ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARIAN JOHNSON, ET AL., Petitioners v. KRISTINE L. FANKELL

CASE NO: 96-292

PLACE: Washington, D.C.

DATE: Wednesday, February 26, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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MARIAN JOHNSON, ET AL., :

Petitioners :

v. : No. 96-292

KRISTINE L. FANKELL :

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Washington, D.C.

Wednesday, February 26, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

MICHAEL S. GILMORE, ESQ., Deputy Attorney General of Idaho, Boise, Idaho; on behalf of the Petitioners.

W. B. LATTA JR., ESQ., Boise, Idaho; on behalf of the Respondent.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-292, Marian Johnson v. Kristine Fankell.

Mr. Gilmore.

ORAL ARGUMENT OF MICHAEL S. GILMORE

ON BEHALF OF THE PETITIONERS

MR. GILMORE: Mr. Chief Justice, and may it please the Court:

Today the Court is presented with the question whether the qualified immunity defense is as powerful in State courts as it is in Federal courts, or whether its scope and its protection may vary among the States, or between Federal district courts and one State, and State trial courts in the same State.

Thirty-six States are involved in this, between the amicus and the petitioners, because of the importance of the qualified immunity defense to the practical functioning of State government, and because of the value of this defense to the employees and officers of State and local governments throughout the Nation.

QUESTION: Do you think, Mr. Gilmore, that if the Idaho legislature had a mended its judicial code to allow appeals in this kind of case that you say the Federal statute requires the supreme court of Idaho would

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have entertained this appeal?

MR. GILMORE: That's a very difficult question to answer, Your Honor, because the Idaho supreme court in three instances had ruled that its court rules take precedence over statutes in the area of conflict in rules of procedure, rules of evidence, and rules regarding a special statutory court that was established to adjudicate water rights in the Snake River basin.

QUESTION: But it hasn't extended -- the court has not said the same with respect to appellate rules?

MR. GILMORE: That is an open question. It has not addressed that.

QUESTION: Well, it seemed to -- you know, the one sense -- I believe in one sense orders seemed to say this was not a final, whatever it is that the Idaho stature requires.

My concern is that since these qualified immunity is designed to protect State officials I would think the Idaho legislature could probably extend the appeal right if it wanted to.

MR. GILMORE: I simply cannot concede that, because the entire recent jurisprudence in Idaho has been for the State supreme court to say its rules preempt statutes are inconsistent.

QUESTION: But in any case, however the State

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speaks, whether it speaks through the legislature or it speaks through the supreme court, there is an agency of the State which is capable of valuing the State's interest here, and if it believes that the State's interest really does require the appealability of a qualified immunity ruling, there's some agency of a State that can say, that's the regime we will have.

MR. GILMORE: The Idaho supreme court could adopt an appellate rule that would explicitly provide for appealability of denial of absolute or qualified immunity motions.

QUESTION: So that ultimately the responsibility for the nonappealability is with the State itself.

MR. GILMORE: It is with one of the branches of State government.

QUESTION: Yes. Now, what do you say to the argument that the justification for immediate appealability is a justification which rests ultimately not on individual interests but on State interests, and therefore, if the State doesn't want to take advantage of it, why, indeed, should a Federal court interfere with that decision?

MR. GILMORE: Because the defendants in this case, or the petitioners here, are sued in their individual capacities. They are not sued as State

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officers, as such, in their official capacity.

QUESTION: But if they were merely individuals there wouldn't be any kind of immunity that they could lay hold of. It's only because they're State officers that they have this qualified immunity.

MR. GILMORE: That is correct, only governmental officers.

QUESTION: But let me ask one anterior question about where the rule-making authority is. I don't recall the Idaho counterpart to 1292(b) that gives the discretion only at the appellate level, is that a rule of the court, that the courts made up, or is it a legislative enactment?

MR. GILMORE: It's Rule 12(a) of the Idaho supreme court, and the Idaho supreme court decision of Todd v. Budell states that that was modeled upon 1292.

QUESTION: But the source of it is the Idaho supreme court, not the Idaho legislature?

MR. GILMORE: That's correct.

QUESTION: What was your answer to Justice Souter? I mean, I take it quite specifically, why are the States filing amicus briefs? It's up to the States. I mean, there's no Federal interest here. If the State wants to subject its people to good procedural advantage, they can. If they don't, they don't. The Federal Government doesn't care, so what's the answer to that?

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That's what I take it --

MR. GILMORE: The answer to that is, the State officers who the Attorney General must represent want to assert these personal defenses that you have held as a matter of Federal law --

QUESTION: What is it as a matter of -- no, I take it the Federal law is that 1983, in giving liability, imposing liability, in helping plaintiffs attain certain things, doesn't reach as far as the area where what the State person did was lawful or uncertain. It only reaches the area where what the State officer did was clearly illegal. Now, that's what this Court has held often.

Qualified immunity in fact arose under State law, and Congress bought into it, so that's the Federal interest. How is that Federal interest hurt in any way at all by some States giving these people some procedural advantage and others not?

MR. GILMORE: In a literal sense, the Federal interest is not hurt.

