ORIGINAL

In the

Supreme Court of the United States

DAVID H. LEROY, ATTORNEY GENERAL OF IDAHO, ET AL.,

APPELLANTS,

V.

GREAT WESTERN UNITED CORPORATION,

APPELLEE.

No. 78-759

Washington, D. C.
April 17, 1979

Pages 1 thru 71

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IN THE SUPREME COURT OF THE UNITED STATES

DAVID H. LEROY, ATTORNEY GENERAL OF IDAHO, ET AL., Appellants, v. GREAT WESTERN UNITED CORPORATION, Appellee.	No. 78-759

Washington, D. C.

Tuesday, April 17, 1979

The above-entitled matter came on for argument at 1:57 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:

PETER E. HEISER, JR., ESQ., Special Deputy Attorney General of Idaho, 4060 - 212th Way, S. E., Issaquah, Washington; on behalf of the Appellants

AMY JUVILER, ESQ., Assistant Attorney General of New York, Two World Trade Center, New York, New York 10047; as amicus curiae

IVAN IRWIN, JR., ESQ., Shank, Irwin, Conant, Williamson & Grevelle, 3100 First National Bank Building, Dallas, Texas 75202; on behalf of the Appellee

FRANK H. EASTERBROOK, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 25030; as amicus curiae

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Leroy v. Great Western United Corporation.

Mr. Heiser.

ORAL ARGUMENT OF PETER E. HEISER, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

The Idaho official appellants in this case believe that the jurisdiction and venue issues that are brought here before the Court are the most important jurisdiction and venue issues relating to federal court jurisdiction over state officials since the decision in 1908 in Ex Parte Young, and that the issues on the merits of this case are very demanding, very interesting in the interrelationship of federal securities laws and state securities laws in a system of cooperative federalism.

This case involves an attempt by the appellee Great Western United Corporation, a New York Stock Exchange traded Delaware corporation, with corporate officers in Colorado, executive offices in Texas, and which does business throughout the United States to effect a cash partial tender offer for up to two million shares of the outstanding common stock of the Sunshine Mining Company, a New York Stock Exchange traded Washington State corporation, with

its principal asset a silver mine located in the State of Idaho, its corporate offices in the State of Idaho, its executive offices in New York, and other substantial assets in the States of Maryland and New York.

Though in this case the proposed tender offer was initiated by Great Western United Corporation in Dallas, Texas, the tender offer was announced and disseminated through a New York investment banking firm and the shares were to be tendered to a Chicago, Illinois, bank. As far as timing was concerned, on Monday, March 21, 1977, Great Western United Corporation simultaneously filed a Schedule 14D statement with the Securities and Exchange Commission as required by the Williams Act amendment to the 1934 Securities Exchange Act which relates to cash tender offers for corporate control. It voluntarily appeared in the State of Idaho to file a registration statement under the Idaho corporate takeover law, which is the subject of the constitutional challenge herein. And it inquire of the States of Maryland and New York as to whether those states would exercise jurisdiction under their respective state takeover laws.

Four days later, that Friday, the Deputy Administrator of Securities of the State of Idaho responded to Great Western United requesting additional information under the Idaho filing and contemporaneously appellant

McEldowney, the Director of the Idaho Department of Finance, submitted an executive order, administrative order delaying the effective date of the tender offer. No other official from any state, including appellant Kidwell, who has been replaced in office by appellant Leroy, took any action or threatened any action. They were merely officials who were charged under their respective state laws with administering those respective state securities laws. Nor did Great Western United ever attempt to negotiate or respond in part to the request of Idaho for additional information, despite the fact that one of those requests was merely that the eight missing pages from the Xerox copy of the 14D statement which had been filed with the SEC be submitted.

Instead, Great Western United's sole response to the request for additional information that was received by them on a Friday, was the next Monday morning at 9:00 o'clock in the morning to appear in Federal District Court in the Northern District of Texas, Dallas Division, seeking an ex parte temporary restraining order in a lawsuit which challenged the constitutionality of the state takeover laws of Idaho, Maryland and New York, and asserted that personal jurisdiction and venue were proper over the state officials' challenge under the Ex Parte Young stripping doctrine in the Northern District of Texas, rather than in their home states.

QUESTION: Was the sole basis for this claim the fact that the federal law preempted the Idaho law?

MR. HEISER: No, Mr. Justice Rehnquist, the basis for the constitutional challenge was preemption on the one hand and on the other hand that the Idaho law and Maryland and New York laws unduly burdened interstate commerce and were therefore forbiddn on that ground as well.

QUESTION: I suppose the mere existence of an Idaho statute which might ultimately be determined to be preempted by a federal statute wouldn't mean that the state official charged with administering would be "violating" the federal statute within section 27.

MR. HEISER: Mr. Justice Rehnquist, that is exactly our contention. We have a situation here where the officials involved were themselves regulators of securities transactions and are being sought to be held under the jurisdiction and venue portion of the Securities Exchange Act of 1934 to be subject to suit under that as though they had participated in fraudulently activities or had in fact violated some direct command of the Securities Exchange Act.

QUESTION: What is the basis for the jurisdictional question?

MR. HEISER: That is the federal securities law basis for jurisdiction, that is correct, Mr. Justice White. The other basis for jurisdiction was the Texas long arm

statute. And under the Texas long arm statute, it was alleged that the Idaho and other officials were actually doing business in Texas and doing business is a jurisdictional prerequisite within that statute. It has a two-step analysis that must be reached. The statute defines two categories of doing business. One of those categories, strange as it may seem, is a tort that occurs in whole or in part in Texas but that is defined in there as doing business. The other aspect of doing business in Texas under the Texas long arm statute as defined is a contract, the performance of which occurs all or in part in Texas. Then the statute opens up the scope and it says that it encompasses other activities that may constitute doing business in Texas, and it is very much the appellants' contention that their activity in a governmental capacity in being in Idaho, as Idaho officials, charged with and administering Idaho law, is certainly not an activity of doing business in Texas with the commercial overtone that that doing business concept necessarily implies.

That is the threshold consideration that must be reached in the Texas long arm statute for assertion of personal jurisdiction. The next requirement for inquiry is, of course, constitutional due process, International Shoe, Hanson v. Denckla. Again, phrased in terms of minimum contacts, activities that are commercial, profit oriented

activities that would subject a company or organization or person engaged in interstate commerce in a profit oriented mode to be rightfully subjected to jurisdiction in a place where the consequences of that commercial activity were felt.

We submit that the basis of this Court's determinations in due process really relate to the fact that the entity of person subjected to the jurisdiction of the out-of-state forum has been one who has sought the profit orientation of commercial activity. Never before has it been applied to a state official who is merely a regulator.

In fact, the mischief of it being applied really relates to a question that was earlier posed this morning by Justice Marshall about being sued in Maui. And while it may be nice for a state official to be able to vacation in Maui, it certainly is difficult when a state official would be called to defend his action in Idaho in enforcing an Idaho law in Idaho, in Maui or in any other place.

The chilling effect that that would have on the enforcement of state laws, the chilling effect it would have on legislatures in determining what law that they passed might be deemed to have somewhere in some other jurisdiction of this United States an extra territorial effect or consequence would be incredible, and the budgetary problems that defending in a foreign jurisdiction present

are also potentially overwhelming. The cost of sending attorneys and officials who were hired by their state to represent activities within the state, sending them to foreign jurisdictions to defend actions, the expense of the legislature in a small state such as Idaho trying to figure appropriations that would cover defenses in jurisdictions throughout the United States of allegations that are brought merely because someone feels they have been affected in a foreign jurisdiction, and the expense in many of the federal districts of the United States where a person cannot be admitted directly to practice before that federal district but must have -- sometimes can appear pro hac vice with associate counsel, local counsel, in other instances you cannot be admitted to practice before that district at all and you must hire local counsel.

QUESTION: Mr. Heiser, what if this case had arisen with a plaintiff as one who was contending that the takeover should not be permitted because the corporation had not complied with the Idaho statute, that plaintiff lived in Texas and otherwise had standing, is there any reason why in that sort of a lawsuit where Idaho officials weren't joined as parties the District Court in Texas couldn't hold that the federal statute preempted the Idaho statute?

