The Burger Court Opinion Writing Database

South Carolina v. Regan

465 U.S. 367 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1984

PERSONAL

Re: 94 Original - South Carolina v. Regan, Secretary of Treasury

Dear Bill:

I have some reservations, but to curtail the fragmentation, I will join you today and perhaps submit a few thoughts to you privately later on.

Regards,

WEB

Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1984

Re: 94 Original - South Carolina v. Regan, Secretary of Treasury

Dear Bill:

I join.

Regards,

WEB

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 15, 1984

Re: 94 Original - South Carolina v. Regan

MEMORANDUM TO THE CONFERENCE

I suggest we consider the following for Special Master in this case:

Louis Burke
Ammi Cutter
Paul Reardon

Regards,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 20, 1983

No. 94 Original

South Carolina v. Regan

Dear Sandra,

I just returned to town to find your letter regarding this case. I appreciate your views and am looking forward to seeing what you come up with. At conference, a number of reasonable ways to reach the conclusion that the Act does not bar this suit were advanced. In thinking through the case, I realized that none of these approaches -- including the one I have proposed -- is entirely without its problems. Although I continue to believe that the Act was not intended to apply when there is no other remedy, and that a contrary interpretation would raise serious constitutional difficulties, it may be that your approach is a reasonable one that would permit us to leave that question for another day.

I note, however, that there is one practical problem with holding that the Act does not apply to this Court. I am concerned that such a holding would invite a spate of lawsuits by States invoking our original jurisdiction to litigate tax matters. Holding that the Anti-Injunction Act does not apply in this Court, but does apply in other courts when there is no alternative remedy, would be particularly troublesome. Were a State to file a suit in this Court claiming that it had no access to any other court, I would think that, at a minimum, we would be required to take a hard look at the issues presented before declining to hear the case. Indeed, in some of these cases, because of the absence of an alternative remedy, it would be an abuse of discretion for us to deny leave to file. See Maryland v. Louisiana, 451 U.S. 725, 740 (1980) (whether it is appropriate to deny leave to file depends on the seriousness of the claim and the availability of another forum).

If you can allay my concern in this regard, I do not think that I would be likely to take issue with a holding that the Act

does not apply to this Court, as long as the question whether the Act applies in other courts in the absence of an alternative remedy were left open.

Sincerely,

W.J.B., Jr.

Justice O'Connor

Copies to the Conference

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 12-13-83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94, Orig. Decided December ——, 1983

JUSTICE BRENNAN delivered the opinion of the Court.

South Carolina invokes the Court's original jurisdiction[1] and asks leave to file a complaint against Donald T. Regan, the Secretary of the Treasury of the United States. The state seeks an injunction and other relief, on the ground that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97–248, 96 Stat. 596, is constitutionally invalid as violative of the Tenth Amendment and the doctrine of intergovernmental tax immunity.

The Secretary objects to the motion on the ground that the Anti-Injunction Act, 26 U. S. C. § 7421(a), bars this action[2] and, alternatively, that the Court should exercise its discretion to deny leave to file. We are not persuaded that either is a ground for denying the motion, and therefore grant the motion for leave to file the complaint.

I

Section 103(a) of the Internal Revenue Code (I.R.C.) exempts from a taxpayer's gross income the interest earned on

[1] U. S. Const., Art. III, § 2; 28 U. S. C. § 1251(b).

[2] Defendant also argues that the Court may not grant declaratory relief because the Declaratory Judgment Act, 28 U. S. C. § 2201, which authorizes "any court of the United States" to issue a declaratory judgment in an appropriate case, excepts from its coverage most "actions with respect to Federal taxes." Because of our disposition of the case, we need not decide at this time whether we may grant declaratory relief should plaintiff prevail on the merits.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 9, 1984

No. 84 Original

South Carolina v. Regan

Dear Sandra:

I have read your draft concurrence in this case with great interest. As I suggested in my letter of December 20th, since you conclude that the Anti-Injunction Act does not apply to this Court, it is not necessary to reach the question whether the Act would apply in the lower federal courts in the absence of an alternative remedy. Had South Carolina brought this action in a lower federal court, any argument that the Act was inapplicable because it had no alternative remedy would be met with the simple response that a remedy exists in this Court. Thus, upon reflection, I am convinced that under your approach, the question whether the Act would apply in the absence of an alternative remedy is not properly before this Court. Thus, even were I to agree with your Part II (and I do find it persuasive), I couldn't agree that the analysis in Part I is necessary to the decision.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 10, 1984

No. 94 Original

South Carolina v. Regan

Dear Sandra,

Thank you very much for your response of January 9. You note that Part III of your draft concurrence concludes that the exercise of our original jurisdiction is appropriate in this case because South Carolina cannot bring a suit in a state court or a lower federal court. I gather that it is this view that you believe requires that we address the question discussed in your Part I whether the Anti-Injunction Act applies to a party that is aggrieved by the actions of the IRS and has no alternative forum in which to raise his legal challenge. I still suggest that we need not do so.

