UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-5285/5286-MN

APL LIMITED PARTNERSHIP,

Plaintiff-Appellee,

v.

VAN DUSEN AIR INCORPORATED

and

HUBERT H. HUMPHREY, III,
Attorney General of the
State of Minnesota,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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MISCELLANEOUS

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is the agency primarily responsible for the administration and enforcement of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a et seq., of which the Williams Act 1/ is a significant part. Congress enacted the Williams Act to regulate tender offers and other substantial acquisitions of securities, establishing a variety of substantive and disclosure requirements.

This appeal concerns the validity under the United States Constitution of the Minnesota Control Share Acquisition Act (the "Minnesota Act" or the "Act"), which, in a substantial departure from traditional forms of state regulation, severely restricts securities acquisitions that are permissible under federal law. The Commission has a substantial interest in the application of any state scheme for the regulation of securities acquisitions that potentially conflicts with the Williams Act, and also in the

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1/ The Williams Act, enacted in 1968 and amended in 1970, added sections 13(d), 13(e), 14(d), 14(e), 14(f) to the Securities Exchange Act. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454; Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497 (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f) (1970)).

question of whether particular state securities laws impose undue burdens on interstate commerce. The Commission submits this brief to express the view that the Minnesota Act is unconstitutional under both the Commerce and Supremacy Clauses of the United States Constitution. 2/

STATEMENT

The Federal Scheme

In enacting the Williams Act in 1968, Congress established a comprehensive federal scheme for the regulation of tender offers and for the disclosure of other substantial acquisitions of publicly-traded equity securities. Section 13(d) of the Exchange Act, 15 U.S.C. 78m(d), provides that any person who acquires the beneficial ownership of more than 5% of the equity securities of a public company must file a statement within 10 days after that acquisition fully describing, inter alia, the background of the purchaser, the purposes of the acquisition, and certain specified plans or proposals with respect to the issuer. 3/ Section 13(d) does not restrict in any way further open market purchases by the filing person. As discussed below, Congress considered and rejected

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2/ The Commission takes no position on any factual question or on any other legal issues in the case. The Commission's enforcement staff is conducting an informal inquiry into certain events related to this action.

3/ Schedule 13D, 17 C.F.R. 240.13d-101. The Williams Act requires "that an accurate, informative and full disclosure be made and that the disclosure be amended promptly to reveal any change in the plans originally disclosed * * *." Telvest v. Bradshaw, 697 F.2d 576, 581 (4th Cir. 1983); see Rules 13d-1, 17 C.F.R. 240.13d-1; 13d-2, 17 C.F.R. 240.13d-2. The statute requires that the statement and any amendments be sent to the issuer and the exchanges on which the security is traded, and filed with the Commission. The Commission makes Schedule 13D filings available to the public and the press, and its experience has been that filings involving contested tender offers are reported in national and regional newspapers.

the imposition of a requirement for advance public announcement with respect to these types of non-tender offer purchases.

Section 14(d), 15 U.S.C. 78n(d), regulates the conduct of tender offers for the equity securities of a publicly-traded company. Unlike the post-acquisition disclosure required by Section 13(d), Section 14(d) requires disclosure of material information at the time a tender offer is made. 4/ Section 14(d) also establishes a number of substantive protections for securities holders. Open market or private purchase programs may constitute "unconventional tender offers" subject to Section 14(d)'s disclosure and substantive protections. 5/

The Minnesota Act

The Minnesota Act, challenged in this case, requires approval by subject company shareholders prior to consummation of "control share acquisitions." 6/ The term "control share acquisition" is

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4/ This is accomplished through a filing with the Commission and delivery of that filing to the subject company, and through dissemination of such information to security holders. Rules 14d-3(a), 17 C.F.R. 240.14d-3(a); 14d-6, 17 C.F.R. 240.14d-6; Schedule 14D-1, 17 C.F.R. 240.14d-100.

