In the

ORIGINAL

Supreme Court of the United States

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA, ET AL., Petitioners,	)	
v.	)	NO. 80-1556
MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.	)	

Washington, D. C.

January 18, 1982

Pages 1 thru 51

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Monday, January 18, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 o'clock a.m.

APPEARANCES:

JEROME B. FALK, JR., ESQ., San Francisco, California; on behalf of the Petitioners.

O. CLAYTON LILIENSTERN, ESQ., Houston, Texas; on behalf of the Respondents Lummis et al.

RICK HARRISON, ESQ., Austin, Texas; on behalf of Respondents White and Bullock.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Cory against the Attorney General of Texas.

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

ORAL ARGUMENT OF JEROME B. FALK, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. FALK: Thank you. Mr. Chief Justice, and may it please the Court, though we were here before in California versus Texas, the issues of jurisdiction now presented by this petition were not addressed in any of the briefs of the parties, or with the exception of the Eleventh Amendment issue in the concurring opinion.

Indeed, it is fair to say that in the days following the decision in California versus Texas, many of us, myself included, thought that the concurring opinions had pointed the way to a workable and fair procedure for the resolution of the domicile dispute concerning the domicile of Howard Hughes.

However, in the months that followed, numerous procedural and jurisdictional problems not ventillated in California versus Texas became apparent.

I intend to discuss three grounds which preclude, in our view, preclude the district court from exercising jurisdiction in this case. A central theme of those issues is that Congress has simply never undertaken to fashion a

statutory process for the resolution of interstate death tax controversies of this kind. The court of appeals sought to bend the federal Interpleader Act to that task, but for the three reasons I will discuss, the Act simply will not serve.

Moreover, though I will not separately discuss the issue today of changing venue, the court of appeals use and understanding of the Interpleader Act would produce what we believe is the absurd and unfair result of requiring a state, California in this instance, to litigate its death tax claim for what is an enormous sum of money before a jury of Texas citizens when the issue involves the rival claim of the state of Texas.

We submit that this is, if nothing else, further evidence that Congress could not possibly have intended the Interpleader Act to be used in this fashion.

The first ground of objecting to jurisdiction is, of course, 28 U.S.C. 1251(a). Although Congress has in recent years allowed concurrent lower court jurisdiction for most categories of controversies which are within the court's original jurisdiction, one category has remained outside the concurrent jurisdiction mode, and has always been within the court's original and exclusive jurisdiction, namely, controversy among different states.

There is no way to square the maintenance of this action in a district court with the clear command of

Congress in Section 1251(a) that only this Court can hear such controversies. Now, in making that statement I am, of course, mindful that in California versus Texas, the Court declined to permit us to exercise or to invoke the original jurisdiction, and I am also aware that three Justices wrote then that there was not then a justiciable controversy between California and Texas.

As the Court knows, we have now filed a new motion for leave to file an original complaint, and at Pages 28 to 39 of that motion, we endeavor to show that there is indeed a present case or controversy between California and Texas, but that question isn't presented here, and need not be addressed today. I say that because this case is different from what was before the Court in 1978. Then Justice Stewart was able to write that each state was free to proceed in its own courts, and each state could obtain, in theory, in its own courts a favorable judgment, without regard to the acts of the other or the proceedings in the courts of the other state. That is no longer true.

Now that there has been filed an interpleader action, California and Texas must square off as adversaries in a federal district court. Each must file pleadings answering the claim of the other, and responding to the position of the other, for that is standard interpleader practice, and because the claims are mutually inconsistent,

if California wins, Texas must lose, and if Texas wins, California must lose.

Each is enjoined by the district court from proceeding in their respective state courts. The states are, in short, litigation adversaries in a single lawsuit, and this is therefore now a controversy between states within the meaning of Section 1251, even if one agrees with what was said in the concurring opinions in California versus Texas.

QUESTION: If you were legitimately before the district court in an interpleader action, is it impossible that that court could conclude that under the law of California as well as under the law of Texas, that Mr. Hughes was a domiciliary of both states? Is that impossible?

MR. FALK: Yes, Jusice O'Connor, it is impossible under our law and under the law of the state of Texas, and I believe under the law of every state in the United States, but certainly under the laws of the two states. An individual may have but one domicile.

QUESTION: Is that constitutionally requisite, do you think?

MR. FALK: No, I don't think so, Justice Brennan. I think the courts' decisions make clear that states can have other bases for taxation, but in the cases of California and Texas, they do not.

QUESTION: What I was trying to get at is, do you think it is a constitutional principle that one may have only one domicile?

MR. FALK: No, I meant to say that I do not believe it i constitutional principle.

QUESTION: You do not.

MR. FALK: It is simply the law of California and the law of Texas. I make the statement, then, that we are -- that this is a controversy between states without regard to what the Court may ultimately say about our pending motion for leave to file a new original complaint. Naturally, we hope, for the reasons stated there, that the Court will permit it to be filed. But we also recognize that there are prudential or may be prudential limitations on the exercise of original jurisdiction in this situation, some of which were discussed by Justice Stewart in his concurring opinion.

If the Court declines on any of those grounds to permit California to invoke the original jurisdiction, the fact remains that Congress has not created an alternative form in a district court for the litigation of controversies between states which this Court declines to adjudicate. This Court has turned down over the years many suits brought by one state against the other. Not too many days ago it declined to hear a controversy between California and the

state of West Virginia over an unplayed football game.

The decision by the Court not to permit jurisdition to be invoked in that case did not automatically create jurisdiction in some other court for the resolution of that controversy.

So, for those reasons, we believe Section 1251(a) bars this action.

The second ground for objection to jurisdiction, which of course the Court does not need to reach if it agrees with the first, is a constitutional one, founded on the Eleventh Amendment. The Court's cases have traditionally identified two distinct requirements which must be satisfied for suit to be brought against a state officer in a federal court.

First, there must be a colorable allegation that the defendant has acted unconstitutionally or in violation of his statutory authority or her statutory authority. Second, only prospective injunctive relief is being sought, or at least that there be sought prospective injunctive relief.

