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In the

Supreme Court of the United States

Hyman Radzanower,

Petitioner

v.

Touche, Ross & Co., Et Al

No. 75-268

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IN THE SUPREME COURT OF THE UNITED STATES

HYMAN RADZANOWER,

Petitioner

v. : No. 75-268

TOUCHE, ROSS & CO., ET AL

Washington, D. C.

Wednesday, March 30, 1976

The above-entitled matter came on for argument at 11:48 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

IRA JAY SANDS, ESQ., 515 Madison Avenue, New York City, New York 10022
For Petitioner

SAMUEL E. GATES, ESQ., 299 Park Avenue, New York City, N.Y. 10017

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-268, Radzanower against Touche, Ross and Company, et al.

Mr. Sands, you may proceed whenever you are ready.

ORAL ARGUMENT OF IRA JAY SANDS, ESQ.

ON BEHALF OF PETITIONER

MR. SANDS: Thank you, sir.

Mr. Chief Justice and Mr. Justices of the Court:

We have a very simple factual situation here in which a national bank is one of a number of defendants under a 1934 act -- securities action, a 10B5 claim.

And we go back to a widely-known dispute in this nation in which we find the Third Circuit now recently aligned against all of the other circuits as to whether in a securities-related 10B5 action, the plaintiff must divide his case and must sue the National Bank in the particular district in which that National Bank was established, or whether, under the wide venue provisions of the '34 Act, the plaintiff may join the National Bank together with the other defendants in the district in which the violations took place or, as the '34 act permits, where the defendants may be located or found.

It is our position that in the Second Circuit where this action commenced, under the Bruns, Nordeman case, the situation is jelled and a divided, bifurcated litigation would

be required. It is our position, sir, however, that that is erroneous and that the 1864 National Bank Act was not necessarily repealed by implication or otherwise by th 1934 Act, but that the venue provision of the 1864 Act was broadened, was extended in the one instance in connection with a 1934 Securities Act violation.

Now, to lightly touch upon ancient history in the hallowed --

QUESTION: Mr. Sands, you say in one instance and you are talking, of course, about the '34 Act but 15 U.S. C. 77B, the '33 Act and the Interstate Land Sales regulations are -- certainly are other acts giving general venue for specific causes of action which would be affected by a decision in this case, aren't there?

MR. SANDS: Your Honor, we, of course, are concerned with the '34 Act and the '33 Act which would overlay it as well.

However, your Honor is correct. When any act states that the defendants may be sued in a venue where they may be found or where the transaction took place, I would agree, Mr. Justice Rehnquist, that the argument I am professing for the '34 Act would apply if the language were similar.

Now, going back to ancient history and the hallowed halls, we know that the National Bank is an arm of the American Government. The cases are galore and have not been cited for the lack of piling on additional material. The First National

Bank was organized in the late 1700's as an arm of the government and it could not be sued, as the government cannot be sued, without its consent.

Now, until the 1863 as modified by the 1864 Act, one could not sue a national bank which was set up to administer currency, which was set up to administer the fiscal policies of the United States, except as specifically permitted by the Congress, by the sovereign.

QUESTION: I thought there weren't any national banks until 1863. Before that it was a Bank of the United States.

MR. SANDS: Your Honor, my understanding is that there were national chartered banks prior to 1863 but the 1863 legislation which then found itself amended in 1864 was an all-encompassing scheme for the institution and the use and the broad-scale operation of national bank but the first bank, we find that in the brief of S.E.C. as amicus, in their footnote --

QUESTION: Well, the point may not be important to your argument. I didn't mean to have you spend a good deal of time on it.

MR. SANDS: My recollection is not precise as to it being in the S.E.C.'s amicus brief, but it is in the footnote that the first bank was called the Bank of the United States and then we had a lapse of its charter some ten years or so

later and then another bank was set up to administer the fiscal policy of the United States called the First Bank of the United States or First National Bank of the United States and the 1863-1864 legislation was all-encompassing, a schematic to operate national banks.

Now, we take the position that this was permission by the sovereign to be sued, to have one of its instrumentalities sue and the sovereign determined where it can be sued.

It can be sued in the district in which it was constituted.

Now, we take no issue with that until 1933-1934. In 1933 and 1934, of course, we find the -- as it is commonly called, the Roosevelt legislation concerning the '33 Act, the '34 Act, the so-called remedial statutes concerning banks and the like and we find that we have a number of cases, of Bell against Hood, S.E.C. against Joiner, remedial statutes. We go all the way down to Affiliated Ute case, which was decided only recently, S.E.C. against Capital Gains Bureau.