5/ See, e.g., Wellman v. Dickinson, 475 F. Supp. 783, 821-26 (S.D.N.Y. 1979), aff'd on other grounds, 682 F.2d 355 (2d Cir. 1982), cert. denied, 460 U.S. 1069 (1983) (secret, active and widespread solicitation of shares over a short period of time constituted a tender offer, even absent widespread publicity of the offer); but cf. SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir. 1985) (open market repurchase program initiated by Carter Hawley Hale in response to a hostile tender offer did not violate Rule 13e-4, 17 C.F.R. 240.13e-4).

6/ The constitutionality of the Minnesota Act was also challenged in Edudata Corp. v. Scientific Computers, Inc., 599 F. Supp. 1084 (D. Minn.), aff'd in part, dismissed in part, 746 F.2d 429 (8th Cir. 1984). See also Scientific Computers, Inc. v. Edudata Corp., 599 F. Supp. 1092 (D. Minn. 1984). The Edudata court, however, expressly declined to reach the issue. Similar statutes have been challenged in other jurisdictions.

(footnote continued)

defined as an acquisition of shares, by any means, that would result in the purchaser's level of ownership crossing the 20%, 33 1/3%, or 50% threshold of voting power. Minn. Stat. § 302A.011, subd. 38; § 302A.671, subd. 2 (1985). 7/ The Minnesota Act applies to such acquisitions of the shares of any corporation organized under Minnesota law that has at least 50 shareholders and either its principal place of business or over one million dollars in assets located in Minnesota. Id. at § 302A.011, subd. 39. The Minnesota Act applies even if no shareholders of the subject company reside in Minnesota and applies to all shareholders, wherever they are located.

Before acquiring more than 20% of the outstanding voting shares of a subject company, the prospective purchaser is required by the Minnesota Act to obtain the affirmative vote of a majority of the subject company's outstanding voting shares at a special meeting of the shareholders called for this purpose. Id. at § 302A.671, subds. 3, 4; § 302A.011, subd. 38. The Minnesota Act requires that the prospective purchaser send an "information statement," containing certain prescribed information, to the issuer. Id. at § 302A.671, subd. 2. Within five days of its receipt of that statement, the

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6/ (Continued)
Compare Icahn v. Blunt, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,096 (W.D. Mo. June 24, 1985) (finding Missouri Control Share Acquisition Act unconstitutional under the Supremacy and Commerce Clauses), with CEIC Holding Co. v. Cincinnati Equitable Insurance Co., No. C-1-84-1587 (S.D. Ohio Nov. 8, 1984) (refusing to grant temporary restraining order enjoining enforcement of Ohio Control Share Acquisition Act as applied to an Ohio corporation where 90% of shareholders were Ohio residents).

7/ The plaintiff, according to its Schedule 14D-1 filed on August 26, 1985, owns approximately 19.7% of the outstanding common stock of Van Dusen.

issuer must call a special shareholders meeting to consider the proposed acquisition. Id. at § 302A.671, subd. 3. The meeting must be held within 55 days after receipt of the information statement unless the prospective purchaser agrees to a later date. Id.

Notice of the meeting must be given within 25 days after receipt of the information statement, and must be accompanied by a copy of the information statement and a statement of the position of the board of directors of the issuer. Id. Proxies for this special meeting must be solicited separately from the offer to purchase or solicitation of an offer to sell shares of the issuer, and must be solicited no less than 30 days before the meeting, unless the prospective purchaser and the issuer agree otherwise in writing. Id. at § 302A.449, subd. 7. The prospective purchaser may request in writing when delivering the information statement to the issuer that the meeting be held no sooner than 30 days after such delivery. Id. at § 302A.671, subd. 3.

The Minnesota Act provides substantial penalties. Shares acquired in violation of the Act are denied voting rights and are non-transferable for one year after acquisition, and the issuer may, at its option, redeem such shares during the one year period at the price paid by the purchaser. Id. at § 302A.671, subd. 1(b).