In this case, the second requirement is satisfied, but the first is not. Here the Texas and California taxing officials who are defendants are plainly acting within their statutory authority, and they are not violating the Constitution. Obviously, the domicile claim advanced by one

or the other or conceivably by both of the state taxing officials is wrong on the facts, but that does not make the assertion of the claim unconstitutional. All each of these officials seek to do is to submit their relevant evidence to a court of competent jurisdition and obtain a judicial determination in that court.

Worcester County Trust Company versus Riley holds that this does not violate the Constitution, and that portion of the opinion in that case has never been questioned and was not questioned in the concurring opinions in California versus Texas, and is supported by many decisions of the Court.

Thus, one is brought to the state's principal argument, that Edelman versus Jordan somehow dispensed with the requirement that illegality be shown, and left only the requirement that prospective relief be sought. I recognize that three Justices implied in California versus Texas that this was so. With all respect, I think Edelman does not stand for that proposition, and that indeed there is no warrant for what would be a genuinely radical change in our Eleventh Amendment law.

Edelman focused on and clarified the line between prospective relief, which is allowed, and retrospective relief, which is not. But it could not have held that the first requirement, a showing of unconstitutional conduct or

violation of statute, need not be required. It could not have held that, because in Edelman the defendants were found to have violated a controlling federal statute.

Now, the element of illegality is an integral part of the Eleventh Amendment law. It follows from Ex parte Young, in which the Court held that the Eleventh Amendment did not bar a suit against state officers if the officer was acting unconstitutionally, on the ground, admittedly somewhat ficticious, but an important fiction, on the ground that the illegality of the conduct severed the officer's nexus to the state, and thus the suit could be maintained.

For that reason, the element of illegality in an Eleventh Amendment case is crucial. Without it, the suit against a state officer in his official capacity remains a suit against the state, and thus barred by the Eleventh Amendment, regardless of whether the relief is retrospective or prospective.

No decision of this Court has ever suggested that the requirement of unconstitutional or illegal conduct could be dispensed with. Indeed, the Court reaffirmed the requirement of illegal conduct, of unconstitutional conduct or a violation of the statute, in Larson versus Domestic and Foreign Commerce Corporation. That is not a case cited in the briefs, I regret to say. It is found at 337 U.S. 682. That is a case involving the parallel rule of sovereign

immunity for federal officials, and has been cited by the Court as reflecting of good Eleventh Amendment law as well.

In Larson, the defendant's conduct was assertedly tortious, and also in violation of contract. Prospective relief was sought. The Court nonetheless held that sovereign immunity barred the suit against the federal officer because his conduct was neither unconstitutional or in violation of his statutory power, against a claim that it was illegal and thus also permissible as a suit, because it was tortious.

Therefore, acceptance of the state's Eleventh Amendment theory --

QUESTION: Mr. Falk --

MR. FALK: Yes, sir.

QUESTION: -- do the California taxing officials have statutory authority to collect these taxes if the decedent was not a resident of California?

MR. FALK: No. The authority -- they have authority to make the claim. The Court will not award --

QUESTION: Doesn't their authority depend on whether or not Hughes was a resident of California?

MR. FALK: No, their authority -- the only authority they have exercised so far is to propose to file a claim. They do not -- and they will collect the tax only if the Court orders or finds that there had been domiciliary.

QUESTION: But if he was not a resident of California, do they even have authority to file a claim to tax the intangibles?

MR. FALK: Surely they have authority to file a claim, in the same way, Justice Stevens, that a district attorney has authority to file a criminal indictment or a criminal complaint, even if the defendant is in the objective sense of the word innocent. I mean, every government lawyer, be it civil or criminal, files claims in court that ultimately a court rejects. They are certainly not acting in an ultra vires way when they do that, and that is the position of the controller of California.

QUESTION: In Edelman against Jordan, did you know that the defendant there, the state official acted improperly until you addressed the merits? Didn't he have the authority to do the preliminary things that were challenged?

MR. FALK: Well, in Edelman versus Jordan, there was conduct engaged in that was in direct violation of a federal statute. That is the difference between this --

QUESTION: Well, but is the conduct any different than collecting a tax from a non-resident decedent?

MR. FALK: I think I am repeating myself, but we are not -- the controller of California and the controller of Texas are not proposing to collect a tax without judicial

process. That is the difference. All that they are doing is filing claims which a court will decide. It cannot be said that a state officer or state attorney violates the law by going to court and presenting a claim. That is what Worcester County dealt with, and held in the course of the opinion, that that is not unconstitutional conduct, or illegal conduct.

QUESTION: And you think in all the cases where a suit against a state officer has been permitted, that they were different in this respect?

MR. FALK: Yes, that's true.

I want to just make this observation, that acceptance of the state's Eleventh Amendment theory would have serious consequences beyond the four corners of this case. Because the law of sovereign immunity for federal officers and the law of the Eleventh Amendment for state officers has been linked over the years and somewhat homogenized, a decision in this case dispensing with the requirement of illegality would effectively overrule the Larson case and destroy a workable line of demarcation which has existed at least since Ex parte Young, and I think it would also open the doors to federal courts to suits against state and federal officers for injunctive relief in a wide variety of cases theretofore barred by sovereign immunity and the Eleventh Amendment, such as suits to enjoin a breach

of contract.

QUESTION: You don't think this could be limited to the interpleader situation?

MR. FALK: Well, I don't think there is any difference in principle between interpleader and other cases. As a matter of fact, in a sense, interpleader is an even easier case than Larson. In Larson, there was illegal conduct in the sense of tortious conduct, and yet the Court said tortious conduct is still within the officer's authority and is not -- and suit may not be maintained against him.

So, I think, in a sense this is a less close case than a tort case would be, as you had in Larson.

The third ground of objection I will speak to very briefly, and that has to do with subject matter jurisdiction under the Interpleader Act. When one looks at the Interpleader Act, and tries to fit it to suits of this kind, the fit is very poor. Section 1335 requires at least two claimants of citizenship of diverse states, and refers to the general definition of diverse citizenship in the diversity statute. This requirement has been referred to as minimal diversity.