I think that it is enough to address the question, as you do, whether South Carolina can sue in a lower federal court or a state court. However, under your approach, that question does not depend on whether the Anti-Injunction Act applies to a party without an alternative remedy. You conclude that South Carolina has an alternative forum in which to litigate its claims. That forum is, of course, this Court. Therefore, under your view is it not true that the difficult question whether the Anti-Injunction Act bars a suit by a party who has no alternative forum is simply not presented? For, once you conclude that South Carolina may sue in this Court, the question whether they may sue in a state court or a lower federal court is governed by the rule of Williams Packing: the Anti-Injunction Act bars the suit of a party who has an alternative forum in which to litigate his claims absent a showing of irreparable harm and certainty of success on the merits. Thus, regardless of whether the Act bars a suit by a party that has no alternative remedy, South Carolina, because it has an alternative remedy in this Court may not bring this suit in a state court or a lower federal court.

Perhaps we've reached the point where it would be helpful to our discussion to know the views of our colleagues. I'll await their responses with interest.

Sincerely,

Justice O'Connor

Copies to the Conference

Stylistic Changes Throughout
Changes as marked
pp 8-12

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: Feb 17

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94, Orig. Decided February ——, 1984

JUSTICE BRENNAN delivered the opinion of the Court.

South Carolina invokes the Court's original jurisdiction[1] and asks leave to file a complaint against Donald T. Regan, the Secretary of the Treasury of the United States. The state seeks an injunction and other relief, on the ground that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97–248, 96 Stat. 596, is constitutionally invalid as violative of the Tenth Amendment and the doctrine of intergovernmental tax immunity.

The Secretary objects to the motion on the ground that the Anti-Injunction Act, 26 U. S. C. § 7421(a), bars this action[2] and, alternatively, that the Court should exercise its discretion to deny leave to file. We are not persuaded that either is a ground for denying the motion, and therefore grant the motion for leave to file the complaint.

I

Section 103(a) of the Internal Revenue Code (I. R. C.) exempts from a taxpayer's gross income the interest earned on

[1] U. S. Const., Art. III, § 2; 28 U. S. C. § 1251(b).

[2] Defendant also argues that the Court may not grant declaratory relief because the Declaratory Judgment Act, 28 U. S. C. § 2201, which authorizes "any court of the United States" to issue a declaratory judgment in an appropriate case, excepts from its coverage most "actions with respect to Federal taxes." Because of our disposition of the case, we need not decide at this time whether we may grant declaratory relief should plaintiff prevail on the merits.

Stylistic Changes and p.1

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: Feb 20

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94 Orig. Decided February ——, 1984

JUSTICE BRENNAN delivered the opinion of the Court.†

South Carolina invokes the Court's original jurisdiction[1] and asks leave to file a complaint against Donald T. Regan, the Secretary of the Treasury of the United States. The state seeks an injunction and other relief, on the ground that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97–248, 96 Stat. 596, is constitutionally invalid as violative of the Tenth Amendment and the doctrine of intergovernmental tax immunity.

The Secretary objects to the motion on the ground that the Anti-Injunction Act, 26 U. S. C. § 7421(a), bars this action[2] and, alternatively, that the Court should exercise its discretion to deny leave to file. We are not persuaded that either is a ground for denying the motion, and therefore grant the motion for leave to file the complaint.

---

† Part III of the opinion is joined only by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE MARSHALL.

[1] U. S. Const., Art. III, § 2; 28 U. S. C. § 1251(b).

[2] Defendant also argues that the Court may not grant declaratory relief because the Declaratory Judgment Act, 28 U. S. C. § 2201, which authorizes "any court of the United States" to issue a declaratory judgment in an appropriate case, excepts from its coverage most "actions with respect to Federal taxes." Because of our disposition of the case, we need not decide at this time whether we may grant declaratory relief should plaintiff prevail on the merits.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 19, 1983

Re: 94 Orig. - South Carolina v. Regan

Dear Bill,

I am awaiting other writing in this case.

