Filed Nov. 3, 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 28 Original

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STATE OF DELAWARE, *Plaintiff*

v.

THE STATE OF NEW YORK, *ET AL.*, *Defendants*

PETITION FOR REHEARING

DAVID P. BUCKSON
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THE STATE OF NEW YORK, *ET AL.*, *Defendants*

PETITION FOR REHEARING

By decision of the Court of October 17, 1966, Petitioner's Motion for Leave to File the above entitled Complaint was denied without a hearing and without opinion of this Honorable Court.

Petitioner, Plaintiff in the above entitled action, by its Attorney General, respectfully requests the Court to rehear its Motion for Leave to File, and to reconsider its decision denying the Motion, for the following reasons:

I.

Twelve sovereign States of the United States, by their Motions to be Realigned as Parties Plaintiff, have validated Petitioner's Complaint, the jurisdictional arguments

of the Petitioner, the existence of a "case or controversy' between parties Plaintiff and Defendant, and one or more of the Petitioner's Constitutional arguments supporting its prayers for relief.

II.

Summary refusal to permit Petitioner to sue another State in this Honorable Court denies Petitioner a right under Article III, Section 2, of the U. S. Constitution, which provides that "the judicial power shall extend . . . to controversies between two or more states . . . [and that] In all cases . . . in which a state shall be a party, the Supreme Court *shall have* original jurisdiction. (Emphasis supplied.)

Unlike petitions for Certiorari, where the Court's exercise of appellate jurisdiction is made discretionary by statute, the Original branch of the Court's jurisdiction is made mandatory by the Constitution. As stated by Chief Justice Marshall in 1821 with regard to suits between States —

> If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union. *Cohens v. Virginia,* 19 U.S. 264, 378.

In other Federal Courts having original jurisdiction, there is no question that, if the parties and the matter in controversy are within the Court's jurisdiction, a full and fair hearing of the case must be had. No such Court has the power or the right to determine not to hear a case for any subjective or non-judicial consideration, and such Courts are precluded from refusing to take jurisdiction on the basis of *a priori* findings relating to evidentiary matter in the pleadings.

III.

The Court's order denies Petitioner due process of law in violation of the Fifth Amendment, by disposing of its claim without a hearing. It is fundamental to the procedural due process guaranteed by this Amendment that no claim or defense may be adjudicated without opportunity to hear the issue. *Hovey v. Elliott,* 167 U.S. 409. In exercising its unique Original Jurisdiction as a trial court, this Honorable Court surely should hold itself to the same minimal standards of procedural fairness which it has required of other courts and Government agencies. Cf. *Morgan v. United States,* 304 U.S. 1, 18-19, *Wong Yang Sung v. McGrath,* 339 U.S. 33, *Greene v. McElroy,* 360 U.S. 474. Assuming all procedural and jurisdictional requirements for an Original and Exclusive action in this Court have been met, those standards of procedural due process which this Court would impose on other U. S. or State Courts, require a full and fair hearing on the merits.

IV.

Failure of the Court to assign reasons for its action places thirteen States and their citizens (and, as well, the citizens of the Defendant States) in a legal *limbo,* and fosters confusion and relitigation in an important area of voting rights. This Court in its recent "voting rights cases" has opened the door and raised the expectation in the hearts and minds of the citizens of each of the States that they may seek vindication in the courts of *all* their voting rights and their rights to political equality. Petitioner has no way of learning whether substantive or procedural defects caused the Court to refuse to hear a claim advanced by thirteen states and resisted by but one. Petitioner, the public, and the profession are left to speculate whether the proposed Complaint was considered unmeritorious in its substantive claims. The Court's order contains no hint as to whether the deficiencies of its action are in any way curable or whether underlying issues may be litigated by other means.

Since issue was never joined by responsive pleadings and nothing was adjudicated, a plea of *res judicata* will bar a subsequent similar action. By summarily dismissing this action without stating reasons, the Court has failed to observe the important principle that finality should characterize court adjudication. As the first Mr. Justice Harlan observed in 1897 —

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. *Southern Pacific Ry. v. United States*, 168 U.S. 1, 49.

WHEREFORE, in consideration of the foregoing, Petitioner prays that the Court grant a rehearing on its Motion for Leave to File in the above entitled cause.

David P. Buckson
Attorney General
State of Delaware
Dover, Delaware

I hereby certify that the foregoing petition is presented in good faith, and not for delay.

David P. Buckson

I, David P. Buckson, Attorney General of the State of)elaware, and a member of the Bar of the Supreme Court f the United States, hereby certify that on November __, 966, I served a copy of the foregoing Petition for Rehear-ıg by depositing same in a United States Post Office, with ir mail postage prepaid, addressed to the official post ffice address of each Governor, and each Attorney Gen-ral of each of the Plaintiff and Defendant States in the bove entitled action, and to the President of the Board of ;ommissioners, and the Corporation Counsel, of the Dis-rict of Columbia.

David P. Buckson