

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner V. WILLIAM D. FORD AND
THOMAS L. JOHNSON

CASE NO. 91-779

PLACE: Washington, D.C.

DATE: Monday, April 20, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BURLINGTON NORTHERN RAILROAD :
4 COMPANY, :
5 Petitioner :
6 v. : No. 91-779
7 WILLIAM D. FORD AND THOMAS :
8 L. JOHNSON :
9 - - - - -X

10 Washington, D.C.
11 Monday, April 20, 1992

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:03 a.m.

15 APPEARANCES:

16 BETTY JO CHRISTIAN, ESQ., Washington, D.C.; on behalf of
17 the Petitioner.
18 JOEL L. KLEIN, ESQ., Washington, D.C.; on behalf of the
19 Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-779, Burlington Northern Railroad Company
5 v. William D. Ford and Thomas L. Johnson.

6 Ms. Christian, you may proceed.

7 ORAL ARGUMENT OF BETTY JO CHRISTIAN

8 ON BEHALF OF THE PETITIONER

9 MS. CHRISTIAN: Mr. Chief Justice, may it please
10 the Court:

11 The issue in this case is whether Montana's
12 venue law violates the equal protection clause. That
13 venue law provides that a domestic corporation can be sued
14 only in the county in which he has its principle place of
15 business or in a case where a tort occurred within the
16 State in the county where the tort occurred.

17 The same venue law provides that suit can be
18 filed against any foreign corporation in any of the 56
19 counties in the State. This rule applies even to a
20 foreign corporation that has been licensed to do business,
21 has named a registered agent, and has established a place
22 of business in the State.

23 Burlington Northern is this latter type of
24 corporation, and the reason that we're before this Court
25 today is that application of the Montana venue law has led

1 to these suits and a number of others being filed in two
2 particular counties in Montana in which suit would not be
3 proper if the suit were against a domestic corporation.

4 Now, I want to emphasize at the outset that
5 petitioners are not asking this Court to determine what
6 kind of venue law any State should prescribe. That is
7 strictly a matter for the State, and they are entitled to
8 make it as narrow or as broad as they choose. Our
9 position is simply this: that a foreign corporation that
10 has been admitted to do business in the State and has
11 named its registered agent and established a place of
12 business there is entitled to the protection of the same
13 venue laws that the State chooses to adopt for its
14 domestic incorporations.

15 QUESTION: And this is why, Mrs. Christian,
16 because of the equal protection clause of the 14th
17 Amendment?

18 MS. CHRISTIAN: This is the equal protection
19 clause of the 14th Amendment, Justice Rehnquist.

20 QUESTION: You would say, then, that there is no
21 rational basis for distinguishing between a foreign
22 corporation with a place of business in Montana and a
23 corporation -- Montana corporation that has a principal
24 place of business?

25 MS. CHRISTIAN: That is our position, Justice

1 Rehnquist. We believe that that basic issue was decided
2 by this Court 60 years ago in the case of Power
3 Manufacturing Company v. Saunders, and there are two
4 points that I want to particularly emphasize in the
5 argument today.

6 First, that the Saunders law was squarely based
7 upon the reality of the substantial similarities between a
8 domestic corporation and a corporation that, although
9 incorporated in another State, has been what this Court
10 called domesticated in *Wheeling v. Lander*.

11 QUESTION: Saunders was substantially criticized
12 and limited very shortly after it was decided, wasn't it?

13 MS. CHRISTIAN: The only criticism of Saunders
14 that I'm aware of, Justice Rehnquist, occurred in the
15 *Starnes* decision in a footnote.

16 *Starnes* had decided, in the context of a Texas
17 venue law in which geographic discrimination was not at
18 issue that in that particular case there was in fact no
19 discrimination at all in practice between the foreign and
20 domestic corporation, and in a footnote in Justice
21 Brennan's opinion he simply stated, citing three decisions
22 of this Court, that it is not clear whether Saunders is
23 still good law.

24 But when those three decisions are analyzed, one
25 of them -- Metropolitan Life Insurance Company against

1 Brownell -- actually cited Saunders and quoted from it as
2 establishing the standard that should be applied, and
3 simply went on to find that in that case, because of the
4 different statutory schemes that the State had enacted
5 related to foreign and domestic insurance companies, there
6 was a rational basis for the difference.

7 The second case was the Bain Peanut Company case
8 authored by Justice Holmes. In that case, the Court held
9 that a venue law which established venue for a corporation
10 of any type, domestic or foreign, in any county in which a
11 cause of action arose, was constitutional although a suit
12 could be brought against an individual only in the county
13 of Donethal, and the point there was simply that there's
14 sufficient difference between a corporation and an
15 individual to justify the different treatment. We have no
16 quarrel with that.

17 The third case cited was the Allied Stores case
18 in which the Court was concerned with a State statute that
19 provided a more favorable treatment for a foreign
20 corporation than a domestic corporation and thus did not
21 involve the issues of disparate treatment for one who is
22 essentially an outsider to the State.

23 So we do not think that those cases in any way
24 undermine Saunders. In fact, to the contrary, Saunders
25 was actually the first in a line of cases that has

1 established a broad principle regarding the equality of
2 treatment to which a domestic corporation and foreign
3 corporations in this domesticated class are entitled.

4 Now --

5 QUESTION: Ms. Christian, if you win this case,
6 is it sufficient for us to decree that Montana must -- in
7 effect the Montana courts must allow domestic corporations
8 to be tried in any county?

9 MS. CHRISTIAN: I think that the equal
10 protection simply demands that foreign corporations that
11 have been admitted to do business and in fact have a place
12 of business in the State be treated equally with domestic
13 corporations. Now, the State legislature could choose to
14 equalize this in any way that they see fit. We think as a
15 practical matter that a State legislature is unlikely to
16 ever adopt an any-county rule if it has to be applied to
17 domestic corporations.

18 QUESTION: If I may interrupt you, what do we do
19 right now?

20 MS. CHRISTIAN: I think the answer would be to
21 determine that the equal protection clause requires that
22 foreign corporations of this class be given equal
23 treatment with domestic corporations and remand to the
24 Montana supreme court.