MR. HEISER: Mr. Justice Rehnquist, if it were

procedurally proper to entertain the lawsuit in the Northern District of Texas, there is absolutely no reason why the Idaho law could not be assessed as it affected someone in the Northern District of Texas, that is correct, but that is not what happened here, unfortunately. Of course, we contend that had this lawsuit been brought in the District of Idaho, as it should have been, there would be no question that it is a lawsuit that is properly entertainable in Federal District Court in the District of Idaho, but unfortunately it was not brought there and that is what poses the very difficult jurisdiction and venue --

QUESTION: I suppose New York and Maryland on your basis would have the same objection to jurisdiction in Idaho as you are objecting to in Texas?

MR. HEISER: Mr. Justice White, that is absolutely correct. In fact, New York and Maryland very strenuously did object to the jurisdiction and venue being based in Texas, as I am sure they would have had it been based in Idaho.

QUESTION: But you wouldn't go so far as to say that given all the other necessary requirements of federal jurisdiction and venue, only the Federal District Court sitting in Idaho could hold an Idaho statute preempted by a federal statute.

MR. HEISER: No, Mr. Justice Rehnquist, that

would not be my contention. Under proper jurisdiction and venue in raising the federal question, it would be proper for a federal court to consider the Idaho law or someone else's law and there might be a situation like that where Idaho would participate as amicus curiae and volunteer to come down. I am not saying that there is restraint on the Court in entertaining the Idaho law. In fact, I think there is ample Supreme Court precedent for that occurring.

There has been an allegation made that the State of Idaho delayed the effective date of Great Western's tender offer for the shares of Sunshine Mining Company stock and that it therefore interfered with the transaction of $31 million of interstate commerce.

In fact, the delay attributable to action by Idaho was for a period of two days, from May 28th to March 30th, 1977, when after hearing that there was an ex parte temporary restraining order sought, we asked the Federal District Judge in Dallas to allow us to go on the record and he postponed the hearing for two days.

All the other delay in this case either resulted from a lawsuit that was brought by Sunshine Mining Company in the District of Idaho against Great Western United under the Williams Act, charging that Great Western United had not complied with the Williams Act, and the other delay was occasioned by Great Western's desire to pursue in the

Northern District of Texas this constitutional challenge to the Idaho, New York and Maryland takeover statutes.

We have additionally the venue problems. Venue was alleged under the Securities Exchange Act of 1934, section 27, and venue there was sought on the basis that the violations that were alleged to have been committed by the state officials actually occurred in the State of Texas rather than in the State of Idaho, when in fact the action that did take place was action that was taken in Idaho pursuant to the Idaho law, was transmitted to Texas at the request of Great Western United which had sought the response to be sent to them in Texas. So it may have come to rest in Texas, but it took place in Idaho and it, of course, creates the awkward situation that if you say that for venue purposes you have properly a single federal district for venue purposes as the place where the violation occurred, rather than a place where acts in furtherance of a violation occurred, which is not what the venue statute says, then you create this strange situation where if venue is proper in the Northern District of Texas, then it cannot be proper in the District of Idaho, and what you are really challenging is the action of the Idaho officials, the Idaho law, and the constitutionality of the Idaho law.

QUESTION: May I ask you a question in two stages. First, suppose the Idaho company borrowed money from a

Houston bank in Texas and as usual submitted financial statements and defaulted on the loan and suit was brought, where would venue lie, in Texas?

MR. HEISER: Mr. Chief Justice, under the terms of the Texas long arm statute, where you had defined within the doing business context of that statute, a contract to be performed in whole or in part in Texas, it is quite likely that the Federal District Court in Texas would have proper jurisdiction over that action so long as it did not fall within the proscription of U-Anchor Advertising, Inc. v. Burt.

QUESTION: Now, eliminate the Texas statute from the hypothetical and have the same loan made, financial statements submitted, and it turned out that the financial statements were allegedly false, would venue lie in Texas independent of the Texas long arm statute?

MR. HEISER: Under the general venue statute, Your Honor?

QUESTION: Yes.

MR. HEISER: Under the general venue statute, then it would be proper for all the defendants resided or where the act, the violator of the act or transaction that is the subject matter occurred, and in this instance while the loan was sought in Texas, it would appear from the hypothetical you pose that the default occurred in Idaho

and the venue would therefore be --

QUESTION: The false statement was delivered to Texas, to the bank, the lender. Isn't that enough?

MR. HEISER: You have there a situation of a weight of contacts problem, where one of the acts in furtherance, if that is the operative fact, the false statement and its transmission into Texas, then, yes, there are cases which hold that the venue would be proper in Texas, although under a weighing of contacts analysis it might also be deemed proper that venue would be laid in Idaho, if that were the --

QUESTION: There is no question about it being in Idaho.

MR. HEISER: Well, it would be in Idaho under the defendants, where the defendants resided.

QUESTION: Definitely.

MR. HEISER: But as far as where the act or transaction occurred, I think that you could have it either in Idaho or in Texas where there is a deliberate fraudulent activity because in that context which you pose, Your Honor, there you have a deliberate action by the defendant which he wants to have a jurisdiction causing effect in Texas.

QUESTION: Mr. Heiser, are we talking now about venue or jurisdiction, and if jurisdiction are we talking over the person or over the subject matter, and are we

talking as a matter of what is permissible under the Constitution or what is provided by state statute? I have been lost in this discussion.

MR. HEISER: Mr. Justice Stewart, that has been one of the problems of this case from the beginning. It is our contention --

QUESTION: Well, in this particular question --

MR. HEISER: -- that there are several distinct criteria which must be met, that there are three criteria which must be met --

QUESTION: Must be met, what, under the Constitution or under some state statute?

MR. HEISER: Must be met under the Constitution as well -- well, there are criteria that must be met under the Constitution, due process standards.

QUESTION: Yes.

MR. HEISER: There are three criteria which must be met under the Federal Securities Act jurisdiction and venue provision, and there are special criteria which must be met under the Texas long arm statute. Under the Securities Act jurisdiction and venue statute, there must be subject matter jurisdiction. It has been alleged that there is subject matter jurisdiction because the state officials in enforcing or being charged with the enforcement of a state law allegedly in conflict with federal law

rises somehow to the dignity of a violation of the Securities Exchange Act of 1934 and that therefore there is subject matter jurisdiction.

Next, it has been said that there is personal jurisdiction over the officials because the action that they took was having an effect on a corporation in Texas and that venue was proper in Texas because that was the district where the effect of the action in Idaho was felt.

QUESTION: It is personal jurisdiction over the Idaho officials, which is the big threshold issue here, isn't it?

MR. HEISER: Absolutely.

QUESTION: And it is personal jurisdiction over them, not subject matter jurisdiction over the case, personal jurisdiction over the Idaho officials, whether there is under the Constitution of the United States, whether there can be, isn't that it?

MR. HEISER: Mr. Justice Stewart, that is absolutely correct. There is the one additional problem we have in that the personal jurisdiction that was alleged under the Securities Exchange Act of 1934 was alleged because of the further allegation of subject matter jurisdiction in that they violated the Act because of --

QUESTION: Let's assume they violated the Act, there is still a threshold question --

MR. HEISER: There is still the --

QUESTION: -- of whether or not the court had personal jurisdiction over them, isn't it?

MR. HEISER: Absolutely, Your Honor. And under the Texas long arm statute, that is the crux of the contention.

QUESTION: But if there was a violation, there is nationwide serice, isn't there?

MR. HEISER: Mr. Justice White --

QUESTION: Let's assume there was a violation by the Idaho officers -- and I don't suggest that I think there was -- doesn't the securities law provide for nationwide jurisdiction service?

MR. HEISER: Mr. Justice White, that is correct, it provides for nationwide service of process. We --

QUESTION: Wouldn't that give personal jurisdiction?

MR. HEISER: That would give personal jurisdiction in a court where the due process standards were properly applied.

QUESTION: Right.

MR. HEISER: And there again we go to the crux of the argument. It has been the contention that sometimes in the case that due process does not obtain in an action such as is brought under section 27 of the Securities Act

because there is nationwide service of process and therefore a state official can be served anywhere where a court can issue that process.

QUESTION: Anybody can served by a federal court within the bounds of our nation.

MR. HEISER: Absolutely, Mr. Justice Stewart, anybody may be served by the court, but the threshold question there is is that the proper court to issue the service and that is the crux --

QUESTION: Isn't that a matter of venue then?

