

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL W. SOLE, SECRETARY, :

4 FLORIDA DEPARTMENT OF :

5 ENVIRONMENTAL PROTECTION, ET AL., :

6 Petitioners :

7 v. : No. 06-531

8 T.A. WYNER, ET AL. :

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10 Washington, D.C.

11 Tuesday, April 17, 2007

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:20 a.m.

16 APPEARANCES:

17 VIRGINIA A. SEITZ, ESQ., Washington, D.C.; on behalf of
18 Petitioners.

19 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting Petitioners.

23 SETH M. GALANTER, ESQ., Washington, D.C.; on
24 behalf of Respondents.

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	VIRGINIA A. SEITZ, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	PATRICIA A. MILLETT, ESQ.	
7	On behalf of the United States, as amicus	
8	curiae, supporting the Petitioners	18
9	ORAL ARGUMENT OF	
10	SETH M. GALANTER, ESQ.	
11	On behalf of the Respondents	29
12	REBUTTAL ARGUMENT OF	
13	VIRGINIA A. SEITZ, ESQ.	
14	On behalf of Petitioners	58
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll next hear Case
4 06-531, Sole versus Wyner.

5 Ms. Seitz.

6 ORAL ARGUMENT OF VIRGINIA A. SEITZ

7 ON BEHALF OF THE PETITIONERS

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

10 The court of appeals held that plaintiffs
11 who obtain a preliminary injunction are prevailing
12 parties entitled to fees, even though the district court
13 concluded that the State's nudity ban does not violate
14 the Constitution, that plaintiffs were not entitled to
15 any permanent relief, and that final judgment should be
16 entered against the plaintiffs.

17 This Court's cases have found plaintiffs to
18 be prevailing parties in only two situations, when they
19 win judgment on the merits or enter into a consent
20 decree. And this Court has declined to confer
21 prevailing party status based on interim rulings in
22 ongoing litigation.

23 JUSTICE SCALIA: Ms. Seitz, I'd be curious
24 to get your reaction to one of the points made by
25 opposing counsel, which is that there were really sort

1 of two different pieces of litigation at issue here,
2 that it was an as-applied challenge that produced the
3 preliminary injunction, and what was rejected in the
4 final decision was a facial challenge. Is there
5 anything to that?

6 MS. SEITZ: No, I don't think there is. In
7 the preliminary injunction, the district court predicted
8 that it would find the nudity ban significantly
9 infringed free expression and that the State had less
10 restrictive alternatives. That's at page 18a and 19a.
11 In the summary judgment decision, the court held that
12 the nudity plan's effect on free impression was de
13 minimis and it had, that the State had no less
14 restrictive alternative. So in both instances the
15 underlying legal claim was that as applied to nude
16 expression the nudity ban was unconstitutional.

17 JUSTICE SOUTER: What do we make of what I
18 understand was the court's post hoc statement that what
19 was -- the reason for issuing the temporary injunction
20 was the perception that there was a content basis at
21 work? And what do we make of it in light of the fact --
22 I think this is of record; you correct me if I'm wrong.
23 what do we make of that in light of the fact that I
24 believe it is in the record that I forget the
25 appropriate State official said, well, it's true we've

1 let you do this in the past, but this is political or
2 this looks political, which suggests that there was a
3 content basis going on?

4 What do we make of the court's statement and
5 the record statement by the official in deciding whether
6 there really was in effect a separate kind of order
7 involved in the preliminary injunction from the order
8 that was denied at the end of the case?

9 MS. SEITZ: There's a factual answer to that
10 and a legal answer, and I'll start with the legal
11 answer, which is that the preliminary injunction itself
12 states that it is assuming content --

13 JUSTICE SOUTER: Oh, I know that. I know
14 that.

15 MS. SEITZ: And as a legal matter --

16 JUSTICE SOUTER: Because that's why I asked,
17 what do we make of the court's statement subsequently?

18 MS. SEITZ: I think we, as the court of
19 appeals did, have to disregard those statements because
20 under Rule 65 of the Federal Rules of Civil Procedure,
21 the preliminary injunction itself is the operative
22 document, and the bases that it states for the issuance
23 of the preliminary injunction are the bases that must
24 govern both on judicial review of the injunction and as
25 a matter of notice to the parties of the operative

1 effect and basis for the injunction.

2 JUSTICE SOUTER: Is that so when there is
3 some evidence in the record that a content basis
4 actually was the criterion?

5 MS. SEITZ: And that's the factual part of
6 my response, which is that this testimony that was
7 relied on which we quote in full in our reply brief, was
8 testimony by the State, a State official who did not
9 make the decision so was not actually aware of why the
10 decision was made, and was testimony only to the effect
11 that the demonstration envisioned on February 14th might
12 be different than her previous plays, because more
13 people might be expected.

14 Now the court drew from that telephonic
15 testimony a possibility that the reason for the State's
16 denial on February 14 was the content; but in fact,
17 although the court didn't recognize it, it also had
18 before it a decision by the State in 2000 denying her
19 permission to put on her play based on its decision to
20 enforce its nudity ban against her at that time.

21 JUSTICE SOUTER: Now the 2001 order was it
22 -- was it? She applied, I think it was in --

23 MS. SEITZ: She wrote a letter in 2000
24 requesting permission to perform her play --

25 JUSTICE SOUTER: Yeah.

1 MS. SEITZ: Under the same terms that she
2 had under the stipulated settlement from 1998. The
3 State denied her request in a letter indicating that the
4 nudity ban would be enforced against the play.

5 JUSTICE SOUTER: So the factual answer in
6 effect is there isn't enough fact to support the
7 distinction?

8 MS. SEITZ: And -- and I guess there's in
9 addition a legal elaboration on that factual record,
10 which was this was all occurring in a preliminary
11 injunction hearing that took place 24 hours before the
12 demonstration, telephonic testimony of an ill-prepared
13 State witness. It was never followed up, even though
14 that claim remained live through summary judgment,
15 because the plaintiffs continued to have a claim against
16 an individual defendant for damages.

17 JUSTICE SOUTER: Yeah. But when you got to
18 the summary judgment stage, the particular peace
19 demonstration performance was -- was behind them. So
20 they're, I'm not sure that it would have been expected
21 to be reinjected into the case.

22 MS. SEITZ: The challenge continued because
23 there was a claim for individual damages from the park
24 manager. So in order to determine that individual claim
25 for damages, of course, the plaintiffs could have put in

1 evidence that, in fact, rather than just as a
2 preliminary prediction, the injunction was issued to
3 prevent content-based discrimination.

4 JUSTICE SOUTER: So it wasn't moot after the
5 demonstration.

6 MS. SEITZ: That was not mooted out.

7 CHIEF JUSTICE ROBERTS: That's one of the
8 things that concerns me. I mean in many of these cases
9 you have fairly elaborate proceedings over the
10 preliminary injunction and the event takes place. I
11 would not want to get to a situation where people feel
12 the need to artificially keep a case alive simply to
13 ensure their entitlement to attorney's fees. So how do
14 you protect against that?

15 MS. SEITZ: We -- the purpose of the
16 attorney's fees provision is to encourage and reward
17 meritorious litigation. And at the point at which you
18 only have a preliminary injunction, no matter how long
19 that preliminary injunction has been in effect, what you
20 have is a prediction of success on the merits, a
21 balancing of equitable factors that determine interim
22 fairness, but you do not have a decision that the
23 defendant has violated the Constitution or any Federal
24 law.

25 JUSTICE KENNEDY: But in, but in many cases

1 the case will become moot after a period of time and the
2 Chief Justice and I have the same concern. The question
3 is directed to do we just keep this litigation alive for
4 the -- for the ancillary issue of attorney's fees?

5 MS. SEITZ: There are significant
6 consequences to a finding of liability. And to
7 conferring preliminary -- or fees for preliminary
8 injunction when you do not have a final determination of
9 violation by the State, you're essentially ordering the
10 State and local governments who have not been judged
11 violators of law or had a full or fair opportunity to
12 defend as a matter of law --

13 JUSTICE KENNEDY: Well, we're asking about
14 what rule you propose we adopt and the submission to you
15 is that if we have a rule there can never be attorneys
16 fees in this instance, that will then create pressure to
17 continue the litigation when it's for all practical
18 purposes of no real importance to the parties, other
19 than to just establish attorney's fees. And that seems
20 a waste of resources.

21 MS. SEITZ: And but the -- the situation --
22 that situation will also obtain if you confer attorney's
23 fees and prevailing party status on a plaintiff who only
24 has a preliminary injunction.

25 JUSTICE GINSBURG: But do we have to judge

1 all preliminary and judgments alike? I mean, in some
2 cases, the preliminary injunction is the thing. For
3 example, suppose in this case, the demonstrators had
4 said yeah, we went in with a -- with a broad challenge
5 but we knew all we wanted was that peace demonstration,
6 and we got it; so we're -- that's enough. We're not
7 going to fight on.

8 MS. SEITZ: The fact that a plaintiff gets
9 his or her way temporarily based on a preliminary
10 junction does not mean that the defendant has violated
11 that plaintiff's constitutional rights or that that
12 would be the resolution of the --

13 JUSTICE BREYER: Who -- who -- where does it
14 say you have to have done that? My statute here says in
15 any action to enforce a provision of 1983 -- the TRO or
16 whatever was such an action. It says the court in its
17 discretion may allow the prevailing party an attorneys'
18 fee. Well, did they prevail fail or not? They got what
19 they wanted. And it was such an action. Doesn't say
20 anything about whether you have been declared horrible
21 or wonderful or violator or not a violator. It says did
22 they get what they want in the action? Answer, yes.
23 End of matter.

24 Now what's wrong with reading it that way?

25 MS. SEITZ: To prevail you must prevail on a

1 legal claim.

2 JUSTICE BREYER: Yeah, they got the legal
3 claim. The legal claim is we want to have our
4 demonstration on February 14; we have a right to do it
5 and therefore issue an order. You said no, don't issue
6 the order, because they don't. And therefore, they won.

