

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-485

TITLE KATHY KEETON, Petitioner v. HUSTLER MAGAZINE,
INC., ET AL.

PLACE Washington, D. C.

DATE November 8, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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KATHY KEETON, :

Petitioner :

v. : No. 82-485

HUSTLER MAGAZINE, INC., ET AL. :

-----x

Washington, D.C.

Tuesday, November 8, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

NORMAN ROY GRUTMAN, ESQ., New York, N.Y.; on behalf of the Petitioner.

STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; by invitation of the Court, as amicus curiae in support of judgment below.

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- - -

1 Relying upon that determination for several
2 years thereafter Plaintiff continued to vigorously
3 prosecute her case in Ohio until on the night before
4 trial was to commence the Ohio trial court reversed
5 itself and applied the New York statute of limitations
6 reparable to the cause of action for invasion of privacy
7 and dismissed the Plaintiff's case entirely out of
8 court.

9 After the Plaintiff's appeal was affirmed by
10 the Ohio Appellate Court Plaintiff promptly brought a
11 diversity law suit in New Hampshire serving the
12 Defendants under the New Hampshire long-arm statute
13 which the New Hampshire Supreme Court has interpreted as
14 being intended to be extended as far as the Constitution
15 will permit under the due process clause.

16 The District Court found that while the New
17 Hampshire long-arm statute was satisfied due process
18 forbade entertaining the action and it dismissed it
19 giving two reasons: Plaintiff's lack of connections or
20 contacts with the State of New Hampshire and the alleged
21 lack of New Hampshire's interest in the litigation.

22 The First Circuit affirmed without disturbing
23 the District Court's evaluation of the Defendant's
24 presence in New Hampshire as regular, systematic and
25 continuous because of the monthly circulation of Hustler

1 seeking to exploit the New Hampshire market place which
2 took place on a continuing basis since 1975. The reason
3 or the reasoning of the First Circuit in affirming is
4 epitomized in the catchy phrase at the conclusion of its
5 opinion in which it said the New Hampshire tail is too
6 small to wag so large an out of state dog.

7 The phrase captures what we submit to this
8 Court is the essential misconception of the lower courts
9 in assuming that jurisdiction turns on a little more or
10 a little less of Plaintiff's contacts and damage in the
11 forum overlooking that for 38 years since this Court's
12 opinion in International Shoe the jurisdictional inquiry
13 has always focused on the contacts of the defendant, not
14 the plaintiff.

15 We submit to the Court that insofar as the
16 assertion that jurisdiction is to be determined there
17 are essentially three levels by which or three tiers by
18 which a determination can be made. If a defendant by
19 its continuous, systematic process can be said to be
20 doing business then it is dogmatic that general
21 jurisdiction exists in that forum for litigation against
22 that defendant for all kinds of causes of action.

23 We do not argue in this case that we fall
24 within that rubric. We submit that synthesizing all of
25 the cases in which this Court has spoken from

1 International Shoe through Mr. Justice White's opinion
2 in World-Wide Volkswagen.

3 QUESTION: That was the Court's opinion.

4 MR. GRUTMAN: The Court's opinion written by
5 Mr. Justice White. Forgive me.

6 The synthesis of those cases holds that where
7 you have purposeful conduct by a defendant directed at
8 the forum in question and out of which conduct the cause
9 of action arises or is generated that satisfies the
10 formula of those minimum contacts which substantial
11 justice and reasonable fair play make it suitable that a
12 defendant should be hailed into that court and be
13 amenable to suit in that jurisdiction.

14 QUESTION: I am a little surprised, Mr.
15 Grutman. You do not make much of the Boxite case which
16 came after International Shoe. You cited in your reply
17 brief but not in --

18 MR. GRUTMAN: Yes, we do, Your Honor. The
19 Boxite case as I interpret it has to do with the failure
20 of the defendant who by its waiver to its failure to
21 comply with orders of the court to demonstrate its
22 nonamenability to suit was found by the Court in that
23 case to have subjected itself to a determination that
24 facts could be found against it so that jurisdiction
25 could be properly assessed against that defendant.

1 QUESTION: But it certainly bears on
2 World-Wide Volkswagen.

3 MR. GRUTMAN: I think it does, but I think
4 that Volkswagen in its facts and in the more expansive
5 treatment in the Court's opinion is a case which I think
6 provides the springboard from which the Court can find
7 in this lawsuit that what you have present in this case
8 and what was lacking in Volkswagen. In Volkswagen you
9 had purely adventitious or fortuitous circumstances by
10 which jurisdiction was asserted against a little
11 automobile dealer in Mesena, New York whose only
12 business was in Mesena, New York and who had no
13 connection with the State of Oklahoma.

14 Similarly the tri-state regional dealer albeit
15 under the name World-Wide Volkswagen it unlike Hustler
16 in this case in no way for its economic advantage did
17 business in Oklahoma or sold its products in Oklahoma.
18 As I read what the Court was saying and what your
19 opinion I think pointed to Mr. Justice Blackmun is that
20 you were looking for in the conduct of the defendant
21 willful, purposeful economic activity.

22 Now that is clearly present in this case as it
23 relates to Hustler because Huslter in the Court's
24 opinion directly or indirectly was responsible on a
25 systematic basis from 1975 for sending copies of its

1 magazines into New Hampshire out of which the record
2 shows they derived substantial economic benefit running
3 into millions of dollars.

4 That was not one insurance policy which this
5 Court found sufficient in McGee v. International
6 Insurance. That was a 1957 case and again tracing the
7 sweep of this Court's opinions on jurisdiction starting
8 with the germinal case of International Shoe and running
9 through World-Wide Volkswagen into the Roxite case I
10 think the Court has acknowledged that we are seeing an
11 expansion of jurisdiction since the second World War in
12 recognition of the changing facts of life in American
13 society.

14 I say that on the second level of analysis
15 which our reply brief attempted to explicate for the
16 Court we believe that we are squarely within the
17 philosophical underpinnings by which this Court has
18 formulated those circumstances in which jurisdiction can
19 properly be laid, and again I say the focus must be on
20 the conduct of the defendant.

21 Respondent's briefs tend to castigate us by
22 opprobrious references to so-called forum shopping,
23 which, while it is sort of a pungent phrase, seems to
24 lose sight of the fact that it is not the plaintiff that
25 creates the forum, it is the defendant, by his conduct

1 in the forum.

2 QUESTION: Of course, a nationwide publisher
3 creates a forum, presumably, in almost any state, and I
4 suppose it has always been libel plaintiff's position
5 that they are perfectly at liberty to shop.

6 MR. GRUTMAN: They are what?

7 QUESTION: They are perfectly at liberty to
8 shop in that kind of --

9 MR. GRUTMAN: I think that is absolutely
10 correct, Mr. Justice Rehnquist, because libel is a
11 peculiar kind of a tort, and when we are dealing with
12 media defendants that are nationwide in the scope of the
13 economic activities that they pursue, seeking the
14 benefits of the marketplace nationwide, they have the
15 unique ability of simultaneously creating the harm which
16 the libel causes in all of the places where the
17 publication is disseminated.

18 Now, the publications have the benefit of the
19 single publication rule. That is a rule which I think
20 is uniformly recognized throughout the country in which
21 the plaintiff is required to prove all of her damage or
22 all of his damage in whichever forum the case is
23 properly brought, but if one were to look at that from
24 the standpoint of the publisher, what should the
25 publisher do in the event of concern with statutes of

1 limitations or the special niche which this Court has
2 carved out for media defendants in libel cases?