The idea that the remedial statutes be broadly and non-restrictively interpreted --

QUESTION: Mr. Sands, is there anything in the legislative history that shows that Congress actually considered national banks at the time of the enactment of the Securities Act?

MR. SANDS: Mr. Justice Blackmun, I say yes,

emphatically yes. The national banks, in '33 and '34, were under consideration. There is a Senate report which is referred to in our brief. The S.E.C. has referred to that. The Comptroller has referred to it as well, as we did.

The problems of national banks were divided, in our analysis, in two parts.

One, the necessity to protect the investors and the depositors. We all remember the run on the Bank of the United States.

QUESTION: Let me direct my question, however, to the venue provisions.

MR. SANDS: Yes, sir.

There is nothing precise, Mr. Justice Blackmun, that we have been able to locate which indicated that the Congress considered the venue provision of national banks at that time. We can only reason from our incisiveness, which we hope is accurate, in that there is decisional law which indicates that Congress knows every statute on the subject when it legislates.

Congress did set up the Glass-Steagall Act to concern itself basically with protection of depositors, protection of the bank itself in that regard.

Congress set up the '33 and '34 Act in which it did not set forth any exceptions whatever to the venue provision with regard to any actions concerning the '33 and the '34 Act.

There is no legislative history that the precise question was ever discussed. It is merely by inference.

Now, our position is that there is no reason for implied repeal, although the facts as they approach would give us the effect of implied repeal, if we would like to but judicially, we are constrained to say that both may exist together, if that is possible.

Now, our interpretation of these acts would leave both fully intact; in securities matters the plaintiff and the Commission would have its choice of venue. In non-securities matters or, except as Mr. Justice Rehnquist aptly pointed out, in other matters where there may be statutory language, one would have to follow the Bank Act of '64.

Now, Congress did exempt, in the '33 and '34 Acts when it so desired. There were certain definite exemptions.

In Levin against Great Western Sugar Company, which was a District Court of New Jersey case, which started a Third Circuit run of matters that indicated that there was a wider venue than did the Second Circuit, the judge said, "A quick examination of the '33 and '34 Acts revealed that on a number of occasions, the legislative draftsmen found fit to exempt national banks and their securities from provisions of the Act."

And then he cites 15 U.S.C. 77C, 15 U.S.C. 77L, et cetera. It becomes clear that the legislative draftsmen knew about national banks when writing the securities acts and knew

how to exempt them from provisions of the acts when it choose to do so. It would be an usurpation of legislative prerogatives for this Court to impute an exception to the '34 Act in view of the background just described.

Now, the Chicago Bank in, as amicus in its brief, admits that there are exceptions for United States banks -- for national banks -- and for the United States Government from the registration requirements of 382 of the '33 Act.

The Comptroller admits that as well on page 6 and again on page 16.

In this Court, in Carnation against Pacific Conference in 1965, quoted United States against Borden, which is 308 U.S., to this effect: "If Congress had desired to grant any further immunity, Congress doubtless would have said so."

The courts have, in addition, carved out additional immunities from the 1864 venue. For instance, this Court, in 1968, Great American Insurance against United States, carved out an exception for a claim being filed by a national bank in the Court of Claims and said that the national bank must go to another district where the Court of Claims was sitting in the particular matter in order to file its claim and the national bank there said, "But you are taking this out of the district that the 1964 Act required."

This Court said, "No, if you are filing a claim under the Court of Claims Act, you must go to that district

where that matter is now pending.

In transfers under the JPML, which happen all the time, the JPML has consistently said to national banks, "You must follow along the case. You are not protected in any manner by the 1864 venue to have a separate bifurcated pretrial in your own district. You must follow the case.

"Then, of course, you'll come back later on after the pretrial is concluded."

And we have that in such cases as Pittsburgh and Lake Erie Railroad, Great Western Ranches, Glenn Turner. We have that in Westec.

Now, we have another rule which has been followed by the District Courts. I haven't found authority that it has come up here -- and that is concerning the impleted third party, where a national bank is impleted as a third party and then says, Wait, I can only be sued in my own district. The district courts, the circuit courts have a Fifth Circuit Lone Star package against Baltimore and Ohio Railroad, said -- and there are others -- said, No, if you are a third party impleted defendant, you must go to the district where the action is being litigated.

Basically -- basically, the reason behind that, I believe, have been judicial economy. We can just visualize the number of different bifurcated trials that would result if the banks had that cloak of immunity.