QUESTION: Well, if that's so, then isn't that the end of the matter, because -- well, why not?

MR. GILMORE: Because -- because all of these officers of the State of Idaho are Federal citizens and have citizens' rights. The Federal Government, I suppose, could be indifferent to all kinds of -- all kinds of

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violations of rights or immunities of Federal citizens unless it enacts a law to take care of them.

QUESTION: Mr. Gilmore --

MR. GILMORE: Yes.

QUESTION: -- I thought that the qualified immunity Federal rule did not just apply to Federal officers but also applied to State officers.

MR. GILMORE: It applies to all State, local, Federal Government officers.

QUESTION: So then there is some Federal interest, or at least when we discerned that rule we thought that was, or when Congress enacted the statutes relying on prior historical practice Congress thought there was a Federal interest in allowing State officers to have immunity.

MR. GILMORE: There's

QUESTION: We do give State officers immunity in Federal courts, don't we?

MR. GILMORE: Yes. There's a Federal interest that's been described in both the Bivens cases and the 1983 cases, preventing unfounded distraction of Government officers and disruption of effective Government.

QUESTION: All of those --

QUESTION: Suppose a State were to say that we don't -- for State law purposes have this immunity. Our

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officers don't have this immunity. Under 1983, would the State officer nonetheless be able to claim an immunity that his State as a matter of State policy thinks the officer should not have?

MR. GILMORE: No. As I understand the Court's precedent, State officers can only claim Federal immunities, not State immunities. For example, in this case --

QUESTION: No, I mean his 1983 immunity which he would get is a Federal source, but the State says, just as municipalities can waive their sovereign immunity, that we don't want our officers to be any less responsible than anyone else for the torts they commit, so our officers will not be shielded by immunity.

Now, would there be a Federal interest in saying, State, in defiance of your policies, we are going to insist that in 1983 cases these people be shielded by qualified immunity?

MR. GILMORE: Yes. I think there are several Federal interests. One is that there be identical decisions in the 1983 case between the Federal district court and the State courts in the same State. I think our interest in 1983 be applied uniformly throughout the Nation.

QUESTION: Well, isn't the interest stronger

than that? Isn't the interest that the citizen is liable for a judgment under 1983 under a Federal statute, and that is a Federal immunity that appertains to that person as an individual?

MR. GILMORE: Yes, and that's the interest --

QUESTION: As part of the contours of the 1983 right. The liability of the officer personally does not extend so far as to avoid an immunity that the Federal Government grants.

MR. GILMORE: The Federal Government has an interest in all of its citizens.

QUESTION: But you're saying the Federal interest, then, is superior, that even though a State can waive its Eleventh Amendment immunity, the State cannot waive this federally granted immunity for its officers?

MR. GILMORE: I --

QUESTION: That the Federal policy in shielding the State officer is -- tugs against the State policy no matter how strong that State policy is?

MR. GILMORE: The State cannot waive its Federal officers -- excuse me. The State cannot waive its officers or employees' rights as Federal citizens. This is a right that every citizen of the United States has if they work for a Government.

QUESTION: Is there a right? That is --

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MR. GILMORE: An immunity.

QUESTION: Say Federal statutes allow me or you or anybody to sue certain groups of people under myriad circumstances, and in each of those statutes there are thousands and thousands of ways in which the person might not be liable. That's because the statute doesn't cover the situation. Is there then some Federal interest in making certain that the procedures that are used to decide each way he's not liable is going to be the same in every State, the Federal Government?

MR. GILMORE: No.

QUESTION: Because that's the problem I have. Once I see the case that way, and I have -- obviously have been seeing it that way. Once I see it that way, I find it difficult to articulate the Federal interest.

MR. GILMORE: The Federal interest is in preservation of the State actors' Federal immunities created under Federal law, and the prevention of a loss of those Federal immunities.

QUESTION: May I ask a hypothetical question? Do you think the State could pass a statute that was patterned after 1983 and said, State court shall entertain claims for violations of Federal constitutional rights and everything else the same as in 1983, and add to it, and the State -- and the defendant shall not be allowed to

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plead qualified immunity?

MR. GILMORE: I think the State would have the constitutional authority to pass such a statute.

QUESTION: Well, what if the Federal courts -- what if Congress passed a law saying, unlike the law as written at present, that when we say there can only be an appeal from the final judgment, we mean it, and there are no exceptions. Is there some constitutional reason why we can't give that effect in a Federal court?

MR. GILMORE: If Federal law prohibited appeal from qualified immunity motions from the denial of qualified immunity motions in the Federal courts, we would not be here today.

QUESTION: Well, but we've just given them a right in the Federal courts to appeal based on an interpretation of the law that Congress has applied, not as a matter of constitutional law, have we?

MR. GILMORE: No, I do not believe the qualified immunity defense has been characterized as a matter of constitutional law.

QUESTION: What if the double jeopardy defense, which, you know, has more of a constitutional basis, obviously, than qualified immunity, in the Abney case that we decided some time ago, we said a defendant could appeal that in the Federal system on an interlocutory basis. Do

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you think Congress could say, no, we're not going to allow that kind of an appeal?