3 This Court in its decisions beginning with
4 Sullivan and working through Gertz against Welsh in the
5 evolution of the public figure doctrine, has established
6 that the states, so long as they do not create liability
7 without fault, may establish standards which are
8 different. State A may say that it is gross
9 negligence. State B may say that it is simple
10 negligence. State C may say it is the malice standard.
11 Now, assuming that we have a publication, of whatever
12 nature, whether it is acceptable or presumably
13 reputable, if a harm occurs nationwide, then
14 conscientious and responsible lawyering would require
15 that a plaintiff take cognizance of where it would be
16 most propitious to bring the lawsuit, and in that, I
17 think there is neither shame nor disgrace. I think that
18 it is an incident of our federal system under the
19 peculiarity which adheres in defamation law.

20 The submission, may it please the Court, which
21 we make, is that we are squarely within all of your
22 prior holdings. We are the case which International
23 Volkswagen contemplated with the telling difference to
24 which I have alluded and the argument that I have just
25 made.

1 The contention is, however, made by
2 respondents that there must be, in order for
3 jurisdiction to be appropriate against an out of state
4 resident in an action such as this, a so-called state's
5 interest. Well --

6 QUESTION: Do you understand respondent's
7 contention in that regard to mean something more than
8 just the state of New Hampshire was willing to accept
9 this case in a state court? I suppose it must, because
10 it is obvious that the state of New Hampshire would have
11 accepted this case.

12 MR. GRUTMAN: Precisely. I do. And --

13 QUESTION: So it must have a constitutional
14 dimension, the term states --

15 MR. GRUTMAN: I think that there is a
16 constitutional dimension, and it could primarily be
17 derived from the fact that an indispensable ingredient
18 of state sovereignty is the right of any state to
19 regulate intentional harm which takes place within the
20 perimeter of its geographical confines, particularly
21 where that harm is not unintentional.

22 QUESTION: I meant that I thought the
23 respondent's contention that there must be a state
24 interest had a constitutional dimension to it.

25 MR. GRUTMAN: Beyond what I have said, I am

1 not prepared to concede that.

2 QUESTION: Well, no, I don't ask you to, but
3 is that your understanding of respondent's contention?
4 When they talk about a state's interest, it isn't just a
5 question of what New Hampshire wanted in this situation,
6 but that there are some limits on what New Hampshire can
7 do.

8 MR. GRUTMAN: I am not really sure that I can
9 agree with that, because I think that takes us into a
10 very murky area, where it would be extremely difficult
11 to predict or to understand what kind of state interest
12 they want. Perhaps, Mr. Justice Rehnquist, in another
13 kind of a case, in a case in which you have something
14 less than purposeful conduct out of which the cause of
15 action arose, and you were looking to ascertain whether
16 jurisdiction could be affirmed, you would have to find
17 affiliating circumstances with the defendant plus a
18 so-called state interest.

19 Now, that kind of a state interest, if you
20 look for it in this case, and it is to that to which I
21 address my attention, is demonstrated, as we have set
22 forth in our reply brief, by the fact that New Hampshire
23 in 1971 amended its long arm statute so as to permit the
24 use of that statute for non-residents. It has
25 interpreted its long arm statute to permit the furthest

1 reach permissible under due process.

2 In Leaper versus Leaper, which was treated by
3 the First Circuit, New Hampshire said it had an interest
4 in protecting not only its residents but non-residents
5 against just such kinds of harm as are involved in a
6 case like this in libel, and lastly, New Hampshire,
7 expressing as another part of the cluster of its
8 evidences of its interest in this case, has a criminal
9 statute which makes it a misdemeanor if anyone
10 intentionally by falsehood holds someone up to the kind
11 of ridicule, calumny, and obliquy which Mr. Flynt did in
12 this case.

13 So, if you ask me in this case, because I am
14 not really entirely sure whether the respondents are
15 advocating that there should be a general grab-bag of
16 so-called state interests which are highly amorphous
17 that should be considered at every stage in all cases in
18 the equation of ascertaining if jurisdiction exists or
19 not, that is so far out of the question, I would prefer
20 for the purposes of the adjudication of this case to
21 confine myself simply to the facts of this case, and to
22 point out that if you are looking for state interest, it
23 is abundantly present in all of the indicia to which I
24 have just alluded.

25 QUESTION: Well, Mr. Grutman, does that

1 include any actual harm to the plaintiff? Is that
2 alleged in the state of New Hampshire?

3 MR. GRUTMAN: Yes. It is -- not only is it
4 alleged, it is conceded by the First Circuit that harm
5 occurred in New Hampshire.

6 QUESTION: That harm being?

7 MR. GRUTMAN: The harm occurs in the
8 defamation itself, the negative reputation if she
9 doesn't have a positive reputation. It is the libel,
10 the accusation, the psychic mayhem, which is what
11 Professor Tribe calls it, of simply disseminating
12 something which is itself a libel.

13 There is no requirement when you speak of
14 harm, Mr. Justice Brennan, as far as I understand it,
15 that the plaintiff has to demonstrate that she suffered
16 her principal injury or loss in that particular state,
17 so long as some harm occurred there, and the harm by
18 definition under the restatement and under the law of
19 New Hampshire would be the circulation, not necessarily
20 where it was published, but the circulation of something
21 which is libelous.

22 As I think -- forgive me.

23 QUESTION: It is alleged that this particular
24 issue which involved the petitioner --

25 MR. GRUTMAN: Yes.

1 QUESTION: -- was circulated?

2 MR. GRUTMAN: Oh, there is no question about
3 that. There were a minimum of 10,000 copies that month
4 and every month, and there are five issues which we are
5 concerned with. You see, this is not an isolated case.
6 It is a total campaign where this media mogul has simply
7 fastened on Ms. Keeton as an object of his ire, and can
8 decide that he can make money all over the country, but
9 he just doesn't want to be sued in New Hampshire.

10 QUESTION: Would this apply in Alaska, too?

11 MR. GRUTMAN: I beg your pardon?

12 QUESTION: Would it apply in Alaska?

13 MR. GRUTMAN: It would apply, Mr. Justice
14 Marshall, wherever the magazine was circulated. It
15 would apply in Honolulu if the publication were
16 circulated there. It would apply theoretically and, I
17 think, correctly wherever the magazine was circulated,
18 however many copies were circulated.

19 QUESTION: Just to clarify the point, that
20 would be even if the plaintiff was totally unknown in
21 the jurisdiction before the magazine was circulated?

22 QUESTION: I think that is correct, Mr.
23 Stevens, so long as Alaska or Hawaii adheres, I believe,
24 to the uniform and universal determination that the tort
25 of libel is perpetrated wherever a defamatory falsehood

1 is circulated. Wherever a third person reads about it,
2 there is that harm.

3 QUESTION: What if the publisher had no
4 intention of ever selling any magazines in New
5 Hampshire?

6 MR. GRUTMAN: A very different case, Mr.
7 Justice White.

8 QUESTION: I know it is different, but how --
9 what would be --

10 MR. GRUTMAN: I think that is a case --

11 QUESTION: Would the result be different?

12 MR. GRUTMAN: It might be different. It might
13 be different, because in that case you could not say, as
14 you do here, that you have purposeful conduct.

15 QUESTION: Yes.

16 MR. GRUTMAN: There you have to look for other
17 -- I think your phrase is affiliating circumstances,
18 other connections, judicially cognizable ties --

19 QUESTION: Is your position that if this case
20 had been brought in the New Hampshire state courts, is
21 it your position that the New Hampshire courts would
22 have been required by the federal Constitution to
23 entertain the suit?

24 MR. GRUTMAN: I don't think that is a question
25 that is inherent in the case, but I think that they

1 should have, yes.

2 QUESTION: And you would say that they would
3 not be entitled just to dismiss the suit?

4 MR. GRUTMAN: I am not entirely sure of the
5 answer to that question, because that is a state court,
6 and your question postulated a state court. I believe
7 that because we brought it in federal court, and because
8 of the federal court's unflagging obligation to exercise
9 jurisdiction to its maximum, a federal court could not --

10 QUESTION: Well, what if you -- I suppose you
11 think that the court of appeals held -- held that the
12 federal Constitution prohibited New Hampshire from
13 entertaining --

14 MR. GRUTMAN: Yes, the federal court would be
15 prohibited. I am not quite sure of what the answer
16 would be in a state court.