Now, I do not -- in fact, I insist that the Congress did not, in 1864, give the banks the cloak of immunity but the Congress, as the sovereign, in 1863 and 1964, opened the field, opened the wall of sovereign immunity and gave us permission to sue national banks at that time and then, in 1934, the Congress again opened the wall of immunity because of the overriding concern for the populace involved in securities frauds so it is not a question by which our national banks have for 30 years impressed the lower courts that they are protected, that there is immunity, that the statute was made for their protection. I say no.

I say the 1864 statute was made to permit banks to be sued, not to protect the banks from all suits. The 1934 statute was enacted to permit banks to be sued a little more widely in a more practical sense.

Now, there is no reason why both of these interesting statutes may not live together, may not be supplementary, may not each be fully effective. They certainly can coexist.

We found that in the Robertson case, 422 U.S. where we had two acts which were permitted to coexist.

This Court has frequently admonished the lower courts to attempt to prevent conflict in statutes, achieve the aim of the 1934 act.

Merrill Lynch against Ware, not many years ago. We

have been admonished to interpret statutes by practical experience and practical experience certainly would permit the banks to be sued in a securities-related matter in the same district where everyone else is.

Erlenbaugh against the United States in '72.

Now, even going back to these interesting old cases such as Red Rock against Henry, unless the acts are completely repugnant, keep them both alive. And we have a long line of decisions.

In Wilmot against Mudge, which is 103 U.S. back in 1880, this Court said that both statutes can be said to have their own spheres of operation. If both can stand by any reasonable construction, that construction must be adopted, the basic tenet of law in this nation.

We have an interesting case, 1846, Beals against Hale, and there this Court discussed a parliamentary example where Parliament said that a particular crime was punishable at Caesar's Court and then Parliament subsequently allowed another court to have jurisdiction.

This Court stated that in examples like that, you must reconcile them. They both must exist and the government in a particular situation like that would have a choice of either forum.

Now, in the Posadas case, Posadas against National City Bank, which my learned brother had attempted to interpret

"It is well-settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

QUESTION: Mr. Sands, before you proceed, if I may interrupt you, it has been your submission up to now that these two statutes can coexist with -- can compatibly and congenially coexist. I understood you correctly, have I not?

MR SANDS: That, sir, is my strongest argument. I feel strongly about that. I have also placed my leg on the other point that even if they cannot coexist.

QUESTION: Yes, but if one looked only at the text of the venue provisions of the National Bank Act, the 1864 Act, your argument would have a very great deal of merit, I think because it simply provides that actions and proceedings against any banking association may be brought. But we have the Lango case and the Michigan case which construe that language and that statute to say that this is exclusive, that it is not permissive, that it is exclusive and I don't really follow you when you say that these two venue statutes can coexist. I don't mean that you lose your case if they can't but the Securities Exchange Commission, for example, tells us that these two venue statutes are in hopeless and irreconcilable conflict and --

MR. SANDS: I cannot --

QUESTION: -- you obviously disagree because you say they can both coexist.

MR. SANDS: I do not fully agree with my very learned brother at the SEC and I have told him that. I think he has taken a strong viewpoint that they cannot coexist. It is my position, sir, that the cases which you mentioned refer, not to two special federal venue statutes.

QUESTION: No, but they did construe the venue provision of the National Bank Act, did they not?

MR. SANDS: Yes, sir, but they construed it vis-a-vis a state act. They did not construe it vis-a-vis an equally significant federal statute.

The 1864 statute did not say that no future act may further enlarge the venue and the 1934 Act did further enlarge venue. The case which your Honor has cited construed the question of permissiveness with regard to a state venue and there there is no question in mind.

I do not know of a single decision reasonably interpreted which would permit any state statute to enlarge the 1864 venue provisions.

But Congress is Congress. If Congress is, in effect, a continuing body from the day of the Founding Fathers to this day, Congress may change its mind. Congress may enlarge what it previously had restricted.

QUESTION: There is no question of the fact that

Congress could have amended the National Bank Act venue provision. It could have repealed it. It could have done a variety of things to it but everybody agrees, I gather, that there is nothing -- Congress has certainly done nothing explicit with respect to the 1864 Act.

MR. SANDS: Explicit, it did not. Implicit, we believe they did. Implicit -- I'm sorry. I didn't mean to interrupt you, sir.

QUESTION: No, no, I'm finished.