Proceedings in the District Court 8/

This action arises out of a series of open market purchases by APL Partnership ("APL") of the common stock of Van Dusen Air

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8/ We do not include a complete factual description, but only those facts (derived from the district court's opinion and public filings by the plaintiff) that are necessary for an understanding of the Commission's position in this appeal. References to the district court's opinion will be cited as "Slip op. at __."

Incorporated ("Van Dusen"). 9/ APL's Schedule 13D filings disclosed that its ultimate intention was to "acquire the remaining equity of [Van Dusen] * * *."

On July 29, 1985, APL filed an action in the United States District Court for the District of Minnesota seeking, inter alia, temporary and permanent injunctions against enforcement of the Minnesota Act on Commerce, Due Process, and Supremacy Clause grounds. The district court found that the Minnesota Act violates the Commerce Clause, and permanently enjoined its enforcement. 10/

On August 26, 1985, APL filed a Schedule 14D-1 with the Commission, commencing a tender offer at $19.50 per share for a minimum of 950,000 shares of Van Dusen.

ARGUMENT

I. THE MINNESOTA CONTROL SHARE ACQUISITION ACT IS INVALID UNDER THE COMMERCE CLAUSE.

The Supreme Court has long held that

> the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. * * * [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. 11/

9/ Van Dusen is a diversified aviation company organized under the laws of Minnesota, with its principal place of business in Minneapolis, Minnesota. Van Dusen's common stock is registered under Section 12(g) of the Securities Exchange Act, 15 U.S.C. 781(g). Approximately 24% of the company's assets are located in Minnesota. Approximately 25% of Van Dusen's outstanding common stock is owned by Minnesota residents. Slip op. at 2.

10/ The court noted that, having decided that the Minnesota Act violates the Commerce Clause, it need not address any of the other issues in the case. Slip op. at 20.

11/ Freeman v. Hewitt, 329 U.S. 249, 252 (1946); accord, Great A&P Tea Co., Inc. v. Cottrell, 424 U.S. 366, 370-71 (1976); (footnote continued)

As this Court recently noted, the Securities Exchange Act does not "authorize state violations of the Commerce Clause." 12/ The Commerce Clause prohibits direct regulation of interstate commerce by the states, and permits incidental regulation only when it serves a legitimate state interest and does not place an excessive burden on interstate commerce in relation to the local benefits. Under these standards, the Minnesota Act is invalid.

A. The burdens imposed by the Minnesota Act on interstate commerce outweigh any putative local benefits.

1. The Minnesota Act imposes substantial burdens on interstate commerce.

As was the case with the state takeover statute struck down by the Supreme Court in Edgar v. MITE Corp., the "most obvious burden the [Minnesota] Act imposes on interstate commerce arises from the statute's * * * nationwide reach * * *." 13/ The Minne-

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11/ (Continued)
Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851); see also H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 538 (1949).

12/ Middle South Energy, Inc. v. Arkansas Public Service Comm'n, Nos. 84-2409, 2410, 2480 (8th Cir., Aug. 23, 1985).

13/ 457 U.S. 624, 643 (1982); see Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425, 1429 (10th Cir. 1983). In MITE, the Supreme Court held the Illinois Business Takeover Act to be unconstitutional on Commerce Clause grounds. The Illinois Act required a tender offeror to notify the Secretary of State of Illinois 20 business days before commencement of a tender offer. The Secretary of State was empowered to convene a hearing, and the tender offer could not proceed until that hearing was completed. One function of the hearing was to permit the Secretary of State to review the substantive fairness of the tender offer; if an offer were found "unfair," it could be permanently blocked.

