ORIGINAL

In the

Supreme Court of the United States

GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA, ETC.,

APPELLIANT.

V.

No. 79-45

BT INVESTMENT MANAGERS, INC., ET AL.

APPELLEES.

Washington, D. C.
January 15, 1980

Pages 1 thru 46

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA, ETC., Appellant,	:	
v.	:	No. 79-45
BT INVESTMENT MANAGERS, INC., ET AL. Appellees.	:	

Washington, D.C.

Monday, January 15, 1980

The above-entitled matter came on for oral argument at 11:36 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Jones, Day, Reavis and Pogue, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036; on behalf of the appellant.

JOHN L. WARDEN, ESQ., Counsel for the New York Clearing House Association, Amicus Curiae, 125 Broad Street, New York, New York 10004 on behalf of the appellees.

- - -

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Next is Lewis v. BT Investment Managers.

Mr. Griswold, you may proceed whenever you are ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GRISWOLD: May it please the Court, this case is here on appeal from a three-judge District Court in the Northern District of Florida. It is a constitutinal case in the commerce clause area relating to banks. It involves specifically the validity of two Florida statutes duly enacted by the Florida legislature, designed to prevent activities in Florida by subsidiaries of out-of-State bank holding companies.

The first of these statutes, section 659.141 of the Florida statute, as amended, effective in December 1972. This is set out in full in Appendix A at the close of the appellant's brief -- that is the red brief -- the appendices are separately paginated but I think it can be easily found at the beginning of Appendix A -- the part which is relevant in this case is at the beginning of the section on the first half of page A-1. Except as provided in subsection (3), no bank, trust company or holding company, the operations of which are principally concucted outside this State, shall acquire, retain or own directly all or substantially all the assets of or control over

any bank or trust company having a place of business in the State where the business of banking or trust business or functions are conducted. That is the first part, a bank or a trust company or require, or retain, or own all or substantially all of the assets of or control over any business organization having a place of business in the State where, or from which informatious investment advisory services in this State.

Now, that statute was amended in 1972 and reads in its present form, that prior to that it had been applicable only to the rendering of investment services to banks. But the restriction of the banks was taken out in December 1972.

It will be seen that this bars an out-of-State bankholding company from (1) ruling any bank or trust company having a place of business in the State, and it also bars out-of-State bank holding company from owning a subsidiary having a place of business in Florida from which it furnishes invest= ment advisory service.

The second of the Florida statutes is section 660.10 and that is in Appendix B at the close of the appellant's red-covered brief. And the essential part of it is that no one except a bank and trust company incorporated under the laws of the State, and having trust powers, except the national bank located in the State and having trust powers, can exercise any of the following powers, which include acting as executor, guardian, trustee, trustee in various situation, receiver,

assignee, fiscal agent, and so on, barring anybody but Florida corporations from conducting the trust business in Florida. You will see that fits in with the corresponding provision in the other section.

QUESTION: Mr. Griswold, do you think that the effect of these statutes would bar an individual who did not wish to limit his liability from going into Florida and rendering these services?

MR. GRISWOLD: Not under the law. It is only applicable -- an individual would have to incorporate in Florida but if he could not --

QUESTION: What if he didn't want to incorporate at all?

MR. GRISWOLD: He -- well, I would have to read the language of the statute to see just how it applies to an individual.

QUESTION: I was looking at Page A2 of your appendix and on section 2 there it says, referring to the business organization, controls in any manner the election of a majority of the directors or truestees of the bank, trust or holding company. And then section 1 before that says that business organizations, directly or indirectly. acting through one or more persons owns or controls 25 percent of the shares of any class of voting security, well that language to me connotes a corporation --

MR. GRISWOLD: In section 660.10, and I am looking at it, it is plainly applicable only to corporations. It does not apply to individuals, you could have private individuals acting as trustees in Florida in the trust business. And the section has no relation to it.

QUESTION: Mr. Griswold, before you leave the statute, do I correctly understand that 659.141 would prohibit the formation of a subsidiary to engage in the investment advisory business? Whereas, 660.11 would permit an out-of-State bank to own a local subsidiary if it is provided by Florida charter?

MR. GRISWOLD: As far as the Florida statute is concerned, it would. There are other --

QUESTION: I have some question as to whether we really have to decide anything about 660., the second statute, because I don't see that they ever tried to do that.

MR. GRISWOLD: I agree with you entirely, Mr. Justice; however, the court below did grant an injunction against the enforcement of 669.141 and entered a declaration that 660.10 was unconstitutional.

In view of that stand, the result is essentially the same, with respect to trust companies. But I think the operatie operative statute is 659.141.

659.141.

The court below held that first of the statutes was

unconstitutional as applied to trust and investment advisory services as an interference with interstate commerce. In the Court's words, this parochial legislation must be viewed per se unconstitutional. It enjoined the enforcement of the statute except as to -- or except with banks. It also gave a declaratory judgment to section 660.10, is invalid as violative of the commerce clause.

QUESTION: The District Court had originally abstained, had it not, and then been reversed by the --

MR. GRISWOLD: It had never been reversed by the Fifth Circuit and went back and they then decided the case.

It is our contention that neither of these Florida statutory provisions violates the commerce clause as understanding the effect of that clause has been developed in the teachings of this Court.