But neither the United States nor taxing officials of -- or any officials of states or states themselves are citizens of states, so the Act doesn't apply to them. And

thus the court of appeals found minimal diversity here only as to two parties, neither of whom were the state taxing officials. The first was Mr. Lummis, who is the administrator of the Hughes estate, and the stakeholder who filed the lawsuit. The court of appeals held that his citizenship could be considered because he was an interested stakeholder in the sense that he also has a claim, was therefore a claimant, and his citizenship of Nevada could be considered as one of the two claimants for minimal diversity.

We think that was error for reasons discussed in the brief, and which I will not repeat here. But even if Mr. Lummis qualifies as one of the two necessary claimants, there is a serious problem with the necessary second one. The court of appeals found that second claimant in Mr. Alvord, the Los Angeles County treasurer, who it found was a claimant because under the then existing law the county of Los Angeles was to receive a tiny fraction of the state inheritance tax.

However, effective January 1, 1981, California law was changed as part of an overall revision of the inheritance and gift tax law, and the entire tax is now paid to the state. Mr. Alvord will get nothing. The county of Los Angeles will get nothing. He has therefore --

QUESTION: I take it that change was not the result of the pendency of this litigation.

MR. FALK: Absolutely not. It had been a state bar proposal. It had been pending for years, and we had absolutely nothing to do with it.

As a result of the legislation, however, Mr. Alvord has abandoned any claim to the fund, and must be dismissed as a party. Thus, if jurisdiction is determined as of this moment, or at least as of January 1, 1981, we have only one claimant and minimal diversity has not been satisfied, and there is no jurisdition.

The estate argues, however, that jurisdiction must be determined as of the date the complaint was filed, when Alvord did have a claim, and that subsequent events do not affect it. That is, to be sure, consistent with a general rule that jurisdiction be measured at the time a complaint is filed, but we say that this case falls within a second -- within a clearly marked exception to that general rule, and that is that where a party is added or deleted after a complaint is filed, then the courts re-examine jurisdiction in light of the new lineup of parties, and we cite at Pages 33 and 34 of our brief six different categories of cases, every conceivable permutation in which this rule has been applied by the courts.

And therefore, because Mr. Alvord is not a claimant today, and must be dismissed as a party, subject matter jurisdiction under Section 1335 is absent.

Now, many states, including California, have voluntarily agreed by statute to submit to binding arbitration as a means of resolving controversies of this kind. Unfortunately, some other states, including Texas, have not. And thus, a suitable federal process for the resolution of domicile disputes would be desirable, but Congress has not seen fit to enact that legislation, despite decades of judicial and --

QUESTION: What form do you think that should take, Mr. Falk?

MR. FALK: Well, I think, Justice Brennan, that it would be likely to be a district court proceeding, as an express, explicit exception to Section 1251(a)'s exclusive jurisdiction, and I am absolutely confident that Congress would take into account the problem of venue, and provide for venue in a state whose citizens are not interested in the outcome.

QUESTION: Any suggestion yet to the Congress to do something?

MR. FALK: I am not aware of any. And that surprises me in light of extensive literature on this problem before and after Texas versus Florida.

QUESTION: And I gather the Hughes case is not the only one likely to arise.

MR. FALK: No, although it is the last one, I

think, that will involve claims exceeding 100 percent, because as a result of the changes in the federal tax rates, I think you will never see another case in which the claims exceed 100 percent.

QUESTION: The power of Congress to do it would be because the judicial power extends to controversies between states?

MR. FALK: I think that is right, Justice White, and conceivably under Section 5 of the Fourteenth Amendment as well. We make that suggestion in our footnote in our reply brief.

But because it has --

QUESTION: Under Section 5, you mean implementing Section 1?

MR. FALK: Implementing -- Section 5 of the Fourteenth Amendment.

QUESTION: Yes. Implementing Section 1 of the Fourteenth Amendment.

MR. FALK: Yes. The estate asks the Court to create the remedy that Congress has yet to address, and I think that there is a high price to be paid for that course. First, it would require the Court to disregard what I think is fairly said to be the plain meaning of Section 1251(a). Second, without any explicit legislative intent to overcome the immunity afforded states and state officers by

the Eleventh Amendment, as was found present in Fitzpatrick versus Bitzer and Huto versus Finney, the estate would open the door to state officers without any showing of illegal or unconstitutional conduct.

Third, it would result in an interpleader remedy with a venue provision that for this purpose is just awful, resulting in suit being heard in one of the two claimant states before a jury of interested citizens.

For those reasons, we think that the Court should not accept the invitation of the estate to distort the Interpleader Act in the way that has been proposed, and to leave to Congress the task of fashioning an appropriate remedy. Thank you.

CHIEF JUSTICE BURGER: Mr. Lilienstern.

ORAL ARGUMENT OF O. CLAYTON LILIENSTERN, ESQ.,
ON BEHALF OF RESPONDENTS LUMMIS ET AL.

MR. LILIENSTERN: Mr. Chief Justice, and may it please the Court, Mr. Falk is quite right that we are before the Court today because of the concurring opinions in California v. Texas. The plight of the estate, which was noted in those concurring opinions, is the same today as it was then. The estate is still confronted with multiple claims on which we contend these claims are based on a single obligation.

We are not trying to deny either set of tax

officials the full opportunity to try the domicile claims. We are not trying to cut off their right to have an adjudication of their right to assess and collect inheritance taxes. We are merely asking that they be joined together in one unitary forum, and we believe that the federal Interpleader Act provides us with the mechanism to try it.

QUESTION: But if the case goes forward and a decision is had, one of the states will not be free to go forward in its own state.

MR. LILIENSTERN: If the case goes forward, Your Honor, neither state will be free to go forward in its state courts.

QUESTION: Yes.

MR. LILIENSTERN: But both sets of state officials will be capable of going forward in this interpleader action.