MR. GILMORE: I am not an expert in this area of relations between Federal courts and the Federal Congress, but for the purposes of this case, I think I would say yes, only to try to outline the contours of what we're looking for.

QUESTION: Congress could regulate.

MR. GILMORE: Congress --

QUESTION: On that subject, it seems to me that if you prevail here, States must give Abney appeals in all double jeopardy cases. Do the States generally do that?

MR. GILMORE: When I did my research in that area, a majority of the States that I was able to identify allowed an Abney appeal, and then there was a further safety valve. Three of the circuits in cases where there are no -- in which there are States located that have not allowed Abney appeals, have found an exception to Younger abstention and have handled the practical difficulties of dealing with double jeopardy claims in the State courts by proceeding to enjoin the criminal prosecution.

QUESTION: Well, it does follow from your position here, I suppose, that Abney appeals would be mandated on the States in all double jeopardy cases if you prevail here. It would seem to me a parallel principle,

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perhaps a principle of even more importance, as the Chief Justice has indicated.

MR. GILMORE: I think there are theoretical parallels. There may be practical differences in the sense that I've just been talking about. There already may be an existing safety valve that the circuits have created.

QUESTION: But if the -- this is a right that does have a constitutional underpinning, double jeopardy, and I think the precedent you cited said States might very well want to adopt that policy as their own, but it seemed to me it wasn't your brief, it was I think the State's brief in support of you that just cited Abney and -- sort of en passant, but that would be a pretty big thing to say, yes, we want the officer to be shielded here in 1983, even though we recognize the price might be that the States no longer have a choice that some of them thought they had about double jeopardy.

MR. GILMORE: I think if you look at the Kentucky amicus, that is something the Court must weigh in the balance, but I would hesitate to say that the Court must reach that issue in this proceeding I think because of the practicalities of administration of Abney, in particular, modification in Richardson with the notion of a colorable double jeopardy claim.

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QUESTION: There's another oddity here that in addition to the States saying their own State court is not sufficiently the guardian of the State officer's rights, it's that these cases are removal by the defendant, are they not? So if you're complaining about Idaho procedure being less generous to the defendant, why couldn't the defendant remove?

MR. GILMORE: At the time this case was brought, we had no reason to believe Idaho procedure would be less generous, and there are practical reasons --

QUESTION: Well, you didn't know about that they had this final judgment, firm final judgment rule and that they didn't allow interlocutory appeals except in specified cases?

MR. GILMORE: No. We knew that the language of Idaho Appellate Rule 11(a) was, you may take appeal from judgments, orders, or decrees which are final, and this was an order, and this Court's precedent had discussed the finality of denial of qualified immunity orders many times.

QUESTION: Well, does Idaho have the collateral order rule? Does it have it in Cohen v. Beneficial, because you would have know about that one way or the other.

MR. GILMORE: To the best of my knowledge, Idaho

has never addressed Beneficial, to adopt or reject the collateral order rule.

QUESTION: But you could have removed -- in any case, wouldn't one factor, if one wants -- if a Federal court is going to tell -- if this case is going to tell the State, change your procedure for these cases only, that the defendant who is asking for that could have gotten himself into the Federal forum.

MR. GILMORE: One cannot always get in the Federal forum, and many 1983 cases will be a suit against a number of officers, perhaps city, county, and State, and without concurrence of all the defendants, there is no right of removal.

QUESTION: Apart from the -- if you have multiple defendants and they -- what interest would any of them have in not getting into Federal court on a question of the qualified immunity?

MR. GILMORE: Maybe not legal interest, but practical interest. Idaho's a big State. It has 44 county seats. I was looking at a map yesterday. One of them -- the two fish and game officers in Salmon, Idaho, for example, were sued in State district court and attempted to remove, the nearest Federal district courthouse to them would be in Pocatello, 209 miles away, so if they were looking at trial, they'd be looking at

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leaving their family and friends, having a 2-1/2 to 3-hour drive with the new speed limits on a sunny, clear day, and 5 or 6 hours on a snowy day through mountain roads. There are real interests in keeping things in the State courts.

QUESTION: But don't they have influence with the legislature in Idaho?

(Laughter.)

MR. GILMORE: But I think to elaborate on Justice Ginsburg's question, the answer is the same as the plaintiffs in Felder. They could have filed in Federal district court if they didn't want to worry about Wisconsin's notice of claim statute, but the answer in there was, when you are in State court applying Federal law, you apply all the Federal law, not some of the Federal law, and these defendants have the --

QUESTION: Well, let me ask how far you would take that, because there's one respect in which Idaho is more generous in allowing interlocutory appeals, and that is from a new trial order, right?

MR. GILMORE: That's correct.

QUESTION: So suppose we had a case where a plaintiff had prevailed, and then the judge, the trial judge said, sorry, I'm going to wipe that out -- let me see if I've got that reversed.

MR. GILMORE: I think I understand.

QUESTION: Yes, so where it would be -- the State procedure would be to the defendant's advantage to take the interlocutory appeal, but we wouldn't be allowed that in the Federal system.