MR. HEISER: That is a matter of whether one wants to call venue or proper assertion of personal jurisdiction, it is whether that is the proper court. That is the purpose of trying to stop the forum shopping.

QUESTION: Well, what if Congress says in so many words that if there has been a violation of the Act, as Mr. Justice White's question to you assumed, process may be served and personal jurisdiction may be obtained in any one of the 93 judicial districts in the United States.

MR. HEISER: Mr. Justice Rehnquist, if that is what the statute said then I would still try to be here before you saying that that statute in assessing personal jurisdiction on such a broad scope was missing the very important due process requirement that allows the federal court to hear the case in the first place.

QUESTION: Well, wouldn't you have that even in a case where the prosecution or the action arose in a case where the alleged violation occurred?

MR. HEISER: Mr. Justice White, no.

QUESTION: Of course you would.

MR. HEISER: That is the whole point.

QUESTION: So if the violation occurs in State A and the federal laws says that you can serve anybody connected with this case anywhere in the country, you wouldn't object to that?

MR. HEISER: Absolutely not, Your Honor, and that is the whole point. If this were brought in the District of Idaho and for some reason the Idaho officials had to be served in Hawaii or Alaska or wherever, nationwide service of process, absolutely no problem whatsoever.

QUESTION: Well, that doesn't determine where the venue is going to lie.

MR. HEISER: That's correct, Your Honor. That is where the claim or the act in violation occurred, is where the venue of the case is laid.

QUESTION: All of this colloquy is addressed to the federal statute, is it not?

MR. HEISER: All of this is directed to jurisdiction under section 27 of the Securities Exchange Act.

QUESTION: This case involves the Texas statute,

doesn't it?

MR. HEISER: That is one basis for jurisdiction. The other basis -- the one basis for jurisdiction over the state officials is section 27 of the Securities Exchange Act of 1934. The alternative basis for jurisdiction over the state officials was under the Texas long arm statute and its accompanying venue statute. So what the two courts below found was that jurisdiction was proper in the Northern District of Texas by coming down these two avenues, either one of which --

QUESTION: Well, don't you agree that if your opponents can sustain either one of those that the Court of Appeals was correct?

MR. HEISER: Mr. Justice Rehnquist, if this Court would sustain either one of those, then the Court of Appeals is correct, but --

QUESTION: There are independent bases of jurisdiction?

MR. HEISER: Absolutely, Your Honor. But it is our contention that both of them are absolutely wrongly decided because both of them misapplied not only the due process standards but failed to come to grips with the doing business prerequisite on the one hand and the Texas long arm statute and created this incredible fiction that state officials who were enforcing a state law in Idaho,

themselves regulators of securities transactions, were somehow guilty of the same type of activity that people who are subject to the Williams Act and the other portions of the Securities Exchange Act violate.

QUESTION: That is answering the question that Mr. Justice White earlier asked you to assume. Suppose they go into the Northern District of Texas and allege that you have violated the securities act and allege venue and jurisdiction under section 27, now don't you think that Congress has a right to allow that sort of jurisdiction and venue if it expressly says so, and if the plaintiffs can satisfactorily make out a case that you have violated the thing?

QUESTION: In Texas.

QUESTION: In Texas.

MR. HEISER: Mr. Justice Rehnquist, yes. If the prerequisites that you say, if there has been a violation, truly a violation, if the statute were framed in such a way, the underlying law were framed in such a way that a violation truly could be said to have occurred, yes, if Congress constructed --

QUESTION: Insofar as your having violated the statute or not -- and I don't suggest one way or another -- your position or your status is the same in Idaho as it is in Texas? You have violated it in Texas just as much as

you have in Idaho, but no more or no less?

MR. HEISER: You have violated it, Mr. Justice White, any place in the United States.

QUESTION: Exactly.

MR. HEISER: But then if you violated it at all, then you would not necessarily be proper in the United States and then you are back to venue.

I reserve the balance of my time.

QUESTION: Mr. Heiser, before you sit down, just a detail. Is the Attorney General properly here?

MR. HEISER: Mr. Justice Blackmun, it is my contention that the Attorney General is properly here. The decision of the Firth Circuit Court of Appeals, although the Attorney General did not make a formal appeal from the District Court decision, at all times during the context and in the writings of the Fifth Circuit, it treated the officials in the plural as if both of them were before the court, it affirmed the decision of the court below that related to both of the officials, and it is our contention that the Attorney General is properly before this Court because the Fifth Circuit wrongly or rightly certainly did assert jurisdiction over him and adjudged the case with regard to him.

QUESTION: Speaking of Attorney General, I think in your brief you have Ex Parte Young as the Attorney

General of Minnesota. Sometimes we in Minnesota might be glad to yield that to Michigan, as you have described him, or one of the briefs did, I think yours, but Ex Parte Young is the Attorney General of Minnesota.

MR. HEISER: In the summary of argument, my printer got Michigan and in my argument he did it right as Minnesota.

MR. CHIEF JUSTICE BURGER: Mrs. Juviler.

ORAL ARGUMENT OF MRS. AMY JUVILER, ESQ.,

AS AMICUS CURIAE

MRS. JUVILER: Mr. Chief Justice, and may it please the Court:

The unprecedented decisions below with which you have just been grappling with Mr. Heiser, changed the law with regard to jurisdiction and venue so as to expose the state, their officials and the laws enacted by the citizens of this country through their state representatives to unfair trial as occurred in this case. There was no reason whatsoever, none to warrant the established procedures to accommodate Great Western United, a multistate corporation seeking to expand its Idaho operations. Suit in the District Court in Idaho was possible and was convenient for the defendants, as we demonstrated in our brief.

The only reason that these problems are presented to Your Honors, that of subject matter jurisdiction under

the Securities Act, personal jurisdiction under the Securities Act, and the long arm statute and the limits on those statutes posed by due process, and the questions of venue not only under the general venue statute of this Court in issues which have never been presented before and venue under the Securities Act, the only reason was that because the lower courts were impatient to exercise their own jurisdiction, the personal jurisdiction of the Northern District Court and the jurisdiction of the Firth Circuit in order to decide a superficial and intellectual question only, and that is whether the law of Idaho was preventing shareholders of Sunshine Mining Company who personally resided in other states from selling their shares to Great Western United.

Those shares we must remember throughout this case were in a company whose major asset is the largest silver mine in the United States, and a very important resource of the State of Idaho, and it is permanently located in Idaho.

QUESTION: Mrs. Juviler, your friend, Mr. Heiser, in response to Justice Blackmun, said that very definitely the appellant is here. Could he have taken an appeal to the Court of Appeals from the District Court judgment? Could he? We know that he didn't, if I recall correctly.

MRS. JUVILER: Yes, Mr. Chief Justice, I believe

that appellant Kidwell could. That is an interesting question to pose to the representative of the Attorney General of New York who sat in our office and debated whether we could take an appeal because we had to expend public monies and, may I say, my own private funds because the Comptroller didn't think that I was really on state business in Dallas and New Orleans, he thought I was on some frolic and detour for my own amusement. Also the people who provided us the transcripts have similarly suffered the skepticism of the Comptroller of the State of New York. But we determined that we wouldn't burden this Court with yet another jurisdictional problem in a case already bothered, and we chose not to appeal but to appear as amicus throughout, although we feel personally aggrieved -- I mean the Attorney General feels personally aggrieved for having to defend his statute in Texas when there was no reason whatever to do so, leaving aside all of the legal objections and the Constitution.

Along the way in doing this, we are not only dealing with statutes that failed to provide jurisdiction and venue over state officials, but the policy that is reflected by Congress' utter lack of interest in securing this kind of jurisdiction over state officials is part of the way our government is organized. I am not going to go so far here because it is unnecessary to say that if Congress wrote the kind of statute that Mr. Justice Rehnquist was talking about,

it would be unconstitutional as a violation of our federal rights. We would first have to see it -- or perhaps unconstitutional as a violation of due process of the individual state officials sued under the doctrine of Ex Parte Young as to whether they were given adequate notice that they would be exposed in foreign jurisdictions for their actions in good-faith compliance with their own laws.

QUESTION: You don't deny that a private citizen could be made subject to suit anywhere in the United States by Congress, do you?

MRS. JUVILER: No, Mr. Justice Rehnquist, I don't deny that it would be possible for Congress to establish nationwide service over state officials, if the statute not only gave full notice but was based on some reasonableness and action, also had some basis in the jurisdiction in which --

QUESTION: What if Congress just said in so many words that there shall be nationwide service of process on everyone who is alleged to violate the statute when it didn't purport to make any finding of reasonableness, they just said this is what the law is going to be?