7 MS. SEITZ: Respectfully, that's not a legal
8 claim.

9 JUSTICE BREYER: It is not?

10 MS. SEITZ: The underlying legal claim is
11 that the State's denial of the permit was
12 unconstitutional.

13 JUSTICE BREYER: Yeah. But what about the
14 legal claim we are under the law entitled to a
15 preliminary injunction.

16 MS. SEITZ: That is a type of relief you are
17 seeking but it's based on an underlying legal claim.

18 JUSTICE SCALIA: It is not a determination,
19 is it, that they have a right to hold a demonstration?

20 MS. SEITZ: It is --

21 JUSTICE SCALIA: It is just a determination
22 that we don't know at this point enough to say that you
23 don't have a right.

24 MS. SEITZ: It is a product of an equitable
25 balancing that determines interim fairness --

1 JUSTICE BREYER: Well I thought, where it
2 say that in the statute that you have to have that
3 particular kind of a claim?

4 MS. SEITZ: I think this Court's cases have
5 interpreted the word prevail and prevailing parties to
6 mean you must prevail on the merits of a legal claim.
7 The only instance in which that is not true is in a
8 consent decree scenario and in a consent decree what you
9 have is a defendant assuming legal responsibility for
10 providing relief on the merits that resolves a claim.

11 CHIEF JUSTICE ROBERTS: So what do you do in
12 a situation of mootness where there's -- you know,
13 they'd be happy to pursue the claim to establish that
14 they prevail on a permanent junction as well as a
15 preliminary one, but the case has become moot. Are they
16 automatically disentitled to attorneys' fees in that
17 case?

18 MS. SEITZ: A claim that is never resolved
19 cannot be the basis of prevailing party status. And
20 that's what your hypothetical poses. And I also think
21 it's not correct to say there is no point in continuing
22 with litigation in that setting. In a private attorney
23 general setting, there is a value to having at the end
24 of litigation a decision --

25 CHIEF JUSTICE ROBERTS: Well, there may be a

1 pint to pursuing it but I'm not sure it's one that the
2 locality governments -- I mean if you ask them the
3 question, would you rather be liable for attorney's fees
4 where you lose in a preliminary injunction but then the
5 case becomes moot, or would you rather have to face
6 individual officer liability to prevent the case from
7 becoming moot? Or would you rather face ongoing
8 litigation to prevent the case from becoming moot
9 because there's too much invested in the fees -- they
10 might choose the former.

11 MS. SEITZ: Well in this case, of course,
12 the State officials decided to defend the
13 constitutionality of their nudity ban to the end. It
14 was important to them.

15 CHIEF JUSTICE ROBERTS: Well, the plaintiffs
16 decided to challenge it to the end. But I'm suggesting
17 that if they know they might -- it might result in a
18 loss of attorneys fees, when all they really wanted was
19 a particular demonstration, others might pursue it
20 differently.

21 MS. SEITZ: There are significant
22 countervailing considerations, and one is that under the
23 rule you're proposing, state and local governments would
24 be fearful about enforcing perfectly valid laws in
25 emergency situations for fear of being penalized with

1 fees. Then they have no fair chance --

2 JUSTICE KENNEDY: Well, you are saying the
3 Chief Justice is proposing a rule. I think he was
4 asking you -- you want to just give us all or nothing.
5 And we're suggesting that it just doesn't make systemic
6 good sense to insist that every preliminary injunction
7 be carried through to a final adjudication for
8 attorney's fees. And we are asking is there some midway
9 ground. And you, you've so far -- you can structure the
10 argument the way you want, but you so far are -- in
11 effect telling me absolutely not.

12 MS. SEITZ: I -- I think that because of the
13 rule I distill from this Court's case which is that you
14 can't prevail on a claim that's not decided, it's hard
15 for me to see what the middle ground would be. We do of
16 course have the alternative ground for decision in this
17 case which is that a claim, a preliminary junction
18 that's issued in ongoing litigation whose prediction on
19 the merits is later essentially proven to be false by
20 subsequent litigation, can't be the basis for prevailing
21 party --

22 JUSTICE BREYER: So what do you think, when
23 this was enacted, to make up an example that it is as
24 horrifying as I can think, where the Ku Klux Klan was
25 riding in the South, and a group of civil rights

1 demonstrators wanted to make certain they could have
2 their demonstration outside the jail and they go to the
3 judge and says the sheriff is involved in this, the
4 whole town is; we want an injunction tomorrow.
5 Tomorrow. Right now. So -- and we don't really care
6 that much about the end of it, but we'll -- we'll go
7 ahead and litigate it if you want. Now they get their
8 injunction. They have the demonstration; it's over. I
9 would have thought if there was a situation for which
10 1983 was written, it's that one.

11 MS. SEITZ: And if in fact it is clear that
12 there is no issue law in that setting.

13 JUSTICE BREYER: Oh, there is. The other
14 side has a lot of arguments. And they each have
15 arguments. There are plenty of issues of law.

16 MS. SEITZ: Then you just articulated why
17 that plaintiff should not be considered a prevailing
18 party without taking the position that that is capable
19 of repetition, but evading review situation, arguing
20 that in effect the judgment is based totally on law and
21 converting it essentially to a judgment on the merits,
22 or otherwise coming to a final judgment on a claim, so
23 that the plaintiff would have --

24 JUSTICE GINSBURG: But why should a
25 plaintiff do that when the plaintiff's position is we

1 got precisely what we wanted; this is not going to be --
2 this is a one-time only demonstration. We're not going
3 to repeat this.

4 Why force litigation, especially when we can
5 say in this case, you lost on the merits? The judge
6 made a prediction. Turned out that -- that that was
7 wrong.

8 MS. SEITZ: To -- to impose attorney's fees
9 on a defendant, it's not simply about what the plaintiff
10 gets, whether the plaintiff gets what he wants, but it
11 is also about what the justification is for forcing the
12 state and local government to pay fees.

13 And the purpose of the Civil Rights Act is
14 to impose such fees against violators of civil rights
15 and for the benefit of victims of similar rights
16 violation, and not simply on those whom it is predicted
17 will have a substantial likelihood of success on the
18 merits.

19 JUSTICE GINSBURG: So you get a case that
20 involves a student. And -- and something like the
21 DeFunis case. The student is admitted to the law school
22 event. They have much controversy over this affirmative
23 action program. The student graduates. And -- but the
24 student has prevailed up until that time.

25 MS. SEITZ: I don't believe the student has

1 prevailed within the meaning of Section 19(a). The
2 student has been predicted to be likely to prevail and
3 has received an interim fairness -- an interim
4 adjustment based on considerations of fairness.

5 JUSTICE GINSBURG: But can't fight on
6 because first, the student had gotten everything that he
7 wanted and the case is moot. The student has graduated.

8 MS. SEITZ: In that situation, I think the
9 benefit is capable of repetition for debating review or
10 of utilizing the class action --

11 JUSTICE GINSBURG: On if you had a class
12 action. He had a single action, and he's graduated.

13 MS. SEITZ: But there are tools a plaintiff
14 can use to prevent this kind of case from becoming moot
15 where there is an important need to have an issue
16 decided.

17 JUSTICE GINSBURG: Apart from the class
18 action, what -- what else is there?

19 MS. SEITZ: 65(a)(3) which allows
20 consolidation of a merits determination.

21 JUSTICE GINSBURG: Oh. Yeah.

22 MS. SEITZ: I reserve the reminder of my
23 time?

24 JUSTICE SCALIA: Well, I mean, what if --
25 what if there's nothing else he can do? What -- what

1 horrible does he face? He faces a horrible of having to
2 pay for his own litigation, just like the rest of us do.

3 I mean this is an extraordinary benefit
4 we're talking about here, getting -- getting your
5 attorney's fees paid. I -- it doesn't seem to me that
6 we're casting this, this person into the underworld.

7 MS. SEITZ: And there's no basis for
8 awarding fees against the innocent state and local
9 government not determined to have committed a violation.
10 May I reserve the balance?

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

12 We'll hear from Ms. Millett. Ms. Millett.

13 ORAL ARGUMENT OF PATRICIA A. MILLETT,

14 ON BEHALF OF UNITED STATES,

15 AS AMICUS CURIAE SUPPORTING PETITIONERS

16 MS. MILLETT: Mr. Chief Justice, and may it
17 please the Court.

18 This Court has held repeatedly that
19 liability for attorney's fees and liability for
20 violation of Federal law go hand in hand. A preliminary
21 injunction does not determine that there has been a
22 violation of Federal law.

23 CHIEF JUSTICE ROBERTS: Are you on the all
24 or nothing team this morning?

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Is it -- can a
2 preliminary injunction never be the basis for an award
3 of attorney's fees?

4 MS. MILLETT: I won't say never in this
5 narrow circumstance. And that is when, when a
6 preliminary injunction results in a definitive and
7 determinative ruling of law such as Thornburgh versus
8 Obstetricians -- College of Obstetricians and
9 Gynecologists, or the steel mill seizure case from this
10 Court. It came up on a preliminary injunction but this
11 Court made a dispositive and controlling ruling of
12 constitutional law. And assuming that that declaration
13 is then followed up by a change in behavior by the
14 defendant compelled as result of the ruling, that would
15 be enough. But --

16 JUSTICE SCALIA: Excuse me. How can that
17 be, that a preliminary injunction resolves a dispositive
18 question of law? Does that happen?

19 MS. MILLETT: Well it happened -- it
20 happened in this Court and -- and -- and there were
21 dissenters. But there -- it happened in this Court's
22 case in the Thornburgh case. It came up on a
23 preliminary junction. This Court determined there were
24 no disputed questions of fact and it was only a contest
25 of law what the Court said is that when they have done

1 that we can make dispositive ruling of law. But I think
2 that's an unusual situation and what's critical is that
3 when --

4 JUSTICE SCALIA: But it wasn't the issuance
5 of the preliminary injunction that resolved it, it was
6 the appeal to this Court where we -- we resolved a
7 question of law.

8 MS. MILLETT: This Court resolved a question
9 of law on the merits. The debate in that opinion
10 between the majority and the dissents was that the --
11 the dissent said majority should only decide whether it
12 was an abuse of discretion to issue the preliminary
13 injunction.

14 And, I mean -- it, it, it can become sort of
15 the same thing if an error in law is necessarily an
16 abuse of discretion, but when -- when a superior court's
17 made a definitive --

18 JUSTICE BREYER: What is the law in respect
19 to this, which is right on the point you're arguing,
20 that two parties have this kind of suit and the
21 government party -- they settle it, and giving
22 everything that the plaintiff conceivably wants, but at
23 the end they say: We don't admit we violated the law.
24 Can you get attorney's fees there or not.

