
Supreme Court Update

Supreme Court Update – State and Local Taxes

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This column focuses on the Supreme Court hearing oral arguments in MoneyGram Unclaimed Property cases, the Pork Producers' Dormant Commerce Clause case, new petitions filed in foreclosure tax matters, and an emergency appeal to block President Biden's Student Debt Relief Plan

On October 3, 2022, the Supreme Court heard oral arguments in the MoneyGram cases: *Delaware v. Pennsylvania,* 220145 and *Arkansas et al. v. Delaware,* 220146. The dispute is over which state is entitled to escheat, or take custody of, the proceedings of certain unclaimed monetary instruments issued by MoneyGram Payment Systems, Inc. (“MoneyGram”). A week later, the Supreme Court heard oral arguments in *National Pork Producers Council, et al. v. Ross*, Docket No. 21-468, a case addressing California's Proposition 12, a ballot initiative to protect certain farm animals that bars the sale in California of uncooked pork meat when the seller knows or should have known that the meat came from the offspring of a sow - a breeding female pig – not housed in conformity with the law's requirements. While this case is not a state tax case, the Court's ruling could have a far-reaching effect on state tax matters because the National Pork

Producers Council and the American Farm Federation argue that Proposition 12 violates the dormant Commerce Clause to the U.S. Constitution, an argument advanced in many state tax cases. As many of our readers know, the Commerce Clause of the U.S. Constitution provides that Congress shall have the power to regulate interstate and foreign commerce.[1] The dormant Commerce Clause refers to the prohibition, implicit in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce. Stated differently, the concept is that even if the Constitution does not explicitly say anything about state law, the Constitution's grant of power over interstate commerce to Congress also means that states cannot pass laws that discriminate against interstate commerce.

This article also discusses three cases that involve petitions for writ of certiorari that ask the Court primarily the same two questions: whether a state government violates the Taking's Clause of the Fifth Amendment to the U.S. Constitution when it confiscates property worth more than the debt owed by the owner; and, whether the forfeiture of far more property than needed to satisfy a delinquent tax debt plus interest, penalties, and costs, constitute an excessive fine within the meaning of the Eighth Amendment to the U.S. Constitution.

Finally, as we go to press, we note that a group of Wisconsin taxpayers filed an emergency appeal in *Brown County Taxpayers Association v. Biden, et. al.*, 22A331, asking the U.S. Supreme Court to block President Joseph R. Biden's “One-Time Student Loan Debt Relief” plan (the “Program”), which was set to begin canceling student debt. The Program allows the cancelation of $10,000 of federal loans to individuals earning less than $125,000 (or $250,000 for households) per year or $20,000 to individuals who received Pell grants. Justice Amy Coney Barrett rejected the appeal on the basis that the Brown County Taxpayers Association did not have standing to bring the case, in conformity with the lower court's rulings.

MoneyGram Unclaimed Property Cases Oral Arguments

The Supreme Court heard oral arguments on October 3, 2022, in *Delaware v. Pennsylvania,* 220145, and *Wisconsin* and *Arkansas, et al. v. Delaware,* 220146. In short, the dispute is between Delaware and 30 other states, as the Claimant States.[2] During the oral argument, the Court considered arguments by Neal K. Katyal, on behalf of Delaware, and Nicholas J. Bronni, the Solicitor General of Arkansas, on behalf of the

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Claimant States, on the issue of whether MoneyGram's Agent Checks and Teller's Checks, referred to herein as “Official Checks,” are included as “money orders,” or, alternatively, as “similar written instruments” in the Federal Disposition Act (“FDA”). If the Official Checks are considered “money orders” or “similar written instruments” under the FDA, *the state where the instrument was purchased* is entitled to take custody of funds from the purchase of these financial instruments, if

abandoned, and if the purchaser and payee's addresses are unknown to the obligor. If the Official Checks are not within the act's scope, however, the common law rule controls, which allows *the issuer's state of incorporation* to take custody of such funds. Delaware has been claiming the funds associated with these unclaimed MoneyGram Official Checks under the common law rule and operated with the belief that the Official Checks were outside the scope of the FDA. The FDA applies to sums payable on a money order, traveler's check, or other similar written instrument, other than a third-party bank check, if a banking or financial institution is directly liable.