MRS. JUVENILE: If Congress had done that -- well, one of the basic questions, we use the word "violate," and it has been used here a great many times, it is not conceded and I think it does not do credit to the language of the

statute, the states are not violators, the language of a state statute which is in conflict with the Williams Act or with any other act of the securities law is precisely that conflict. The word "violation" does not fairly apprise the state official that what he does is in conflict or in fact if someone sought to sue the official of the Securities and Exchange Commission under the same ground, I don't think he would be given due process notice that he would be exposed to suit as a violator unless Congress also said a violation means that you act in conflict with the statute.

And then I think if Congress did that, securities administrators would know that a new era has come into the United States and state statutes governing securities, instead of giving the heavy presumption in favor of them that they are presently given, now are to be treated as substantively suspect. And because we have a procedural system that reflects the substantive law of securities regulation in this country as well as corporate regulation, one can expect that in ordinary state statute which governs affairs of corporations within that state, actually within that state, and the affairs of securities trading regarding such a corporation, such a statute is presumed correct and is not presumed to be a violation unless Congress held hearings and thought about it a lot and did it. But Congress hasn't

threatened us with that nor is there any suggestion that Congress went so far.

And all of this, Your Honors might want manipulation, the courts below did, the law to get at the issue if there wasn't a court sitting that could get at the issue. But we have conceded from the beginning that there was subject matter jurisdiction under the supremacy clause, under 1331, and subject matter jurisdiction was available in Idaho.

QUESTION: You know us better than to think we would want to manipulate, don't you?

MRS. JUVILER: I used the wrong -- well, we feel that it is very difficult to look at the decisions below and not think that the laws of jurisdiction and venue have been manipulated. Not one single decision has a direct precedent, nothing in the finding jurisdiction and venue over the defendant here has a precedent in any previous decision. None of it is required by the language of any statute except by interpretation that is overlaid and is not supported by precedent.

Just as an example of the most minor aspect of the venue decision of the court below, look what it did to a multi-state corporation doing business all over the country. Suddenly it can now sue where its board of directors reside, even though it is conceded it was doing

business in Idaho and it was Idaho business that was at issue.

Suddenly in a federal court, venue now lies for this kind of action in Texas, and the court below implies that that is the only place it can lie. That applies not only to actions against state officials but to actions against federal officials and to actions against people who have commercial dealings with Great Western United. Indeed, when Sunshine Mining sued Great Western under the Williams Act in the District of Idaho following -- or sued HIRCO, the successor company, after the completion of this tender offer, Great Western United said, oh, no, you have got to sue us in the Northern District of Texas, we have special rights, we can only be sued in the Northern District of Texas, we now own controlling interest in Sunshine Mining and your cause of action is about Sunshine Mining Company, but we get sued where we live, in Texas. This does terrible violence to the system that has been established by, for instance, the Texas long arm statute, and also, for instance, by section 27. Nationwide service of process under section 27 has a purpose and its purpose is to make Great Western United be servicable where its securities are issued, and Sunshine Mining be served where its securities are issued. It does not have the purpose of making the officials of Idaho enforcing their own state statutes servicable where

their decisions may have an effect.

The precedential effect of that kind of decision below is overwhelming and for those of us who represent state officials with regularity, we know that this will change radically the way states are able to defend themselves.

MR. CHIEF JUSTICE BURGER: Your time is expired now, Mrs. Juviler.

MRS. JUVEILER: Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Irwin.

ORAL ARGUMENT OF IVAN IRWIN, JR., ESQ.,

ON BEHALF OF THE APPELLEE

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

I represent here the interests of Great Western United Corporation, the appellee. In March of 1977, as Mr. Heiser has stated, Great Western United Corporation proposed an interstate tender offer for shares of stock of Sunshine Mining Company. Great Western is a Delaware corporation with its headquarters and principal ownership in Dallas, Texas. Sunshine Mining Company was and is a Washington corporation, with business operations in Idaho, in Maryland, and in New York.

I mention the fact that Sunshine had its place of incorporation in Washington because Washington had and

has no state takeover statute.

The share of Sunshine stock were held by citizens across the nation, about 2.5 percent residing in Idaho, about 6 percent in Washington, some 7 percent in Texas and elsewhere. Shares were listed and traded on the facilities of the national securities marketplace. Great Western was proposing to pay a premium over the market of $15.75 per share for up to two million of those shares.

With that backdrop, Great Western complied in all respects with the provisions of federal law governing the regulation of interstate cash tender offers pursuant to the Williams Act Amendments, to the Securities Exchange Act of 1934.

Nevertheless, because Sunshine had operations in these other three states, Idaho, Maryland and New York, and each one of those states had a state takeover statute, Great Western could not make the offer upon filing with the Securities and Exchange Commission its schedule 13D, now a 14D-1.

The Idaho Act, which is typical of state takeover statutes, contains an express extra territorial provision which states that no tender offer can be made for shares of a target company as defined in the Act anywhere in the world to any shareholder until the Idaho statute has been complied with. Now, the extra territorial application of

that statute combined with the fact that Maryland and New York had similar statutes constitute the most critical fact which permeate all of the issues before this Court this day.

QUESTION: And the coverage of the Idaho statute was of corporations with their principal place of business in Idaho, corporations incorporated in Idaho, and what else?

MR. IRWIN: Having substantial assets in Idaho.

QUESTION: And this is principal place of business?

MR. IRWIN: This was principal place of business and assets. There was an office as well as the mining operations --

QUESTION: No question as to the coverage of the --

MR. IRWIN: No question but that it was covered. I also would make the point that the triggering mechanism of the Idaho statute was not the presence of any Idaho shareholder of Sunshine; it was, rather, the business contacts between Sunshine and the state.

I feel that I should turn to the questions of jurisdiction and venue because that was all that was opened with and --

QUESTION: Mr. Irwin, may I ask you a question?

MR. IRWIN: Yes.

QUESTION: I understood you to say that the Idaho

statute was typical of these state statutes. In your brief, on page 20, the first sentence under "Summary of Argument," is "Unlike any other state statutes" and --

MR. IRWIN: Any other state statutes other than state takeover statutes.

QUESTION: I see.

MR. IRWIN: I'm sorry, Your Honor.

QUESTION: So you say this is typical of the 22 or 25 other state statutes?

MR. IRWIN: I think all but about five have this same extra territorial reach, and I think there are 32 states now which have state takeover statutes.

The District Court had personal jurisdiction over this case and venue was proper. Great Western had two avenues available, as has been discussed. One avenue was utilizing the general venue statute, 1391(b), and the Texas long arm statute. The other avenue, if we had subject matter jurisdiction under the 1934 Act, an issue, of course, which is being controverted, was through the nationwide service of process under the provisions of section 27 of the 1934 Act and service in accordance with Rule 4.

QUESTION: But even there you had to show that the defendant was "found," did you not?

MR. IRWIN: I had to show under section 27 that an act or transaction had occurred within the district

which constituted a violation or breach of duty.

QUESTION: Well, will you turn to page 6 of the jurisdictional statement, please, where I believe section 77 of the Securities Act, it says -- it begins on page 5 and ends on page 6 --

MR. IRWIN: Yes.

QUESTION: -- and it talks first about criminal proceeding and then it says, "Any suit or action to enforce any liability" -- this is at the beginning of page 6 -- "or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, mau be brought in any such district or in the district wherein the defendant is found..." Now, you say that you can bring it in a district where the defendant is found or in such district?

MR. IRWIN: In any such district, referring back to the lead-in sentence concerning a criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred, that is the criminal proceeding. Then you --

QUESTION: So the civil adds-on is broader than the criminal?

MR. IRWIN: It refers back to the criminal district as one place, and then goes further and the criminal district is where the act or transaction complained

of occurred.

QUESTION: You are going to tell us what the violation was, aren't you?

MR. IRWIN: And breach of duty, if it may be characterized that way.

QUESTION: I say you are going to tell us what it was?

MR. IRWIN: Yes. Would you like me to do that now or wait?

QUESTION: I think it is kind of the heart of the case.