QUESTION: That may be so, but only one state is going to ultimately be able to collect the taxes.

MR. LILIENSTERN: Oh, that is quite right, because this unitary action will determine --

QUESTION: And except for the interpleader, both states could have gone forward in their own courts.

MR. LILIENSTERN: We don't agree with that, Justice White. We believe that the Western Union case is very similar in many respects to this case.

QUESTION: Well, do you agree with -- I thought the court indicated one reason for denying leave to file in the case before, that both courts could -- both states could go forward --

MR. LILIENSTERN: It is quite correct that --

QUESTION: -- and determine domicile, and collect their tax.

MR. LILIENSTERN: Under Worcester County Trust v. Riley, I believe that is a correct conclusion. That was so noted by the Court. However, we contend that the Western Union v. Pennsylvania case, which was 24 years after Worcester County, has changed that result at least insofar as the Worcester County Court held that there was nothing unconstitutional about each state taxing the same intangible assets of the estate, because Western Union held that when one state goes forward to escheat -- it was an escheat case -- the intangibles, it cannot provide relief from a later judgment in another state court that that denied the stakeholder due process.

We feel that we are on all fours with that case. We have intangible assets. Each state proposes to go forward. Neither state will submit to the state courts of the other. Neither state can protect us against the inconsistent domicile determination of another state court. And we are not looking for a windfall in this case, because

even if we prevail in this interpleader case, we are going to be taxed at the rate of 77 percent total, and that doesn't include the matters of interest which we have alluded to, and that doesn't include the matter of the California deductions if it were determined to be California domiciled, to which we are not entitled.

Mr. Falk alludes to federalism. As a matter of policy, we believe that the ends of federalism would actually be served and promoted by permitting us to go forward with this interpleader action, because it would give a binding determination, binding on both the administrators of the estate and on the state tax officials, and it will free them from the burden of having to race to judgment, a race to collection in this case, in which the assets of the estate -- the tax rate, the applicable tax rates in totality are going to exceed the assets of the estate.

QUESTION: Do you have diversity in your interpleader action?

MR. LILIENSTERN: Yes, Your Honor, we do.

QUESTION: Would you spell that out for me?

MR. LILIENSTERN: Yes, sir. We have diversity between the interested stakeholder, Mr. Lummis, Alvord, the county treasurer. We don't believe the change of law affects the fact that diversity fixed as to Mr. Alvord at the commencement of this suit. That change of law may

release him from his status as a claimant when we get back to the district court, but that doesn't affect the fact that jurisdiction was fixed because the nature of the claim is still the same. Mr. Cory has succeeded his rights. Mr. Cory still asserts the claim of California domicile. Mr. Cory will still attempt to collect the 24 percent. That claim is still there.

QUESTION: On that thesis, though, this makes the Howard Hughes situation a freak, doesn't it? Because the next Howard Hughes that will come along, you won't have that county treasurer in there.

MR. LILIENSTERN: That is quite correct, Your Honor, and we believe that we have diversity jurisdiction as between the two sets of state officials, because, since we have sued the state officials, seeking only prospective relief, the officials, we believe that Edelman is subject to that interpretation, the officials and not the states are the real parties in interest, and if the officials are the real parties in interest, they, like anyone else, they are citizens of their state. The Fourteenth Amendment tell us that, that all persons are citizens of the state in which they reside. If those officials are the real parties in interest, we can look to their --

QUESTION: Why wasn't it so held below?

MR. LILIENSTERN: I don't know. Only minimal -- is

required --

QUESTION: Because the state taxing official was thought in his official capacity to represent the state, which isn't a party.

MR. LILIENSTERN: Well, but --

QUESTION: I mean, which doesn't qualify for diversity.

MR. LILIENSTERN: If he -- if the state is a real party in interest, if he brings an action as a plaintiff, suing for money and damages on behalf of the state, that is quite correct, but the principle should be no different whether you are speaking of the Eleventh Amendment or whether you are speaking of diversity, when he is sued as a defendant and only prospective relief is sought, because the key test in each instance is still whether the state or the official is the real party in interest.

QUESTION: How about illegality?

MR. LILIENSTERN: Illegality, we have alleged that each set of state officials are acting illegally because it is the law of each state that a decedent has only one domicile. We have also alleged in our complaint, and this is a bit technical, but it is still the law, that in passing on the motions to dismiss, which is, after all, how this case went up through the appellate process, the district court was obligated to accept as true our assertion that Mr.

Hughes was domiciled in Nevada. That is a factual assertion, and the lower court was obligated to accept that.

Justice Stevens hit the nail on the head when he asked Mr. Falk whether the states are permitted to impose domicile based inheritance taxes if decedents are not in fact domiciled within the states. Under our assertion, which must be accepted as true, it may turn out that we are wrong on a trial on the merits, but at this preliminary stage for passing on the issue of jurisdiction, it must be accepted as true. Neither set of state officials is proceeding legally because it must be accepted that Mr. Hughes was not domiciled in either of their states.

QUESTION: Well, you don't always go on the papers for jurisdiction. Sometimes there are some affidavits or some hearing or even evidence is taken.

MR. LILIENSTERN: Yes, sir.

QUESTION: What happened in this case?

MR. LILIENSTERN: We have none of that in this case, except in the briefs. Each set of state officials have spent two or three pages trying to argue their domicile cases in the briefs. We didn't feel that was appropriate, and no one has challenged, so far as I can recall, by way of affidavit. There certainly was no court testimony. There was nothing by way of hearing. No evidence to the contrary that our assertion that Mr. Hughes was domiciled in Nevada.

Mr. Falk urges that Edelman has made no change with respect to the Eleventh Amendment. We don't know. A reading of Edelman, it seems to me, is -- a fair reading of Edelman could lead to the conclusion that if you are suing only for prospective relief against a state official, not seeking any retroactive relief, that the Eleventh Amendment will not be a bar.

In this case we are not even seeking the ancillary type of relief which impacts state treasuries which the Court in certain instances has permitted.