25 MS. MILLETT: If it's a consent decree.

1 JUSTICE BREYER: It's a consent decree, but
2 no admission of a violation of law.

3 MS. MILLETT: No, that's right. This
4 Court, while repeatedly stating, including unanimously
5 just two years ago, that the central justification for
6 attorney's fees is that the defendant is a violator of
7 Federal law, has found that it will also permit
8 attorney's fees in the consent decree situation, but
9 that's because there you have a defendant who is not
10 fighting and continuing to resist any form of final
11 relief, has instead agreed to provide final relief that
12 runs to a plaintiff, in favor of a plaintiff, and that
13 advances the purpose of Federal law.

14 CHIEF JUSTICE ROBERTS: I have never
15 understood why that's an issue. Can't the parties -- it
16 seems to me an exception that isn't consistent with the
17 theory. Why can't the parties just agree on attorney's
18 fees in the settlement agreement and the consent decree
19 and then it wouldn't have to be an issue?

20 MS. MILLETT: I think, I think that in
21 reality certainly a party can say, I'm not entering into
22 a consent decree if we're not going to resolve
23 attorney's fees now or if we're going to have a fight
24 over them. So they certainly have that power because
25 it's largely a contract, although one enforced by

1 courts. I'm only trying to be candid with this Court's
2 precedent, which is also recognized in Mayer versus
3 Gagne. For some reason, maybe they reserved the
4 question there to be disputed in court whether you'd be
5 responsible for attorney's fees.

6 But I do think That's much more of a side
7 show because that can all be dealt with through the
8 contract elements of the consent agree. And really what
9 you're talking about when a court is coercively imposing
10 attorney's fees on a defendant is that the defendant has
11 a right to not pay those unless they have been found to
12 be a violator of Federal law or have agreed to through
13 contract to deal with that issue.

14 JUSTICE SOUTER: Okay, but the argument is
15 undercut, as you yourself say, by the settlement rule.
16 Don't we have the settlement rule simply because we want
17 to promote settlements? We don't want litigation to go
18 on and on and on simply because somebody wants to
19 establish a right to attorney's fees. And doesn't that
20 same reasoning apply here when there is a preliminary
21 injunction and that's all the person wants. By the same
22 reasoning that we accept a settlement, why shouldn't we
23 accept a preliminary injunction as being a sufficient
24 determination of rights to justify fees because we don't
25 want it to go on and on and on when nobody has any issue

1 of substance involved, but is just litigating for the
2 sake of establishing a right to fees later?

3 MS. MILLETT: I have three answers to that.
4 First of all, there are two parties here. The defendant
5 has a right not to be assessed attorney's fees, which
6 are a form of final relief not interim relief, without a
7 final decision that they violated on the merits.

8 JUSTICE SOUTER: But the only attorney's
9 fees that would be assessed would be attorney's fees
10 attributable to the preliminary injunction.

11 MS. MILLETT: That's right, but they have a
12 right not to pay anything if they haven't done anything
13 wrong.

14 JUSTICE SOUTER: They have been found
15 subject to a preliminary injunction. The playing field
16 is no longer even.

17 MS. MILLETT: They haven't been found to be
18 -- there may be a Presumption or a substantial
19 likelihood they're going to lose, but that doesn't
20 always come out. And there's not even always a
21 substantial likelihood --

22 JUSTICE SCALIA: The point is you wouldn't
23 mind putting that on a resume, that you have been
24 subjected to a preliminary injunction.

25 MS. MILLETT: No --

1 JUSTICE SCALIA: It's not a black mark on
2 your name, is it?

3 MS. MILLETT: No.

4 JUSTICE SCALIA: You haven't violated any
5 Federal law.

6 MS. MILLETT: This is a case in point.

7 JUSTICE SOUTER: But it does mean, it does
8 mean that somebody with a burden to establish an
9 entitlement to the injunction has carried the burden.

10 MS. MILLETT: Well, the test is the
11 prevailing party, not the substantially likely to
12 prevail party. And the other reason --

13 JUSTICE SOUTER: Then let's not have it in
14 the settlement case.

15 MS. MILLETT: Well, again settlements can be
16 dealt with through the settlement, as part of the
17 settlement process. But I think --

18 JUSTICE SCALIA: They are voluntary, these
19 settlements, aren't they? So you could at least say
20 that the innocent person who gets stuck with attorney's
21 fees for settling gets what he asked for, right? It's
22 voluntary.

23 MS. MILLETT: Well, that's what I tried to
24 explain to Justice Breyer.

25 JUSTICE SCALIA: That may be, but that's not

1 the way the statute is written.

2 JUSTICE STEVENS: Would this case be
3 different if the defendant had consented to the entry of
4 a preliminary injunction?

5 MS. MILLETT: No, I don't think so, and I
6 don't think courts as a matter of judicial economy want
7 to tell the government every time we agree not to
8 oppose, to stay the removal of an alien, that we somehow
9 would get a bill.

10 JUSTICE STEVENS: So if this had been, if
11 they had entered into a consent decree covering just the
12 one event on the front burner, that would have been?

13 MS. MILLETT: A consent decree is a final
14 resolution of a claim that legally obligates the
15 defendant, final relief that runs in favor of the
16 plaintiff.

17 JUSTICE STEVENS: But if they consented to
18 the entry of a preliminary injunction, why wouldn't that
19 be equally binding?

20 MS. MILLETT: Because it is not a final
21 resolution. Preliminary injunctions are important.
22 They're of value to the parties. But there's a
23 trade-off in getting it. The reason courts can give
24 them is they aren't committed to final relief. They
25 aren't committed to final obligation, and they can

1 decide when --

2 JUSTICE STEVENS: Well, they were able to go
3 ahead with their one demonstration that precipitated the
4 litigation, and they would have been able to do it the
5 same way if they had a consent decree instead of having
6 the other side not fight very vigorously in opposition
7 to the preliminary.

8 MS. MILLETT: The defendant who'S been fully
9 vindicated at the end of the case shouldn't have to
10 write checks to two attorneys instead of just their own.
11 There's a fundamental fairness element here.

12 But also on the judicial economy --

13 JUSTICE STEVENS: But then why isn't the
14 attorney -- if there were a consent decree -- I don't
15 understand the difference.

16 MS. MILLETT: Because the defendant's in the
17 control of the fairness issue in the consent decree and
18 is not in this situation.

19 But the other situation, concern, is concern
20 about judicial economy. And there's arguments in the
21 amicus briefs on the other side that preliminary
22 injunctions are common. But remember, this is -- the
23 central justification is that the plaintiff is a private
24 attorney general who doesn't just do what they want to
25 do, but either resolves the issue of law or obtains

1 enduring changes in defendant's behavior that are of
2 utility to the community at large. Contrary to --

3 JUSTICE KENNEDY: We have when election
4 season comes many, many requests for injunctions, and
5 after the election is over the case just goes away.
6 Nobody is interested.

7 MS. MILLETT: That is not --

8 JUSTICE KENNEDY: Under your position, all
9 of these matters must be contested until final judgment
10 before attorney's fees are available.

11 MS. MILLETT: That is not the United States
12 Government's experience when it's been involved in a lot
13 of voting cases. Lots of them get fought until the end,
14 and this Court's decision in Brown versus Choate
15 recognizes these are capable of repetition, yet evading
16 review. Now, if the private plaintiff doesn't want to
17 do the work of a private attorney general, that's their
18 choice. No one says you have to stay. It's just, if
19 you want attorney's fees, you have to accept a
20 preliminary injunction for what it is. It's very
21 beneficial, but it is not a resolution on the merits
22 that obligates the defendant to provide a form of final
23 relief, not interim relief, to you.

24 And this Court itself has expressed
25 significant concerns about having voting cases being run

1 up on preliminary injunctions at the last minute and the
2 impact that can have on voting, and we shouldn't
3 encourage that.

4 CHIEF JUSTICE ROBERTS: Ms. Millett, did I
5 hear your legal test a while ago is an enduring change
6 in the defendant's behavior? Is that your standard?

7 MS. MILLETT: Enduring more in -- not in the
8 transient sense of preliminary injunction. Obviously,
9 things change on the outside world. But in the form of
10 final relief and permanent relief, and that's what this
11 Court's cases have said time and again. Not only must
12 the defendant be a violator of Federal law, but in
13 Ferrari, in Texas Teachers versus Darwin, in Hanrahan
14 and Hewitt, the Court has made clear that it is final, a
15 resolution of a dispute, a final judgment, the settling
16 of a problem that makes someone a prevailing party. And
17 "prevailing party," as this Court explained in
18 Buckhannon, is a term of art. As we say on pages 11 to
19 12 of our brief, "That term of art, as defined in the
20 relevant dictionaries at the time, was not just that you
21 won something, but that you won at the end of the suit."

22 And that's a question of basic fundamental
23 fairness to plaintiffs. Remember, there's going to be
24 countervailing judicial economy concerns. If you tell
25 governmental entities that they're going to have to

1 take -- may I finish -- - have to take emergency appeals
2 from every interlocutory order and revisit stays to
3 avoid liability for attorney's fees.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Ms. Millett.

7 Now we'll hear from you, Mr. Galanter.

8 ORAL ARGUMENT OF SETH M. GALANTER

9 ON BEHALF OF THE RESPONDENTS

10 MR. GALANTER: Mr. Chief Justice and may it
11 please the Court:

12 Respondents went into Federal court because
13 State officials told them their protest would be illegal
14 and they left Federal court with a preliminary
15 injunction that prohibited State interference with their
16 protest.

17 CHIEF JUSTICE ROBERTS: No, no. They left
18 Federal court having lost on the permanent injunction.

19 MR. GALANTER: Well, Your Honor, 20-some
20 months later they lost on another component of their
21 case, where they were seeking permanent relief to enjoin
22 the facial applicability of the regulations.

23 CHIEF JUSTICE ROBERTS: Their legal, their
24 legal claim was that these regulations were invalid
25 under the First Amendment. And they lost on that legal

1 claim.

2 MR. GALANTER: At the end of the case, Your
3 Honor, yes. But at the preliminary injunction stage,
4 one -- their claim for relief was a violation of the
5 First Amendment and there was evidence at the
6 preliminary injunction stage that --

7 CHIEF JUSTICE ROBERTS: Well, they succeeded
8 in filing their complaint as well, but they don't get
9 attorney's fees for that, because they were successful
10 at the filing complaint stage.