Can the plaintiff then say, no interlocutory appeal from the new trial?

MR. GILMORE: That's a close call, and I can't find anything in the Court's precedents and things like FELA or 1983 to really answer that. I guess the only answer there is like development in FELA, or development in 1983, that's going to require a case-by-case analysis. I don't see that as being a black-and-white issue.

What I think is black and white is that if you don't get your appeal from denial of a qualified immunity motion, and you should prevail later but you've gone to trial in the meantime, you've lost the benefits of your qualified immunity, and that is a black-and-white issue, not a gray issue.

I think one of the essential underpinnings that we're looking for in this case is even-handedness between treatments of plaintiff's rights and claims in 1983 in State courts and defendant's immunities.

Felder v. Casey has been decided, so Idaho's notice of claim statute allow this case to be brought in

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State court. If State courts would be taken as they found them, the plaintiffs wouldn't be here at all.

Both, it's time to, we think, look at the other hand, look at the question of what happens to defendants who find themselves in State courts for whatever reasons -- they prefer the forum for convenience, they can't get concurrence of all the defendants to remove to Federal court -- they should be given the same benefits of Federal law as plaintiffs.

QUESTION: Mr. Gilmore, here's what troubles me. We do have language in our opinions to say that the immunity right is a right not to be tried, not just a right to be acquitted, or found innocent. However, we said that for the purpose of deciding whether the policy expressed in 1983 was sufficient to overcome what would be the normal operation of a Federal statute. I'm not sure that it's the same question whether that policy is strong enough to overcome the State's ability to manage procedures in its own courts. Don't you think they're really two different questions?

MR. GILMORE: I don't, because I think the policy we're talking about is what immunities can citizens of the United States assert, and how can they protect them, and that's a policy that this court says overrides under the collateral order doctrine --

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QUESTION: No, but the procedure that's followed doesn't reach the question whether you will ultimately prevail on the immunity issue. If you do have the immunity, you will ultimately win the lawsuit, but you will have the burden of a trial that you will otherwise avoid, a burden that is a burden on the State judicial system as well as on the parties to the case, and the top officers of the State judicial system say we're willing to pay that price in order to save the appellate courts the premature adjudication burden.

MR. GILMORE: I think the answer there was given in Behrens last term. In that case, Behrens said -- the opinion in Behrens was that when you talk about appealability you don't talk about whether you're going to succeed or not succeed, whether you've got a good case or a frivolous one. You talk about categories of orders.

And here is a category of order, a black and white category, denial of a motion for qualified immunity, be it 12(b)(6) or summary judgment, and that is so important -- so important under Federal law that that's considered final.

QUESTION: Mr. Gilmore, in the reverse situation in cases, Erie cases in Federal court where State law is governing just as 1983 Federal law is governing, the decisions of this Court have said there is an essential

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character to the Federal court system, and things that pertain to that essential character don't give way to the States.

I mean, think of if a State allowed an interlocutory appeal whenever the lawyers liked it. You had -- you've got diversity cases certainly wouldn't have the Federal courts copy that, so is there a -- should there be some kind of symmetry? Just as the Federal courts don't have to make themselves over in the State court's image, the State courts ought to be allowed their essential characteristics, including how firm they want their final judgment rule to be.

MR. GILMORE: Symmetry should hold up to the Supremacy Clause and either the burdening or in this case the extinguishment of a Federal immunity.

What we're talking about here is the complete elimination of a Federal immunity of discovery from trial should there be an erroneous trial court ruling, and there's always going to be an asymmetry between these two situations because of the Supremacy Clause.

QUESTION: Mr. Gilmore, you have repeatedly characterized the right which is at stake here as being a personal right of United States citizens. The difficulty I have with that is this. As I understand our analysis of qualified immunity up to this point, it is an analysis

which has recognized the immunity number 1, because it was thought to be recognized at common law when 1983 went in, and that common law background is supposedly the basis for our interpretation.

But number 2, because the interest which that immunity protects is the public or State interest against having its officers made timid or distracted, and so on.

My understanding is we have never recognized the interest as being a separate, individual interest. The individuals get the benefit because that's the necessary implication of the State getting the benefit.

Am I right in my understanding?

MR. GILMORE: You have always tied the individuals' interest to their function in the State or local government, or National Government in the Bevins case.

I see that my time is running. If there are no further questions from the bench at this moment, I will reserve the remainder for rebuttal.

QUESTION: Very well, Mr. Gilmore. Mr. Latta, we'll hear from you.

ORAL ARGUMENT OF W. B. LATTA, JR.

ON BEHALF OF THE RESPONDENT

MR. LATTA: Mr. Chief Justice, and may it please the Court:

The qualified immunity that is recognized in Harlow, and the procedure set out in Mitchell, are benefits offered to the States, including Idaho, by Congress. In this matter, the State has declined twice the benefit of the ability to take an interlocutory appeal from a qualified immunity denial.

First, Idaho's longstanding finality rule and its nonrecognition of the collateral order doctrine are State policies by the proper parties in Idaho at least. The Idaho supreme court --

QUESTION: Well, when you say nonrecognition of the collateral order doctrine, Mr. Latta, do you mean that the supreme court of Idaho has rejected it, or simply has never confronted it one way or the other?