17 QUESTION: Well, suppose a state court could
18 have dismissed it without having any problems under the
19 Constitution.

20 MR. GRUTMAN: Yes.

21 QUESTION: Could a federal court sitting in
22 that district also dismiss it for the same reason that
23 the --

24 MR. GRUTMAN: I do not think so, because the
25 requirements --

1 QUESTION: Why not? Why not?

2 MR. GRUTMAN: Because the requirement --

3 QUESTION: You couldn't say it's a
4 constitutional problem. Otherwise, the state would have
5 to entertain it.

6 MR. GRUTMAN: Mr. Justice White, I am not sure
7 of the answer to this question. I have pondered the
8 question. I think there is a difference between what a
9 state and a federal court could do.

10 QUESTION: Aren't you claiming, though, that
11 the district court was required to entertain it by the
12 Constitution?

13 MR. GRUTMAN: Yes, I am.

14 QUESTION: But you don't have to go that far.

15 MR. GRUTMAN: Perhaps I don't have to, Mr.
16 Justice Rehnquist.

17 QUESTION: All you have to prove, really, is
18 that New Hampshire would have entertained it, could have
19 under the Constitution, and this was a federal court
20 sitting in diversity.

21 MR. GRUTMAN: Exactly. And because of New
22 Hampshire's statement about its intention of what should
23 be done, namely, that New Hampshire would have taken
24 this case, the district court said that the New
25 Hampshire court would have taken this case if it was a

1 New Hampshire resident.

2 QUESTION: Well, you do have to -- you do have
3 to, though, say that -- you do have to say that the
4 Constitution would not have forbidden New Hampshire to
5 entertain --

6 MR. GRUTMAN: No, I don't think you can force
7 jurisdiction on a state, on a state court, and as again
8 I pointed out, I think there is a very big difference
9 between state courts and federal courts and their
10 obligations.

11 QUESTION: Yes, but you have to say that --
12 you have to say that the constitutional holding of the
13 court below was wrong. You do have to do that.

14 MR. GRUTMAN: Would you repeat that for me,
15 please, Mr. Justice White? I didn't hear you.

16 QUESTION: Well, the court below held that the
17 Constitution forbade.

18 MR. GRUTMAN: Yes.

19 QUESTION: You have to overturn that.

20 MR. GRUTMAN: Yes, I do.

21 QUESTION: You have to win on that issue.

22 MR. GRUTMAN: I think I do, and the reason I
23 think I do is because the court's perception of which
24 end of the scope to look through was just backwards.

25 QUESTION: Well, Mr. Grutman, I understood in

1 part of your colloquy with Justice White, that you think
2 our cases support the proposition that a federal court
3 in a situation like that may have an obligation to take
4 jurisdiction even where the state court doesn't. I am
5 at a loss to know why that would be in a diversity case.

6 MR. GRUTMAN: Because I think the obligation
7 which the federal rules require is that a federal court
8 cannot substitute an alternate basis of its own
9 determination which runs contrary to what the state has
10 said, and New Hampshire has said it would take this
11 case.

12 QUESTION: But diversity is not a
13 constitutional principle.

14 MR. GRUTMAN: I beg --

15 QUESTION: Is it?

16 MR. GRUTMAN: Which is not a --

17 QUESTION: Diversity is judicial --

18 MR. GRUTMAN: That is correct.

19 QUESTION: -- and not constitutional.

20 MR. GRUTMAN: That is correct.

21 QUESTION: Well, how does that put a
22 constitutional burden on somebody?

23 MR. GRUTMAN: Because once you have diversity,
24 and you have a demonstration --

25 QUESTION: Well, the only diversity here is

1 that this person has never been in New Hampshire.

2 MR. GRUTMAN: Nor had Mr. Flynt been there,
3 but the publication was there, the publication --

4 QUESTION: I am not talking about any case but
5 this one.

6 MR. GRUTMAN: All right.

7 QUESTION: And you say that she could file a
8 case in New Hampshire if she were a citizen.

9 MR. GRUTMAN: That is what the district court
10 said.

11 QUESTION: Do you agree with that?

12 MR. GRUTMAN: No. Do I believe that she
13 should have been able to? Yes, except the only
14 disagreement --

15 QUESTION: Except that she wasn't.

16 MR. GRUTMAN: My disagreement is --

17 QUESTION: So what's that got to do with this
18 case?

19 MR. GRUTMAN: It has to do with the fact that
20 there's a discrimination that is being practiced upon a
21 non-resident. They are saying, although the
22 legislature --

23 QUESTION: Well, doesn't diversity
24 automatically discriminate?

25 MR. GRUTMAN: I think diversity makes for

1 jurisdiction in the federal court. It is the sine qua
2 non for diversity jurisdiction. But in a state court,
3 which is where I think we were speaking of, if this case
4 had been brought in the state court, the district court
5 said that New Hampshire would undoubtedly have
6 entertained the case.

7 Now, because Ms. Keeton was not a New
8 Hampshire plaintiff, a discrimination was practiced
9 against her that finds no support in the New Hampshire
10 decision or in the New Hampshire legislation in which
11 she was deprived of her right to that forum, and while
12 the due process argument is raised against her, I think
13 that is an argument that she could raise on her own
14 behalf along with equal protection.

15 QUESTION: I have one more question.

16 MR. GRUTMAN: Yes, sir.

17 QUESTION: Could she have filed 50 lawsuits?

18 MR. GRUTMAN: No, she could not, because the
19 single publication rule requires that the plaintiff make
20 an election of that jurisdiction in which she intends to
21 make a claim not only for the harm that occurred in the
22 jurisdiction where she properly brings suit, but for the
23 harm that has occurred wherever the libel has been
24 perpetrated.

25 QUESTION: And her damages would be the

1 damages to her reputation in New Hampshire?

2 MR. GRUTMAN: No, they would not. The damages
3 that she would be entitled to prove in New Hampshire
4 would not be restricted simply to those that were
5 sustained in New Hampshire, but would embrace all of the
6 damages that she had suffered wherever it had occurred.

7 QUESTION: Including Alaska and Hawaii?

8 MR. GRUTMAN: Including Alaska, Hawaii,
9 Kamchatka and Tobago, wherever. I think --

10 QUESTION: Guam?

11 MR. GRUTMAN: Pardon, Your Honor?

12 QUESTION: Why don't you go to Guam while
13 you're at it?

14 (General laughter.)

15 MR. GRUTMAN: Anywhere, Your Honor.
16 Worldwide. Worldwide. Wherever they occur, she has to
17 bring that to that forum. Why did she go to New
18 Hampshire is obvious, because it was the only remaining
19 jurisdiction in which suit could have been brought. It
20 was the only statute of limitations that was still
21 viable.

22 QUESTION: New Hampshire couldn't give a
23 remedy for any injury except that which occurred in New
24 Hampshire?

25 MR. GRUTMAN: I disagree, Mr. Justice White.

1 I believe --

2 QUESTION: You just said --

3 MR. GRUTMAN: The damages worldwide become --

4 QUESTION: In the New Hampshire suit, you
5 could recover.

6 MR. GRUTMAN: In the New Hampshire suit, the
7 damages sustained wherever they occur is proof that is
8 to be brought in the New Hampshire action.

9 QUESTION: Of course, while you say that, you
10 are in effect making an end run around the statute of
11 limitations in all other jurisdictions.

12 MR. GRUTMAN: That may be a by-product, or
13 that may be a fact, but I do not think because we are a
14 federal system, Mr. Justice Blackmun, I do not think
15 that because we are a federal system, where the statutes
16 of limitations in the 50 states may vary, that as soon
17 as the earliest statute expires, that all of the others
18 simultaneously are extinguished. Insofar as New
19 Hampshire is --

20 QUESTION: That isn't what I am asking, but is
21 that one extinguished, the one that has expired? Is
22 that one extinguished even in New Hampshire?

