

In the

# Supreme Court of the United States

FLORIDA DEPARTMENT OF STATE, )

Petitioner )

v. )

TREASURE SALVORS, INC., ETC. )

No. 80-1348

Washington, D. C.

January 20, 1982

Pages 1 thru 50

**ALDERSON  REPORTING**

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Washington, D.C.  
Wednesday, January 20, 1982

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:  
MRS. SUSAN GAMBLE SMATHERS, ESQ., Tallahassee,  
Florida; on behalf of the Petitioner.  
DAVID PAUL HORAN, ESQ., Key West, Florida; on  
behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will arguments next in  
Florida against Treasure Salvors.

Mrs. Smathers, I think you may proceed when you're  
ready.

ORAL ARGUMENT OF MRS. SUSAN GAMBLE SMATHERS, ESQ.,  
ON BEHALF OF THE PETITIONER

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

It is respectfully submitted that the central  
issue involved in this petition is whether the federal  
courts below exceeded the bounds of their constitutional  
authority attesting the validity of an apparently sufficient  
contract which was the basis for the state's assertion of  
sovereign immunity under the Eleventh Amendment.

We submit that the court's authority is limited to  
determining whether the state has an genuine interest in the  
subject matter of a dispute, and that once the state's  
interest is demonstrated, even though there may be defenses  
that may be asserted in another forum, that the inquiry of  
the federal court should cease.

This Court does not sit today to decide the merits  
of the parties' contractual dispute; rather, the people of  
the State of Florida deserve to have a dispute over the  
ownership of historic artifacts, on display in many



1 instances in their state museum, decided in a state court  
2 which is fully equipped to hear the issue and which, it must  
3 be assumed, can reach a decision which meets the ends of  
4 justice.

5           Briefly, the facts are in 1622 a flotilla of 28  
6 Spanish ships was proceeding through the Florida straits and  
7 encountered a hurricane. Eight of the ships were lost. One  
8 of the ships, which was not subsequently recovered by the  
9 Spaniards, was the Nuestra Senora de Atocha. She went down  
10 with a precious metal cargo as well as a vast amount of  
11 artifacts from the 17th century which today may be worth as  
12 much as \$400 million. Certainly the archaeological  
13 significance of those artifacts could have no price tag  
14 put on them.

15           In 1971 under the authority of Florida's  
16 antiquities legislation the State of Florida Department of  
17 State entered into a contract with Respondents to search for  
18 and later recover the remains of the Atocha. Under the  
19 contract the state was to retain 25 percent of the artifacts  
20 recovered, and the Respondents were to be paid in kind for  
21 their services consisting of 75 percent of the artifacts.

22           Then in March 1975 United States v. Florida was  
23 handed down which re-established Florida's boundaries for  
24 purposes of the Submerged Lands Act. It was at this point  
25 that Respondents filed an in rem complaint in admiralty in

1 the Southern District of Florida for possession and  
2 confirmation of title to the remains of the Atocha.

3 What is important for this Court to understand was  
4 that Respondents' in rem complaint sought possession and  
5 title to the unidentified remains of a vessel which were  
6 scattered below on the ocean floor. The artifacts in  
7 dispute in today's action were not in dispute in that case.  
8 Florida was not a party to that proceeding.

9 QUESTION: Why was Florida not a party to it?

10 MRS. SMATHERS: Well, Your Honor, at that time --

11 QUESTION: There was a conscious decision not to  
12 intervene on the part of the state.

13 MRS. SMATHERS: That's right. It was a policy  
14 decision. Certainly the state recognized that their  
15 authority to continue exercising jurisdiction in those  
16 waters was drawn seriously in question.

17 QUESTION: It was convenient to get the United  
18 States in.

19 MRS. SMATHERS: Certainly. The United States did  
20 intervene in that proceeding and claimed ownership of the  
21 wreck under the Federal Antiquities Act and the Abandoned  
22 Properties Act. There had never before this time been any  
23 dispute between the United States and Florida as to who  
24 could exercise ownership or control of these artifacts.

25 The United States intervened, as I said, and

1 claimed ownership under the Antiquities Act and the  
2 Abandoned Properties Act.

3 QUESTION: Did the United States intervene at the  
4 behest of the State of Florida?

5 MRS. SMATHERS: As far as I know, Your Honor, they  
6 did not. Certainly --

7 QUESTION: You can't give me an assurance as to  
8 that answer, however.

9 MRS. SMATHERS: Well, I would say no. I will say  
10 that all of the parties, including the Respondents, met in  
11 Washington sometime before the initiation of these suits to  
12 talk about the wrecks, to talk about who would own them and  
13 to try to work out some agreement over who could salvage the  
14 wrecks. At some point that broke down and Respondents filed  
15 their complaint in rem in the Southern District Court for  
16 possession and title.

17 But as I say, that in rem complaint sought  
18 ownership of that which had not even been raised yet. The  
19 ownership of these artifacts was not in question in that  
20 proceeding. Florida, at that point having made a decision  
21 no longer to exercise jurisdiction in that area, did not  
22 intervene in the proceeding because the artifacts under  
23 which possession had already passed to the state and were in  
24 fact being worked on in the state laboratory, in some cases  
25 already on display, those artifacts were not in dispute.

1                   QUESTION: And how did they come into the  
2 possession of the states, Mrs. Smathers?

3                   MRS. SMATHERS: They came into possession under  
4 the contracts in which both parties agreed at that time that  
5 the Atocha lay on sovereignty submerged lands owned by the  
6 State of Florida.

7                   QUESTION: So this is only that portion which to  
8 that time had been recovered?

9                   MRS. SMATHERS: That is right, Your Honor.

10                  QUESTION: And the state got 25 percent and  
11 Respondents kept 75 percent of it?

12                  MRS. SMATHERS: That's right.

13                  QUESTION: You say in the original libel the  
14 artifacts which had been distributed to Florida or were to  
15 be distributed to the State of Florida were not -- their  
16 title was not challenged?

17                  MRS. SMATHERS: No, Your Honor. And, in fact, the  
18 Fifth Circuit when it affirmed that case or affirmed the  
19 trial court holding as between Treasure Salvors and the  
20 United States, expressly held that we do not approve that  
21 portion of the trial court's order which held that  
22 Respondents had title against all the world. We do not  
23 address any rights of ownership as to parties which are not  
24 before us. And that's very clear in their opinion.

25                  QUESTION: Could I follow through on your answer



1 to Justice Brennan?

2 MRS. SMATHERS: Certainly.

3 QUESTION: He asked whether the Respondents kept  
4 75 percent. Wasn't there a time when the State of Florida  
5 had possession of all of them?

6 MRS. SMATHERS: No, Your Honor, unless by the fact  
7 that the Respondents were a contracting party with the  
8 state. By virtue that the State of Florida was their  
9 principal I suppose you could say that we had possession of  
10 all of them. However, the state had an agent on board the  
11 vessel at the time that all of these artifacts were  
12 recovered, and divisions were to be conducted under the  
13 contracts at different times, periodically at mutually  
14 agreed upon times.

15 QUESTION: Is there not an implication in the  
16 papers, however, that Florida's release of 75 percent of  
17 them was with some reluctance?