The Court's Commerce Clause opinion, written by Justice White, had two branches. One branch of the opinion, in which five Justices joined (Chief Justice Burger and Justices White, Powell, Stevens and O'Connor), and which stands as the opinion of the Court, held that the Illinois Act was invalid on Commerce Clause grounds because it placed a
(footnote continued)

sota Act requires shareholder approval as a precondition to any acquisition of a Minnesota company's securities in interstate commerce, however or wherever made, that results in a specified percentage ownership of the voting shares of certain Minnesota corporations. At a minimum, the Minnesota Act blocks -- for up to 55 days -- the consummation of securities transactions conducted anywhere in the nation. At its worst, such transactions are prevented altogether if shareholder approval is not obtained. 14/

The effects of blocking a nationwide tender offer are, as the MITE Court recognized, "substantial": 15/

13/ (Continued)
substantial burden on interstate commerce which outweighed any local benefits. 457 U.S. at 643-46.

The other Commerce Clause branch of the opinion, in which only four Justices joined (Chief Justice Burger and Justices White, Stevens and O'Connor), concludes that the statute regulated interstate transactions taking place wholly outside of Illinois. Thus, the statute constituted a "direct" restraint on interstate commerce and was, therefore, void, even without an inquiry into the state interests involved. Id. at 641-43.

Three Justices (Chief Justice Burger and Justices Blackmun and White) found that the Illinois Act was invalid under the Supremacy Clause. Id. at 630-40. Three Justices (Justices Marshall, Brennan and Rehnquist) found that the case was moot and did not reach the merits. Id. at 655-67. Justice Powell agreed that the case was moot, but nevertheless determined to reach the merits. Id. at 646-47.

14/ Unlike the Minnesota Corporate Take-Overs Act which this Court upheld in large part in Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984), the Minnesota Act is not primarily a disclosure statute intended to protect Minnesota shareholders, but rather, without significantly advancing any legitimate state interest, impedes or even blocks securities acquisitions occurring throughout the nation, applying even where none of the subject company's shareholders are Minnesota residents, and frustrates fundamental Congressional objectives embodied in the Williams Act. See infra Part II.

15/ 457 U.S. at 643. The district court noted that the Minnesota Act allows the shareholders to block a control share acquisition, whereas the Illinois statute at issue in MITE vested
(footnote continued)

> Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced. 16/

The application of the Minnesota Act to acquisitions made other than by tender offer compounds the burdens of the statute on interstate commerce. By requiring pre-purchase disclosure of open market and privately-negotiated purchases, the Minnesota Act may cause market disruptions that are inconsistent with efficient and orderly national markets. The penalty provisions of the Minnesota Act may not only impose substantial costs for non-Minnesota acquiring persons, but also may impair the liquidity of the public market for the subject company shares.

15/ (Continued)
such authority in the Secretary of State. Nevertheless, the district court found that the Minnesota statute "lead[s] to many of the same results." Slip op. at 18.

16/ 457 U.S. at 643. The substantial burdens which delay imposes on a tender offer may be mitigated to some degree where the delay occurs at the post-commencement stage of the process, as with the Minnesota Act, rather than at the pre-commencement stage as was the case in MITE. The burdens are still significant, however, as evidenced by the fact that other federal agencies administering statutes implicated in tender offers have sought to avoid any undue delay in consummation of the transaction, although they are not restricted in any way by the Commerce Clause. See, e.g., Federal Communications Act, 47 U.S.C. 222, 308.

In an appropriate case, where delay results from the operation of a state statute that furthers a special state interest in a particular industry traditionally subject to state regulation, some burdens on interstate commerce may be tolerated under the Commerce Clause. As discussed below, the statute at issue in this case does not implicate any state interest of this kind, and by its terms applies to Minnesota corporations engaged in businesses of every variety.

2. The purported local objectives of the Minnesota Act do not justify the burdens it imposes on interstate commerce.

Given the substantial nationwide burdens imposed by the Act, it is invalid unless it is outweighed by counterbalancing local interests. 17/ The district court identified three potential local interests: (1) the protection of resident shareholders, (2) the regulation of the internal affairs of corporations organized under the state's laws, and (3) the protection of the state's business climate. 18/ But, the benefits that "actually accrue from the statute are, at best, speculative" (Slip op. at 20). A state interest is not entitled to deference where the contested regulation fails to promote that interest. 19/ Moreover, any of these purported local interests "could be promoted as well with a lesser impact on interstate activities." 20/

a. The Act does not protect resident shareholders.