Sincerely,

Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 24, 1984

Re: 94 Original - South Carolina v. Regan

Dear Bill,

After again examining the various writings in this case, I would grant leave to file and much prefer your reasons for arriving at that result. Sandra takes you to task for disregarding the plain language of the statute of §7421, but she ends up doing the same thing in the name of avoiding a constitutional question, which, by the way, she all but decides. Also, as I read her circulating draft at p. 10, barring a taxpayer all judicial review would raise constitutional issues. Thus, if a taxpayer were involved in this case and had no way to turn, §7421 would have to give way, despite its plain language, just as it does for Sandra to reach her end result. In comparison, construing the section to accommodate a State without a remedy for an alleged serious injury to its pocketbook and its ability to borrow is not objectionable to me. Furthermore, your approach would permit us to refer a state to the District Court, which could not be done under Sandra's approach. Although there is much in what John says, I agree with you that we should keep the case here and grant leave to file.

In short, please join me.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 13, 1983

Re: No. 94 Orig. - State of South Carolina v. Regan

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JAN 31 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94, Orig. Decided January ——, 1984

JUSTICE BLACKMUN, concurring in the judgment.

I, too, agree with all those who have written opinions in this case that the Anti-Injunction Act, 26 U. S. C. §7421(a), is no bar to the ability of the State of South Carolina to invoke the original jurisdiction of this Court in order to challenge the validity of a federal tax statute. Like JUSTICE O'CONNOR, I have reservations about the breadth of the approach taken by JUSTICE BRENNAN in determining that Congress did not intend the Act to apply in any case in which the aggrieved party has no alternative avenue by which to contest the legality of a particular tax.

In *Bob Jones University* v. *Simon*, 416 U. S. 725 (1974), the Court stressed the broad sweep of the Anti-Injunction Act. The Court noted that the language added in 1966, prohibiting any suit for the purpose of restraining the assessment or collection of any tax "by any person, whether or not such person is the person against whom such tax was assessed," see §110(c) of the Federal Tax Lien Act of 1966, Pub. L. 89–719, 80 Stat. 1144, was intended as a "reaffirmation of the plain meaning" of the Act as it had stood since 1867. See 416 U. S., at 731–732, n. 6. See also *Alexander* v. *"Americans United" Inc.*, 416 U. S. 752, 760, n. 11 (1974). The Court in *Bob Jones* rejected the petitioner's efforts to rely on exceptions to the reach of the Act suggested in the 1930's for situations in which there is no adequate remedy short of a suit to enjoin the challenged tax. See 416 U. S., at

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 21, 1984

Re: No. 94 Orig. - South Carolina v. Regan

Dear Chief:

This refers to your memorandum of February 15 suggesting Louis Burke, Ammi Cutter, and Paul Reardon for Special Master in this case.

These are old and familiar names. Perhaps it is impertinent of me to mention age in "our crowd," but I note that Cutter is 81 and Burke is 79. The three names indicate that you are interested in a former state supreme court justice. Others who would so qualify now are your old friend, Robert Sheran, Sam Roberts, and Wally Schaefer.

If we wish to go again into academic ranks in this or some future case, the following are possibilities: Benno Schmidt, Jr., of Columbia; Louis Henkin of Columbia; Louis Loss of Harvard; Victor Brudney of Harvard; Robert McKay of NYU; Robert A. Leflar of Arkansas and NYU (although he now is 83!); Phil Neal; and Erwin N. Griswold. Byron could come up with names from Yale. And Robert Meserve and Johnnie M. Walters might be useful sometime.

I mention these merely as new names. Another old name is John Davis. I guess I can't get away from recalling Ammi Cutter's desire to be permanent South Lake Master in the Lake Champlain case.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

September 20, 1983

PERSONAL

94 Orig. South Carolina v. Regan

MEMORANDUM TO THE CONFERENCE:

The above case, set for argument on October 5, involves - as the substantive constitutional question - the validity of a provision of the federal 1982 Tax Act that had the effect, after June 30, 1983, of requiring that municipal bonds be issued in registered form if the interest thereon is to be exempt from federal income taxation.

The briefs, filed on behalf of South Carolina and the amicus brief on behalf of 24 other states, including affidavits, argue that the effect of this requirement is to burden the sovereign authority of states to borrow money. The affidavits assert that most municipal bonds had been issued in bearer form, and that the requirement of registration will add substantial additional costs to the borrowing of money. One of the elements of additional cost is an increase in interest payable by 1/4-1/2 percent. In addition the fees of the paying and transfer agents (usually banks) are higher for the handling of registered than for bearer bonds.

