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In the

Supreme Court of the United States

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CITIZENS AND SOUTHERN NATIONAL BANK,

PETITIONER,

V.

NICK BOUGAS,

RESPONDENT.

No. 76-398

Washington, D. C.
October 3, 1977

Pages 1 thru 39

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v.

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Respondent.

No. 76-398

Washington, D. C.

Monday, October 3, 1977.

The above-entitled matter came on for argument at
1:19 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:

WILLIAM C. HUMPHREYS, JR., Esq., Alston, Miller and
Gaines, 1200 C&S National Bank Building, 35 Broad
Street, N.W., Atlanta, Georgia 30303; on behalf
of the Petitioner.

MICHAEL J. KOVACICH, Esq., Kovacich and Naughton,
101 Trust Building, Decatur, Georgia 30030; on
behalf of the Respondent.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
William C. Humphreys, Jr., Esq., for the Petitioner	3
Michael J. Kovacich, Esq., for the Respondent	26

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-398, Citizens and Southern National Bank against Bougas.

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

ORAL ARGUMENT OF WILLIAM C. HUMPHREYS, JR., ESQ.,
ON BEHALF OF CITIZENS AND SOUTHERN
NATIONAL BANK

MR. HUMPHREYS: Mr. Chief Justice, may it please the Court, my name is William Humphreys and I represent the petitioner in this case, the Citizens and Southern National Bank.

The case arises out of Title XII, Section 94 of the United States Code, which is known as the National Bank Venue Act, and the case involves the application and interpretation of that bank venue provision.

The interpretation of that statute requires this Court to decide whether the statute requires that a national bank only be sued in its home county, that is, the county which is specified in its certificate of organization.

A second issue that must be decided by the Court in order for any decision on the merits is to the interpretation of the statute to be rendered meaningful is whether a national bank may waive the provisions of Section 94 by the establishment of a branch bank in a county other than the county where it is chartered.

Those are the two issues presented by this petition to the Court.

QUESTION: In how many Georgia counties does the C&S have banks?

MR. HUMPHREYS: Your Honor, that fact is not in the record, but I will frankly concede that C&S has branches in many counties.

QUESTION: In many counties?

MR. HUMPHREYS: Yes, sir. That is not disputed. And in fact, in the instant case, the record shows that we did have a branch in DeKalb County, where this suit was brought. That is not our home office; our home office, specified in the certificate of organization, is in Chatham County, Georgia.

QUESTION: So you are taking the position that even though you had a branch in DeKalb County, that suit may not be brought there if it is not on a transaction arising out of -- well, it may not be brought there, period?

MR. HUMPHREYS: That is correct.

QUESTION: It has to go to Savannah?

MR. HUMPHREYS: That is correct, Your Honor.

QUESTION: Even though the volume -- suppose someone brought suit against you in Fulton County, Atlanta, and the volume of business done by C&S in Fulton County was twenty times what it was in Savannah: You would still say they had to go to Savannah to sue you?

MR. HUMPHREYS: That is correct, Your Honor, if the venue was waived by the bank in that particular case or raised, excuse me, then it would be required to be sued in Savannah, its home county.

QUESTION: You say the home office, is that --

MR. HUMPHREYS: Yes, sir, it is the county specified in its charter.

QUESTION: Well, is that synonymous with registered office?

MR. HUMPHREYS: Well --

QUESTION: In my State a corporation has to recite in its certificate of incorporation the location of its registered office.

MR. HUMPHREYS: Yes. It is a little bit different with regard to national banks. They are obviously federally chartered, and there is not the registration that goes on with State corporations.

Rather, there is a certificate of organization, and in that certificate of organization, there is a place specified, and it is that place that we contend is the home county, that is, the place specified in the certificate of organization.

QUESTION: Is it wholly within the discretion of the bank to select any county within the State that it has a bank at to be that certified place?

MR. HUMPHREYS: Well, at the time the bank is initially chartered, the answer to your question is yes. When they are chartered, they will select a place that is to be their home office, and then there are very strict provisions that that home office, for example, cannot be moved during the lifetime of the bank over 50 miles. So that even if, as I understand it, if you select County A, you cannot move your principal office over 50 miles, period. You can move it 50 miles with the permission of the Comptroller of the Currency, but as I read, I believe it is 12 USC Section 30, you may not move it over 50 miles, period.

QUESTION: Are there any substantive requirements in connection with the principal office? Do you have to hold your directors' meetings there, or is it just purely a venue provision?

MR. HUMPHREYS: No, Your Honor. There are approximately, when I went through and counted at least 7 or 8 statutes that talk about activities and duties that must be conducted where you are located.

QUESTION: Well, what about the maintenance of records. Is there not any requirement that certain records remain at the principal or chartered place of business?

