

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WYOMING, Petitioner V. OKLAHOMA

CASE NO: 112 Original

PLACE: Washington, D.C.

DATE: November 4, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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WYOMING, :
Plaintiff :
v. : No. 112 Original
OKLAHOMA :
- - - - -X

Washington, D.C.
Monday, November 4, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:56 p.m.

APPEARANCES:

NEAL LEADER, ESQ., Assistant Attorney General of Oklahoma,
Oklahoma City, Oklahoma; on behalf of the Defendant.
MARY B. GUTHRIE, ESQ., Deputy Attorney General of Wyoming,
Cheyenne, Wyoming; on behalf of the Plaintiff.

C O N T E N T S

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1 P R O C E E D I N G S

2 (1:56 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 112 Original, Wyoming against Oklahoma.

5 Mr. Leader, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF NEAL LEADER

8 ON BEHALF OF THE DEFENDANT

9 MR. LEADER: Mr. Chief Justice, and maybe it
10 please the Court:

11 You are asked today, I believe, to establish a
12 dangerous precedent, not a dangerous precedent in the area
13 of Commerce Clause law, but a dangerous precedent in the
14 area of your original jurisdiction, for today in this
15 original action, Wyoming makes a Commerce Clause challenge
16 to an Oklahoma law that requires coal-burning utilities in
17 Oklahoma who sell to Oklahoma consumers to burn at least
18 10 percent coal.

19 This challenge is brought, however, on the basis
20 of an indirect taxing interest, an interest in collecting
21 coal severance tax. The essence of Wyoming's claim is that
22 Oklahoma's law results in the private Wyoming coal
23 producers having a smaller share of Oklahoma's coal
24 market.

25 This reduction in market share, Wyoming argues,

1 and I will argue later, but it does not prove, reduces
2 Wyoming coal production, which in turn lowers severance
3 tax.

4 Oklahoma's position is that the exercise of
5 original jurisdiction to adjudicate a Commerce Clause
6 challenge based on an alleged indirect loss of tax revenue
7 is (1) inappropriate, (2) not necessary, and it will very
8 likely popularize a new trend which I will refer to as
9 end-running, and I will discuss that new trend in a
10 moment.

11 As this Court has recognized, the exercise of
12 original jurisdiction by this Court is a serious intrusion
13 on society's interest in the Court's most deliberate and
14 considerate performance of its paramount role as a supreme
15 Federal appellate court, and original jurisdiction should
16 only be assumed when justified by the strictest necessity.

17 To permit a State to maintain a Commerce Clause
18 challenge to protect an indirect tax interest is not
19 strictly necessary and not appropriate because it invites
20 mischief. It invites a new game, a game called
21 end-running, where someone who is engaged in commerce and
22 the commerce is taxed and they want to challenge another
23 State's statute, but they don't want to have to come up
24 through the district court and the appeals system,
25 end-runs the traditional system by going to the Government

1 and say, you taxed this, you bring an original action.

2 And then we wind up with an appearance of State
3 qua State saying, we are interested in our taxes --

4 QUESTION: You suggest that the taxpayer is
5 going to invite the State to impose the tax just so it can
6 run this end run?

7 MR. LEADER: I am not, but --

8 QUESTION: That's what I thought you said.

9 MR. LEADER: -- we are dealing with commerce,
10 Your Honor, and almost everything that moves in commerce
11 is at one place taxed, one place or another taxed by the
12 State, and that is why it is so dangerous in this
13 particular area.

14 QUESTION: Are you suggesting the State doesn't
15 care that it loses tax revenue?

16 MR. LEADER: I am saying the State certainly
17 does care, but I am stating it is not necessary for the
18 State to come here to get relief, and therefore, original
19 jurisdiction shouldn't allow.

20 Secondly, I am saying that the danger is that we
21 have the appearance of State qua State, but we really have
22 a State qua shill for the local industry.

23 QUESTION: Mr. Leader, what would be the
24 perceived advantages from the point of view of the
25 Commerce Clause plaintiff in going for original

1 jurisdiction rather than in coming up through either the
2 State or Federal court system?

3 MR. LEADER: Having a final answer for the
4 entire country, that -- don't have to worry about being
5 overturned so simply another time. Secondly, I assume it
6 is proceeded as speedier, if you get here, and can start
7 here, you become the Court or the forum of first choice.
8 It saves time and money because you don't have all those
9 layers of litigation.