As this Court recently said in its decision in Hughes v. Oklahoma, just last April, the cases defining the scope of permissible State regulation in areas of congressional silence reflect an often controversial evaluation of the rules to accommodate Federal and State interests. And that is what we have involved in this case.

The cases show that for the purposes of applying the commerce clause as a limitation on State power, the definition of State commerce, while broad, is not without limit. One of the cases which we discussed in our brief is United States v.

the Oregon State Medical Society, which found that local personal services were not interstate commerce for the purposes involved in that case.

Similarly, I would point out that this case does not involve movement of goods across State lines as in Philadelphia v. New Jersey. The case upon which the Court below primarily relied in Hughes v. Oklahoma, nor does it involve any restrictions on the meanings of transportation of goods such as a railroad or trucking company or airlines.

In this case the subject of commerce is the provision of a personal service on a local basis. The nexus with interstate commerce is much less obvious and proof ot the substantial effect of interstate commerce is required before a State restriction can be struck down.

But there is no wuch showing of a substantial adverse effect on interstate commerce here, no direct evidence of any sort was presented on that matter in the trial court. The case was tried entirely on the stipulation which is set out in full text on pages 22 to 25 of the appendix, the court below hypothesized the necessary effect on interstate commerce. The court expressly acknowledged that that there was no direct evidence of that effect in this case. The appellees were the plaintiffs in the court below and it is difficult, if not impossible, to conclude that they written their burden of proof on this elememement.

We have discussed a number of cases in our brief, but the case which is closest to this, I believe, is the decision two years ago in Exxon Corporation v. Governor of Maryland.

It is appropriate I think to point out that the court below didn't even discuss the Exxon case. It didn't even cite it in its opinion, even though it is I think clearly the closest case. It involved the Maryland statute which prohibited all producers and refiners of petroleum products from operating retail service stations in Maryland, or from discriminating between customers in Maryland.

Now, there are no producers or refiners of petroleum products in Maryland, which everyone knew, it is suggested in the other side's brief here, that this statute is bad because it is discriminatory on its face whereas the Maryland statute was not. But this Court said in the Hughes v. Oklahoma case last week that a statute must be determined as to whether it is discriminatory on its face or in its operation and effect.

And the impact of the statute in the Exxon case was entirely on out-of-State refiners and producers which operated service stations in Maryland.

This Court noted that statute did not totally block interstate marketers of petroleum from entering into a market and this statute did not totally block extra-state corporations, individuals, businesses, other than banks and bank holding

holding companies from entering the Florida market.

QUESTION: Well, how do you enter the Florida market under these statutes; how would a New York bank enter the Florida market?

MR. GRISWOLD: The New York bank can't enter the market but Paine, Weber, Jackson & Curtis can open an office and get investment advice in New York. Standard & Poor's, which puts out much investment service, can open an office and give investment advice from New York.

Anyone --

QUESTION: But banks and trust companies, especially trust companies who are usually in the business of giving investment --

MR. GRISWOLD: Any sort --

QUESTION: -- they can't enter the market at all.

MR. GRISWOLD: So our --

QUESTION: Yes, but in any way they cannot enter the market.

MR. GRISWOLD. It is quite true. The effect of --

QUESTION: Either as a subsidiary or directly.

MR. GRISWOLD: Either directly or as -- through a subsidiary, they cannot enter this --

QUESTION: Investment advisory service.

MR. GRISWOLD: -- investment advice.

QUESTION: And that also means they can't act as a

trustee.

MR. GRISWOLD: And the other part of the statute means they cannot act as a trustee.

QUESTION: That normally includes giving investment advice.

MR. GRISWOLD: It means they cannot act as a trustee.

QUESTION: That normally includes including transportation advice.

MR. GRISWOLD: It often includes giving investment advice.

QUESTION: As in Exxon, the statute here does not prohibit the interstate movement of articles or goods; it doesn't prohibit the flow of fiduciary services into or out of Florida, it limits out-of-State outlets when leave by out-of-State banks, trust companies and holding companies, just as the Maryland statute in Exxon barred interstate outlets, only to producers and refiners, all of which were out of State, k--

MR. GRISWOLD: Section 660.10 by itself --

QUESTION: Could I ask you a question about the Exxon case: There it is stated, at least a reason whether one agrees with it or not, for discriminating against the finders and ownership, what is the reason that Florida asserts for treating out-of-State banks different from way Paine, Weber or other types of businesses that might open

as advisory services, if any. Is there any --

It wasn't too clear in Exxon -- it was asserted that there were --

QUESTION: At least the legislature had some hearings and came to a conclusion that ownership of a retail station by refiners gave rise to certain kinds of discrimination that they thought --

MR. GRISWOLD: I think it is the problem that all of the States have had over the years, of trying to find a way to maintain control over their own banking and economic facilities in such a way that their assets will not be drawn away by out-of-State operations, the States being led while the money goes elsewhere, it is in very large measure a --

QUESTION: Kind of protective local capital, is that right?

MR. GRISWOLD: No, protect local citizens, particularly people who may want to borrow money to buy houses and find the money has gone to be lived on the Euro-dollar market, at very high rates of interest.

QUESTION: Is there a greater danger of the out-flow of money from Florida if the investment advisory service is owned by Paine Webber rather than some big bank?

QUESTION: Well --

QUESTION: I don't see the difference. I don't see

how your explanation justifies that kind of a distinction.