18 MRS. SMATHERS: There may be that allegation, Your  
19 Honor, but it's strongly contested by the state. We  
20 undertook the divisions, as we do today, with 15 other  
21 salvage companies working off the coast. There's no  
22 dispute. It's in the contract. The parties each choose an  
23 appraiser, and they each choose a third. Artifacts are  
24 given a point value. The most valuable artifact gets a high  
25 point value; the lowest value gets a low point value.

1 Everything else is put in between, and the 75/25 split is  
2 made on that basis.

3 QUESTION: I have one more question, and it may be  
4 irrelevant to your basic legal argument, but there is an  
5 inference also in the papers that the contract was made  
6 under threat of arrest. Is this correct?

7 MRS. SMATHERS: Well, certainly at that time it  
8 was the State of Florida's belief that they had absolute  
9 control and ownership over that area, and if Respondents  
10 were found to have been salvaging in an area without a  
11 contract, yes, they would have been arrested. That was the  
12 law.

13 QUESTION: And you think it's a valid contract  
14 then.

15 MRS. SMATHERS: I think that whether or not it's a  
16 valid contract should be decided in a state court. We have  
17 a vast amount of contract jurisprudence in the State of  
18 Florida which a state court is certainly willing and able to  
19 decide. And this was a dispute -- if the basis of the  
20 parties' dispute was a rescission of the contract based on a  
21 mistake of fact or it could be argued a mistake of law, then  
22 that dispute is certainly to be determined in a state court.

23 QUESTION: May I ask a question at this point?  
24 With respect to those artifacts that are in Florida's  
25 possession is it Florida's position that those belong

1 entirely to the state or they're to be shared 75/25?

2 MRS. SMATHERS: No. That is their share. They  
3 only have 25 percent of the artifacts which they recovered  
4 pursuant to four years of contracts with the Respondents.

5 QUESTION: I'm still not sure I understand what  
6 you're telling me. You're saying that those which they have  
7 in their possession represent 25 percent of the total, is  
8 that it, and therefore --

9 MRS. SMATHERS: Twenty-five percent of what had  
10 been recovered up to that time, yes.

11 QUESTION: Of those which were originally  
12 delivered to Florida, Florida has only retained 25 percent  
13 of those.

14 MRS. SMATHERS: That is absolutely correct.

15 QUESTION: Has Florida instituted any litigation  
16 in state courts to resolve any of these issues?

17 MRS. SMATHERS: No, they have not, although it has  
18 been contemplated and in fact gone so far as to have  
19 complaints drawn up. They have not to date.

20 QUESTION: But nothing has been filed.

21 MRS. SMATHERS: No.

22 QUESTION: And what is the relative proportion of  
23 what's been recovered and is in Florida's possession as  
24 opposed to what remains -- I guess some is still in the  
25 ocean, isn't it?

1 MRS. SMATHERS: Oh, yes.

2 QUESTION: What percentage has been recovered?

3 MRS. SMATHERS: Well, the parties differ on their  
4 assessment of the value. It could be as much as \$13  
5 million. It could be \$2 million. Certainly, as I have  
6 stated --

7 QUESTION: You mean still in the ocean?

8 MRS. SMATHERS: No. What is in dispute today.

9 QUESTION: What is in dispute. Well, what is the  
10 value of what remains?

11 MRS. SMATHERS: The total, including what's in  
12 dispute today as well as that which is still in the ocean,  
13 could be as much as \$400 million.

14 QUESTION: So that the major portion of what may  
15 have been on the Spanish ship is not in dispute here.

16 MRS. SMATHERS: That's right.

17 QUESTION: And Florida has made no claim to that  
18 either in the state court or elsewhere.

19 MRS. SMATHERS: Not yet.

20 QUESTION: Well, the contract, I gather, covers  
21 that, too, doesn't it? The contract Florida made with  
22 Respondents covers, does it, what's still in the ocean?

23 MRS. SMATHERS: Well, the parties quit dealing in  
24 1975 right after U.S. v. Florida came down.

25 QUESTION: Are you telling me then that what's



1 still in the ocean is not subject to the contract?

2 MRS. SMATHERS: That's right.

3 QUESTION: I see.

4 MRS. SMATHERS: Treasure Salvors, the Respondents,  
5 have continued to work on the wreck site, and what they  
6 brought up is presumably in their possession.

7 QUESTION: But if the argument you make in the  
8 last part of your brief is valid, Florida would have a claim  
9 to all that, wouldn't it?

10 MRS. SMATHERS: Your Honor, we make that argument  
11 to show that at least we had a colorable claim to those  
12 artifacts, at least it didn't deserve to be dismissed in so  
13 cavalier a fashion as to say well --

14 QUESTION: Well, but apparently notwithstanding  
15 the immense amount of value there, it's not a claim that has  
16 enough merit to have persuaded you even to institute a  
17 lawsuit to assert it.

18 MRS. SMATHERS: It was a policy decision made by  
19 the state at that time, made by the administration of the  
20 Department of State not to pursue it until the issue had  
21 been clearly settled. We would argue that under the  
22 Submerged Lands Act that -- or at least we could make the  
23 argument that the Submerged Lands Act applies to natural  
24 resources and that the state may in fact be able to continue  
25 to exercise jurisdiction in those waters.

1           QUESTION: Aren't you a little worried about  
2 whether you do have -- that that is in your waters?

3           MRS. SMATHERS: Certainly, but that's not what's  
4 in dispute in this case.

5           QUESTION: Is that why you didn't file the lawsuit?

6           MRS. SMATHERS: That is exactly right. I concede  
7 that there is a question as to whether the Atocha lies in  
8 Florida waters or not, but I would also make the argument  
9 that these parties contracted on the basis of the state's  
10 constitutional boundaries as they were in 1868 when Florida  
11 was readmitted to the Union, which boundaries Congress  
12 approved in order to be readmitted, and that it was the  
13 Submerged Lands Act which has some very specific language  
14 that compelled the Special Master to draw an insular pocket  
15 of jurisdiction around the Dry Tortugas Islands and then to  
16 draw a line over here around the end of the Keys, and to  
17 hold that under the Submerged Lands Act that Florida could  
18 not own the land in between those two pieces of territory  
19 because of the three mile-three league provision in the  
20 Submerged Lands Act.

21           But the boundaries is not something that we  
22 dreamed up for purposes of salvaging the Atocha; in fact,  
23 the state's constitution today, if you look at a geodetic  
24 map it's going to show that the state's boundaries go all  
25 the way from the Marquesas Keys all the way and including

1 the waters in between the Marquesas and the Dry Tortugas,  
2 which is where the Atocha is found.

3 QUESTION: May I ask one other question?

4 Supposing your maritime people who were going to make the  
5 arrests before this whole thing got started went out and  
6 used self-help to go start taking some of these things off  
7 the bottom of the ocean themselves, and your adversaries  
8 then sought an injunction to force them to stop. Would you  
9 have an Eleventh Amendment defense to that injunction action?

10 MRS. SMATHERS: I would think that under Alabama  
11 v. Pugh we would have a defense if the State of Florida was  
12 the party or if the State of Florida Department of State was  
13 a party. Had it been an injunction against a specific  
14 official, perhaps under many cases in this Court it would  
15 lie. However, the contract entered into by these parties  
16 was between the State of Florida Department of State and the  
17 Respondents. It wasn't entered into by the Secretary of  
18 State or by the Director of the Division of Archives.