Delaware argued that the Official Checks should be governed by the common law because (1) the term “money order” refers to “specific commercial products labeled 'money order' and [are] typically sold to unbanked consumers to pay small debts,” and the Official Checks are not labeled as “money orders” and are sold to consumers with bank accounts for larger sums of money; (2) the rationale for enacting the FDA is not advanced as there is not a concern that the price of smaller dollar instruments will increase because of address collection requirements; (3) if found to be within the scope of the FDA, the Official Checks are within the third-party bank exception, as they are signed by bank employees rather than purchasers; and (4) under the doctrine of reading statutes to avoid derogation of the common law and considering a need for bright-line rules and predictability, a correct interpretation of the FDA should not include the Official Checks to be within its scope.

Delaware consistently asserted, while responding to Justice Clarence Thomas and Justice Sonia Sotomayor's inquiries on the importance of a financial instrument's label, that if the instrument is labeled a “money order” it should be treated as one. Furthermore, prompted by questions from Justice Clarence Thomas and Justice Neil Gorsuch regarding what constitutes a “similar written instrument,” Delaware suggested that “a similar written instrument” under the FDA is an instrument that has the substantive characteristics of a “money order” but not the title of such. Delaware declared, after being asked by Justice Elena Kagan, that such defining characteristics are a retailer selling the instrument, the purchaser of the instrument not having a bank account, and the instrument not being signed by the bank. Importantly, the Official Checks at issue are purchased at a bank by purchasers with bank accounts, and the Official Checks are signed by the bank. Thus, Delaware found the Official Checks to be outside of the FDA's control. Notably, these characteristics are how address information is collected for the Official Checks and, therefore, why the purpose of the FDA, according to Delaware, is not advanced by finding the Official Checks to be within the scope of the FDA. The reasoning being that if relevant address information for the Official Checks is already collected, address collection requirements will not increase the price of the instruments.

Justice Ketanji Brown Jackson inquired about the purpose and language of the FDA. Here, Delaware suggested that a concern for inequitable escheatment, the Claimant States' advanced purpose of the FDA, is not an issue when dealing with the Official Checks, as address and payee

information from such instruments is collected, as noted above, while such information is not collected for money orders and traveler's checks, and if there is address information, funds will not escheat to the issuer's state of incorporation. Rather, Delaware stated the purpose was to impede any increase in the price of traveler's checks and money orders stemming from address collection requirements, which, as indicated, is not a concern for the Official Checks. Moreover, to the extent there is an equity concern with respect to the Official Checks, or to the extent address information needs to be transmitted to MoneyGram, the issuer, Delaware suggested throughout their oral argument that states, or Congress itself, can simply require the collection and transmittal of address information. Delaware reasoned that this approach would avoid the frustration to the financial sector that would be created under the Claimant States' wide reading of the FDA.

Moreover, in responding to Justice Jackson, Delaware found it significant that Congress could have written a broader statute but elected to write a narrower one. Delaware contended that the FDA should be read narrowly, to only diverge from the common law the treatment of money orders and traveler's checks, and not the Official Checks, as the policy reasons for the implementation of the FDA are not at issue when considering treatment of these Official Checks. Delaware asserted, after inquiries by Justice Jackson and Justice Gorsuch, that the Claimant States' contrary wide reading of the FDA is “incredibly damaging and destabilizing to the financial sector” because any prepaid money instrument would fall into the Claimant States' reading, such as cashier's checks and certified checks, which would conflict with how states have been collecting money under what they thought were settled escheatment rules.

Additionally, Justice Samuel Alito inquired into what constitutes a “third-party bank check” and Delaware expressed that Congress was concerned about larger-dollar products, such as the Official Checks at issue, being included in the FDA, and thus explicitly excluded them from the statute.

