

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GRANITE STATE INSURANCE COMPANY, Petitioner v.
TAND CORPORATION

CASE NO: 91-2086

PLACE: Washington, D.C.

DATE: Tuesday, February 23, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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GRANITE STATE INSURANCE :
COMPANY :
Petitioner :
v. : No. 91-2086
TANDY CORPORATION :

- - - - -X

Washington, D.C.
Tuesday, February 23, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:20 a.m.

APPEARANCES:

ANN E. WEBB, ESQ., Houston, Texas; on behalf of the
Petitioner.
LYNNE A. LIBERATO, ESQ., Houston, Texas; on behalf of the
Respondent.

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

2 (10:20 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 91-2086, the Granite State
5 Insurance Company v. the Tandy Corporation. Ms. Webb.

6 ORAL ARGUMENT OF ANN E. WEBB

7 ON BEHALF OF THE PETITIONER

8 MS. WEBB: Mr. Chief Justice, and may it please
9 the Court:

10 There is only one issue in this case which is
11 truly uncontested. Granite State and Tandy had been
12 engaged in a significant coverage dispute for over 2 years
13 beginning several months before Granite State filed suit.

14 In an effort to resolve an escalating problem,
15 Granite State filed a declaratory judgment action in
16 Federal court using a remedy expressly granted by Congress
17 in the Declaratory Judgment Act. Both jurisdiction and
18 venue were proper in Houston. Nonetheless, the district
19 court stayed this action in deference to a later-filed
20 State court action filed almost a month later by Tandy in
21 Fort Worth, Texas. The Fifth Circuit affirmed.

22 By giving the district court virtually
23 unfettered discretion to defer to the State courts, the
24 Fifth Circuit has judicially eviscerated an affirmative
25 legislative remedy. Granite State is here today asking

1 this Court to reinstate the Declaratory Judgment Act.

2 There are two questions presented by this
3 appeal. The first is whether a district court with
4 unquestioned jurisdiction can abstain from hearing an
5 action validly before it simply because of the presence of
6 a later-filed State court action. The second issue is
7 whether the abstention decision of the district court is
8 reviewed de novo or for abuse of discretion.

9 Because of the importance of the comity and
10 Federalism issues presented by abstention decisions, it is
11 important that courts of appeals stringently address --
12 stringently review the decision of the district court.

13 The pendency of a parallel action is always a
14 consideration in an abstention decision. There is no
15 abstention decision unless there is a parallel State court
16 action. This cannot be an exceptional circumstance which
17 will justify abstention from a Federal court's unflagging
18 obligation to exercise its valid jurisdiction.

19 In determining whether an abstention decision is
20 appropriate, a Federal court must begin with one of the
21 fundamental precepts of our Federal judicial system, and
22 this Court has stated that Federal courts have no more
23 right to decline the exercise of valid jurisdiction than
24 to usurp that which is not given. The one or the other is
25 treasonous to the Constitution.

1 Abstention is an extraordinary and narrow
2 exception to a Federal court's unflagging obligation to
3 exercise its valid jurisdiction.

4 QUESTION: Well, Ms. Webb, are you assuming that
5 an action for a declaratory judgment in that respect is
6 the same as an action for an injunction or for damages
7 because the declaratory judgment statute which you set
8 forth in your brief at page 3 says that the district court
9 may declare the rights. It certainly suggests discretion
10 to do so or not to do so, doesn't it?

11 MS. WEBB: Your Honor, there seems to be some
12 discretion in the declaratory judgment statute. We
13 believe the discretion is not whether or not a district
14 court may hear the case, but whether or not the district
15 court may grant the release asked for.

16 There are many occasions in which declaratory
17 relief is sought, but declaratory relief isn't appropriate
18 for one reason or another. For example, in the Grow case,
19 it's -- the Voting Rights Act precludes the granting of
20 declaratory relief. The State legislative prerogative
21 precludes the granting of declaratory relief. A case
22 cited by my co-counsel, Mansour v. Green, the Eleventh
23 Amendment barred the granting of declaratory relief.

24 We believe that is where the discretion lies.
25 The courts do not have discretion whether or not to

1 decline jurisdiction. Jurisdiction is mandatory.

2 QUESTION: What do you do with the Brillhart
3 case?

4 MS. WEBB: We believe that the Brillhart case, a
5 decision almost 50 years old at this point, cannot be read
6 in a vacuum. It must be read in light of this Court's
7 intervening decisions, in Colorado River, Moses Cone, and
8 most recently in the NOPSI decision, in which this Court
9 has applied a different type of analysis to cases
10 involving the Declaratory Judgment Act. They have not
11 relegated declaratory judgment cases to the unfettered
12 discretion of the district judge as Brillhart seemed to
13 do.

14 QUESTION: Well, were all of the cases that you
15 described as the more modern cases, did those all involve
16 declaratory judgments?

17 MS. WEBB: Colorado River did not. Moses Cone
18 was begun as a declaratory judgment action seeking a
19 declaration that the Arbitration Act applied. NOPSI, the
20 New Orleans public service case issued by this Court in
21 1989, was expressly seeking declaratory and injunctive
22 relief.

23 QUESTION: Ms. Webb, I don't quite understand
24 how you express -- how you expect this to work. After
25 hearing all the evidence the district court says, well, in

1 light of the fact that there is a State court action
2 pending, I don't think it's a good idea to issue the
3 declaratory judgment you want and therefore, exercising
4 the discretion I have not to issue the declaratory
5 judgment, though I don't have any discretion whether to
6 take all the evidence, I won't give you the declaratory
7 judgment. Is that how it works?

8 MS. WEBB: I don't believe so. In the first
9 place --

10 QUESTION: I hope not, because that would be an
11 awful waste of time if they have discretion not to issue
12 it, why don't they have discretion not to hear it?

13 MS. WEBB: Well, in the first place you have to
14 start with the proposition that jurisdiction is
15 unflagging, and you have to go from there into --

16 QUESTION: We've never said its unflagging.
17 We've said it's virtually unflagging and really haven't
18 even behaved as though it was.

19 MS. WEBB: Well, certainly in Moses Cone and
20 NOPSI this Court has reversed abstention decisions in
21 declaratory judgment cases, which -- and the Court has
22 continuously emphasized the importance of the obligation
23 to exercise jurisdiction. The --

24 QUESTION: Well, you must take the position,
25 then, that after taking all of the evidence and proceeding

1 with the trial, the district court does not have the
2 discretion to deny the declaratory relief, either, if the
3 reason he's going to deny it she's going to deny it that
4 there's a State action pending, right?

5 MS. WEBB: I don't believe that the fact that
6 there's a State action pending is a sufficient reason to
7 deny declaratory relief.

8 QUESTION: Why do you say that?

9 MS. WEBB: Because this Court has continuously
10 emphasized that the presence of a parallel action is no
11 bar to the Federal court's ruling on an issue.

12 QUESTION: It seems to me a very good reason to
13 deny the declaratory relief, that there's a prior action
14 pending, comity, consideration for the State. Why isn't
15 that a perfectly valid equitable consideration? If it's a
16 valid consideration for not issuing the injunction for the
17 declaratory relief, certainly it's a valid consideration,
18 it seems to me, for not accepting jurisdiction in the
19 first place.