19 And I think that what the court has held below, or  
20 it certainly could be construed in the future to hold that  
21 if a party wants to rescind a contract or if they want to  
22 question the state's title to property, that they can now go  
23 into federal court and do that if they win or if the federal  
24 court is persuaded that they may have the more persuasive  
25 argument. But under the Eleventh Amendment we have a right

1 to assert a losing argument in state court.

2           And Judge Rubin below in dissent expressed it very  
3 well when he said that the rule now of the majority is that  
4 suits against the state are permitted by the Eleventh  
5 Amendment if the result is that the state loses. I think  
6 that's going much further than any of the cases of this  
7 Court have indicated. And certainly in the Edelman  
8 decision, while these facts are not covered by the Edelman  
9 decision, Edelman did state that the Eleventh Amendment  
10 declares a policy of such compelling force that it is an  
11 explicit limitation on federal courts. And in light of that  
12 thinking and that policy we think that the court in this  
13 case overstepped the bounds of its inquiry.

14           The court below justified its position that the  
15 Eleventh Amendment did not apply to the dispute based upon  
16 its reading of a 1921 decision *In re New York*, and the court  
17 below took this decision to mean that the Eleventh Amendment  
18 is merely a rebuttable presumption which may be defeated  
19 upon a showing of facts that it believed can refute a claim  
20 of state ownership of property.

21           *In re New York* held that the verified suggestion  
22 of ownership filed by New York's Attorney General as to  
23 state ownership of a tugboat in that case was sufficient  
24 evidence of state ownership to trigger the Eleventh  
25 Amendment, at least in the absence of a special challenge.



1 It was the special challenge language that allowed the Fifth  
2 Circuit to infer that had the plaintiff in that case  
3 presented a genuine controversy as to the ownership of the  
4 tugboat that the court would have been obliged to take  
5 jurisdiction and hear the case.

6 We submit that In re New York holds, and it is the  
7 state of the law, that a court may initially examine a claim  
8 of state involvement to determine whether a state's being  
9 genuinely sued in a case; but that once the state's presence  
10 is discovered, the suit must be dismissed for lack of  
11 jurisdiction.

12 We would also submit that the reasoning, this  
13 rebuttable presumption argument, simply begs the  
14 jurisdictional question in the most fundamental way, since  
15 all it does is allow the plaintiff to reassert his position  
16 on the merits, the Eleventh Amendment notwithstanding.

17 QUESTION: Are you familiar with United States v.  
18 Lee?

19 MRS. SMATHERS: Yes, Your Honor.

20 QUESTION: If the defendants in that case had been  
21 state officials and the issue was the title to state  
22 property would the case have come out differently?

23 MRS. SMATHERS: I think that is possible. I think  
24 that --

25 QUESTION: Possible. So why isn't U.S. v. Lee

1 relevant here?

2 MRS. SMATHERS: Because in this case --

3 QUESTION: Is it because it's just a sovereign  
4 immunity case, or is it --

5 MRS. SMATHERS: The reason U.S. v. Lee is not  
6 applicable is because the order to show cause, the trial  
7 court's final judgment, as well as the Fifth Circuit, was  
8 against the State of Florida. And under Alabama v. Pugh,  
9 this Court thought it important enough to dismiss the State  
10 of Alabama where an injunction was sought against it even  
11 where it was argued that the --

12 QUESTION: So the Fifth Circuit didn't take the  
13 way out that this was just against state officials.

14 MRS. SMATHERS: No.

15 QUESTION: They said even if it's against the  
16 state, the Eleventh Amendment doesn't bar it because at the  
17 outset you have a jurisdictional question, namely the merits.

18 MRS. SMATHERS: That's right. That's right.

19 What the majority holds is that the state must  
20 defend an action to rescind a contract in order to prevail  
21 on the question of Eleventh Amendment immunity. It's one  
22 thing to determine -- to inquire into your jurisdiction and  
23 to see whether the state's genuinely a party or to determine  
24 whether there's even a contract that exists. But once we  
25 came into court with a contract in our hand, if you please,

1 and the possession of the artifacts already in the state  
2 museum, I would submit at that point it was obvious that the  
3 state was very involved and very interested in the  
4 litigation, and that the suit should have been dismissed to  
5 a state court which could hear the issue.

6           The majority, as I've stated, also used its  
7 jurisdiction to determine jurisdiction analysis, the  
8 question being that if the merits are so inextricably  
9 intertwined with the -- if the question of jurisdiction is  
10 so intimately tied to the merits, then the majority can look  
11 to the merits to determine jurisdiction.

12           The District Court here went much further than  
13 inquiring into that question. At least the State of  
14 Florida, as I've argued, did have a colorable claim which  
15 was a contract entered into on the basis of its  
16 constitutional boundaries and possession in the state museum.

17           And I would like to reserve the remainder of my  
18 time for rebuttal.

19           CHIEF JUSTICE BURGER: Very well.

20           Mr. Horan.

21           ORAL ARGUMENT OF DAVID PAUL HORAN, ESQ.,

22           ON BEHALF OF THE RESPONDENT

23           MR. HORAN: Mr. Chief Justice, and may it please  
24 the Court:

25           This is the fourth major appellate argument in

1 this action. It was filed nearly seven years ago, and I  
2 filed it. The case is not concerning a question of the  
3 relative merits of federal and state government, but a  
4 question of the right of an individual against the massive  
5 power of the State of Florida. It involves the protection  
6 of private property rights and the power of the federal  
7 judiciary to determine constitutional jurisdiction over  
8 admiralty and maritime claims.

9           Now, the wreck of the Nuestra Senora de Atocha was  
10 found after three years of search by Treasure Salvors, and  
11 as previously determined by this Court, it was outside the  
12 territorial boundaries of the United States and that of  
13 Florida.

14           The factual findings of the trial court have for  
15 the most part not even been attacked on appeal, and none  
16 have ever been found to contain any error. The 38-page  
17 memorandum of the trial court discloses one of the most  
18 interesting and relevant factual situations you could ever  
19 believe which must form the background of this Court's final  
20 and at last unappealable opinion.

21           The Atocha's association with Florida was  
22 tangential at best. When it sank in 1622 it was outside the  
23 boundaries of a continent, largely unexplored, which was  
24 much later to be called Florida. The State of Florida did  
25 not research, they did not find, and there is no basis in



1 fact for even suggesting they could have found it, much less  
2 recovered it.

3           The trial court in its November 21st, 1978 order  
4 states as follows: "Merely because the agents of the state  
5 covet the treasure does not give the agents the right to  
6 take it in the name of the state." And the court went on to  
7 say: "It's ironic that the agents of the state are able to  
8 use resources of the state to deprive Treasure Salvors of  
9 what it justfully and rightfully owns, especially when the  
10 record reflects that Treasure Salvors was at one time  
11 willing to donate a portion of the salvage vessel to the  
12 state."

13           Now, the record reflects that the State of Florida  
14 and the United States were working secretly in 1975 to  
15 completely vest title in the United States with Florida  
16 having the exclusive right to continue the salvage started  
17 by Treasure Salvors four years before.