QUESTION: Well, you are not going to get an injunction unless you claim he is doing something wrong.

MR. LILIENSTERN: Well, Your Honor, Section 2361 says we can get an injunction, because interpleader, which is the companion statute to 1335, it says we can enjoin them from going forward in other forums other than in this forum to litigate this issue.

QUESTION: But Edelman does require illegality, doesn't it?

MR. LILIENSTERN: Well, of course, you were the author, Justice Rehnquist, and I am not here to quarrel with what you say the case means, but in the usual case, you are always going to have an allegation of unconstitutionality or some illegality --

QUESTION: Or statutory violation.

MR. LILIENSTERN: -- because otherwise there will be no federal subject matter jurisdiction in the first instance to get into court. Here, we say we have that. We say under Western Union we have unconstitutionality, and under the notion I just described for Justice White we have illegality, but we also have federal subject matter jurisdiction under 1335, the federal interpleader statute. So, in the usual case, you are going to have allegations which would be described as unconstitutionality or illegality. In this instance, unless it is true, as we mention in our brief, that interpleader carries with it its own type of wrongdoing, and that wrongdoing is the inability of the stakeholder to join the two claimants, two or more claimants together in one forum, and the refusal of those claimants to join together in one forum.

But we don't rely solely upon Edelman and the fact that only prospective relief is required in order to aviod the Eleventh Amendment. We have, as I say, our unconstitutional argument, and that is directly applicable to the Ex parte Young series of cases in which state officials are stripped of their immunity, and they cannot assert the Eleventh Amendment once that immunity is stripped, because they and not the states are the real parties in interest.

QUESTION: Are you going to comment or is your

colleague going to comment on the new motion to take original jurisdiction?

MR. LILIENSTERN: I would be happy to comment on that.

QUESTION: And why that isn't an expeditious and relatively simple way of solving the problem.

MR. LILIENSTERN: If we are wrong, and if the Court holds there is no interpleader jurisdiction here, it seems to me it will be held on the Eleventh Amendment or on no diversity. Such a holding will carry with it the suggestion that the states and not the tax officials are the real parties in interest. If the Court so holds, I agree. I believe at that time the tax liens of the two competing sets of tax officials will be in conflict, and there will be a present controversy.

But if we are right, and if the state officials in the case as we have structured it are the real parties in interest, then there is no controversy between two states. The rule is the same for the Eleventh Amendment, for diversity, and for original jurisdiction, we submit, and that is whether the states are the real parties in interest or whether the officials are the real parties in interest.

QUESTION: But one of the states is not going to be able to collect its inheritance tax.

MR. LILIENSTERN: If we prevail in this

interpleader action, that is quite correct. But that comports with the law of each of those states that a decedent has only one domicile at death, Justice White.

QUESTION: Well, I know, but I am just wondering how realistic it is to say that it is not a controversy between two states. I know the officials are there, but nevertheless the state treasury is certainly involved.

MR. LILIENSTERN: Perhaps that is so, but neither set of tax officials are going to pay the other. Their claims are against the interpleaded fund which we hold, the intangible assets of the estate. Neither one can satisfy its claim from the other. But, as I say, if the Court holds that the tax officials are not the real parties in interest in this action, and if interpleader fails, we quite agree that at that point there is the controversy between the two states.

QUESTION: Is there an appeal pending in your state courts?

MR. LILIENSTERN: Yes, Your Honor, there is appeal pending in the Texas state courts which has been stayed by that court pending the determination of this federal interpleader matter. It was stayed way back when we were still in the district court, and that stay has continued to the present time.

QUESTION: As long as that appeal was pending,

isn't that a negative factor in original jurisdiction?

MR. LILIENSTERN: Well, I don't see how it relates to original jurisdiction.

QUESTION: Well, there may be a reversal.

MR. LILIENSTERN: It may be reversed, and if we have no interpleader relief, and if there is no relief by way of the original jurisdiction, we hope that it will be reversed, but it seems to me that if there is a controversy between two states, and if the Court so holds, that is not affected in any way, because the tax liens are still impaired. The tax liens of the two states -- each set of state tax officials asserts that it has a lien on all the intangible assets of the estate. Those are inconsistent claims. Each one, especially since the total tax rate will exceed 100 percent, each one cannot fully satisfy its tax lien.

QUESTION: Has there been a determination yet in California that Mr. Hughes was domiciled there?

MR. LILIENSTERN: No, Your Honor.

QUESTION: There are a lot of things yet that are still pending.

MR. LILIENSTERN: Well, the reason for that is because of the temporary restraining order issued by the district court and because of the injunction pending appeal from the Fifth Circuit. Otherwise, the report of the

California inheritance tax referee would have been filed. That matter would have gone forward, and perhaps we would have a domicile determination there now. But that is one part of the interpleader relief that we chose to avail ourselves of to stop these -- it is the notion of vexatious litigation. We could be dragged to Delaware, perhaps, when they try to satisfy, if they get tax judgments under state courts, and if we get no relief, we may have to litigate it again. That is one reason for interpleader jurisdiction, to help the stakeholder avoid the vexatious litigation and to permit him to avoid the multiple liability.

In the interpleader context, we don't have to wait until there are two judgments staring us in the face. The fact that they may claim, that they assert claims is sufficient.

QUESTION: Counsel, if we were to decide that the interpleader action did not properly lie, then how would the circumstances have changed to entitle you to 1251 jurisdiction here, in view of our previous action?

MR. LILIENSTERN: Justice O'Connor, the circumstance would change in that we presently assert that we have interpleader jurisdiction, because the states are not the real parties in interest.

QUESTION: I understand that, but if you lost that argument.

MR. LILIENSTERN: Well, necessarily, we believe, your holding that there is no interpleader jurisdition, you would have to be holding that the states are the real parties in interest, and if the states were the real parties in interest, that latent controversy between the two states because of their inconsistente liens would resurrect itself.

Thank you.

QUESTION: Of course, that doesn't mean that we have to entertain that original jurisdiction.

