Nos. 14-1597 & 14-1598 (consolidated)

United States Court of Appeals
for the First Circuit

No. 14-1597

TOWN OF BARNSTABLE

Plaintiff-Appellant

HYANNIS MARINA, INC.; MARJON PRINT AND FRAME SHOP LTD.; THE KELLER COMPANY, INC.; ALLIANCE TO PROTECT NANTUCKET SOUND; SANDRA P. TAYLOR; JAMIE REGAN

Plaintiffs

v.

ANN BERWICK, in her official capacity as Chair of the Massachusetts Department of Public Utilities; JOLETTE A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; KATE MCKEEVER, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; MARK SYLVIA, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources; CAPE WIND ASSOCIATES, LLC; NSTAR ELECTRIC COMPANY

Defendants-Appellees

No. 14-1598

HYANNIS MARINA, INC.; JAMIE REGAN; ALLIANCE TO PROTECT NANTUCKET SOUND

Plaintiffs-Appellants

MARJON PRINT AND FRAME SHOP, LTD.; THE KELLER COMPANY, INC.; SANDRA P. TAYLOR; TOWN OF BARNSTABLE

Plaintiffs

v.

ANN BERWICK, in her official capacity as Chair of the Massachusetts Department of Public Utilities; JOLETTE A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; KATE MCKEEVER, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; MARK SYLVIA, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources; CAPE WIND ASSOCIATES, LLC; NSTAR ELECTRIC COMPANY

Defendants-Appellees

(Continued on inside cover)

Appeal from the Final Judgment of the United States District Court for the District of Massachusetts, No. 1:14-cv-10148-RGS

REPLY BRIEF OF APPELLANT TOWN OF BARNSTABLE

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November 6, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Appellant Town of Barnstable ("Barnstable") adopts and incorporates by reference Parts I-V of the Reply Brief filed by Appellants Hyannis Marina, Inc., Jamie Regan, and Alliance to Protect Nantucket Sound. *See* Fed. R. App. P. 28(i). It files this separate Reply Brief solely to respond to the argument advanced by State Appellees that Barnstable lacks standing to sue state officials.

ARGUMENT

Barnstable Has Standing to Bring Its Claims.

For the first time, State Appellees contend that Barnstable lacks standing because it may not sue its parent state for federal constitutional violations. As State Defendants acknowledge, however, this Court has never so held. State Br. 56 n.18.

As an initial matter, the main case relied upon by State Appellees specifically distinguishes preemption claims from those brought under substantive provisions of the Constitution, and holds that municipalities *can* sue a parent state for violation of the Supremacy Clause. *See City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1255-56, 1270-71 (10th Cir. 2011) (cited by State Br. 55) (acknowledging and distinguishing *Branson Sch. Dist. RE-82 v. Remer*, 161 F.3d 619 (10th Cir. 1998), which held that "a political subdivision has standing to bring a constitutional claim against its creating state when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law," *Branson*,

161 F.3d at 628)). Other Circuits agree that a political subdivision can bring a preemption claim against its parent state. *See Rogers v. Brockette*, 588 F.2d 1057, 1068-71 (5th Cir. 1979) (permitting preemption claim); *S. Macomb Disposal Auth. v. Twp. of Wash.*, 790 F.2d 500, 504 (6th Cir. 1986) (stating that "[t]here may be occasions in which a political subdivision is not prevented … from challenging the constitutionality of state legislation," and citing *Rogers*); *but see Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1363-64 (9th Cir. 1998).*

Even as to the Commerce Clause claim, the rationale for prohibiting suits by political subdivisions against a state – that a federal court should not "interfere with a state's internal political organization" by refereeing an intramural political dispute, *Rogers*, 588 F.2d at 1070; *see also City of Trenton v. New Jersey*, 262 U.S. 182, 189-90 (1923) – does not apply in this case. Barnstable is not suing in its capacity as a political subdivision, but instead is suing in its capacity as a retail electric customer forced to pay above-market rates in the buildings it owns and operates – just like the other Plaintiffs in this case.

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* In a footnote, State Appellees suggest that the Federal Power Act provides no privately enforceable right to a reasonable rate. State Br. 56 n.17. As discussed in the Reply Brief filed by the other Appellants, however, Plaintiffs' claim is *not* that the rates at issue are unjust or unreasonable. Their claim is that the State acted illegally when it compelled NSTAR to enter a wholesale electricity contract on specified terms. State Appellees conflate these distinct claims. *See* Reply Brief of Hyannis Marina, Inc. *et al.* at 23-24.

What is more, in *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011), the Supreme Court allowed an *Ex Parte Young* suit by one state agency against another state agency to go forward, holding that "the Eleventh Amendment presents no obstacle to [the plaintiff agency's] ability to invoke federal jurisdiction on the same terms as any other litigant." *Id.* at 1642. It would be odd indeed for the Supreme Court to have issued that holding if a state agency were jurisdictionally barred from suing its sister agency in federal court, as State Appellees contend. Accordingly, Barnstable has standing.

CONCLUSION

For the foregoing reasons, and those given in Parts I-V of the Reply Brief filed by Hyannis Marina *et al.*, the District Court's judgment should be reversed.

November 6, 2014 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 628 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 34.0(a).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point font.

Dated: November 6, 2014

/s/ Joshua M. D. Segal
Joshua M. D. Segal

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2014, using the Appellate CM/ECF system, I electronically caused to be filed with the Clerk of Court for the U.S. Court of Appeals for the First Circuit the foregoing Reply Brief. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

/s/ Joshua M. D. Segal
Joshua M. D. Segal