Protecting local investors is a legitimate state objective. But, 75% of Van Dusen's stock is owned by nonresidents of Minnesota. The Minnesota Act applies even if no security holders of the company reside in the state and no transaction takes place in the

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17/ MITE, 457 U.S. at 643; Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

18/ The "findings" set forth in the preamble to the Minnesota Act (see slip op. at 3-4) indicate that the state may also have adopted the law to protect local corporations from unfriendly takeovers. A state statute designed to further such local economic interests at the expense of national economic interests is subject to a virtual per se rule of invalidity under the Commerce Clause. See, e.g., Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980); Pike, 397 U.S. at 145.

19/ See Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 353 (1977).

20/ Lewis, 447 U.S. at 37, quoting Pike, 397 U.S. at 142.

state. The statute therefore extends to transactions between out-of state purchasers and sellers. 21/ The United States Supreme Court has made clear that Minnesota can have no legitimate interest in protecting non-resident shareholders:

> Insofar as the [state statute] burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law. 22/

Moreover, the Minnesota Act's design does not significantly further its avowed purpose of protecting Minnesota shareholders. 23/ For example, the statute would not apply to a non-Minnesota corporation, even if a majority of the selling shareholders were Minnesota residents. Minnesota security holders of such companies would have no "protection" at all. Further, the Minnesota Act does not apply to an acquisition of shares made directly from the corporation, thereby effectively letting the directors decide when shareholders need the "protections" of the Minnesota Act. 24/ Thus, protection of resident shareholders is not furthered by the Act and thus does not justify the burdens the Act imposes on interstate commerce.

21/ Theoretically, every Minnesota resident shareholder could vote in favor of an acquisition that did not obtain the requisite majority of all of the outstanding voting shares. Thus, this statute, ostensibly designed to further the interest of resident shareholders, could actually operate in a manner directly contrary to their expressed intentions.

22/ MITE, 457 U.S. at 644; Icahn, Fed. Sec. L. Rep. ¶ 92,096, at 91,945.

23/ See Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1285 (5th Cir. 1978), rev'd on venue grounds sub nom, Leroy v. Great Western United Corp., 443 U.S. 173 (1979).

24/ Minn. Stat. § 302A.011, subd. 3. The Minnesota Act is also said to provide shareholders with additional disclosure necessary to ensure reasoned decisionmaking concerning an acquisition. However, the information required under the statute is substantially similar to the information already required under the federal securities laws.

b. The "internal affairs" doctrine does not justify state interference in transactions between shareholders and would-be shareholders.

The district court also considered the assertion that the Minnesota Act is a valid exercise of the state's authority to regulate the "internal affairs" of a domestic corporation. 25/ However, statutes regulating internal affairs govern only existing relationships between shareholders and the corporation; the internal affairs doctrine does not justify regulation of relationships between shareholders and third parties seeking to buy their shares, such as those arising from a tender offer or open market purchase. Thus, in rejecting the internal affairs argument in MITE, the Supreme Court concluded that "transfers of stock by stockholders to a third party do not themselves implicate the internal affairs of the target company." 457 U.S. at 645. Similarly, as the district court found, the Minnesota Act's attempt to regulate transactions between shareholders and potential shareholders must be distinguished from traditional state regulation of a corporation. 26/

c. The Act does not protect the business climate of Minnesota.

Nor does the Minnesota Act further any state interest in protecting the domestic business climate. The approval vote of the

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25/ The "internal affairs doctrine" is a conflict of laws concept based on the recognition that a corporation doing business in more than one state would be greatly hampered if subjected to multiple and possibly inconsistent laws governing its internal operations. See Restatement (Second) of Conflict of Laws § 302, Comment b at 307-08 (1971). See also MITE, 457 U.S. at 645.