25 Under the existing law, the Montana supreme

1 court has to plead that a domestic corporation resides
2 wherever it has its principal place of business in the
3 State, and so the equality would appear to be one of
4 permitting the foreign corporation that is also operating
5 a place of business in the State to have venue only at its
6 principal place of business in the State, but I would
7 reiterate that ultimately the decision is for the State
8 legislature and for the State courts, and that the
9 equalization that is required is simply equal treatment
10 for the foreign corporation and the domestic corporation.

11 QUESTION: But you think it would be open to the
12 Montana supreme court to provide the, as it were, the more
13 favorable alternative relief that in effect would get you
14 out of this county.

15 MS. CHRISTIAN: We think that it would, and we
16 think in fact that if -- to do anything else would require
17 that they overrule their own prior decisions, holding that
18 the residence of a domestic corporation is its principal
19 place of business.

20 It might be illuminating, Justice Souter, if we
21 look briefly at how this disparity arose, because it
22 doesn't arise directly from the statute itself.

23 QUESTION: I think maybe if I may interrupt you
24 again, maybe that's in part what was provoking my
25 question, and I may simply be wrong about the statute. I

1 thought the Montana statute -- well, Montana had a statute
2 in which the domestic corporation simply had the power to
3 designate its principle place of business and that that
4 was binding for venue purposes. Am I wrong on that?

5 MS. CHRISTIAN: It does not appear to be that,
6 Justice Souter. The statute talks about residence and
7 nonresidence, and the Montana supreme court decreed that a
8 domestic corporation resides wherever it has its principal
9 place of business.

10 Now, at the time this case arose and
11 historically, there had been no requirement that a
12 domestic corporation designate a principal place of
13 business. That came --

14 QUESTION: So, in effect it's a question of
15 fact, it's not something that is, as it were, within the
16 control of the domestic corporation simply by putting the
17 name of one town down when it files its annual return.

18 MS. CHRISTIAN: I think that's correct, Justice
19 Souter.

20 QUESTION: Okay.

21 MS. CHRISTIAN: Now, the requirement of
22 designating a principal place of business in the State was
23 added to the statute just last year, after this case was
24 litigated, and at the time that it was adopted the State
25 also added a definition. I believe the definition for the

1 domestic corporation is that the principal place of
2 business is where its executive offices are located, and
3 so the State itself has provided a definition which would
4 certainly be appropriate for them to also do in the
5 context of a foreign corporation.

6 QUESTION: Well, what about a foreign
7 corporation, as would be the case for most of them, I
8 suppose, whose executive offices are not in the State?

9 MS. CHRISTIAN: Justice Scalia, we think that
10 the concept of a principal place of business in the State
11 is one that has received widespread recognition both in
12 Montana and elsewhere. In Montana, for example --

13 QUESTION: But Montana has given it an
14 artificial meaning for domestic corporations. A domestic
15 corporation can have its major plant at one place and do
16 almost all its business there but have its executive
17 offices somewhere else, and it's where the executive
18 offices would be that would be the principal place of
19 business.

20 MS. CHRISTIAN: It has given it an artificial
21 meaning. Our contention is that consistent with the equal
22 protection clause the State cannot refuse to give similar
23 and appropriate meaning to the situation of a foreign
24 corporation that, even though it has its national
25 headquarters elsewhere, in fact has a principal place of

1 business in the State.

2 QUESTION: Well, why can't it say, you know,
3 just as with the -- we'll treat it just the same as
4 domestic corporations. We will treat your principal place
5 of business in the State to be where your executive
6 offices are, and if they are not in the State, tough luck,
7 but we're treating you equally.

8 MS. CHRISTIAN: I think the equality would have
9 to reflect equal treatment related to the purposes of the
10 venue laws, and in the context of the considerations that
11 go into venue, a foreign corporation such as Burlington
12 Northern that in fact has a major executive office
13 presence in the State, even though its national
14 headquarters is elsewhere, cannot be treated differently.

15 The uncontroverted affidavit in this case,
16 Justice Scalia, shows that Burlington Northern has its
17 division headquarters in Hill County, Montana. That's
18 headed by its general manager of the division. Over half
19 of its employees in the State are there.

20 So our position is that, consistent with equal
21 protection, a State has the obligation to recognize that
22 the same factors that justify treating a domestic
23 corporation's principal place of business in Montana as
24 its residence have equal application to a foreign
25 corporation that in fact has a principal place of business

1 in the State.

2 QUESTION: Well, are you defining principal
3 place of business in the State for yourself,
4 Ms. Christian? Is Burlington Northern defining it for
5 itself?

6 MS. CHRISTIAN: Certainly, Justice Rehnquist,
7 the State would have full power to adopt any bona fide
8 definition.

9 QUESTION: Well, I mean, when you're talking now
10 about Burlington Northern having a principal place of
11 business, you're simply using your own language, so to
12 speak.

13 MS. CHRISTIAN: This has historical precedent in
14 Montana, Justice Rehnquist.

15 QUESTION: I'm the Chief Justice.

16 MS. CHRISTIAN: I apologize, Mr. Chief Justice.

17 Historically, from 1893 up until the late 1960's
18 the State of Montana required every foreign corporation
19 that sought to be admitted to do business in the State to
20 file with the Secretary of State at the time of its
21 admission a certificate that stated both its principal
22 place of business outside the State and its principal
23 place of business in the State, so this is something that
24 historically was recognized by the State of Montana.

25 In addition, numerous other States in the

1 aftermath of this Court's Saunders decision brought their
2 statutes into compliance with Saunders by adopting the
3 concept of a principal place of business in the State as
4 the residence for a foreign corporation. Some of them at
5 the same time adopted a definition that would control what
6 that principal place of business was. Others did not.
7 Others pleaded it as a fact matter.

8 QUESTION: You're asking us, it seems to me, to
9 say that it is rational, almost necessary, for every State
10 to enact a scheme whereby foreign corporations have a
11 single, principal place of business in that State.

12 Now, that may apply to your client, but that
13 isn't the test under the equal protection clause rational
14 basis. This is not narrow tailoring, where your client is
15 entitled to the narrowest possible statute to bring it
16 into conformance with domestic corporations. The State
17 need legislate only on a rational basis with respect to
18 all out-of-State corporations, and many of those
19 corporations may have no principal place of business, or
20 no office that can be equated to that.