MR. SANDS: Implicit, we believe they did for the precise reasons that the '34 Act was an all-encompassing method of operations with regard to securities, something quite new in this nation. The exception was not put in there. I have mentioned that the '34 Act did accept, precisely accept, certain activities vis-a-vis securities of national banks, specifically accept national banks, United States Government securities and similar and I read Judge Gruenfeld's language opinion in the District of Connecticut in which he said they knew how -- a little sarcastic, as I read it -- and interesting in his emphasis -- they knew how to except if they wished to except.

There was no exception. There could be no exception to a state statute which attempted to broaden the 1864 law, except from the 1864 law.

I therefore differed with my brother at the SEC in

their amicus brief when I said that the 34th statute is supplementary to the 64th statute.

QUESTION: Why did you abandon your waiver argument?

MR. SANDS: I have not, sir.

QUESTION: I thought maybe you had.

MR. SANDS: No, sir, I have not. I feel that waiver is a hard row to how.

QUESTION: I noticed you didn't cite the Nearbo case, 308 U.S. where this court held that there had been a waiver by a corporate defendant of a right to be sued under this statute by the filing of a consent to service a process not too different from that of your case.

MR. SANDS: No, sir, we did not cite that cade. There have been situations where waiver has taken place.

QUESTION: You didn't -- you haven't raised the waiver issue in your petition for certiorari.

MR. SANDS: We did, sir -- I believe we raised it in the petition for cert and we have raised it in each one of our briefs. We have not, however, hammered hard upon it. I feel that waiver is our weakest argument in this regard --

QUESTION: Do you think your question presented subsumes the waiver issue? You have presented one question. Should not the Court resolve once and for all a serious conflict by declaring that the more liberal venue provisions in the Securities Act prevail over the stringent National Bank Act?

That is the question you presented.

MR. SANDS: Yes, sir.

QUESTION: Does that include waiver?

MR. SANDS: No, sir.

QUESTION: Well, /that is the end of the waiver question, isn't it?

MR. SANDS: No, the two questions which I did present in our brief include the second as a waiver and I have said, sir, without a question, that the waiver is the weakest of the two arguments.

QUESTION: Now, we didn't grant certiorari on that question because it wasn't presented to us.

MR. SANDS: I am perfectly content, your Honor, to hold firm on the question of, both statutes living together or, in the alternative --

QUESTION: Unless you want to argue that it is plain error or something.

MR. SANDS: No, I do not, sir.

QUESTION: Well, in your petition, you did refer to the waiver -- not in the question presented, but you talked about it elsewhere.

MR. SANDS: In the body, sir.

QUESTION: You gave greater, much greater emphasis to it in the District Court than you have here, and even in your brief.

MR. SANDS: Well, your Honor, Mr. Gottlieb, who argued in the District Court and in the Circuit Court, was met with a dilemma. There is no question, as he said to Judge Mulligan, there is no question but that the law of the Second Circuit is very clear. The Bruns, Nordeman case. And that when Mr. Gottlieb presented orally the Third Circuit decision and Judge Mulligan said,"Do you wish us to reverse ourselves?" Mr. Gottlieb's language, in effect, was a polite suggestion that in view of the fact that the retired chief judge had previously reluctantly affirmed in the Bruns case that he politely was suggesting that perhaps you might reconsider it in view of the fact that you now have a peg to hang your hat on the waiver question -- the reluctance was something that we were hoping would cause the panel to change. The panel was very quick to affirm.

Mr. Gottlieb held in his hand a xerox copy of the Third Circuit -- the Ronson against Liquifin decision and I believe, if I recall correctly, read a passage or more from it.

The waiver was what he picked to hang one's hat upon and we could not expect the District Court to reverse the circuit by a frontal attack upon the propriety of the 1864 statute, either as an implied repeal, which I still maintain is our second leg, or the cooperation between the two, the supplementary effect, the either/or situation.

Justices Black and Douglas -- may they rest in peace --

did have this interesting concurrence in the Michigan National Bank case in which they spoke. They tried to get around it by claiming that there was a waiver situation because the bank came across the state line to do business and conferred itself in the new state.

The problem that we do have with our adversaries is that historically they have taken the position that the National Bank Act of '64 is mandatory and we insist it is mandatory only against a state-conflicting decision. It is not mandatory against another special venue provision.

Now, a perfect example, although we have not found the case law in this Court on two special venue statutes, is the jurisdiction question. I

MR. CHIEF JUSTICE BURGER: Your time is up, counsel.

MR. SANDS: I'm sorry, sir. May I close with one sentence, sir?

MR. CHIEF JUSTICE BURGER: Make it one sentence.