20 MS. WEBB: Well, we would certainly disagree
21 with your position that it's a valid reason for declining
22 to issue the requested relief, but the issue is not
23 whether or not the district court -- I'm sorry.

24 The State court action was the second action
25 filed in this case. Granite State filed first in Federal

1 court using an affirmative remedy under the Declaratory
2 Judgment Act.

3 The presence of a later-filed State court action
4 is not a reason to decline to hear a first-filed
5 declaratory judgment action.

6 It makes no sense, and it certainly does not
7 comport with the obvious congressional purpose in giving
8 Federal litigants a right to a declaratory judgment action
9 when they have valid jurisdiction to say that a litigant
10 who comes to a Federal court seeking help, a litigant who
11 says, I don't know -- I'm between a rock and a hard place
12 here. I have a choice. I can pay my assured \$10 million
13 on the one hand with no hope of ever getting it back, or I
14 can deny coverage and get nailed with a bad faith lawsuit
15 in State court.

16 Granite State being faced with that position
17 chose what we believe to have been the prudent course of
18 asking the Federal court for help.

19 QUESTION: What if the State court action had
20 been filed first?

21 MS. WEBB: In that case, Your Honor, there is a
22 good argument for leaving it in the State court.

23 QUESTION: So then it's not an unflagging
24 obligation. There may be considerations based on State
25 court litigation.

1 MS. WEBB: We would suggest that the Declaratory
2 Judgment Act represents such an important congressional
3 intent that litigants who have Federal jurisdiction be
4 allowed to retain their Federal jurisdiction and proceed
5 in Federal court, that abstention would not be appropriate
6 even in a later-filed State court action. The argument is
7 much stronger that the Federal court should defer if there
8 is a first-filed State court action.

9 QUESTION: But you don't -- you would say they
10 shouldn't defer even then.

11 MS. WEBB: I would say they shouldn't defer even
12 then.

13 QUESTION: Wasn't there just a stay in this
14 case?

15 MS. WEBB: There was just a stay in this case,
16 but because --

17 QUESTION: So it really isn't an abstention case
18 in the sense that you dismissed the case.

19 MS. WEBB: It has the same effect as an
20 abstention case because res judicata --

21 QUESTION: But it isn't an abstention case.
22 It's just a stay. They are retaining their jurisdiction.
23 They did not dismiss.

24 MS. WEBB: They did not dismiss. The district
25 court stayed, but because of the presence of res

1 judicata -- because of the doctrine of res judicata, any
2 ruling by the State court is going to effectively keep
3 Granite State out of its Federal forum. We will not be
4 able to relitigate our issues in the Federal forum.

5 QUESTION: Well, then you go back to the
6 question that Justice Scalia raised initially. I don't
7 really understand what the rule is you're proposing.

8 If a district judge finds, after looking at the
9 face of the pleadings, that it's most unlikely that he
10 will enter this declaratory judgment, then it seems to me
11 that he should stay the action, but you seem to think that
12 he has to proceed through the motions of hearing evidence
13 and come right up to the time when he's ready to issue his
14 decision. That doesn't make sense.

15 MS. WEBB: What we are suggesting is that the
16 district court has to engage in abstention analysis before
17 they can make a decision whether to abstain or not.

18 QUESTION: But it's not --

19 MS. WEBB: Not that he has --

20 QUESTION: But you call it abstention analysis.
21 Suppose he calls it declaratory judgment statute analysis.
22 There are factors that indicate whether or not it's
23 prudent, under the declaratory judgment statute, for me to
24 make this ruling, for me to make this expenditure of time
25 and resources of the courts and the parties, and those

1 factors indicate to me that I should not do this. I'll
2 just let the case hang on the docket and see what happens
3 in the State proceeding.

4 MS. WEBB: That's exactly what the district
5 court has done in this case, and we believe that the
6 district court's analysis was incorrect, because he
7 ignored the court's unflagging obligation to exercise
8 jurisdiction. We think that the --

9 QUESTION: Well, to begin with, he hasn't
10 dismissed the case. He is retaining jurisdiction.

11 MS. WEBB: It does not matter in -- certainly
12 not in the Moses Cone analysis, which was also a stay, and
13 which this Court decided resolved under the Colorado River
14 plus two additional factors.

15 The Moses Cone-Colorado River analysis involved
16 stays, not dismissal. I don't recall whether NOPSI was a
17 stay or a dismissal at this point, but the functional
18 effect of a stay in a case such as this one is of a
19 dismissal. There should be no difference in the analysis.

20 QUESTION: Do you agree that the Colorado River
21 factors should govern?

22 MS. WEBB: In the first instance, we would
23 prefer to say that the legislative policy of the
24 Declaratory Judgment act, coupled with valid Federal
25 jurisdiction, means that the Federal court cannot dismiss

1 or stay a case of this nature.

2 However, we recognize that this Court has
3 indicated in Colorado River and Moses Cone in a
4 declaratory judgment case that there may be some certain
5 circumstances in which there is an extraordinary state
6 interest or other exceptional circumstances in which there
7 is an extraordinary State interest or other exceptional
8 circumstances in which abstention is appropriate, and we
9 suggest that those factors come from Moses Cone and
10 Colorado River and must be analyzed.

11 QUESTION: So if the Colorado River factors
12 happen to balance out against you, why, you wouldn't be
13 here, I guess.

14 MS. WEBB: Well, the Colorado River doctrine
15 states, when it's coupled with Moses Cone, that the
16 obligation to exercise jurisdiction is unflagging, and the
17 factors must be exercised or weighed in light of that
18 unflagging obligation. In other words, if the factors are
19 evenly balanced, or if the factors do not apply, such as
20 jurisdiction over property --

21 QUESTION: My proposition was that let's assume
22 that the Colorado River factors clearly balance out
23 against you.

24 MS. WEBB: If the factors --

25 QUESTION: You would say you would lose the

1 case.

2 MS. WEBB: Yes, sir.

3 QUESTION: Which is to say it's not really an
4 unflagging obligation. You would say the obligation
5 flags --

6 MS. WEBB: But only --

7 QUESTION: If you lose on the Colorado River
8 factor, right?

9 MS. WEBB: The obligation only flags if
10 extraordinary circumstances exist, and the Court has
11 identified those extraordinary circumstances in the
12 various abstention doctrines -- Pullman, Burford,
13 Younger -- and the factors of Colorado River and Moses
14 Cone.

15 I think the NOPSI decision, which was quite
16 straightforwardly a declaratory and injunctive relief
17 lawsuit in which this Court did not defer to the district
18 court's discretion but instead analyzed it de novo in
19 light of the Burford and Younger abstention doctrines,
20 indicates clearly that the declaratory judgment cases are
21 not committed to the unfettered discretion of the district
22 court but rather must be analyzed under traditional
23 principles of the Federal court's jurisdiction is
24 mandatory unless exceptional circumstances exist, and no
25 exceptional circumstances were identified by the district

1 court.