11 MR. GALANTER: That's true, Your Honor. But
12 what they obtained on February 13, 2003, was the relief
13 they sought.

14 JUSTICE SCALIA: What if they got a TRO
15 instead of a preliminary injunction?

16 MR. GALANTER: We're not suggesting that
17 TROs --

18 JUSTICE SCALIA: I know you aren't. Why
19 not?

20 MR. GALANTER: Well, there are structural
21 differences between the two.

22 JUSTICE SCALIA: What are the two? I mean,
23 they prevailed. They have a TRO here, something of
24 value.

25 MR. GALANTER: There was not the adversaries

1 that exists in a preliminary injunction. And I think
2 the distinction --

3 JUSTICE SCALIA: But it's just prevails. If
4 you think "prevails" means you come out of there with
5 anything that's worth something that has a contempt
6 citation behind it, I don't see why a TRO wouldn't
7 qualify.

8 MR. GALANTER: We're not suggesting that as
9 the basic rule. What we are suggesting is that if you
10 obtain a preliminary injunction, in part because
11 Congress recognized the difference between TROs and
12 preliminary injunctions and placed preliminary
13 injunctions and permanent injunctions together as the
14 kinds of orders that had --

15 JUSTICE ALITO: What if you get a
16 preliminary injunction and then at the permanent
17 injunction stage the basis for the preliminary
18 injunction is reversed. Let's say the preliminary
19 injunction here was based on the ground that the
20 decision was content-based, a factual decision, and at
21 the permanent injunction stage the court finds that it
22 was not content-based.

23 MR. GALANTER: Then we would not be
24 prevailing. But I have to point out the district court
25 in this case expressed --

1 JUSTICE GINSBURG: Even though you got what
2 you wanted? You got to put on the show.

3 I thought that at the end of the line, the
4 judge said your First Amendment rights have not been
5 violated, the nudity ordinance can be enforced. If you
6 had come back again, say the next week, and said, we
7 want to do another peace symbol, after the court has
8 ruled on the permanent injunction and you lost, you
9 certainly couldn't prevail when you're coming back with
10 another as-applied, when the court has said this
11 ordinance is good and doesn't violate the First
12 Amendment.

13 That's correct. But if there were an
14 intervening fact, if they permitted a performance of
15 "Hair" and then said, but we'll enforce the nudity
16 prohibition against your protest, then we would be able
17 to come back.

18 The final judgment in this case does not
19 preclude future as-applied challenges, either
20 content-based or arbitrary, and the district court
21 recognized that when it made very clear that it did not
22 reverse or repudiate its preliminary injunction ruling
23 simply because we lost the permanent injunction.

24 JUSTICE GINSBURG: I thought this court
25 said, and correct me if I'm wrong, that you wanted to

1 put on a demonstration that would be like the plays,
2 that would be hidden from public view because you have a
3 curtain or whatever around it. And then the judge said,
4 oh no, that's not what they wanted, they didn't want it
5 to be hidden from you view, they wanted people to see
6 their demonstration, so if that's what they want to do,
7 they don't have any First Amendment protection.

8 MR. GALANTER: That is what was at the end.
9 I would just point out that at the preliminary
10 injunction stage, you have to remember Ms. Weyer had
11 been permitted to put on her play, not hiding it,
12 several years before. There was testimony suggesting
13 that one of the differences in the result, the refusal
14 to allow the anti-war protest, was because it was an
15 anti-war protest. And the district court makes it
16 clear, in our brief in opposition appendix at page 4a.
17 He says: "The court did not revisit or reverse its
18 earlier decision regarding the same legal issue.

19 But I think all this just goes to the point
20 for that this case presents some interesting issues, but
21 that the per se rule that the Petitioners press, that
22 you can never get --

23 JUSTICE GINSBURG: Let's stay with this case
24 because your interest is in getting fees in this case.
25 Suppose you had lost the preliminary injunction and then

1 you won at the end of the line. Certainly you would be
2 prevailing throughout, right?

3 MR. GALANTER: We would obviously be a
4 prevailing party. But under Hens ley --

5 JUSTICE GINSBURG: Even though you lost on
6 the preliminary injunction?

7 MR. GALANTER: Yes. Under Hensley versus
8 Eckert, this Court has made clear you can win on some
9 claims, lose in others.

10 JUSTICE STEVENS: But you would get
11 attorney's fees for the preliminary injunction work,
12 even though you lost on that?

13 MR. GALANTER: We would get attorney's fees
14 for the reasonable work that ended up leading to the
15 success. District courts have for decades now parsed
16 through these legal records, subject to review by the
17 court of appeals.

18 JUSTICE GINSBURG: That parsing, is there
19 any doubt that if you won on the main, in the main bout,
20 that you would get your fees for your entire
21 representation?

22 MR. GALANTER: Yes, there is doubt, Your
23 Honor. The court does look for whether these fees are
24 reasonable.

25 JUSTICE GINSBURG: Not that. But would you

1 not get -- would the judge say you don't get a penny for
2 the effort you made to achieve the preliminary
3 injunction because you lost, you lost it, even though in
4 hindsight I could see that that was the wrong decision,
5 you should have had it?

6 MR. GALANTER: Well, Your Honor, under
7 Hensley you look to see whether they're related or
8 unrelated claims. This Court has adopted --

9 JUSTICE GINSBURG: They're obviously
10 related. It's the same thing. I need -- I have a short
11 time to answer the preliminary injunction. The judge
12 said: You haven't shown probability of success on the
13 merits, or denies it. You win. I thought that there
14 wasn't any doubt that you could get your fees for the
15 successful result from the time you filed the complaint
16 until the final judgment.

17 MR. GALANTER: We would hope a court would
18 find that an as-applied challenge and a facial challenge
19 were sufficiently related that we'd be entitled to fees
20 for both. But what I have to stress --

21 JUSTICE SCALIA: Even though you lost on the
22 preliminary injunction? The fees that you reasonably
23 expended in seeking a preliminary injunction, even
24 though you lost, you'd be able to charge to the other
25 side?

1 MR. GALANTER: If I had won the final --

2 JUSTICE SCALIA: Yes or no? I think you can
3 answer yes or no.

4 MR. GALANTER: Yes.

5 JUSTICE SCALIA: Okay.

6 MR. GALANTER: But I would like to caution
7 that that would be eligible for fees, but the court
8 would go through it and say how much of this were rated
9 to your final win, was it reasonable.

10 JUSTICE SCALIA: No. No. No. How much of
11 it related to the preliminary -- you mean anything that
12 related only to the preliminary injunction you would be
13 denied?

14 CHIEF JUSTICE ROBERTS: All the work you did
15 to show irreparable harm, balance of the equities, not
16 on the merits, you're saying that's off the table?

17 MR. GALANTER: Well, it -- no, Your Honor,
18 because those very things are also needed at a permanent
19 injunction.

20 JUSTICE ALITO: But you've got five hours
21 billed -- you bill for five hours to write the brief
22 that you submit at the preliminary injunction stage.
23 You could get those fees later if you won at the
24 permanent injunction stage, could you not?

25 MR. GALANTER: Probably. And we certainly

1 would get the money we did for writing the complaint.
2 And one of our counts for the complaint here was exactly
3 for the preliminary injunction that we obtained.

4 CHIEF JUSTICE ROBERTS: Counsel, your
5 approach, just as there are problems from the judicial
6 economy perspective with your friend's approach, but
7 doesn't your approach require the States to fight tooth
8 and nail on the preliminary injunction because they're
9 running the risk if they lose there, they're going to
10 pay fees even if they prevail later? As opposed to, as
11 is often the case, they might say, you know, we consent
12 to the entry of the preliminary injunction or we
13 don't -- you know, we're going to save our energy.
14 Doesn't it require them to fight every possible stage,
15 including appeal and so on?

16 MR. GALANTER: Well, two things, Your Honor.
17 As I think I made clear to Justice Alito, if the
18 decision is reversed or repudiated by the district
19 court, there would now -- we would not be prevailing
20 parties. We would simply have gotten this benefit. But
21 --

22 JUSTICE SCALIA: I don't know what you mean,
23 if the decision on what? On the preliminary injunction?

24 MR. GALANTER: Yes.

25 JUSTICE SCALIA: Is repudiated by the

1 district -- how is it repudiated? What do you envision?

2 MR. GALANTER: Well, in the hypothetical
3 where the same facts, the same law, and the district
4 court says I was wrong, that would be the kind of
5 repudiation.

6 JUSTICE SCALIA: In a later case, you mean?

7 MR. GALANTER: In the course of the
8 proceedings in the same case, Your Honor. But --

9 CHIEF JUSTICE ROBERTS: Well, he doesn't
10 have to say he's wrong. What often happens is as it is
11 here, he say's I've got 24 hours, I don't have a brief
12 from the other side, I kind of make the best guess I
13 can. And then later on after an adversary presentation
14 and an evidentiary hearing, he issues a different
15 ruling. As here, he doesn't have to say I was wrong on
16 my 24-hour off-the-cuff guess. It's just that I'm
17 better informed. Is that repudiation or not?

18 MR. GALANTER: No, Your Honor, it's not.
19 And here, in fact he said the opposite. He said I
20 wasn't wrong, these were based on different legal
21 theories. And --

22 JUSTICE GINSBURG: Where -- can you -- I
23 thought what he said was -- I thought they wanted a
24 demonstration that was going to be secure from public
25 view, and instead I understand now that's not -- that

1 wasn't what they wanted from the start.

2 So on the premise on which I was operating,
3 I was right, that they were going to do it just like the
4 plays. But what they really planned to do, and did do,
5 I was wrong because those facts were not before me. Had
6 those facts been before me, they would have lost on the
7 preliminary injunction.

8 MR. GALANTER: I don't believe that that's
9 the fairest reading of the district court's subsequent
10 orders in this case. What the district court made clear
11 was that his as-applied holding, that the plays and the
12 war protests were being treated differently. Remember
13 that it's --

14 JUSTICE STEVENS: Yes, but assume the
15 district court thought he was right at the preliminary
16 injunction, and ruled otherwise at the permanent
17 junction. But what if the court of appeals when it
18 reviews the fee application, thinks he was wrong both
19 times?