MR. SANDS: Thank you. I would suggest, I would urge, that any doubts be resolved in favor of lessening the burden of duplicative litigative litigation. We have the Emil against United States case, which came from the Court of Claims, a multi-party wage claim, and this Court said, "One forum eliminates any problem of transferring venue from several district courts to one locale." If we are here misconstruing the intent of Congress --

MR. CHIEF JUSTICE BURGER: Is it in your brief, counsel?

MR. SANDS: No, sir.

MR. CHIEF JUSTICE BURGER: Go on, finish.

MR. SANDS: It is easily -- it can easily set the matter to rest by new Congressional explicit language.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gates.

ORAL ARGUMENT OF SAMUEL E. GATES, ESQ.

ON BEHALF OF RESPONDENTS

MR. GATES: Mr. Chief Justice, and may it please the Court:

I am here appearing for the Respondents, First National Bank of Boston only.

At the outset, I would like to set the record straight on the posture of this case. Before the lower courts, the only issue raised by Petitioner in this case was one of waiver. The allegations of this complaint have charged that there had been a violation of Section 10B of the New York State statutes in the common law and that arose out of the alleged issuance of some false and misleading statements by Teleprompter, Inc. which had been developed as a result of a formal complaint and investigation by the SEC, whereupon a class action was brought in the Southern District of New York.

The plaintiff purported to bring the action under

the venue provisions of Section 27 of the Exchange Act.

Now, the complaint does not allege that the bank, which was the agent bank in a $150 million credit and loan agreement, had anything to do with the alleged issuance of the false statements. It doesn't allege that the plaintiff, the bank, purchased or sold, the Teleprompter stopped, or that it made any profit out of any of the transactions complained of.

The basis of jurisdiction and cause of action against the bank, as I see it -- and I am not sure that I am right -- is that the bank is alleged to have aided and abetted the other defendants and that it reached its fiduciary obligations to the investing public because it did not disclose to the SEC, the New York Stock Exchange or the public generally the information which it had learned as a lending bank and which was alleged to be inconsistent with the statements issued by Teleprompter, whereupon, relying upon this Court's decisions in Langdon and Robertson, which makes mandatory the application of Section 94, we moved under Rule 12 and Section 94 to dismiss for lack of proper venue.

Now, at this point, your Honors, may I say I want to make our position perfectly clear. We are not saying that the Exchange Act does not apply to a national bank. We are saying only that the venue must be laid in the district where the bank is established and whatever rights Petitioner may have here, he can pursue in the District of Massachusetts.

Now, Petitioner has conceded that the bank is established in Boston and, indeed, as it has been since 1864, right after the National Banking Act was put into effect.

And he conceded in his affidavit -- which appears at page 77-A of the Appendix, that under normal circumstances, section 94 of the National Bank Act would prevent a bank foreign to this -- meaning the southern district -- from being sued in the southern district. But he argued that because the bank had qualified under Section 1313 of the New York Banking Law to engage in a limited fiduciary capacity in its activities in New York that that constituted an intentional waiver.

Now, this was the issue which was before the District Court. The District Court found as a fact that there had been no waiver. Petitioner appealed to the Second Circuit, again on the issue of waiver.

QUESTION: Was Nearbeau argued to the District Court?

MR. GATES: It was not, your Honor. It was not cited in any of the briefs.

At no time in the District Court or in the Court of Appeals in any of this record until you get to the oral arguments before the Second Circuit is there ever a reference to the fact that there might be some conflict between Section 77 and Section 94. There is not one word of implied repeal or repeal by implication. Only when it got to oral argument was

the Ronson case cited by the Third Circuit in 1973 ever mentioned and then when it was mentioned by counsel for the Petitioner, he didn't urge that as a basis for an implied repeal. He did not rely upon it on that basis at all.

Now, Petitioner has agreed in answer to questions from Mr. Justice White that, in effect, he has abandoned his argument of waiver. Well, I submit, if your Honors please, that one has only to look at the question which appears on page 3 of the petition for certiorari to see that there is a single question posited and that question --

QUESTION: Well, you -- I take it you have just argued that -- are you implying that that question isn't properly here, either?

MR. GATES: No, I'm not. Well, yes, I am, your Honor.

QUESTION: Well, you made this very argument in your opposition to petition for certiorari.

MR. GATES: That is correct, your Honor.

QUESTION: And we granted the petition with that single question in it.

MR. GATES: I am well-aware that this Court has the right to take upon itself --

QUESTION: We might, but we nevertheless --

MR. GATES: I understand, Mr. --

QUESTION: -- you have the --

MR. GATES: I understand, Mr. Justice White, that you have that, but I suggest that on this record -- and I say it with no disrespect -- that certiorari was improvidently granted. It was not passed upon by the District Court or the Circuit Court.