10 So there are several advantages here that would
11 invite the danger.

12 QUESTION: I don't understand how we come
13 off -- you mean whenever a State has a valid interest and
14 a sufficient interest to confer standing, article 3
15 standing, we should still and all inquire case by case
16 whether somehow that interest is what? Significant enough
17 to justify the risk of end-running that you refer to?

18 I mean, I can understand an argument that there
19 is no State interest here or not the sufficiently direct
20 interest that would confer standing, but that is not the
21 argument you are making.

22 MR. LEADER: That will be my second argument,
23 Your Honor.

24 QUESTION: I see.

25 MR. LEADER: My first argument is, because of

1 the dangers involved here, and because of the other forums
2 that are available, the strictest necessity test simply is
3 not met in this kind of case.

4 QUESTION: May I just suggest this with respect
5 to these dangers, the parade of horrors, let me say
6 something, we are in a pretty good position to control
7 those dangers. In other words, if we think there are an
8 awful lot of these complaints being filed, we do not have
9 to take the -- allow the complaints to be filed.

10 MR. LEADER: You may control them, but still
11 your docket gets clogged up.

12 QUESTION: Well, we would just deny a leave to
13 file the bill of complaint.

14 MR. LEADER: Even that takes time and other
15 people get to --

16 QUESTION: Well, that doesn't take an awful lot
17 of time.

18 (Laughter.)

19 MR. LEADER: The use of original jurisdiction is
20 not necessary here because first, the real party's
21 interests, the Wyoming coal producers, have both Federal
22 and State courts available to them, and truly, if this
23 indirect tax interest is enough to justify the cost of
24 litigation, the direct impact would motivate the actual
25 movers in commerce similarly.

1 Secondly, the State could have sued the State
2 utility companies here in either State or Federal court
3 and sought injunctive relief and declaratory judgment.

4 The State is also not prohibited from
5 encouraging the people who are actually affected from
6 bringing suit. The State is not prohibited from helping
7 the movers in commerce from bringing the action, or given
8 the proper appropriation, not prohibited from funding it.

9 In short, there are sufficient alternatives to
10 have this issue resolved, and the strict necessity which
11 you say is, was to guard your original jurisdiction has
12 not been met here.

13 We say the special master erred in finding that
14 this was an appropriate case for original jurisdiction.
15 Secondly, we say that the special master erred in finding
16 that this indirect tax interest conferred sufficient
17 standing.

18 There is no Supreme Court case that we have been
19 able to find that recognizes this indirect taxing interest
20 as justifying standing. We would urge the Court to follow
21 the teachings of the D.C. Circuit Court of Appeals case in
22 Philadelphia v. Kleppe.

23 In that case the State of Pennsylvania sued the
24 Small Business Administration, challenging that agency's
25 classification of a hurricane-damaged area as a Class B

1 disaster. Pennsylvania claimed that its taxing revenue
2 and economy were damaged by the mistake in classification.

3 The court of appeals rejected this vicarious
4 injury as the basis of standing, saying, impairment of
5 State tax revenue should not, in general, be recognized as
6 sufficient injury in fact to support State standing.

7 And the court goes on and says, we need a direct
8 link between the State statute and the collection of
9 taxes, and then says, this would prevent State standing in
10 cases like the present one where the diminution of tax
11 receipts is largely an incidental result of the challenged
12 activity.

13 Now, even if on occasion this indirect taxing
14 collection interest could justify standing, that interest
15 has not been shown here. As this Court noted in Duke
16 Power Company v. California Environmental Study Group, to
17 show standing a plaintiff must (1) show direct and
18 palpable injury to the plaintiff, and a fairly traceable
19 causal connection between the claimed injury and the
20 challenged conduct.

21 Here, Wyoming has failed to prove those
22 elements. And certainly --

23 QUESTION: What did it prove, Mr. Leader, in the
24 way of lost revenue because of the existence of the
25 Oklahoma statutes?

1 MR. LEADER: What it proved was, is that a share
2 of the market has been denied to Wyoming producers. It
3 introduced no evidence that demonstrated that the loss of
4 that market share converted automatically into less
5 production in Wyoming.