21 MS. CHRISTIAN: Justice Kennedy, certainly the
22 State, as I indicated before, would have the power to set
23 definitions for what it considers to be a principal place
24 of business, what it considers to be enough to qualify as
25 a principal place of business in the State, and if a

1 particular foreign corporation's contacts with the State
2 are not sufficient to meet that definition, then it would
3 not fall within, but we cannot conceive of any bona fide
4 definition that would not include Burlington Northern.

5 Our position is simply this, and I think this is
6 the basic principle established by the Saunders case, that
7 with respect to matters pertinent to venue -- and that is,
8 we're talking about trials in State district courts --
9 that there is no substantial difference between a domestic
10 corporation and between those foreign corporations that
11 have been admitted to do business in the State and have
12 actually established a place of business there, and that
13 if the court chooses to extend to its domestic
14 corporations the very great benefits that are attached to
15 limiting venue to the single county where it has its
16 residence, then there is no rational basis not to extend
17 that same benefit to those foreign corporations that have
18 been domesticated, are also doing business in the State,
19 and also have what is reasonably considered a residence in
20 the State.

21 QUESTION: Yes, but you're saying that it's
22 irrational for the State not to treat foreign corporations
23 differently on a basis of several subclasses, and it seems
24 to me quite plausible, quite rational, for the State to
25 treat all foreign corporations similarly, and the only way

1 you can make your argument is by saying that some foreign
2 corporations have a principal place of business, but I
3 don't know why we are required to say that the State is
4 entitled, or is required to legislate on that narrow
5 assumption.

6 MS. CHRISTIAN: I think the principal
7 established by Saunders which was carried forward in cases
8 such as Searle v. Cohn is that in the modern world the
9 concept of a foreign corporation includes two very
10 distinct and very different types of corporations with
11 respect to their relationship with the State.

12 One of them is those that can be treated as --
13 can be considered to be truly foreign. That is, those
14 that have only transitory relationships, if any, with the
15 State, and they're entitled to be treated quite
16 differently from domestic corporations.

17 But in the modern world of multi-State
18 businesses there is another very large category of
19 corporations which happen to be incorporated in another
20 State, many of them like Burlington Northern and Delaware,
21 which may even have their national headquarters elsewhere,
22 but which in fact for all purposes related to venue are no
23 different from a domestic corporation, and let me try to
24 illuminate that by explaining what we're really talking
25 about in terms of factors related to venue.

1 Now, the respondent has emphasized that a --

2 QUESTION: Ms. Christian, let me look at the
3 other side of the coin. Your client, the Burlington
4 Northern, has its principal place of business in Dallas,
5 doesn't it?

6 MS. CHRISTIAN: It's nationwide principal place
7 of business is in Forth Worth, Texas.

8 QUESTION: Is Fort Worth -- what's it doing down
9 there? You know, originally it was the old CB&Q --
10 Chicago, Burlington, and Quincy. Those are not Texas
11 names, and the -- its original basic place of business was
12 in Minnesota. How come Dallas and Fort Worth?

13 MS. CHRISTIAN: This occurred after a merger.
14 There were two mergers, actually, as you will recall, in
15 which the Burlington -- which formed the present
16 Burlington Northern. The first was the merger of the old
17 Great Northern, Northern Pacific, and the CB&Q back in
18 1970. Then around --

19 QUESTION: None of which had anything to do with
20 Texas.

21 MS. CHRISTIAN: That had nothing at all to do
22 with Texas, and Burlington Northern remained in St. Paul
23 with its headquarters there. Subsequently, in I believe
24 1980, Burlington Northern merged with the Frisco, which
25 had lines extending to the South and going down into the

1 Southwest and Texas, and it was after that that Burlington
2 Northern chose to move its headquarters down to Fort
3 Worth, Texas, because at that --

4 QUESTION: These things can really be maneuvered
5 rather easily.

6 MS. CHRISTIAN: I think as a practical matter
7 corporations select their national headquarters and their
8 in-State headquarters based on business realities of where
9 it makes sense to run a business from, and in this case,
10 for example, Hill County was chosen as Burlington
11 Northern's principal place of business in Montana because
12 that is in the middle of its only main line running across
13 the State.

14 QUESTION: Well, what is the county seat of Hill
15 County?

16 MS. CHRISTIAN: That is Havre, Mr. Chief
17 Justice.

18 QUESTION: That's the eastern part of the State?

19 MS. CHRISTIAN: It's approximately the center
20 part of the State. It's the largest town on the
21 Burlington Northern main line, and it's located just about
22 the middle of Montana, I believe, or possibly a little bit
23 to the --

24 QUESTION: Well, that's an old part of Montana
25 that everybody's known about for years and years. What's

1 wrong with it?

2 MS. CHRISTIAN: I beg your pardon?

3 QUESTION: I say, that's an old-established town
4 on the main line that everyone has known for years in
5 Montana. What's wrong with it?

6 MS. CHRISTIAN: There's nothing wrong with it.
7 That is Burlington Northern's principal place of business
8 in Montana. That's where it has its division
9 headquarters.

10 QUESTION: Is Montana just one -- is Montana
11 itself a separate division on the Burlington Northern?

12 MS. CHRISTIAN: There is a Montana Division
13 which includes most of the lines in Montana. The actual
14 boundaries, Mr. Chief Justice, are drawn based on railroad
15 operations rather than strict State boundaries, so there
16 are some lines that are in the Montana Division that spill
17 over into Idaho on the west and into North Dakota on the
18 east.

19 QUESTION: Are there some lines which are not in
20 the Montana Division which are geographically in Montana?

21 MS. CHRISTIAN: At the time that this case
22 arose, there were. At the present time, most of those
23 lines have now been incorporated into the Montana
24 Division. There are still a few lines down close to
25 Wyoming that are in the Denver Division.