As I understand certiorari, a matter is brought here for your review.

QUESTION: Do you have any doubt how the Court of Appeals for the Second Circuit would have decided the issue that is now stated that was stated in the petition for certiorari?

MR. GATES: None whatsoever, as I read the opinion of Chief Judge Henry Friendly in Bruns, Nordeman --

QUESTION: And --

MR. GATES: -- followed by the decedent of Klein against Bower --

QUESTION: Yes.

MR. GATES: -- I can see no positive, no possibility of the Second Circuit taking a different point of view and as a matter of fact, the Ninth Circuit, both in 1970 and 1972, had precisely this issue --

QUESTION: Well, are you suggesting we ought to dismiss the petition for cert as improvidently granted so that -- or vacate it and remand it so that the Second Circuit may tell us what the answer to this question is in the Second

Circuit?

MR. GATES: Well, I think it would be presumptuous, Mr. Justice White, for me to tell you what this Court ought to do and I would therefore refrain from responding.

But let me answer it this way: At the time of the argument before the Second Circuit, Judge Mulligan, who was the presiding judge, turned to Mr. Gottlieb and said, "Counsel, are you suggesting that this Court reconsider or overrule its [sic] decision in Bruns against Nordeman?" And Mr. Gottlieb responded in the negative. He said he was not asking that that be done.

Now, I submit that on the law as developed in this area, going back a great many years but referring specifically to your opinion, Mr. Justice White, in Langdeau followed by Robertson and the cases that have followed subsequent to that time, that there is no need to repeal, particularly when you say, the substantive provisions of the Act can be applied.

Granted, there may be some inconvenience. Granted there may be some hardship. But in this case, I submit, that the hardship is much less than it was in Michigan National Bank against Robertson and if we are going to decide that repeal by implication is to be determined by hardship, it would be contrary to the decisions that have come down from this Court in the past.

But let me move from this question of the fact that

I have some doubt about whether I should be here today. I know I am. Let me try to deal with this question of implied repeal a little bit.

This Court has not directly passed on the question which the Petitioner posits here today. I am frank to say that there is such a shift in position that occurs with respect to this Petitioner that I am not sure just what I am called upon to respond to.

In the lower courts we were talking about waiver. The petition for certiorari talks about the broader provisions of the securities laws prevailing over the narrow provisions of the Banking Act -- or can they coexist? And then in the reply brief we get a completely different --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Gates.

MR. GATES: Thank you, Mr. Chief Justice.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Gates, you may pick up where you left off.

MR. GATES: Mr. Chief Justice and may it please the Court:

I think when we recessed at the luncheon recess that I was about to say that in Bruns, Nordeman, then Chief Judge Friendly, relying upon this Court's decisions in Borden, Robertson and Langdeau, found that there was no basis for implied repeal.

Mr. Sands this morning in his brief has attempted to differentiate at least Langdeau and Robertson on the grounds that they only have state statutes involved.

Now, that precise question was presented to Judge Friendly of the Second Circuit and in what I think was a very careful analysis, he rejected that argument saying, in these words, that"it would indeed strain language to say that the same verbs are merely permissive with respect to suits in federal courts, although prohibitory as to action in state courts."

Now, clearly, Section 27 --

QUESTION: But did he not go on and say that they were foreclosed in that circuit by an earlier decision?

MR. GATES: That is not my recollection, Mr. Justice Stevens.

QUESTION: I think he does. I think those were the two points that he made.

MR. GATES: I will stand corrected if I am in error.

Clearly, Section 27 does not by its express terms repeal Section 94 nor did Congress say, as Petitioner has asserted in his reply brief, that in enacting the '34 Act -- and I quote --"Congress intended that a national bank in a securities case could be sued in certain specified additional act districts."

Now, Petitioner admittedly gets no help from the legislative history. He has acknowledged this morning that he can make only an implicit argument.

But he argues that the two statutes can coexist and the principal thrust of his opening argument seems to be that implied repeal of Section 94 can be found because the broad public interest at the time of the enactment of the Securities Act required it.

In 1934, Congress was consumer-concerned. The 1934 Act was meant to supercede any earlier conflicting statutes.

But so far as we are able to ascertain, nothing supports these assertions except the ipse dixit of counsel but they go even farther at page 16 of the opening brief and they say, "Congress itself evidenced its intent, in 1934, to impose the venue provisions of the 1934 Act on all concerned."