2 QUESTION: And you think that that call is
3 different from the call as to whether you issue the
4 declaratory relief. You must acknowledge that whether you
5 will issue the declaratory judgment is not governed by any
6 jurisdictional principles --

7 MS. WEBB: Yes.

8 QUESTION: It's governed by equitable
9 principles --

10 MS. WEBB: Yes.

11 QUESTION: Right?

12 MS. WEBB: Yes. Yes, right.

13 QUESTION: Okay. So you say there is a
14 different standard for whether you issue the injunction
15 than for whether you agree to hear the whole case in the
16 first place.

17 MS. WEBB: That's correct.

18 QUESTION: So then we are confronted with the
19 problem that troubled Justice Kennedy and me that you're
20 going to make judges go through a whole trial, even though
21 it's very clear that at the end of it, by virtue of their
22 equitable discretion, they are not going to issue the
23 declaratory judgment --

24 MS. WEBB: I think that's --

25 QUESTION: And there's no way to avoid that.

1 MS. WEBB: I'm not sure that there's no way to
2 avoid that. For instance, if the Eleventh Amendment
3 sovereign immunity controls, and you have a declaratory
4 judgment action against a State, there's no reason why
5 that can't be addressed on summary judgment immediately.
6 There's nothing to prevent that issue from being resolved
7 before a full-blown trial on the merits.

8 QUESTION: Oh, but that --

9 MS. WEBB: It depends on the type --

10 QUESTION: But that's not an equitable issue.
11 You're talking there a legal issue with respect to
12 jurisdiction. I'm talking about the equitable call is
13 clear at the outset. The judge knows that the court will
14 not issue a declaratory judgment, and you say the Court
15 must nonetheless accept jurisdiction and go ahead.

16 MS. WEBB: I believe so. I believe the court
17 has an obligation to do that.

18 QUESTION: But are you saying that even on the
19 facts of this case? I mean, can't you tell at the
20 beginning, assuming your client is right, would there be
21 any reason why the judge wouldn't have discretion not to
22 grant your relief if he goes ahead with the trial?

23 MS. WEBB: This case involves a marine insurance
24 contract dispute.

25 QUESTION: Right.

1 MS. WEBB: Granite State claims the policy is
2 void ab initio because Tandy misrepresented certain
3 material facts --

4 QUESTION: Right.

5 MS. WEBB: In the formation of the policy. It's
6 a fairly simple contract --

7 QUESTION: You're not suggesting that if you win
8 on those -- if you prove what you've alleged he'd have
9 discretion not to give you relief on these facts, are you?

10 MS. WEBB: No, I'm not saying he would have
11 discretion. In fact, that raises a point that I'd like to
12 address briefly.

13 If Granite State had filed this lawsuit not as a
14 declaratory judgment action but as a breach of contract
15 lawsuit seeking to have the policy rescinded under
16 traditional contract principles, the Court would have had
17 no discretion to have abstained. The Court would have had
18 to have taken it up, and Granite State chose to file this
19 as a declaratory judgment action because we did not want
20 to further escalate the hostilities between the parties.

21 That judgment call, whether it be a declaratory
22 judgment action or a breach of contract suit should not
23 make the difference in whether or not this case gets to
24 stay in Federal court. There is nothing to prevent --
25 there is no reason why equitable relief in the form of

1 declaring the policy void ab initio should not be entered
2 in this case.

3 QUESTION: But that's contrary to a long line of
4 authority at common law, that the issuance of an
5 injunction and the declaratory judgment statute indicates
6 that you use the same principles there as -- is a matter
7 of discretion with the court. There are all sorts of
8 reasons why you may not issue an injunction even though
9 the party has made out a good case on the law, as opposed
10 to the common law claim for damages where there isn't any
11 discretion.

12 MS. WEBB: That's correct, but we would --

13 QUESTION: Then what does that do to your
14 position, if that's correct?

15 MS. WEBB: The court has to make the decision
16 whether the equitable considerations exist or not, and the
17 district court never got to that point.

18 The district court said, I don't want to hear
19 this court -- this case because Granite State raced to the
20 courthouse, because Granite State took advantage of a
21 proactive, preemptive remedy which is expressly designed
22 to get litigants into court before another lawsuit is
23 filed, and because Tandy filed a second lawsuit you're not
24 entitled to be in a Federal forum. That's the only basis
25 for the district judge's decision.

1 QUESTION: Even if the court hadn't stayed the
2 action, if the State court suit went ahead and finished
3 first and it was against you, why, there would be res
4 judicata, wouldn't there?

5 MS. WEBB: Yes, it would, and that is one of the
6 ever-present problems in a dual judicial system.

7 QUESTION: Well, sure. Sure --

8 MS. WEBB: This court has addressed that
9 numerous times.

10 QUESTION: But you wouldn't suggest that the
11 Federal court could stay the State court action, would
12 you?

13 MS. WEBB: Certainly not, not unless Younger
14 applies, not unless the, you know, traditional kind of
15 equitable considerations with Federal courts enjoining
16 State courts applied.

17 QUESTION: If this action had been in State
18 court -- there's no Federal court. Just assume that
19 Granite had gone first to a State court and asked for
20 equitable relief, declaratory relief, rescission of the
21 contract, there had been a counterclaim for damages.

22 I think it would have been perfectly in order
23 for the State trial judge to say well, we have legal
24 issues here and equitable issues here, I'm going to let
25 the jury make the first determination. Depending on what

1 it does, it may or may not be necessary for me to make
2 further orders.

3 And it seems to me that in all likelihood the
4 trial judge would let the jury hear the case initially,
5 and it seems to me that in effect that's all that's
6 happening here. You just have two courts where the claims
7 for relief are divided, rather than being all in one, and
8 it seems to me perfectly sensible for the district court
9 to say, oh, I'll wait for the legal action to proceed.

10 MS. WEBB: It may be sensible for the district
11 judge to have done that, but we believe that Congress has
12 given an affirmative remedy in the Declaratory Judgment
13 Act which is designed to give litigants -- Granite State
14 has never denied coverage in this lawsuit, yet nonetheless
15 we are facing a significant, substantial exposure of
16 \$110 million in the State court action because Tandy has
17 sued us for bad faith failure to pay them the \$10 million
18 they want. We believe that the --

19 QUESTION: Ms. Webb, would you have felt better
20 if the district judge here, after hearing the same
21 arguments that it heard with regard to the jurisdictional
22 point, had decided the case not on a jurisdictional
23 ground, but rather, on the merits, and said after hearing
24 all this argument about this pending State action, I am
25 going to decline to issue a declaratory judgment while

1 this State act is pending, and therefore I dismiss this
2 lawsuit without prejudice.

3 You can refile it for declaratory judgment after
4 the State proceeding is completed. I've accepted
5 jurisdiction, I am denying you your declaratory judgment
6 on the merits. Would you have any problem with that?

7 MS. WEBB: I'm a little bit confused about your
8 question, because I believe you said that the district
9 court declined to enter the declaratory relief because of
10 the pending State court action --

11 QUESTION: No --

12 MS. WEBB: Not because he had decided on the
13 merits. Is your question, he's --

14 QUESTION: No, but he has decided on the merits
15 of whether equity calls for the issuance of a declaratory
16 judgment. He's not deciding on a jurisdictional ground.
17 He's saying, I've accepted jurisdiction, I have on my hat
18 as a court of equity, and as the chancellor, I decide this
19 is not the kind of a case in which a declaratory judgment
20 should issue -- on the merits.