MR. HUMPHREYS: Your Honor, I am not aware that there is any specific statute in existence now that requires that the records be maintained only at that one office.

QUESTION: How about regulations of the Comptroller General, the Comptroller of the Currency?

MR. HUMPHREYS: Your Honor, there may be -- I do not-- there may be a regulation such as that; I am sorry, I do not know of any. I do not find any specific statutory authority. There may be certain records, but generally the bank can, of course, now conduct business not only at its main office but at its branch.

QUESTION: But you do say that there are some statutes that require at the home office the conduct of some kind of business, is that right?

MR. HUMPHREYS: Yes, Your Honor.

QUESTION: Well, what kinds?

MR. HUMPHREYS: For example, one very important statute, I believe, governs the amount of reserves that must be maintained with Federal Reserve banks. And this statute requires that if you are located in a Federal Reserve city, that you will maintain so many percentage of reserves. If you are not located in a Reserve city, the Reserve requirements are less. This we found in 12 United States Code 142.

QUESTION: Is that why you are in Savannah and not Atlanta?

(Laughter.)

MR. HUMPHREYS: No, Your Honor. The reason we are in Savannah is because years ago we in fact were started in

Savannah.

QUESTION: Has this bank, has the C&S ever itself used the courts of DeKalb County?

MR. HUMPHREYS: Again, that is not in the record, but yes, sir, I am certain that we have.

QUESTION: It must be.

MR. HUMPHREYS: I am certain that we have.

QUESTION: I would like to ask you two questions. In this reserve calculation, I take it reserves throughout all of the bank's branches are counted in calculating the reserves?

MR. HUMPHREYS: I would presume so, as long as they were part of the same bank.

QUESTION: Is there anything in the statute, my second question is, that would preclude you from closing your banking activities in Savannah but retaining your office for directors' meetings and the like there?

MR. HUMPHREYS: Well --

QUESTION: Say you decide to do all your banking in Atlanta but keep your home office in Savannah: Could you do that?

MR. HUMPHREYS: I am reluctant -- I do not know the answer to that question. I will add that with regard to the requirement that it be moved 50 miles, that it only be moved 50 miles, period, and even then only with the Comptroller's permission, I am told as an anecdote that at one point in time

there was thought of trying to move the office from Chatham County to Atlanta, and someone suggested they could only do it at about 50 miles a week, so they would move it 50 miles one week and 50 miles the next. But clearly, I --

QUESTION: That only relates to moving the home office. That is not relevant to the question whether they could discontinue banking --

MR. HUMPHREYS: No, sir, I do not know whether, if they could discontinue banking activities. I believe this would probably depend to some extent on the answer to the Chief Justice's argument which I am unable to answer, and that is must there be some records, must there be a physical place that continues to be maintained in the home county, and there may be some regulations requiring that.

QUESTION: What limitations are imposed on branching in the Georgia law?

MR. HUMPHREYS: Your Honor, we have opened up branching somewhat, and I believe it is not a grandfather situation. We can pretty much go, we can merge with, and I believe this Court considered the effects of that, what used to be 5 percent banks, and I believe now we have Statewide branch banking in Georgia. It is not a grandfather situation.

QUESTION: Did Georgia ever have the situation that I understand prevails in some States in which no branches were allowed whatever, perhaps no branches beyond the county in

which the home office is located?

MR. HUMPHREYS: Oh, yes, Your Honor. We did have that law at one time, it's got the Georgia banking law gone through several phases and I am confident that law did exist at one point, because that is why we used to have grandfathers, or 5 percent banks, where the bank would go and could only own 5 percent of banks in other counties, so we did have that at one point in time.

QUESTION: But now, so far as the law is concerned, your bank could have a branch in every county in Georgia?

MR. HUMPHREYS: That is correct.

QUESTION: That is 100-and-some -- how many counties in Georgia now?

MR. HUMPHREYS: I do not know how many counties, I am sorry, sir, that Georgia has, but it is a large number of counties, and the bank will undoubtedly have branches in those counties where it is profitable to open up an office or have a branch.

QUESTION: You are going to tell us what your justification for opposing this venue is, are you not?

MR. HUMPHREYS: Yes, Your Honor. It involves basically the meaning of two words in 12 USC Section 94 --

QUESTION: Is that all, just the statute? There is not any policy justification?

MR. HUMPHREYS: No, Your Honor. This statute was

being presented to be written by Congress today, there is probably no policy argument, or for not writing a statute that would allow a branch, a bank to be sued, anyplace it had a branch for cause of actions arising out of the business activities conducted at that branch. I do not believe there would probably be a very good policy argument for not giving the bank the same wide venue that a corporation had.