23 MR. GRUTMAN: No, it was not extinguished at
24 the time.

25 QUESTION: That is your position, and of

1 course I suppose one could take the other position.

2 MR. GRUTMAN: I think not. It is
3 unquestionable that at the time this lawsuit was
4 brought, the legislature of New Hampshire had allowed, I
5 believe, a six-year period in which libel actions could
6 be brought before it, and we were within the New
7 Hampshire statute of limitations. I think it is
8 desirable --

9 QUESTION: May I ask another question?

10 MR. GRUTMAN: Certainly.

11 QUESTION: The -- In the red brief, they take
12 the position that the issue is different as to the
13 corporate publisher and the individual defendant and the
14 parent. Do you --

15 MR. GRUTMAN: That is another case for this
16 morning, Mr. Justice Stevens. But it raises a point
17 which I think bears mention in this case.

18 QUESTION: Well, it is this case. It is this
19 case. Jurisdiction over Larry Flynt in --

20 MR. GRUTMAN: Exactly. The problem there was
21 that because the district court decided that it didn't
22 have jurisdiction over the publication, it never
23 considered whether it had jurisdiction over the
24 corporation or Mr. Flynt personally, and we were
25 deprived of the opportunity of establishing the record,

1 which I submit responsively we could demonstrate that we
2 will be able to do if on remand we can flesh out the
3 record and demonstrate that --

4 QUESTION: Well, but in the trial court, was
5 not jurisdiction overall all three parties challenged?

6 MR. GRUTMAN: In which --

7 QUESTION: In the district court. Didn't they
8 challenge jurisdiction over all three?

9 MR. GRUTMAN: They did, but the district court
10 never considered --

11 QUESTION: Why didn't you --

12 MR. GRUTMAN: The district court said,
13 inasmuch as they are making a determination that there
14 is no jurisdiction over the publication, that will lump
15 together Flynt and the corporation, and we don't think
16 that that is correct, because the jurisdictional
17 equation must be separately applied to each defendant,
18 and that wasn't done in the district court.

19 QUESTION: But you had an opportunity to make
20 whatever record you need to as to the other two --

21 MR. GRUTMAN: No, we did not fully. I will
22 develop that in my rebuttal, since I notice that my time
23 has presently expired.

24 CHIEF JUSTICE BURGER: Mr. Shapiro.

25 ORAL ARGUMENT BY STEPHEN M. SHAPIRO, ESQ.,

1 BY INVITATION OF THE COURT, AS AMICUS CURIAE,
2 IN SUPPORT OF THE JUDGMENT BELOW

3 MR. SHAPIRO: Thank you, Mr. Chief Justice,
4 and may it please the Court. My submission as amicus
5 curiae is that the court of appeals correctly applied
6 the due process clause to prevent the forum shopping
7 attempted by plaintiff.

8 Forum shopping in multi-state defamation cases
9 poses a very real danger to the values of our federal
10 system. It permits a plaintiff who sleeps on her rights
11 to sue in any state which has the longest statute of
12 limitations, effectively making that statute nationwide
13 and scope and overriding the policies of the other
14 states having a paramount interest in the parties and in
15 the litigation. This case vividly illustrates that
16 danger. Plaintiff here --

17 QUESTION: You say the other states, the other
18 states have a paramount interest in the parties?

19 MR. SHAPIRO: In the parties, Mr. Chief
20 Justice. That would be --

21 QUESTION: That seems to negate what you
22 started out with.

23 MR. SHAPIRO: The states that have the
24 paramount interest are New York and Ohio, the states of
25 residence, and also those are the states where the

1 damage from the libel principally occurred. We say
2 these are the states with a paramount interest, and
3 these are the states where the statute of limitations
4 had expired.

5 QUESTION: Mr. Shapiro, would not the New
6 Hampshire court have the authority if it found
7 jurisdiction to apply the statute of limitations of the
8 other states with respect to the recovery?

9 MR. SHAPIRO: One would think that the court
10 should do such a thing, and that it would be reasonable
11 to do so, but the law in New Hampshire is that the
12 statute of limitations is procedural in nature, and that
13 the court therefore applies its own local statute of
14 limitations, bringing back to life a tort action that is
15 dead in the other 49 states where 99 percent of the
16 damages actually arose.

17 QUESTION: Mr. Shapiro, if your concern is
18 with what you feel to be manipulation of statutes of
19 limitations, it seems to me that is not a jurisdictional
20 argument. That is perhaps an argument over choice of
21 law, maybe constitutionally mandated choice of law.

22 MR. SHAPIRO: We submit that the choice of the
23 forum here for the purpose of escaping the statute of
24 limitations in the 49 other states is indeed a
25 jurisdictional matter, because it implicates the

1 interests of the other 49 states, which is one of the
2 very most fundamental concerns of the due process
3 clause, and imposes burdens on the party and the
4 judicial system that are unreasonable burdens, which is
5 the other leg of the due process analysis.

6 QUESTION: Mr. Shapiro, this argument doesn't
7 dispose of the case, because you still have got New
8 Hampshire left.

9 MR. SHAPIRO: The suit in New Hampshire has
10 been dismissed. There was a --

11 QUESTION: Well, I know, but your argument
12 would say New Hampshire couldn't give a remedy for
13 injuries that have already barred somewhere else, but
14 how about the injury in New Hampshire?

15 MR. SHAPIRO: Well, that --

16 QUESTION: You still have to make that
17 argument.

18 MR. SHAPIRO: We don't have to make that
19 argument for this reason. This suit is not focused on
20 damages in New Hampshire. It is focused on damages
21 throughout the entire United States.

22 QUESTION: Well, it may be, but your argument
23 would only say -- would only refer to the injuries
24 outside of New Hampshire, the argument that you have
25 made so far.

1 MR. SHAPIRO: If this case was filed in New
2 Hampshire just for New Hampshire damages, it would
3 present a very different issue --

4 QUESTION: How do we know that she will not be
5 able to prove damages in New Hampshire? You seem to
6 take that as an assumption, that she can't.

7 MR. SHAPIRO: We take that as a finding of the
8 district court, that she had no reputation of any sort
9 in the jurisdiction. She was a virtual unknown in the
10 jurisdiction. She had never lived there, never owned
11 any property there, had virtually no ties with the
12 forum. If she did --

13 QUESTION: That may be, but suppose there was
14 proof of it. Your argument would not forbid New
15 Hampshire to give a remedy for that.

16 MR. SHAPIRO: Not necessarily. I say that is
17 a closer question, because it still has elements of
18 inconvenience. There still is a question about the
19 palpability of the state's interest.

20 QUESTION: I know, but the holding that you
21 are seemingly defending is that the Constitution of the
22 United States prevented the district court from
23 entertaining this suit even if, as I understand it,
24 there was damage in New Hampshire.

25 MR. SHAPIRO: That's correct, because the

1 purpose of this lawsuit is to recover damages in all 50
2 states.

3 QUESTION: You haven't answered that one yet.

4 MR. SHAPIRO: If the suit was focused solely
5 on damages in the state of New Hampshire, we say it
6 would be a different case, and it may be --

7 QUESTION: Well, it may be different, but what
8 would the result be jurisdictionally?

9 MR. SHAPIRO: I say that that is a fence
10 sitter for this reason. You would not be trampling --

11 QUESTION: Well, which side are you going to
12 fall off of?

13 (General laughter.)

14 MR. SHAPIRO: I would submit in that case that
15 there may well be jurisdiction over that particular
16 limited cause of action, although it is not at all
17 clear, because the lack of state interest and the
18 inconvenience to the parties is present.