MR. LILIENSTERN: That is quite correct, Justice Blackmun. I understand the notion of appropriateness of exercise of the Court's original jurisdiction. That is one reason why, frankly, we have urged interpleader as a much more appropriate solution to the dilemma in which we find ourselves.

QUESTION: Well, you urge it because it was suggested by the concurring opinion.

MR. LILIENSTERN: Absolutely.

QUESTION: Which was not a court opinion.

MR. LILIENSTERN: No, sir. That is quite correct.

CHIEF JUSTICE BURGER: Mr. Harrison.

ORAL ARGUMENT OF RICK HARRISON, ESQ.,

ON BEHALF OF RESPONDENTS WHITE AND BULLOCK

MR. HARRISON: Mr. Chief Justice, and may it please the Court, I might be so bold as to inform the Court that

Mr. Lilienstern and I are colleagues in profession, but not in parties, and our interests are quite different, as my argument should reveal.

Your Honors, four years ago California brought Texas before this Court, and Texas postulated its position, let the states alone, let them settle these tax matters in their own state courts. This matter is not ripe for controversy before the Court. As I hope my argument should reveal, there is no change of circumstances that has transpired during that four years that changed the factual unripeness of the estate that existed when this Court unanimously turned down California's motion to file an original action.

That unanimous decision of this Court we had hoped would free Texas to continue its claim and allow California to pursue in its own state courts whatever claim it chose to pursue against the Hughes estate, and whatever claim it could prove. But due to the fact that we have been enjoined by lower federal courts from proceeding, both states, there has been no progress at all in perfecting either state's position insofar as a right to tax this estate.

Texas' position today is as it was four years ago. The federal courts, with all due respect, should leave this matter to the states, at least until, as Justice Stewart pointed out in the concurring opinion in California v.

Texas, the matter has ripened with determinations in favor of each state's appraisals of the estate that reveal an inability of one state to gain all of its tax and a sufficient showing of gravity to warrant the exercise of original jurisdiction here.

It is not that Texas is unmindful of or unsympathetic with the plight faced by an estate such as the Hughes estate, faced with two competing tax officials trying to grab tax based on the same basis. But no more I would postulate than this Court is unsympathetic with that position, there simply is no constitutional impediment to states having domicile based inheritance taxes and pursuing in their own state courts the remedy against the estate and applying the tax against the estate if they can perfect and prove the basis of their claim.

Should this Court be of the view that relief is merited for states so situated, I would suggest that the district court interpleader remedy is the most suitable remedy, and I would cover the reasons for that in just a few moments, if I may.

The district court interpleader as postulated by the Fifth Circuit does permit the least broad incursion, federal incursion into the state taxing machinery in inheritance tax. As the Court questioned counsel, in fact, with the disappearance of the county treasurer from the

taxing scheme, that the case as postulated by the Fifth Circuit is not likely to repeat itself jurisdictionally.

More troublesome to the state of Texas is the suggestion that this is a 1251(a) case, or an appropriate an expeditious case for original action. Simply, as Justice Stewart pointed out, in a domicile inheritance tax case, there are two cases. One is a determination of domicile. The other is an assessment of and collection of tax. It is only when you have the domicile determination decided in a contradictory fashion by two or more states, and then you have an appraisal of the estate that is finite, an assessment of taxes by the federal government and these competing states, that you begin to get to the constitutional issue, and that is, is one state grabbing so many of the marbles that the other state can't satisfy its claim.

And this estate is far from that. The appraisals are not complete. Only the federal government has rendered its appraisal. We are still litigating --

QUESTION: Do I understand that to suggest that by the process you have just described, each state ended up with 35 percent of the total estate, and there would be no federal question.

MR. HARRISON: Yes, Your Honor, and I believe --

QUESTION: It would only be if each state or the

total of the two exceeded 100 percent, your submission is that we don't have any federal question.

MR. HARRISON: Using those percentages as an example, because the federal tax also bears an eating up of the estate, but if we were only talking about 100 percent left, and the two states took 70 percent, I submit there would be no federal question raised for this Court.

QUESTION: It would have to be over 100.

MR. HARRISON: It would have to be over 100 percent, and I would submit that even if the Court were faced with a factual analysis that showed it, that the state of Texas and the state of California had perfected their claims and thereby one of the two states was not going to be able to reach 1 percent of its tax, then the Court, I believe, would still be faced with the gravity test that it applies in Article III cases, and also in 1251(a) cases, and that is, is that loss of that 1 percent of sufficient gravity for the Court to take it.

QUESTION: I gather you agree with Mr. Falk that domicile as a matter of the federal Constitution is not limited to a single state.

MR. HARRISON: I believe there is no constitutional impediment --

QUESTION: No federal constitutional provision embodies that principle.

MR. HARRISON: Yes, Mr. Justice Brennan.

QUESTION: And yet I guess all 50 states, as I recall it, the principle is that you can have only one domicile.

MR. HARRISON: I would not question counsel's representation that that is nationwide, but I can advise the Court that in the states of Nevada, Texas, and California, the domicile criteria is substantially the same. I might point out that there are different gradations of test for domicile which I believe make it necessary to allow the states to make their own determination. For example, in Texas, we have a different test, and that is residents on a permanent basis with no intention of leaving. California's is slightly different, present intention of remaining, and that factual inquiry is not exactly the same.

QUESTION: Although it may bring out -- it could have the same result of one state.

MR. HARRISON: Yes, but the fiction the estate would ask you to indulge is the decedent in common law only has one domicile, and that justifies proceeding, and bringing these states in. By that very assumption and fiction, Texas postulates -- Texas has in this case proven to the satisfaction of a jury in a three-month trial that Hughes was domiciled in Texas. I simply suggest that it is unlikely that California can bear that proof, and this Court

should give it that go, and allow California to attempt it if they can, but the situation will very likely resolve itself.

QUESTION: Do I understand you to be saying that if we affirm the judgment of the court of appeals, that the district court on remand must apply Texas law?