21 MS. WEBB: I would feel better in that
22 situation, although we would still be probably before this
23 Court appealing it. It results -- has the same effect on
24 Granite State, the same adverse effect on Granite State,
25 but the district judge has then engaged in the correct

1 analysis, which Judge Hittner did not do here.

2 QUESTION: So that's all we're fighting about,
3 whether you want to conduct the same argument under the
4 rubric of jurisdiction or whether you want to conduct it
5 under the rubric of equitable discretion.

6 MS. WEBB: I believe what we're trying to do is
7 get -- give district court some guidelines as to what
8 they're supposed to in declaratory judgment cases. The
9 circuits are significantly split on this issue, and some
10 of them just use unfettered discretion, and some of them
11 use the Colorado River-Moses Cone factors.

12 QUESTION: Ms. Webb, you say Congress has
13 furnished this remedy, but it seems to -- don't you think
14 Brillhart was a statutory construction case? Didn't it
15 construe the Declaratory Judgment Act?

16 MS. WEBB: Yes, Brillhart did in fact construe
17 the Declaratory Judgment Act.

18 QUESTION: And it said there's discretion.

19 MS. WEBB: Well, Brillhart --

20 QUESTION: Well, is -- I know, but isn't that
21 true?

22 MS. WEBB: Yes, it is true. Brillhart did --

23 QUESTION: And we usually don't overturn
24 statutory construction cases very readily. We leave it up
25 to Congress. If they don't like it, they change it, and

1 this was an authoritative construction of this statute
2 that Congress has left standing all these years.

3 MS. WEBB: The Brillhart court stated
4 specifically that they did not in that case pretend to
5 enumerate all the factors that go into this district
6 judge's discretion. That's one of the last paragraphs of
7 the decision. We do not now intend to enumerate all
8 factors the district court should consider in exercising
9 his discretion.

10 We believe that this Court's opinions in later
11 abstention-type cases, specifically Colorado River and
12 Moses Cone, and then NOPSI put on top of that, indicate
13 that declaratory judgment cases have been interpreted by
14 this Court to be the same type of case as any other case
15 validly within the Federal jurisdiction, and they must be
16 viewed with a light toward the Court's unflagging
17 obligation to exercise jurisdiction and in light of the
18 Moses Cone-Colorado River factors.

19 That does not require overruling -- overturning
20 Brillhart. I believe that it is a fair assessment -- or
21 fair statement that the intervening decisions of Colorado
22 River and Moses Cone and NOPSI just show -- just expand
23 upon the Brillhart analysis, but do not overturn it.

24 QUESTION: But you don't think -- you're
25 suggesting, however, I suppose, that in light of the later

1 cases the degree of discretion that a district judge has
2 in a declaratory judgment case is not the discretion that
3 Brillhart suggests.

4 MS. WEBB: Brillhart I believe reversed an
5 abstention decision and sent it back to the district
6 court, but yes, I would agree with you that the discretion
7 imposed by Moses Cone, Colorado River and NOPSI is
8 different from the one --

9 QUESTION: So we -- you suggest we have really
10 revisited our statutory construction decision in
11 Brillhart.

12 MS. WEBB: I believe it's --

13 QUESTION: Unknowingly, yes.

14 QUESTION: Unknowingly.

15 MS. WEBB: I believe it's -- I think so. I
16 mean, there have been several declaratory judgment cases
17 this Court has addressed in recent years, and not a single
18 one of them has been decided under the Brillhart analysis.
19 They have -- they've used Burford, they've used Pullman,
20 they've used Younger, or they've used Colorado River-
21 Moses Cone. They have not used the Brillhart analysis.

22 QUESTION: Because four of the -- the four
23 dissenters in Calvert thought Brillhart stood on its own
24 two feet, didn't they?

25 MS. WEBB: The Calvert decision is, we believe,

1 somewhat aberrational when compared with the others.

2 QUESTION: Well, was the dissent aberrational?

3 MS. WEBB: I -- the Calvert decision, I think
4 that the plurality -- I'm sorry, I'm having a little
5 trouble remembering who was where in that case.

6 QUESTION: Well, I think -- my recollection,
7 Justice Blackmun made the majority, so that you had four,
8 four, and one, and the dissenting four, as I read the
9 dissent, thought Brillhart stood on its own feet.

10 QUESTION: You should say dissent is always
11 aberrational, Ms. Webb.

12 (Laughter.)

13 MS. WEBB: I just didn't want to suggest that
14 when several of the dissenters were present on the Court
15 today.

16 QUESTION: You can tell who just announced two
17 opinions of the Court this morning.

18 (Laughter.)

19 MS. WEBB: The Calvert case -- the decisions
20 that come after Calvert seem to indicate -- my opinion
21 that Calvert is a bit off the mark is not an unusual
22 opinion. The following decisions say that Moses Cone-
23 Colorado River are still good law and that Brillhart may
24 not be as strong a proposition as my opponents would have
25 you believe.

1 QUESTION: Have you abandoned your suggestion in
2 your brief that there's a Federal issue in the case?

3 MS. WEBB: No, sir, we have not. We have
4 certainly not abandoned that issue.

5 QUESTION: You haven't paid much attention to
6 it.

7 MS. WEBB: That's because I've been asked a lot
8 of questions about the abstention doctrine.

9 (Laughter.)

10 MS. WEBB: The --

11 QUESTION: But you would think it wouldn't make
12 any difference whether there was or not. At least it may
13 be a factor on your side.

14 MS. WEBB: It certainly is a factor on our side,
15 and I believe Moses Cone --

16 QUESTION: Under Colorado River it's a factor on
17 your side.

18 MS. WEBB: It certainly is. Moses Cone says
19 that if there's a Federal law issue -- an issue of Federal
20 law present then this Court is virtually -- the Federal
21 courts are virtually obligated to take on a case, and we
22 certainly have not abandoned our position that Federal
23 maritime law applies to this case, and it applies to this
24 case because of the choice of law provision in the
25 contract.

1 The contract provision is somewhat ambiguous,
2 and the issue of choice of law is hotly contested by my
3 opponents, but we firmly believe that Federal maritime law
4 applies to the formation of this policy.

5 QUESTION: But even if it's a State law issue
6 and no Federal issue, you think you should win under the
7 declaratory judgment cases.

8 MS. WEBB: Yes, sir.

9 QUESTION: But even the Federal choice of law
10 issue simply remits you to the law of one or another
11 competing States, does it not?

12 MS. WEBB: No, it does not. In this case we
13 have a worldwide contract for the transportation --
14 worldwide policy for the insurance of goods in --

15 QUESTION: What's your position on the conflict
16 of law issue?

17 MS. WEBB: My position is Federal maritime law
18 applies, but because the place of the loss is Korea and
19 the parties are diverse, there could be several choices of
20 law. If it's not Federal maritime, it could as easily be
21 Korean law as Texas law.