20 MR. GALANTER: Well, Your Honor, we would
21 suggest that the person in the best position to
22 understand what the district court was doing --

23 JUSTICE STEVENS: Is the district court.

24 MR. GALANTER: Yes, Your Honor.

25 JUSTICE STEVENS: But maybe the court of

1 appeals is in the best position to determine whether
2 they made an error of law or not.

3 MR. GALANTER: Yes. And obviously they
4 review errors of law, questions of law --

5 JUSTICE STEVENS: And if they think he made
6 an error of law, what should they do?

7 MR. GALANTER: If he had made an error of
8 law in the preliminary injunction ruling that, on
9 de novo review, and reversed, then --

10 JUSTICE STEVENS: No, there's no reverse.
11 It's too late. They've had the demonstration so it's
12 all over. But in reviewing the fee application, the
13 court of appeals concludes that the district judge --
14 the decision represented an incorrect premise of law and
15 therefore, he did make an error. Would that control or
16 would the district judge's view of the validity of his
17 own decision control?

18 MR. GALANTER: We would suggest the latter,
19 Your Honor, in part to avoid the fees on fees litigation
20 problems. I mean, other than the per se rule of --

21 JUSTICE KENNEDY: In other words, to avoid
22 fees on fees, we do something that's wrong?

23 MR. GALANTER: No, Your Honor. It's not
24 wrong. It's consistent with the text and the policies
25 underlying --

1 JUSTICE BREYER: I thought that it -- am I
2 wrong about that? I thought that if, A, he goes in, he
3 gets a preliminary injunction, he says the law is da,
4 da, da, the judge says you're right, that's what it is,
5 preliminary injunction. And now it's continued up on
6 appeal, the appellate court says you're wrong about the
7 law. You got it, you had the event, but you're
8 absolutely wrong, the law did not support you. I
9 thought under those circumstances you were not
10 prevailing and you couldn't get it. Is that the law or
11 not?

12 MR. GALANTER: It is the law, Your Honor.
13 What I'm suggesting, though, is that --

14 JUSTICE SCALIA: I thought the hypothetical
15 was different, was, the case proceeds to final judgment
16 on the merits; and at that point -- okay -- at that
17 point, the issue of whether the preliminary injunction
18 was valid or not comes up, not in the direct appeal from
19 the preliminary injunction.

20 MR. GALANTER: I --

21 JUSTICE SCALIA: Assume you win on the
22 merits.

23 JUSTICE STEVENS: It's a direct appeal on
24 the fee issue.

25 MR. GALANTER: Yes, Your Honor. What my --

1 if I may, I agree with Justice Breyer's hypothetical
2 that if you're appealing the merits and the court of
3 appeals says something which shows that the -- the
4 preliminary injunction should not have been issued,
5 we're not a prevailing party. I agree with
6 Justice Scalia that if you're appealing from the
7 preliminary injunction and the court of appeals
8 reverses, then you're not the prevailing party. But
9 Justice Stevens, what I would suggest to you and to
10 Justice Kennedy was, we shouldn't be adjudicating
11 whether the preliminary injunction was correctly entered
12 at the fees stage. If there is --

13 JUSTICE BREYER: Is there any authority for
14 that? Because it does seem to me wrong, that where a
15 person has got a preliminary injunction and it's legally
16 unsupportable, and then he gets the fee but then they
17 appeal that and the court of appeals determines it's
18 legally unsupportable, he never should have gotten it,
19 I'd be surprised if there is a case that awards the fee
20 in those circumstances, but maybe there is. What is it?

21 MR. GALANTER: Well, I mean, the courts of
22 appeals have adopted different standards. I can't point
23 to one --

24 JUSTICE BREYER: Is there any case you can
25 think of that under those circumstances let's him have

1 the attorney's fees?

2 MR. GALANTER: I can't point to one.

3 JUSTICE BREYER: No, I would be surprised.

4 MR. GALANTER: But the --

5 JUSTICE BREYER: The other thing that I
6 wonder about this case is, are you the prevailing party?
7 And the reason I ask that is because when I look through
8 the record it seems to me your clients are very
9 interesting. They have their point of view. And their
10 point of view, one of their points of view was that the
11 state said you can have this demonstration, just wear a
12 skimpy swimming suit. No. Well, you can have the
13 demonstration maybe, I'm not sure of this, but we're
14 going to put up a cloth so other people who don't want
15 to see you don't have to see you. And there your client
16 said, we won't pay any attention to the cloth. At least
17 we didn't in the past. And then looking at that I
18 thought, well, maybe what they got was, they got a
19 preliminary injunction or a TRO, whatever you want to
20 call it, but it didn't stop the State from putting up
21 the cloth. It was pretty clear the State would, and it
22 should have been pretty clear that they were going to
23 ignore it, which they did.

24 And why is this any different than having
25 won an injunction to say okay, you can demonstrate, but

1 in your swimming suit? In other words, they didn't want
2 this. They didn't want what they got. Now, what's the
3 response to that?

4 MR. GALANTER: They did get what they
5 wanted. They wanted to be nude. They wanted to make
6 sure they weren't escorted off the beach or arrested.
7 And that's exactly what happened. They had an order
8 that protected that.

9 Now, the screen was there, and there's
10 material disputes of fact about what they were told
11 about the screen by whom. But the court's order did not
12 say stay behind the screen. They were not in violation
13 of the court order.

14 But I think this goes to the more general
15 point, how can you tell when someone prevails, and this
16 Court has already established that. You obtain some
17 relief through a court award that materially changes the
18 relationship.

19 CHIEF JUSTICE ROBERTS: Did the court order
20 provide for a screen?

21 MR. GALANTER: The court order that -- no.
22 The court order said that the State was not prohibited
23 from using the means it had in the past. So it
24 clarified what the State was not prohibited from doing.
25 It did not impose any requirement on the plaintiffs.

1 JUSTICE SCALIA: That included a screen.

2 MR. GALANTER: It did, Your Honor, but it
3 didn't order the screen.

4 JUSTICE SCALIA: But your people didn't want
5 a screen.

6 MR. GALANTER: That's correct, Your Honor.

7 JUSTICE SCALIA: So they didn't get what
8 they asked for.

9 MR. GALANTER: They didn't get removed from
10 the beach or arrested for being nude either, Your Honor,
11 so they did get what they wanted.

12 JUSTICE SCALIA: Well, that's only because,
13 I guess the other side didn't take the action that they
14 could have taken if they didn't -- if they didn't apply
15 the screen.

16 MR. GALANTER: Your Honor, when you obtain
17 the court award, just as if you obtain a court award to
18 get on a ballot or to hold a parade, or to wear a tee
19 shirt, I mean, you get that --

20 JUSTICE SCALIA: Did they conduct the
21 demonstration with a screen or without a screen?

22 MR. GALANTER: I'm sorry?

23 JUSTICE SCALIA: Did they conduct the
24 demonstration with or without a screen?

25 MR. GALANTER: They did not use the screen.

1 JUSTICE SCALIA: And since they didn't use
2 the screen, the State was not prohibited from arresting
3 them; is that correct?

4 MR. GALANTER: That's correct.

5 JUSTICE SCALIA: So they did not get what
6 they asked for. Mainly a prohibition against the state
7 interfering with the kind of demonstration they wanted,
8 which was one without a screen. You say they didn't get
9 that.

10

11 MR. GALANTER: They didn't get that, but
12 they got something more than they had when they went in,
13 which was, they got the right to be naked on the beach,
14 which would have otherwise subjected them to arrest.
15 And, I mean --

16 JUSTICE SCALIA: The state had no problem
17 with that. In the past the State had let them do that,
18 as long as they had the screen.

19 MR. GALANTER: It wouldn't let them do that
20 this time even with the screen. It sent them a letter
21 saying you may not appear on the beach nude. And I
22 mean, obviously, at some times you don't get --

23 CHIEF JUSTICE ROBERTS: So the State
24 prevailed to some extent as well. They prevailed to the
25 extent of getting in the order that they can do what

1 they had done, which is erect a screen.

2 MR. GALANTER: They -- yes. They
3 narrowed --

4 CHIEF JUSTICE ROBERTS: So they're entitled
5 to some -- I mean, if -- this is not a reciprocal
6 switching thing, but I mean, it does go to the question
7 of whether or not you are the prevailing party when your
8 opponents have prevailed to a significant extent as
9 well.

10 MR. GALANTER: With respect, even if we had
11 sought and obtained a permanent injunction that allowed
12 us to protest but not behind the screen, we'd be a
13 prevailing party, although the defendants by their
14 successful advocacy would have narrowed the scope of the
15 injunction.

16 JUSTICE STEVENS: Let me ask you this. Is
17 it correct that an underlying principle of law that
18 justified your claim for relief and your actual relief
19 was that there's some First Amendment right to
20 demonstrate in the nude?

21 MR. GALANTER: Yes, Your Honor, that was an
22 underlying part of that.

23 JUSTICE STEVENS: And what is the support in
24 our cases for that proposition, if any?

25 MR. GALANTER: Well, I think this Court's

1 cases in Barnes, the nude dancing cases suggest that
2 expressive activity combined with nudity is protected by
3 the First Amendment. Judge Calabrese in the Second
4 Circuit wrote an extensive opinion in a case called
5 Tunic versus Zapper, where he surveys this Court's
6 cases, and finds that occasionally there may be for
7 artistic or political reasons a right to be nude as part
8 of more expressive conduct. But I'd like to maybe --

9 JUSTICE GINSBURG: But that was also a --
10 that was the demonstration or the show arrangement under
11 the -- was it the Brooklyn Bridge or the Williamsburg
12 Bridge?

13 MR. GALANTER: It was on the streets of New
14 York, Your Honor, yes.

15 JUSTICE GINSBURG: At 6 a.m.

16 MR. GALANTER: Yes, Your Honor. But to take
17 this back just one step, to the notion that we either
18 not need something that's sort of enduring or merits
19 based in order to obtain relief. Maher versus Gagne
20 suggested, a court doesn't need to resolve the merits in
21 order for a party to be prevailing.

22 JUSTICE SCALIA: But see, it's so
23 extraordinary for somebody to make the other side pay
24 for his attorney. We don't even do that -- we don't
25 even do that for guilty people when they -- when the

1 other side wins. So they have violated the law. We
2 still don't make them pay the other side's attorney's
3 fees. Now you want us to pay your client's attorney's
4 fees even though you're not dealing with a guilty party,
5 because ultimately the court found no, there really,
6 this person didn't violate the law.