1 QUESTION: More than one division, then, has
2 geographical operations in Montana.

3 MS. CHRISTIAN: There are a very few lines that
4 are still in the Denver Division at the time that this
5 case -- that is a very short trackage, down near the
6 border, the southern border of Montana, but at the
7 time this --

8 QUESTION: Why do you --

9 MS. CHRISTIAN: I beg your --

10 QUESTION: Why do you suppose all the lawsuits
11 are filed in Yellowstone County?

12 MS. CHRISTIAN: I think the practical answer to
13 that, Justice O'Connor, is that plaintiffs are going into
14 Yellowstone and Cascade Counties because they perceive,
15 and Burlington Northern agrees with them, that the verdict
16 that they received in those two counties is likely to be
17 far more favorable than they would receive if they sued in
18 Hill County --

19 QUESTION: In that juries are more responsive to
20 plaintiffs in those counties?

21 MS. CHRISTIAN: Precisely, Justice O'Connor, and
22 this is a reality of modern litigation. This is why venue
23 is so important in modern civil litigation, and it's why
24 the protection afforded by a State venue law that limits,
25 as this one does, venue to a single county for its own

1 domestic corporations is of such great importance.

2 The difference to a corporation in being subject
3 to suit only in one county, where it has its principal
4 place of business, and to one that is subject to suit
5 anywhere in the State, in the county that the plaintiff
6 selects as the one that it believes is the most favorable
7 to its particular lawsuit, is an enormous advantage.

8 QUESTION: Under your theory, could Burlington
9 Northern move its principal place of business to a very
10 small town in Montana, the county seat which had a
11 reputation for very small plaintiffs' verdicts?

12 MS. CHRISTIAN: I think that that would be
13 largely precluded, and certainly limited by the simple
14 business reality that you have to have your principal
15 place of business in a place where it makes sense to run
16 your business. You can't have 900 people located in some
17 inaccessible spot that is remote from the business they're
18 operating, and that's true of domestic or foreign
19 corporations. The selection of a principal place of
20 business is dictated by the business realities.

21 QUESTION: Ms. Christian, what -- if you counted
22 up all the foreign corporations that are doing business in
23 Montana, how many of them -- what percentage of them do
24 you think would have what you would call a principal place
25 of business in Montana?

1 MS. CHRISTIAN: I can't really answer that,
2 Justice White. Certainly --

3 QUESTION: I would suppose there would be a lot
4 of them that didn't have a principal place of business in
5 Montana.

6 MS. CHRISTIAN: I think you would find some in
7 both categories, and this is why we emphasize that --

8 QUESTION: And you wouldn't -- if you were
9 representing one of those companies that didn't have a
10 principal place of business in Montana, you wouldn't be
11 making this argument about them --

12 MS. CHRISTIAN: Justice White --

13 QUESTION: They could be sued in any county in
14 the State --

15 MS. CHRISTIAN: Justice White --

16 QUESTION: Is that right?

17 MS. CHRISTIAN: I think the --

18 QUESTION: Is that right?

19 MS. CHRISTIAN: It depends on how you define
20 principal place of business, and that's rightly for the
21 State --

22 QUESTION: Well, let's just assume, then, that
23 there are corporations doing business in Montana that do
24 not have a principal place of business in Montana, such as
25 your client does. Let's just assume that.

1 Now, those companies could be sued in any county
2 in Montana without violating the equal protection clause.

3 MS. CHRISTIAN: If, under a bona fide definition
4 of principal place of business they did not in fact have a
5 principal place of business in Montana --

6 QUESTION: Yes.

7 MS. CHRISTIAN: Then we think that they could
8 appropriately be sued in any county, but I would reiterate
9 that this is where, Justice White, I think we get into
10 what Bain Peanut referred to as allowing a little play in
11 the joints.

12 Now, with respect to domestic corporations, the
13 State of Montana grants every domestic corporation a
14 principal place of business regardless of how small that
15 may be. Now, with respect to foreign corporations, we
16 think it would be entirely appropriate that every foreign
17 corporation also be assumed to have a principal place of
18 business. This is in fact what Montana for 70 years
19 apparently assumed in requiring that designation to be
20 made, but we're getting now into an area in which we think
21 that the States do have some discretion to adjust at the
22 margin.

23 The point is that for those foreign corporations
24 that do have a principal place of business in the State,
25 according to every standard the State may choose to adopt,

1 you cannot, consistent with the equal protection clause,
2 treat them differently from the domestic corporations in
3 the same category.

4 Mr. Chief Justice, I would like to reserve my
5 remaining time for rebuttal.

6 QUESTION: Very well, Ms. Christian.

7 Mr. Klein, we'll hear from you.

8 ORAL ARGUMENT OF JOEL L. KLEIN

9 ON BEHALF OF THE RESPONDENT

10 MR. KLEIN: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 Montana's venue laws, like those of virtually
13 every other jurisdiction in this country, treat residents
14 and nonresidents differently. Petitioner acknowledges
15 legitimacy of that basic distinction, but objects to one
16 aspect of its application -- Montana's decision to treat
17 its domestic corporations as residents while denying that
18 status to foreign corporations who simply have an office
19 in the State.

20 QUESTION: How many States have laws like
21 Montana's, Mr. Klein?

22 MR. KLEIN: Justice O'Connor, the answer is that
23 there are probably a dozen or so States that draw
24 distinctions similar. The problem is, each State has a
25 different venue law, so for example, some States say --

1 and these are cited in petitioner's petition on pages 21
2 to 23, but some States will say that if you're a
3 nonresident you can be sued in the county of a plaintiff's
4 residence, so they're not identical, but I think there are
5 something like a dozen States that draw these kinds of
6 distinctions.

7 QUESTION: Except for those dozen States, do the
8 other States generally require the foreign corporation to
9 designate a principal place of business within the State?

10 MR. KLEIN: I don't think that's right, I think
11 there are a handful or so that do that. Other States
12 don't use single place of business. In other words -- and
13 that's a key distinction between Saunders. A lot of
14 States provide that any corporation can be sued wherever
15 it has an office. Montana hasn't gone that way. That was
16 the statute in Saunders, and it seems to me, Justice
17 Kennedy, that's a very different statute.

18 If it says, look, wherever you have an office,
19 you're amenable to suit, now you're a foreign corporation,
20 and wherever you have an office it's not going to be a
21 limitation, that does seem to me to be an arbitrary
22 distinction.