12 USC 94 contains two basic provisions. One is a Federal provision and one is a State provision. The Federal provision says simply that a bank may be sued in any county or in any Federal court in any district in which the bank is established, and the State court provision provides that a bank for state court purposes may be sued in any State, municipal, county court in the county in which it is located.

And these two provisions were enacted, one in 1863, the Federal court provision, and one in 1864, the State court provision.

Now, the Georgia court, the Georgia Court of Appeals decided that since Congress had used a different word, "located," in describing the venue for national banks than it did when it described the venue for national banks, which was -- excuse me -- connected to the word "established", that therefore Congress must have intended for "located" to have a different meaning, a broader meaning than the word "established" and therefore Congress must have intended for banks to be

sued in every county in which they were located.

QUESTION: Were there any branch banks in 1864?

MR. HUMPHREYS: No, Your Honor, there were not any branch banks in 1864.

QUESTION: How do you derive that intention of Congress?

MR. HUMPHREYS: I do not, I am not arguing for that. I believe the Georgia Court of Appeals, as in other courts -- State courts are trying to find ways to expand their venue. That has always been the case. And they looked at the dictionary, not the Georgia Court of Appeals but the Security Mills v. Wachovia case in North Carolina took a run through the dictionary to look at the various words and definitions of "locate" and "establish." This is not a very fruitful task because one of the synonymous meanings, or synonyms for "locate" is "to establish." So having done that, to still give them opposite meanings does not make a lot of sense.

And that is particularly true in light of the conditions that existed in 1863. As we said, there were not branch banks in 1863. A bank could only do business in one place, the county in which its certificate of organization was issued. But more importantly, the jurisdiction of the State and Federal courts in 1863 and 1864 was concurrent with regard to national banks, and this to me is very important in deciding whether "locate" and "establish" mean the same thing, because

until 1882, any suit against a national bank could be brought in the first instance in Federal court without regard to diversity and without regard to amount involved.

Similarly, any suit brought in a State court could also be removed to a Federal court since the Federal courts had concurrent and original jurisdiction. Therefore it seems to me that the argument becomes even more untenable that a Federal court that Congress intended for State courts to have a broader venue and to permit suits in more State courts than in Federal courts with this concurrent jurisdiction.

And the same really holds true today, because if a suit, a diversity suit were brought in Georgia, in a branch, in a place other than where the bank was established, the bank could remove that case to Federal court and the Federal courts are clearly unanimous in holding that the word "established" refers only to the place specified in the bank's certificate of organization.

QUESTION: Why can the bank remove in a situation like that?

MR. HUMPHREYS: Well, it would have to be a diversity case, Your Honor. It would have to be a New York citizen suing a bank in Georgia, for example, and bringing suit in Atlanta. That would not work with two Georgia citizens, such as we have here.

QUESTION: Since 1882.

MR. HUMPHREYS: Since 1882. Now, prior to 1882, you have the same result, you would remove and then you could end up back in the county where you started, or rather have the case dismissed if you removed from Federal court to -- State court to Federal court.

So I submit that the first argument or consideration that should not control in this case is any consideration that the word "located" and "established" have different meanings, as used by Congress in 1863 and 1864. Whatever interpretation is given to the word "located" in this case, and this is clearly a State court case; it is not, does not arise in the Federal courts. But whatever interpretation this Court gives to the word "located" it also must give to the word "established."

It is clear, as I think we have mentioned briefly before, that "located" and "established" when used in 1863 and 1864 referred only to one place. There was only one place in existence in 1863 and 1864, and that was the place that the bank was chartered.

Now, furthermore, if you read the language of Section 94 carefully, it is very apparent that although Congress might have mingled the words "located" and "established", it was very particular as to when it intended to denote a potential plurality and when it intended to mean the singular, and thus the statute provides that the suit may be brought in any

district or territorial court of the United States, and it further provides that the suit may be maintained in any State, county or municipal court. There is a potential plurality of courts that I believe could be found from that language.

On the other hand, Congress was quite explicit that it could only be maintained in the district, the one district, I would suggest, in which the bank was established and in the one city or county in which the bank was located.

QUESTION: Does the Langdeau case help you much or hurt you, or is it kind of neutral?

MR. HUMPHREYS: No, the Langdeau case helps more than it hurts, but is not determinative of the issue. In Langdeau the court was concerned with whether 12 USC 94 was permissive or mandatory. That was the only issue before the court.

QUESTION: Whether it prevailed over a State venue statute?

MR. HUMPHREYS: That is right, whether it could be in that way, whether it had to be applied, or whether it just was something that could be applied.

QUESTION: It held it had to be.

MR. HUMPHREYS: And it held that it had to be applied.

QUESTION: But there was no question there about where the bank was --

MR. HUMPHREYS: There was no question about where the bank was, although the court did say that to hold that the statute was merely permissive rather than mandatory would render meaningless a congressional enactment permitting suits in the bank's home county.