18           When these covert activities were discovered,  
19 Treasure Salvors filed its in rem action against the Atocha,  
20 and this Court ruled on Florida's boundaries in U.S. v.  
21 Florida, and the state rushed at that point, knowing that it  
22 was losing, under its contract which said that we had the  
23 right to do out and salvage on state-owned sovereign  
24 submerged lands if we paid them \$1,200 a year, the state at  
25 that time rushed to divide much of the salvaged treasure.

1 But they were only dividing -- they had everything that we  
2 had recovered. They had never given us a division. We had  
3 asked for a division over and over and over again.

4 And they talk about these series of contracts.  
5 The reason there was a series of contracts is that there was  
6 a total forfeiture provision if we stopped short of a total  
7 recovery; so we had no option but to continue the salvage.  
8 And then with their plan -- and the trial court found that  
9 this was an ongoing plan to keep all of it, and that was a  
10 factual finding of the trial court after the evidentiary  
11 hearing.

12 But what happened was one week prior to this Court  
13 issuing its opinion, after the oral arguments and after they  
14 went back and said boy, we just got cleaned, the state  
15 rushed to try this division; but they only divided about 80  
16 percent of what was up there, and they kept the rest.

17 Now, frustrated in its desire to obtain the entire  
18 treasure, the state encouraged and worked with the United  
19 States to claim everything, past, present, and future.  
20 There were negotiations which Mike Reed talks about in the  
21 San Diego Law Review, the Assistant Solicitor of the United  
22 States, when the State of Florida comes up and says hey,  
23 listen, we've lost this thing; you've got to protect our  
24 interest.

25 Now, after extensive evidentiary hearings the

1 trial court found that the state chose not to enter a claim  
2 but to rely upon the United States to win the suit. And  
3 they even went so far as to decide how they were going to  
4 divide up the spoils once the United States won.

5 QUESTION: Well, does that really bear on the  
6 Eleventh Amendment issue?

7 MR. HORAN: Yes, it does, because there is no  
8 Eleventh Amendment, Justice Rehnquist, if it's between the  
9 United States and Florida. See, the United States came in  
10 and claimed --

11 QUESTION: I realize that.

12 MR. HORAN: And so certainly there would be no  
13 Eleventh Amendment; if the United States had won their claim  
14 saying they were the owner, then they'd have come down and  
15 just said okay, that's ours.

16 QUESTION: No. The Eleventh Amendment is strictly  
17 a defense between a state and an individual; but I take it  
18 Florida has sought to assert it here, and the Court of  
19 Appeals has said it can't.

20 MR. HORAN: Right. The factual assertion or the  
21 factual finding of the trial court that the State of Florida  
22 was in privity with the United States puts it foreclosed,  
23 because at that point the United States was urging Florida's  
24 claim.

25 QUESTION: Well, do you think that's what the

1 Court of Appeals rested on?

2 MR. HORAN: No, sir. The Court of Appeals rested  
3 primarily on the fact that the court must have jurisdiction  
4 at least to find out the propriety of the claim being put  
5 forward, and that's why U.S. v. Lee is so much on point.

6 The state, after all this litigation, tremendous  
7 amount of litigation, working with the federal government in  
8 this two and a half years of litigation, then after the  
9 litigation is decided in a manner which the state didn't  
10 like at all, tried to paint themselves as total strangers to  
11 litigation. And the trial court on page 7 of its opinion  
12 says, "It ill behooves the Division of Archives to play such  
13 a fast and loose game with the courts."

14 It's important to understand that the state knew  
15 that the title to all past salvage was being litigated in  
16 this suit. Had the original case been decided as hoped for  
17 by the Division of Archives, there would have been no  
18 Eleventh Amendment available to attempt to hold those  
19 portions of the salvage against the United States.

20 QUESTION: I can't find that language on page 7.  
21 Am I looking at the wrong 7?

22 MR. HORAN: Sir?

23 QUESTION: The language you just read.

24 MR. HORAN: That would be page 7 of the trial  
25 court's opinion. That would be --



1 QUESTION: The trial court's opinion.

2 MR. HORAN: Yes, sir. That would have been the  
3 opinion of the 28th of August 1976.

4 QUESTION: Where is that in this --

5 MR. HORAN: It would be in the Appendix, Your  
6 Honor.

7 QUESTION: What page, please? The index doesn't  
8 help me very much.

9 Well, don't stop your argument now then. I'll get  
10 at it later.

11 MR. HORAN: The trial court found that Florida was  
12 bound for failing to intervene and its participation in the  
13 previous litigation. The trial court held that the extent  
14 of the state's entanglement and reliance on the federal  
15 government in this case quite simply serves to highlight the  
16 fact that equitable principles call for the division to be  
17 bound.

18 Equity does cry out for Treasure Salvors to keep  
19 the property that it's paid so dearly to find and possess.

20 QUESTION: This is an admiralty case, not an  
21 equity case, isn't it?

22 MR. HORAN: Yes, sir. It is.

23 In this particular case, Your Honor, the federal  
24 courts have been in the middle of a modern tragedy and a  
25 real tragedy that has unfolded not only in the federal

1 courthouse in the Southern District of Florida but 40 miles  
2 west of Key West out on the high seas, on the Continental  
3 Shelf of the United States outside Florida.

4           The world learned in the federal District Court  
5 during the court's time of the striking of the salvage  
6 vessel North Wind and it going down with Mel Fisher, the  
7 president of Treasure Salvors son, Dirk Fisher, his wife,  
8 Angel, and a young diver, Rick Gage. After the funerals the  
9 search and the salvage went on in this case, and certainly  
10 they wouldn't have had it any other way.

11           After receiving a mandate in the Fifth Circuit it  
12 was clear that the court had in rem jurisdiction over that  
13 salvage. An ancillary process was authorized, directed the  
14 two individuals holding the salvage in Tallahassee -- not  
15 the State of Florida but two individuals, Ross Morrell and  
16 James MacBeth.

17           Now, the state attempted to block the service of  
18 that writ on those two individuals, even including emergency  
19 appeals to the Fifth Circuit; but the Fifth Circuit refused,  
20 and it said that the question of jurisdiction is for the  
21 District Court to determine on the basis of such record as  
22 may be developed in the trial court.

23           The only real question before the Court today is  
24 jurisdiction. Does the trial court dismiss a salvage action  
25 after a mere suggestion by the state that it owns the

1 salvage? That is, may admiralty courts look beyond a mere  
2 assertion of title to see if a claim is valid?

3 During the 360 years that the Atocha spent down  
4 there --

5 QUESTION: So I take it that you seem to agree  
6 that the Fifth Circuit decided the case on the assumption  
7 that the state was involved, just not two officials, and  
8 said even if the state is involved, a court may look beyond  
9 a mere assertion.

10 MR. HORAN: The state actually forced itself to  
11 become involved. It was very similar to --

12 QUESTION: But the Fifth Circuit didn't decide the  
13 case on the basis that this just involved state officials  
14 rather than the state.

15 MR. HORAN: No, it didn't. It didn't. Because  
16 once the two officials, once these two men that the writ was  
17 directed to were forced to give up the treasure, the state  
18 came in and said that's ours. They filed a claim to the  
19 vessel and said that vessel is ours, and everything that  
20 came up from it is ours, and it's ours completely.