MR. GRISWOLD: The history of this country is filled for 150 years of the struggle between national banking and local banking. I think the history books show that a Chief Justice of this Court attained prominence because he supported President Jackson in opposition on behalf of the State of Maryland to the operations of the Bank of the United States. This is part of that same --

QUESTION: But a bank is kept out of Florida but an investment banker isn't.

MR. GRISWOLD: That is correct.

QUESTION: And they both give investment advice.

MR. GRISWOLD: They both give investment advice and --

QUESTION: Under this statute could a bank -- could a Florida bank acting as and giving investment services, could it buy some investment advice from a New York bank?

MR. GRISWOLD: Yes, so far as I can see, it could.

QUESTION: Then there is a New York bank doing business in Florida, --

MR. GRISWOLD: No.

QUESTION: -- selling investment advice.

MR. GRISWOLD: No, it is not. It doesn't have an office in Florida.

QUESTION: You mean under this statute New York banks may give investment advice to Florida citizens?

MR. GRISWOLD: They can do it by mail or telephone and they can send representatives into the State as long as they don't open an office and conduct business in the State.

QUESTION: But could they act as trustee of assets located in Florida?

MR. GRISWOLD: Not without complying with section 660.10, which means --

QUESTION: You have to be a corporation.

MR. GRISWOLD: -- becoming incorporated in Florida.

I think it is appropriate now to move on to the other aspect of the case which is the fact that we have two strings to our ball. I have tried to argue so far that under Exxon there is not interstate commerce here which is adversely affected by this statute sufficiently to require the result reached below.

But there are two Federal statutes which are directly relevant. These Federal statutes are important not only because of the text of their provision but also because they represent important policy determinations made by Congress which are relevant in determining the validity of the Florida statute here involved.

They show that Congress made clear choices in this area and these should not be frustrated by opening the doors to minors and sappers, to use an historical phrase, in the form of the devices involved here which if allowed, and if

allowed here soon extended, will allow out-of-State bank holding companies to do much of what they have been specifically forbidden to do by Congress.

QUESTION: Mr. Griswold, before you move on, what would the District Court's decision here do to the general provisions in all the Sun Belt States denying reciprocity of admission to the bar?

MR. GRISWOLD: I haven't the slightest idea, Mr. Justice. There isn't any question of reciprocity involved in the decision of the court below.

QUESTION: But it is a common fact that the Sun Belt States simply refuse to admit on reciprocity where most of the other States don't.

MR. GRISWOLD: But the factors involving control by a State over admission to the bar it seems to me are historically and otherwise different factors than those involved in the admission of foreign corporations to do business in the State, particularly in the light of the Federal statutory provision to which I am about to refer to.

The first of the statutes was the MacFadden Act which was passed in 1927, more than 50 years ago. It relates to national banks but it says that national banks have branches in a State except to the extent that State banks can have branches in the State. And it also prevents interstate branching of national banks because branches were by that statute

limited to States within which the national bank was situated. But pressure to reach out is always found in the banking area. That, indeed, is what this case is all about. In due course the effect of these limitations on banking, including the limitations in the laws of most of the States, led to the development of a new expansive device and thus to vast growth in the use of bank holding companies.

By creating a corporation to own multiple banks it was possible to avoid limitations on branching, not only intra-state but across State lines, across many State lines. It was to deal with this problem that Congress passed the Bank Holding Company Act in 1956 and it contains three provisions that are relevant here.

The first of these is section 3(d) and that appears in Appendix C as 12 U.S. Code 1842(b). And it provides -- it bars any bank holding company or subsidiary from acquiring any additional bank located outside of the State where the holding company's banking subsidiaries are operating unless this is expressly authorized by the outside State. And here we have the Florida statute which says, we don't authorize, just what is invited by that provision.

And the second provision is section 4 of the Bank Holding Company Act now found in 12 U.S.C. 1843, in Appendix D at the close of the appellant's brief. The basic provision there says, "Except as otherwise provided in this Act no bank

holding company shall acquire direct or indirect ownership or control of any voting shares of any company which is not a bank."

And if it is said that these investment advisory and trust company services are not banks, Congress has said the out-of-State holding company shan't own it.

And then finally there is section 7 of the Bank Holding Company Act which is in Appendix E, which broadly reserved to the States their powers to regulate a bank holding company and their subsidiaries -- the last three words are "and subsidiaries thereof" -- as long as the State regulation is not inconsistent with the Acts of Congress.

Now, thus the basic Federal statutory scheme may be stated very simply. No bank holding company may own a bank outside the home State without the outside State's expressed permission.

It does not seem to me to be too difficult to construe this to apply to bits and pieces of banks, particularly when they are owned by a bank holding company and are so closely related to managing or controlling banks as to be a proper incident thereof as the Federal Reserve Board has determined.

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

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

AFTERNOON SESSION

(1:00 P.M.)

MR. CHIEF JUSTICE BURGER: Mr. Griswold, you may resume.

FURTHE R ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GRISWOLD: First, I would like to make a brief further answer to what, in effect, were two questions closely related, from Justice Stevens.

This case does not involve a question of who makes a sale, of what business is done. This case involves an aspect of Federalism. The difference between Paine Weber and the appellee here is that the appellee is a bank, a bank holding company. And the whole history of this country for 200 years shows a constant struggle on the highest policital level to maintain the position of the States with respect to the handling of money. And that is what this case is about. This is both the Congress and the States have passed legislation in this area over many years. And the statutes which are involved here are statutes of that type.