Now, that is an exact quote from Mercantile. They coined the phrase "home county", the court in Mercantile. This court really for one hundred and three years, beginning back in 1871 with Bank of Bethel and going really down through 1976 in the Radzanower case, has never intimated, and it has had many opportunities, that located and established referred to any place other than the one place, that is the place in the certificate of organization. For 40 years the Federal courts, ever since the Leonardi case which was decided by the 2nd Circuit in 1936, for 40 years the Federal courts have been unanimous in holding that "established" is determined by the place specified in the bank's certificate of organization, and that once that decision is made, there is no need to go further to determine where venue properly lies in a suit against a bank.

Most courts, most even State courts in this day, have recognized that "located" and "established" do, in fact, mean not only the same thing, but that they refer only to the county specified in the certificate of incorporation or, rather, the certificate of organization.

QUESTION: Do you have any idea when this statute

was passed how many States had more than one Federal district?

MR. HUMPHREYS: Your Honor, I have made diligent search to try to find out this potential plurality question on district and territorial. As the statute was initially enacted it provided that it could be brought in any circuit district or territorial courts. Clearly I believe in 1863 there still were circuit courts that had primary or trial court jurisdiction. I have not been able to, the court system is very complicated in 1863, I am unable to say that there was a State that had a district or a territory. I do know that back in 1863 when you write in the alternative of circuit district or territorial court, I feel that there must have been some overlapping. And even if we cannot, or I cannot --

QUESTION: States that had more than one circuit court, for example?

MR. HUMPHREYS: Your Honor, I have --

QUESTION: Or having more than one district court?

QUESTION: There were States that had more than one district court.

MR. HUMPHREYS: I know that there were district courts that would encompass two States. I know that. In other words, a district court might cover two States.

QUESTION: But more than one in one State?

MR. HUMPHREYS: I do not know. I have -- the treatise is on the court system in 1863. I have tried to go

through it and it is a very tedious task. The system was very complicated back then. I am extremely sorry, Your Honor, I simply cannot respond to that.

QUESTION: I suspect you could find it in the front pages of 35 Federal.

MR. HUMPHREYS: Your Honor, I think not. It is very complicated. I will go back and undertake that, but we have tried diligently so that I could definitely say that State X had a district and a circuit court in it and therefore there was a reason for that potential plurality, but I would suggest that my ignorance is not that damning to my argument, because my point is that even if there was a potential plurality, just the chance of more than one, Congress used the word "any". Really whether there were more than one or not, I do not know, but if there was a chance that there was more than one court in which this case could be brought, then they used the word "any" -- in other words, any circuit district or territorial court, on the chance that there was a plurality.

QUESTION: I just remembered, there must have been plenty of States with just one district court, because if I remember correctly, Maryland has still got one.

MR. HUMPHREYS: There are still States today that have only one district court.

QUESTION: What significance if any do you attach to the McFadden Act of 1927 authorizing national banks to branch

and using the word "establish" with respect to branches?

MR. HUMPHREYS: Well, the act probably could be used to make a distinction between the location and establishment of a bank versus the location and establishment of the various branches of that bank. But that statute has no effect on 12 USC 94. It has certainly not been amended by Congress. The Federal cases that have considered that, the McFadden Act, have placed no importance on it to the extent that it somehow changes or affects 12 USC 94. That statute was written at the time still in terms of the basis, we believe, of the county specified in the charter, and if for some reason "locate" and "establish" are now supposed to mean every place where the bank has a branch, then we have numerous other statutes, for example the publication of comptroller's report shall be in the city or county where you are located, these reserve requirements, all of these topple like a house of cards, and instead of having one central county where all of these reports are published, the reserve requirements, suits against the comptroller of the currency, all of a sudden these also take on a plurality, rather than what we contend would be the single place where they, where Congress originally intended for these activities to take place.

QUESTION: Is a branch of bank in and of itself, does it have all of the attributes of the bank?

MR. HUMPHREYS: It may have all the attributes of

the bank; it may not. It may have the instant teller and it may not be able to make loans, but it is permitted to have all of the attributes of a bank. I mean, the general business of the bank may be conducted at the branch.

QUESTION: Does it have its own president and board of directors?

MR. HUMPHREYS: A branch would not; no, sir.

QUESTION: Well, that is one of the important attributes of a bank, is it not?

MR. HUMPHREYS: Well, yes, sir. I was directing myself to what the business that they could conduct.

QUESTION: Well, the main office would not have its own president and board of directors. The president and the board of directors would be for the main office and all of the branches, would it not?

MR. HUMPHREYS: That is correct; yes, sir.

The bank itself has a president and a board of directors. Each branch would have a branch manager. Just like a division of a corporation. It is not a separate entity.