MR. LATTA: It has never confronted it, and based on the jurisprudence as -- and I believe Mr. Gilmore and I both read it it would be unlikely that they would do it because the door is open by another means, Appellate Rule 12, that allows for permissive appeals to bring those up. The permissive appeal rule is the -- would be the preferred, under Budell v. Todd, matter to bring this --

QUESTION: And what does the permissive appeal rule provide, briefly?

MR. LATTA: In this case, to illustrate, having received the order denying qualified immunity from the

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trial judge here, the State could go back to the trial judge and ask for its order permitting a permissive appeal to the supreme court. The court would issue its order. That order would not be binding on the appellate court because -- the Idaho supreme court. The supreme court would make its own decision in light of the --

QUESTION: It's like Federal 1292(b), the --

MR. LATTA: Exactly. Not -- excuse me, not exactly, but that was the model Rule 12 is modeled on, 1292.

QUESTION: Does the trial court have to give its permission to have the ruling appealed under that discretionary regime?

MR. LATTA: No, it would not. It could say this would be a frivolous appeal and deny it, just as it could deny a 54(b) certificate if it were asked, but --

QUESTION: I'm trying to ascertain what role does the trial judge have in establishing whether or not there may be a permissive appeal?

MR. LATTA: His role under Rule 12 is to look at requests for the order and say it should or should not be the subject of a permissive appeal.

QUESTION: And if he says that it should not, then that ends the matter?

MR. LATTA: No. That is not binding on the

supreme court. You look at -- there are two separate decisions made, one by the trial judge to say yes or no, and then the supreme court acts on its own in light of what the trial judge has said.

QUESTION: Well, I suppose, then, if we were to say that this is a substantive, very significant right, the right to have an interlocutory ruling, then it would be then an abuse of discretion of Idaho law not to take the appeal, and so at least the right could be enforced under the existing procedural structure in Idaho.

MR. LATTA: I would agree it could be under that scenario.

QUESTION: Mr. Latta, I thought that Idaho's creation of that rule, which does modify 1292(b), is to make it totally discretionary on its part. Idaho has a firm final judgment rule. It's enacted a provision for interlocutory review at its sole pleasure. Not the trial judge's approval but just -- so how could it abuse its discretion when it's deliberately created a rule that gives it a prerogative to do as it pleases?

MR. LATTA: I was unfortunately mixing the two court systems. The abuse of discretion rule that I was thinking of would be abusing this Court's discretion in failing to accept that permissible appeal. The Idaho Appellate Rule 12 is wholly permissive in nature, but it

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would be an abuse of this Court's discretion not to accept a interlocutory appeal.

QUESTION: Who's going to enforce that?

MR. LATTA: It might be -- it might occur only in the circumstance that brings us here, where we are in front of the Supreme Court by virtue of --

QUESTION: If we don't take a case, how are you going to get here?

MR. LATTA: In -- it is not likely that I would be the one who needed to get here. It would be the State.

QUESTION: Well, just focusing on the Idaho court based on your comments to Justice Ginsburg I assume no one could tell the Idaho court that it has to take -- has to exercise its discretion to take the appeal. Let's assume that we think that it's very, very important that there be an interlocutory appeal. I was asking whether or not that could be accommodated within the existing Idaho structure, and suggested that maybe it would be an abuse of discretion for Idaho supreme court not to take the appeal, and then Justice Ginsburg points out, well, the whole point of this is so they can have complete control over their docket. They're not answerable to anybody.

And so it does seem to me that there is then a problem if we agree with the petitioner's case that this is such a significant right that it has to be enforced in

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the State courts.

MR. LATTA: Well, the -- because it is permissive as to the Idaho supreme court, then it would only be answerable to this Court on an abuse of discretion theory, but the solution to the problem presented by the permissive nature of Idaho Appellate Rule 12 is in what was suggested by Justice Ginsburg earlier, and that is that this represents and tells us that the first opportunity to exercise the ability to get exactly what you want in the way of the interlocutory appeal is to take this Court's -- excuse me, take Congress' route, and that is to remove it to Federal court.

QUESTION: Which might be equally inconvenient for your client, given the distance that Mr. Gilmore just told us about, that the State court is much more accessible.

MR. LATTA: There are three Federal courtrooms in Idaho, and for a large number of people in Idaho it's a very long haul to a Federal courtroom, but if the State believes on behalf of its actors that it must have the right of interlocutory appeal, then the answer is to go to Federal court, not to be subjected to the discretion of the Idaho supreme court where they may not --

QUESTION: I had thought maybe the closest case supporting petitioner was Felder v. Casey. How do you

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distinguish that case and the reasons for it with the situation here?

MR. LATTA: I take solace in the language of Felder v. Casey, because it talks in that case of the natural and permissible consequences of the otherwise uniformly applicable State rule. Felder does not dictate that there shall be an interlocutory appeal rule in State court. This finality rule --

QUESTION: Well, it wasn't dealing with the appeal problem, it was dealing with a notice problem.

