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In the

Supreme Court of the United States

CAROL MAUREEN SOSNA, ETC.,

Appellant,

v. No. 73-762

THE STATE OF IOWA, ET AL.,

Appellees.

Washington, D. C.
October 17, 1974

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v.	:	No. 73-762
THE STATE OF IOWA, ET AL., Appellees.	:	

Washington, D. C.

Thursday, October 17, 1974

The above-entitled matter came on for argument at 10:03 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES H. REYNOLDS, ESQ., 630 Fischer Building, Dubuque, Iowa 52001, for the Appellant.

ELIZABETH A. NOLAN, ESQ., Assistant Attorney General of Iowa, State Capitol, Des Moines, Iowa 50319, for the Appellees

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Sosna against Iowa.

Mr. Reynclds, you may proceed when you are ready.

ORAL ARGUMENT OF JAMES H. REYNOLDS ON

BEHALF OF THE APPELLANT

MR. REYNOLDS: Mr. Chief Justice, and may it please the Court, first of all, this is a durational residency requirement case. It is a developing area of the law, as the Court is aware. We are raising the constitutional question of the Iowa durational residency requirement for access to the domestic courts of Iowa. It's an Iowa statute requiring one year residency before you have access to the courts. We are raising it --

QUESTION: Mr. Reynolds, is that precisely true? Straighten me out because I have a misapprehension here perhaps. Does one year residential durational requirement apply if the defendant is also a resident of Iowa?

MR. REYNOLDS: No. If both of the parties move into Iowa together, then it does not apply; only if one of the parties moves in and the other party is not a resident.

QUESTION: This is rather unusual as compared to most statutes, is it not?

MR. REYNOLDS: I believe it is.

QUESTION: Would the statute be harder for you to

attack if it applied across the board to a situation where a defendent was a resident?

MR. REYNOLDS: I think the narrower the classification the easier it is to argue on an equal protection question if there's no rational relationship to the narrow group that is excluded. And I think that ours, because it is a more narrow restriction, is probably easier to argue because of the fact that it applies only to nonresidents where there is a nonresident party, out-of-State party. In other words, if both moved into the State --

QUESTION: Even for a week?

MR. REYNOLDS: Even for a week.

QUESTION: Actual residence even for only as long as a week?

MR. REYNOLDS: Right. For some reason the State feels it has some compelling interest over parties which are -- when one of them isn't in the State.

QUESTION: Well, isn't that an obvious background, the divorce mill State problems that we had for a number of years when there were only about three States -- Florida, Nevada, I guess?

MR. REYNOLDS: I think that's probably true, but I think that probably the reason for it is the durational residency requirement has caused divorce mills to occur. I think the striking down of such durational residency requirements

will take care of that problem and that the States can litigate the proper status of those parties in the State where the real interest lies.

QUESTION: But isn't there quite a difference -- isn't the States different, quite different when both the husband and the wife come into the State and are subject to its jurisdiction, giving indications that they are going to make that the family home, as distinguished from your case?

MR. REYNOLDS: No. I think that in the instance that if we used the criterion that we advocate as the real jurisdictional question which the Court has said in the past to be the jurisdictional question, which is domicile, that the domicile of the party is the real interest which the State has, and the fact of the domicile of the other party is only peripheral to the interest that they have because of the many concomitant things that go with the marital situation, such as the severance, such as the custody, support, division of property, and the attendant other things that go with it, such as in Iowa we have a requirement of reconciliation, injunctions that would be necessary or proper to preserve the peace or property. And these things, we feel, are the real issue and that the citizen has in the divorce court, non-resident or a resident domiciliary of the State who cannot overcome the jurisdictional one-year requirement, he cannot have, for instance, the severance of the relationship which is

possible to a nonresident who moves in with his spouse and then the other spouse would, for instance, move out after the action has been commenced, if there is a severe reason for an immediate severance, we don't have to wait the 90 days that are normally required for divorce. But if one party was from out of the State, they would have to wait a full year and 90 days possibly, or at least a year, before they could have access to the court. The custody of the offspring -- and I feel this is very important and why many times access to the court is quite urgent because of the fact of the ramifications of the separate families if we don't make the ties cut off, that the ramifications and the effect upon children and the offspring of the marriage can be affected to a great extent and that therefore you should be able to get in, at least as far as support of the parties are concerned and that the custody questions can be litigated so you don't have the situation of parties running from State to State with children trying to get the other State to give them custody, that we could get these matters litigated and that the offspring could be better protected if they have a chance to get to the court, and the support of those persons, the division of the properties, so that there could be certain injunctory orders entered to preserve the status quo so that the disposition of the propert that the parties if they are living in another State don't dispose of the properties or do something with them, so that

when it comes time to take care of the offspring, that there are things available. For instance, in our statute, the counseling, there is no counseling. The State of Iowa has maintained that one of the purposes of the one-year residency requirement is that it is somehow going to preserve the union. We feel, however, that immediate access to the courts would allow the order for some type of counseling which may be more beneficial than having two parties in separate States sitting and wondering about the situation for a year.

QUESTION: You did present this question to the Iowa courts, I gather?

MR. REYNOLDS: We tried to.

QUESTION: You presented it in your pleadings, didn't you?