We can find no case from this or any other court

which supports the thesis that silence will support implied repeal.

Now, as Mr. Sands has acknowledged this morning, the S.E.C. in its brief, makes a completely different argument saying that the adherance to the decisions of the Second and Ninth Circuits would frustrate the policy of the '34 Act and would have an adverse effect upon the enforcement activities of the Commission.

I would remind this Court that the 1934 Act has been in effect for 42 years. Yet the Commission in its brief does not cite a single instance where resort by a national bank to the provisions of Section 94 has impinged upon or interfered or adversely affected the Commission's enforcement activities.

The sole justification advanced in support of this thesis is that the Commission may be unable, someday, to join some national bank in some unidentified future enforcement proceedings. That argument was made just ten years ago before the Southern District of New York in an action entitled General Electric Credit Corporation against Talcott where the Commission again filed an amicus brief. The Department of Justice, representing the Comptroller of Currency, took an opposite point of view.

Judge Tenney made a very careful survey of the situation and he came to the conclusion that there was

nothing to support the conclusion of implied repeal.

Now, in a somewhat different context, but I submit, a similar situation, Mr. Justice White, in writing for this Court, said, in Mercantile National Bank , that this was a problem for Congress to consider. It wasn't a problem for this Court. One would have thought, had there been, in fact, an interference with the Commission's enforcement activities during the last 40 years that they would have gone to Congress and sought help.

Now, they have not been reluctant to do so in the past but they have not done so here.

Whatever may be the speculative views of Petitioner as to the intentions of Congress or the -- whatever the SEC believes are the controlling policy considerations, we have been unable to find any support in any decisions in this Court which will sustain an argument for implied repeal.

To the contrary, this Court has consistently taken the view that absent a waiver by a bank, that Section 94 mandates that all transistory actions shall be brought only in the district where the bank is established.

Now, in order to sustain implied repeal, there are two cardinal precepts, as we read the cases, which must be undertaken and established by the Petitioner.

One, there must be a clear and manifest intent to repeal and, two, there must be a positive repugnance or an

irreconcilable conflict. We find neither of those present in this situation.

There is nothing to support, in our judgment, clear and manifest intent to repeal. In an effort to buttress the arguments of the Petitioner and its own arguments, the SEC in its brief refers to the report of Senator Fletcher of the Senate Banking and Currency Committee and says that this sustains the position.

I submit that the Fletcher report is completely irrelevant to this argument. It was not submitted to the Senate of the United States until after the '34 Act had become law and it made no recommendations of any kind with respect to remedial legislation.

Now, certainly, at the time that the 1934 Act was adopted, Congress was aware -- and this is conceded by Petitioner -- of the special status which Congress had granted to the national banks going back to 1864.

QUESTION: Mr. Gates, would it have been sufficient, in your view, dealing with the repeal intent, if somebody had gotten up on the floor of Congress and said, the '34 Act venue provision is broad and we mean it to apply just in its literal language?

MR. GATES: It would have been very considerable assistance, Mr. Justice Rehnquist, if you had found something like that but we have found nothing of that nature to indicate

that there was any real consideration given to this particular issue. It is quite true that the Congress was concerned about abuses which had been developing and existed in the securities industry but they were also well-aware of the special status of national banks.

QUESTION: If it would have been sufficient to simply get up on the floor and say that, why isn't it even more impressive that they used broad, general language in the statute itself?

MR. GATES: Well, I suppose one can make that argument. I do not happen to subscribe to it based upon the decisions which have emanated in this Court but certainly conceptually, one can make that argument and I would be lacking in candor if I didn't acknowledge it.

But I can't believe that simply by enacting Section 27 and by silence that it can be properly construed that Congress intended to amend or repeal Section 94. But the Petioner has, it seems to me, an even more difficult burden in sustaining implied repeal in that he must show positive repugnance or irreconcilable conflict between the two statutes and I submit that the Petitioner has made no attempt at such a showing.

In his reply brief at page 3, he concedes that implied repeal is more difficult to establish than what he terms a coexistence. I think it might have been a little bit

more accurate if he had said it was impossible under these circumstances to establish implied repeal.

Then on the next page of his reply brief, that is page 4, under the heading, the two venue statutes are supplementary and not in conflict.

He apparently abandons any effort at showing repugnance and he characterizes this as the major point of his argument. He said this morning that there is no reason why they can't coexist, a position which is diametrically opposed to that of the SEC, which spent the entire brief that it submitted as amicus in establishing that there was repugnance and a direct conflict.