7 That is -- you know, that's double
8 indemnity. I mean, it's multiplying the extraordinary
9 departure from our usual practice, which is that each
10 side pays his own. It's one thing to say well, if
11 you're a bad actor, in certain circumstances, civil
12 rights cases, we'll make you pay the other side. But
13 it's another thing to say if you're -- if you're not a
14 bad actor in a civil rights case but you're unlucky
15 enough to get hit with a preliminary injunction, we'll
16 make you pay for the other side. It just grates
17 that that -- it ain't fair.

18 JUSTICE STEVENS: It's not just a question
19 of weaker, but what Congress intended when they wrote a
20 statute authorizing these fees.

21 JUSTICE SCALIA: I assume that Congress
22 doesn't often do things that are grossly unfair. And if
23 there are various interpretations, one of which is not
24 grossly unfair, that's the one we should --

25 JUSTICE STEVENS: And these trump the

1 literal language very definitely.

2 MR. GALANTER: Speaking of the language, we
3 have here when Congress enacted in 1970 -- in 1998 -- in
4 1976, just two years before this Court had interpreted
5 another civil rights attorney's fees statute. In that
6 one, however, Congress had actually required a final
7 order before attorney's fees would be awarded.

8 JUSTICE BREYER: Well, before you leave
9 that, I wonder if -- there's one other thing floating
10 around in my mind. I might as well bring it up. The
11 word is prevailing, and if I go with you on the ground
12 that it's flexible and can apply to all kinds of things,
13 at least you have to really be prevailing, is there a
14 good faith element in that? That is to say, if your
15 clients when they went in to get this order and they got
16 it, and at that time they had no intention of following
17 what they had to do. Rather, they had every intention
18 of going out and tearing down the curtain. Does that
19 enter into the determination of whether they are really
20 a prevailing party who ought to get their attorney's
21 fees, if you're bringing the ethical element into it?

22 MR. GALANTER: I think, Your Honor, that --
23 well, first of all, the preliminary injunction itself
24 was an equitable remedy. Unclean hands could have gone
25 into that question, and yes, in determining the amount

1 of fees, again, equity can be considered. The good
2 faith of the parties, just as the complete bad faith of
3 a plaintiff, this Court has held, permits fees to be
4 awarded for the defendants.

5 CHIEF JUSTICE ROBERTS: You can't go into
6 court with the objective of just getting preliminary
7 relief, can you? I mean, you have to have an underlying
8 claim of illegality and, that seeks permanent relief,
9 right?

10 MR. GALANTER: That's true, Your Honor.
11 Although you can go into court knowing that --

12 CHIEF JUSTICE ROBERTS: Knowing that --

13 MR. GALANTER: -- you're only going to be
14 getting --

15 CHIEF JUSTICE ROBERTS: -- preliminary
16 injunction.

17 MR. GALANTER: And everyone here -- excuse
18 me. And everyone here knew that absent an appeal, this
19 was the final word on the February 14th --

20 CHIEF JUSTICE ROBERTS: On the February
21 14th, but your client sought further relief.

22 MR. GALANTER: Yes. But it also sought it
23 as a discrete claim for relief in the complaint, this
24 very injunction.

25 JUSTICE GINSBURG: You get costs? The

1 phrase is "attorney's fees as part of costs". So, do
2 you get costs for up to the preliminary injunction?

3 MR. GALANTER: Yes, Your Honor. The
4 district court in this case awarded us costs and also
5 awarded the other side costs. And that's actually --

6 JUSTICE GINSBURG: So you would split the
7 costs?

8 MR. GALANTER: He found we were both
9 prevailing parties in the case. And that's also
10 consistent with this Court's decision in Hensley, which
11 says you look at a case and the unrelated claims; you
12 can find that the plaintiffs are prevailing parties on
13 some, the defendants are prevailing parties on others,
14 and order cross awards of attorney's fees.

15 JUSTICE GINSBURG: So this defendant, having
16 succeeded in being the winner in the whole case, didn't
17 get costs for the whole case; is that what you're
18 telling me?

19 MR. GALANTER: They were awarded -- they
20 sought and were awarded all their costs for the entire
21 case, or they sought their costs for the entire case.
22 It was reduced by the district court as a matter of
23 equity. But they -- not because -- not parsing it out
24 among various parties to the case.

25 JUSTICE GINSBURG: So they were entitled to

1 costs for the entire case?

2 MR. GALANTER: Yes, they were, Your Honor.

3 JUSTICE GINSBURG: And attorney's fees under
4 the statute are to be awarded as part of costs?

5 MR. GALANTER: Yes, Your Honor.

6 JUSTICE GINSBURG: So if you're not entitled
7 to costs, if the defendant got the full costs, then how
8 do you get entitled to attorney's fees when the statute
9 puts them together? Because attorney's fees are part of
10 costs.

11 MR. GALANTER: That's correct. And there
12 are many cases where both parties end up getting awarded
13 costs. Hensley was one that suggested it was possible.

14 JUSTICE GINSBURG: But this wasn't --

15 MR. GALANTER: No.

16 JUSTICE GINSBURG: This was one that the
17 state got all of its costs from your client?

18 MR. GALANTER: Yes. And our client got
19 costs from the state. There were counter awards --
20 cross awards of cost, which is not unusual in civil
21 litigation with multiple claims.

22 But more importantly, I think, when we go
23 back and we look at the purposes, not only do we have
24 the language here, we also have the recognition, I think
25 as I was mentioning to the Chief Justice, that there's

1 going to be a lot of situations where core 1983 rights,
2 core constitutional rights are at stake where you know
3 you're not going to be able to obtain a permanent
4 injunction. You may even, as my friends on the other
5 side say, ask that the two be consolidated.

6 JUSTICE ALITO: What if that's not the case,
7 but the plaintiff after getting a preliminary injunction
8 just voluntarily dismisses the case? Do they still get
9 costs for the preliminary injunction?

10 MR. GALANTER: Oh, I think the answer is
11 yes. And I think that that's actually something that
12 should be encouraged. In this case, the preliminary
13 junction was relatively cheap, as litigation goes. To
14 encourage them to continue, particularly since the core
15 relief they sought had become moot. Yes, there was
16 additional relief they sought, or it could, in a
17 hypothetical could seek. But absent an appeal, that
18 part of the case is over and there's no real need to
19 continue to litigate it.

20 CHIEF JUSTICE ROBERTS: I know you were
21 asked this question and your answer may have just
22 slipped by me. Why, if you had asked for a TRO, why
23 would you not be entitled to fees on that?

24 MR. GALANTER: We think that Congress's
25 distinction as far as putting preliminary injunctions

1 and permanent injunctions in one category and TROs in
2 another for purposes of appealability, reflect kind of a
3 congressional judgment about which is -- which mechanism
4 is intended to alter the kind of substantial rights.
5 And absent the rights to appeal, absent the
6 adversariness, the heavier focus on irreparable
7 injuries, unlike at the preliminary injunction stage,
8 those are all things that we think make TROs generally
9 ineligible to affect prevailing party status.

10 JUSTICE SOUTER: Because the TRO case,
11 characteristically the other side isn't heard, so you
12 haven't prevailed.

13 MR. GALANTER: That is one way to view it,
14 Your Honor. Without the adversariness at the hearing,
15 there really was no one to prevail over. Whereas
16 here --

17 CHIEF JUSTICE ROBERTS: No. I thought you
18 prevailed in the sense that you secured relief. That's
19 how you articulated it up to this point.

20 MR. GALANTER: Well, this Court has
21 certainly described some relief as the threshold of
22 prevailing. I'm simply suggesting that there may be
23 other kinds of orders, as this Court suggested in
24 Hanrahan versus Hampden, that are just not sufficiently
25 -- they don't have a sufficient change in the legal

1 relationship between the parties to warrant prevailing
2 party status, even though they do benefit the
3 plaintiffs.

4 JUSTICE SCALIA: Well, you surely wouldn't
5 say that the fact that the other side never shows up
6 means that you can't get your attorney's fees.

7 MR. GALANTER: No, Your Honor. What I'm
8 suggesting --

9 JUSTICE SCALIA: So you're a prevailing
10 party whether there's an adversary on the other side or
11 not.

12 MR. GALANTER: What I'm saying is that the
13 TRO anticipates that, which is in part why we're not
14 suggesting TROs are --

15 JUSTICE STEVENS: Yes. But in this very
16 case, if you had gotten a TRO instead of a preliminary
17 injunction, you'd have exactly the same practical
18 situation.

19 MR. GALANTER: Yes, Your Honor, but we were
20 -- we did have a preliminary injunction. The State
21 therefore did have a right to appeal, and a lot of other
22 consequences flow from the fact that there --

23 CHIEF JUSTICE ROBERTS: The State did make a
24 point, that they were kind of -- this was short notice
25 and they were doing the best they could on short notice.

1 I mean, they showed up but only sort of.

2 MR. GALANTER: With three attorneys, Your
3 Honor. And yes -- and we both have our stories about
4 why there was short notice. Ours is they only told us a
5 week before they weren't going to allow her to protest
6 nude. And so we moved as quickly as we could. And this
7 is what often happens in election cases, demonstrations,
8 parades, religious exercise.

9 CHIEF JUSTICE ROBERTS: But the regulations
10 told you weren't allowed to protest nude.

11 MR. GALANTER: Your Honor, those same
12 regulations had been in effect the four previous times
13 she had protested nude. And it was consistent with the
14 stipulation they had entered into that her nudity was
15 protected by the First Amendment. So again, she was
16 certainly entitled to negotiate as she tried to do with
17 the State. She was told one week before that she
18 wouldn't be allowed to do this. She went to court. She
19 got the very relief that she sought and she was able to
20 protest in the nude.

21 Now in the other cases, you're going to get
22 someone who just finds they were denied the right to
23 register or to get on the ballot, and that's going to be
24 disposed of immediately. It won't be capable of
25 repetition by evading review because the person is now

1 registered, the election is now over. Maybe that
2 candidate won't run again. So we have a whole core of
3 First Amendment cases that will be affected if
4 Petitioner's per se rule that preliminary injunction is
5 never enough goes into play, because then States have
6 the unfortunate incentive of pushing the decisions very
7 close to the actual event deadline so that even if they
8 lose in court, they won't have to pay attorney's fees.