MR. REYNOLDS: We presented it in the pleadings, and the fact that we are required under the statute in question to plead the fact of one-year residency requirement --

QUESTION: And it was rejected, your claim was rejected?

MR. REYNOLDS: The claim was rejected by Judge Keck. He rejected it not on the basis that he passed on the question and as he said, he felt he wasn't in a position to pass upon the constitutional question when the statute upon its face seemed to be quite certain and he didn't want to go to the constitutional issue.

QUESTION: He didn't want to, but he rejected your claim. You presented it to him. Why didn't you appeal in the Iowa courts, carry the constitutional issue through the Iowa courts?

MR. REYNOLDS: Because of the status of the cases at the time, it appeared that the only preservation under a situation where there was little or no dispute about the statute itself, that the State courts have been very reluctant to get into the constitutional issue.

QUESTION: You could present it to them and they could reject it.

MR. REYNOLDS: We could present it to them again, and reject it, but the court system then was in fact depriving, under 1983, was depriving the citizen of his civil rights which had been by history the prerogative or had been -- the place it had been litigated was in the Federal court, and therefore the Federal court would be the proper forum to litigate this when in fact the State law which was depriving a citizen of the United States of a constitutional right --

QUESTION: You felt that within your pleadings in the State court you challenged the constitutionality of the statute?

MR. REYNOLDS: No. The constitutionality of the statute was raised by the special appearance of Mr. Sosna, who then raised the special appearance, and then it was litigated

not by us but by them, because the question had been raised as to his right to be litigated.

QUESTION: I see. It was then litigated.

MR. REYNOLDS: It was then litigated.

I don't like the term "litigated". I don't feel it was litigated. We tried to present the case and Judge Keck said that he didn't want to pass upon that, and I don't think he ever intended to make a judicial decision on the constitution issue.

QUESTION: What did he do to your complaint?

MR. REYNOLDS: Dismissed it.

QUESTION: Well, then, certainly he decided that you have no claim.

MR. REYNOLDS: No, he didn't decide we had no claim. He just said that the statute says that you cannot have access to our courts, period.

QUESTION: Why aren't you bound by that? Under the law of res judicata why are you free to go into Federal court and relitigate that?

MR. REYNOLDS: Because we are going back into the Federal court and litigating really the State. The original party was Mr. Sosna. We have now different parties, and we are talking about the State, the State under color of law is trying to deprive us of a constitutional right, the right of access to the courts to litigate a very essential and

necessary right, which is that of the marriage relationship and all of the concomitant things that arise from it, we feel a very basic right.

QUESTION: Here was a pending case in a State court system that wasn't final? I mean you had appellate opportunities to carry this constitutional question through the State court system. Why should a Federal court get into it at that point?

MR. REYNOLDS: Because of the fact of the status of the law at the time, the law was very certainly put to the question of durational residency requirements had been struck down in the past by other Federal courts, and I think if you look in our brief, you can see when you split up the cases between those that have sustained the durational residency requirement and those that have struck it down, it has been almost a majority in the State courts, and the Federal courts however have always vindicated the rights, the constitutional rights, because that had been the proper forum. And when it was, as the court said, a very certain statute on its face, there wasn't any way normally that you say, O.K., we will go litigate it further in the State court if there is any chance that you might have a chance of changing the opinion or having the matter, at least in 1983 cases, that there could be some construction of the statute which would in fact give you vindication of those rights and that there would be no such vindication, then it's superfluous to require them to proceed.

QUESTION: How can you assume that the Supreme Court of Iowa would not apply the United States Constitution properly? How can you assume that when they took an oath to support the Constitution of the United States and the State of Iowa?

MR. REYNOLDS: That's true.

QUESTION: You say they won't follow the Federal Constitution.

MR. REYNOLDS: No, what I was saying was --

QUESTION: I thought you said they wouldn't decide in your favor.

MR. REYNOLDS: I think it has been historically true that they can find a decision or a reason more compelling which would justify the durational residency requirement.

QUESTION: You say"they"; who do you mean?

MR. REYNOLDS: The Supreme Court of Iowa could find a more sufficient reason -- as in our particular case, two of the three Federal judges found -- that this was somehow going to preserve the marital situation. If you look at the decisions which have sustained the -- the State court decisions which have sustained these durational residency requirements, they have gone from pillar to post on the reasons that they felt that somehow was going to sustain these -- for some reason we are going to help the marriage or we are going to preserve a compelling State

interest which --

QUESTION: Has that been challenged at the Iowa Supreme Court --

MR. REYNOLDS: The durational residency --

QUESTION: -- on Federal constitutional grounds?

MR. REYNOLDS: Not to the best of our research, it hasn't. The Iowa court has spoken, however, over and over again in the past --

QUESTION: How can you imagine what they are going to do?

MR. REYNOLDS: Well, I suppose you would just have to, as a lawyer, look at what the history has been.

QUESTION: Of Iowa?

MR. REYNOLDS: Well, the history of State court decisions.

QUESTION: This is Iowa you are talking about?

MR. REYNOLDS: Right.

QUESTION: You have a unique statute in Iowa, you have indicated to Justice Blackmun.

MR. REYNOLDS: Well, it's unique in regards to durational residency requirement, but I don't think it therefore makes it any more easy for the Supreme Court of Iowa to decide it.

QUESTION: Then how are the actions of other State courts with different statutes relevant to this issue?