22 QUESTION: All right.

23 MS. WEBB: I'd like to reserve the remainder of
24 my time for rebuttal.

25 QUESTION: Very well, Ms. Webb. Ms. Liberato.

1 ORAL ARGUMENT OF LYNNE A. LIBERATO

2 ON BEHALF OF THE RESPONDENTS

3 MS. LIBERATO: Mr. Chief Justice, and may it
4 please the Court:

5 At the heart of this case is an understanding of
6 the purpose of declaratory relief under the Declaratory
7 Judgment Act. The purpose of a declaratory judgment is to
8 settle and to clarify legal issues. It is to provide
9 relief from uncertainty and from insecurity.

10 But here, what Granite State is trying to do is
11 to turn these wholesome purposes of declaratory judgment
12 relief on its head, and instead of simplifying the issues,
13 declaratory relief in this case would complicate. Instead
14 of clarify, it would confuse.

15 To have a declaratory judgment action take place
16 in this case would increase costs, and it would waste
17 judicial resources and personal resources and the
18 resources of the parties. This is an attempt to forum-
19 shop by Granite State. It is a tactical attempt to, if
20 you will, divide and conquer, and to seek safe harbor, to
21 use an admiralty term, but to seek safe harbor in the
22 Federal courts.

23 QUESTION: Well, that's okay, isn't it?

24 MS. LIBERATO: It's okay --

25 QUESTION: I mean, that's why we have Federal

1 courts, because some people don't trust State courts, so
2 do we get mad when they come into Federal court?

3 MS. LIBERATO: We don't, but there are times
4 when it's appropriate to consider that and times when it's
5 not, and in this particular case it's a misuse of the
6 declaratory judgment action to seek that safe harbor.
7 Certainly it's not inappropriate to seek it under the
8 right circumstances.

9 This just isn't one of those circumstances,
10 because the declaratory judgment relief is discretionary,
11 and we know it's discretionary because it's specifically
12 provided for in the Declaratory Judgment Act, where
13 Congress says that any court of the United States may
14 declare rights and other legal relationships. It doesn't
15 say that it has to -- that it may declare rights, and so
16 whenever --

17 QUESTION: Well, why shouldn't it do it here,
18 other than the reason that there's forum shopping, because
19 I frankly don't find that a very persuasive one. Are
20 there any other reasons?

21 MS. LIBERATO: Well, there are many reasons,
22 and -- for example, the danger of piecemeal litigation,
23 the application of State law rather than Federal law, all
24 of these types of factors that you hear frequently
25 discussed in cases using Moses Cone and using Colorado

1 River, and even using abstention, those kinds of analysis
2 also apply to the determination of whether there should be
3 declaratory relief granted, at least the declaratory
4 judgment heard.

5 But it's also easy to kind of mix up apples and
6 oranges, because even though those common sense factors go
7 into the determination of whether it's appropriate --

8 QUESTION: May I ask you a question, just so --
9 I don't know whether it's actually in this record or not,
10 but supposing the State court had a 3-year delay on
11 getting to trial and the Federal court's calendar was
12 current, because one of the things they always did was
13 dismiss all of their declaratory judgment cases --

14 (Laughter.)

15 QUESTION: Would that be a factor that the judge
16 should weigh in deciding whether to dismiss?

17 MS. LIBERATO: I think so, yes, Your Honor. It
18 is not to say --

19 QUESTION: What was the condition here? Does
20 the record tell us which court was more current?

21 MS. LIBERATO: The record doesn't tell us that.

22 QUESTION: But he -- there's something he should
23 have considered but it's not in the record, so we don't
24 know.

25 MS. LIBERATO: Well, but in this particular case

1 what is in the record is the fact that there was
2 practically no progress in the Federal court action. The
3 only thing --

4 QUESTION: Well, how -- because you filed, what,
5 within 30 or 40 days, is that what it was?

6 MS. LIBERATO: The State court suit?

7 QUESTION: Yes.

8 MS. LIBERATO: Was about -- I think it was 21
9 days after the Federal suit was filed.

10 QUESTION: Would it make a difference if it was
11 90 days later?

12 MS. LIBERATO: I think it depends on the
13 progress that was made in the State action -- excuse me,
14 the progress that had taken place in the Federal action.

15 QUESTION: In other words, if the defendant in
16 the Federal action was able to get three or four
17 continuances before filing his answer, and then filed the
18 State action, that would still be a duty to dismiss and
19 let the State action go forward.

20 MS. LIBERATO: I think it depends on the other
21 factors that are present in the case. I'm not sure --

22 QUESTION: What are the factors here except for
23 the one fact that there's a State action pending?

24 MS. LIBERATO: Well --

25 QUESTION: And I guess you say you want to bring

1 in another party, too, don't you.

2 MS. LIBERATO: Bring in other parties, right.
3 The danger of piecemeal litigation certainly is here, but
4 that's present any time there's parallel cases. The forum
5 shopping aspect --

6 QUESTION: Should the Court give any
7 consideration to the reason why there is diversity
8 jurisdiction, the neutral forum argument? Does that have
9 any relevance?

10 MS. LIBERATO: It has relevance. I think that
11 is a factor to a degree.

12 QUESTION: Should the court give any
13 consideration of the possibility of a Federal question
14 being in the case?

15 MS. LIBERATO: It should consider it just
16 because that is yet another practical factor.

17 QUESTION: What consideration does the district
18 judge give to those factors in this case?

19 MS. LIBERATO: Well, in particular, the district
20 judge talked about three factors. He elaborated actually
21 on all those other factors as an alternative to his
22 primary decision, which is that under Brillhart it was
23 discretionary. There he talked about the piecemeal
24 adjudication, forum shopping, and needless decision State
25 law.

1 QUESTION: Is one party guilty of more forum
2 shopping than the other in this case?

3 MS. LIBERATO: Well --

4 QUESTION: Each of you has a forum you'd prefer.

5 MS. LIBERATO: That is true, but as the -- as
6 the, really the putative plaintiff in this case is the
7 claimant. Looking at the claim and not the claimant we
8 have a right, I believe, to pick our forum, and in certain
9 instances certainly the Federal plaintiff in this case,
10 Granite State, has the right to pick its forum, but then
11 once it picks its forum, then the district judge has the
12 discretion under Brillhart to determine whether that and
13 balancing all the other factors that are appropriate in
14 making that determination whether the State or the
15 Federal -- well, not really the State is appropriate, but
16 whether the Federal forum is appropriate and whether that
17 Federal action should go forward.

18 QUESTION: Are you defending the Fifth Circuit
19 judgment?

20 MS. LIBERATO: Yes, Your Honor, I am.

21 QUESTION: And the theory -- and the theory that
22 Colorado River doesn't apply at all to declaratory
23 judgment actions?

24 MS. LIBERATO: I think that it does not, except
25 for the fact that some of the factors that go into the

1 Colorado River analysis just logically go into a
2 determination of whether a district judge properly
3 exercises his or her discretion.

4 QUESTION: Well, the Fifth Circuit came awfully
5 close just to saying that there's complete discretion
6 to -- under the -- in the district court under the
7 declaratory judgment action as to whether to go ahead at
8 all.

9 MS. LIBERATO: I don't think it's complete
10 discretion. I think that they were saying that the
11 district court has a lot of discretion and that that
12 discretion is reviewed under an abuse of discretion
13 standard.