Now, I was referring to the particular provisions in the Bank Holding Company Act, the first one of which is that a bank holding company cannot own a bank in a State unless the State says it can.

The second one is that no bank holding company may

own any company which is not a bank and these things are not banks, this investment advisory, and strange to say, the trust business is not a bank.

And then there comes -- well, through these provisions Congress has formulated a national policy in this area. This case would never have arisen were it not for an exception to section 4 of the Bank Holding Company Act which is in 12 U.S.C. 1843(c)(8) and is printed on page D2, Appendix D of the appellant's brief. And it says "And such prohibition shall not with respect to any other bank holding company apply to shares of any company, the activities of which the Board" -- that is the Federal Reserve Board -- "after new notice an opportunity for hearing as determined by order or regulation to be so closely related to banking or managing or controlling banks as to be a proper incident thereto."

Now, the appellees contend that in substance by this exception Congress has undone much of what it so clearly did and intended to do in the basic parts of the very same statute.

I do not think that this exception needs to be construed or should be construed to authorize any such result, to authorize, in effect, the introduction of a new cutting edge of expansion from outside the State, when the whole tenor of the statute and its history shows that the basic policy choice made by Congress was to protect the States from expansion by outside bank holding companies, except to the extent that the

State chose to authorize such expansion.

The basic policies established by Congress are clear, no bank outside the State, no subsidiary which is not a bank. This gives color to and helps to define the scope of the exemption given in (c)(8). To use the words used by the Court in another text, these basic -- in another context, these basic prohibitory provisions provide emanations which help to determine the intent of Congress which was expressed in (c)(8).

My suggestion is that (c)(8) can be given full scope and effect by construing it to have territorial limitation, that (c)(8) authorizes the Board to authorize a bank holding company to own a corporation which is not a bank, to provide services to the bank holding company in a State where the bank holding company is authorized to own a bank. But that it should not be construed in a wide open way to authorize the bank holding company to proceed into other States, all other States without limitation.

QUESTION: Was that the basis -- is that the construction the Board put on it?

MR. GRISWOLD: The Board has not -- the Board considered this case up to the point where Florida passed the statute and then the Board said because Florida says we can't go there, we will not authorize it.

QUESTION: That is your position.

MR. GRISWOLD: I believe that the --

QUESTION: Is it now your position?

MR. GRISWOLD: I believe that the Board has authorized some bank holding companies to have a subsidiary outside the State. I am contending the Board was wrong.

QUESTION: The Board might do this in a State that didn't prevent it.

MR. GRISWOLD: It might do it in a State which didn't prevent it.

QUESTION: And you would say that it didn't in a State that did prevent it, it was right.

MR. GRISWOLD: In a State --

QUESTION: You would say the Board was quite right then in denying permission here, because Florida prevented it.

MR. GRISWOLD: Yes, I would say they were but I would also say that the Board has no power under this statute, if properly construed, because the statute ought to be construed to authorize the Board to allow these subsidiary assisting factors only in States where the bank holding company needs those factors in order to carry out its banking business in those States.

QUESTION: So you are disagreeing the administrative construction of this action.

MR. GRISWOLD: Not -- there never has been a clear

administrative construction by way of --

QUESTION: But you said you thought the Board was wrong, a moment ago.

MR. GRISWOLD: I think that in those cases where the Board has authorized this outside of the State where there is a bank that properly considered judicial authority might hold if the Board was wrong.

As Justice Cardozo said in the Panama Refining case, the meaning of the statute is to be looked for not in any single section but in all the parts together and in their relation to the end in view.

And I would call attention to the fact that in the recent case of Kee v. Boyle involving jurisdiction of appeals from the District of Columbia Court of Appeals, this Court did exactly that; it applied a territorial limitation to a statute which was otherwise quite clear.

Accordingly, we think that the judgment below was erroneous and should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Warden.

ORAL ARGUMENT OF JOHN L. WARDEN, ESQ.,

ON BEHALF OF THE APPELLEES

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

I should point out initially that the statutory provision that Dean Griswold was just referring to, which is

at D-2 of the Appendix, the red brief, contains no territorial limitation. It has never been construed by the Board to contain the limitation that Dean Griswold contends should be read into it. Indeed, until a few minutes ago I wasn't aware that that argument was being made in this case. And if that construction is adopted by the Court, with no basis whatsoever, it will result in invalidating literally hundreds of substantial acquisitions made by bank holding companies with the approval of the Federal Reserve Board, not disturbed by any judicial proceeding, for many years.

QUESTION: What do you say? I suppose you will get to it, but what would you say the Board's error was in denying permission here?

MR. WARDEN: Well, Mr. Justice White, the Board has construed this Court's decision in Whitney as requiring it to give effect to State law in ruling on applications, whatever the constutionality of the State law. In other words, it will not determine the constitutional question. It remids the parties to the Court for that purpose, which is why this case was instituted in a three-judge District Court in Florida and brought up here as it has been.

So the Board's final action was: We would have approved or we would likely have approved this application but for the recent hastily enacted Florida statute.

QUESTION: Do you think the Board also -- or perhaps

it didn't -- you don't think there is any element in the Board's decision that -- to the effect that Congress consented to the kind of Florida statute?

MR. WARDEN: No, I do not.