MR. REYNOLDS: Because of the fact that they have always found that there was some compelling State interest, which we have felt there was no such compelling State interest and that the Federal courts whenever presented with the case always found that there was not a compelling State interest, that the history of the Federal decisions in regard to the marital relationship was that it was one of the most basic of the relationships, and therefore to deprive someone under color of law, whether by a court or some residency requirement, was in fact one of the very basic things that was at issue and therefore the line of cases, the Shapiro and welfare cases and Dunn and the voting cases and Memorial Hospital and the non-emergency medical care, that these were all the same type of situation.

QUESTION: What you are saying is, you felt there was a more favorable atmosphere for your cause on the Federal side.

MR. REYNOLDS: I felt a more favorable atmosphere because of the fact that that has been the forum --

QUESTION: I know why, but on the other hand you started your action on the State side and chose not to appeal.

MR.REYNOLDS: Well, if we didn't start it on a State action, we would be in a rather moot position to go in and say, now, we would like to start a divorce but we can't because of the residency requirement. If you don't start it,

you could then turn around and say, How do you know you really have a broken marriage?

QUESTION: Isn't there a Federal declaratory judgment statute?

MR. REYNOLDS: I think there is -- sure, there is a declaratory judgment statute, but the question is whether or not it's really at issue then. Is it a judiciable situation or controversy if you haven't in fact brought your divorce action? How do you know for sure you want a divorce?

QUESTION: Do you have a separate maintenance statute in Iowa?

MR. REYNOLDS: There is a separate maintenance statute in Iowa.

QUESTION: You chose not to follow that one either?

MR. REYNOLDS: That also has a requirement.

QUESTION: Mr. Reynolds, may I ask you, I notice that the defendant from the Federal suit, that's the State, and Judge Keck expressly pleaded -- I'm looking at page 23 now of the appendix, paragraph (d), "The suit involves primarily State laws or constitutions, and this Court should abstain until Iowa Courts have ruled on such issue."

I don't see any reference in either of the district court opinions to that issue. Was that briefed and argued before the district court?

MR. REYNOLDS: The issue of the --

QUESTION: Whether or not the district court should have abstained pending resolution of this constitutional question by the Iowa courts wasn't briefed even?

MR. REYNOLDS: No.

QUESTION: By either side?

MR. REYNOLDS: I don't believe it was.

QUESTION: Arguably the question is whether or not the Younger v. Harris kind of approach to a pending criminal case when one seeks to go into a Federal court should be applied where civil proceedings are pending in the State court.

MR. REYNOLDS: The criminal part of it, as an old prosecutor I know how important it is to keep your prosecution going once you have got the machinery going, and therefore that interest is far different than that of a civil litigation where you are alleging that the civil litigation and the judge under color of State law is in fact depriving a citizen of his basic Federal constitutional right. And I think that's quite different because the nature of the criminal process, which is different than the civil process and therefore rises above and maybe is a more compelling State interest in the prosecution --

QUESTION: I suppose that if you had immediately after this trial court judgment, which you didn't appeal, if you had filed a declaratory judgment action against the other

party to this marriage in a State court in Iowa seeking to have the statute declared unconstitutional and the defense of res judicata would have been raised, it would have been sustained under Iowa law or any other law, wouldn't it?

MR. REYNOLDS: On res judicata as to issue or claim or parties?

QUESTION: Well, with the same parties. You couldn't have brought another declaratory judgment action or another piece of litigation in the Iowa courts without facing res judicata claims, could you?

MR. REYNOLDS: I think if we had brought the case against Iowa as against Mr. Sosna, I think we could.

QUESTION: I am talking about the other party to the marriage.

MR. REYNOLDS: I don't know how I could bring a declaratory judgment action against another party to the marriage.

QUESTION: Especially after your claim had already been decided.

MR. REYNOLDS: The marriage situation, you are strictly litigating the marriage situation. You can't get a declaratory judgment on that.

QUESTION: If you had brought a declaratory judgment action on the constitutionality of the statute and that claim had already been decided in your divorce action.

MR. REYNOLDS: Right.

QUESTION: But you think the real thing that saves you is that you were litigating with Iowa rather than with the other party to the divorce action.

MR. REYNOLDS: Right. It's a 1983 case. We are saying that the State by enacting a statute is in fact depriving us of our constitutional rights, and we have joined Judge Keck in it because of the fact that he under color of law is in fact depriving us of a basic constitutional right. Otherwise you might as well throw 1983 out the window if you are going to say if you bring a State court action and the judges use the State court law to deprive you of your constitutional right, you can't raise a declaratory judgment question as to whether or not that State law is in fact --

QUESTION: Appeal it and then you could file for cert here.

MR. REYNOLDS: That is an alternate procedure, yes.

QUESTION: What you really did, instead of appealing to the State court, you are appealing to the Federal district court.

MR. REYNOLDS: No, we are not really appealing to the Federal district court; we are asking --

QUESTION: What is the difference?

MR. REYNOLDS: Well, because we are litigating -- we started out with a divorce action. We said we wanted a

divorce. We wind up having the defense being forced upon us and the fact you haven't been in there a year and litigating our constitutional rights in the State court. Now, we then have to turn around to the Federal court and say, We have been deprived by the State court under the defense of no jurisdiction and therefore we would like to have this court declare and enjoin the court from using that defense and from throwing us out of court, so we can have access to the State court.