6 QUESTION: This is a severance tax, not a sales
7 tax?

8 MR. LEADER: This is a severance tax, not a
9 sales tax. It is tax on the removal, for the privilege of
10 removing it from the ground, whether there is a sale or
11 not.

12 QUESTION: Did Wyoming introduce any statistics
13 to show that there was less coal removed from the ground
14 as a result of Oklahoma's statute --

15 MR. LEADER: Quite the contrary. The evidence
16 here, Your Honor, shows that since the act has gone into
17 effect Wyoming has produced more coal and it continues to
18 produce more coal year after year after year.

19 In fact, the second year after this act,
20 Oklahoma's act went into effect, there was more coal sold
21 in Oklahoma. They simply have not shown there is a
22 connection between this lost market share of the producers
23 and their severance tax collection.

24 They offer two pieces of evidence to attempt to
25 show it. One is an affidavit of Richard Markel, who is

1 the director of the Wyoming mining tax division. His
2 affidavit just assumes that there is a direct one-to-one
3 relationship. If you lose a sale of 1 ton of coal or you
4 have a sale of Oklahoma coal in Oklahoma, that is an
5 automatic loss of tax revenue and he just multiplies.

6 But he is assuming what has never been proved.
7 The second piece of evidence --

8 QUESTION: Yes, but why did they pass this
9 statute?

10 MR. LEADER: Why did who pass the statute?

11 QUESTION: The Oklahoma legislature? Didn't
12 they assume that it would cause the utilities to buy
13 Oklahoma coal they would otherwise buy from Wyoming?

14 MR. LEADER: They assumed --

15 QUESTION: Go ahead --

16 MR. LEADER: Sure. They passed it for a variety
17 of reasons. It was to limit the utilities' reliance on
18 this umbilical cord, this railroad that connects it to its
19 source of energy, and to see that any cutoff in that
20 energy would be --

21 QUESTION: Yes, but the method of doing that was
22 to increase purchases of local coal --

23 MR. LEADER: That's right.

24 QUESTION: -- and decrease purchases of Wyoming
25 coal.

1 MR. LEADER: That's right.

2 QUESTION: So can't we kind of presume that is
3 what has happened?

4 MR. LEADER: You can presume that Wyoming
5 produces --

6 QUESTION: To the extent that they bought
7 Oklahoma coal, that that would be coal otherwise --

8 MR. LEADER: They have lost the market share in
9 Oklahoma, and what you can't presume is that that loss of
10 market share in Oklahoma means they had a bad year.

11 QUESTION: No, but they would have sold that
12 coal to Oklahoma had Oklahoma's statute not required the
13 purchase of the Oklahoma coal.

14 MR. LEADER: What we don't know is what their
15 production is like. Do they have manpower difficulties?
16 Are they having a hard time meeting their present demands
17 now? Are they selling out of stockpile? We do not know
18 the relationship between this lost market share and what
19 is produced in Wyoming. That is the missing link here.

20 Even if -- let me talk about the second piece of
21 evidence, was that affidavit from Mr. Cartwright from
22 Trident Oil Company. His affidavit merely says that he
23 has a contract to sell coal with one of the utilities and
24 he can meet that contract.

25 He doesn't say how it affects his total

1 production. He doesn't say how he meets it, to say if he
2 is meeting it out of stockpiles. This evidence at best is
3 vague and suggestive and clearly does not meet the
4 standard in your original jurisdiction cases.

5 You require the plaintiff to show their case by
6 clear and convincing evidence. There is no clear and
7 convincing evidence in this case showing a relationship
8 between the lost market share in Oklahoma and the ultimate
9 production of Wyoming coal producers. In fact, the
10 evidence suggests that Wyoming coal producers keep
11 producing more and more coal.

12 Now as to Oklahoma's statute itself, Oklahoma
13 freely admits that its statute does not, in the
14 constitutional sense, treat all evenhandedly, and that in
15 fact, that it does aid coal production in Oklahoma.

16 Part of this difference is based upon the
17 difference in the properties of coal in each State. As
18 the uncontradicted, stipulated facts show, Oklahoma coal
19 has a much higher BTU. It takes approximately 1-1/2
20 pounds of Wyoming coal to equal the burning power, the BTU
21 power of Oklahoma coal.