23 But Montana has its own scheme, and I think it
24 rests on this rational justification, and that is, the
25 Montana legislature could rationally have concluded that

1 domestic corporations tend to have an important attribute
2 that foreign corporations like petitioners lack, and that
3 attribute is a single, easily identifiable headquarters in
4 the State of Montana.

5 That attribute, that single identifiable
6 headquarters, is rationally related to Montana's
7 distinction for two reasons: first, having that
8 headquarters relates to the kind of convenience
9 considerations that affect venue, and second of all,
10 having such a headquarters means there won't be litigation
11 over where the venue is located.

12 QUESTION: Yes, but I mean if it were discovered
13 that corporations -- just statistically it happens to be
14 true that corporations whose names begin in Z, many more
15 of those have such headquarters than corporations that
16 begin with other letters, you wouldn't allow a law that
17 said only those corporations whose names begin in Z can be
18 sued solely where their chief headquarters are.

19 MR. KLEIN: That's because the preliminary
20 criteria is absolutely arbitrary.

21 QUESTION: Well, that's right, but why isn't
22 it -- if -- why isn't it just as arbitrary to say well,
23 just because it happens that domestic corporations are
24 more likely to have a headquarters, why do you have to
25 write off those that aren't domestic but do have a

1 headquarters?

2 MR. KLEIN: Because it seems me, Justice Scalia,
3 we don't write them off. We're saying is there a rational
4 basis to distinguish the two categories.

5 QUESTION: I suggest not, any more than with
6 corporations whose names begin in Z.

7 MR. KLEIN: Well, let me see if I can develop
8 the distinction. That is, the Montana legislature says
9 we're conferring venue based on residence because that is
10 convenient in the sense that the reason we have a
11 residence law is people want to be close to their
12 litigation.

13 Now, if you have your corporate headquarters in
14 Montana, that's where your chief executive officials are
15 going to be, that's where your chief legal counsel if you
16 have one is going to be, that's where your books and
17 records are going to be. That is your litigation hub as a
18 rule, and that's all the equal protection clause asks, is
19 let's look across the spectrum of these corporations.

20 As a rule, if we have a Montana corporation,
21 people incorporate in Montana, unlike Delaware, to do
22 their business in Montana. Their executive offices, we
23 rationally believe, are a litigation hub.

24 Now, for a foreign corporation like --

25 QUESTION: Excuse me, I -- is that all it takes

1 to be rational, is to pick some factor that puts the
2 majority of people in that classification so that you
3 could pick, you know, males with blue eyes, and if that
4 happens to correspond to a majority of situations, that's
5 a rational classification, even though you could just as
6 readily identify the particular individuals with the
7 characteristic you're concerned about, such as residence?

8 MR. KLEIN: I think you put your finger on the
9 distinction. It's not simply that there's a correlation.
10 There's a reason to expect the correlation, Justice
11 Scalia, and that reason is, if you incorporate in Montana,
12 you're going to have your executive offices, as a rule,
13 there. That's what the Montana legislature has decided.

14 QUESTION: That is likely to be true. So what?

15 MR. KLEIN: But that seems to be --

16 QUESTION: If there are other companies that
17 just as well have their principal place of business in the
18 State, why do you have to write them off?

19 MR. KLEIN: Well, it's not a question of writing
20 it off. When you administer a rule like this, Justice
21 Scalia, there are some people who are going to fall on the
22 outside. Let's take a simple rule. If you're 18 years
23 old, you can drive in Montana. If you're 17 you can't.
24 There are some people who are 17 who are very good
25 drivers, but the State doesn't have to make an individual

1 determination. The State has to look across a category.

2 Now, I suggest to you, if you take the following
3 two groups that petitioner is talking about, one is those
4 corporations that incorporate in the State. Are they
5 likely to have their headquarters, their executive
6 officials, and litigation hub in the State? The answer to
7 that is yes. If you take foreign corporations, they may
8 or may not. Burlington Northern's litigation may be
9 handled out of Forth Worth. It may be handled any place
10 within the State out of a division.

11 Second of all, if you have a headquarters -- and
12 this is important to venue law -- it's easy to know where
13 to sue. There's no dispute. You know, in the history of
14 Montana there's never been a single lawsuit about where is
15 the residence of a domestic corporation, and I think
16 that's important because that issue is subject to
17 interlocutory appeal.

18 So what it means is, plaintiffs know where the
19 domestic headquarters of a Montana corporation is going to
20 be. It's an easy place to find, and indeed, as counsel
21 points out, it's now expressly designated, but it was
22 always designated in that we knew where the chief
23 executive official was.

24 Now, if you're a foreign corporation -- excuse
25 me. If you're a foreign corporation, and let's just say

1 you have five different drugstores in Montana and your
2 executive offices are in Chicago, there's no readily
3 identifiable place to call residency. The fact that you
4 may have a few more employees or a few fewer employees in
5 a particular place doesn't answer that question.

6 QUESTION: Well, does Montana, though, require a
7 foreign corporation to designate some place in Montana as
8 a principal place of residence?

9 MR. KLEIN: That is not the case. That is not
10 the case. There was an earlier statute going back to
11 1895, in which the option of designating a chief office
12 was available. I believe if you look at the statutes that
13 suggests a place where you could file suit, serve papers,
14 but the notion that there is a kind of principal place of
15 business within the State is not what Montana requires.

16 QUESTION: There -- does Montana law provide for
17 the designation of someone in the State on whom suit can
18 be served?

19 MR. KLEIN: Yes, Your Honor.

20 QUESTION: And that's a matter of public notice,
21 and anyone can easily find that, I suppose.

22 MR. KLEIN: That's correct, and in this
23 instance -- that's an interesting point, Justice O'Connor,
24 because in this instance Burlington Northern, for example,
25 has its registered agent in Helena, Montana. It's

1 basically a shop that serves as registered agent for
2 virtually everyone.

3 They don't claim that that's where they should
4 be sued, and again I don't think the State has to
5 accommodate -- the mere fact of certainty that you have an
6 agent some place doesn't give you a residence. You could
7 put an agent in the most far-away corner of the State for
8 service of process, but that would not give you a
9 residence, in the same way that a domestic corporation is
10 entitled to say we reside in this State.