I am prompted to circulate this memorandum because my family accounts, managed by United Virginia Bank, contain municipal bonds. I am informed by the bank that most of the municipal bonds it holds in most if not all of its accounts are in bearer form except those purchased since June 30. At least arguably, I suppose - if the affidavits are correct - the purchasers of municipal bonds issued after June 30 may benefit from some increase in interest rates.

This presents a question of disqualification for me. It occurs to me that possibly other Justices have the same question. The Reporter's Notes to the ABA Code of Judicial Conduct state that "government securities" do not require disqualification unless "the value of [the] interest could be substantially affected by the outcome of the

proceedings . . ." p. 71. I doubt that one's interest would be "substantially affected" in view of the various factors that influence the price of these bonds at the time of issue and again at the time a person happens to acquire them. The question, however, is one that perhaps we can discuss at Conference.

L.F.Jr.,

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 15, 1983

94 Orig. South Carolina v. Regan

Dear Bill:

I'll await Bill Rehnquist's dissent.

Sincerely,

L. Lewis

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 19, 1983

94 Orig. South Carolina v. Regan

Dear Bill:

In my letter of December 15, I mistakenly said I was awaiting a dissent from Bill Rehnquist.

I certainly agree with your judgment. My concern is whether we need go beyond holding that the Anti-Injunction Act does not limit the exercise of our original jurisdiction.

I therefore will await SOC's concurrence.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 13, 1984

94 Orig. South Carolina v. Regan

Dear Bill:

I have followed with interest the exchange of views by you and Sandra, and note your letter of January 10 in which you invite the views of other Justices.

In my note of December 19, I advised that I would await Sandra's concurring opinion. It seems to me that her views of the tax Anti-Injunction Act are fully in accord with my opinion for the Court in Bob Jones.

Also, it seems advisable to decide whether South Carolina could sue in any other court. If there were an alternative remedy, I assume we would have declined jurisdiction. The reason South Carolina cannot bring suit in a lower court is because the Anti-Injunction Act, as I view it, is an absolute bar.

For these reasons, I am inclined to join Sandra but - in view of your letter - will await other views that may be expressed.

Sincerely,

Lewis

Justice Brennan

cc: Conference

LFP/sm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 31, 1984

94 Orig. South Carolina v. Regan

Dear Sandra:

Please join me in your concurring opinion.

Sincerely,

Lewis

Justrice O'Connor

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 14, 1983

Re: No. 94 Orig. South Carolina v. Regan

Dear Bill:

I will wait for Sandra's concurrence.

Sincerely,

WHR

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 16, 1984

Re: No. 94 Orig. South Carolina v. Regan

Dear Sandra:

I am in substantial accord with your concurring opinion; please join me in it.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 14, 1983

Re: 94 Original - South Carolina v. Regan

Dear Bill:

Although I will join Parts I and II of the opinion, I remain persuaded that we should not grant leave to file because there is simply no merit whatsoever in the State's claim. I will write this out as soon as I can.

Respectfully,

JPS

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JAN 11 '84

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-94

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94, Orig. Decided January ——, 1983

JUSTICE STEVENS, concurring in part and dissenting in part.

While I join Parts I and II of the Court's opinion, I disagree with Part III. The Solicitor General has persuaded me that the Court should exercise its discretion to deny leave to file this complaint. We should do so not only because the proceeding can be conducted more expeditiously in another forum,[1] but also because it is so plain that even if we read the complaint liberally in favor of the State of South Carolina, there is simply no merit to the claim the State has advanced. I do not believe the Court does a sovereign State a favor by giving it an opportunity to expend resources in litigation that has no chance of success. I would therefore deny leave to file.

[1] As the Solicitor General points out, "this case is particularly inappropriate for the exercise of this Court's discretionary original jurisdiction. First, given the demands on this Court's original and appellate docket, it seems plain that a district court could hear the case more promptly. This is especially true in light of the fact that to support its claim, South Carolina would undoubtedly seek to introduce evidence of the actual burden imposed upon it by the federal tax statute. Such a proceeding could be more expeditiously conducted at the usual trial court level by a federal district court." Brief for the Defendant in Opposition 12. See *United States* v. *Nevada*, 412 U. S. 534, 538 (1973); *Washington* v. *General Motors Corp.*, 406 U. S. 109 (1972); *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1970).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JAN 17 1984

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 10

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-94

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94, Orig. Decided January ——, 1983

JUSTICE STEVENS, concurring in part and dissenting in part.