22 Oklahoma coal has a high sulfur content and
23 Wyoming has a low sulfur content. The purpose of the
24 statute was to aid utilities, reduce and limit its
25 reliance on this coal production connected by a single

1 railroad, now two railroads, and to see that if there is a
2 shutoff of fuel, they have some protections against those
3 dangers there.

4 QUESTION: How do we know that is the purpose,
5 as opposed to --

6 MR. LEADER: Sheer economic protectionism,
7 right.

8 QUESTION: Yes, right, because that is what I
9 would have guessed it was, if you didn't tell me.

10 (Laughter.)

11 MR. LEADER: Your Honor, I think we determined
12 that the purpose of the statute when you don't have
13 legislative history for the act by looking at the statute
14 and its effect. Clearly, the act has the effect that you
15 talk about. It also has the effects that I talk about.

16 I emphasize the effects that I think are more
17 legitimate and I emphasize the effects that I think are
18 least legitimate, but I think it is fair to presume that
19 all those were intents of the legislature.

20 But we are dealing here with an area where the
21 State has in the past been given a great deal of
22 deference. This Court has found that a State has a clear
23 and substantial governmental interest in determining the
24 need, the reliability, cost, and other related matters
25 with respect to utility.

1 I mean, after all, the State has an obligation
2 to keep the lights on. Society has a great need for that,
3 and here --

4 QUESTION: I was really asking for something
5 more specific. You are not relying upon some legislative
6 history?

7 MR. LEADER: We do not have legislative history.

8 QUESTION: And the title of it -- the State does
9 not even have it? I mean, the State does not keep it?

10 MR. LEADER: We don't have a legislative
11 committee --

12 QUESTION: How enlightened.

13 (Laughter.)

14 QUESTION: You have --

15 (Laughter.)

16 QUESTION: Not only that, but you are lucky.

17 MR. LEADER: In the utility area, the State
18 franchises utilities. We make them monopolies. We set
19 them up to do business for the people's good. We
20 guarantee them a fair rate of return. We set their rates.
21 We control and limit many of their business decisions. To
22 a real -- in a real sense, the State and utilities are
23 partners for the good of the people.

24 And I maintain that in this area, the State
25 should be given more deference, as it is given deference

1 when the State is a market participant. We are not quite
2 a market participant here, but we are closer to that than
3 a mere regulator. And I ask that this Court give the
4 States greater deference in this area.

5 Now, if the Court should decide not to give
6 greater deference to us in this area, at least as to
7 respect of the State-owned utility, the Grand River Dam
8 Authority, that is a market participant and your market
9 participation doctrine protects the State against the
10 challenge.

11 There is a severability argument here, and I
12 think it is a red herring. If we were to test this
13 statute clearly and only as to the Grand River Dam
14 Authority, it would be constitutional. It could be
15 applied.

16 We are dealing with an application of a statute,
17 not a severance here. It is clear in Oklahoma, and we use
18 Oklahoma law to determine these areas, it is Oklahoma's
19 statute -- and a familiar rule of Oklahoma law is that an
20 active legislature, while invalid and inoperative as to
21 one set of facts, may be constitutional and valid as to
22 another and different set of facts.

23 Additionally, Oklahoma's jurisprudence provides
24 that where a statute on its face is applicable to several
25 classes of persons or cases, the constitutionality of the

1 statute as applied to one class may be upheld at the same
2 time as its applicability to another class is stricken
3 down as unconstitutional.

4 When such a situation arises, the statute is
5 only entirely void where it is clear that the legislature
6 intended it to be. We don't have such a clear intention
7 here. The Oklahoma legislature, in fact, has a
8 severability clause attached to this act.

9 In conclusion, let me note Chief Justice
10 Fuller's comment in Louisiana v. Texas. In that case, in
11 commenting on original jurisdiction, Chief Justice Fuller
12 said, it is apparent that the jurisdiction is of so
13 delicate and a grave a character that it was not
14 contemplated that it would be exercised save when the
15 necessity was absolute and the matter itself properly
16 adjudicable.

17 I urge this Court to adhere to Justice Fuller's
18 teachings and dismiss this original action because it is
19 not necessary. There are other forms available to have
20 this issue answered, and secondly, because it is not a
21 justiciable issue, Wyoming having failed to show standing.