The Court noted in its opinion in Whitney that the Board had at that point considered that section 7 of the Bank Holding Company Act permitted States to preclude the doing of business by bank holding companies entirely, to preclude that form of commercial organization. We don't have to reach that question in this case, for since Florida permits the doing of business by bank holding companies it permits that form of commercial organization.

But I don't believe there is any indication that the Board reads section 7 as permitting an otherwise unconstitutional discrimination against out-of-State firms.

QUESTION: Well, it is if Congress permitted --

MR. WARDEN: No. I said "an otherwise," and they don't read section 7 as constituting a congressional validation of otherwise unconstitutional discrimination against out-of-State firms. I know of no suggestion to that effect in the Board's opinion. And they make no such allusion in their opinion in this case.

Secondly, I would like to note that with respect to the question of whether interstate commerce is involved in this case at all, which Dean Griswold addressed, I do not

notice that contention made in the brief filed on behalf of the appellant. And the fact that the business that Bankers Trust proposes to engage in would be conducted in interstate commerce was not disputed by Florida before the three-judge District Court and, in fact, was conceded.

QUESTION: Let me -- I just want to clear up one more point.

Do you think the Board has addressed either way the question of congressional consent?

MR. WARDEN: To this sort of statute, I do not.

QUESTION: So you can't rely on Board construction that there is no consent.

MR. WARDEN: Well, that is correct. And I must say I don't think that, as I shall approach that part of the argument later, that there is any need for administrative expertise in determining that question.

QUESTION: I know you don't.

Well, when you said there is no need for administrative expertise, you mean you don't rely on any pre-emption doctrine under the Bank Holding Company Act. You simply rely on what are called reverse commerce clauses from this Court?

MR. WARDEN: That is correct.

QUESTION: Because the commerce clause itself simply grants Congress the authority to regulate commerce among

several States.

MR. WARDEN: Well, that is correct, Your Honor, but the consistent line of authority in this Court has been that it has negative implications of its own force for State statutes that discriminate against interstate commerce. There was no Federal statute involved, for example, in Philadelphia v. New Jersey, at least of which I am aware. And I believe that Dean Griswold has conceded in his brief on behalf of the Conference of State Bank Supervisors at page 4, that the commerce clause has exactly the same scope when relied upon to strike down discriminatory State regulation as when relied upon to justify affirmative congressional regulation.

Now, to continue briefly on the interstate commerce question, the three-judge court addressed directly the question of the counsel for the State of Florida below of whether the defendant made any serious contention, and I quote that, that Bankers Trust would not be engaged in interstate commerce in the business it proposes to conduct and counsel replied, and I quote: "The defendant does not."

I might add that a New York-based financial institution operating these businesses in Florida by means of local offices directed from New York and effecting the flow of capital funds into the national capital market is inescapably involved in interstate commerce.

The second point I would like to make is that this case does not involve banking or any issue of competitive quality between State and national banks or any question of the dual regulation of banks.

The distinction between the business of banking and the businesses here involved, trust services and investment advisory services, is recognized not only in the Bank Holding Company Act by Congress, which I shall address in a moment, but right on the face of Florida statute, section 659.141, which expressly discusses as discreet businesses the business of banking, the trust business and investment advisory services.

QUESTION: They might be lesser included offenses though, mightn't they?

MR. WARDEN: I think not.

As we pointed out in our brief, Your Honor, banks might do trust businesses and investment advisory businesses, but so do many other sorts of commercial institutions.

QUESTION: But they are not unrelated to banking.

MR. WARDEN: They are not unrelated to banking.

QUESTION: Otherwise, it may be your clients wouldn't be interested.

MR. WARDEN: That is quite right. And otherwise the Federal Reserve Board wouldn't have given --

QUESTION: I beg your pardon?

MR. WARDEN: -- an indication of that. But I point out that not only the Paine Weber's engaged in investment advisory services, but other forms of non-deposit trust companies such as what we propose to set up here, engage in trust services; and so do natural persons who have no banking powers whatsoever. I think we used the illustration in our brief the manufacturer of aircraft doesn't become the manufacturer of automobiles because it is carried on by General Motors.

Now, I should also point out, because I thought it might have been unclear, while I am talking about 659.141, that that statute itself bars us both from the investment advisory business and from the trust business, irrespective of 660, because 659.141 keeps us out whether we have a locally incorporated subsidiary or open an office of an out-of-State subsidiary.

QUESTION: Well, Mr. Warden if --

MR. WARDEN: Yes, sir.

QUESTION: -- if the District Court was correct in holding 659.141 unconstitutional, why would we have to go ahead -- assume we agreed with them, just for purposes of discussion -- would we still have to go ahead and consider the other statute; and if so, why?

MR. WARDEN: I think you would, Mr. Justice Stevens, because as Dean Griswold suggested in his brief, it appears

that the lower court may have read 660.10 as of its own force precluding Bankers Trust New York Corporation Holding Company from complying with its terms by incorporating a local subsidiary. Now, the statute doesn't say that on its face.

QUESTION: Well, then why should a Federal court assume -- you know you certainly don't strain to give the statute an unconstitutional reading.

MR. WARDEN: Absolutely not, Your Honor,but Florida has not yet represented or conceded in this proceeding that the statute will not be so construed and enforced if Florida does so or if this Court rules that that is not what the statute means. Then section 660.10 insofar as that was the basis for the lower court's decision does not have to be reached by this Court.

QUESTION: Well, the Florida courts have never had an opportunity to interpret the law. Their District Court originally abstained and you appealed, saying they shouldn't have abstained.