While I join Parts I and II of the Court's opinion, I disagree with Part III. The Solicitor General has persuaded me that the Court should exercise its discretion to deny leave to file this complaint. We should do so not only because the proceeding can be conducted more expeditiously in another forum,[1] but also because it is so plain that even if we read the complaint liberally in favor of the State of South Carolina, there is simply no merit to the claim the State has advanced. I do not believe the Court does a sovereign State a favor by giving it an opportunity to expend resources in litigation that has no chance of success. I would therefore deny leave to file.

[1] As the Solicitor General points out, "this case is particularly inappropriate for the exercise of this Court's discretionary original jurisdiction. First, given the demands on this Court's original and appellate docket, it seems plain that a district court could hear the case more promptly. This is especially true in light of the fact that to support its claim, South Carolina would undoubtedly seek to introduce evidence of the actual burden imposed upon it by the federal tax statute. Such a proceeding could be more expeditiously conducted at the usual trial court level by a federal district court." Brief for the Defendant in Opposition 12. See *United States* v. *Nevada*, 412 U. S. 534, 538 (1973); *Washington* v. *General Motors Corp.*, 406 U. S. 109 (1972); *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1970).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 13, 1983

No. 94 Orig. South Carolina v. Regan

Dear Bill,

I continue to be concerned about holding that the Anti-Injunction Act is inapplicable in situations where the aggrieved parties have no other remedies. It seems to me various potential plaintiffs, such as tax exempt organizations, pay no direct taxes and cannot bring suits for refunds. Nevertheless, I had thought Congress made a judgment that only actual taxpayers should be able to litigate the propriety of a tax assessment, and that such litigation should be limited to suits for refunds. Indeed, Congress has previously recognized the dilemma that the Anti-Injunction Act creates for such parties and has given relief in at least one instance.

For example, in 1978, precisely because "the present law does not allow the state or local government to go to court," S. Rep. No. 95-1263, 95th Cong., 2d Sess., 533 (1978), Congress provided that issuers of state and municipal bonds could seek declaratory judgments about the status of certain prospective obligations. 1RC § 7478. It seems to me that such post-enactment legislative history is reliable and should help guide our interpretation.

I agree with your final judgment, however, because Congress cannot prevent this Court from entertaining a constitutional challenge to a tax statute under our original jurisdiction. It might also be possible to hold that Congress did not intend the Anti-Injunction Act to apply to original actions brought by states in this Court.

In due course, I will circulate a concurrence in the judgment.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 7, 1984
'84 JAN -9 A10:21

No. 94 Orig. South Carolina v. Regan

Dear Bill,

I enclose a draft of my concurrence in the judgment in this case. I have attempted to address the concerns you expressed to me in your letter before Christmas.

Sincerely,

Sandra

Enclosure

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Conno**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94, Orig. Decided January ——, 1984

JUSTICE O'CONNOR, concurring in the judgment.

The motion of South Carolina for leave to file a complaint in our original jurisdiction raises three questions. First, the Court must decide whether Congress intended by the Tax Anti-Injunction Act (Act), 26 U. S. C. §7421(a), to bar nontaxpayers like the State of South Carolina from challenging the validity of federal tax statutes in the courts. Second, if the Act generally does bar such nontaxpayer suits, the Court must decide whether Congress intended, and if so whether the Constitution permits it, to bar us from considering South Carolina's complaint in our original jurisdiction. Third, if Congress either did not intend or constitutionally is not permitted to withdraw this case from our original jurisdiction, the Court must decide whether South Carolina's challenge to the constitutionality of §310(b) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97–248, 96 Stat. 596, raises issues appropriate for original adjudication.

In answering the first question, the Court reaches the unwarranted conclusion that the Tax Anti-Injunction Act proscribes only those suits in which the complaining party, usually a taxpayer, can challenge the validity of a taxing measure in an alternative forum. The Court holds that suits by nontaxpayers generally are not barred. In my opinion, the Court's interpretation fundamentally misconstrues the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 9, 1984

No. 94 Original South Carolina v. Regan

Dear Bill,

Thank you for your letter concerning my draft concurrence in this case. Part II, with which you say you might agree, concludes that, despite the all inclusive language of the Tax Anti-Injunction Act, the purpose and history of the Act do not indicate that Congress meantto withdraw this Court's original jurisdiction. To reach that conclusion it seems to me it is necessary to discuss the language, purpose, and history of the statute, giving meaning to it all. Moreover, Part III concludes that exercise of our original jurisdiction is appropriate because South Carolina, a nontaxpayer, has no alternative remedy in either a state or federal court. In short, it seems to me that Parts II and III necessarily depend upon the analysis and conclusion of Part I.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 12, 1984

No. 94 Orig., South Carolina v. Regan

Dear John:

I read your opinion concurring in part and dissenting in part in this case with interest. The question whether South Carolina has a legitimate claim on the merits is one we should have in mind as we consider whether to exercise our original jurisdiction. I am still unsettled, however, on what I see as the crucial issue in the case.