11 And I would just follow that with a historical
12 point, Justice Scalia, is that this is an area where we're
13 talking about a tradition that goes back 100-some-odd
14 years in that as a logical matter if a State creates a
15 domestic corporation the logical inference is that it's
16 going to treat it as a residence.

17 That inference is still the rule, by the way,
18 under Federal venue statute 1400(b), that your residence
19 under 1400(b), as this Court made clear in Brunette, is
20 where you're incorporated, so I think this rule has both
21 the virtue of historical tradition and the virtue of
22 practical significance.

23 QUESTION: I don't understand Burlington
24 Northern to be saying that you have to pick a certain
25 criterion, nor do I understand that to have been what

1 Saunders said, but why isn't it reasonable to say look,
2 corporations are artificial entities -- they don't really
3 exist anywhere.

4 I mean, they don't have a residence, they're not
5 people, but if you're going to allow your domestic
6 corporation artificially to acquire a residence, and
7 thereby to be suable only in one place, you have to let
8 out-of-State corporations artificially acquire a
9 residence.

10 We don't care where it is. It could be where
11 they file with CT, if it's in Helena, or it could be where
12 their principal drugstore is, or it could be -- make up
13 whatever you want, but you have to allow them to acquire a
14 residence if you let your domestic corporations do that.
15 Why isn't that a rational rule?

16 MR. KLEIN: That may be a rational rule. I
17 don't think it's constitutionally compelled. Don't get me
18 wrong, I think a State could perfectly well have that
19 rule. The reason why it's not --

20 QUESTION: You're quite right. Let me put it
21 the other way. Why isn't it irrational to say we are only
22 going to let our domestic corporations acquire a
23 residence?

24 MR. KLEIN: I think the two reasons, Justice
25 Scalia, are 1) that domestic corporations, because they

1 have their executive offices, literally do have a
2 functional residence. You know, when it comes to a trial,
3 if I am the chief executive official or the general
4 counsel of a Montana corporation, my presence at the trial
5 may be important.

6 That's especially in a big case. My direct
7 access to trial counsel has practical convenience concerns
8 that relate to every venue kind of consideration. Those
9 are real. If you need the books and records of the
10 corporation, they're right there. They're accessible.

11 Now, it may be that an individual foreign
12 corporation has the same kind of practical necessities. I
13 don't believe Burlington Northern does, but as a rule,
14 foreign corporations don't claim to have the same kind of
15 practical necessity in terms of venue considerations and
16 accessibility, and I do want to emphasize, I think
17 Saunders is a very different case.

18 The statute in Saunders says wherever you have
19 an office you're suable. Now, that statute, it seems to
20 me once you say that it's impossible to say that just
21 because you have your certificate from another State you
22 shouldn't be suable wherever you have an office, but
23 there's nothing wrong with Montana's single residence
24 notion.

25 Once you buy that notion, then you have the rule

1 I gave you, and second of all you have the question of
2 administrative convenience. If I have my executive
3 offices in Montana, that's going to be where my business
4 is.

5 Now, Burlington Northern, when it has a regional
6 system of railroads, is not making Statewide decisions
7 about where to locate its office.

8 QUESTION: Mr. Klein, can I interrupt you right
9 on that point about, isn't it not possible that a
10 corporation in Montana could designate Helena as its
11 principal place when it incorporates and have its
12 corporate office there for that purpose, but in fact have
13 its major commercial offices located at the other end of
14 the State?

15 MR. KLEIN: I think that's possible, but I
16 think --

17 QUESTION: If that were true, which would be the
18 principal place of business?

19 MR. KLEIN: Helena would be the principal place,
20 where it has its executive offices.

21 QUESTION: Where it designated in its charter,
22 even though the president in fact worked in the --

23 MR. KLEIN: Oh, I think -- I don't know --

24 QUESTION: It's just, you can set up a Delaware
25 corporation and have the necessary papers filed down there

1 to have that your headquarters for corporate purposes but
2 yet you really run your business out of Detroit or some
3 place.

4 MR. KLEIN: No, I misunderstood your question.
5 Let me change my answer, Justice Stevens. I think the
6 question is where, in fact, are your executive offices?

7 QUESTION: Right, so it's even true within
8 Montana that you could have the same kind of -- for a
9 domestic corporation you have the same situation you could
10 have for a foreign corporation, where it designates a
11 registered agent in Helena but it actually has all its
12 corporate business run out of another city.

13 MR. KLEIN: But in fact the way that works is
14 that you get sued at that other city. You get sued where
15 your executive offices are located. There's never been a
16 case -- in other words, everybody in Montana whose --

17 QUESTION: Then I don't understand the
18 difference as you explained it to Justice Scalia when you
19 posited each, the domestic and the foreign, could have the
20 same situation with a designated registered agent in town
21 A but have most of their business in town B.

22 MR. KLEIN: No, my point is not -- is where the
23 difference that I'm relying on, I'd like to make it clear,
24 is where are the executive officers of the corporation.
25 That is critical to venue, because those are the people

1 that are most responsible for the litigation. That's
2 where the books and records are most likely to be.

3 QUESTION: Then why isn't that true of a
4 division in Montana also?

5 MR. KLEIN: It may or may not be, but you have
6 to understand we're talking about two classes of
7 corporations.

8 QUESTION: I understand, and we're also talking
9 about Montana, but the same rule presumably could apply to
10 Michigan or New York as well, where you have, you know,
11 the same kind of problems.

12 MR. KLEIN: I think it could and I think it
13 does, but the difference is, as a class of corporations,
14 if we know the following thing, that they have an office
15 in the State, is there reason to think that that office is
16 a litigation hub in the same way that there is to think
17 that an executive office where the people who ultimately
18 must answer for the corporation are located, and I think
19 it's not, and I think Montana simply says it's rational
20 for us to conclude we've got two categories.

21 You always have to factor in venue, and I think
22 this may also address some of -- I hope address some of
23 Justice Scalia's concerns. You always have to factor in
24 venue. Every venue decision balances convenience.
25 There's somebody else out there called the plaintiff who

1 is essentially arguing I have convenience considerations
2 too, here, and while Montana --

3 QUESTION: We're primarily concerned with out-
4 of-State plaintiffs and out-of-State torts for the most
5 part, I take it. That's where this becomes significant.