QUESTION: Mr. Humphreys, you mentioned the fact that their requirements, such as publishing the amount of reserve, or something like that. What is the purpose of a requirement like that? To inform people who do business with the bank what its size is and the like? Why are the requirements you are talking about that would apply all over?

MR. HUMPHREYS: Well, the ---

QUESTION: Maybe they should apply every place there is a bank.

MR. HUMPHREYS: Well ---

QUESTION: I did not quite get the argument.

MR. HUMPHREYS: All right.

There are numerous other statutes. In some of them it might in fact be desirable to apply every place the bank has a branch. Publications of, as I say, directors' meetings and that sort of thing. And it might be that it is desirable for the bank to publish them not only in the place where it is located as specified in the statute, but also all over the State, every place it has a branch.

I would suggest, though, it is that sort of argument that ought to be directed to the Congress and not directed to this Court. Whether it is desirable policy for a bank to be sued everywhere or whether it is desirable policy to have comptroller's reports published everywhere is something we cannot answer.

QUESTION: Maybe Congress has already answered that.

MR. HUMPHREYS: Well, I do not think so particularly with regard to the reserve requirement, Your Honor, because there it would seem like Congress certainly would not intend to create a confusion by using the word "located" to define the specific reserve requirements for a bank depending on the

county that it was located in, and that is whether it be a central reserve county or whether it be another county; by saying that a bank is located everywhere, then that provision becomes if not -- becomes almost unmanageable, it seems to me.

QUESTION: Well, I thought the requirement related only to the place where publication had to be made, rather than the content of the publication?

MR. HUMPHREYS: No, Your Honor. There are, as I say, I tried to summarize too quickly and they are not cited in the brief, but there are about eight more statutes in 12 USC -- excuse me, that were enacted in 1864.

One of the statutes concerns the requirements for maintaining reserves. I mean, this is not a publication statute. And I do not want to suggest that that statute was necessarily passed in 1864, but the statute provides that if you are located in a reserve city, you will have a reserve requirement of X. If you are not located in a reserve city, you will have another reserve. That is not a publication; that actually directs you as to how much reserve you may have.

QUESTION: In the State of Texas, a bank that is chartered in Galveston and a branch in El Paso, at the turn of the century it would take you about three days to get there, would it not?

MR. HUMPHREYS: At least.

QUESTION: And it would apply, your statute would

apply?

MR. HUMPHREYS: That is correct, Your Honor.

QUESTION: And as of today, that bank could publish whatever they want in the Galveston daily paper as notice in El Paso?

MR. HUMPHREYS: Under all of these statutes, that would be correct; yes, sir.

In the few minutes that I have remaining, I would like to ask the Court's indulgence to consider the waiver argument, because many State courts having concluded that "located" and "established" refer to only one county, then turn right around and say, "However, this venue requirement is waived by the erection and maintenance of another branch in another county," that argument is not founded on juridicial precedent, and if the Court would think about it as I know it will, it occurs to me that never before in American jurisprudence have we decided that venue can be waived presumptively by prelitigation conduct.

The only case that even suggests that, if that sort of rule was adopted, every case that comes before a trial court, the judge is now going to be faced with an argument of he presumptively waived venue by some conduct inconsistent with it in advance of trial."

QUESTION: Well, what do you do about the Neirbo case?

MR. HUMPHREYS: Neirbo was a -- tread very lightly on this matter and was a very narrow holding, and it involved the corporation who specifically appointed a registered agent for service of process.

QUESTION: But prelitigation --

MR. HUMPHREYS: All right, but that was very narrow. They found express consent to be sued by the appointment of agent for service of process, and I would suggest that Neirbo can never be cited or used without considering Olberding, which was decided in 1953 by Justice Frankfurter, because Neirbo can be read too expansively, or can be used too expansively without reading Olberding, because in Olberding the argument was made that a non-resident motorist passing through a State -- and this was not a jurisdiction question, this was on venue. They had decided the constitutionality of the non-resident motorist statute.

But the non-resident motorist was passing through a State and for some reason venue requirements were not met because neither the plaintiff nor defendant were residents of that State, and the defendant asserted his venue right, and the court said, "No, you waived venue because we've got our non-resident statute that says when you're passing through the State, you waive venue if you have an automobile wreck and you appoint the Secretary of State to receive process," although no specific appointment was made.

And Justice Frankfurter said that "but to conclude that a motorist who never consented to be sued has agreed to be sued and therefore waived Federal court venue is to move in the world of Alice in Wonderland."

In other words, that non-resident motorist had not consented expressly to be sued. There is no case that this Court has considered other than *Neirbo* in which a prelitigation waiver has been allowed, and in *Neirbo* the Court was very specific to say that it was because they had expressly appointed an agent for service of process and therefore had expressly consented to be sued.