9 And I would add that in terms of the broader
10 notion, here we have a midlevel state official sending a
11 letter to an individual saying we don't think you have
12 any First Amendment rights, and if you come, you'll be
13 violating a law that's subject to criminal arrest, if
14 you come and you're naked, you're going to be subject to
15 criminal arrest. Absent Section 1998, it would be
16 incredibly difficult for persons in Ms. Wyner's
17 situation to find attorneys.

18 Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Seitz, you have three minutes remaining.

21 REBUTTAL ARGUMENT BY VIRGINIA A. SEITZ

22 ON BEHALF OF THE PETITIONERS

23 JUSTICE GINSBURG: Ms. Seitz, would you
24 clarify that point about costs? Did your client have to
25 pay costs?

1 MS. SEITZ: The plaintiffs were awarded
2 costs incurred on the preliminary injunction. My client
3 was awarded a right to costs on the remainder of the
4 litigation. Those costs were reduced to mirror the
5 precise costs that the plaintiff was awarded on
6 preliminary injunction, so in the end no one received
7 any costs. But costs were allocated for plaintiffs for
8 the preliminary injunction, and defendants for the
9 remainder of the case.

10 I just want to make one point about the
11 timing. The time prior to the 2003 demonstration, in
12 2000 she wrote a letter requesting the right to protest
13 nude and received a denial letter in response, similar
14 to the one she received in 2003. So she was on notice
15 as of 2000 that we were enforcing the nudity ban against
16 her activities.

17 Second, I want to say that the district
18 court itself characterized its holding on summary
19 judgment, quote, "as plaintiffs are unable to show
20 actual success on the merits," page 34a of the appendix.
21 So there's no doubt that what even the court understood
22 its own holding to be was that the prediction in the
23 preliminary injunction had failed to materialize when
24 the court considered the full case on the merits.

25 And finally, I want to say that awarding

1 fees, conferring fees for a plaintiff for obtaining a
2 preliminary injunction essentially requires the State
3 treasury to pay its opponents when, in fact, the State
4 has done nothing but enforce a valid law. And we know
5 that in this case because the case ended up getting
6 litigated to conclusion. But simply because we don't
7 know that in other cases involving preliminary
8 injunctions doesn't mean it isn't true, and that's why
9 it's fundamentally unfair to impose fees on State
10 defendants and local governments that haven't had a full
11 and fair opportunity to defend their legal position.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

15 (Whereupon, at 12:19 p.m., the case in the
16 above-entitled matter was submitted.)
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A				
<p>able 26:2,4 32:16 35:24 54:3 57:19 above-entitled 1:13 60:16 absent 51:18 54:17 55:5,5 58:15 absolutely 14:11 41:8 abuse 20:12,16 accept 22:22,23 27:19 achieve 35:2 Act 16:13 action 10:15,16 10:19,22 16:23 17:10,12,12,18 45:13 activities 59:16 activity 48:2 actor 49:11,14 actual 47:18 58:7 59:20 add 58:9 addition 7:9 additional 54:16 adjudicating 42:10 adjudication 14:7 adjustment 17:4 admission 21:2 admit 20:23 admitted 16:21 adopt 9:14 adopted 35:8 42:22 advances 21:13 adversaries 30:25 adversariness 55:6,14 adversary 38:13 56:10 advocacy 47:14</p>	<p>affect 55:9 affirmative 16:22 ago 21:5 28:5 agree 21:17 22:8 25:7 42:1,5 agreed 21:11 22:12 agreement 21:18 ahead 15:7 26:3 ain't 49:17 AL 1:5,8 alien 25:8 alike 10:1 Alito 31:15 36:20 37:17 54:6 alive 8:12 9:3 allocated 59:7 allow 10:17 33:14 57:5 allowed 47:11 57:10,18 allows 17:19 alter 55:4 alternative 4:14 14:16 alternatives 4:10 Amendment 29:25 30:5 32:4,12 33:7 47:19 48:3 57:15 58:3,12 amicus 1:21 2:7 18:15 26:21 amount 50:25 ancillary 9:4 answer 5:9,10 5:11 7:5 10:22 35:11 36:3 54:10,21 answers 23:3 anticipates 56:13 anti-war 33:14</p>	<p>33:15 Apart 17:17 appeal 20:6 37:15 41:6,18 41:23 42:17 51:18 54:17 55:5 56:21 appealability 55:2 appealing 42:2,6 appeals 3:10 5:19 29:1 34:17 39:17 40:1,13 42:3,7 42:17,22 appear 46:21 APPEARAN... 1:16 appellate 41:6 appendix 33:16 59:20 applicability 29:22 application 39:18 40:12 applied 4:15 6:22 apply 22:20 45:14 50:12 approach 37:5,6 37:7 appropriate 4:25 April 1:11 arbitrary 32:20 arguing 15:19 20:19 argument 1:14 2:2,5,9,12 3:6 14:10 18:13 22:14 29:8 58:21 arguments 15:14,15 26:20 arrangement 48:10 arrest 46:14</p>	<p>58:13,15 arrested 44:6 45:10 arresting 46:2 art 28:18,19 articulated 15:16 55:19 artificially 8:12 artistic 48:7 asked 5:16 24:21 45:8 46:6 54:21,22 asking 9:13 14:4 14:8 assessed 23:5,9 Assistant 1:19 assume 39:14 41:21 49:21 assuming 5:12 12:9 19:12 as-applied 4:2 32:10,19 35:18 39:11 attention 43:16 attorney 12:22 26:14,24 27:17 48:24 attorneys 9:15 10:17 12:16 13:18 26:10 57:2 58:17 attorney's 8:13 8:16 9:4,19,22 13:3 14:8 16:8 18:5,19 19:3 20:24 21:6,8 21:17,23 22:5 22:10,19 23:5 23:8,9 24:20 27:10,19 29:3 30:9 34:11,13 43:1 49:2,3 50:5,7,20 52:1 52:14 53:3,8,9 56:6 58:8 attributable 23:10</p>	<p>authority 42:13 authorizing 49:20 automatically 12:16 available 27:10 avoid 29:3 40:19 40:21 award 19:2 44:17 45:17,17 awarded 50:7 51:4 52:4,5,19 52:20 53:4,12 59:1,3,5 awarding 18:8 59:25 awards 42:19 52:14 53:19,20 aware 6:9 a.m 1:15 3:2 48:15</p> <hr/> <p>B</p> <p>back 32:6,9,17 48:17 53:23 bad 49:11,14 51:2 balance 18:10 36:15 balancing 8:21 11:25 ballot 45:18 57:23 ban 3:13 4:8,16 6:20 7:4 13:13 59:15 Barnes 48:1 based 3:21 6:19 10:9 11:17 15:20 17:4 31:19 38:20 48:19 bases 5:22,23 basic 28:22 31:9 basis 4:20 5:3 6:1,3 12:19 14:20 18:7</p>

19:2 31:17 beach 44:6 45:10 46:13,21 becoming 13:7,8 17:14 behalf 1:17,21 1:24 2:4,7,11 2:14 3:7 18:14 29:9 58:22 behavior 19:13 27:1 28:6 believe 4:24 16:25 39:8 beneficial 27:21 benefit 16:15 17:9 18:3 37:20 56:2 best 38:12 39:21 40:1 56:25 better 38:17 bill 25:9 36:21 billed 36:21 binding 25:19 black 24:1 bout 34:19 Breyer 10:13 11:2,9,13 12:1 14:22 15:13 20:18 21:1 24:24 41:1 42:13,24 43:3 43:5 50:8 Breyer's 42:1 Bridge 48:11,12 brief 6:7 28:19 33:16 36:21 38:11 briefs 26:21 bring 50:10 bringing 50:21 broad 10:4 broader 58:9 Brooklyn 48:11 Brown 27:14 Buckhannon 28:18 burden 24:8,9	burner 25:12 <hr/> C C 2:1 3:1 Calabrese 48:3 call 43:20 called 48:4 candid 22:1 candidate 58:2 capable 15:18 17:9 27:15 57:24 care 15:5 carried 14:7 24:9 case 3:3 5:8 7:21 8:12 9:1 10:3 12:15,17 13:5 13:6,8,11 14:13,17 16:5 16:19,21 17:7 17:14 19:9,22 19:22 24:6,14 25:2 26:9 27:5 29:21 30:2 31:25 32:18 33:20,23,24 37:11 38:6,8 39:10 41:15 42:19,24 43:6 48:4 49:14 52:4,9,11,16 52:17,21,21,24 53:1 54:6,8,12 54:18 55:10 56:16 59:9,24 60:5,5,14,15 cases 3:17 8:8 8:25 10:2 12:4 27:13,25 28:11 47:24 48:1,1,6 49:12 53:12 57:7,21 58:3 60:7 casting 18:6 category 55:1 caution 36:6	central 21:5 26:23 certain 15:1 49:11 certainly 21:21 21:24 32:9 34:1 36:25 55:21 57:16 challenge 4:2,4 7:22 10:4 13:16 35:18,18 challenges 32:19 chance 14:1 change 19:13 28:5,9 55:25 changes 27:1 44:17 characteristic... 55:11 characterized 59:18 charge 35:24 cheap 54:13 checks 26:10 Chief 3:3,8 8:7 9:2 12:11,25 13:15 14:3 18:11,16,23 19:1 21:14 28:4 29:5,10 29:17,23 30:7 36:14 37:4 38:9 44:19 46:23 47:4 51:5,12,15,20 53:25 54:20 55:17 56:23 57:9 58:19 60:13 Choate 27:14 choice 27:18 choose 13:10 Circuit 48:4 circumstance 19:5 circumstances 41:9 42:20,25	49:11 citation 31:6 civil 5:20 14:25 16:13,14 49:11 49:14 50:5 53:20 claim 4:15 7:14 7:15,23,24 11:1,3,3,8,10 11:14,17 12:3 12:6,10,13,18 14:14,17 15:22 25:14 29:24 30:1,4 47:18 51:8,23 claims 34:9 35:8 52:11 53:21 clarified 44:24 clarify 58:24 class 17:10,11 17:17 clear 15:11 28:14 32:21 33:16 34:8 37:17 39:10 43:21,22 client 43:15 51:21 53:17,18 58:24 59:2 clients 43:8 50:15 client's 49:3 close 58:7 cloth 43:14,16 43:21 coercively 22:9 College 19:8 combined 48:2 come 23:20 31:4 32:6,17 58:12 58:14 comes 27:4 41:18 coming 15:22 32:9 committed 18:9 25:24,25	common 26:22 community 27:2 compelled 19:14 complaint 30:8 30:10 35:15 37:1,2 51:23 complete 51:2 component 29:20 conceivably 20:22 concern 9:2 26:19,19 concerns 8:8 27:25 28:24 concluded 3:13 concludes 40:13 conclusion 60:6 conduct 45:20 45:23 48:8 confer 3:20 9:22 conferring 9:7 60:1 Congress 31:11 49:19,21 50:3 50:6 congressional 55:3 Congress's 54:24 consent 3:19 12:8,8 20:25 21:1,8,18,22 22:8 25:11,13 26:5,14,17 37:11 consented 25:3 25:17 consequences 9:6 56:22 considerations 13:22 17:4 considered 15:17 51:1 59:24 consistent 21:16 40:24 52:10
---	---	--	---	---