22 I thank the Court. I reserve the rest of my
23 time for rebuttal.

24 QUESTION: Thank you, Mr. Leader.

25 We will hear now from you, Ms. Guthrie.

1 ORAL ARGUMENT OF MARY B. GUTHRIE

2 ON BEHALF OF THE PLAINTIFF

3 MISS GUTHRIE: Thank you, Mr. Chief Justice, and
4 may it please the Court:

5 The Oklahoma statute which the State of Wyoming
6 has challenged is a classic example of economic
7 protectionism. The statute is discriminatory because it
8 has disrupted the current coal market by forcing Oklahoma
9 utilities to purchase Oklahoma coal rather than the
10 Wyoming coal that they were purchasing until the statute
11 was passed.

12 We urge this Court to adopt the special master's
13 recommendation that you find the Oklahoma statute
14 unconstitutional under the Commerce Clause.

15 The statute is invalid because it, on its face,
16 discriminates against interstate commerce. It forces
17 Oklahoma utilities that sell power to Oklahoma consumers
18 to buy Oklahoma coal. This explicit discrimination is the
19 most blatant kind of economic protectionism that this
20 Court on many instances has invalidated.

21 QUESTION: Are you going to go into the question
22 of standing at all, Ms. Guthrie?

23 MISS GUTHRIE: Yes, I will address that now, Mr.
24 Chief Justice.

25 QUESTION: At your convenience.

1 QUESTION: How come you are not the coal
2 company? I mean, why didn't the coal company bring this
3 lawsuit?

4 MISS GUTHRIE: Well, I don't know --

5 QUESTION: Is there some explanation for that?
6 I mean, if they are losing money, one would think that
7 they would be as interested in it as you are, unless you
8 have 100 percent severance tax.

9 MISS GUTHRIE: No, we don't. Our severance tax
10 is 8-1/2 percent. The assumption would be that perhaps
11 they have chosen for political purposes not to rock the
12 boat. Perhaps coal companies make so much money anyway
13 that it doesn't matter; however, the injury that the State
14 of Wyoming has sustained to the tune of at least \$500,000
15 a year is certainly a significant interest and injury as
16 far as we are concerned.

17 QUESTION: How was the \$500,000 a year proven,
18 Ms. Guthrie?

19 MISS GUTHRIE: There was an affidavit prepared
20 by a person from our tax division who looked at the amount
21 of coal that had not been sold in Oklahoma and estimated
22 how much that would be. That information was in no way
23 rebutted by the State of Oklahoma.

24 QUESTION: Well, the burden of proof would be on
25 the State of Wyoming, I suppose, on that issue because

1 it's the plaintiff, and I suppose the special master could
2 make a finding that Wyoming lost a certain amount of
3 money.

4 Did the special master make any finding like
5 that?

6 MISS GUTHRIE: Yes. He referred to the loss of
7 severance taxes and he determined that there were those
8 direct injuries as a result of our loss of severance taxes
9 because of the statute.

10 QUESTION: Did he make any finding as to dollar
11 amount?

12 MISS GUTHRIE: I don't recall if he did or not.
13 I think that he did make that finding.

14 QUESTION: It seems to me that your affidavit,
15 while it would perhaps support a finding of loss, doesn't
16 rule out the possibility that if the coal production in
17 Wyoming didn't sell in Oklahoma, it might have found a
18 market for elsewhere.

19 The affidavit doesn't say that Wyoming lost tax
20 revenues.

21 MISS GUTHRIE: The affidavit does say that the
22 State of Wyoming lost \$500,000 in tax revenues because of
23 coal that had not been sold to Oklahoma utilities.

24 QUESTION: But that doesn't indicate that that
25 same coal that would otherwise have been sold to Oklahoma

1 might not have been sold elsewhere.

2 MISS GUTHRIE: That doesn't really affect the
3 State of Wyoming sales. The question that you really have
4 to look at is the injury to the State of Wyoming as a
5 result of lack of Oklahoma sales, regardless of whether
6 Wyoming sold coal in other places. It has lost the sale to
7 the Oklahoma producers, Oklahoma utilities.