QUESTION: If you had gone to the Supreme Court of Iowa, what would you have asked for? The same, wouldn't you?

MR. REYNOLDS: We would have asked for an injunction against maybe mandamus or something like that and then --

QUESTION: But couldn't you have appealed that one? Direct appeal.

MR. REYNOLDS: Direct appeal to the Iowa Supreme Court.

QUESTION: Yes, sir.

QUESTION: Dismissal.

MR. REYNOLDS: Yes, we could have appealed that.

QUESTION: And instead of that you appealed to the Federal court.

MR. REYNOLDS: We went in and asked the Federal court to declare and enjoin the State court --

QUESTION: ... faster that way?

MR. REYNOLDS: No, I don't think so. At least it

has been my experience with three-judge Federal panels that if you've got civil rights that are being deprived under color of law by a State, the quickest way you can do it, and it was thought to be that by the Congress, was to enact 1983. And that, to me, I know is the quickest way to vindicate your rights if you are being abused by the State.

QUESTION: That brings up another related matter. Your client has now been a resident of Iowa for much more than a year, is that not so?

MR. REYNOLDS: I believe so.

QUESTION: Now she satisfies the requirement, does she?

MR. REYNOLDS: She has, yes.

QUESTION: And she gets jurisdiction of the husband, the defendant, by publication?

MR. REYNOLDS: Right. And we could probably litigate the status in Iowa but not the questions of personal jurisdiction as to non-Iowa in rem type things. I mean, the status is in Iowa, but anything else is still in New York. Yes, you can probably get it terminated if she is willing to give up everything, the questions that would go with it.

QUESTION: Won't she get the same thing right now as if we would knock the statute out?

MR. REYNOLDS: That's the whole point. You have to wait the year and it's --

QUESTION: She's waited the year.

MR. REYNOLDS: Yes, but there were important things that --

QUESTION: She can get the divorce right now.

MR. REYNOLDS: But there were important things that should have been litigated that never were, for instance, the right and support of those children should have been litigated and not having to wait a year while maybe Mr. Sosna might take up other relationships.

QUESTION: Can it be done now?

MR. REYNOLDS: Pardon?

QUESTION: Can it be done now?

MR. REYNOLDS: It can be done now, yes, but --

QUESTION: All of them? What is there that relief in this Court will give you that you don't have as of right now?

MR. REYNOLDS: Declaratory judgment, declaratory of the constitutional right of the --

QUESTION: That she could have had the divorce before.

MR. REYNOLDS: Right.

QUESTION: And what good does that do her?

MR. REYNOLDS: This particular case, this particular plaintiff in the class action? Well, this particular plaintiff, her situation has been resolved by time, by the length of time

it takes to litigate the matter. But there are other situations --

QUESTION: And that doesn't give you any problem.

MR. REYNOLDS: What doesn't give me any problem?

QUESTION: The fact that it's moot so far as she is concerned.

MR. REYNOLDS: No, because --

QUESTION: Is there any other named party?

MR. REYNOLDS: As Judge Stephenson said --

QUESTION: Is there any other named party in the class?

MR. REYNOLDS: No, I believe not, but I believe the class was acknowledged and never challenged by anyone up to this point.

QUESTION: Did anybody else intervene?

MR. REYNOLDS: No. We have had plenty of calls about people that wanted to.

QUESTION: Suppose it's moot as to the named party, what happens to the class?

MR. REYNOLDS: I believe that there is precedent for the class; if nothing else, it is to remand it to the court again and let other members of the class join in.

QUESTION: What case is that?

MR. REYNOLDS: I think it was Babcock v. Wilson. I don't have the --

QUESTION: That's all right, we can find it.

You admit that the named party does not need any relief now from this Court?

MR. REYNOLDS: She herself?

QUESTION: Yes.

MR. REYNOLDS: Not so far as the Iowa court. She in fact has gone and got her divorce and had to go back and litigate the matter, take a bus back to New York and had to litigate her --

QUESTION: You say she has got her divorce?

MR. REYNOLDS: Yes. In fact, in New York. She had to go back to New York and litigate --

QUESTION: Can she get a divorce in Iowa if she has already gotten one in New York?

MR. REYNOLDS: That's a good question.

QUESTION: It's no problem for me at all.

MR. REYNOLDS: Well, Cooper v. Cooper raises the question, which is an Iowa decision, about a doctor from Iowa that went out to Nevada and got a Nevada divorce, and the Iowa court said, We can still -- our support judgments and personal judgments in regard to support and so forth, they are still going to stand, but we acknowledge the divorce in Nevada.

Now, under Iowa law, I question as to whether or not she can get a New York divorce and might have a different question as far as the State of Iowa under the present status

of Iowa law. I believe Cooper v. Cooper? was a 73rd case.

QUESTION: As far as the support of the children go.

MR. REYNOLDS: Pardon?

QUESTION: So far as the support of the children go.

MR. REYNOLDS: Right. In other words, they granted the divorce and the court there used their powers of determining domicile of the doctor who left in October, went to Nevada, got a divorce, came back in January, and they went through the question as to whether or not it was domicile, and they said, yes, it was domicile in Nevada sufficient for the Nevada court to have jurisdiction, we will acknowledge his divorce --

QUESTION: Is there anything that she can get from us that she can't get from the Iowa court right now, from this very same judge you went before?