Now, what the proponents of the waiver argument would seek now is to say that any act inconsistent with asserting venue that you do prior to trial will result in waiver of venue, such as erecting a branch bank. Well, I submit that individuals do things all the time inconsistent with the normal State venue right of to be sued in your home county. But no court has ever said that because you go to -- if you are an individual and you go to another county and commit a tort that you have waived venue. You have not waived venue, if the statute says you have a right to be sued where you live, you do not waive that statute prior to litigation, and that is what we would contend this statute says, that a bank has a right to be sued where it maintains its home offices.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Humphreys.

Mr. Kovacich, you may proceed.

ORAL ARGUMENT OF MICHAEL J. KOVACICH, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I am Mike Kovacich and I think Mr. Humphreys has outlined to you the crunch of the matter, and it basically boils down to a statutory interpretation. And there have been decisions which are cited in the briefs from various lower Federal courts and State appellate courts dealing with this question in recent years.

These cases revolve basically around two series of interpretations as far as holding for the position which I contend is proper. The first theory, and this was the one predominantly followed by the Georgia court, is the dichotomy in language between the words "established" and "located".

The ruling was basically that because of this dichotomy in language, once the bank set up a branch in a county other than its charter county, if you want to use that term, that it was located there and could be sued there, and therefore in compliance with the statute.

The second theory is that of waiver, that is, the act of establishing a branch bank in and of itself constituted a waiver. This is what Mr. Humphreys discussed when he said

prelitigation waiver. That is the basis of the decisions in some of the lower Federal courts which are cited in my brief, and in some of the State court decisions, which are also cited.

But as I said, it revolves around this question of interpreting the statute. As to litigation in Federal court which is not really what we have got here, but it has been brought in for consideration in looking at the entire picture, I would agree with Mr. Humphreys that the established does mean that particular county. I do not know whether that is quite the case for State litigation, and I would not go so far as to concede that. But I think as some of these Federal decisions have held, the establishment or the conduct of business -- there were one or two of the decisions and there is also a recent Florida appellate decision which dealt with the question of doing business -- and this gets us in part as to what is required.

Some of these cases have contained a recitation of -- like the Reaves case, 66 branches in the Southern District of California and all of that, the volume -- and this brings upon the question that Justice Rehnquist posed before in volume.

You may not be aware that DeKalb and Fulton Counties are, border next to each other, and part of the City of Atlanta is located in DeKalb. I think that as Mr. Humphreys response to Mr. Justice Rehnquist indicates, a considerable portion of C&S's business by volume is in DeKalb and Fulton

Counties. I am sure the business in DeKalb is several times what it is in Chatham County.

And as to the question raised by Mr. Justice Blackmun about their using the courts in DeKalb, as I pointed out in my brief, there was earlier litigation dealing with one of the loans that led to the unlawful redemption, as we have alleged in our petition, and there was litigation in regard to that filed by the bank in the exact court that this litigation initiated in.

QUESTION: Are you suggesting that the person goes to another State, another jurisdiction from his own and uses their courts, that that in and of itself draws him into the jurisdiction of that court for all other purposes?

MR. KOVACICH: No, I would not, Your Honor, Mr. Chief Justice. But what I am raising here is the fact that besides using the court, the bank has established branches and is conducting acts of business and uses the courts as a part of conducting that business, and has become a part and parcel of that county, and this leads into somewhat the point that Mr. Humphreys raised about, Does going to another county and committing a tort waive an individual's venue?

He said no, it would not, and I believe that is a correct statement of the law. But many States, Georgia included, provide that a corporation can be sued in any county in which it commits a tort. You can sue a corporation in a

county where the tort is committed, or in a contract matter, where the contract is entered. So I think the courts have recognized different jurisdictional and venue requirements as to corporations.

QUESTION: There is nothing ambiguous about that statute, is there?

MR. KOVACICH: No, Your Honor. That, I think that statute is fairly clear, and I think that situation --

QUESTION: When you talk about that statute, you are simply saying the Georgia Legislature as a matter of policy declared that to be so. We do not have that quite that clear kind of expression here, do we?

MR. KOVACICH: No, we do not, Your Honor, and because of this court's decision in the Mercantile case, that is holding that 12 USC Section 94 was not permissive but was mandatory, that therefore preempts the Georgia statute for the determination of where C&S can be sued, and the determination has to be made under this statute.

QUESTION: Mr. Kovacich, I want to be sure about your posture: Do you feel that you could sue this bank in any county, in the State court of any county in Georgia where it has a branch, whether this particular transaction arose out of business from that branch?

MR. KOVACICH: No, I would not go that far, Your Honor. I would say that there has to be some connection to

that county.

QUESTION: Why do you draw that distinction?