MR. HARRISON: No. No, Your Honor. I did not mean to leave that impression.

QUESTION: What would it apply? Federal law?

MR. HARRISON: This Court asked that same question when the case was here on original action, asking, I believe, what this Court would apply if it took the case before. The Court would in that instance, I believe, apply the federal common law.

QUESTION: Is there a federal common law of domicile?

MR. HARRISON: I am presuming that there is, Your Honor.

QUESTION: If not, we would have to fashion one. Is that it?

MR. HARRISON: That might very well be, and taking into consideration that law in the respective three states.

QUESTION: So would the district court if this interpleader action went forward.

MR. HARRISON: I believe -- yes, Your Honor.

QUESTION: Is that right?

MR. HARRISON: That is the question I thought I was responding to.

QUESTION: What law would be applied if original jurisdiction were taken?

MR. HARRISON: The Court would be faced with that same dilemma, and I believe would fashion that law that was the best intermediary between the laws of the competing states.

On the question of the gravity necessary to reach this Court's original jurisdiction under either the original bill or under 1251(a), I would like to point out that the record in this case in conjunction with the record in the original bill and that of California v. Texas does indicate that California four years ago had entered into a provisional settlement agreement with the estate agreeing to only take an 18 percent tax as opposed to 24 percent. Now it postulates to this Court that it is being aggrieved at the level which requires the imposition of 1251(a) jurisdiction because it may, if quite a few different things as yet unresolved happen, only get 23 of its 24 percent.

I simply point that out, that just because the fiscal matters are reduced to a finite conclusion, and just because a state may lose 1 percent, the Court should still examine whether that is of sufficient gravity to the estate

-- or to the state. Exactly the type of a gravity question that Justice Rehnquist pointed out in the recent case of Maryland versus Louisiana, that you must look to the gravity of the situation.

Furthermore, I would point out, in the Court looking at its original jurisdiction, under either Article III or Section 1251(a), there are alternate forms available. First of all, as we have pointed out, just this last August, an appearance by the state of California was allegedly made by the state -- was allegedly made in the state probate court in Houston, Texas. Therefore, at this very time, all the parties to this proceeding have appeared, we allege, in the Texas probate court, and that court has personal jurisdiction to proceed.

If not that forum, then certainly we have the alternate forums of the state courts in both California and Texas, which I ask you, as we asked you four years ago, to allow to proceed in this matter.

There is a policy reason, and I certainly wouldn't preach policy to this Court, but as I glean some of the reasons the Court has given for not exercising its original jurisdiction in the past, one that is especially relevant to a domicile determination that is such a heavily factual matter, the literal investigation of a man's life, this Court has pronounced that it is ill-equipped to sit as a

factfinder at the trial level, it is ill-equipped to try such cases, and it could not accord to the litigants here what I would perceive to be their constitutional right to a jury trial.

QUESTION: Do you think it is more factually complicated than some of the other original jurisdiction cases the Court has had over the years?

MR. HARRISON: I certainly wouldn't presume to say so, but it is a virtual factual nightmare, as illustrated by the length of the Texas trial that has already gone before, and I would just submit that the litigants should be entitled to the trial level investigation of those facts in a trial before a jury.

QUESTION: Mr. Harrison, may I just clear up one thing in my own mind? You are asking that the judgment of the Fifth Circuit be affirmed, are you not?

MR. HARRISON: I am asking that the state of Texas -- that the Fifth Circuit be reversed, and that there be no federal jurisdiction. I say if you believe, though, that the estate merits relief, that it not be original action or 1251(a), but --

QUESTION: I know you are opposed to the original action. You also definitely want us to reverse the Fifth Circuit?

MR. HARRISON: Your Honor --

QUESTION: I was a little unclear from your brief.

MR. HARRISON: -- the state of Texas did not appeal the Fifth Circuit decision, and I appreciate your question, because it gives me an opportunity to explain that. That decision became final almost exactly one year ago, but three years after we were here asking to be left alone. We were looking at a Fifth Circuit decision that had drawn an incursion by -- via the Edelman doctrine and into our Eleventh Amendment protection very, very narrowly, and as this Court has pointed out in questions, one that would not likely ever happen again.

We were also faced with four Justices of this Court in a concurring opinion indicating agreement with what the Fifth Circuit had done. A matter, quite frankly, of expediency, of putting some conclusion to this long litigation -- Mr. Hughes has now been dead six years -- we brought no appeal of the Fifth Circuit decision.

QUESTION: But you don't want -- do you or do you not want us to affirm it?

MR. HARRISON: The state of Texas does not want an affirmance. We do not want --

QUESTION: You don't want to be in that interpleader.

MR. HARRISON: We don't want to be in federal court, Your Honor.

My summary should cover what I have just said, that the state of Texas' position is, leave the states alone, and don't encumber your original jurisdiction with this type of case until it is so factually finite that there is a true harm to the states with the gravity required and no alternate form available.

QUESTION: And the only gravity we should concern ourselves with is the gravity to one of the states if 101 percent should be taxed. We don't have to worry about the gravity to the taxpayer if there is only 99 percent taxed.

MR. HARRISON: That is right.

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

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Falk, you may continue.

ORAL ARGUMENT OF JEROME B. FALK, JR., ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. FALK: Thank you, Mr. Chief Justice, and may it please the Court, I want to discuss for a moment the relationship between this action and the original suit, in light of some of the questions which were asked of counsel.

If this Court were to reverse the Fifth Circuit, it will then have a choice between an original -- allowing an original suit and leaving California and Texas to their own state court proceedings with the attendant risk of inconsistent verdicts and taxation in excess of 100 percent of the estate assets.

Texas asks you to allow that latter course. Indeed, it views even a district court interpleader suit as a lesser intrusion upon state sovereignty than an original action here. But an interpleader suit in the district court would breach a 180-year tradition mandated by statute that all controversies between states be heard, if at all, in this Court.

QUESTION: Mr. Falk, will you, before you finish this point, answer your adversary's observation that apart from the interpleader suit, nothing really has happened since four years ago that would justify original

jurisdiction that didn't justify it then?