MR. REYNOLDS: No. She herself, no, but the class to which she is a member, I think still can, because I think as the State has admitted in their stipulation of facts that it is a group so numerous, more numerous than is able to be counted, and I think there are numbers and numbers of people who have marital relations which are at question and that need immediate access --

QUESTION: We have said on several occasions, Mr. Reynolds, that a person can't represent a class of which he is not a member, and I think that would probably be true

of your client now. Whatever the class might be of people awaiting Iowa divorce requirements, your client certainly is no longer a member of it.

MR. REYNOLDS: At this present status, yes, she would not be, but the class itself, and I would urge that if the Court wants to duck the question, they would send it back so that other members of the class who would be members would in fact be able to join in the matter and to bring the matter back before the Court.

I would like to reserve 5 minutes for rebuttal, if possible.

QUESTION: Why couldn't these people file their own lawsuit?

MR. REYNOLDS: I suppose they can, but as we have indicated, it's a matter of urgency and necessity and that's the basic question about the marital relationship. It's not a matter of waiting a year, because by that time the damages are done as to the children, the property, the relationship itself has deteriorated, and these are matters that need .. instantly. That's the whole crux of the question.

MR. CHIEF JUSTICE BURGER: Very well.

Miss Nolan.

ORAL ARGUMENT OF ELIZABETH A. NOLAN ON BEHALF OF THE APPELLEES

MISS NOLAN: Mr. Chief Justice, and may it please

the Court, I am here on behalf of the State of Iowa to urge the affirmance of the court below. The Federal district court there did take on this civil rights action, and as its opinion clearly states, it was convinced --

QUESTION: Would you raise your voice a little, Miss Nolan.

MISS NOLAN: Yes, sir.

It was convinced that the compelling interest test had been satisfied and that the State of Iowa did meet all of the requirements that have been set as standards in the recent cases determining whether or not when a person is newly arrived in a State it has access to its courts and access to its rights given to citizens.

The matter below was at one time pled with a view toward the abstention doctrine.

QUESTION: And did you argue it?

MISS NOLAN: We didn't argue -- I did not take part in the hearings below, but it's my understanding it was not argued. And as a matter of fact, when research was done on cases and the various standards that might come into play, it was decided that abstention was probably not the proper thing in this particular case, that the State could meet its burden and that it would be of some value in this area to have a Federal court ruling on the case being litigated.

In this connection, Mr. Justice White, you asked

if there was a reason for the Federal court to come in and hear cases of this nature when it was perfectly possible for the State courts to determine the constitutionality of their own statute. And I can only say to that that it appears to be a current practice, and that the name of one case I can't pronounce, but it's a Hawaiian case, it's been decided since Whitehead v. Whitehead, and in that instance both Federal courts and State courts have looked at this very same question. And so for that reason we abandoned our position of abstention in this case.

QUESTION: And did you argue, in any event, collateral estoppel based on the conclusion of the proceeding before Judge Keck in the State court?

MISS NOLAN: No, I don't believe that was argued as a matter of collateral estoppel. Judge Keck's decision there was one which we believe was thoroughly grounded in the law. It was a well-reasoned decision, and that there, too, all of the requirements of the Federal constitutional protections for the rights of individuals had been met.

QUESTION: Yes, but what I was getting at, Miss Nolan, was whether you relied on that conclusion of Judge Keck's disposiing adversely to this petitioner.

MISS NOLAN: To the plaintiff?

QUESTION: Yes. The constitutional question,you relied on that as collateral estoppel in this Federal court.

MISS NOLAN: Well, I would say, representing Judge Keck in his position, that he had acted under color of State law, yes, I guess we did.

QUESTION: Miss Nolan, did you acquiesce in bypassing your own State court? Do you think that's .. by the Attorney General?

MISS NOLAN: I don't, Mr. Justice Marshall. I think that here, however, a statement was made just previously to my arising, and that is that the plaintiffs have the right to go to the Supreme Court of Iowa in this matter. Actually, their time for appeal has expired. I don't think that is any longer available to them.

QUESTION: All of our questions were directed to their right to go to the Supreme Court of Iowa at that time, not now.

MISS NOLAN: At that time, yes, sir, I think they did have that right.

QUESTION: Is your answer to Justice Marshall that the State of Iowa is perfectly willing to bypass the State Supreme Court and go into Federal court?

MISS NOLAN: The State of Iowa in the last 10 years has done a great deal to liberalize its divorce laws. We also would like to know where we stand. We believe that our Supreme Court would affirm Judge Keck's decision in this particular case. We don't have any reason to appeal that

decision. On the other hand, if the plaintiffs in that case chose to abandon their appeal and they bring their action in another forum, why, we did come to that forum with the hope that this might serve some benefit both in the State of Iowa and in general in resolving these particular requirements for the protection of civil rights.