26/ Slip op. at 20 n.7; see Kidwell, 577 F.2d at 1280 n.53 ("[t]he voting rights of shares and the legal relationship between a corporation and its shareholders does not change because of a tender offer."). See also Restatement (Second) of Conflict of Laws, § 302, Comment e at 310, citing the transfer of stock as an example of a matter that is not within the scope of "internal affairs regulation".

shareholders is not in any way tied to protection of the domestic business climate. Moreover, because no shareholders need reside in Minnesota, the Act may have the effect of granting nonresident shareholders the determination of what is best for Minnesota and its business climate. Similarly, the Minnesota Act provides no protections against actions by incumbent management that would adversely affect Minnesota's business climate. 27/

B. The Minnesota Act directly regulates interstate commerce

The Act also violates the Commerce Clause because it purports to regulate interstate commerce directly. As the Supreme Court has stated, "a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." 28/ The district court's analysis demonstrates the direct burdens on interstate commerce imposed by the Act.

As discussed above, the Minnesota Act flatly prohibits certain purchases of securities, even if the purchases occur wholly outside the state and involve purchasers and sellers who are not Minnesota residents. When Minnesota claims the right to tell buyers and sellers who have no relationship with the state whether and under what conditions they can trade through the channels of interstate

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27/ As the Icahn court found with respect to the Missouri Control Shares Acquisition Statute: "It is difficult to discern the rational basis for concluding that incumbent management will protect the economic interests of Missouri if there is a conflict with management's interests, or with the economic interests of the corporation." Fed. Sec. L. Rep. ¶ 92,096, at 91,495 (footnote omitted).

28/ Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925), cited with approval in MITE, 457 U.S. at 642 (opinion of four Justices; see supra n.13).

commerce, it invades a province reserved by the Commerce Clause to Congress. 29/

II. THE WILLIAMS ACT PREEMPTS THE MINNESOTA ACT.

A state statute is preempted under the Supremacy Clause if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 30/ We do not contend that the federal government has occupied the entire field of securities regulation. Congress has approved concurrent regulation of some types of securities transactions by federal and state governments. 31/ Congress has not, however, authorized state

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29/ Another control share acquisition statute was held to constitute an impermissible direct restraint on interstate commerce in Icahn, Fed. Sec. L. Rep. ¶ 92,096. The Icahn court used reasoning equally applicable here: "The * * * regulatory scheme in Missouri's Control Share Acquisition Statute * * * attempts to control conduct beyond the borders of Missouri. Transactions between a non-Missouri purchaser and a non-Missouri seller * * * are directly regulated. * * * If Missouri can so directly affect securities trading between non-residents on national exchanges, so too may other states. The interstate sale of securities on national and regional securities exchanges would be at the mercy of any state's parochial interests." Id. at 91,493-94; see slip op. at 24. The application of the Missouri Control Share Acquisition Act was not limited to companies incorporated under Missouri Law. However, as other courts have held, state takeover laws should not survive challenge under the Commerce Clause solely because their application is limited to companies organized under that state's laws. See Telvest, 697 F.2d at 579; Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982).

30/ Lawrence County v. Lead-Deadwood School District, 105 S. Ct. 695, 698 (1985); see MITE, 457 U.S. at 631 (opinion of three Justices; see supra n.13); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

31/ See, e.g., Section 28(a) of the Securities Exchange Act, 15 U.S.C. 78bb(a), which was intended to preserve traditional blue sky laws of the type in existence at the time the Exchange Act was adopted. See Kidwell, 577 F.2d at 1275 n.39; Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 62 Cornell L. Rev. 213,

(footnote continued)

regulation of securities transactions where, as here, that regulation undermines federal law by frustrating the accomplishment and execution of Congress' purposes. Therefore, the issue here is not whether the Williams Act forecloses any role for the states, but whether the Minnesota Act so conflicts with the Williams Act by frustrating Congress' purposes as to be preempted by the federal legislation.

A. By interjecting lengthy delays, which favor the subject company management, the Minnesota Act conflicts with the Congressionally-mandated policy of neutrality between bidder and management.