8 QUESTION: I am not saying that that is not a
9 reasonable position, but it doesn't seem it is the only
10 one. Supposing that Wyoming in 1988 took in \$5 million in
11 severance tax revenues. Then in 1989 it also takes in \$5
12 million in severance tax revenues. In 1989, a certain
13 amount of coal that was previously sold to Oklahoma isn't,
14 but it is sold in Utah instead.

15 How is Wyoming the loser?

16 MISS GUTHRIE: We have a stipulation that
17 provides that until about 1986 virtually 100 percent of
18 all the coal burned in Oklahoma came from Wyoming, and
19 since that time, after the statute has been passed, the
20 amount of coal that has been sold to Oklahoma has been
21 reduced.

22 There was a report that was prepared by two
23 economic fuel specialists who said that but for the act,
24 the State of Wyoming's coal producers would have still
25 continued to sell virtually 100 percent of the coal to

1 Oklahoma plants.

2 So there are facts that would support the fact
3 that this statute has changed the way that electric
4 utilities in the State of Oklahoma make their fuel
5 choices.

6 QUESTION: So even though -- your theory is that
7 even though Wyoming did not lose a penny, its severance
8 tax revenues are as high as ever, if some of the severance
9 taxes were imposed on coal sold in Utah as replacements
10 for the sale that wasn't sold in Oklahoma, it can still
11 bring this action?

12 MISS GUTHRIE: Our position is that because the
13 act was passed, we can fairly trace an injury to the
14 collection of severance taxes. The State of Wyoming has a
15 great deal of coal capacity that is not sold every year.
16 So we have, as producers and then as tax people, have
17 experienced an injury as a result of this act.

18 It's also possible, Mr. Chief Justice, that
19 other States could then begin to enact these kinds of acts
20 and then States like Wyoming would really begin to
21 experience a tremendous injury as a result of this kind of
22 discriminatory legislation.

23 QUESTION: Ms. Guthrie, let me be sure about one
24 fact; didn't Oklahoma move to dismiss the original action?

25 MISS GUTHRIE: This Court has viewed the

1 standing issue, this is the third time the Court has
2 viewed the standing issue. The first time they filed a
3 motion -- they filed a response to our motion for leave to
4 file a complaint, and the Court ordered the State of
5 Oklahoma to answer --

6 QUESTION: So one could almost argue that the
7 standing issue already has been decided up here.

8 MISS GUTHRIE: I would argue that, but if I am
9 getting questions from the Court, I wouldn't be so abrupt
10 to make that kind of argument, but the standing
11 issue -- because then the motion to dismiss based on
12 standing was denied.

13 Then the whole issue was brought up again in
14 front of Judge Tone, who had been selected as a special
15 master, and he also made a determination that
16 standing -- that the State of Wyoming did have standing in
17 this case because we had suffered an injury.

18 QUESTION: So he didn't think we had decided it,
19 anyway.

20 MISS GUTHRIE: Well, he probably thought you had
21 decided, but he wanted to decide it again.

22 QUESTION: He just wanted to decide it again?

23 MISS GUTHRIE: Yes. He did an awfully good job.

24 (Laughter.)

25 QUESTION: Ms. Guthrie, I have a problem. I

1 guess it is a little -- it is even more fundamental. You
2 have been asked about the proof of the damages. Let's
3 assume -- let's assume that it could be proven in this,
4 case that there would have been more sales.

5 Would that necessarily establish standing? I
6 mean, standing requires not only that there be an
7 injury -- at least our prudential rules require both an
8 injury and a direct injury. I mean, I think, haven't we
9 adopted standing rules that are similar to the rule that
10 we adopted in the antitrust field in Illinois Brick, which
11 prevents a secondary injury from a secondary purchaser
12 whose price has been inflated by a Sherman Act conspiracy
13 from recovering triple damages?

14 Isn't it the same thing here? I have never
15 heard of a State suing for loss of taxes before. I mean,
16 what is -- an ordinary contract case where somebody is
17 guilty of a breach of contract, an enormous amount of
18 money, a great big contract, do you think the State could
19 sue for the loss of sales tax revenue from that breach of
20 contract?

21 MISS GUTHRIE: No, the State couldn't in that
22 instance, but that is certainly not the kind of --

23 QUESTION: Why?

24 MISS GUTHRIE: -- case that is presented here,
25 because we are directly collecting taxes as a result of

1 the sale of coal. The cases to which Mr. Leader refers
2 are cases that are this injury to the general kind of
3 taxing power of a State.