This Court is well aware that since Pennoyer v. Neff and the Williams v. North Carolina there has been a great deal of controversy about divorce actions. And when the Iowa legislature, starting about 1967, undertook a study of the divorce laws with the purpose of reforming them in the State of Iowa, they were well aware of the conference work on the Uniform Divorce Act and also they were aware of the decisions of this Court, particularly Eston v. Eston and the Vanderbilt v. Vanderbilt cases which talked in terms of divisible divorce and accommodation of the parties in all of these matters. And it was for this purpose that we abandoned our abstention doctrine in the lower court and attempted to meet what the Fifth Circuit now has seemingly in the Makres v. Askew case: coming from Florida, what seems to be a unitary standard showing compelling interest and overriding significance in all matters whether they arise from due process or from some other incident equal protection of the law.

In the case in Iowa we feel that our statute is tailored to minimize overbredth by applying the durational

residency rules only in those cases where the respondent is not a resident and cannot be served personally in the State. For this reason we feel that we have in re-enacting a requirement that has long been on the books of Iowa helped to formulate a valuable standard, and we have been pointed out in the Uniform Marriage and Divorce Act as being one of the original States to take part in this kind of uniformity in this area of the law. And for this reason the Federal district court action was argued by the State.

QUESTION: Miss Nolan, has the Supreme Court of Iowa in any other case dealt with the constitutional validity of this statute? I think Mr. Reynolds was asked that question, but I didn't get his answer.

MISS NOLAN: Well, in Judge Keck's decision, which is set out in the jurisdictional statement, there is a reference to Korsrud v. Korsrud, that's in 242 Iowa, I believe, 45 NW2d, I think it is. In any event, that case involved a petitioner who originally was a resident of the State of Iowa. He took up residence in Hawaii and attempted to obtain a divorce there. Then he came back to the State of Iowa on being advised out in Hawaii that Iowa was the proper place to bring his action and obtained a divorce without informing his spouse who later came back and contested the validity of that divorce on the basis that the court had not had jurisdictional -- the fact of jurisdictional basis for giving the

divorce, and that order was invalidated. We find this from our own experience in Iowa, so --

QUESTION: So the court applied the statute. You don't know if the validity of the statute itself was attacked in that case.

MISS NOLAN: The Supreme Court did test the validity of that statute at that time and held that there was a sham domicile pled and it was a victim of fraud, that the court was a victim of fraud.

QUESTION: The court applied the statute.

MISS NOLAN: The court applied the statute.

QUESTION: But do you know whether or not the constitutional validity of the statute was attacked in that case? Does it appear from the opinion or anywhere else?

MISS NOLAN: In my recollection it was attacked only on the basis of whether or not the court had jurisdiction. But I think that is essential to the constitutional validity of that particular statute.

QUESTION: The facts were litigated, I guess, that were in issue in that case.

MISS NOLAN: That's right.

I think it should be mentioned here also that in the district court this petitioner came in and the court found that not only did the petitioner fail to allege the one year's residence that was mandatory under the circumstances of that

particular action, but that also the plaintiff failed to plead that her residence in the State had been in good faith and not for the purpose of obtaining marriage dissolution. This is not an issue in this particular case, but both of these requirements are mandatory under the Iowa dissolution of marriage statute.

QUESTION: How long has this statute been on the books? You said that Iowa has recently been in the process of changing its divorce law, domestic relations law.

MISS NOLAN: Our dissolution statute was enacted in 1970 and it has re-enacted this particular provision for the protection of the absent spouse so that due process will be accorded which was in the law previously. I don't know how far back that goes. It appears to go back at least into the 'fifties. I'm sorry, I didn't research that.

QUESTION: Is the Iowa statute based on the uniform law?

MISS NOLAN: Well, I would say that as close as uniform laws are uniform, Iowa's statute is the uniform law, yes. It contains requirements that there be an allegation of the breakdown of the marriage relationship. This is also one of the reasons that we were interested in pursuing this in the Federal court because we felt that it was necessary to determine that the State of Iowa did have jurisdiction over the marital status. In this particular instance it appears

from the allegation in the Federal action that the plaintiff -- and from the answers to the interrogatories, also -- that the plaintiff's marital relationship with her husband had broken down somewhere outside the State of Iowa and some several months prior to her relocation in the State of Iowa. And we felt it was questionable as to whether or not there actually was a jurisdiction over the marital status in the State of Iowa, although one of the parties alleged to be domiciled there.

QUESTION: That wasn't in the Federal court, was it?

MISS NOLAN: I believe it was, sir.

QUESTION: I thought the Federal court was just on the statute, not on the divorce. The Federal court didn't give a divorce, did it?

MISS NOLAN: There were interrogatories propounded and answered in the Federal court action, and I believe this information is contained clearly in the answers to the interrogatories.

QUESTION: What you really wanted was the Federal court to put its stamp of approval on the statute.

MISS NOLAN: We appeared in that action as defendants.

QUESTION: But that's what you wanted.

MISS NOLAN: We would be happy if the court would --

QUESTION: What you really want is an advisory opinion, don't you?

MISS NOLAN: Pardon?

QUESTION: You want an advisory opinion from the Federal court, don't you?

MISS NOLAN: The action that was brought was for a declaratory action, for a declaratory judgment.

QUESTION: I mean, the action of the State of Iowa in abandoning abstention and everything else, what you really wanted was a stamp of approval, didn't you?

MISS NOLAN: I would say yes, that is true. The State of Iowa had --

QUESTION: I didn't know the Federal courts were here to grant advisory opinions. I didn't know that.

QUESTION: You were the defendant.

MISS NOLAN: That's correct.