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Conversely, the Claimant States argued that the FDA directly establishes how these Official Checks should be treated. They state that when the Supreme Court decided *Pennsylvania v. New York*, a windfall to the issuer's state of incorporation was created, as it was established there that unclaimed financial instruments escheat to a purchaser's state of residence, or if not known, to the issuer's state of incorporation, and issuers of relevant financial instruments were not keeping record of purchaser addresses. Hence, when asked by Justice Jackson to discuss the purpose of the FDA, the Claimant States contended that the FDA responded to this inequitable escheatment windfall issue by declaring that the relevant instruments, including the Official Checks at issue here, escheat to the state of the purchaser instead. Thus, the Claimant States argued, in response to Justice Kagan, that because the Official Checks function the same way as money orders and traveler's checks, they should be treated in the same fashion, as they are prepaid, the purchaser

receives a written instrument, and the selling financial institution has no role in the transaction after it transfers the funds.

Furthermore, the Claimant States point out, in response to a question from Justice Jackson regarding whether address information is kept for the Official Checks, that while address information is collected for Official Checks, it is not transmitted to or accepted/kept by MoneyGram and that this case is an example of the relevant addresses not being kept for large dollar amount instruments. In fact, the Claimant States argued, in response to Chief Justice John Roberts's inquiry on address collection, that Congress's position in passing the FDA was that address collection would be too burdensome for the states and that it would be easier to simply have these instruments escheat to their state of purchase.

Additionally, the Claimant States made a point of arguing that the Official Checks are not excluded from the FDA as a third-party bank check because the Official Checks are not bank checks and MoneyGram is not a “third party” as the term was understood in 1974. The Claimant States reasoned that a bank check is an ordinary check or “an instrument that's signed by a bank officer . . . drawing on funds deposited in the officer's own bank . . . or drawing on funds of the officer's bank deposited in another financial institution” and that neither definition describes the Official Checks at issue. Moreover, the Claimant States asserted that Delaware argued that the third party referred to in “third-party bank check” is an outside issuer or payer; however, in the 1970's, “third party” meant, in connection with a financial instrument, a payee or party that ultimately got paid on an instrument. Thus, the Claimant States contended that the Official Checks are not excluded as third-party bank checks. Aligned with this reasoning, and after Justice Jackson brought it to the Court's attention, the Claimant States asserted that the FDA's legislative history suggests that the third-party bank check exception was thought to be a minor one and, therefore, including instruments that function as money orders in such exception would be inconsistent with the FDA's legislative history.

In answering Justice Thomas's question regarding Delaware's contention that a “parade of horribles” would occur if the Court were to accept the Claimant States' argument and Justice Alito and Justice Kagan's questions regarding how to categorize certain financial instruments, the Claimant States asserted that their definition of a “money order” includes only instruments that are prepaid, that do not ordinarily have relevant addresses kept as part of their business practice, and that have named payees. Thus, they stated a cashier's check, a teller's check, and a prepaid cash card would not necessarily be included in their definition and the suggested “horribles” of damage to the financial sector would not occur.

Considering the Claimant States' broad description of a “money order,” Justice Kagan asked “what's left for 'similar instrument?' ” Here, the Claimant States asserted that such language was

included in the FDA to serve as a “catch-all” provision and to prevent a simple label changing work-around scheme from having effect.

Also, Chief Justice Roberts inquired about differences between Official Checks and instruments already understood to be within the scope of the FDA. The Claimant States responded by arguing that Delaware's definition of a “money order” is too narrow. They argued that Delaware's definition only encapsulates one segment of the money order market and that Congress was referring to more of the market in the FDA, to include financial instruments sold at financial institutions, including those sold at high-dollar amounts and to banked customers, such as the Official Checks at issue.