4 Maybe a State will in fact have to assess more
5 taxes to pay for some kind of service that they weren't
6 able to provide before --

7 QUESTION: We are not talking about a sales tax.
8 It is very clear that had this contract been performed,
9 the sale would have occurred, the State would have gotten
10 X dollars from the sale, and there is a breach of the
11 contract and it seems to me, I doubt very much whether the
12 State would have any cause of action for that, as a person
13 harmed by that breach of contract, have any standing to
14 complain about it.

15 MISS GUTHRIE: Well, we must look at this,
16 though, in the context of the Commerce Clause and also the
17 fact that this is legislation has harmed one State to the
18 benefit of another State's residents.

19 QUESTION: We usually leave it to the people
20 immediately affected, in this case, the coal company, and
21 you said these statutes could be passed in a lot of
22 States. I suppose they could, but I don't imagine the
23 coal companies would sit idly by while that was happening.

24 It's not as though we wouldn't have an
25 opportunity to remedy the matter.

1 MISS GUTHRIE: Well, you referred to the
2 prudential kind of limitations that the Court has
3 undertaken to sift out the cases it doesn't want to hear,
4 and you certainly have developed a great number of rules
5 that deal with standing or original actions.

6 And I would say that this is the kind of case
7 that requires an original action being taken. You have
8 had a serious claim. We certainly are challenging the
9 fact that the statute has violated the Commerce Clause.
10 It's not a trivial matter at all. There is this direct
11 injury.

12 Now, the State of Oklahoma says it is not
13 direct, but they have certainly never shown you through
14 any kind of -- or there was no evidence that this injury
15 that we suffered was not direct. It is just his saying
16 that it's not direct and I guess it is my saying that it
17 is direct.

18 It certainly is direct so far as the State of
19 Wyoming is concerned because of the way that we use that
20 money and that we do impose that tax.

21 But there are several different prudential rules
22 that you have adopted, and I would suggest that virtually
23 all of the qualities that you say you look for in an
24 original action are similar to this one.

25 In Maryland v. Louisiana, this Court accepted

1 original jurisdiction and it was also a Commerce Clause
2 challenge. I think also in another case, Pennsylvania v.
3 West Virginia. So I think the implication of the Commerce
4 Clause additionally adds another feature that you might
5 not have seen in some of the other cases that --

6 QUESTION: The import of my question doesn't go
7 to whether we should take the original action or not, it
8 goes to whether we should think there is standing in the
9 Federal courts anywhere, not just here, so I agree with
10 you to that extent.

11 MISS GUTHRIE: Once this Court has determined
12 that the State of Wyoming does have standing, you must
13 determine that the statute is invalid because it's invalid
14 on its face.

15 It's also invalid in its purpose. Examination of
16 a resolution that was passed by the State of Oklahoma in
17 1985, a year before this statute was passed, will show you
18 the kinds of things that were motivating legislators from
19 Oklahoma.

20 They referred to the fact over \$300 million had
21 gone out of State because ratepayers were paying for
22 Wyoming coal, and \$9 million had been assessed in Wyoming
23 severance taxes. They said that the purpose of
24 encouraging utilities to use Oklahoma coal would be to
25 enhance the economy. Again, the classic sort of example

1 of the kinds of things that this Court has disapproved of
2 because it is a discriminatory purpose.

3 There was only one purpose for this statute to
4 be passed, and that was to encourage the use of Oklahoma
5 coal. The State of Oklahoma provided no evidence in this
6 proceeding through affidavits or even in the statement of
7 material facts to the special master that would in any way
8 show that there was any kind of purpose besides some kind
9 of discriminatory economic purpose.

10 There is a very definite protectionist effect,
11 also, of the law. The result means that there will be a
12 sale of less coal to the State of Wyoming.

13 We acquired the services of an economist who
14 came up with several different ideas about why Oklahoma
15 coal was being used, and the whole conclusion that they
16 all reached was that it was only because of the
17 interference of the statute.

18 The State of Wyoming asks this Court to declare
19 the Oklahoma statute unconstitutional as an example of
20 simple economic protectionism and to apply your virtually
21 per se rule of invalidity that you have encountered
22 whenever you find a facially discriminatory statute.