19 QUESTION: Well, I know, but aren't there
20 allegations here of injury in the state of New
21 Hampshire?

22 MR. SHAPIRO: There is nothing but a general
23 allegation of \$80 million in damages throughout the
24 United States. Nothing is focused on the state of New
25 Hampshire.

1 QUESTION: Well, I know, but he might prove it
2 whenever he had a chance to prove it.

3 MR. SHAPIRO: Well, there were affidavits
4 submitted, Your Honor, in the district court.

5 QUESTION: I know, but there has been no
6 ruling on it. That is a -- They dismissed the case,
7 dismissed the case for lack of jurisdiction.

8 QUESTION: Everything has to be resolved
9 against affidavits at this point, because they have
10 never had an opportunity to put in their proof.

11 MR. SHAPIRO: It is the plaintiff's burden to
12 show that the state of New Hampshire had an interest in
13 this cause of action that was filed in this
14 jurisdiction, and there is another lack of evidence,
15 affidavits, arguments in the briefs to that effect.

16 QUESTION: Well, maybe she can prove it if she
17 has her day in court, and if that happens, the federal
18 court might decide, agreeing with you, that the damages
19 could be only the damages suffered in the state of New
20 Hampshire.

21 MR. SHAPIRO: I would submit to Your Honor
22 that that would be inconsistent first with the single
23 publication rule, which says that you have to subsume
24 all of your damages in a single piece of litigation. It
25 is inconsistent with the theory of this complaint, which

1 is seeking \$80 million in damages for nationwide
2 injury.

3 QUESTION: That may be, but the judgment you
4 are defending, the judgment you are defending here is
5 that there is no jurisdiction in the district court
6 because of the federal Constitution to hear even a case
7 about damages in New Hampshire.

8 MR. SHAPIRO: We disagree, Your Honor, with
9 that interpretation. The essence of this holding is
10 that this suit is intended --

11 QUESTION: Well, what if we don't agree with
12 you. What if we don't agree with you? What are we
13 going to do about the district court's constitutional
14 holding that there could not be a suit in New Hampshire
15 for New Hampshire damages?

16 MR. SHAPIRO: I would suggest to you, Your
17 Honor, that that is simply not the holding in this
18 case. If another pleading were filed that focused in
19 exclusively on injuries in New Hampshire, that question
20 would be presented, but that --

21 QUESTION: Say it focused on both, clearly
22 both. Say any fool reading it would know it focused on
23 both.

24 MR. SHAPIRO: Well, in that situation, if the
25 Court were disposed to look at the case as one seeking

1 both 1 percent of the damages in New Hampshire and 90
2 percent of the damages in other jurisdictions, if the
3 Court were to do that, the correct constitutional result
4 would be that only that 1 percent of the damages in the
5 local jurisdiction could be collected, because
6 collection of the 99 percent from the rest of the
7 jurisdictions would infringe the statute of limitations
8 in those states.

9 QUESTION: But that is not a reason for
10 dismissing the whole suit. You say that they are
11 seeking nationwide damages, and perhaps they might
12 recover New Hampshire damages only, but certainly New
13 Hampshire is one of the 50 states, and it is part of the
14 nation, and so that when they seek nationwide damages,
15 it probably includes some small segment that happened in
16 New Hampshire.

17 MR. SHAPIRO: Well, I would submit that if the
18 Court were disposed to redraft the complaint in this
19 manner to make it a New Hampshire damage proceeding, and
20 to remand with the opinion stating that only damages in
21 that jurisdiction are constitutionally collectible, that
22 perhaps would be a constitutionally permissible result,
23 but it would require a reformulation of the complaint, a
24 reformulation of the --

25 QUESTION: It would also require reversing the

1 district court's jurisdictional holding, and which I
2 take it you would think we should do, if it were just
3 strictly a New Hampshire suit.

4 MR. SHAPIRO: I said initially that I thought
5 that that was a much closer case. I am not persuaded
6 that even that case is one that is within the
7 constitutional power of the district court.

8 QUESTION: You are still on the case. You are
9 still on the case.

10 MR. SHAPIRO: In light of the Court's analysis
11 of this question and discussion of the question, it is
12 perhaps worth focusing on a little more. I am very
13 doubtful about the constitutionality of even that
14 localized proceeding, even though that hasn't been
15 briefed, even though that is not the nature of the
16 complaint, and even though that isn't the argument of my
17 brother, Mr. Grutman.

18 I am doubtful about it because the parties
19 still have a most indirect and tenuous connection with
20 this forum. There is a very substantial burden on
21 them. I don't think that the state of New Hampshire --

22 QUESTION: Mr. Shapiro, you say the parties
23 have a very indirect and tenuous connection with this
24 forum. Let's take the defendant. The defendant, as I
25 understand it, sent to New Hampshire six, eight, 10,000

1 copies of the magazine each month. How can you call
2 that an indirect and tenuous connection?

3 MR. SHAPIRO: Those copies, by the way, Mr.
4 Justice, were sent through an independent distributor in
5 Connecticut --

6 QUESTION: Well, do you think that --

7 MR. SHAPIRO: -- were sold by independent
8 retailers and wholesalers in the state of Connecticut.

9 QUESTION: Don't you think the corporate
10 defendant intended that to happen?

11 MR. SHAPIRO: There is no doubt that he did,
12 and that there is some connection with the forum state.
13 I don't dispute that. However, both of the courts below
14 correctly characterized it as a tenuous and a sparse
15 connection.

16 QUESTION: Why is that either -- why is that
17 correct?

18 MR. SHAPIRO: Because it is -- there is no
19 presence of property in the jurisdiction. There is no
20 agent in the jurisdiction. There is merely selling
21 products in the jurisdiction, like the rest of the 50
22 states in the United States, and to say that this is a
23 substantial continuous presence is to say, as Mr.
24 Grutman did, that this company is present everywhere,
25 and that the plaintiff can pick and choose among the 50

1 states and sue in Hawaii or sue in Alaska.

2 QUESTION: If the corporate defendant chooses
3 to publish hundreds of thousands of copies of a magazine
4 and libel somebody in it, it is present everywhere.

5 MR. SHAPIRO: The answer is, Mr. Justice, that
6 we are talking about the selection of a reasonable forum
7 to litigate this particular dispute, and that requires
8 consideration of the location of the parties. It
9 requires a consideration of the interests of the other
10 states in the federal system, and to permit this
11 lawsuit, which seeks recovery of \$80 million for damages
12 throughout the country to proceed, runs roughshod over
13 the policies of the other states in the Union.

14 QUESTION: Maybe they won't be able to make
15 the proof for the other 49 states, and how does this
16 Court concern itself with that problem at this stage,
17 before there has been any evidence and before there has
18 been any trial?

19 MR. SHAPIRO: I think the Court has to take
20 the complaint the way it is drafted as a nationwide
21 libel complaint and not a complaint for damages in the
22 state of New Hampshire.

23 QUESTION: People don't always get everything
24 that they ask for in a complaint, do they?

25 MR. SHAPIRO: Well, as I said, Mr. Chief

1 Justice, I am even doubtful about the constitutional
2 validity of sustaining this merely as a proceeding to
3 collect damages in the state of New Hampshire, in light
4 of the burdens on the parties that would be produced by
5 this sort of forum shopping, by the lack of direct state
6 interest compared to the interests of New York and Ohio,
7 and by the other factors that this Court mentioned in
8 the Volkswagen case, which I would like to enumerate.

9 QUESTION: Mr. Shapiro, I am afraid we are not
10 giving you much chance to argue your case, but you
11 suggest that the plaintiff has little or no interest
12 because she may not have been known in New Hampshire,
13 but let's assume that she was not known at all,
14 therefore had no favorable reputation there. Is it not
15 possible that after these publications, she had a bad
16 reputation in New Hampshire?