21 QUESTION: Well, does that mean that the first  
22 time the state became a party in its own name was pursuant  
23 to a paper that the state had filed?

24 MR. HORAN: Yes, sir. Yes, sir. Absolutely. We  
25 did the writ to those two individuals. Then the state comes

1 in, and they say hey, you can't take that because it belongs  
2 to the state.

3 QUESTION: Well, what did the state file in that  
4 proceeding?

5 MR. HORAN: The pleading that they filed was a  
6 motion to dismiss the writ of attachment, the warrant of  
7 arrest, the ancillary warrant.

8 QUESTION: On the ground that?

9 MR. HORAN: On the ground that they owned it.

10 QUESTION: Eleventh Amendment?

11 MR. HORAN: Now, it was later that they urged the  
12 Eleventh Amendment.

13 QUESTION: Not at that time?

14 MR. HORAN: No, sir.

15 QUESTION: May I just be sure I have the right --  
16 is the document you refer to the one that's entitled, "State  
17 of Florida's Motion to Quash Warrant for Arrest In Rem?"

18 MR. HORAN: That's correct.

19 QUESTION: That's on page 43 of the --

20 MR. HORAN: That's correct.

21 During the 360 years that the Atocha spent  
22 abandoned on the high seas, all ownership was lost. It was  
23 the property of no one. The finder and salvager was  
24 Treasure Salvors, and it filed its in rem claim against the  
25 vessel claiming ownership and validation of past and future



1 salvage rights.

2           At separate times the State of Florida and the  
3 United States filed claims of ownership in the cause. The  
4 federal claim was grounded on the sovereign prerogative of  
5 the English kings. The federal claim was found to be  
6 entirely groundless.

7           The state's claim was based on the state's  
8 exercise of its sovereign prerogative. However, the state  
9 statute even if constitutionally valid by its own terms did  
10 not apply to areas outside state territorial waters. The  
11 first paragraph of the contract says that they're talking  
12 about only state-owned submerged lands. The issue of the  
13 salvage of other vessels outside the territorial sea is  
14 presently pending before the Eleventh Circuit.

15           Now, much of the state's argument in its reply  
16 brief and certainly a lot of the argument of the amici in  
17 this case centers on the fact that we're talking about the  
18 salvage within territorial boundaries. That is presently  
19 pending, and I have available the opinion of Judge James  
20 Lawrence King of the United States District Court for the  
21 Southern District of Florida which is on appeal to the  
22 Eleventh Circuit -- briefs have not been submitted at this  
23 time -- which has to do with inside state waters. But it  
24 doesn't have anything to do with salvage, a traditional  
25 maritime activity, on the Continental Shelf of the United

1 States outside the State of Florida.

2 Now, the state's argument does not even dispute or  
3 even discuss in the entire reply brief that the wreck is  
4 outside state waters. It doesn't even mention that fact.  
5 It does not dispute the Florida Statute 267 only applies to  
6 wrecks on state-owned lands, nor do they dispute that the  
7 trial court was correct in holding the salvage contract was  
8 invalid on five separate grounds, nor do they dispute that  
9 the salvaged articles had been forcefully taken by state  
10 agents who were not entitled to ownership or possession.  
11 And finally, after so much argument below, the state never  
12 even mentions the Queen City cases -- now, this is in their  
13 reply brief -- the Navemar, which is the Spanish ship; In re  
14 Muir, which is the Glen Eden, the British ship; and the  
15 Baja, California, the Mexican ship -- which hold that  
16 ownership -- every one of these are cases out of the Supreme  
17 Court here that say that ownership is a jurisdictional fact  
18 that must be established before sovereign immunity or the  
19 Eleventh Amendment is a defense.

20 QUESTION: I didn't read Queen City as holding  
21 that.

22 MR. HORAN: Well, the Queen City case said absent  
23 a special challenge, we're going to accept that. And it  
24 wasn't even raised that there was a problem with ownership  
25 until the appellate time.

1           QUESTION: You draw from that a negative  
2   implication that if there were a special challenge, the  
3   Court would have not followed the doctrine of Queen City?

4           MR. HORAN: I do, and that's exactly what the  
5   trial court and the Fifth Circuit so held.

6           QUESTION: As I read Queen City it was more an  
7   application of principles traditionally applicable to  
8   municipal corporations, and saying that even if you're a  
9   municipal corporation not protected by the Eleventh  
10  Amendment, you are still not subject to this sort of a libel  
11  and admiralty; and then saying if it's true of municipal  
12  corporations it's true of a fortiori of the state.

13          MR. HORAN: Certainly. I read the Queen City  
14  cases very similarly to say that ownership is the pivotal  
15  issue on whether the Eleventh Amendment applies, and if  
16  there is a showing of ownership, then the Eleventh Amendment  
17  is going to apply. But that is a jurisdictional fact.

18          There is a little bit of a difference between  
19  sovereign immunity of a foreign state and the Eleventh  
20  Amendment, but in both of these there are similarities in  
21  both of them. The application of sovereign immunity of  
22  foreign nation or foreign state or whatever, or the Eleventh  
23  Amendment turn on the question of the ownership. If there  
24  is ownership and there is public service, then the Eleventh  
25  Amendment applies. If there is not ownership and there is

1 not public service, if these people are holding it  
2 wrongfully, as they did in Lee --

3 QUESTION: Would you say that a colorable claim to  
4 ownership would suffice for jurisdictional purposes, just a  
5 colorable claim?

6 MR. HORAN: Well, I would say this. I would say  
7 that the colorable claim, if there is a challenge -- now,  
8 the colorable claim, we're not talking about getting into  
9 the whole litigation at this point. We're talking about  
10 whether it applies, and the Court's making this  
11 jurisdictional fact determination of jurisdiction.

12 At that point I think that when the state came up  
13 and said here we have a contract, the federal court is not --

14 QUESTION: But answer in the abstract, if you  
15 would, without reference to these disturbing facts.

16 MR. HORAN: Okay. If you come up and you say  
17 okay, this property which is in the possession, and you  
18 allege in the wrongful possession, of these state agents  
19 here and that you own it, now this property here belongs to  
20 the state and here's a contract, and it says that the  
21 property belongs to the state, and the court looks at that  
22 contract.

23 Now, I don't think that the court has to put on  
24 blinders. I think when the first paragraph of the contract  
25 says something which is just completely outrageous like we



1 don't really own this and we're just taking it because we  
2 want it, even though that might be in the contract, I think  
3 the federal court has the right to look at that and say  
4 well, okay, if that's what you say. Now then the other  
5 party can come in and say listen, that contract right there  
6 is a forgery. Those state agents that are in possession on  
7 that did not have the right to make us sign that. We were  
8 coerced into signing that contract. They can't use that  
9 coercion to deprive this court of jurisdiction over a  
10 traditional maritime claim out on the Continental Shelf of  
11 the United States outside Florida boundaries. And that's  
12 exactly what we did.

13           QUESTION: Well, you think then that for  
14 jurisdictional purposes the entire dispute over ownership  
15 can be settled by the court before you even determine  
16 whether the Eleventh Amendment.

