stevens,  
22 and that is, it really doesn't matter in this case, and we have  
23 yet to hear a fact suggested or tendered or raised, today, or  
24 in all of the pleadings, that suggests any fact that makes it  
25 necessary for an evidentiary hearing on this aspect of the

1 case. There is nothing about processing, whether processing  
2 is or isn't one thing or another does not change the fact  
3 that what this statute does is take every conceivable oppor-  
4 tunity to export this tax out of the state. A fertilizing  
5 company in Alabama is going to, that takes gas from the Outer  
6 Continental Shelf, is going to pay this tax. A fertilizing  
7 company in Louisiana that takes the same gas, does not pay  
8 the tax. The utility companies in Louisiana do not pay the  
9 tax on gas that comes from the Outer Continental Shelf, but  
10 utility companies in my state and in New York and in Massa-  
11 chusetts and in all of the other states, indeed, 30 of the  
12 states of this nation, will pay that tax. As one of the  
13 sponsors of the Utility Tax Credit Bill said, in the legis-  
14 lative history, very candidly he said, I just want to make  
15 sure that the folks in my district don't have higher fuel  
16 bills. Well all of us, especially those of us who run for  
17 office, would like to be able to insure that that protection  
18 is afforded; but the Constitution of the United States says  
19 you can't do that and make interstate commerce bear all the  
20 burden. And finally, what the essential discrimination in  
21 this case, and Professor Hellerstein in his Shell lectures  
22 in Tulane, not so long ago, points this out, the essential  
23 discrimination in this case is that an owner of gas who takes  
24 the gas from the Outer Continental Shelf and who has severance  
25 tax liability in the state, takes the Outer Continental Shelf

1 gas tax-free. One who doesn't do business in the state of  
2 Louisiana and thus have those severance tax credits, he pays  
3 the full tax. And that, may it please the Court, is precisely  
4 what the Commerce Clause exists to prevent. Thank you very  
5 much.

6 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
7 The case is submitted, *11:53 a.m.*

8 (Whereupon, at 11:53 o'clock a.m. the case in the  
9 above-entitled matter was submitted.)

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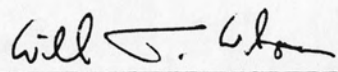
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V.

STATE OF LOUISIANA

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