MR. KOVACICH: Well, I think maybe because in the back of my mind I think of the Georgia venue statute as to corporations. That is, if you are going to sue a corporation over a tort or a contract, you have to have some connection to the county other than just finding them there.

QUESTION: Do you feel you could sue in Savannah, Chatham County, is that what it is?

MR. KOVACICH: Yes. Well, of course, the bank is contending that Chatham is the only place we can sue.

QUESTION: That is right. Do you think you can sue there -- so at least on your theory, you have two counties in which you could sue, Chatham and DeKalb?

QUESTION: Regardless of where the transaction was?

MR. KOVACICH: Well, under my theory, if there were no ties, no transactions, no part of these transactions in Chatham County, then the only way that I could sue there is on the fact that the statute provides a special additional venue.

QUESTION: Well, let me ask it again. On the facts of this case, on your theory, then, you can sue only in Chatham County or DeKalb County, not in Fulton?

MR. KOVACICH: That is correct, Your Honor, because I am not aware of any transactions or any part of this entire

matter which were conducted in Fulton County.

QUESTION: So you do not go all the way and say because there is a full-service branch in a county, whatever that means -- that is banking terminology -- that you can sue the bank in that county?

MR. KOVACICH: No, I do not. Now, I think some of the decisions referred to in my brief imply that possibly that is the case, that the waiver of the establishment of the branch, the knowing business decision to open the branch and all the ramifications that imposes includes the right to be sued there.

Now, some of these decisions, though, do contain the qualifying language or the limitation that there must be transactions that arose out of that; otherwise I would think the original purpose of the statute, that being to protect the national banks, in their infancy at the time, from cumbersome litigation, would be thwarted, and I think, I don't know whether or not that is a legitimate purpose today, but assuming that it is, I think that that same purpose is accomplished by limiting the litigation to counties which have some connection.

I won't say -- here we were dealing with a series of four or five different actions, including two separate notes. And, you know, the record does not show and the way this case was involved, that --

QUESTION: Now, you confuse me a little bit. I suppose I am not tracking, but I thought you were approaching this

initially on the basis of statutory interpretation.

MR. KOVACICH: Yes, Your Honor.

QUESTION: And then I, hence I am wondering why you include the county of the branch of the transaction but exclude a county where there is another branch and no transaction.

MR. KOVACICH: Well, as I say, Your Honor, I think some of the decisions do not, and --

QUESTION: I am asking about you, not those decisions.

MR. KOVACICH: Well, I guess from the standpoint of the fairness aspect, I do that in my mind, that this could possibly be burdensome to the bank. And I think really fairness is one aspect that we have to consider in this.

QUESTION: Well, on that approach don't you lose your construction argument, and aren't you forced to go into a waiver theory?

MR. KOVACICH: Well, I think to a certain degree, and to me, thinking from the fact that to resolve this question which has gone through extensive litigation in many courts recently, that this court's decision, or it might be desirable that this court's decision also address itself to the Federal, and the only way to do that is on the waiver theory, because the dichotomy of language definitely does not exist and apply to the Federal situation.

QUESTION: Well, you say "located" does not mean "established"? Is that your position?

MR. KOVACICH: Well, this -- I think that is one theory of application, and I think that is the theory --

QUESTION: What would you say about a national bank that exists in a State that has two districts in it and it has branches in two districts. It would have one as its home office and another as a branch in another district. Where may it be sued?

MR. KOVACICH: Well --

QUESTION: Let's assume that the suit is brought in the Federal district court in the district where it has a branch.

MR. KOVACICH: All right.

QUESTION: But that is not its home office. Can they be sued there?

MR. KOVACICH: Excepting -- if you follow my contention that the establishment of the branch constitutes a waiver at least for transactions arising out of --

QUESTION: Except on the waiver basis you would have to say that it could be brought in only one district, except for the waiver.

MR. KOVACICH: As far as the Federal is concerned, yes, Your Honor. And this is why I think we get into the fairness question and this touches upon the matter that Mr. Justice Marshall raised before in regard to the Galveston-El Paso situation.

QUESTION: Well, your suggestion is we just rewrite the statute in a fair way?

MR. KOVACICH: No, no I am not, Your Honor. I am not suggesting that you rewrite the statute. I am suggesting that you interpret the statute and you decide what constitutes a waiver of the prerogatives that the bank has under the statute and I would contend to you that the establishment of a branch should be a sufficient act to constitute a waiver, at least as to transactions arising out of the conduct of business in that branch.

QUESTION: Where is the notice there? The bank does not get that notice. Where was the bank told that if they establish a branch, they will be subject to suit in that county?

You know, waiver is a knowing waiver.