17           MR. HORAN: Well, my version of Eleventh Amendment  
18 application --

19           QUESTION: That seems to be what the Court of  
20 Appeals said anyway.

21           MR. HORAN: Well, I believe that's right. I think  
22 that what the Court of Appeals, and what I'm insisting on is  
23 that Florida's unsupported claim of ownership is at best  
24 clothed with the presumption of validity that if duly  
25 challenged and rebutted cannot operate as a jurisdictional

1 bar. Because Florida's claim of ownership was duly  
2 challenged, the question of ownership was a jurisdictional  
3 matter to be judicially resolved on evidence to be presented.

4 Now, in this matter the state has not even  
5 attacked the trial court's findings of fact which  
6 overwhelmingly controvert the state's claim of ownership.

7 QUESTION: Before you can reach the claim of  
8 ownership don't you have to -- a question of ownership, as  
9 you put it, a jurisdictional matter, don't you have to  
10 surmount the Eleventh Amendment?

11 MR. HORAN: I don't believe so, because I think  
12 the Eleventh Amendment turns on the ownership argument. If  
13 it is not owned by the state, if it is being improperly held  
14 by the state, there is no Eleventh Amendment argument. It's  
15 the Tinsdale case, and the Tinsdale case is directly on  
16 point. Here you had two state officers who were in  
17 possession of some property, and the court came along and  
18 said you're in possession of that property, and they said  
19 oh, yes, but we're state officials and it's state property.

20 Well, in the Tinsdale case the only difference is  
21 that instead of pursuing all the way through the litigation  
22 like Florida did, in Tinsdale the state came in and filed an  
23 Eleventh Amendment defense and said we are the owner, but  
24 the Eleventh Amendment means that we don't have to get into  
25 it. And the court looked at that and said okay, stay out of

1 it. And they looked into it and said those people do not  
2 own it; they are in wrongful possession of that property;  
3 get off.

4 The fact is that the State of Florida was not a  
5 necessary party to this litigation. They chose to come in  
6 and assert their claim and say we own the whole wreck and  
7 everything. The fact is that the defendant in this case was  
8 some property that came from a marine salvage operation.  
9 Now, that's what it was. That was the res over which that  
10 we were fighting. We never sued the State of Florida,  
11 never. It was them coming in affirmatively.

12 The sovereign immunity rested in many cases. We  
13 can go back and see that the sovereign immunity rested on  
14 the structure of the feudal system, the fiction that the  
15 king could do no wrong. Yet, this Court's doctrine in Ex  
16 parte Young is an integral part of our judicial fabric.  
17 Neither sovereign immunity nor the Eleventh Amendment will  
18 bar a suit in federal court for relief against the  
19 wrongdoing of state or federal officials. In this  
20 particular case there was --

21 QUESTION: Well, if the Fifth Circuit had rested  
22 its judgment on that ground, it might be one thing, but that  
23 isn't the ground it rested on.

24 MR. HORAN: Well, the only party for the Fifth  
25 Circuit --

1           QUESTION: The ground it rested on was that this  
2 is an argument between the state and the individual, but the  
3 Eleventh Amendment doesn't bar it because the state doesn't  
4 own the property.

5           MR. HORAN: Well, the only reason that the Fifth  
6 Circuit --

7           QUESTION: Isn't that the ground it used?

8           MR. HORAN: Yes. The reason was because that's  
9 the only parties that were before the court. See, the state  
10 took the reins away from the two people that had possession,  
11 and they filed their claim of ownership, so the only people  
12 before --

13           QUESTION: Well, as I read the findings of the  
14 District Court, the District Court said that the property  
15 was in the possession of a certain named department of the  
16 state government. That's what he found.

17           MR. HORAN: Well, it was in the possession of Mr.  
18 Morrell and Mr. O'Brien who were state officials of the  
19 Department of --

20           QUESTION: Nevertheless, the court said it's in  
21 possession of the state.

22           MR. HORAN: Okay. Without conceding the  
23 constitutionality of Florida statute, the case resembles and  
24 is on point with a case that was decided 14 years before  
25 this Court decided Ex parte Young, and that was Reagan v.



1 Farmers Loan and Trust Company, 154 U.S. 362. And this  
2 Court held then that a valid law may be wrongfully  
3 administered by officers of the state so as to make such  
4 administration an illegal burden and an exaction on the  
5 individual. They may go beyond the powers thereby  
6 conferred, and when they do the fact that they are assuming  
7 to act under a valid law will not oust the courts of  
8 jurisdiction to restrain their excessive and illegal acts.

9 Now, under the reasoning of Ex parte Young, the  
10 state had no interest in the lawsuit for it was incapable of  
11 authorizing an unconstitutional act. The suit began when an  
12 ancillary writ was issued to Mr. Morrell and Mr. MacBeth.

13 Now, the claim made by the United States when the  
14 case was first filed and when the United States came in,  
15 they said move to dismiss, sovereign immunity; we are the  
16 owner. That's what the United States said. And ultimately  
17 when we got into the merits, because we went into the  
18 merits, the court said listen, I'm not going to decide this  
19 on the bare claim that the United States is an owner. Why  
20 are you the owner? And they said 1906 Antiquities Act. And  
21 so ultimately we got actually a summary judgment against the  
22 United States, and it was upheld by the Fifth Circuit, and  
23 they sought to come before this Court.

24 In this particular case the state says well,  
25 because the United States failed in its claim, we should be

1 the ones. There must be a bureaucracy out there that can  
2 govern that wreck; but in fact, the state cannot enforce  
3 anything out there. They cannot protect that wreck. The  
4 federal court can enforce and can protect. That's Treasure  
5 Salvors III. We've had some Panamanian pirates out there  
6 during the interim and had to go against them, and it was  
7 appealed to the Fifth Circuit, and the Fifth Circuit said  
8 you've got the jurisdiction.

9           Now, the fundamental issues here are do the rules  
10 established in Queen City and in Tindal v. Wesley, do they  
11 hold that the mere assertion of title in the state bars  
12 Eleventh Amendment ground suits against the state and state  
13 officers where the claim is specifically challenged.

14           Now, the issue here, as in Tinsdale, is whether  
15 there is an action brought against individuals to recover  
16 the possession of land which they have in their possession  
17 and control is to be deemed an action against the state  
18 within the meaning of the Constitution simply because those  
19 individuals claim to be in rightful possession as officers  
20 of the state and that title is in the state. And can the  
21 court decline to inquire whether the individual defendants  
22 are in law entitled to possession.

23           QUESTION: Well, but here you have the State of  
24 Florida as concededly a party, do you not?

25           MR. WALLACE: Right. On their motion. They came

1 in. They did not have to. They came in and intervened and  
2 said we are filing a claim of owner.

3 QUESTION: But I mean you don't get to the Ex  
4 parte Young situation unless you dismiss the State of  
5 Florida and say that your action should go on just as  
6 between you and the two state officials. That's Alabama  
7 against Pugh.

8 MR. HORAN: That's correct, Your Honor, but in  
9 this particular case where the state came in, the state came  
10 in and said we are the owner. Later they assert Eleventh  
11 Amendment. They say we are the owner, and we're going to  
12 act for those individuals. We're not going to let those  
13 people file any responses. We can't tell who to file  
14 responses. We're not going to let those people file  
15 responses. We are going to file responses on their behalf.  
16 And that's what they did.