14 QUESTION: Well, at least it refused -- the
15 district court went through the Colorado River rigmarole,
16 didn't it?

17 MS. LIBERATO: Yes, Your Honor, it did as an
18 alternative --

19 QUESTION: And it came out on your side.

20 MS. LIBERATO: Yes. Yes, Your Honor.

21 QUESTION: And the Fifth Circuit didn't even get
22 to the Colorado River factors.

23 MS. LIBERATO: Right.

24 QUESTION: Do you think -- and you say it
25 needn't have.

1 MS. LIBERATO: I say it needn't have, except to
2 the limited degree that those are logical factors for a
3 trial court to consider in exercising its discretion.

4 The principles underlying the unflagging
5 obligation of the court to consider a case are different,
6 because this is a declaratory judgment action and a
7 declaratory judgment action is discretionary, and there's
8 a specific legislative mandate that makes that
9 discretionary, and that's why it's different, that the
10 whole difference in this case is the fact it's a
11 declaratory judgment action.

12 If it were not, we wouldn't disagree that the
13 court has an unflagging duty to exercise jurisdiction, but
14 the fact of the matter is, this is a declaratory judgment
15 action, and Congress has said that that is discretionary,
16 as has this Court in Brillhart.

17 And so if I may come back to your question,
18 Justice White, only to say that yes, the factors apply in
19 the sense of making a common sense determination, but as
20 far as using the standard, the unflagging obligation
21 standard in applying those factors, that does not apply to
22 this case.

23 QUESTION: Well, I suppose if the district court
24 had come out the other way, and had applied the Colorado
25 River factors against you, and you had appealed, the court

1 of appeals probably would have said, well -- would have
2 reversed, because the Colorado River factors shouldn't
3 decide the case.

4 MS. LIBERATO: Well, I agree to the point that I
5 think that if the district court had agreed to hear this
6 case and granted declaratory relief, that the Fifth
7 Circuit would have reversed, because I don't think it's
8 necessary to go that far in this case, but I think it
9 would be a fair policy to say that the presumption is
10 against the district court exercising its declaratory
11 judgment relief authority if there is a parallel State
12 court action, and so I do believe --

13 QUESTION: You say they would have reversed, but
14 there wouldn't have been an appealable order, would it?

15 MS. LIBERATO: Only after final disposition of
16 the case.

17 QUESTION: Well, they wouldn't have reversed
18 after the whole trial, would they, and have said you
19 shouldn't have the trial?

20 MS. LIBERATO: Well, there are -- they could
21 have granted, I guess, arguably, a summary judgment. I
22 think it's possible that that could arise. There are some
23 cases that have come through the circuits where the court
24 has actually reversed the case based on an abuse of
25 discretion for hearing the case after the district court

1 granted the declaratory judgment relief.

2 As a matter of fact, most of those cases you'll
3 find in the petitioner's brief, because they use that in
4 support of their contention that de novo is a proper
5 standard of review, and perhaps I could address that for
6 just a moment.

7 It seems logical, and perhaps going back to what
8 Justice White was talking about, about the Fifth Circuit's
9 view of this, and just a great deal of discretion, but it
10 seems logical that if there is discretion to grant
11 declaratory relief, or to hear a declaratory judgment
12 case, then that should be reviewed on an abuse of
13 discretion standard.

14 But just in looking at the cases as they reach
15 the circuits and they apply a de novo review, they apply
16 that review to cases where the court did indeed hear a
17 declaratory judgment action and then the circuits reverse
18 on a de novo review of the granting of the declaratory
19 relief, and I think that's significant. I think it
20 supports our position, because our position is that this
21 is a case in which -- and this type of case is a case in
22 which the court should not have granted and should at
23 least properly exercise its discretion and refuse to hear
24 the declaratory judgment relief request.

25 QUESTION: Is there any dispute, Ms. Liberato,

1 about what the standard is for reviewing a denial of
2 declaratory relief on the merits? Is that de novo, or
3 abuse of discretion?

4 MS. LIBERATO: It is -- I

5 QUESTION: Suit has proceeded to judgment --

6 MS. LIBERATO: Right.

7 QUESTION: And judgment is -- declaratory
8 judgment is denied for lack of equity. How is that
9 reviewed?

10 MS. LIBERATO: More often than not, it's
11 reviewed de novo. I don't know of a pronouncement from
12 this Court, but it appears to me in reading the cases from
13 the different circuits that there is a variance, but more
14 often than not they use a de novo review.

15 QUESTION: And how is the refusal to issue an
16 injunction reviewed?

17 MS. LIBERATO: I don't know. I believe it's
18 abuse of discretion, but I'm not sure, on injunction.

19 QUESTION: You are arguing for a more permissive
20 standard of review with regard to the acceptance of
21 jurisdiction --

22 MS. LIBERATO: Well, I --

23 QUESTION: Again as applied to the merits
24 question about whether a declaratory judgment in equity
25 should issue or not. You want the reviewing court to

1 review the declining of jurisdiction more deferentially.

2 MS. LIBERATO: In -- quite frankly, Your Honor,
3 in this case it doesn't matter either way. I know that
4 the Court --

5 QUESTION: Well, I know, but just make believe
6 it did.

7 MS. LIBERATO: Okay. Of course, I would prefer
8 that it be abuse of discretion, because that's a more
9 liberal standard, and that would be more favorable.

10 QUESTION: But doesn't it seem strange to you
11 that you're going to apply a more liberal standard to the
12 merits than you apply to the jurisdictional question?

13 MS. LIBERATO: Well --

14 QUESTION: It seems strange to me. You know,
15 that the judge can decline to take the case entirely and
16 it's pretty much up to him, but if he takes the case and
17 finds no equity in issuing the declaratory judgment, we're
18 going to review that as an original matter, just as though
19 the question is for us and not for him. It seems to me
20 just backwards, if anything.

21 MS. LIBERATO: Well, part of it may well be that
22 in applying the factors it may be a distinction without a
23 difference.

24 I understand, of course, that de novo review is
25 very different than abuse of discretion, but in looking at

1 the factors, the common sense factors that results tend to
2 be the same in most of the cases that use de novo review
3 whether it's on the front end or the back end. After the
4 determination on the merits the result comes out to be the
5 same, and that is a great deference to the discretion of
6 the trial judge.

7 QUESTION: In the State court proceedings, if
8 the insurer alleges that there was nondisclosure on the
9 part of the insured, or misrepresentations in procuring a
10 policy, does the State trial judge have the choice or the
11 discretion to hear the equitable claims for rescission
12 first before the case is submitted to the jury?

13 MS. LIBERATO: I think the trial court would
14 have that discretion to do that.

15 QUESTION: Does the trial judge in Texas often
16 exercise the discretion that way, or does he usually
17 submit all the issues to the jury?

18 MS. LIBERATO: He submits all of the factual
19 issues, certainly, to the jury, and I would say tends to
20 submit the issues to the jury. If there's going to be a
21 jury trial the judges tend to submit the whole case to the
22 jury, but all of those kinds of questions still have to
23 be, I think, couched in terms of what is the purpose of a
24 declaratory judgment action. It is to simplify, it is not
25 to complicate, and in this case --

1 QUESTION: Well, I'm not sure why it doesn't
2 simplify it in one respect, leaving aside for a moment the
3 using resources of multiple courts, if there's no
4 coverage, then that's the end of it, there's no jury
5 trial. That's a substantial saving for the insurer, isn't
6 it?