23 We also respectfully submit that the Court does
24 accept standing in this case. You have already, as
25 Justice Blackmun has pointed out, you have already looked

1 at this question twice or three times. Therefore, we
2 request that you do affirm the special master's report.

3 QUESTION: You are not questioning the special
4 master's treatment of the Grand River Dam Authority?

5 MISS GUTHRIE: That was part of our -- we took
6 the exception to the special master's report and it was
7 not so much the treatment of the Grand River Dam
8 Authority, it was his holding that that statute could be
9 severed.

10 We feel that the statute, as it was written,
11 really, once the invalid portions are removed, could not
12 be validated. The statute reads, all entities that sell
13 electrical power to consumers in Oklahoma must buy
14 Oklahoma coal. Once you get rid of that invalid portion
15 there is nothing left in the statute.

16 QUESTION: You think that is necessarily so?

17 MISS GUTHRIE: That's the --

18 QUESTION: I take it, you opposed, you didn't
19 think the special master should have suggested your
20 resolving severability in the State court.

21 MISS GUTHRIE: That was true as well, Justice
22 White.

23 QUESTION: And I take it you, then, think it
24 would be wholly improper for us to certify a question to
25 the Oklahoma supreme court as to the severability of this

1 statute?

2 MISS GUTHRIE: That was the argument that we
3 made. The idea being that it's really not -- it's a
4 demeaning sort of thing to take a State, one State into
5 another State's court. So from that aspect it would be
6 more appropriate for --

7 QUESTION: We wouldn't be -- a certification
8 wouldn't be taking a State into a State court. We would
9 certify the question and then the court would just give us
10 the answer.

11 MISS GUTHRIE: Bring it back to you. Well, I
12 would suggest that Oklahoma judges, like Oklahoma
13 legislators, are elected, and perhaps we might not have
14 the same kind of impartiality that we would have here.

15 QUESTION: I don't understand that argument,
16 because how should the question be decided, then? First
17 of all, let me ask one preliminary question. Does
18 Oklahoma have a certification statute, do you know?

19 MISS GUTHRIE: I have no idea.

20 QUESTION: I see. Well, I was puzzled about
21 your saying you couldn't go in another jurisdiction. In
22 Nevada v. Hall, California had to go to Nevada or vice
23 versa, I don't remember which one it was.

24 MISS GUTHRIE: But there were some kind of
25 definite -- there had been an accident. I think it was a

1 Nevada State employee who was injured in California.

2 QUESTION: Yes, but there is a dispute between
3 the State and someone else. I don't know why -- I don't
4 understand.

5 MISS GUTHRIE: And certainly if this Court
6 chooses to certify the case, I am sure --

7 QUESTION: We have ruled -- if we followed the
8 master's recommendation with respect to the invalidity
9 insofar as the statute applies to the three private
10 utilities, what can you lose by having the matter go to
11 the State supreme court?

12 MISS GUTHRIE: Certainly, I would much prefer
13 that you affirm the master's holding that the statute is
14 unconstitutional as it relates to the three private
15 utilities and not worry so much about the GRDA.

16 QUESTION: It seems to me that you are waiving
17 your severability argument.

18 MISS GUTHRIE: I am not waiving it, but I am not
19 very artfully expressing it, I guess. It is obviously not
20 as big a concern to the State of Wyoming as these other
21 questions are, but I think if you look at the general rule
22 of severability, you would find that the special master
23 did not precisely apply those severability principles.

24 QUESTION: No, but the Oklahoma attorney general
25 is here representing to us that as a matter of Oklahoma

1 law, this is the result that was appropriate as I
2 understand him, assuming that the merits --

3 MISS GUTHRIE: That is his representation, yes.
4 Thank you.

5 QUESTION: Very well, Ms. Guthrie.

6 Mr. Leader, you have 11 minutes remaining.

7 MR. LEADER: Your Honor, I will waive rebuttal.

8 CHIEF JUSTICE REHNQUIST: Very well. The case
9 is submitted.

10 (Whereupon, at 2:31 p.m., the case in the
11 above-entitled matter was submitted.)

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CERTIFICATION

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NO. 112 Original - WYOMING, Petitioner V. OKLAHOMA

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BY *alan friedman*

(REPORTER)

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