MR. WARDEN: Well, at that point Bankers Trust took the position that there was nothing unclear about this statute.

QUESTION: But to say that Florida hasn't yet conceded, very likely the Executive branch in Florida or the people representing the State banking authorities aren't in a position to make the final determination . That is for the

Florida courts I would think.

MR. WARDEN: If I may, Your Honor, I think that if the lower court did construe the statute the way Dean Griswold suggested it may have, the lower court clearly erred. In that question the State law is so clear that it should be disposed of by this Court.

QUESTION: You are talking about --

MR. WARDEN: But that is --

QUESTION: -- 660.10.

MR. WARDEN: Yes, I am, Mr. Justice Stewart.

But that would be a necessary part of this Court's decision if it is going to set aside the declaration below that 660.10 is unconstitutional on the ground that it prevents of its own force Bankers Trust from complying with it.

But let me --

QUESTION: It is a auggestion that we would know more about the Florida law than the District Court.

MR. WARDEN: Well, it is a suggestion, if you please Mr. Justice White, that you can read statutes.

QUESTION: Well, that is in the District Court.

MR. WARDEN: In this case, yes.

QUESTION: And a matter of State law, it is a matter of State law.

MR. WARDEN: In this particular instance, yes, Your Honor.

QUESTION: So you --

MR. WARDEN: But I might add, Mr. Justice White, --

QUESTION: You are suggesting you should lose on that part of the case.

MR. WARDEN: No, I am not suggesting we should lose on that part of the case. I am going to get to another aspect of that statute in just a moment.

But the decision below need not be affirmed on that basis if this Court construes the statute not to operate as it may have been thought to operate by the District Court. There will nonetheless remain the effect of 660.10 on Bankers Trust's New York subsidiaries which conduct a large trust business and are precluded by that statute from themselves acting as an executor or testamentary trustee, even without a local office, of a Florida resident, even when named in his will as such.

Now, this result I don't think can be justified --

QUESTION: Perhaps I understood Dean Griswold -- didn't he suggest that this statute didn't prevent an outside executor from himself doing business across the State line?

MR. WARDEN: I didn't hear Dean Griswold suggest that statute contains --

QUESTION: I will --

MR. WARDEN: -- some exceptions.

QUESTION: He speaks for himself. I will rely on the

transcript.

MR. WARDEN: But it says in the first paragraph that only locally incorporated banks and trust companies and national banking associations having trust powers may do the following within this State, and that **includes** acting as testamentary trustee.

QUESTION: Suppose that 660.10, if that provision had been construed to permit out-of-State corporations directly to give investment advice in a State, either through a local office or without a local office, on the telephone or by mail, the District Court might have had a different idea about the other statute because there might be a way where if they could do business this way it wouldn't be so burdensome on interstate commerce.

MR. WARDEN: I don't think that 660.10 can be read as dealing with anything other than a requirement of local incorporation. I don't think it can possibly be read to permit out-of-State corporations from doing the very business it says they can't do.

QUESTION: Yes.

MR. WARDEN: And even if it were so read, as I mentioned a minute ago, 659.141 of its own force, by its plain language prevents the doing of these businesses in Florida by out-of-State holding companies either directly or through local subsidiaries.

QUESTION: As you read 660.10 simply as requiring an executor or an administrator or the these other named offices be local, that is incorporated or qualified in Florida, it is not too unusual a provision, is it? Don't many States in their probate law or decedents law require that the guardian or the administrator of a decedent's estate be a local corporation or a local resident?

MR. WARDEN: Mr. Justice Stewart, there are approximately ten or so such statutes --

QUESTION: In ten or more States.

MR. WARDEN: Yes.

As pointed out in the Conference of State Supervisors' brief there are fewer now than there were in years past. And I might say that in Fain v. Hall, a District Court in Florida decision last year, 463 F. Supp. 661, the District Court struck down the Florida statute that limited to close relatives out-of-State individuals who could act as fiduciaries in Florida, basing its decision not on the privileges and immunities rights of the fiduciaries but on the basic and fundamental right of the testator to name his own fiduciary.

QUESTION: You say that was a District Court?

MR. WARDEN: Yes, and that was not appealed by the State.

QUESTION: What constitutional provision did the District Court rely on in that case?

MR. WARDEN: The due process clause, Your Honor.

QUESTION: Life, liberty, property?

MR. WARDEN: The District Court said that selecting a fiduciary to manage one's property was a fundamental part of human liberty protected by the due process clause.

QUESTION: And that this had been taken away without due process of law?

MR. WARDEN: It also found the classification --

QUESTION: It was legislation enacted by the State legislature.

MR. WARDEN: That is correct.

QUESTION: And that was not due process of law?

MR. WARDEN: That is correct, that was the holding, Your Honor.

QUESTION: Would you suggest -- suppose the District Court had stricken down 660.10 and then said that we needn't reach the other section.

MR. WARDEN: 659.141, they would have to reach, Mr. Justice White.

QUESTION: Because that --

MR. WARDEN: That covers both businesses, investment advisory and trust and of its own force considered apart from 660.10 keeps Bankers Trust from doing business in Florida.

QUESTION: In any form.

MR. WARDEN: In any form.

QUESTION: Across State line, by telephone, by letter.

MR. WARDEN: No, no, no, I beg your pardon -- prevents their maintaining a local office in Florida.