MR. KOVACICH: I do not think, in that sense, maybe that there was notice, Your Honor, but I think also in the same vein, if an individual say in Fulton County, Georgia, goes into C&S to transact business with them, do they tell him, "Look, if this does not go the way you want and you decide you have to sue us, that you have to go to Savannah."

QUESTION: No.

MR. KOVACICH: I am sure they do not. And so --

QUESTION: So if he goes into an ordinary corporation store he gets the same thing, does he not? It is the

extent of the law. But you are talking about a waiver.

MR. KOVACICH: Yes, I am, Your Honor.

QUESTION: Well, I say a waiver has to be knowingly made. Wouldn't the bank have to know when they established that branch bank that they were waiving this statute?

MR. KOVACICH: Well, I would think that it could be -- I mean, you could argue, and I am sure that would be the bank's position, that they must make a knowing waiver and they must be put on some kind of a notice, but I really do not know any way to put the bank on any type of notice as to what other ramifications of establishing a branch bank.

QUESTION: How otherwise can you waive a statute?

MR. KOVACICH: Well, I think that going into that county assumes some ramifications of it. It is a knowing business decision, and I am sure when they go in there they do not know -- they may not know what the tax structure or the tax rate is going to be, but they presume and know that they have to pay, they are going to have to pay some type of taxes, and as far as, you know, this point, it is hard to --

QUESTION: Well, the bank knows that the statute tells us that they can only be sued in Savannah. That they know. The statute says that.

MR. KOVACICH: Well, that is the interpretation that the bank has been operating under.

QUESTION: Well, now, that is what the statute says.

MR. KOVACICH: Well, this is a question of statutory interpretation, Your Honor. Some courts including State appellate courts and lower Federal courts have held that that is not what the statute means because by the establishment of the branch, the bank waives venue. There are decisions on both sides of that, and in the fairness question, I think probably the most classic is the Helco case, where a New York bank had established a branch in the Virgin Islands, and the transaction and everything arose out of the activities of the branch in the Virgin Islands.

Now, there the 3rd Circuit's holding was that the individual had to go to New York to sue the bank, but there are then other Federal decisions, including one that crosses State lines, that hold that the establishment of a branch is a waiver. One where the bank was established in Camden, New Jersey and the branch in Philadelphia, and the district court in Philadelphia held that the establishment there was sufficient action to constitute a waiver.

Now, some of the decisions have looked at other business, or the extent of business of the branches, but I think that it would be hard to write any definitive standards there.

QUESTION: What do you do where the bank has its office in Fulton County and a branch in DeKalb County? That is only a couple of feet.

MR. KOVACICH: Yes.

QUESTION: So how would your fairness work there?
You sue in either one, I guess?

MR. KOVACICH: Well, I think probably if that had been the situation as a matter of convenience I -- since our office had been handling the litigation in the prior action -- we might have gone down to Fulton. But --

QUESTION: As a matter of fact, your office has a branch in Fulton County, does it not?

MR. KOVACICH: No. No.

QUESTION: Well, a lot of them do.

MR. KOVACICH: No, mine is a small suburban firm,
Your Honor.

But I think one other point that this deals with is each of the branches has a branch manager who is also generally a vice president who can be an agent for service, and in fact, that is how service was perfected in this case, and how it has been in other cases.

But besides the -- you know, the fairness as an argument is difficult to make, but I think the statute is subject to interpretation on either the basis of a waiver theory, and for this court to definitively say what actions constitute a waiver. Is the establishment -- I would contend that the establishment of a branch in and of itself is sufficient.

And the other, as I said, and this was the basis on which the Georgia Court of Appeals rendered its decision, is

that by establishing a branch bank, the bank located itself in that respective county for suit under that court's interpretation of this act, without getting into any waiver.

But I think that on either application, that the motion of the bank, the original motion of the bank to dismiss was properly denied and I would respectfully request that this court affirm the decision of the Georgia Court of Appeals.

QUESTION: Mr. Kovacich, may I ask you a question? I think throughout the argument both parties seem to have assumed that when a Federal venue is sought to be established, the bank can be established only in one place, and that the branch would not be established within the meaning of the statute.

Has this court ever so held?

MR. KOVACICH: I do not think so, Your Honor. I think the reason that both parties have taken that position is one, we have not gone into that aspect of it in as great a depth because we are dealing with the State court issue, and secondly, the statute uses the word "establish" in regard to the Federal district, and as I understand it, the Federal laws which set up the procedure for a bank, a national bank being chartered also use that exact term, "established". And so from that you draw possibly an intention to mean the same thing, and therefore you do get this home county aspect. But to my knowledge, as far as --

QUESTION: There is no holding by this Court that a Federal, that a branch of a national bank is not established in the county in which the branch is located. There is no holding by this Court?

MR. KOVACICH: Not that I am aware of, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:12 o'clock, p.m., the case in the above-entitled matter was submitted.)

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