After the Pollock decision, advocates of the income tax had to turn to an amendment to the Constitution as a means of reviving the tax. In 1909, President Taft, along with insurgent Republicans and the Democrats, proposed the joint resolution that, in 1913, became the Sixteenth Amendment. The most influential opposition to the proposed amendment, when it was before the states for ratification, stemmed from Governor Charles Evans Hughes of New York. Governor Hughes stated that he believed the Federal government should have the power to impose an unapportioned income tax. However, he recommended against ratification because the words "from whatever source derived" in the proposed amendment, "if taken in their natural sense," would permit income from state and municipal bonds to be taxed by the Federal government, a power that would "afford the opportunity for federal action in violation of the fundamental conditions of State authority." Governor Hughes' construction was quoted widely throughout the nation. Supporters of the Federal income tax then attempted to assure the States that the language of the Sixteenth Amendment was not intended to apply to the income from state and municipal obligations. See 45 Cong. Rec. 1696, 2245, 2247 (1910). Thus, there is a substantial argument that the Framers of the Sixteenth Amendment intended to codify the holding of Pollock: that

interest from state, county, and municipal bonds could not be taxed by the Federal government.

This Court, at various times since, has indicated that the Sixteenth Amendment did not increase the Federal government's power to tax such obligations. For example, in 1916, when Governor Hughes himself was on the Court, it was held that the Sixteenth Amendment merely eliminated the apportionment requirement. See Brushaber v. Union Pacific R. Co., 240 U.S. 1, 11 (1916). Two years later, the Court reviewed the history of the Hughes' message and the responses, reaching the same result. See Peck & Co. v. Lowe, 247 U.S. 165, 172 (1918). Then, in 1932, Chief Justice Hughes, in upholding the constitutionality of a tax on the capital gains from trading in state and municipal securities, expressly distinguished that tax from one on "the obligations themselves," Willicut v. Bunns, 282 U.S. 216, 226 (1931), and concluded that the only subject "held to be exempt from Federal taxation is the principal and interest of the obligations." Ibid.

In addition to this original history and subsequent judicial interpretation, there are various indications in Congress that a constitutional amendment would be necessary to secure taxation on the interest earned on state and municipal securities. See 76 Cong. Rec. 3588 (1933); 65 Cong. Rec. 347 (1924); id., at 43.

None of this is conclusive, of course. But I believe the original intent of the Framers of the Sixteenth Amendment is a constitutional issue worthy of litigation in this Court's original jurisdiction. Therefore, without expressing any view on the ultimate disposition of the merits, I still think the Court should exercise its discretion to grant leave to file the complaint.

Sincerely,

Sandra

Sandra D. O'Connor

Justice Stevens

Copies to the Conference

pp. 1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA, PLAINTIFF *v.* DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 94, Orig. Decided February ——, 1984

JUSTICE O'CONNOR, with whom JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

The motion of South Carolina for leave to file a complaint in our original jurisdiction raises three questions. First, the Court must decide whether Congress intended by the Tax Anti-Injunction Act (Act), 26 U. S. C. §7421(a), to bar nontaxpayers like the State of South Carolina from challenging the validity of federal tax statutes in the courts. Second, if the Act generally does bar such nontaxpayer suits, the Court must decide whether Congress intended, and if so whether the Constitution permits it, to bar us from considering South Carolina's complaint in our original jurisdiction. Third, if Congress either did not intend or constitutionally is not permitted to withdraw this case from our original jurisdiction, the Court must decide whether South Carolina's challenge to the constitutionality of §310(b) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97–248, 96 Stat. 596, raises issues appropriate for original adjudication.

In answering the first question, the Court reaches the unwarranted conclusion that the Tax Anti-Injunction Act proscribes only those suits in which the complaining party, usually a taxpayer, can challenge the validity of a taxing measure in an alternative forum. The Court holds that suits by nontaxpayers generally are not barred. In my opinion, the Court's interpretation fundamentally misconstrues the