17 MR. SHAPIRO: Well, I would submit that
18 compared to the interests of the states with a
19 predominant, or, I say, paramount interest in the suit,
20 the state of domicile of the plaintiff and the state of
21 domicile for the defendants who committed this alleged
22 wrong, that any such interest is a very abstract
23 interest.

24 QUESTION: Doesn't the state have an interest
25 in protecting the name of a person who receives the sort

1 of publicity this individual has received in New
2 Hampshire, even though she was totally unknown before?

3 MR. SHAPIRO: We think that that interest,
4 although it is possible to articulate it, is not a
5 sufficiently substantial interest to permit this
6 overriding of the statutes of limitations in the 49
7 other states, including the state of domicile and the
8 state where the damage occurred.

9 Now, undoubtedly it is true that a completely
10 unknown person who has unflattering things said about
11 them in the jurisdiction would experience some
12 discomfort about this. It is something that they don't
13 want to occur. But if you compare that interest to the
14 interest of the state of New York, where she lived, had
15 her reputation, had her professional relations and ties,
16 that is the state which traditionally under common law
17 principles is perceived as the state that has the
18 paramount interest in a multi-state defamation action.

19 There is a body of law on this subject. It is
20 not just a matter of inferences about what the most
21 reasonable forum is. According to the restatement of
22 conflicts, the states that have a real palpable interest
23 in a multi-state defamation proceeding are the state
24 where the plaintiff lives, the state, if there is
25 another state, where she has a more well established

1 reputation, such as the state where she works, the
2 domicile of the defendant, because the state is
3 responsible for the conduct of local residents, and the
4 principal place of business of the defendant.

5 These are the logical focuses of a multi-state
6 defamation case, and to say that the plaintiff is
7 privileged to simply sue in Alaska or Hawaii or any
8 other state in the Union without regard to the
9 convenience of the parties, without regard to where the
10 witnesses come from, which is here in New York and Ohio,
11 and without regard to the needs of the judicial system,
12 where a jury and a judge would have to sit through an
13 extensive trial --

14 QUESTION: Well, Mr. Shapiro, wouldn't you --

15 MR. SHAPIRO: -- is to invite forum shopping
16 on the grandest scale.

17 QUESTION: Wouldn't you normally take care of
18 that under the forum non-convenience doctrine, assuming
19 that it were in a federal court and several
20 jurisdictions were available? It just simply isn't an
21 option here because the statute of limitations has
22 expired.

23 MR. SHAPIRO: That's correct.

24 QUESTION: But isn't that how you would
25 normally take care of those concerns?

1 MR. SHAPIRO: I believe, Justice O'Connor,
2 that this 1401(a), the forum non-convenience statute,
3 has been traditionally held and consistently held not to
4 even come into play unless personal jurisdiction is
5 established in the forum, and here we say the choice of
6 forum is so unreasonable and the burdens are so great
7 and the disregard of the interests of the other states
8 and the convenience of the witnesses is so great that
9 the forum is a constitutionally deficient forum
10 initially, and that you can't simply transfer a case
11 under Section 1404. It has to be dismissed.

12 And one of the undesirable consequences of
13 simply permitting a transfer under 1404 would be that it
14 would permit forum shopping with a vengeance. The
15 plaintiff would file the suit in the state with the
16 longest statute of limitations, and then simply have the
17 case transferred back to her place of residence, and get
18 the benefit of the longer statute of limitations.

19 QUESTION: Mr. Shapiro, you used the term
20 forum shopping several times, and you speak of it rather
21 opprobriously, as perhaps you have a right to, but there
22 is no general constitutional provision against forum
23 shopping, if you mean by that that the plaintiff chooses
24 the forum in which it can get jurisdiction over the
25 defendant in the most favorable terms to it.

1 MR. SHAPIRO: We think the Constitution says
2 something in addition to this, and that is that the
3 forum has to be a reasonable and a fair forum from the
4 point of view of all the parties, and from the point of
5 view of the other states in the federal system. There
6 are two things that the due process clause guarantees, a
7 fair forum for the parties and the witnesses, and a
8 forum which is reasonable in light of the needs of the
9 other 49 states in the Union. These are the factors.

10 QUESTION: Mr. Shapiro, may I interrupt you on
11 that point? Supposing this suit had been brought
12 promptly after -- within six months of the libel, so
13 that the statute of limitations had not run in other
14 states. Would you still argue that New Hampshire had no
15 constitutional power to entertain the suit?

16 MR. SHAPIRO: Again, that is a closer
17 question. I am not sure I can give the correct answer
18 to you, but it would certainly remove this element of
19 trampling on the statute of limitations of the 49 other
20 states. That would be gone. But it would still be an
21 extremely inconvenient forum. The defendants, the
22 witnesses are all domiciled in other states. The
23 defendant is an individual paraplegic living in the
24 state of California. Highly inconvenient for them. And
25 it is inconvenient, we say, for the federal judiciary,

1 too, to require a local court and a local jury to
2 entertain a case such as this, an extended proceeding in
3 which there is no palpable local concern, and this is a
4 factor that the courts mention.

5 QUESTION: Well, are you then arguing that the
6 only constitutionally permissible forum was Ohio or New
7 York?

8 MR. SHAPIRO: That is essentially correct.
9 The state of plaintiff's residence is constitutionally
10 permissible. The state of Ohio, which was the place of
11 business and the domicile of the defendants, would be
12 constitutionally permissible under all circumstances,
13 and the principal place of business, if there was one.

14 QUESTION: Would you make the same argument
15 even if most of the magazines were circulated in some
16 third state, say, California or Illinois?

17 MR. SHAPIRO: Yes, yes, we would. The
18 restatement -- I would refer the Court to the
19 restatement, Section 150, which has a very good
20 discussion of which states really do have a palpable
21 interest in a multi-state defamation case, and the place
22 where the plaintiff lives, not only because that is
23 convenient, but because that is a state that really has
24 an interest in the outcome, and the state where the
25 defendant resides, and the state where the defendant has

1 a principal place of business. There is an additional
2 state occasionally if the plaintiff works in another
3 state and her reputation is better developed in that
4 forum. That would be a reasonable selection of forum in
5 this instance, too.

6 QUESTION: Mr. Shapiro, would you help me on
7 one respect? You referred a while ago to New
8 Hampshire's statute of limitations situation as a
9 procedural matter.

10 MR. SHAPIRO: Yes, Your Honor.

11 QUESTION: There was an action in Ohio in this
12 litigation, and dismissed because the Ohio court applied
13 the New York statute of limitations. Is that procedural
14 in Ohio or substantive?

15 MR. SHAPIRO: The court treated it as
16 substantive because it was a special statutory cause of
17 action, and the statute of limitations was a
18 precondition to the existence of the cause of action.
19 That is why it was treated as a migratory matter.
20 Ordinarily --

21 QUESTION: If it is substantive, could you
22 argue that the case is res judicata?

23 MR. SHAPIRO: It refers, I think, to a
24 different cause of action. It is the cause of action
25 for privacy, whereas this is a cause of action for

1 libel, and they have been treated as separate and
2 independent causes of action, so I wouldn't press the
3 res judicata argument.

4 QUESTION: Maybe I missed it, but do you agree
5 that it could have been filed only for the damages in
6 New Hampshire?

7 MR. SHAPIRO: I am very doubtful about that,
8 although I say it is a closer question, and this --

9 QUESTION: My problem is, how can we rule on
10 all the multiple states if they would have jurisdiction
11 there? The only thing the multiple states would do
12 would go to the damages.