Pork Producer's Dormant Commerce Clause Case Oral Arguments

Proposition 12 bans the sale of pork in California unless the sow from which it derived was housed with space allowances consistent with California standards. The National Pork Producers Council and the American Farm Bureau Federation (collectively referred to herein as “the Council”) filed an action for declaratory and injunctive relief on the basis that Proposition 12 violates the dormant Commerce Clause to the U.S. Constitution. In *National Pork Producers Council, et al. v. Ross*, 6 F.4th 1021 (2021), the Ninth Circuit Court of Appeals concluded that the district court did not err in dismissing the Council's complaint inasmuch as they failed to plead a dormant Commerce Clause violation. The Court of Appeals pointed out that “[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that direction. Indeed, some justices have criticized dormant Commerce Clause jurisprudence as being 'unmoored from any constitutional text' and resulting in 'policy-laden judgments that [courts] are ill equipped and arguably unauthorized to make,” *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 610, 618, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (Thomas, J., dissenting). Under our precedent, unless a state law facially discriminates against out-of-state activities, directly regulates transactions that are conducted entirely out of state, substantially impedes the flow of interstate commerce, or interferes with a national regime, a plaintiff's complaint is unlikely to survive a motion to dismiss.

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Even though the Council has plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide, it has not stated a violation of the dormant Commerce Clause under existing precedent.”

On October 11, 2022, Timothy S. Bishop argued on behalf of the Council that “Proposition 12 violates the Commerce Clause almost per se because it's an extraterritorial regulation that conditions pork sales on out-of-state farmers adopting California's preferred farming methods, for

no valid safety reason" and "fails the Pike test because it burdens interstate commerce for no local benefit." In response to questions from many of the Justices, Bishop argued that by conditioning in-state sales on out-of-state producers operating in a certain way Proposition 12 violates the Commerce Clause in contravention of U.S. Supreme Court precedent; "the rule derived from your cases, from Baldwin, from Healy, from Brown-Forman, from Carbone . . . " When questioned about the Commerce Clause, Mr. Bishop explained that "[m]aybe the Court got it wrong when it said that ... under the Commerce Clause, Congress doesn't have exclusive authority over interstate commerce, but it's too late to fix all of those things."

Following up on this point, Justice Barrett explained that "th[e] line of cases, the Baldwin line, is the most dormant of the Dormant Commerce Clause cases . . . Baldwin was decided in 1935, before Darby, before Wickard, and the idea of what constituted interstate commerce was very different then. We were trying to draw lines between interstate and intrastate commerce that don't exist anymore."

Mr. Edwin Needler, Deputy Solicitor General, U.S. Department of Justice, for the U.S. in support of the Council, began his oral arguments stating that "Proposition 12's sales ban is invalid under Pike because it imposes a substantial burden on interstate commerce without serving a legitimate local public interest." Justice Thomas asked Mr. Kneedler whether you could circumvent this problem by having national legislation? Mr. Kneedler responded in the affirmative. Justice Alito questioned whether the law applies to pork that is shipped into the U.S. from Canada and Mexico, and if so, "[w]ould it be tougher ... for a state to satisfy ... to survive a dormant Commerce Clause challenge when the challenge concerns international commerce?" Mr. Kneedler responded in the affirmative stating that "if a state law is expressly directed at interstate commerce, then, you know, its singling out foreign – not interstate – foreign commerce. It's singling out foreign commerce for special treatment, which I think under the Constitution and under the framer's interest, would be . . . a serious problem."

Michael J. Mongan, Solicitor General, San Francisco, argued on behalf of the California Respondents, that the "Commerce Clause does not prohibit . . . choice" (*i.e.,* California voters choice to pay higher prices to serve their local interests in refusing to provide a market to producers they viewed as morally objectionable and potentially unsafe. Furthermore, Mr. Mongan argued that the law "doesn't implicate the rule in Baldwin and Healey because it doesn't control prices in other states, and it doesn't violate the general principle against regulating wholly extraterritorial commerce." Mr. Mongan also argued that the Petitioners should "ask Congress to regulate under the express terms of the Commerce Clause, not for the Courts to expand the dormant Commerce Clause."