MR. IRWIN: All right. Section 28(a) of the 1934 Act addresses itself specifically to the question of what securities regulators can do. It reserved to state securities commissioners or their counterparts the jurisdiction within their states over securities transactions so long as the activities of those commissioners was not in conflict with federal law.

The language itself speaks in terms of jurisdiction is preserved as long as it doesn't conflict. Thomas Corcorran, one of the draftsmen of the '34 Act, stated at the time that section 28(a) was adopted that the purpose was to establish and to utilize traditional preemption under the supremacy clause. The statement was that the state may legislate in addition but may not legislate

inconsistently, which is the very foundation of the supremacy clause.

It is our view that the attempted enforcement by appellants in this case of a statute which conflicted with the substantive provisions, the disclosure provisions and indeed the approaches of Congress as expressed in the Williams Act Amendments constitutes a breach of the very affirmative duty which was placed upon securities regulators not to enact statutes which conflicted.

QUESTION: What affirmative duty was placed on -- are you talking about 28(a)?

MR. IRWIN: Yes.

QUESTION: Well, I would not read that as placing any affirmative duty on them. It says nothing in this chapter shall affect the jurisdiction except such and such. Now, that may negate their right to do a particular thing, but it certainly doesn't place any duty on them, does it?

MR. IRWIN: I would view it differently. I would view it in terms of, as the Fifth Circuit said, the commerce clause is expressed only as an affirmative grant to Congress but it contains self-executing restrictions on state power.

QUESTION: You are saying that an officer who tries to enforce a state statute that is in conflict with a federal statute is violating that duty under the federal law?

MR. IRWIN: Under the 1934 Act, if it is a statute which conflicts with the federal law as embraced within the Securities Exchange Act of 1934 --

QUESTION: Well, what about the term you had the right to be free from state regulation?

MR. IRWIN: Well, I think the shareholders of Sunshine had the right to be free from regulation which blocked this tender offer until the state statute was declared unconstitutional.

QUESTION: So did your client, I take it?

MR. IRWIN: My client, of course, wanted the opportunity -- I am not saying we had a right to make a tender offer free of state regulation.

QUESTION: No, but you --

MR. IRWIN: I think the states can regulate in certain areas in tender offers. I don't think that this particular statute, with its infirmities, will stand constitutional muster.

QUESTION: Well, normally your company in Texas has a gripe against a state official in Idaho that would be litigated where?

MR. IRWIN: It would depend on where the --

QUESTION: Normally. I said normally. It would go to where the --

MR. IRWIN: Normally you would go to where the

defendant is located.

QUESTION: And you would attack the statute there, wouldn't you?

MR. IRWIN: We could.

QUESTION: And solely because of the Williams Act or are you relying on both?

MR. IRWIN: Well, we are relying upon the constitutional privileges as well as a violation of the Act. I referred a moment ago to the extra territorial --

QUESTION: Do you mean due process?

MR. IRWIN: The supremacy clause and the commerce clause which we believe the --

QUESTION: You are not arguing due process though, are you? You are not arguing due process.

MR. IRWIN: I think there is some element of due process in here, but that was not specifically how we brought our suit. A state cannot regulate the affairs of another state, that is certainly a due process argument which is implicit --

QUESTION: Well, if I understand the problem, that is exactly what you are doing, that the federal court in Texas is administering the laws of Idaho or whatever the state is.

MR. IRWIN: I think what the District Court in Texas was doing was --

QUESTION: They never did say, -- the Federal District Court in Dallas is interfering with the laws and the officials of Idaho. That is their complaint.

MR. IRWIN: And our complaint is that the Idaho regulators by seeking to regulate extra territorially were damaging the plaintiffs, the federal plaintiffs who brought the suit in the Northern District of Texas, where the very restraint occurred. It is tit for tat. It is fair play. If the Idaho regulators stay at home and regulate within their state, they are only going to be subject to being sued in their state. If they purport to regulate for the rest of the world and say you can't make a tender offer, Great Western, you can't buy a single share of Sunshine stock from any shareholder anywhere until you come and comply with Idaho law, and you have to route all of this commerce around to us, then they should be subject to suit in the place where they caused their consequences.

QUESTION: And you would say that if each of the other fifty states had exactly the same law and issued the same order, you think every state should be subject to suit in at least one place?

MR. IRWIN: Yes, I do, under the 1966 amendmente to the general venue statute allowing suit to be brought where the claim arose. For the first time, the federal plaintiff could bring different multi-defendants into a

single forum, just as we did in this case through the application of the general venue statute. We were faced with New York, Maryland and Idaho at the inception stages of this litigation.

QUESTION: And it is inevitable that if you spread that widely it is going to be quite inconvenient for someone.

MR. IRWIN: Very inconvenient for someone. We do not think that any policy of judicial economy would be served by Great Western being required to sue one time in Idaho, one time in Maryland and one time in New York, particularly when the focal point of all --

QUESTION: Well, how many states have takeover statutes?

MR. IRWIN: Approximately 32 or 33, I am not sure of the exact number. Mr. Heiser says 36, I will take his count.

QUESTION: That would be four more suits for you.

MR. IRWIN: Right.

QUESTION: Mr. Irwin, of course you don't have to have the law held unconstitutional in this transaction, I take it?

MR. IRWIN: No.

QUESTION: Only three of them affected you. But the violation, getting back to the question I asked before,

the violation I take it was committed when Mr. Baptie mailed the letter into Texas, is that right?

MR. IRWIN: I think it was a little broader than that. Mr. Baptie sent a letter into Texas which required the disclosure of substantial additional information over and above federal law, and two of the disclosures which he sought if we had complied would have triggered federal enforcement action. We would have violated federal law if we had complied. That is one point.

Accompanying the letter was an order.

QUESTION: Right.

MR. IRWIN: That order had been entered without any notice, hearing, posting of bond or other security which, as held by both courts below, restrains Great Western from going forward anywhere.

QUESTION: Well, did Mr. McEldowney, when he signed that order, violate the federal statute?

MR. IRWIN: I think by seeking to enforce this statute he breached the duty or violation, either one --

QUESTION: Did he commit a crime?

MR. IRWIN: No, Your Honor. No, he did not commit a crime.

QUESTION: Well, you are relying on such District language from 27 that provides for criminal jurisdiction, aren't you?

MR. IRWIN: But it is repeated when the civil jurisdiction provisions of section 28 come into play.

QUESTION: Mr. Irwin, is it

MR. IRWIN: First it is in the district where the violation occurred in criminal proceedings, then it goes to -- it may also be brought -- and this is the civil side of the docket, as I read it, Your Honor -- where the violation, the civil violation occurred, where the breach of duty occurred or to collect a liability.

QUESTION: No, it says may be brought in any such district or in the district wherein the defendant is found or as an inhabitant or transacts business.

QUESTION: Such you think refers to any district in which a criminal violation could be prosecuted?

MR. IRWIN: Or any act or transaction occurred constitutes a violation.

QUESTION: Well, do you think that would be limited by the requirement of the Sixth Amendment?

MR. IRWIN: I am not sure I understand you, Your Honor.

QUESTION: Well, the Sixth Amendment says, as you no doubt know as well as I do, that in all criminal prosecutions the accused shall enjoy the right to speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. Now, I take

it that Congress is bound by that in allocating criminal jurisdiction under the Securities Act.

MR. IRWIN: Yes.

QUESTION: And do you think a crime was committed in Texas in this case by the state defendants?

MR. IRWIN: No, I do not think a crime was committed. I do not. I think it is important for me to remember and advise that there have been a number of cases where venue has been proper under section 27, although there was no criminal violation involved.

QUESTION: From this Court?

MR. IRWIN: No, not in this court. Not in this Court, but in the lower courts. And I think the reasoning of the lower courts is sound. In the 16(b) area, for example, suits may be brought under section 27 to collect the profits which must be disgorged for illegal short-swing trading, but there is no criminal sanction for such prohibited activity. But the lower courts reasoned that it doesn't mean only that there has to be a criminal violation under section 27, it could also be a civil violation or breach of duty or something that would lead to the enforcement of a liability.

If I may, if I have answered that question, I will get back to this question of the first route which we took, which was the general venue statute where the claim arose.

We believe that the Northern District of Texas was the focal point of all of appellants' regulatory activity as well as that of Maryland and New York. Jurisdiction was obtained under the Texas long arm statute which has been definitively construed by the Texas Supreme Court, in U-Anchor v. Burt, as going to the full limitation of constitutional due process. Judge Stakley, in writing for the Texas Supreme Court on that state issue, said that the construction does not involve technical and abstruce definitions of what constitutes doing business.