In enacting the Williams Act, Congress sought to protect shareholders through a federal "policy of neutrality in contests for control * * *." 32/ Congress carefully sought to avoid "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." 33/

The Minnesota Act upsets this federally-mandated regulatory balance by introducing a mechanism that permits management of a subject company, solely in its own interest, to substantially

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31/ (Continued)
247 (1977). Section 28(a) was not intended as a grant of authority to the States, but was intended merely to "restate the Supremacy Clause." Kidwell, 577 F.2d at 1276. Thus, as this Court has noted, Section 28(a) does not preserve a state statute that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the Williams Act." National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1129 (8th Cir. 1982).

32/ Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29 (1977); see National City Lines, 687 F.2d at 1129; S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) (hereafter "Senate Report"); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

33/ Senate Report at 3; see Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975); 113 Cong. Rec. S12557 (daily ed. Aug. 28, 1967) (statement by Senator Williams).

delay, obstruct or even thwart the tender offer process where "time is of the essence." 34/ This unduly favors subject company management at the expense of shareholders. 35/

Indeed, altering the balance between bidders and subject companies in this fashion is the very purpose of the Minnesota Act. The mere adoption of the shareholder voting procedure raises the spectre that a tender offer may be rejected by shareholders, and thus aids management by discouraging hostile bids. Moreover, the design of the mechanism for shareholder approval shifts the balance of power in favor of incumbent management. The time periods set by the Minnesota Act purportedly reflect a concern that subject company shareholders be accorded sufficient time to make an informed decision on the merits of the tender offer. But the Act gives the subject company the discretion to waive these time periods, and thus a weapon to defeat an unwanted offer. 36/ This reveals that the Act's purpose is not to benefit the share-

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34/ Empire, Inc. v. Ashcroft, 524 F. Supp. 898, 902 (W.D. Mo. 1981) (invalidating under the Supremacy and Commerce Clauses the Missouri Takeover Bid Disclosure Act).

35/ See MITE, 457 U.S. at 639 (opinion of three Justices; see supra n.13) ("The potential for delay * * * upset[s] the balance struck by Congress by favoring management at the expense of stockholders."); National City Lines, 687 F.2d at 1130-31; L.P. Acquisition Co. v. Tyson, No. 85-1640, slip op. at 13 (6th Cir., Aug. 26, 1985). See also Kennecott Corp. v. Smith, 637 F.2d 181, 190 (3d Cir. 1980); Kidwell, 577 F.2d at 1278; Senate Report at 4; 122 Cong. Rec. 30877 (1976) (statement of Rep. Rodino) ("Lengthier delay will give the target firm plenty of time to defeat the offer * * *."). Among other things, a subject company can (1) issue additional shares of stock to dilute the acquirer's interest; (2) arrange a defensive merger; (3) repurchase its own shares; and (4) sell or encumber its principal assets.

36/ For example, where competing offers are made, a subject company could waive applicable time periods for a "friendly" offeror, but not for a competing "hostile" offeror.

holders of subject companies, but rather to benefit their incumbent managements, contrary to the policy of neutrality embodied in the Williams Act. 37/

B. By imposing restrictions on open market purchases, the Minnesota Act interferes with Congress' determination that there be a free and open market for securities.

In adopting the Williams Act, Congress expressly determined not to subject ordinary open market and privately-negotiated transactions to the more extensive regulatory scheme it adopted for tender offers. In order to avoid unduly burdening open market securities transactions and "upsetting the free and open auction market" for securities, 38/ Section 13(d) of the Exchange Act requires only post-acquisition disclosure for these types of acquisitions.