Takings Clause and Excessive Fines Clause Challenges

In *Tyler v. Hennepin County,* 26 F.4th (8th Cir. 2022), Ms. Tyler brought suit claiming that Hennepin County, Minnesota, violated the Takings and Excessive Fines Clauses of the Fifth and Eighth Amendments to the U.S. Constitution and such provisions under the Minnesota Constitution, when the county foreclosed on her home (a condominium in Minneapolis) and sold it for $40,000, collecting the full amount of her debt ($2,300 in delinquent property taxes, plus approximately $12,700 in interest, penalties and costs) plus a surplus of $25,000 as a windfall (the "Surplus"). Tyler's objection was to the retention of the Surplus. The Eighth Circuit Court of Appeals held that the County's retention of the Surplus following the sale did not violate the Taking's Clause of the Fifth Amendment to the U.S. Constitution. Specifically, the Court of Appeals concluded that "[w]here state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." The Court of Appeals also summarily dismissed Tyler's excessive fines challenge on the basis that it agreed with the district court's well-reasoned order on the issue.

The questions presented to the Court in *Tyler v. Hennepin County,* Docket No. 22-166, are:

> (1)) Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause?
>
> (2)) Whether the forfeiture of property worth far more than needed to satisfy a debt plus interest, penalties, and costs is a fine within the meaning of the Eighth Amendment?

Similarly, in a pair of cases before the Nebraska Supreme Court, *Continental Resources v. Fair,* 311 Neb. 184 (Mar. 18, 2022) and *Nieveen v. Tax 106et al.*, 311 Neb. 574 (May 13, 2022), the issue before the court was the constitutionality of the state of Nebraska's tax sale certificate process. As explained by the court in *Continental Resources,* "[i]f an owner of real property in Nebraska fails to pay property taxes, a statute allows the county in which the property is located to sell a tax certificate for the property to a private party. If, after a period of time, the owner of the real property fails to pay the taxes owed and the tax certificate purchaser complies with certain requirements, the tax certificate purchaser can obtain a deed to the property, free of any encumbrances."

In *Continental Resources,* in 2014, Mr. and Mrs. Fair failed to pay the property taxes they owed on their home in Scotts Bluff County, Nebraska. A year later, the county published a list of tax-delinquent properties in a local newspaper, which list included a description of the Fairs' home. The county treasurer sold a tax certificate for the property's unpaid taxes to Continental Resources on March 11, 2015 for $588.21. Continental Resources then paid the

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subsequent property taxes for the Fairs home. Per Nebraska law, Continental Resources waited three years from the date of the sale, and served the Fairs in April of 2018 with a "Notice of

Expiration of Right of Redemption" (the "Notice"). The Notice informed the Fairs that they had three months from the date of service of the Notice to redeem the property and that redemption would cost $5,268 – the total cost of the unpaid taxes, fees and interest. The Notice also stated that if the property was not redeemed that Continental Resources would apply for a tax deed and the right of redemption would expire. The Fairs did not make any payment within the three-month period and in July 2018, Continental Resources, applied for a tax deed. (During the district court proceedings, Mrs. Fair died. Accordingly, her husband Mr. Fair proceeded solely in appealing the lower court's decision.)

The Nebraska Supreme Court found that Mr. Fair's procedural due process rights under the Nebraska and U.S. Constitutions was not violated by the tax certificate sale. The Nebraska Supreme Court pointed out "there is no dispute in this case that Fair received actual notice in April 2018 that Continental had purchased a tax certificate for the property; that Fair had 3 months to redeem the property by paying the delinquent taxes along with interest and fees; and that if Fair failed to redeem the property, Continental would apply for a tax deed." Thus, it framed the question before it as "whether this notice was constitutionally sufficient" and answered such question in the affirmative. Specifically, the Nebraska Supreme Court "disagree[d] with Fair's contention that state and federal Constitutions required that he receive notice upon the sale of the tax certificate to Continental." In this regard, the court explains that a tax sale certificate purchaser obtains only the county's lien at the time the certificate is sold and has no immediate right to enter the property, use the property or dispossess the owner of the property. The court also notes that the taxpayer has the right to redeem the property by paying the debt owed to the county. The Nebraska Supreme Court found this three-month notice period to redeem the property after being served with the Notice by certified mail was constitutionally adequate under the procedural Due Process Clause of the 14th Amendment to the U.S. Constitution and Nebraska's Constitution, which prohibits the states and Nebraska, respectively, from depriving any person of life, liberty or property without due process of the law.