QUESTION: That is right. But it could still do business across a State line?

MR. WARDEN: Yes.

QUESTION: As far as that section --

MR. WARDEN: It doesn't preclude using a telephone or sending people down by airplane.

QUESTION: Or acting as trustee?

MR. WARDEN: No, I do not believe it does, Your Honor; 660.10 does that.

QUESTION: Yes, sir. Exactly.

QUESTION: Mr. Warden, I am still a little puzzled about the two statutes.

Assuming we hold the first statute, affirm the District Court on the first statute, has the second statute hurt your client -- I mean the appellee here, in any way, because they haven't tried to form a subsidiary, or have they? And --

MR. WARDEN: It has been stipulated that but for 659.141 and 660.10 if considered of its own force to have that effect, Bankers Trust would apply to incorporate a local subsidiary.

QUESTION: If we read 660.10 the way you suggest the plain language indicates, there is no harm to the client and no reason to reach the constitutionality of a statute which says you have got to be locally incorporated.

MR. WARDEN: That is correct as to the principal issue tried below, which was Bankers Trust attempt to open a local office in Florida.

QUESTION: Right.

MR. WARDEN: That statute will, however, continue of its own force to prevent Bankers Trust New York operating a subsidiary.

QUESTION: But there is no evidence they have ever tried to do anything themselves, is there?

MR. WARDEN: There is not, Your Honor. There is, however, a stipulation that the enforcement of the statutes and each of them has caused Bankers Trust New York Corporation economic injury.

QUESTION: Do you think that is enough to require us to face the constitutionality of the statute that says in order to engage in trust business you have got to be locally chartered?

MR. WARDEN: Well, that is the state of the record, Mr. Justice Stevens.

Now, if I may proceed with my basic constitutional point, the statutes that Florida here seeks to sustain

in fact on their face, the simple economic protection as the Court held invalid per se two terms ago in Philadelphia v. New Jersey. Florida has not sought by these statutes to regulate bank holding companies in a way that is even-handed on its face but in operation discriminates against interstate firms.

The so-called regulation here in issue affects only firms not based in Florida and it does not regulate them. It prohibits them absolutely from providing the services in question in Florida.

The Exxon case upon which the opponents place their principal reliance simply does not stand for the proposition that the commerce clause allows a State to exclude some but not all out-of-State firms as out-of-State firms. The barrier in Exxon was not against interstate firms but against vertically integrated firms, Maryland based or otherwise. This Court expressly noted 437 U.S. at 126 that Maryland's statutory scheme did not "distinguish between in-State and out-of-State companies in a retail market."

Florida's statutory scheme, in stark contrast, does nothing but distinguish between in-State and out-of-State companies in these markets.

Florida has acted not to preclude the doing of certain business by bank holding companies but to preclude out-of-State bank holding companies from doing business in

Florida.

Secondly, Hughes v. Oklahoma did not overrule or limit Philadelpha v. New Jersey, it cited the case with approval. And as our briefs note, the first point of the Hughes three-point test incorporates the holding in Philadelphia and says that at the very least in the case of a statute discriminating on its face the State has the burden to justify, under strict scrutiny, a nondiscriminatory local purpose in the absence of nondiscriminatory alternatives. Florida has done neither.

As to the supposed need to protect the people of Florida from some undefined menace of large financial companies, it is sufficient to say that the statutory scheme does not even make a pretense of doing so.

QUESTION: But doesn't the statute single out banks, at least --

MR. WARDEN: It single out bank holding companies.

QUESTION: Yes.

MR. WARDEN: Out-of-State bank holding companies.

QUESTION. Yes, but it doesn't single out other kinds of out-of-State companies, holding companies or otherwise.

MR. WARDEN: No, but our argument, Mr. Justice White, is that under the decisions of this Court Florida is required to treat similarly situate local corporations and out-of-State

corporations similarly unless it justifies, under strict scrutiny, some legitimate nonprotectionist reason for doing so.

QUESTION: Well, what about in Exxon, out-of-State companies that weren't refiners but who were engaged in the distribution of gasoline could own local stations?

MR. WARDEN: That is correct, Mr. Justice.

QUESTION: They just picked out refiners.

MR. WARDEN: Picked out refiners. This statute doesn't pick out bank holding companies, it picks out out-of-State bank holding companies. Florida permits the holding company form of commercial --

QUESTION: Well, it just so happened there weren't any local refiners in Maryland.

MR. WARDEN: That is entirely correct.

QUESTION: It picked out-of-State refiners.

MR. WARDEN: That is a lesser included part of the class, as a matter of fact it was the entire class but that needn't remain so when the statute on its face attached no significance to being an interstate firm or an out-of-State firm.

QUESTION: It wasn't the entire class of out-of-State, however; there were some out-of-State retailers --

MR. WARDEN: Not refiners.

QUESTION: -- distributors who did not produce or

refine.

MR. WARDEN: Yes, who were permitted to continue to operate. As the Court said, as I quoted a minute ago, the statute does not distinguish between in-State and out-of-State dealers in the retail market.

This statute does distinguish between in-State and out-of-State bank holding companies.

QUESTION: It isn't a regulation of banking in a sense, because it doesn't affect local banks.

MR. WARDEN: No, it is a preclusion of the doing of interstate commerce.

QUESTION: If your argument is valid, a State which did not permit bank holding company-type of operation could do what Florida is trying to do here.