7 MS. LIBERATO: If it were a mirror image case,
8 that may be true, but it's not a mirror image because
9 there are in the State court six other parties that are
10 not present and can't be brought into the Federal action,
11 and so all it will do instead is confuse the issues, not
12 simplify them.

13 QUESTION: Why couldn't they be brought into the
14 Federal action

15 MS. LIBERATO: They couldn't be brought in
16 because it would destroy diversity to bring them in.

17 QUESTION: Well, I know, but what if it's a
18 Federal case? What if it's a Federal law case?

19 MS. LIBERATO: If it were a federal case, then
20 that would be true, they could be brought in, but this is
21 not a Federal question case.

22 QUESTION: Well, that's -- nobody's decided that
23 yet.

24 MS. LIBERATO: Well, if they were to decide
25 that, I would make a strong argument that uberrimae fidei

1 does not apply in this case. That is the only Federal
2 issue that Granite State has injected into this case.

3 QUESTION: I know that you make that point in
4 your brief, but your opposition disagrees.

5 MS. LIBERATO: Well, we disagree on several
6 things.

7 (Laughter.)

8 QUESTION: I gather.

9 MS. LIBERATO: But this is one we --

10 QUESTION: I gather.

11 MS. LIBERATO: Yes, Your Honor, but this is one
12 I think we disagree on even more than others. There are
13 at least two reasons why uberrimae fidei doesn't change
14 the ability of the judge to exercise his discretion in the
15 way that he did.

16 The first is, this is not an admiralty case.
17 This case involves a warehouse endorsement to an open --
18 marine open, cargo marine policy. It is the endorsement.
19 It covers -- and this is what -- the only damage was --
20 that we're seeking to be paid for damage that occurred in
21 an inland plant and damage to inventory and work in
22 progress. It has absolutely nothing to do with anything
23 even remotely wet, or as this Court put in one case, it
24 does not have a salty flavor, but even if it did --

25 QUESTION: Ms. Liberato, does everyone say

1 uberrimae fidei, or is it just people from Texas.

2 (Laughter.)

3 QUESTION: Is that really how you say that? I
4 mean, everybody says it that way?

5 MS. LIBERATO: Judge Scalia, it's only Italians
6 from Texas that say it that way.

7 QUESTION: I see.

8 (Laughter.)

9 MS. LIBERATO: Sorry. However you say those two
10 words --

11 QUESTION: I'm seeking information, because I've
12 read them but I've never heard a live person say them.
13 I'm wondering what the --

14 MS. LIBERATO: Well, at the Fifth Circuit Judge
15 Jones was kind enough to say it first before I had to, and
16 frankly, I parroted the way she said it, and she is from
17 Texas also, so at least from that sample -- I guess I have
18 to confess, I cannot answer your question. The best I
19 know, it's uberrimae fidei.

20 But the other part of it, even assuming, to go
21 back to the issue that Judge White raises about -- Justice
22 White, about whether there is a Federal question here
23 based on uberrimae fidei, even if you assume that there
24 were -- was, it is a defense only. It wouldn't even be
25 enough in this particular case to raise Federal question

1 jurisdiction if they were properly a plaintiff.

2 Of course, in a declaratory judgment act again
3 you look at the claim and not the claimant, and so that is
4 why, even if it did apply, which we vehemently disagree
5 that it does not, we do not believe that would make any
6 difference.

7 QUESTION: I would think, given your position in
8 the defense of the Fifth Circuit, that you would think the
9 district court should not just have stayed but have
10 dismissed the case.

11 MS. LIBERATO: Well, I think that the stay is
12 fine. I don't -- we don't have any dispute with the stay.

13 QUESTION: Well --

14 MS. LIBERATO: Because -- because -- if -- there
15 may be some circumstance that would come up that would be
16 proper for the court to go ahead and lift the stay.

17 QUESTION: Like if the State action weren't
18 tried within 2 years, say.

19 MS. LIBERATO: I think that's an excellent
20 point, and certainly that would be a reason, and it didn't
21 cut off Granite State from any right to appeal, obviously.

22 QUESTION: Well, you must -- where do you
23 practice?

24 MS. LIBERATO: In Houston.

25 QUESTION: You must have some clue as to what

1 the State court's docket --

2 MS. LIBERATO: Oh, I do know what the State
3 court's docket is like.

4 QUESTION: What's the --

5 MS. LIBERATO: In this particular case we'd be
6 pretty far down the road in this particular court.

7 QUESTION: Like what? They must have statistics
8 in the State court system as to what's the average time
9 for filing a suit -- go ahead, you've got the answer --

10 MS. LIBERATO: Well, my co-counsel can be real
11 specific and say that it's 18 months.

12 QUESTION: How much?

13 MS. LIBERATO: 18 months to get to trial. This
14 is a little bit more complicated case because it does have
15 so many parties, but 18 months is about right in the
16 Southern District --

17 QUESTION: What about Federal court?

18 MS. LIBERATO: They're getting to trial faster,
19 frankly, Your Honor. I don't know how quickly they are
20 getting to trial, but I do know that they're getting to
21 trial much faster now than they used to, but the court --

22 QUESTION: You say they're getting to trial in
23 the Federal court faster than they used to.

24 MS. LIBERATO: Yes, Mr. Justice Rehnquist.

25 QUESTION: Is there any way you have of

1 comparing the time of getting to trial in the State court
2 with the time of getting to trial in the Federal court at
3 the time the action was filed?

4 MS. LIBERATO: I don't know specifically. I
5 frankly don't know. I do know, of course, that under the
6 Federal Justice Reform Act that there are many changes
7 that have taken place in the Southern District and that,
8 because of those changes, that one is able to get a civil
9 case before the Federal court much more quickly, but it's
10 still a long time.

11 As a general rule -- Yes, Your Honor? Well, as
12 you say, as a general rule it is easier, much easier to
13 get to trial in State court and to get to trial more
14 quickly in State court than it is in Federal court.

15 QUESTION: Ms. Liberato, why do you think that
16 State law is going to be involved in this case? Why
17 wouldn't English law govern the contract? The goods that
18 were destroyed were destroyed in South Korea, right?

19 MS. LIBERATO: Right.

20 QUESTION: It's an international contract,
21 maritime or not. Isn't there a choice of law clause?

22 MS. LIBERATO: There is a choice of law, and it
23 says that I believe the laws of England will apply except
24 in the United States, but all of the contract formation
25 took place in the United States. These are all American

1 companies involved, all of the defendants are, many of the
2 parties are from Texas, in fact.

3 QUESTION: What do you mean, it says the law of
4 England will apply except in the United States?

5 MS. LIBERATO: Except in the United States.

6 QUESTION: Is that how it reads, the law of
7 England will apply except in the United States?

8 MS. LIBERATO: I'm not sure precisely, but it's
9 close to that.

10 QUESTION: Wow.

11 MS. LIBERATO: And so --

12 (Laughter.)