QUESTION: You didn't go into the court.

QUESTION: She agreed.

QUESTION: Not so very long ago, as time goes, the prevailing law was that a wife could not acquire a separate domicile. That was the prevailing domestic relations law, that the marital domicile was the husband's domicile and that so long as there was a marriage between the two the wife was incapable of acquiring a separate domicile anywhere. Do you know if any States still have that rule?

MISS NOLAN: I don't know. I don't think that's been the rule in Iowa for some time because our statutes do prevent the court to take jurisdiction --

QUESTION: Well, obviously Iowa does.

MISS NOLAN: Is domicile.

QUESTION: Um-hmm. I say, the rule that I just summarized used to be the prevailing rule in domestic relations law. You don't know --

MISS NOLAN: I have no knowledge of other States in that particular regard.

QUESTION: Miss Nolan, you heard the discussion of the mootness issue. Mrs. Sosna has now been divorced. There is no other party in the class action. What is your position on the mootness question?

MISS NOLAN: Well, my position on this question before this Court is that there appears to have been a proper appeal from a district court order, and that this Court does have authority and power to affirm that lower court decision, which is what we ask.

With respect to the class action as such, I think that entire matter has now been made moot.

QUESTION: You think it has been mooted?

MISS NOLAN: I think so. But I think the appeal is preserved, or was properly preserved.

QUESTION: You think the class action is moot, but the appeal is preserved.

MISS NOLAN: I think so.

QUESTION: Is the controversy between the husband

and the wife or between the wife and the State of Iowa?

MISS NOLAN: The controversy was --

QUESTION: Is, today, right this minute, at a quarter to eleven. What controversy exists now?

MISS NOLAN: I feel that the petitioner in the original action, although not divorced in I assume the original State of Iowa, would have only the controversy grounds that existed at the time the action was originally brought,and that is to have the question determined under the civil rights sections of the Code and then to pursue any decision through appeal to the highest court in the land.

QUESTION: We have held that a decision, say, if a New York court on a divorce matter would not find, say, Iowa on the question of support of children, that that is not res judicata.

MISS NOLAN: Are you referring to the divisible divorce standard?

QUESTION: I am just trying to get you over this little hedge.

MISS NOLAN: Thank you, I appreciate it.

I don't have the answer, really, to the question. I assume that this appeal was brought in good faith and that the court took jurisdiction of it in good faith.

QUESTION: Are the children in Iowa now?

MISS NOLAN: Pardon me?

QUESTION: Are the children in Iowa or New York?

MISS NOLAN: I do not know.

QUESTION: Are any of the parties in Iowa now?

MISS NOLAN: As of this morning it sounds like they aren't other than Judge Keck and the State of Iowa.

QUESTION: I'm not very clear whether the State of Iowa is urging or not urging Federal jurisdiction, here. You leave me in a state of confusion on it.

MISS NOLAN: The State of Iowa's position on the Federal jurisdiction question is that the United States statutes appear to give to the Federal courts the power under the civil rights law to determine questions of violations of constitutionally protected rights of individuals where the violations occur under color of State law, and this is the way this case was originated and this is the way this case was argued in the lower court.

QUESTION: Many of the lower Federal courts on class actions where the named party has dropped out of the case remand the case to the district court where the case started for an opportunity for others of the class to join. You haven't briefed that.

MISS NOLAN: I have not briefed that and --

QUESTION: Are you familiar with our decision, I think it was last term in the Burney case?

QUESTION: Burney v. Dubiana, two terms ago.

MISS NOLAN: In all this time, no other party has come forth to join this class.

QUESTION: I know that. As I recall the Burney? situation, it was not unlike this one and I think what we did was send it back to give others of the class an opportunity to intervene. As far as the main party was concerned, as I recall Burney?, like this one, it would appear, the case was no longer a case at all, no case of controversy. You don't ask us to do that here.

MISS NOLAN: I don't ask you to do that.

QUESTION: You have won below and you want to hang onto that.

MISS NOLAN: We would be happy with that decision.

QUESTION: Miss Nolan, do you know when the divorce took place?

MISS NOLAN: When the divorce took place? I didn't hear about it until this morning. Evidently it has taken place in New York State.

QUESTION: But is it since we noted probable jurisdiction? The answer is yes?

MR. REYNOLDS: Yes.

QUESTION: We had a special request that the parties address themselves to the Younger v. Harris problem, was that not so?

MISS NOLAN: Younger v. Harris, we would contend that

had they pursued this appeal through the State court, Younger v. Harris would be applicable here. But on the other hand there seems to be an overriding interest in getting some kind of certainty append to these types of jurisdictional questions.

QUESTION: If the Iowa courts had sustained the statute against the Federal claim of unconstitutionality by the litigant, there would have been the right to appeal here to this Court. And the suggestion is that if there is pending State litigation on which the issue is being litigated, th it should be pursued through the State courts and then brought here. But Younger, at least in part, is based on the notion of protecting State interests, and it's an expression of comity to the State court system, and if the State doesn't want it, I suppose they don't need to have it.

You haven't pleaded res judicata or collateral estoppel which is normally an affirmative defense.

MISS NOLAN: That is correct, we did not.

QUESTION: What I gather from what you have told us, Miss Nolan, while you pleaded the Younger point from that provision of paragraph (d) that I read, you have abandoned it. You abandoned it below and you abandon it here.