13 MR. SHAPIRO: We --

14 QUESTION: Am I right?

15 MR. SHAPIRO: Initially, Your Honor, I think
16 if the Court were disposed to look at the case that way,
17 if it were to say in the opinion that damages are
18 restricted to the forum, which has a connection with the
19 parties, that would be a substantial contribution to
20 this body of law, and it would be a significant holding,
21 but if -- our position still is that even if it was
22 restricted to damages in the state of New Hampshire,
23 that there are very serious constitutional questions
24 about even that, because it is such an unreasonable
25 choice of forum from the point of view of the parties

1 who live in Ohio and California and New York --

2 QUESTION: Well, is forum non-convenience a
3 constitutional point?

4 MR. SHAPIRO: When it becomes as egregious as
5 this --

6 QUESTION: How could it be?

7 MR. SHAPIRO: Well, this Court has said the
8 balance of inconvenience --

9 QUESTION: Which section of the Constitution
10 does it --

11 MR. SHAPIRO: Due process clause, Fifth
12 Amendment. That if the balance of inconvenience is
13 sufficiently severe --

14 QUESTION: In a civil case?

15 MR. SHAPIRO: Yes. The International Shoe
16 case. If the balance of inconvenience and the choice of
17 forum with respect to the interests of all the states is
18 sufficiently unreasonable, it is a due process
19 violation.

20 QUESTION: But haven't all of our minimum
21 contacts cases come up out of state courts, or have some
22 of them come from federal courts?

23 MR. SHAPIRO: Many of these cases -- in this
24 Court only from state courts, but the federal court sits
25 as a state court in diversity. It applies as state law

1 non-statute, and the same constitutional due process
2 provisions apply to the federal court when it sits as a
3 state court in diversity.

4 QUESTION: Are you as confident of your answer
5 as you sound?

6 MR. SHAPIRO: Yes.

7 (General laughter.)

8 MR. SHAPIRO: I have read --

9 QUESTION: But no case from this Court
10 supports that proposition.

11 MR. SHAPIRO: Simply because I don't think a
12 diversity case has reached this Court that presents this
13 problem, but I believe it is unanimously accepted in the
14 lower courts that the federal court sits as a state
15 tribunal applying the state long arm statute.

16 QUESTION: You see, in some -- if you are cut
17 of the diversity field of -- you may have nationwide
18 service of process in some cases --

19 MR. SHAPIRO: Oh, yes. Absolutely.

20 QUESTION: -- that may make it much easier to
21 try a case in a federal court than in the corresponding
22 state court.

23 MR. SHAPIRO: Absolutely. When Congress acts
24 -- enacts a special jurisdictional statute that expands
25 service in a securities case or an antitrust case, that

1 is a different matter. In this case the district court
2 sitting in diversity just applies the state long arm
3 statute. There is no other provision conferring more
4 expansive jurisdiction coming from Congress. That is
5 the essence of the holdings that I referred Your Honor
6 to.

7 QUESTION: It would be a waste of time if we
8 spend all our time and decide this case on diversity,
9 and then next year Congress gives up diversity?

10 MR. SHAPIRO: That is a possibility, of
11 course, that Congress may --

12 QUESTION: It sort of shows that it really is
13 a constitutional point.

14 MR. SHAPIRO: I believe it is a constitutional
15 point. I would like, if I may, to refer to the factors
16 that this Court has said are dispositive in deciding
17 whether personal jurisdiction is appropriate in a case
18 such as this.

19 QUESTION: Mr. Shapiro, before you do, I may
20 have -- perhaps I missed it, but if the suit hadn't been
21 barred in Ohio and had gone forward, but it was barred
22 everywhere else --

23 MR. SHAPIRO: Yes.

24 QUESTION: -- have you said, could the
25 recovery be nationwide then?

1 MR. SHAPIRO: Yes, it could, and the reason
2 for that, Your Honor, is that that is a state that has a
3 paramount interest in the litigation.

4 QUESTION: But you wouldn't say then --

5 MR. SHAPIRO: It would stop the tail from
6 wagging the dog.

7 QUESTION: You wouldn't say then that there
8 was some effort to run around the statute of limitations
9 of all the other states?

10 MR. SHAPIRO: We make no such contention. If
11 a constitutionally reasonable forum is selected, then we
12 have no trouble with the single publication rule, and
13 damages can be awarded for the entire nation.

14 QUESTION: Thank you.

15 MR. SHAPIRO: The factors that this Court has
16 mentioned in its recent decisions are the forum's
17 interest in deciding the dispute, the burden on the
18 defendant, the plaintiff's interest in convenient
19 relief, the judicial system's interest in efficient
20 disposition of suits, and the shared interests of all of
21 the states in efficient application of their own
22 substantive policies.

23 And we submit that each of these factors
24 weighs very heavily against the choice of forum in this
25 particular case. The burden here on the defendants is a

1 very substantial one. The defendants were all domiciled
2 and had their place of business in Ohio. The individual
3 defendant is a paraplegic, residing in the state of
4 California, and as the uncontradicted affidavits show,
5 all of the evidence for the defense must come from New
6 York, California, and Ohio. None of it comes from the
7 state of New Hampshire. And these persons aren't even
8 within the subpoena power of the New Hampshire court.

9 QUESTION: Are you suggesting the difficulty
10 of traveling to New Hampshire for the trial of the case
11 because of some disability?

12 MR. SHAPIRO: This is a factor to be weighed.
13 Justice Brennan has made the point in a number of his
14 opinions that litigation involves real people with
15 differences, and this man is confined to a wheelchair,
16 and is under continuous medical care, which makes
17 traveling across the country for an extended trial in
18 another jurisdiction a very significant burden.

19 QUESTION: You distinguish the travel across
20 the country for a trial from the travel to Washington
21 for a similar purpose?

22 MR. SHAPIRO: I do indeed. An extended trial
23 in an \$80 million cause of action is a very substantial
24 and grueling ordeal. The plaintiff is, of course,
25 entitled to seek convenient relief. The trouble here is

1 that she is seeking inconvenient relief from the point
2 of view of everybody concerned. It is inconvenient from
3 her point of view. This isn't her home. It is
4 inconvenient from the point of view of each of the
5 defendants. It is inconvenient from the point of view
6 of each of the witnesses. And it is grossly
7 inconvenient from the point of view of the local court
8 and the local jury that would be required to devote
9 their own scarce time to resolve this stale controversy,
10 in which neither they nor their neighbors have any
11 palpable interest. And in our view, the state of New
12 Hampshire's interest in this litigation --

13 QUESTION: Well, let me inquire there. Just a
14 minute, Mr. Shapiro. You say, in which they have no
15 interest. Doesn't everyone of the 200 and some million
16 people in this country have an interest when someone
17 else is damaged and injured, if they can show that they
18 have been?

19 MR. SHAPIRO: We think not, Your Honor. As
20 this Court --

21 QUESTION: You mean, all the rest of the
22 people are totally indifferent?

23 MR. SHAPIRO: The states are not keepers of
24 the residents of other states, as this Court held in
25 Mite against Edgar. The state's interest is in

1 protecting its own residents, and this is the --

2 QUESTION: Yes, but under that argument, they
3 should not have extended their long arm -- the benefits
4 of the long arm statute to non-residents.

5 MR. SHAPIRO: And indeed, we don't think that
6 they have. If the Court looks at the opinions that Mr.
7 Grutman has cited, the Leeper case and the Roy case, you
8 will see that the New Hampshire court applies the very
9 same analysis that we are talking about here. There has
10 to be a palpable state interest, and there is a
11 prohibition against forum shopping under this very
12 statute. They apply the same constitutional principles
13 that we are relying on here.

14 QUESTION: But the court of appeals and the
15 district court were against you on that point of New
16 Hampshire law. They said New Hampshire would have
17 entertained this suit.