17 Now, the state intervened asserting on behalf of  
18 itself and those named individuals title. In this  
19 particular case do the principles of Queen City and Tindal  
20 apply, where the state's defense of sovereign immunity or  
21 Eleventh Amendment rests upon the validity of this title and  
22 the state statute upon which that rests. Isn't this the  
23 special challenge?

24 Over the last 60 years this Court has had at least  
25 three admiralty actions where the ownership of a vessel

1 determined the federal court's jurisdiction: In re Muir  
2 where the Glen Eden was alleged to be in British service,  
3 and Britain came in and said that's ours; you must dismiss  
4 on sovereign immunity grounds; the Navemar, which is a 1938  
5 case, where Spain came in and said Eleventh -- or not  
6 Eleventh Amendment but sovereign immunity; you must dismiss;  
7 Republic of Mexico versus Hoffman where the Republic of  
8 Mexico had a contract over the Baja, California, the ship in  
9 that, which was claimed in Mexico.

10 In all three of those this Court said that  
11 Britain, Spain, and Mexico's claim of ownership must decide  
12 -- the court, the trial court must decide for itself whether  
13 the requisites of immunity exist. The trial court has never  
14 been bound to accept an ownership allegation is conclusive.

15 Now, we get into one other line of cases, and that  
16 is O'Neill v. Schoenbrod.

17 QUESTION: And so you don't think that does some  
18 damage to the Eleventh Amendment aspect?

19 MR. HORAN: No, sir. The biggest damage in the  
20 whole world would be that envisioned in the Lee case where  
21 if you allow a state to come in with the mere assertion of  
22 ownership, to divest the federal court of jurisdiction to  
23 protect somebody's individual rights, you are leading  
24 justice into a blind alley from which it will never emerge.

25 In this particular case you've got the Florida

1 courts in O'Neill v. Schoenbrod which state very  
2 conclusively that admiralty salvage -- that salvage is a  
3 creature of the federal courts, and the courts of Florida  
4 will not even entertain a claim for salvage. And what other  
5 than a claim for salvage is a salvage contract to salvage a  
6 boat on the Continental Shelf of the United States outside  
7 of Florida? And in that particular case --

8 QUESTION: Well, what's at issue here are the  
9 things that were delivered to Florida.

10 MR. HORAN: Well, everything was delivered to  
11 Florida. They took it all.

12 QUESTION: Up to a certain point, up to a certain  
13 point.

14 MR. HORAN: Yes.

15 QUESTION: And it's that material. You mean the  
16 Florida courts wouldn't entertain an action on a salvage  
17 contract?

18 MR. HORAN: They have no jurisdiction over salvage  
19 contracts. Under O'Neill v. Schoenbrod they dismissed it  
20 the first time because it was styled an in personam between  
21 O'Neill and Schoenbrod on salvage. They dismissed it. And  
22 O'Neill and Schoenbrod must have had attorneys that didn't  
23 want to go into federal court because they tried to refile  
24 it on unjust enrichment. This was something that had  
25 already been accomplished. And the Florida court again, the



1 trial court and the Third District Court of Appeals  
2 dismissed the action again saying listen, you're just trying  
3 to disguise a salvage action, and if we entertain  
4 jurisdiction, we would be getting into a jurisdictional  
5 conflict with the federal courts, because the federal courts  
6 have a unique way of looking at federal salvage contracts  
7 and pure salvage, because there is a unique way of looking  
8 at that and determining the distribution of the goods  
9 salvaged, whether it is perspective or retrospective in  
10 effect. And in O'Neill v. Schoenbrod that's exactly what  
11 happened. They said you can't even disguise it as unjust  
12 enrichment. In fact you are talking about salvage. There  
13 is no doubt in this particular case we are talking about  
14 salvage.

15 In conclusion, Treasure Salvors I was the case  
16 where the United States lost its claim that it could control  
17 salvage operation on the high seas under the 1906 act giving  
18 jurisdiction over lands owned or controlled by the United  
19 States. Now Florida insists that it has greater control  
20 over salvage on the high seas than the United States.

21 The trial court's holding that the state was in  
22 privity with the United States and was bound also for  
23 failure to intervene is a valid basis to affirm the lower  
24 court's opinion because it would obviate the Eleventh  
25 Amendment arguments made by Florida.

1           If the state had intervened claiming against the  
2 United States, there would have been no Eleventh Amendment  
3 defense, and the state litigated by proxy, and it litigated  
4 very hard by proxy and it lost, and now they want to play  
5 another fast and loose game.

6           CHIEF JUSTICE BURGER: Your time has expired,  
7 counsel.

8           MR. HORAN: Thank you.

9           CHIEF JUSTICE BURGER: Mrs. Smathers, do you have  
10 anything further?

11          ORAL ARGUMENT OF MRS. SUSAN GAMBLE SMATHERS, ESQ.,  
12           ON BEHALF OF THE PETITIONER -- Rebuttal

13          MRS. SMATHERS: Yes, sir, I do.

14           First of all, I would like to say that the State  
15 of Florida has never presumed to tell the United States what  
16 cases to intervene in and what not to. And I would also  
17 remind the Court that a bystander's interest in litigation  
18 does not determine their rights.

19           And secondly and most importantly, I would remind  
20 the Court that although the facts in this case may summon  
21 emotional feelings and what not, this Court does not sit  
22 today to decide who wears the white hat and who wears a  
23 black hat. The state courts are fully capable of  
24 determining whether there's fraud that provided the impetus  
25 for a contract or whether --

1           QUESTION: Are you saying that the equities,  
2 whatever they may be in this case, are irrelevant to the  
3 issue that's now before us?

4           MRS. SMATHERS: That is precisely what I'm saying,  
5 Your Honor. And I would also say that they made the claim  
6 that we didn't controvert the facts found by the District  
7 Court. We certainly did, and we happen to be stuck with the  
8 record, if you please, which every time a host of  
9 metallurgists and chemists and illustrators and  
10 archaeologists and historians literally reel in their seats  
11 every time they read it.

12           And we did controvert the allegations made. The  
13 findings were made against us. But the issue in this case  
14 is whether the federal court can try a suit to rescind a  
15 contract and then decide whether the Eleventh Amendment  
16 applies to the case.

17           QUESTION: Could I ask you what the first response  
18 of Florida was to the service of this writ?

19           MRS. SMATHERS: Gladly. Florida filed a motion to  
20 quash the warrant for arrest in rem based also on another  
21 jurisdictional challenge which was the fact that the  
22 property did not lie within the territorial jurisdiction of  
23 the Southern District Court.

24           We lost on that. The trial court denied our  
25 motion to quash, and then it ordered the State of Florida to

1 show cause why the property held in its possession should  
2 not be turned over to the substitute custodians, the  
3 Respondents.

4           The State of Florida, not L. Ross Morrell, not the  
5 Secretary of State himself, not the Governor, the State of  
6 Florida owned the property. That's why the State of Florida  
7 had to come in and say we own this property, we have a  
8 contract, and the dispute should be heard in federal court.