MR. LATTA: That's correct.

QUESTION: But the principle, at least, there was that there were times when we were going to impose certain requirements on State courts in connection with 1983 suits.

MR. LATTA: That's right. The -- but those burdens that you impose on State courts under Felder are the burdens on the plaintiff's exercise of her rights as opposed to the State actors.

QUESTION: That was -- I mean, what's sauce for the goose is sauce for the gander. I really don't see how you can say, well, those were plaintiffs and these are defendants. So what?

I mean, the -- if that's all it is, if they're plaintiffs and here's the defendants, when I read

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Felder -- but you're going to agree with what I say is the problem, and you'd better not agree with it because it will turn out it's wrong. I want to know why -- I mean, when I read Felder, I thought that Felder follows from Rose, because Rose is a case that says you can't just kick a 1983 actions out of your court.

MR. LATTA: That is correct.

QUESTION: And Felder was a case where they said the plaintiff has to show that he's hurt within 120 days, and they say that's such a short time, 120 days to notify that you're hurt, that it's about the same thing, kicking it out. All right. I don't know if that's a correct distinction or not, but if you're just going to distinguish -- unless you find something like -- I mean, can you say a little more about well, we're plaintiffs and they're defendants? I mean, that, to me, doesn't work.

MR. LATTA: Well, the State interest that's being protected by the immunity rule belongs to the States, not to the individuals, as has been offered by petitioners as a reason for applying this Federal rule and this Federal procedure in State court. The --

QUESTION: Well, I suppose that would be true if everybody knew that the State was going to pay the judgment. Suppose the individual's going to pay the judgment? Can the Federal Government not condition the

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terms on which a person is liable for a violation of the Constitution of the United States under a Federal statute and say we're not going to make you liable if the law was not clear?

MR. LATTA: The choice of how the State is going to exercise its actors' immunities is up to the State.

QUESTION: Well, I'm sure that's true if it's a State -- if it's a State liability scheme, but this is a Federal liability scheme. The Federal Government has said you as a person are individually liable for violating 1983, but we'll give you a defense.

MR. LATTA: And the State can elect to expand on that defense by paying for the Office of the Attorney General to defend them or indemnifying them, or, as was suggested earlier, telling the State actors when they come to work, you may be subject to a civil rights case.

QUESTION: Well, but suppose the State doesn't indemnify the persons, or the State treasury is insufficient? I don't think the State can abolish a Federal defense that this Court and the Congress by inference have granted to a defendant, an individual defendant.

MR. LATTA: The State has not abolished the Federal defense in this case. If the Federal defense is immunity from liability, that has to be distinguished from

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immunity from the burdens of trial that they're trying to obtain by imposing this interlocutory appeal rule on the Idaho appellate system.

QUESTION: Well, but the State of Idaho does recognize the doctrine of qualified immunity, doesn't it?

MR. LATTA: Very much so, yes.

QUESTION: So that all Idaho is denying that the Federal courts give is the interlocutory appeal.

MR. LATTA: That is correct, and the distinction that's of importance here is the manner in which the interlocutory appeal is taken in the Federal system compared to the State system.

QUESTION: Then you -- I don't want to interrupt. Are you finished? I want you to finish.

MR. LATTA: I wanted to answer -- excuse me. The interlocutory appeal under the Federal system is pursuant to 1291 and to the Cohen collateral order doctrine, and those are first ideas that a statute that doesn't apply, an idea that does not -- has not been accepted by the Idaho courts for application in State courts, and that provides the complete remedy that the petitioners seek, because there's a court system that allows for the interlocutory appeal that this case -- excuse me, this Court has created in Mitchell.

So if they're objecting that -- if their

objection is that we want our interlocutory appeal, the whole answer is, the case can be, should have been removed because that's where you know you're going to get your interlocutory appeal.

QUESTION: But why wasn't it a complete answer in Felder, then, to say well, you could have filed in the District Court for the Eastern District of Wisconsin, rather than in the circuit court?

MR. LATTA: My understanding of the distinction here would be that if you could have filed in the Federal district court in Wisconsin you would have still been subject to the 120-day rule, and that was what -- that limitation on bringing the State's rights was what was fatally wrong with the Wisconsin notice of claim statute.

QUESTION: I thought what was wrong in Felder was that in the State court, by imposing the time requirement, the right in effect was shrunk a little bit, and they said you can't shrink these rights against the wishes of those who assert them.

In this case, the party that is protected by the appealability rule in a qualified immunity case is the State, and the State says through its official agencies, I don't care. It's okay with me. I don't want that right.

Isn't that a distinction between this case and Felder?

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MR. LATTA: It has been exercised, yes. The State's position, as reflected in Idaho Appellate Rule 11, is that it does not want to hear interlocutory appeals, and it may exercise that right with respect to the State's interest.

QUESTION: Well, if this is an optional thing with the State, then I suppose the State could decide not to accept the qualified immunity doctrine at all, if it thinks its officers don't need it, right?