6 MR. KLEIN: I don't think that's correct. I
7 think first of all this rule applies, that Burlington
8 Northern's talking about, this is a facial challenge. It
9 would apply to every in-State or out-of-State plaintiff,
10 every in-State or out-of-State tort.

11 QUESTION: I understand.

12 MR. KLEIN: And I think that their suggestion
13 that there's somehow -- there's some floodgate of out-of-
14 State litigation is, as I think we --

15 QUESTION: Well, certainly the plaintiff didn't
16 pick this forum because it was most convenient to the
17 plaintiff. I mean, neither the accident occurred there,
18 nor the plaintiff has any connection with this forum.

19 MR. KLEIN: That's not -- as a matter of fact,
20 that happens not to be correct, Justice Stevens. First of
21 all, the plaintiff lives in Sheraton. That's about 110
22 miles from Billings. That's the -- the nearest big city
23 is in Billings.

24 Second of all, the plaintiff went there for
25 medical treatment on his knee. Both plaintiffs did, so

1 their doctors were actually in Billings. So in this
2 particular instance, although I don't think that should
3 decide the constitutional issue, there was actually a
4 nexus.

5 QUESTION: Mr. Klein, do you think the equal
6 protection standard was properly stated in Saunders? It
7 said that the classification should not be arbitrary, but
8 it should be based on a real and substantial difference
9 having a reasonable relation to the subject of the
10 particular legislation. Is that the --

11 MR. KLEIN: That's not the current standard,
12 Justice White.

13 QUESTION: So do you think that Montana's law
14 could pass the standard stated in Saunders?

15 MR. KLEIN: I do, but I don't think it has to.
16 I think it has to pass a much lower threshold, and I think
17 that's the point of Justice Holmes' unanimous opinion in
18 Bain Peanut.

19 First of all, all venue laws are going to be
20 somewhat arbitrary. There's no way around it. It's a
21 rule of general application that can't be tailored to each
22 individual situation.

23 Second of all, venue laws necessarily are going
24 to inconvenience one party in part at the expense of the
25 other, and I suggest to you the reason why, since Bain

1 Peanut, this Court has not had a single one of these
2 cases, even though there's lots of venue laws where you
3 could mount a similar type argument -- you could say, I'm
4 an out-of-State resident. I live in Wyoming, but the
5 truth is, I've got a fixed home in Montana where I
6 vacation three, four, five, six, eight months, and even
7 though I'm a resident in Wyoming, treat me as a resident
8 of Montana.

9 These kind of arguments, the books are rife with
10 these kinds of distinctions in venue law, and it just
11 seems to me all a State needs to say is look, there's a
12 plausible difference. Corporate law was built on the
13 notion that a principal place of business of a corporation
14 is different from just a place of business.

15 That's a plausible, rational distinction, and I
16 don't think Montana or any of these other laws can be
17 subject to a whole lot more rigorous scrutiny, otherwise
18 in a sense venue laws are always challengeable, anybody
19 can show. It's no different, I submit, from my
20 hypothetical that says look, to get social security -- in
21 *Califano v. Jobst*, if you're 18 years old, you no longer
22 get it whether you need it or not, and somebody could say
23 but I'm just like somebody who's under 18, and I need it.
24 That's exactly the kind of situation we have here.

25 QUESTION: Mr. Klein, what if you have a

1 Delaware corporation that has its principal -- it's
2 headquarters in Montana? They can still be sued anywhere
3 in Montana.

4 MR. KLEIN: The answer to that question,
5 frankly, is not directly posed by this case. In other
6 words, Burlington Northern is not such a corporation. I
7 think the answer is yes. I think the equal protection
8 clause in this area doesn't require the States to cut
9 precise corners.

10 However, if one were to think that that is a
11 constitutionally decisive case, I would suggest that the
12 right common law thing to do is to give Montana a chance
13 to face that question. I admit, that's a harder question
14 than the one we face, but I would think before you strike
15 a statute down on its face, Justice Scalia, you'd let the
16 State supreme court take a look at it.

17 These venue rules sort of evolved just the way
18 you'd think they evolve. We started out with a statute as
19 a territory that said if you had a residence you got sued
20 there. Then we created a corporation, where we said now,
21 is that like a residence, and we said yes.

22 Then we took another person and said he's not
23 like -- another corporation and said he's not like a
24 resident because his home's in Forth Worth. Now you're
25 saying, which is possible, that if somebody said look, I'm

1 a Delaware corporation but my executive offices are in
2 Montana, I'd say before we strike down the statute we give
3 Montana a chance to make that argument. That's not
4 petitioner's argument. It wouldn't benefit petitioner in
5 this case.

6 QUESTION: Well, Mr. Klein, I take it that a
7 Montana corporation with its principal place of business
8 in a particular county can only be sued there, is that it?

9 MR. KLEIN: That's exactly right.

10 QUESTION: Why should a corporation, just
11 because it's foreign, be capable of being sued in just any
12 county?

13 MR. KLEIN: Because I think the justifications
14 for limiting venues --

15 QUESTION: Well, I know, it may be that it's
16 very convenient to sue a domestic corporation at their
17 principal place of business, but does it necessary follow
18 that a foreign corporation that doesn't have a principal
19 place of business in Montana can be sued anywhere?

20 MR. KLEIN: It doesn't necessarily follow,
21 Justice White, I'm -- what I think --

22 QUESTION: Well, that's -- I take it it has to
23 follow --

24 MR. KLEIN: I think it follows this way --

25 QUESTION: According to your argument.

1 MR. KLEIN: Well, I think it follows in part. I
2 think it follows that Montana can say if you don't have a
3 chief executive office, then the plaintiff's convenience
4 is paramount and it should pick the forum.

5 But let me just say this, Justice White:
6 Burlington Northern is not --

7 QUESTION: Why shouldn't the equal protection
8 clause say that if you only allow a domestic corporation
9 to be sued in one county a foreign corporation may only be
10 sued in one county, and a foreign corporation is entitled
11 to state where it can pick out a county that it can be
12 sued in.