13 QUESTION: Except in the United States courts,
14 is that what that clause means?

15 MS. LIBERATO: I can't remember exactly, but
16 it --

17 QUESTION: Well, that's sort of important as to
18 whether, you know, we think Texas law is really going to
19 be at issue in this case.

20 MS. LIBERATO: Well --

21 QUESTION: I mean, if it's not admiralty law, it
22 may not be Texas law. I don't want Texas figuring out
23 English law. I think probably the Federal courts are as
24 good at that as the Texas courts.

25 MS. LIBERATO: Well, but all of the dispute here

1 goes to the contract formation and all of the action that
2 took place that relates to this determination definitely
3 occurred in Texas.

4 I don't believe that they have argued that
5 English law applies other than uberrimae fidei. I'm sure
6 Ms. Webb will correct me on that if I'm wrong, but by and
7 large the controversy is going to be governed by the laws
8 of the State of Texas, and insurance law, which
9 necessarily -- or, not necessarily, but which have
10 actually been left specifically by Congress through the
11 McCarran-Ferguson Act to the States.

12 This is peculiarly an issue of State court
13 interest, because that's what is being construed, is a
14 provision in the contract, and the resulting bad faith
15 claims that we have, breach of contract, all of those are
16 peculiar to the State and State court law, and that is
17 another factor, I believe, that the court decides in
18 exercising its discretion to grant the declaratory
19 judgment action.

20 There are many factors the court can apply. The
21 Fifth Circuit emphasized forum shopping and inconvenience.
22 Judge Hittner in the district court emphasized the
23 piecemeal litigation aspect, the forum shopping aspect,
24 and needless decisions of State law.

25 It would be possible, and certainly Judge

1 Hittner did that to a degree in analyzing the Moses Cone
2 and Colorado River factors, to look at other things, like
3 the order in which jurisdiction was acquired and some of
4 the other factors that are found in other cases, but the
5 point is that if, in the exercise of its discretion, the
6 court doesn't fulfill the purposes of the Declaratory
7 Judgment Act, that relief, to provide relief to simplify
8 and to clarify issues, then that declaratory judgment is
9 not appropriate, and for these reasons -- yes.

10 QUESTION: Before you wind up, I want to come
11 back to whether review is de novo or not. You concede --
12 it seems to me it is a concession for your side that it is
13 de novo on review of injunctions, or at least declaratory
14 judgments when they're issued on the merits, but the cases
15 that you rely on for that, aren't they -- if I understood
16 your discussion earlier, aren't they cases in which
17 declaratory judgment was issued?

18 MS. LIBERATO: Yes, Your Honor. Yes, that's
19 correct.

20 QUESTION: Don't you think it's a little bit
21 different if you decline to exercise your equitable
22 powers? Might there not be a different rule, when you
23 decline to issue an injunction as to the rigidity of the
24 review as opposed to when you issue the injunction, which
25 raises a lot of legal issues?

1 MS. LIBERATO: Well, it seems to be that in fact
2 that's a distinction that the circuit courts have made not
3 specifically but in fact.

4 QUESTION: Well, I have a good deal of doubt
5 about whether the ordinary rule for review is de novo on
6 refusal to exercise equitable discretion. It seems to me
7 it ought to be an abuse of discretion standard.

8 MS. LIBERATO: Well, I agree with you, and that
9 is what the Fifth Circuit held in this case, but my point,
10 which I did not make very artfully, that in either event,
11 that the presumption is in favor of the court exercising
12 its jurisdiction, so I would believe that what the Fifth
13 Circuit did was correct and that the district court was
14 proper in issuing the stay.

15 QUESTION: Thank you, Ms. Liberato. Ms. Webb,
16 you have 3 minutes remaining.

17 REBUTTAL ARGUMENT OF ANN E. WEBB

18 ON BEHALF OF THE PETITIONER

19 MS. WEBB: The first thing I'd like to comment
20 on is Ms. Liberato's pronouncement of utmost good faith.
21 On our side of the bench we say, uberrimae fidei, but
22 utmost good faith works just as well and it's a little bit
23 easier to follow.

24 The choice of law provision in the contract says
25 specifically all questions of liability arising out of

1 this policy are to be governed by the law and customs of
2 England except in the United States and its possessions.

3 QUESTION: I repeat, wow. Who wrote that, I
4 wonder?

5 MS. WEBB: It's a form policy. We believe that,
6 since it doesn't say whether the loss arises in the United
7 States or whether the lawsuit arises in the United States,
8 it's ambiguous and it needs to be construed.

9 We believe the appropriate construction is to
10 give a consistent application regardless of where the loss
11 occurs, be it Korea, Australia, Singapore, Texas, Seattle,
12 any one of the States that has a water port.

13 The only consistent application is to apply the
14 law that is equivalent to the law of England, which is
15 Federal maritime law, and we don't believe that the
16 McCarran-Ferguson Act, and "the insurance regulation
17 belongs to the State," applies here, because the doctrine
18 of utmost good faith is a well-entrenched maritime good
19 doctrine, and it is not one of those cases where State
20 insurance law should fill the cracks.

21 I'd like to comment briefly about the district
22 court never -- about some of the points raised by
23 Ms. Liberato. We're talking about the making of a policy
24 of insurance. The place of the loss has nothing to do
25 with the making of the policy, and the policy itself says

1 the choice of law is English, and we believe that gets you
2 to maritime. The place of the loss in Korea has nothing
3 to do with the choice of law that should apply to the
4 formation of the policy.

5 With regard to the several questions about the
6 standard of review, abstention doctrine is a question of
7 law, which is customarily reviewed de novo. It is further
8 important that this type of decision be reviewed de novo
9 because of the comity and federalism concerns that are
10 raised. We believe that both the decision whether or not
11 to keep a case within the Federal jurisdiction as well as
12 the decision on the merits should both be reviewed under a
13 legal standard de novo.

14 The district court partially reviewed the
15 Colorado River factors. He did not review the choice of
16 law issue, and he failed to weigh any of the issues in
17 favor of the unflagging obligation to exercise
18 jurisdiction.

19 We further believe that he did not correctly
20 evaluate some of the ones he did. For instance, the
21 minimal inconvenience between Houston, Texas and Forth
22 Worth, Texas, when there were something upwards of 50
23 flights a day between the two cities, between the Dallas-
24 Fort Worth area and Houston, cannot be justified in this
25 modern era.

1 QUESTION: So I guess, if I'm right about what
2 the review of the failure to issue a declaratory judgment
3 is, a district judge would always be wise to accept
4 jurisdiction and deny the declaratory judgment instead of
5 simply saying, I won't take jurisdiction. I mean, you
6 could do it the same way the same day, but you're
7 better --

8 MS. LIBERATO: In terms of getting reversed, I
9 guess that's correct, but we believe that unless the
10 traditional concerns precluding a declaratory judgment
11 exist, the district court should maintain jurisdiction.

12 Thank you, Your Honor.

13 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Webb.
14 The case is submitted.

15 (Whereupon, at 11:16 a.m., the case in the
16 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:

Granite State Insurance Company ✓
Tand Corporation

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

BY Ann Marie Federico

(REPORTER)