MR. LATTA: That is correct. They could do that. They could direct the Attorney General, perhaps through legislation, likely through legislation, not to assert the defense, and --

QUESTION: Well, I suppose --

QUESTION: If a 1983 action were brought, the defendant would -- I mean, he could tell the Attorney General not to, but he couldn't tell the individual who's being sued for his private fortune not to assert a defense that he has. You think the State could do that, say you offered us this. It was for the benefit of the State, and we don't think we need it so we're not going to let our State officers do it. You don't think they could do that, do you?

MR. LATTA: They could direct or make a policy decision not to use the benefit of the qualified immunity

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defense.

QUESTION: I'm not talking about the executive. I'm talking about the State courts.

MR. LATTA: In the State courts.

QUESTION: In the State courts? The State courts could say, the Federal Government's been very kind to offer us this immunity defense, but speaking for the State, thanks but no thanks, and you're liable under 1983 without any immunity? That's your position?

MR. LATTA: The -- if the question, if I understand the question, if it's collapsing the interlocutory appeal rule into the qualified immunity issue, then --

QUESTION: Oh, I mean -- they go together, it seems to me. If you -- you're asserting a doctrine of waiver, I guess, or -- I don't know, declination of offer, and you say that the Federal Government has essentially offered the State the advantage to its officers of having an immediate interlocutory appeal, and the State is saying we don't think we need it.

Well, if they could do it for that element of qualified immunity, why can't they do it for the whole doctrine and just say, we will not allow that as a defense to a 1983 suit. I think your position is, yes, they can do that.

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MR. LATTA: At the fullest extent the answer is yes.

QUESTION: You certainly don't have to take that position to defend this case, because there's a vast difference between giving up a procedural right that does not affect the ultimate outcome of the case and giving up a defense that would change the outcome in many, many cases.

MR. LATTA: I would agree with you, Justice --

QUESTION: And in Felder, of course, part of the analysis was that the statute affected the outcome in a significant number of cases, and that's not true here.

MR. LATTA: That's why I looked at the distinction between qualified immunity as a defense and the interlocutory appeal, because irrespective of not being able to exercise the interlocutory appeal that they seek by imposing 1291 on the State, the immunity defense will never go away, and it wouldn't matter what kind of a recovery the plaintiff would obtain down below if the State was, in fact, immune from suit the Supreme Court would so hold.

QUESTION: Yes, but in one respect it does go away, because the one element of the immunity defense is the element not to have to stand trial, and that does go away. If the only time you can raise qualified immunity

is after trial, then you have lost that element of the immunity, and that -- to that degree it is outcome-determinative.

MR. LATTA: If -- I would disagree. We've looked at that outcome-determinative issue as hard as we can, and if the answer is, does it determine the outcome of the lawsuit, the answer is no --

QUESTION: No, but it determines the outcome of whether they have to stand trial or not.

MR. LATTA: Exactly.

QUESTION: In that respect there is a determination --

MR. LATTA: There is --

QUESTION: -- that the bell cannot be unrung.

MR. LATTA: With respect to the trial bell, yes, it cannot be unrung, and if you don't want to hear that chimed in the background, either change Rule 11 or remove it to Federal court where you're guaranteed to be in a position to take the interlocutory appeal that they seek.

QUESTION: Well, it really doesn't deny the right not to stand trial, does it?

MR. LATTA: No.

QUESTION: The person has that right not to stand trial. The only issue is, when the district judge makes a mistake in the course of adjudication and finds

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that right not to be applicable, what is the procedural remedy?

You don't have to concede that the right not to stand trial has been abrogated by the State, do you?

MR. LATTA: No, not at all.

QUESTION: Well --

MR. LATTA: But you --

QUESTION: The district court here, the District Court of Bonner County, entertained a motion for summary judgment at the beginning of this case, didn't it?

MR. LATTA: Yes, it did.

QUESTION: And one of the grounds for summary judgment was qualified immunity.

MR. LATTA: That's correct.

QUESTION: So it's not as if Idaho said, we will never recognize any qualified immunity defense until the day before trial.

The district court heard the claim and simply decided against you, and all the other people are being denied, the State people, is the right to appeal that decision before trial.

MR. LATTA: The district court decided the issue in our favor, thinking that there had been a violation of clearly established law, and at this juncture what the petitioners want is to take their interlocutory appeal,

but they're not in a court system that's otherwise available 200 miles to the south in Moscow to take that appeal, and that's the -- the problem that they're faced with is having made the decision, they're now objecting to the effect of staying in the State system.

QUESTION: I suppose your case would be harder if Congress had written into 1983, made it a nice neat package with a substantive right and a procedural right all rolled into one, but the interlocutory appeal that we're talking about comes not from the Bivens claim or the 1983 claim, it comes from the standard 1291, the collateral order that applies as a matter of Federal procedural law to all Federal courts on all questions.

MR. LATTA: That is exactly --

QUESTION: Nothing unique to 1983 about 1291 and the collateral order rule.

MR. LATTA: That is correct. Johnson v. Jones shows us that very explicitly. Qualified immunity is not an issue -- excuse me. The interlocutory appeal is not an issue of 1983. It's a creature of 1291, and in your analysis, we see it the same way.