13 MR. KLEIN: Because I think that would say to
14 the State --

15 QUESTION: Or the State may designate a county
16 to be sued in.

17 MR. KLEIN: Well, there are two things: one is,
18 can the State designate it, the other is, can the foreign
19 corporation designate it. It seems to me the point that
20 was raised before is the foreign corporation can simply
21 say yes, we'll pick a place. Then they can --

22 QUESTION: Well, that's what -- you've let the
23 domestic corporation pick a place.

24 MR. KLEIN: We let them pick a place, Justice
25 White, because that's where they had their executive

1 offices. I don't think --

2 QUESTION: Well, is that true -- you say there's
3 never been any litigation on this. Is there anything to
4 prevent us from making the assumption that it's a
5 conclusive presumption of correctness that that is the
6 principal place of business simply because the corporation
7 so designates it?

8 MR. KLEIN: The only thing to prevent you from
9 saying that is the language in the Montana supreme court
10 opinion that says it's the principal place of business and
11 that term has not been designated in the code.

12 In other words, until this year the term
13 principal place of business meant in Montana would it
14 customarily meant in corporate law, and in the case I
15 cite, what the court in Montana said in the Mapston case
16 is it said a school district is just like a corporation.
17 We know where its principal place of business is in this
18 State. So I think it's not an arbitrary designation.

19 QUESTION: But there's no designation made in
20 the corporate papers or in any other filing by the
21 corporation.

22 MR. KLEIN: Until this year, you designated
23 exactly where your president, vice president and secretary
24 and treasurer were, so that would be, in fact, where your
25 place of business was.

1 This year you also designate your executive
2 offices as an office, but up until this year what you
3 would see on the form in Montana are the four chief
4 officials, which I think is in fact what the executive
5 offices are, and I think that's the point about venue.
6 Those are the people ultimately responsible for corporate
7 litigation.

8 If there are no further questions, Mr. Chief
9 Justice --

10 QUESTION: Thank you, Mr. Klein.

11 Ms. Christian, you have four minutes remaining.

12 REBUTTAL ARGUMENT OF BETTY JO CHRISTIAN

13 ON BEHALF OF THE PETITIONER

14 MS. CHRISTIAN: Thank you, Mr. Chief Justice.

15 I have just two points. First of all,
16 respondent has argued that the matter of convenience in
17 venue is entirely different for a foreign corporation and
18 for a domestic corporation on the theory that the
19 significant factor with respect to convenience in terms of
20 venue is where the chief executive officers and the
21 corporate records are, but I'd like to step back for a
22 moment and just look at what convenience in terms of venue
23 really means.

24 We're talking about convenience in the logistics
25 of a trial in a State district court, and what that really

1 means is the convenience of having an office in which your
2 witnesses can remain and continue to get their work done
3 until shortly before they're called on the stand to
4 testify instead of having to leave town at least one day
5 ahead of time, go to another city, and stay in a hotel
6 waiting to be called.

7 It means having physical facilities, your
8 secretaries and word processors available, in order to put
9 together exhibits, in order to prepare witnesses for
10 trial.

11 This is the sort of thing, the sort of
12 convenience and economy, related to venue, not where the
13 chief executive officer is, who is highly unlikely to be
14 involved, and not the place where the corporate books and
15 records are kept.

16 QUESTION: Well, if --

17 MS. CHRISTIAN: If you need the records --

18 QUESTION: Ms. Christian, it depends on the kind
19 of case, really. If it were a merger case or, you know,
20 fighting off a hostile takeover or something of that --
21 certainly the chief executive could be involved, whereas I
22 suspect the chief executive would not be involved in a
23 personal injury action.

24 MS. CHRISTIAN: That's correct, Mr. Chief
25 Justice, and our point is simply this, that in terms of

1 selecting -- of identifying convenience generally, the
2 convenience in terms of State district court litigation
3 needs to focus primarily on the convenience of logistics
4 in running the trial, not upon in particular -- where
5 particular individuals would be. It's the logistics.

6 QUESTION: You say it has to. You mean Montana
7 has no choice, it must focus on what you say it must focus
8 on.

9 MS. CHRISTIAN: Mr. Chief Justice, Montana has
10 complete discretion as to whether even to consider
11 convenience or not. Respondents have suggested that
12 convenience is the key consideration, and I was simply
13 responding to their argument in terms of, if that is the
14 justification, then it applies just as much to a foreign
15 corporation that also has a place, one place from which it
16 would be more convenient to centralize its litigation, and
17 the mere fact it's incorporated elsewhere, or even has its
18 national headquarters elsewhere, does not mean it does not
19 have a single point that would be more convenient.

20 My final point is simply this: the suggestion
21 has been made that the Saunders case was different from
22 this because in Saunders the venue for domestic
23 corporations was at any place where the corporation had a
24 fixed place of business -- pardon me, any place of
25 business, whereas for a foreign corporation it was any

1 county.

2 What this would mean in practice is that if you
3 have a relatively broad venue statute for a domestic
4 corporation so that the disparity with foreign is
5 relatively narrow, then it's a violation of the equal
6 protection clause, but if you have a vast disparity, the
7 difference between one county venue for the domestic
8 corporation and any county venue for the foreign
9 corporation, then that passes constitutional muster, and
10 that simply does not square with any realistic notion of
11 equal protection.

12 If there are no further questions, thank you
13 very much.

14 QUESTION: One question.

15 MS. CHRISTIAN: Yes.

16 QUESTION: Did you consider arguing that this
17 venue statute violated the commerce clause?

18 MS. CHRISTIAN: Traditionally, Justice Thomas,
19 this Court has considered venue laws, challenges to venue
20 laws, under the equal protection clause rather than the
21 commerce clause.

22 We think that there may be commerce clause
23 implications here, but from a policy standpoint, this is
24 the way this Court has treated it, and since it avoids a
25 case-by-case determination of whether there is a burden on

1 interstate commerce in any particular venue law perhaps as
2 applied to any particular case, we suggest that from a
3 policy standpoint equal protection is really what venue
4 laws is all about.

5 CHIEF JUSTICE REHNQUIST: Thank you,
6 Ms. Christian. The case is submitted.

7 MS. CHRISTIAN: Thank you.

8 (Whereupon, at 11:55 a.m., the case in the
9 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of: 91-779

Burlington Northern Railroad Company, v. William D. Ford and Thomas L. Johnson

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)