9           We may not have asserted the Eleventh Amendment in  
10 that first motion to quash.

11           QUESTION: But when they issued the order to show  
12 cause was the state's response to that in part the Eleventh  
13 Amendment?

14           MRS. SMATHERS: No, sir, it was not.

15           QUESTION: Didn't you submit the question of your  
16 contract? In response to that motion to show cause you  
17 showed up and submitted on the merits, didn't you?

18           MRS. SMATHERS: Your Honor, it was established in  
19 the Ford Motor Company case and in the Edelman case --

20           QUESTION: Well, I just want to know what the  
21 chronology was.

22           MRS. SMATHERS: That's right. We did not assert  
23 the Eleventh Amendment until it became clear that the trial  
24 court was going to try the issue on the merits. Our other  
25 arguments were jurisdictional also, and they --

1           QUESTION: Your first response to the order to  
2 show cause as to why the state shouldn't turn over the  
3 property did not contain the Eleventh Amendment.

4           MRS. SMATHERS: That is correct. But we take the  
5 position that the Edelman case as well as the Ford Motor  
6 Company case recognized that a state could come and try the  
7 entire action, go through an entire lawsuit, go through an  
8 appeal, and not even assert the Eleventh Amendment until it  
9 got to the Supreme Court of the United States.

10          QUESTION: Because it is a jurisdictional matter.

11          MRS. SMATHERS: That's right, and it's not waived.

12          QUESTION: But let me ask you. Supposing you'd  
13 thought about the Eleventh Amendment when your two officials  
14 received the process. You then decided to assert the  
15 Eleventh Amendment as a defense. Could you have done so  
16 without alleging that the state owned the property.

17          MRS. SMATHERS: I'm sorry.

18          QUESTION: Could you have merely said these are  
19 state officials; they work for the State of Florida;  
20 therefore, the Eleventh Amendment is a bar to enforcement of  
21 this process. Would that have been enough?

22          MRS. SMATHERS: It's a possibility. Certainly --

23          QUESTION: Well, is that your position here, that  
24 that's all you had to do in order to win, or did you not in  
25 addition have to say that they're in custody of property



1 that belongs to the State of Florida? Did you not have to  
2 raise the merits even to raise the jurisdictional issue?

3 MRS. SMATHERS: Certainly, Your Honor. We had a  
4 contract in our hand --

5 QUESTION: I know what you had. I'm just asking  
6 in your view what did you have to do to prevent the federal  
7 court -- say you did it as fast as you possibly could --  
8 from asserting jurisdiction over these two individuals?  
9 What kind of a pleading would you have had to file?

10 MRS. SMATHERS: We would have to say that we owned  
11 these artifacts pursuant to contracts that have already been  
12 fully executed and that are otherwise valid on the face, and  
13 under which possession is already --

14 QUESTION: And supposing in reply to that pleading  
15 there had been some response filed that had showed that  
16 there had been res judicata on the issue and you had no  
17 valid claim of ownership, could you then still have asserted  
18 the Eleventh Amendment?

19 MRS. SMATHERS: We believe that we could.

20 QUESTION: Without any basis for really supporting  
21 the ownership claim.

22 MRS. SMATHERS: That's right.

23 QUESTION: Why couldn't you assert the Eleventh  
24 Amendment defense just to a possessory action, a possessory  
25 action against the state to make the state turn over

1 property?

2 MRS. SMATHERS: We could do that, if the state was  
3 the party or the defendant.

4 QUESTION: Well, why do you say you have to claim  
5 ownership in order to assert the Eleventh Amendment? All  
6 you have to claim is possession, isn't it?

7 MRS. SMATHERS: That's true. However, we did  
8 claim that we had possession. We claimed both.

9 QUESTION: Well, and the trial court found that  
10 the state was in possession of the property.

11 MRS. SMATHERS: That's right. But the state had  
12 possession of the property under color of title. The state  
13 had entered into these contracts on the basis of the  
14 constitutional boundaries as they had existed for 100 years,  
15 and that --

16 QUESTION: Well, are you saying that the state has  
17 to go farther and say that it does have a colorable claim to  
18 title as well as possession? Do you think the possessory  
19 action against the state is not barred by the Eleventh  
20 Amendment?

21 MRS. SMATHERS: No. In fact, I don't think the  
22 state has to demonstrate a colorable title. However, we did  
23 in this case which would make it even more --

24 QUESTION: But, Mrs. Smathers, if that's your  
25 position, supposing you had an ordinary case of a police

1 officer searching an individual's car, taking possession of  
2 property, turning it over to the policy property custodian  
3 -- a clear violation of the Fourth Amendment and the  
4 seizure. And the individual brought suit against the  
5 property custodian and said I want my property back. Would  
6 it be a sufficient Eleventh Amendment defense for the state  
7 to come and say well, that property's in the custody of the  
8 state, period? That's your position, I think.

9 MRS. SMATHERS: Yes, Your Honor.

10 QUESTION: Didn't you earlier in your argument say  
11 you agreed with Ex parte Young?

12 MRS. SMATHERS: Yes, Your Honor, because Ex parte  
13 Young --

14 QUESTION: Do you still? Do you still agree with  
15 it?

16 MRS. SMATHERS: Certainly.

17 QUESTION: After that answer.

18 MRS. SMATHERS: Yes, Your Honor, I agree with the  
19 holding in Ex parte Young, but I understand that case to be  
20 distinguishable from this one because that case was brought  
21 against an Attorney General who was doing something which  
22 was unconstitutional in nature. And the Court held that a  
23 suit can be brought against a state official when he is  
24 committing acts which are unconstitutional in nature, or in  
25 other cases in excess of his statutory authority.

1           That's not the case here. The State of Florida  
2 Department of State was the party.

3           QUESTION: Does the State of Florida differ from  
4 other states that operate only through their officials?

5           MRS. SMATHERS: No, Your Honor. Every state has  
6 to operate through its officials, and I think it would be a  
7 difference without a difference if we were to say that Ex  
8 parte Young could apply in any case where the state was the  
9 real party in interest, and yet, obviously the state's  
10 interest has to be conveyed and carried out by its officials.

11           I don't think that the Court in Ex parte Young  
12 intended to draw that fine a distinction, and certainly in  
13 Alabama v. Pugh this Court recognized even where the relief  
14 requested could still be achieved by not dismissing the  
15 State of Alabama, the Court recognized that it was important  
16 enough to dismiss the State of Alabama because of the  
17 Eleventh Amendment.

18           We would also dispute Respondent's representation  
19 that the division of artifacts occurred after United States  
20 v. Florida. The last division of artifacts occurred in  
21 February 1975. United States v. Florida was handed down in  
22 March 1975, and that is in the record.

23           We would also argue with their interpretation of  
24 In re Muir, the Navemar, and the Republic of Mexico cases.  
25 The Eleventh Amendment was not involved in those cases, and

1 if the Eleventh Amendment is to continue to have the  
2 compelling force that this Court has held that it does in  
3 Edelman and in its most recent cases, that In re Muir and  
4 these cases should not be held to carve an exception.

5 Thank you.

6 CHIEF JUSTICE BURGER: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:00 p.m., the case in the  
9 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

FLORIDA DEPARTMENT OF STATE v. TREASURE SALVORS, INC., ETC.

# 80-1348

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and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Lynn Connelly

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