When the statute was passed there were rights and immunities, and at some point -- I believe it's 114 years later -- Mitchell comes down from this court, and now we have interlocutory appeals under 1292 and under

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Cohen that apply in State court, and if the Office of the Attorney General wants to take advantage of the second benefit offered along with the immunity itself, and that is the interlocutory appeal recognized by this Court, they can do so by removal. We don't think that they can do so by engrafting 1291 into Idaho Appellate Rule 11.

QUESTION: Well, you might even go so far, I suppose, as saying there's no right to even have an appellate structure at all in Idaho for a civilian civil dispute like this.

MR. LATTA: This Court earlier in the MLB decision acknowledged that there was no right, there's no requirement that the State provide civil appeals, and so the answer to your question is that is correct. We could go that far. The practicalities are is that is not what has happened here. We do have a civil system, but that civil system has chosen to look at the finality rule, and we can look at this case in the Federal court system the same way.

If Congress were to amend 1291 and make it a final judgment order decree rule as opposed to a final decision rule, then the underpinnings in Mitchell for allowing interlocutory appeals for statutory underpinning at least, would go away.

QUESTION: Mr. Latta, do you think your case

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might be weaker if Cohen hadn't decided that there are exceptions which this Court can carve out to the final decision rule?

In other words, suppose the Federal statute were categorical and this Court had said, well, yes, the procedural statute is categorical, but it seems to come into conflict with the right set forth in 1983, and since it comes into conflict with it, we think the rights set forth in 1983 must prevail, and despite a final judgment absolute rule, we think that statute prevails.

If it would prevail over the Federal statute, wouldn't it prevail over the State statute as well, if it were that strong a Federal policy?

MR. LATTA: It would be a much more difficult case for us to argue here. Interestingly, under Cohen, of course, the number of things that now fit into final decisions that this Court is going to look at keeps growing. It's not shrinking, and there's no hint that the Congress is going to move to a stricter rule than the final decision.

QUESTION: I suppose another --

QUESTION: It's moving at a slower rate, though.

QUESTION: Yes, I think we're not leaking quite as much as we used to.

QUESTION: I suppose another way of phrasing

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Justice Scalia's question is whether the appealability rule adopted in Mitchell is a construction of 1291 or a construction of 1983, and I suppose the answer's obvious because Mitchell wasn't even a 1983 case.

MR. LATTA: That is correct.

When we look at the Idaho State structure, the two opportunities that the State had to take their interlocutory appeal first as a matter of policy and second as a matter of tactics that are to be applied in this case, we suggest that the Court decline the invitation to apply 1291 to Idaho Appellate Rule 11.

Congress provided a complete remedy in the removal statute. It left to the State their choices on how to conduct their business and balance these competing State interests, and the balance is to be struck for the States, not in favor of engrafting a Federal statute.

Thank you very much.

QUESTION: Thank you, Mr. Latta.

Mr. Gilmore, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL S. GILMORE

ON BEHALF OF THE PETITIONERS

MR. GILMORE: Thank you.

The State court balance has already been upset. This case is in the State court. It would not be in the State court but for Felder v. Casey, and I think we've

really got a core issue. What's sauce for the goose is sauce for the gander.

QUESTION: But Felder v. Casey just matches what happens on the diversity side, doesn't it? You've got Rule 3 that says the case commences when you file the complaint, but if the State law says that's not good enough, you have to serve it. That State rule will apply in the Federal court in a diversity case, so Felder's just the match for that, isn't it?

MR. GILMORE: I think not. When you talk about Rule 3, you're talking about something that can be complied with that does not extinguish a substantive right. In this case, the substantive right at issue, the right not to go to trial, will be absolutely extinguished if there's an erroneous --

QUESTION: Not the immunity.

MR. GILMORE: The immunity.

QUESTION: Not -- and the difference in Felder is, if you didn't give that notice that the State had, you don't get your foot in the door in court at all. It's quite different.

MR. GILMORE: I would contend that it's just the same. You don't get your foot in the door for appellate review to protect your immunity, there's no procedure you didn't comply with. In Felder at least, you could have

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made it there in 120.

The way the Idaho supreme court has ruled, there's nothing that could have been done to get you there as a matter of right.

In Federal court, this Court has never said you must try to go under 1292 rather than 1291 if you want to get a review of a qualified immunity order, and there's no reason to impose that possibility of having an opportunity, maybe, for appellate review in the State courts. It should be the same in both court systems in order to preserve the benefits of the immunity.

QUESTION: The extent to which these finality notions are tied into Federal substantive rights is strained, isn't it, when one of the threads that you're tugging is the collateral order rule comes out of Cohen v. Beneficial, which I think was a diversity case.

MR. GILMORE: It was a diversity case. But the finality is tied to the substance of what is going on, and in here it's the Court's characterization of qualified immunity that determines whether it's final. 1291 doesn't tell you whether it's final.

It's the Court's characterization of the qualified immunity, the immunity not to go to trial, that is the key to finality. 1291 doesn't tell you what's final. The Court's 1983 precedents tell you what's final,

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and this is a final order under those precedents.

Just one or two other points -- oh, I see my time is up.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gilmore.

The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)