MR. WARDEN: That is a much stronger case for the State, Mr. Justice Stevens,but I would submit that is not this case. But I would submit that in such a situation, if local banks were allowed to engage in the trust and investment advisory business, say, the sole effect of such a statute would be to preclude out-of-State competition in the trust and investment advisory businesses which Congress has recognized are not the business of banking and therefore are not within the consent that is given to the State to exclude multi-State banking.

QUESTION: But under --

MR. WARDEN: That is not this case.

QUESTION: If I understood Mr. Griswold correctly, so what you should look at is not just out-of-State banks or bank holding companies but all out-of-State concerns that want to enter the investment advisory service market. As in Exxon you look at the whole investment advisory service market and say keeping out a few New York banks isn't going -- there is no proof that will affect that market because there is Paine Weber and others who may come in. That is what I understood his argument to be.

MR. WARDEN: Well, there is no evidentiary record to support the contention that this has a de minimus effect and the State had the burden of establishing that, given the discrimination on the face of the statute.

But in any event, I don't think that is the commerce clause test under this Court's decision. I think that the commerce clause requires that like in-State firms be treated the same as like out-of-State firms.

QUESTION: You say that in Exxon if Maryland had said local refiners, if there were some, may own stations; but out-of-State refiners may not.

MR. WARDEN: That would have been stricken.

QUESTION: That is his case.

MR. WARDEN: Yes.

Now, the kind of rationalizations presented here by

Florida to support this statute, were rejected -- I hope once and for all -- when Mr. Justice Cardozo said in Baldwin v. G.A.F. Seelig 294 U.S. at 523, to give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range.

Now I would like to turn to the contention that Congress has consented to this discrimination.

The meaning of section 3(d) is clear on its face, that is the first of the provisions of the Bank Holding Company Act to which Dean Griswold referred, it precludes acquisition by holding companies of banks across State lines absent affirmative legislative consent by the affected State.

In section 2(c) of the Act Congress has defined a bank, in accordance with common understanding, to be an institution that accepts demand deposits and makes commercial loans.

QUESTION: Where are you reading from?

MR. WARDEN: That is section 2(c) of the --

QUESTION: Is that in the --

MR. WARDEN: Bank Holding Company Act.

QUESTION: Is that Appendix C or D or --

MR. WARDEN: Well, its -- I haven't printed it in there --

QUESTION: It is in your brief -- sorry --

MR. WARDEN: That wasn't printed as one of the statutes in the Appendix.

QUESTION: You suggested --

MR. WARDEN: That is printed at pages 15 and 16 of our brief on the merits, December 19, the yellow --

QUESTION: Right. I have it.

MR. WARDEN: I believe you have it, the appellees' brief there.

QUESTION: That is right.

MR. WARDEN: That is the Clearing House brief.

QUESTION: Oh, yes, you are not an appellee; you are also a stand in.

MR. WARDEN: Right, Your Honor.

Now, this case, as I said at the outset, doesn't involve the organization or acquisition of a bank by anyone anywhere. Indeed, that definition was amended by the Congress in 1966 to read -- well not quite as it now reads, it was amended again in '70. But it was specifically amended in 1966 to remove nondeposit trust companies , which is what we are concerned with here. It never included investment advisory organizations.

And the reason it was removed -- it was amended to remove nondeposit trust companies is stated in the Senate Report on the '66 Amendments at page 7 as follows:

"The purpose of the Act was to restrain undue

concentration of control of commercial bank credit and to prevent abuse by a holding company of its control over this type of credit." I am paraphrasing, the certain institutions which are included now need not be included to achieve that objective. Therefore we are redefining "bank" to exclude institutions like nondeposit trust companies.

I see that my time is up. I have two brief additional points, if I may, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: You can complete it in one minute.

MR. WARDEN: Thank you.

Section 4 to which Dean Griswold referred confers no powers on any State. That is the section that confers on the Federal Reserve Board the power to approve transactions such as the one that Bankers Trust wishes to engage in. Section 7, on which he also relies, is on its face a negation of affirmative preemption. It is not a consent to the exercise of otherwise unconstitutional State legislative powers. It says this Act shall not be construed to preempt it. It doesn't say the commerce clause shall be.

QUESTION: Let me ask you: If the holding company here, if the New York holding company had wanted to acquire a bank in Florida, you would agree Florida could keep it out?

MR. WARDEN: Florida is empowered under --

QUESTION: Even if Florida holding companies may own

banks?

MR. WARDEN: Yes, in fact a holding company is a bank holding company only because it owns a bank.

QUESTION: Yes, exactly.

MR. WARDEN: But Congress has in the Bank Holding Company Act given not just consent to such State legislation, it has itself affirmatively declared --

QUESTION: That is right.

MR. WARDEN: And so --

QUESTION: So Florida has a choice of either discriminating against foreign holding companies or not.

MR. WARDEN: That is right.

Congress says affirmatively prohibit --

QUESTION: That is right.

MR. WARDEN: -- multi-State bank acquisitions by a bank holding company if --

QUESTION: If the State law permits it.

MR. WARD: -- absent an affirmative State --

QUESTION: All right, Florida could permit or it may prevent it.

MR. WARDEN: As far as the business of banking is banking is concerned.

QUESTION: Exactly.

MR. WARDEN: Congress has not granted that permission as far as any other business is concerned.

Thank you.

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

- - -