18 MR. SHAPIRO: What they said is that New
19 Hampshire applies the same due process test that this
20 Court has to apply. They didn't say one way or the
21 other whether the state would fit this within the
22 literal language of the provision, although I -- correct
23 that. They did say that there is some doing business
24 here, but under the statute as interpreted in New
25 Hampshire you have to weigh the palpability of the local

1 state interest and you have to determine whether there
2 is forum shopping going on. I have very little doubt
3 that the state of New Hampshire would do with this case
4 precisely what the district court did. That is, to
5 dismiss it. Plaintiff doesn't get much argument --
6 support for the argument that she is presenting here
7 with the theory that the tort took place in New
8 Hampshire. This is, of course, the keystone of her
9 submission. This argument is too abstract to be helpful
10 in a case that involves a defamation in 50 different
11 states. If the tort took place in New Hampshire, it
12 also took place in Alaska, and in Hawaii, and in every
13 other state.

14 QUESTION: Well, if I put together a defective
15 locomotive and run it through 50 states and it does harm
16 in each of the 50 states, a tort has occurred in all 50
17 states. If someone publishes a libel and circulates it
18 in 50 states, presumably harm has occurred in all 50
19 states. That is the choice of the publisher.

20 MR. SHAPIRO: Well, this defective product
21 exploded, if you will, in the state of New York. It
22 didn't explode in 50 different states. That, we submit,
23 is just a jurisdictional fiction.

24 Practical questions of federalism don't just
25 disappear by saying the tort took place everywhere and

1 therefore the plaintiff can forum shop throughout the
2 whole country and pick the most inconvenient place in
3 the whole nation, which is a burden on the court and the
4 witnesses and which runs roughshod over the policies of
5 the other 50 states. It is simply too facile to say
6 that this tort took place everywhere without regard to
7 which states really had the paramount interest in the
8 controversy, which is New York and Ohio and not New
9 Hampshire, and not Alaska, and not Hawaii.

10 QUESTION: What you are saying is that
11 jurisdiction should not follow injury.

12 MR. SHAPIRO: We say that in a multistate
13 defamation case where there is an argument that a little
14 bit of injury occurred throughout the whole country, you
15 have to look beyond that analysis.

16 QUESTION: Where do we get the statement --
17 what is the support for your statement that a little
18 injury occurred all over the country?

19 MR. SHAPIRO: Because my --

20 QUESTION: Would that be the allegation of the
21 complaint?

22 MR. SHAPIRO: The proof before the district
23 court was that 99 percent of these magazines were
24 circulated in other states, and that the plaintiff had
25 never been in the state of New Hampshire and was not

1 known in the state of New Hampshire. She worked and
2 lived in New York, and that is where the brunt of this
3 tort fell.

4 We are not saying, of course, that the due
5 process clause imposes technical or restrictive
6 requirements on plaintiff. There is no argument here
7 that the plaintiff didn't know that she had been libeled
8 in 1975 --

9 QUESTION: Your position is that the multiple
10 complaint can be filed in only two states, where the
11 defendant is or where the plaintiff is. Is that your
12 position?

13 MR. SHAPIRO: It may be a bit broader than
14 that. It's plaintiff's residence, defendant's
15 residence, defendant's principal place of business --

16 QUESTION: Well, then you don't have a
17 multiple state action, do you?

18 MR. SHAPIRO: And in each of these states you
19 could have a proceeding to collect damages everywhere.

20 QUESTION: You just want the whole -- you want
21 the whole system thrown out, of multiple action.

22 MR. SHAPIRO: We are quite content with the
23 single publication rule. It is just, it has to be
24 applied in a constitutionally reasonable forum, not a
25 forum pulled out of a hat for the purpose of getting the

1 longest statute of limitations in the entire nation.

2 QUESTION: Well, you can prove damages in any
3 state?

4 MR. SHAPIRO: The plaintiff, under the single
5 publication rule, has to prove all of her damages in
6 whatever state she picks.

7 QUESTION: Right.

8 MR. SHAPIRO: And we say that that --

9 QUESTION: In any. In all 50 states --

10 MR. SHAPIRO: All 50 states. That's the rule.

11 QUESTION: -- she can prove damages.

12 MR. SHAPIRO: Yes, and that is why it is so
13 important --

14 QUESTION: But wouldn't that require
15 witnesses?

16 MR. SHAPIRO: If she picks a constitutionally
17 reasonable forum, she can then collect damages for the
18 entire country.

19 QUESTION: You are just against forum
20 shopping.

21 MR. SHAPIRO: You are right, Mr. Justice. I
22 am against forum shopping.

23 QUESTION: It is awful late. It is awful late
24 in the game.

25 MR. SHAPIRO: And we read this Court's

1 decisions to prohibit forum shopping when there is not a
2 reasonable selection of forum in light of the burdens to
3 the parties and the interests of the 50 states.

4 CHIEF JUSTICE BURGER: Do you have anything
5 further, Mr. Grutman?

6 ORAL ARGUMENT OF NORMAN ROY GRUTMAN, ESQ.,
7 ON BEHALF OF THE PETITIONER - REBUTTAL

8 MR. GRUTMAN: Yes, Mr. Chief Justice.

9 I would like to begin by responding to a
10 question which you put to my colleague, and pointing to
11 that place in the record, which is to be found at 15-A
12 of the appendix, where the First Circuit said, "The
13 major factor favoring plaintiff is that she is suing in
14 part for damages suffered in New Hampshire," which is an
15 acknowledgement of the fact that she did suffer injury
16 in New Hampshire, "and although the defendant's contacts
17 with New Hampshire are sparse, they were not random,
18 isolated, or transitory. The general course of conduct
19 in circulating magazines throughout the state was
20 purposefully directed at New Hampshire."

21 Counsel has spoken to the Court about that
22 state which has the paramount interest, and although the
23 language was written by Mr. Justice Brennan in his
24 dissent in Volkswagen, I do not think he was expressing
25 anything with which the Court would disagree when he

1 said that, "A defendant has no constitutional
2 entitlement to the best forum or, for that matter, to
3 any particular forum. Under even the most restrictive
4 view of International Shoe, several states could have
5 jurisdiction over a particular cause of action."

6 That is certainly the case in this lawsuit.

7 I promised that I would allude to something
8 Mr. Justice Stevens raised at the conclusion of my
9 principal remarks, and I would like not to omit what I
10 was saying when I originally concluded, and that was
11 namely that the district court focused on the
12 plaintiff's lack of contacts, and therefore they never
13 reached the minimum contacts of Flynt or of his
14 publication, and they therefore dismissed a fortiori
15 because of plaintiff's lack of contacts, and I submit
16 that on remand we would, and I represent this
17 responsibly, be able to demonstrate that Flynt had those
18 contacts himself, as did the corporation, which would
19 satisfy the International Shoe formula as to them.

20 The references made by counsel to the
21 restatement were to the restatement of conflict, and I
22 think that what is spoken of in that restatement
23 primarily has to do with choice of law, not with
24 jurisdiction or definition as to what constitutes a
25 tort. There was a considerable reference to the

1 inconvenience which, Madame Justice O'Connor, I think,
2 is clearly dealt with under Section 1404(a) by which,
3 after jurisdiction has been determined, the federal
4 court has the flexibility by which under forum
5 non-convenience to designate some other forum in which
6 the case could be tried, but it ought to be mentioned
7 that under the Van Dusen case, the corpus juris that
8 would be applied so far as the statute of limitations is
9 concerned is the corpus juris of the forum in which the
10 action was brought, namely, New Hampshire.

11 Essentially, what this Court has heard this
12 morning is a claim which the respondents argue that
13 other states' statutes of limitations prohibit New
14 Hampshire from exercising a jurisdiction which for
15 itself it has determined at six years. I would
16 conclude, Mr. Chief Justice and members of this Court,
17 by observing that that is an incident of federalism. It
18 is a reflection of our diversity.

19 If you travel around this country and look at
20 the airports in which you land, we are so homogeneous it
21 is almost impossible to know where you are, but I think
22 that it is worthwhile that this Court should preserve
23 the diversity which in no inconsiderable measure has
24 been part of the richness and greatness of this
25 country.

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Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the
above-entitled matter was submitted.)

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