The United States District Court which heard this case said that the statute has no commercial import. The appellants would argue that they were not doing business. The statute uses "doing business" as a pick-up, pulling in every activity other than what is already specifically described and, as I said, goes to the full limits of constitutional due process.

In any event, the business of the Idaho officials, as Judge Wisdom said, was to regulate. Hearing oral argument has been held to be doing business. Now, I don't have this case in my brief and I would like to put it into the record, Wisconsin Telephone Company v. Wisconsin Department of Industry, Labor and Human Relations, 228 Northwestern 2d 649, Wisconsin, 1975.

We then turn to a minimum contact analysis under

the long arm statute. It seemed to us that the activities of the appellants were certainly purposeful. There was nothing accidental about the comment letter or the order which was sent in which restrained us. The results on Great Western were certainly foreseeable. You could certainly see that if they restrained us, it locked up the funds, lost the opportunity to go forward. The cause of action arose directly out of those activities of the Idaho regulators. The causing of purposeful consequences in a foreign district has been held sufficient under many applications of minimum contact analyses.

The other avenue which we proceeded was section 27, its interrelationship with section 28(a), our view and the courts below that there was a violation or a breach of duty by the enforcement of this conflicting statute, therefore minimum contacts analysis was not required because we had from Congress the availability of nationwide service of process. The sovereign United States can exercise in personam jurisdiction over its inhabitants. There would only be a minimum contact analysis requires if we had been seeking to sue someone outside of the continental limits of the United States and its territories.

Under the section 27 construction by the lower courts, the act or transaction does not have to be the core of any wrongdoing or even illegal as long as it is something

more than immaterial. Here the most material aspect of the Idaho regulation happened in Texas, that is the order which enjoined us and we would further say that even if the minimum contact or weight of effects analysis were proper under section 27, it would be satisfied under the same analysis under the Texas long arm statute.

QUESTION: Do you think section 27 gives you the right to sue?

MR. IRWIN: Yes.

QUESTION: A so-called private cause of action?

MR. IRWIN: We would think so. Great Western --

QUESTION: Do you have to find some section to be that right or in the securities law or not?

MR. IRWIN: In order to have subject matter jurisdiction under the 1934 Act, we would have to find a section, yes.

QUESTION: Well, you are suing a state official, aren't you?

MR. IRWIN: Yes.

QUESTION: For interference with what you claim is a federal right?

MR. IRWIN: Yes, for violating the federal right, the federal regulation of tender offers as expressed in the Williams Act, through a statute which conflicts.

QUESTION: All this section says is that actions

may be brought, any suit or action to enforce any liability or duty may be brought in some -- does that automatically provide for private causes of action --

MR. IRWIN: I don't think it --

QUESTION: -- under this entire chapter?

MR. IRWIN: I do not think it automatically does. I think that --

QUESTION: What is your authority then for saying there is a private cause of action here?

MR. IRWIN: It was Great Western's tender offer which was in fact stopped. It was --

QUESTION: Well, don't you have to go back to find out whether Congress intended that you have a private cause of action, rather than relating the facts of this case?

MR. IRWIN: Oh, I see, I understand. The cause of action -- there have been implied causes of action under the '34 Act.

QUESTION: There have been? Have we ever held that there was one under this particular section?

MR. IRWIN: Not under this section, no. No, this is a case of first impression in that respect.

I think it also may be important for me to bring to the Court's attention something I am bringing late but nevertheless I think it would be something the Court would want to look at on its own motion. Idaho came here,

appellants came here under the provisions of section 1254(2), and that is by way of an appeal as opposed to making an application for a writ of certiorari. That appeal invoked this Court's obligatory jurisdiction and under the language of the statute precludes a writ of certiorari. The review on the appeal is limited to the federal questions. There is no authority on how wide that federal question issue is. We would submit it may be -- and again I think this is a case of first impression-- that the only federab issue is the validity of the Idaho statute which was held unconstitutional which furnishes the basis for the utilization of 1254(2).

If that is so, then the provisions of the issues brought here on jurisdiction and venue are not the federal question which was to be reviewed under the provisions of 1254(2).

QUESTION: But if you had no right to sue as a plaintiff under this statute, then there was never any occasion to pass on the validity of the Idaho statute.

MR. IRWIN: May I say that we were not basing our right to sue on just the 1934 Act. We were also basing our right to sue on constitutional privileges under the supremacy clause and under the commerce clause. There we felt we certainly had standing.

QUESTION: But then you certainly couldn't invoke

section 27 jurisdiction.

MR. IRWIN: That's true. If we don't have standing to bring this action because of a violation of 28(a), we can't use 27 and we have to go to the other alternative which was the general venue statute plus the application of the Texas long arm statute, that is correct.

In brief fashion, I would ask the Court to bear with me for a moment on a preemption analysis, very quickly. The Williams Act was brought into play in 1968, after Congress had been deliberating the subject for some three years. It was not an area which had been regulated before by either states or the federal government. At the time of the adoption of the Williams Act Amendments, there was one state takeover statute, Virginia, which had become effective about two months before. Congress said it closed the gap in an area which had not been regulated. Cash tender offer phenomena really didn't occur until the mid-sixties or maybe early sixties, so this was not an area which had been traditionally state regulated.

Congress took a market approach, allowing the tender offeror to make his filing and go direct to the shareholder at the same time that the incumbent management was going direct to the shareholder to tell their story to let the shareholder make his informed decision about taking cash for his shares. As a result, Congress considered but

rejected prior agency approvals, considered but rejected pre-effective filing requirements. Idaho took exactly the opposite course and has an extensive hearing and pre-filing requirement which causes the very delay which Congress didn't want to happen because of the weapon it would give to incumbent management to discourage delay, take defensive maneuvers to defeat a tender offer.

Congress also did not seek to have the shareholder's decision made by any fiduciary. Idaho took the opposite approach where the tender offeror must satisfy either the target management and get their recommendation or the state regulators, and this particular statute suffers a further vice in that the incumbent management can determine whether the state regulator acts or not. If they accept the offer, the state regulator cannot call a hearing, if they don't accept the offer they have to call a hearing.

The enforcement of these differing substantive and disclosure provisions between Idaho and the Williams Act and the difference in approaches as found by the majority opinion in the Fifth Circuit and by the United States District Judge demonstrates that this tips the balance of regulatory power in favor of the target management, which was not the policy Congress had in mind, and the Idaho statute stands as an obstacle to the full accomplishment and execution of congressional purposes.

The preemption analysis was just one of the analyses that the courts below went through. This tells one-half the story. The commerce clause was also violated, we believe, by Idaho's direct regulation out of state of a cash tender offer involving some $31 million. Great Western and shareholders throughout the country could not do business with each other until the Idaho law was satisfied.

QUESTION: If the Idaho statute had been limited to intrastate activities, would it be preempted, in your view?

MR. IRWIN: I don't think so, because I think it would then operate like the state blue sky law.

QUESTION: Exactly.

MR. IRWIN: The constitutionality of which this Court upheld in 1917 in Hall v. Geiger-Jones. The effect of the Idaho regulation put Great Western to a Hobson's choice. We could either ignore the letter that came into the Northern District of Texas and the order and risk substantial civil and criminal penalties, or we could comply and accept the delay and the additional burdens and the jeopardy which would be caused. We chose to go forward with the lawsuit because we believed that the enforcement of this statute had interfered with the area of free trade which had been established by the commerce clause and that there were no legitimate local interests being

protected.

Idaho has stated in their brief that they are protecting shareholders, but that analysis is a little thin. The Idaho statute does not require the presence in Idaho of any Idaho investor in a target company, so the very class of persons Idaho says they are protecting don't have to exist.

I see my time is up.

QUESTION: May I ask this question.

MR. IRWIN: Yes.

QUESTION: Your complaint also alleged a cause of action under 1983. What is the basis of that?

MR. IRWIN: We believe that the delegation by Idaho under the Idaho Act to the target management of the right to determine whether or not the Idaho Act would come into play constituted an unlawful delegation to a vitally interested private party, a violation of the Civil Rights Act as expressed in 1983.

QUESTION: What civil right?

MR. IRWIN: We believe that there is a discrimination involved if an outside party is subject to state regulationly only at the behest of another private party.