MR. FALK: Yes, I will answer that, Justice Stevens. There are several changes, although I certainly must say that -- well, let me respond to it this way. First of all, these are the differences between what existed in 1978 and what exists today. First, if this Court reverses the Fifth Circuit, then you will know and we will know that there is no alternative remedy other than a suit in this Court. Justice Brennan specifically wrote a concurring opinion in California versus Texas which made that point.

Secondly, there was at the time of the 1978 case, as Mr. Harrison said, the provisional settlement between California and Texas which Texas asserted here was collusive and made a number of points about it, and it elicited a number of questions from the Court which at least clouded the issue as to whether there was a present controversy between California and Texas. That settlement, the conditions of that settlement were not satisfied. There is no settlement or any agreement between California and --

QUESTION: But it is also true there is not yet a determination that there is over 100 percent liability.

MR. FALK: No, there is not a determination. You have an allegation which is entirely plausible based on the face of the tax rates that it is over 100 percent, and no evidence to suggest that the allegation is untrue, and that

was enough in Texas versus Florida. I don't think you could ever have more until it is too late. I am going to make the point in a moment that if you wait, it will be too late because the horse will be out of the barn.

And finally, there were in 1978 a number of ancillary disputes which have since been resolved, those disputes involving, for example, the so-called Mormon will, Mr. Dumar's famous will, the questions of airship, a claim by HHMI, the Howard Hughes Medical Institute, that there was a will which had become lost, all of which affected the tax position, and which were urged by Texas in opposition to California versus Texas as problems affecting ripeness. Those problems have been resolved in the trial courts, and in many instances are final. So, all of those matters have been resolved.

Now, turning to the point I was making --

QUESTION: I would think you would want to sustain the interpleader so you could prove there was a dispute between two states.

MR. FALK: To sustain the interpleader so as to -- I don't follow that, Justice White, because if we do sustain the district court interpleader, there is the alternative remedy, and this Court would not take jurisdiction.

QUESTION: Well, it would still be a dispute between two states.

MR. FALK: Well, there would be a dispute between two states. That, of course -- our point is that it cannot be in any court but this, because it is a dispute between two states.

QUESTION: That's right. That's right. But if the interpleader is -- you don't agree with the interpleader.

MR. FALK: No.

QUESTION: And one reason is because these people are the state.

MR. FALK: Yes.

QUESTION: Which means that it is a suit between two states.

MR. FALK: It is a suit between two states.

QUESTION: And so you destroy the interpleader, which puts it right back to where it was before there was an interpleader, which indicates that we were wrong in the first place in denying leave to file, which I take it you simply were wrong anyway.

MR. FALK: Well, I was here as the moving party then.

QUESTION: Yes. Yes.

MR. FALK: But I do believe that there were grounds for denying that motion which are no longer present. That is the burden --

QUESTION: At that time.

MR. FALK: At the time. In other words --

QUESTION: Would there be if the interpleader were set aside?

MR. FALK: Yes, for the reasons set forth in our motion for leave to file. There is an intensely practical reason why there is a controversy between states and will be even without the interpleader suit. You might ask, well, what is the harm if there is no interpleader, and let California proceed, and let Texas proceed, and one can see what happens.

The problem is this. Almost immediately after Mr. Hughes died, Texas began a suit which ultimately resulted in a determination of a Texas domicile in the Texas state courts. California was required by its own law to wait until the estate filed its tax return, known as the IT 22. That was not done for a year and a half roughly after Mr. Hughes died. Only after the IT 22 was filed, under our law, does the administrative process begin which leads to the judicial process.

By the time that judicial process was about to commence, an injunction had been entered by the district court which continues to this very day. But by then, Texas had its judgment, so these were not really parallel trains. One is well ahead of the other. And as a practical matter, as we allege in Paragraph 26 of the proposed complaint,

which is attached to the motion for leave to file, if the Fifth Circuit decision is reversed, and the stay is lifted, the Texas judgment could and undoubtedly would become final rather quickly, and Texas would then be in a position to execute that judgment, and so by the time California was able to complete its administrative and judicial process, the estate could and undoubtedly would be substantially depleted, and California might find very little left when it comes to perfect its own judgment.

So, that course, from California's point of view, simply will not work, and there is thus an immediate threat to California posed by the Texas judgment, and that is what creates, in our view, the case or controversy proposed by our motion for leave to file, which would justify allowing an original suit to be brought.

Justice O'Connor asked what, if anything, is different between now and 1978, and I think I have addressed those questions. There were also some questions about choice of law, and I think a brief comment would be in order.

Whether the controversy is resolved here or in a district court action, the Court would not need to resolve any choice of law problem unless there is a conflict of laws which is outcome determinative. There is no such conflict. At Pages 17 to 18 of our brief, in Footnote 22, we cite the relevant Texas and California authorities, and I think the

Court will find that the law of California and Texas on domicile is --

QUESTION: Yes, but would we purport to follow one or the other?

MR. FALK: Well, you wouldn't have to --

QUESTION: I mean, or would the interpleader?

MR. FALK: I think you don't ever have to face the question.

QUESTION: You just say, one or the other, or would you say federal?

MR. FALK: Well, I think the Court in several cases has said that in an original suit, it can apply state law when the two states have the same law.

QUESTION: It would be federal law, but you are borrowing.

MR. FALK: You borrow. The Court undoubtedly has the power to fashion its own law. I have no doubt of that. But if you don't have an outcome determinative conflict, the problem never arises.

For these reasons, we urge the Court not only to reverse the Fifth Circuit, but also to permit the original suit to be filed. It will be the most practical and efficient means of resolving this controversy, and I think it will not prove burdensome. It would be fair to all concerned, and although this may be the last such case ever

to be brought, it ought to be resolved properly.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:09 o'clock p.m., the case in the above-entitled matter was submitted.)

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:

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA, ET AL. v. MARK WHITE ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL. #80-1556

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

BY Sharon Ryan Connelly