The original draft of the legislation, S. 2731, contemplated that the necessary disclosure of ordinary open market and private

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37/ Further, it hardly seems likely that the Minnesota Act will generally permit compliance within the time frame of the Williams Act, which contemplates that, unless the bidder chooses a longer period, a tender offer may be consummated after 20 business days. Rule 14e-1, 17 C.F.R. 240.14e-1. For this to occur, management and the acquiring person must quickly agree on an expedited timetable which waives most of the Minnesota Act's applicable time periods, and proxy materials must be prepared and filed with the Commission on an expedited basis. For example, if the information statement is received by the subject company and proxy materials are filed with the Commission on Day 1, proxy materials could be mailed on Day 11. A shareholder's meeting could theoretically be called for anytime after Day 11. In order to be able to purchase tendered shares after 20 business days, the acquiring person would only be able to solicit proxies for approximately two weeks. While the subject company may well agree to such a short proxy solicitation period, this puts the acquiring person at a severe disadvantage since a shareholder not voting is equivalent to a "no" vote under the Minnesota Act. Minn. Stat. § 302A.671, subd. 4.

38/ 113 Cong. Rec. 856 (1967) (remarks of Senator Williams).

purchases would be made prior to acquisition of the stock. 39/ The Commission criticized the timing of the disclosure. 40/ The legislation offered the following year by Senator Williams, S. 510, substituted a post-acquisition disclosure requirement. Senator Williams, commenting on the change, explained:

> While some people might say this information should be filed before the securities are acquired, disclosure after the transaction avoids upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interests and avoids prematurely disclosing the terms of privately negotiated transactions. 41/

Achieving the goals of a federal statute often depends on adherence to such deliberately selected limitations on the scope of regulation. The Congressional plan here includes an important role for unfettered private decisionmaking. Congress expressed its intent that the extent of the regulation it wished over ordinary purchases in the open market, where natural forces of supply and demand set the price, was after-the-fact disclosure. Preservation of the line between what the law regulates and what it leaves alone is essential to the success of the statutory strategy. 42/ The Minnesota Act disturbs this careful Congressionally-

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39/ 111 Cong. Rec. 28259 (1965); 112 Cong. Rec. S19003 (daily ed. Aug. 11, 1966).

40/ Memorandum of the Securities and Exchange Commission to the Senate Comm. on Banking and Currency on S. 2731, reprinted in 112 Cong. Rec. S19003-05 (daily ed. Aug. 11, 1966).

41/ 113 Cong. Rec. 856 (1967) (Remarks of Senator Williams). See also Hearings on S. 2234 and S. 2683, The Institutional Investors Full Disclosure Act, Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 2d Sess. 65 (1974) (testimony of senior staff of Commission's Institional Investor Study) ("Advance notice of proposed transactions can have an adverse effect on the market.").

42/ See, e.g., Goldstein v. California, 412 U.S. 546, 569-70 (1973).

selected balance by suspending further purchases until a majority of the shareholders approve and preventing them entirely should they disapprove. The Act thus obstructs "the accomplishment and execution of the full purposes and objectives of Congress." 43/

* * * * *

While our analysis under the Supremacy Clause is necessarily cast in two arguments with respect to tender offers and open market or privately-negotiated purchases, the Minnesota Act makes no distinction. Its end and aim is to restrict, and even totally prevent, certain acquisitions of shares through any means. It delays tender offers substantially to the detriment of the subject company's shareholders and in favor of its management when Congress has decreed neutrality, and it impedes national market forces when Congress wanted a free and open market. The Minnesota Act is an obstacle to Congress' purposes reflected in the Williams Act and thus is preempted.

43/ Hines, 312 U.S. at 67; see, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978); New York Central R.R. Co. v. Winfield, 244 U.S. 147, 153-54 (1917).

CONCLUSION

For the foregoing reasons, we urge this Court to affirm the judgment of the District Court that the Minnesota Control Share Acquisition Act is unconstitutional.

Respectfully submitted,

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STATUTORY APPENDIX

Section 13(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(d).

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) The background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence and citizenship of each such associate, and;

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

Section 14(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(d).

(d)(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consider-

ation offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78bb(a).

Sec. 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other security, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such instrument, if such instrument is traded pursuant to rules and regulations of a self-regulatory organization that are filed with the Commission pursuant to section 19(b) of this Act.