MISS NOLAN: That's correct.

QUESTION: As Justice White said, since that doctrine protects State interests, if the State doesn't want to be protected, I guess we don't apply the doctrine.

MISS NOLAN: We did abandon it below.

QUESTION: Aside from the point of view of the State, isn't the decision of the Supreme Court of Iowa just as good a source of certainty as the decision of a three-judge Federal court?

QUESTION: If not better.

MISS NOLAN: It is, but we did not have the opportunity of taking this case to the Iowa Supreme Court.

QUESTION: That's right. You weren't able to go to the Supreme Court.

MISS NOLAN: That's right.

QUESTION: But you could have hung onto your Younger point and made them take it.

QUESTION: There was no pending litigation in the State courts. The State trial court had decided the case, it had not been appealed, the time for appeal had expired, there was nothing pending in the State courts, not as the Younger case, even assuming Younger applies to civil litigation.

QUESTION: Miss Nolan, you can't abandon the moot point, can you? I mean, abandon everything else, but you can't abandon that, can you? I mean, if a case is moot, it's moot.

MISS NOLAN: The case is moot, but in order to present the other side of this argument before this Court

we appear.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Reynolds?

MR. REYNOLDS: Yes, I do, your Honor.

REBUTTAL ARGUMENT OF JAMES H. REYNOLDS

ON BEHALF OF THE APPELLANT

MR. REYNOLDS: I believe I do have the case of Cox v. Babcock and Wilson, 471 Fed.2d, page 15, of which they did refer the case back to the lower court where --

QUESTION: I was referring to the decision of this Court, and the one in Burney.

MR. REYNOLDS: Right. But I would like to point out to the Court that in Boddie v. Connecticut, which is the other similar case to this in which the ddvorce was terminated or was not restarted was because of the fact -- or was allowed to proceed was because of the failing to pay the fee, which is similar to the situation here, and it was never raised by this Court when they determined Boddie v. Connecticut, and it kind of catches us here after the jurisdictional statement and the matter has already been litigated with a whole new case when we come up before the Court. But the whole thrust of our argument and the argument now is that somehow that federalism or comity or judicial husbandry is going to be affected by you not making a decision on this matter is not

the case. When you look at the fact that there are seven or eight State court decisions all one way and the Federal court decisions are the other way with two of the most recent ones, Alaska and I believe Massachusetts, finally coming our way and in fact the Florentino case in Massachusetts even refer to the fact that the Federal court, a three-judge panel, had made a decision and they were very intelligent men and it may have to even give some deference to their opinion.

QUESTION: Did the Fifth Circuit go against you recently?

MR. REYNOLDS: If it did, I didn't catch it.

QUESTION: As cited by your opposition in her presentation, albeit a shorter period, a six-months period.

MR. REYNOLDS: Is that Shiffman v. Askew in Florida? I believe so. That one decision, and the Iowa decision are the two Federal decisions which are against us. I believe they had been decided at the time. And we would urge that in light of the decision in England v. Louisiana Medical Examiners?, a 1964 case, if you are going to apply this doctrine in 1983 cases, that you at least except our case and maybe apply it to future cases, but that at least as far as ours is concerned, since it was never raised at the lower level, that we not be barred from a decision by the Court at this time and that if the injunction is not to be granted, at least the declaratory judgment part is to be granted and that there may be questions

as far as comity is concerned, but at least as far as the question of the declaratory judgment part of it, that the Court rule on the matter since the States apparently have deferred to the question, at least the State of Iowa has, and that there is a request and that the class does still exist. It is my understanding that the question about named party or party in interest is simply because of the fact that the party in interest will in fact argue the constitutional question. And I believe that we have done that and the fact that the matter may have become moot as to this particular named party, that the other members of the class still exist in Iowa, and for the Court's information, Mrs. Sosna is back in Iowa, lives in Green Island, Iowa, and is there with the children. But there are still in Iowa the class or the other people who are deprived who have recently moved into Iowa and that the class does still exist and that there is still a case in controversy, that there are still people that are being affected in their civil rights by the State court action under 1983, and therefore --

QUESTION: The class may exist, but she is not a member of it.

MR. REYNOLDS: The class still exists and we are arguing on behalf of the class and on behalf of the appellant.

QUESTION: But she is not a member of the class.

MR. REYNOLDS: And I think that's only relevant as

to whether or not -- as far as the issue on the question of case in controversy is concerned, it is only relevant as far as whether or not we are going to adequately represent the class's interest, and I think we are. I think we are trying to argue them and doing, hopefully, a good job, and the fact as to one member of the class it becomes moot, whether it's the named one or any other member, there is going to be a constantly changing group because of the fact that it is in fact a durational period and people are moving in and people will fall out of the class. But the class will continue to exist no matter what this Court does.

QUESTION: Would you make the same argument if the only named plaintiff in a class action dropped dead?

MR. REYNOLDS: I would think so. Or if it was an elected official and someone else had taken his place, a substitution.

QUESTION: That's not the one I said. If the one had dropped dead, you would make the same argument.

MR. REYNOLDS: Yes, that the class still exists.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you,

The case is submitted.

[Whereupon, at 10:57 a.m., the argument in the above-entitled matter was concluded.]