QUESTION: You still rely on 1983?

MR. IRWIN: We have not brought that forward in the brief, Your Honor.

QUESTION: Does that mean you have abandoned it?

MR. IRWIN: We have abandoned it.

QUESTION: You haven't brought it forward in your brief but it is in your complaint, it is a jurisdictional question.

MR. IRWIN: Yes.

QUESTION: Aren't you claiming that you have a right under the federal securities law that is being violated?

MR. IRWIN: Yes, but not only under 1983.

QUESTION: I understand, but that refers to the federal constitutional -- you are certainly claiming that one of your constitutional rights is being violated under the commerce clause.

MR. IRWIN: Yes.

QUESTION: And you are suing a state official.

MR. IRWIN: Yes.

QUESTION: And you are also claiming a violation of federal laws. 1983 speaks of constitutional laws of the United States, doesn't it?

MR. IRWIN: Yes.

QUESTION: Are you sure you are abandoning it?

MR. IRWIN: I will reinstate it.

(Laughter)

MR. IRWIN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE S.E.C. AS AMICUS CURIAE

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

The interest of the Securities and Exchange Commission in this case is in determining the validity of the application of state takeover laws, rather than in identifying the proper forum for this suit. I will therefore devote my time to the commerce and supremacy clause arguments.

QUESTION: If our interest is in identifying the proper forum for the suit, I suppose your argument is largely wasted then.

MR. EASTERBROOK: Mr. Justice Rehnquist, my argument would be entirely wasted if you find that there is no jurisdiction over this case. But in the event that five justices --

QUESTION: Carry on, Mr. Easterbrook.

MR. EASTERBROOK: -- concluded there is jurisdiction, I think the Commission would like to be heard on the merits. I will address the commerce clause first and then I will take up the supremacy clause.

The point of the commerce clause is we think the creation of a common market. It forbids states from vulcanizing the stream of commerce. More than that, it

forbids states from reaching outside their borders to affect the flow of commerce elsewhere.

Idaho's law affects an interstate market in securities. Its law applies to securities that are being traded on the New York Stock Exchange. Its law applies to an offer by somebody residing in Texas to buy sah es from somebody else residing in Texas, and the application of this law doesn't simply, as in most commerce clause cases that come to this Court, affect local commerce but produce ripples elsewhere that are felt in other states.

This is a case in which the very purpose of the state rule is to reach outside the borders of Idaho and tell people in Texas and New York and Florida whether and when they can buy securities from one another. It is as if the state passed a blue sky law and said ordinarily you can decide not to deal in our state if you decide not to file our state registration statement, but we conclude that in order to protect the residents of Idaho from being eliminated or excluded from valuable opportunities to buy stock, no one can offer stock for sale in Texas unless he files a registration statement and sells it in Idaho as well, otherwise our residents are left out.

Idaho indeed extolls the extra territorial reach of its laws as being justified by just such a purpose. That kind of justification has been rejected by this Court,

we think. It may be that the best example of that is Baldwin v. GAF Selig, one of the incredible series of New York milk cases that detained this Court for some twenty years. New York tried to increase the selling price of milk in New York by requiring New York wholesalers of milk to treat the wholesale price of milk, even if bought out-of-state, the same as the New York control price of milk. The Court analyzed the case that New York was trying to tell buyers and sellers in Vermont what price they should charge for milk if the milk ended up in New York, and the fact that the milk ended up in New York produced a very substantial contact with the State of New York, the substantiality of which was not disputed by anyone. The milk had contact with New York, just as Sunshine has substantial contacts with Idaho.

But the Court rejected any notion that New York could attempt to influence the course of commerce in Vermont, no matter how much the course of commerce in Vermont might ultimately have an effect on what happened in New York. That is exactly what Idaho is trying to do here, it is trying to influence the course of conduct in Texas, and in New York on the ground that that conduct ultimately has repercussions in Idaho, and the statute fails for the same reason, we think.

But even if this statute were treated as one that

applied wholly to a state's domestic commerce and merely produced its ripples elsewhere, it would be invalid because the ripples are great and the justifications for the act small.

Idaho argues, for example, that it has the goal of protecting Idaho shareholders. One of the anomlies of the statute though is that it is not triggered by the presence of any shareholder in Idaho. It would apply if there were no shareholder in Idaho. On the other hand, the statute does not apply if the takeover offer is consented to by the management of the company, even if the management of the company is found in Washington State. And so in those cases Idaho shareholders receive no protection.

What is more is that what Idaho tries to do in a case like this is protect the two percent of the shareholders who live in Idaho only by requiring the 98 percent of the shareholders who live in New York and Texas and Florida to forego what they may find to be a valuable opportunity.

The only other justification advanced by the state is that its statute will protect civic-minded businesses or local commerce, health and safety and the like. That amounts to, we think, discrimination against interstate commerce for its own purpose, is an exaltation of the values of local isolationism from the stream of commerce,

and that is the kind of justification that was projected in Philadelphia v. New Jersey last term.

The point of this argument has been that Idaho has had substantial extra territorial intent, effect and scope of its statute. It is those kinds of things that ought to be regulated by Congress if they are regulated at all. In fact, Congress has regulated them, and that brings me to the point under the supremacy clause.

In order to evaluate the argument which we make here that the state law is preempted by the Williams Act, it is necessary first, we think, to understand why people make tender offers. Tender offer is a public offer to buy shares at more than they will fetch in the market. A person ordinarily makes such an offer only if he is persuaded that the shares will be worth more in his hands than they are worth held and distributed to the public at large. That may be because incumbent management is inefficient and mismanaging the company and in that event the value of the shares will increase if new management is substituted by the offeror. It may be that tax considerations would make the shares more valuable in some hands than others if, for example, the target has operating loss carryovers.

Whatever the reason, and there may be many, the offer is relying on an increment in value. The problem is that it is very costly for firms to go out and identify

such cases where there may be an increment in value and they don't accept those costs unless there is some prospect of return. The prospect of return has to be discounted by the risk that the offer will be a failure. The greater the risk, the more return there has to be to make the offer worthwhile.

In order to realize the gain that he has identified, the offeror has to make the public offer and pay more than the shares bring in the market, not too much more, though, and this is the difficulty from the offeror's point of view because if he offers the entire increment of profit to the current shareholders, the highest possible price, there is nothing left for him, no incentive to do the searching, no incentive to make the offer, and without an offer, of course, the shareholders will get nothing at all.

So the closer any rule tries to drive the price to the maximum price of what it is worth to the offeror, the less likely the offer is to occur in the first place, and more likely the shareholder is to end up with nothing.

Time is of the essence in the tender offer process and so is the opportunity to have a fair fight between the offeror and the incumbent management. It is most likely that the incumbent management feels its own personal prerequisites and positions at stake.

QUESTION: Mr. Easterbrook, if a tender offer is

always so beneficial to stockholders, as you suggest, why did Congress enact the Williams Act?

MR. EASTERBROOK: Mr. Justice Powell, there is substantial legislative history to indicate that Congress thought that tender offers were quite beneficial if conducted under a set of rules that allowed the shareholders to make an informed judgment.

QUESTION: They have often been beneficial, but they have often been quite adverse.

MR. EASTERBROOK: That's right. The difficulty lies in determining how that judgment is going to be made. One can construct a set of rules -- there is going to be an offer, there is going to be a response by the target management -- one can construct a set of rules under which someone, usually the shareholders, has to make up his mind whether the offer is beneficial or not, whether there is that incrementive value. And the Williams Act was an attempt to set up that set of rules under which shareholders could make that determination.

The pro rata provisions, the seven-day withdrawal provisions, the disclosure provisions were intended to allow shareholders to make that judgment, but it was a judgment that was to be made in the context of information from both offeror and the target management, the ultimate decision to be made by the shareholders. The difficulty in

regulating in that way is to set up a system of regulation so that the shareholders can make that choice without at the same time so setting up regulatory rules that the number of beneficial tender offers is reduced and there are fewer opportunities for shareholders to make their judgments.

Congress' assessment was that the best combination of protection for shareholders and insurance that tender offers would not be eliminated altogether was a set of disclosure rules coupled with prompt start of the offer, and Congress explicitly considered and just as explicitly rejected a variety of pre-offer notification rules or a variety of rules of a sort that would require the Securities and Exchange Commission to pass on the adequacy of disclosure before the tender offer could begin.