Mr. Fair also argued that the issuance of a tax deed to Continental Resources pursuant to the tax sale certificate statutes violated the Takings Clause of the U.S. and Nebraska Constitutions. As explained by the Nebraska Supreme Court, the Fifth Amendment to the U.S. Constitution states, "[N]or shall private property be taken for public use, without just compensation." The Nebraska Supreme Court concluded that a government's sale of its lien on tax-delinquent property, or the sale of the property itself, is not subject to a Taking's Clause analysis under U.S. Supreme Court precedence: "If taxes, as the U.S. Supreme Court has held, are not takings, we do not see how efforts to collect that tax, whether through the sale of a lien on the property or the sale of the property itself, could be characterized as a taking." The Nebraska Supreme Court also held that the state does not recognize a property interest in the surplus equity value of property after a tax certificate has been sold, the redemption period has expired and a tax deed is requested and issued; therefore, Mr. Fair's claim under the Takings Clause for just compensation failed.

Finally, the Nebraska Supreme Court considered Mr. Fair's argument that the transfer of title to his property to Continental Resources is an excessive fine prohibited by the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution because the value of the property was more than ten times the amount of money he owed in delinquent taxes. The court found that the "transfer of Fair's title to Continental lacks essential attributes of a 'fine,' as that term has been defined by the U.S. Supreme Court." As explained by the court, "[t]he U.S. Supreme Court has drawn a distinction between a penalty or forfeiture that is purely 'remedial' and one that 'can only be explained as serving to punish.' . . . The latter, according to the U.S. Supreme Court, is a fine under the Eighth Amendment. A forfeiture is remedial." Here, the Nebraska Supreme Court rejected Mr. Fair's argument that the transfer of his property was solely a form of punishment, citing among a few cases, the fact that the statutes provided more than 3 years after the tax certificate was sold for Mr. Fair to avoid the loss of the property by paying the outstanding debt.

In *Nieveen v. Tax 106 et al.*, the Nebraska Supreme Court relied on its ruling in *Continental Resources* to reject the taxpayer's argument that her federal and state due process rights were violated when her home was sold to a third party under the same Nebraska tax certificate sale process. The court stated, citing to *Continental Resources:* "[i]n that case, we held that due process did not require the delinquent taxpayer to receive notice at the time of the tax certificate sale and that it was sufficient the delinquent taxpayer received actual notice that a tax certificate had been sold, that he had 3 months to redeem the property, and that if the property owner failed to do so, the tax certificate holder would apply for a tax deed. The court also concluded that "[w]hether there should have been an additional administrative process – permitting a delinquent property owner, before the issuance of a tax deed, to claim the extended right to redeem . . . is a matter properly addressed to the Legislature." The Nebraska Supreme Court similarly rejected the taxpayer's Takings Clause and Excessive Fines Clause arguments citing again to its earlier decision in *Continental Resources.*

The Questions presented to the U.S. Supreme Court in *Fair v. Continental Resources* (Docket No. 22-160) and *Nieveen v. Tax 106 et al.* (Docket No. 22-237), are identical:

> (1)) Does the government violate the Takings Clause when it confiscates property worth more than the debt owed by the owner?
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> (2)) Does the forfeiture of far more property than needed to satisfy a delinquent tax debt plus interest and penalties and costs constitute an excessive fine within the meaning of the Eighth Amendment?

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1 U.S. Const. art. 1, §8, cl. 3.

2 In No. 145, the plaintiff is the State of Delaware; and the defendants are the States of Pennsylvania and Wisconsin. In No. 146, the plaintiffs are 28 States: Arkansas, Texas and

California, along with Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Utah, Virginia, Washington, West Virginia and Wyoming; and the defendant is the State of Delaware. In this Article, we refer to the defendants in No. 145, and the 28 States that are plaintiffs in No. 146, as the Claimant States.

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