I submit that when Petitioner is talking about harmonization of the two statutes that you can make them each effective in its own sphere, he is engaged in -- if I may use a colloquialism -- kidding himself.

He asserts that each special statute is a special grant by Congress of a forum that if more than one statute applies that a plaintiff has the benefit of both and he can make his choice. That is of Section 27 or Section 94.

With respect I suggest that if that were the law and the situation, there would be no need for us to be here today and I would suggest also that even if he is correct, the fact that he may make a choice does not mean that he is going to be able to stay in that forum because Section 1404A of the

judicial code is still on the books. It may well be that a defendant can invoke the provisions of that section.

I submit that Petitioner is really not asking for harmonization. He is asking for an exception, an implied repeal of Section 94 where Securities Act law violations are charged and he would equate such exception to that exception recognized by this Court with respect to purely local actions in Casey against Adams.

Now, as I have indicated, and as Mr. Sands agrees, the Commission is not in accord with Petitioner's views that the two statutes can coexist. Rather, it argues that the two venue statutes are in direct and irreconcilable conflict and the Section 27 supercedes Section 94.

It says that they are repugnant in both their policies and their practical effects. However, it does concede that if Section 94 prevails, then the bank can be sued only in Boston.

It seems to me that by making such concessions, it is an overt admission that the Exchange Act can be made to work against the bank in Boston.

Now, in attempting to establish repugnance, the Commission relies on two cases decided by this Court only last June, Gordon against the New York Stock Exchange and United States against the NASD. It argued that Section 94 has been impliedly repealed by Section 27 because such repeal

is necessary in this case to make the federal regulatory scheme work in the securities industry.

In that regard it seems to me that the Commission overlooked Silver against the New York Stock Exchange which says that if there is repeal by implication it will be granted only to the extent necessary to make the act work and then only to the minimum.

But those two cases, if the Court please, I submit are distinguishable. In each of those cases the requirements of implied repeal have been clearly satisfied.

In order to make the regulatory scheme work as envisioned by Congress with respect to fixed rate commissions and with respect to the sale and distribution of mutual funds, this Court held that the anti-trust laws had to give way.

There was no way to reconcile the restrictive agreements which had developed in the securities industry with the anti-trust laws, the scheme that had been envisaged by Congress, but there is nothing in the case at bar which makes these holdings applicant. As I said earlier, the substantive provisions of this law can work in Boston just as well as they can in New York. The bank is not immune from the terms of the securities laws nor is it exempt from perpetual liability that violates the terms.

We say only that the issue of whether it violated the terms should be determined in the District of Massachusetts

rather than the District of New York.

QUESTION: Has there been some case in this Court construing the word "located " in Section 94?

MR. GATES: There is, Mr. Justice White, but I am frank to tell you the name of it escapes me.

QUESTION: Do you think it has actually been decided here and that "located" means the place if its incorporation?

MR. GATES: No, your Honor.

QUESTION: What does it mean, then?

MR. GATES: I understand that "located" equates itself to what I would term what might be the principal place of business, if you talk about it in terms of general corporate law, whereas, established, which is the word which is used with respect to a national bank, being sued in a federal context, I understand to mean the place where its charter says that it is established.

To wit, the home office.

QUESTION: But it says that, "Or in any state, county or municipal court in the county or city in which said association is located."

MR. GATES: That is correct, Mr. Justice White, but as I interpret the statute, as I have understood from the decisions of this and other courts, the word "locate" relates itself to actions which are brought in state courts and that is

where the bank must be located whereas when you are talking about actions in the federal court, the word "established" is used.

QUESTION: Well, what if this action had been brought under state law in the state courts?

MR. GATES: Well, then, under your Honors' decision in Langdeau, I don't think we have any problem.

QUESTION: Well, I know, but that case didn't focus on location, did it?

MR. GATES: Well, there were 145 defendants in that action of which two were national banks and in an opinion written by your Honors, it said they had to go to another --

QUESTION: Well, I know, but the big issue in Langdeau was whether or not that was -- whether it was exclusive, whether that venue provision was -- whether the word "may" meant "must."

MR. GATES: That is quite true.

QUESTION: And it didn't really go to the question of what the meaning of the word "located" was.

MR. GATES: That is also correct.

QUESTION: Well, so, again I ask you. Do you know of any cases that construe it?

MR. GATES: I have to tell you I do not, Mr. Justice White.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gates, your time has expired.

MR. GATES: It has? I'm sorry, your Honor.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:20 o'clock p.m., the case was submitted.]