But given the necessity of making the kind of balance, actually a rather fine-tuned one, Congress had in mind in the Williams Act, must follow, we think, that a state cannot use the very devices that Congress rejected as detrimental to the interests of investors, because then the state defeats precisely what it was that Congress had in mind to achieve.

Idaho is simply not free to strike a difference balance on how best to achieve that. Congress recognized, however, that what it said in the Williams Act was not the last word and it gave the Securities and Exchange

Commission a substantial rulemaking power. In fact, almost every one of the provisions of the Williams Act is coupled with granted rulemaking power to the Commission to alter it, to change it in some way.

In entrusting that rulemaking task, the fine-tuning task to the Securities and Exchange Commission, Congress set up a system of regulation that is very closely related in concept to the system this Court considered last year in Ray v. ARCO, a Washington supertanker case. In Ray, the Secretary of Transportation had decided not to set up a rule under which super tankers were forbidden to enter Puget Sound and had decided not to use his rulemaking powers, although he surely had them, to set up a rule requiring double bottoms, twin screws, and the like. Washington then required those things and gave as a rationale the argument that it was simply increasing protection of the environment, the very same thing Congress had in mind in passing its statute, and it wanted to view that the congressional statute and the Secretary's regulation was minimum guarantees of environmental safety with the state adding additional guarantees of environmental safety. This Court rejected that argument. The reason it rejected it was because the Secretary of the Treasury had the same power to assess and weigh the benefits of safety against the convenience of commerce, and it said that the state

could not add where the Secretary had said there should not be additional protections.

And that is really the same setup as works under the Williams Act. The Commission is free to provide additional period to increase the length during which a tender offer may be open, it is free to promulgate a great number of other regulations that will have the effect of assessing the benefit to investor against whatever detriment to commerce may be caused. And it is because the Commission has that authority and because it has decided to exercise it in a way that does not provide the kinds of things that Idaho has provided, the Idaho statute is preempted, we submit, and therefore under both the supremacy clause and the commerce clause, if the Court reaches the merits here, we submit that it should affirm the judgment of the Court of Appeals.

QUESTION: Mr. Easterbrook, do you agree with Mr. Irwin that if the Idaho statute had been limited to intrastate activities that it would have been valid?

MR. EASTERBROOK: The Commission's position is that even if it were limited to intrastate activities, it would be preempted by the Williams Act.

QUESTION: Has the Commission taken that position previously to this case?

MR. EASTERBROOK: I am sorry, Mr. Justice, I

don't know whether it took it before this case, but that is the Commission's position.

QUESTION: So the Commission's position is that all 36 state laws are invalid?

MR. EASTERBROOK: It is, Your Honor. That should be distinguished though, I think, from the Commission's position under the commerce clause. The position under the commerce clause allows states substantial authority to regulate within the state for the same reason that in Hall v. Geiger-Jones the commerce clause permitted blue sky laws. On top of that, I think it is important to point out that the Commission does not argue that all state laws touching on takeovers are preempted. For example, a state law requiring any statements by offeror or management to be fair, adequate and so on, similar to or tracking federal law could be enforced in --

QUESTION: Any state law that makes additions to the requirements of the Williams Act could be invalid under that analysis?

MR. EASTERBROOK: No, I think the Commission is not of that view. It is any state law that makes additions of the sort that disrupt the balance of investor protection established in the Williams Act.

QUESTION: Even if limited only to stockholders within the state?

MR. EASTERBROOK: Yes, Your Honor. But I think it is important to point out, and I think it should be clear that in the Commission's view there are a number of possible state statutes that would not disrupt the balance. Take, for example, the state statute that says any corporation incorporated in this state shall respond to tender offers only by a two-thirds vote of the board of directors or any of the other things regulating the affairs between the corporation and its shareholders would in most cases not be preempted by the Williams Act. The test is not simply does it touch tender offers. We are not making a field preemption argument. The test is whether it upsets or undermines the careful balancing that Congress has done and its assessment of where the interests of investors lie.

QUESTION: Would it make a difference if the state statute is limited to corporations incorporated under the laws of that state?

MR. EASTERBROOK: I think that would substantially reduce the opportunities for disrupting the balance that has been created by Congress. The difficulties in allowing the state to regulate even those offers that are made to its own citizens might arise if, for example, New York, where 35 percent of shareholders lie, has a statute saying you must do A, California, who has another 30 percent, has a statute saying you can't do A, and each tries

to tug the balance in a slightly different way. The opportunities for that, when more than one state can enter the picture on one tender offer, are really quite substantial and it is for that reason that the Commission says that even as applied to shareholders within the state the acts are in many cases preempted by the Williams Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Heiser, you have a few minutes left.

ORAL ARGUMENT OF PETER E. HEISER, JR., ESQ.,
ON BEHALF OF THE APPELLANTS--REBUTTAL

MR. HEISER: As a preliminary matter, Mr. Chief Justice, I would like to point out to the Court that the typewritten brief of the Securities and Exchange Commission was only received by us on the 5th of April, with corrections on the 9th of April, the printed brief we were able to pick up a copy here yesterday, have not received it yet. I would like to request that I have an opportunity to respond to that brief in written form, if the Court would grant me that opportunity.

MR. CHIEF JUSTICE BURGER: You may respond, if you wish, in the usual way.

MR. HEISER: Thank you, Your Honor.

One of the frustrations that the Idaho appellants have in this case is that the Securities and Exchange

Commission, where it had a real opportunity to provide enlightenment for this Court as to what section 27 really involves and what section 28 conflict may mean in their terms ignored those issues. And like the courts below, because of the fascination of the merits, which certainly are fascinating, lept right into the constitutional questions.

Unfortunately in doing that, they used some of the cliches and terms that have been used all along with regard to these state laws which have had a salutary effect. Talk about the term delay. State laws have prolonged the period during which tender offers are open. The net result of that has been in the period between 1974 and 1976 of a $1.2 billion premium to the shareholders as a result of that extended period of time.

But the point that we really have focused here is that we have a Texas corporation that wanted to take over a controlling interest in a corporation that was subject to jurisdiction under the Idaho corporate takeover law and the Texas corporation, with operations in Texas, knew and recognized that Idaho law was going to have jurisdiction. They came to Idaho to submit themselves to the jurisdiction of that Idaho law and then, when they didn't get the immediate approval that they wanted, their reaction to test the constitutionality of the Idaho law was down in Texas,

and that is unfortunately what creates the problem in this case.

We shouldn't be having to be concerned about defending the action in Texas because it shouldn't have been brought in Texas. It should have been brought in Idaho. And if a corporation like Great Western United wants to do, as it does, business in many states, then it should be prepared to conform to the problems that it may be presented with by the laws of those states, and if it has constitutional challenges to the laws of those states, it is perfectly free to go into the federal courts in those states or the state courts in those states and raise those constitutional challenges.

QUESTION: By the same token, of course, the respondent company says that what Idaho did had a direct impact upon what the respondent wanted to do in the State of Texas.

MR. HEISER: Well, Mr. Justice Stewart, what the respondent wanted to do was not only in the State of Texas but --

QUESTION: And in the other 49 states also.

MR. HEISER: Exactly. And under the rationale advanced by the courts below, then because of the effect and all of the other 49 states, they more than likely could have brought suit in any of the other 49 states and we

could have been defending an action in Vermont or Hawaii or Alaska or Florida, as well as Texas, because Great Western United wanted to secure shares of stock from shareholders in those states. So the problem becomes the forum shopping problem and that really is not what we feel the federal law was designed for, and it certainly isn't what we feel the Texas long arm statute and the accompanying federal venue statute were designed for. That is the whole point.

The U-Anchor case that the Texas Supreme Court recently decided that construed the Texas long arm statute, it is absolutely true that they said that the Texas long arm statute goes to the full limits of due process. What was the context of the case? A contract, one of the specifically defined terms that constitutes doing business under the Texas long arm statute. The threshold first level of inquiry under the Texas long arm statute was satisfied so they didn't have to waste time on deciding whether it was an act of doing business in Texas because it fell within the actual definition. But what the court did do in U-Anchor was finding that, yes, the facts technically satisfy our jurisdictional prerequisite in the Texas long arm statute as a doing business context.

I am out of time. Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:30 o'clock p.m., the case in the above-entitled matter was submitted.)

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