57:13 consolidated 54:5 consolidation 17:20 Constitution 3:14 8:23 constitutional 10:11 19:12 54:2 constitutionali... 13:13 contempt 31:5 content 4:20 5:3 5:12 6:3,16 content-based 8:3 31:20,22 32:20 contest 19:24 contested 27:9 continue 9:17 54:14,19 continued 7:15 7:22 41:5 continuing 12:21 21:10 contract 21:25 22:8,13 Contrary 27:2 control 26:17 40:15,17 controlling 19:11 controversy 16:22 converting 15:21 core 54:1,2,14 58:2 correct 4:22 12:21 32:13,25 45:6 46:3,4 47:17 53:11 correctly 42:11 cost 53:20 costs 51:25 52:1 52:2,4,5,7,17	52:20,21 53:1 53:4,7,7,10,13 53:17,19 54:9 58:24,25 59:2 59:3,4,5,7,7 counsel 3:25 18:11 37:4 58:19 60:13 counter 53:19 countervailing 13:22 28:24 counts 37:2 course 7:25 13:11 14:16 38:7 court 1:1,14 3:9 3:10,12,20 4:7 4:11 5:18 6:14 6:17 10:16 18:17,18 19:10 19:11,20,23,25 20:6,8 21:4 22:4,9 27:24 28:14,17 29:11 29:12,14,18 31:21,24 32:7 32:10,20,24 33:15,17 34:8 34:17,23 35:8 35:17 36:7 37:19 38:4 39:10,15,17,22 39:23,25 40:13 41:6 42:2,7,17 44:13,16,17,19 44:21,22 45:17 45:17 48:20 49:5 50:4 51:3 51:6,11 52:4 52:22 55:20,23 57:18 58:8 59:18,21,24 courts 22:1 25:6 25:23 34:15 42:21 court's 3:17 4:18 5:4,17	12:4 14:13 19:21 20:16 22:1 27:14 28:11 39:9 44:11 47:25 48:5 52:10 covering 25:11 create 9:16 criminal 58:13 58:15 criterion 6:4 critical 20:2 cross 52:14 53:20 curiae 1:21 2:8 18:15 curious 3:23 curtain 33:3 50:18 <hr/> D D 3:1 da 41:3,4,4 damages 7:16 7:23,25 dancing 48:1 Darwin 28:13 de 4:12 40:9 deadline 58:7 deal 22:13 dealing 49:4 dealt 22:7 24:16 debate 20:9 debating 17:9 decades 34:15 decide 20:11 26:1 decided 13:12 13:16 14:14 17:16 deciding 5:5 decision 4:4,11 6:9,10,18,19 8:22 12:24 14:16 23:7 27:14 31:20,20 33:18 35:4	37:18,23 40:14 40:17 52:10 decisions 58:6 declaration 19:12 declared 10:20 declined 3:20 decree 3:20 12:8 12:8 20:25 21:1,8,18,22 25:11,13 26:5 26:14,17 defend 9:12 13:12 60:11 defendant 7:16 8:23 10:10 12:9 16:9 19:14 21:6,9 22:10,10 23:4 25:3,15 26:8 27:22 28:12 52:15 53:7 defendants 47:13 51:4 52:13 59:8 60:10 defendant's 26:16 27:1 28:6 defined 28:19 definitely 50:1 definitive 19:6 20:17 DeFunis 16:21 demonstrate 43:25 47:20 demonstration 6:11 7:12,19 8:5 10:5 11:4 11:19 13:19 15:2,8 16:2 26:3 33:1,6 38:24 40:11 43:11,13 45:21 45:24 46:7 48:10 59:11 demonstrations	57:7 demonstrators 10:3 15:1 denial 6:16 11:11 59:13 denied 5:8 7:3 36:13 57:22 denies 35:13 denying 6:18 Department 1:4 1:20 departure 49:9 described 55:21 determination 9:8 11:18,21 17:20 22:24 50:19 determinative 19:7 determine 7:24 8:21 18:21 40:1 determined 18:9 19:23 determines 11:25 42:17 determining 50:25 dictionaries 28:20 difference 26:15 31:11 differences 30:21 33:13 different 4:1 6:12 25:3 38:14,20 41:15 42:22 43:24 differently 13:20 39:12 difficult 58:16 direct 41:18,23 directed 9:3 discrete 51:23 discretion 10:17 20:12,16 discrimination
--	--	--	--	---

8:3 disentitled 12:16 dismisses 54:8 disposed 57:24 dispositive 19:11,17 20:1 dispute 28:15 disputed 19:24 22:4 disputes 44:10 disregard 5:19 dissent 20:11 dissenters 19:21 dissents 20:10 distill 14:13 distinction 7:7 31:2 54:25 district 3:12 4:7 31:24 32:20 33:15 34:15 37:18 38:1,3 39:9,10,15,22 39:23 40:13,16 52:4,22 59:17 document 5:22 doing 39:22 44:24 56:25 double 49:7 doubt 34:19,22 35:14 59:21 drew 6:14 D.C 1:10,17,20 1:23	either 26:25 32:19 45:10 48:17 elaborate 8:9 elaboration 7:9 election 27:3,5 57:7 58:1 element 26:11 50:14,21 elements 22:8 eligible 36:7 emergency 13:25 29:1 enacted 14:23 50:3 encourage 8:16 28:3 54:14 encouraged 54:12 ended 34:14 60:5 enduring 27:1 28:5,7 48:18 energy 37:13 enforce 6:20 10:15 32:15 60:4 enforced 7:4 21:25 32:5 enforcing 13:24 59:15 enjoin 29:21 ensure 8:13 enter 3:19 50:19 entered 3:16 25:11 42:11 57:14 entering 21:21 entire 34:20 52:20,21 53:1 entities 28:25 entitled 3:12,14 11:14 35:19 47:4 52:25 53:6,8 54:23 57:16 entitlement 8:13	24:9 entry 25:3,18 37:12 ENVIRONM... 1:5 envision 38:1 envisioned 6:11 equally 25:19 equitable 8:21 11:24 50:24 equities 36:15 equity 51:1 52:23 erect 47:1 error 20:15 40:2 40:6,7,15 errors 40:4 escorted 44:6 especially 16:4 ESQ 1:17,19,23 2:3,6,10,13 essentially 9:9 14:19 15:21 60:2 establish 9:19 12:13 22:19 24:8 established 44:16 establishing 23:2 ET 1:5,8 ethical 50:21 evading 15:19 27:15 57:25 event 8:10 16:22 25:12 41:7 58:7 evidence 6:3 8:1 30:5 evidentiary 38:14 exactly 37:2 44:7 56:17 example 10:3 14:23 exception 21:16	excuse 19:16 51:17 exercise 57:8 exists 31:1 expected 6:13 7:20 expended 35:23 experience 27:12 explain 24:24 explained 28:17 expressed 27:24 31:25 expression 4:9 4:16 expressive 48:2 48:8 extensive 48:4 extent 46:24,25 47:8 extraordinary 18:3 48:23 49:8	26:11,17 28:23 faith 50:14 51:2 51:2 false 14:19 far 14:9,10 54:25 favor 21:12 25:15 fear 13:25 fearful 13:24 February 6:11 6:16 11:4 30:12 51:19,20 Federal 5:20 8:23 18:20,22 21:7,13 22:12 24:5 28:12 29:12,14,18 fee 10:18 39:18 40:12 41:24 42:16,19 feel 8:11 fees 3:12 8:13,16 9:4,7,16,19,23 12:16 13:3,9 13:18 14:1,8 16:8,12,14 18:5,8,19 19:3 20:24 21:6,8 21:18,23 22:5 22:10,19,24 23:2,5,9,9 24:21 27:10,19 29:3 30:9 33:24 34:11,13 34:20,23 35:14 35:19,22 36:7 36:23 37:10 40:19,19,22,22 42:12 43:1 49:3,4,20 50:5 50:7,21 51:1,3 52:1,14 53:3,8 53:9 54:23 56:6 58:8 60:1 60:1,9 Ferrari 28:13
<hr/> E <hr/> E 2:1 3:1,1 earlier 33:18 Eckert 34:8 economy 25:6 26:12,20 28:24 37:6 effect 4:12 5:6 6:1,10 7:6 8:19 14:11 15:20 57:12 effort 35:2			<hr/> F <hr/> face 13:5,7 18:1 faces 18:1 facial 4:4 29:22 35:18 fact 4:21,23 6:16 7:6 8:1 10:8 15:11 19:24 32:14 38:19 44:10 56:5,22 60:3 factors 8:21 facts 38:3 39:5,6 factual 5:9 6:5 7:5,9 31:20 fail 10:18 failed 59:23 fair 9:11 14:1 49:17 60:11 fairest 39:9 fairly 8:9 fairness 8:22 11:25 17:3,4	

fight 10:7 17:5 21:23 26:6 37:7,14 fighting 21:10 filed 35:15 filing 30:8,10 final 3:15 4:4 9:8 14:7 15:22 21:10,11 23:6 23:7 25:13,15 25:20,24,25 27:9,22 28:10 28:14,15 32:18 35:16 36:1,9 41:15 50:6 51:19 finally 59:25 find 4:8 35:18 52:12 58:17 finding 9:6 finds 31:21 48:6 57:22 finish 29:1 first 17:6 23:4 29:25 30:5 32:4,11 33:7 47:19 48:3 50:23 57:15 58:3,12 five 36:20,21 flexible 50:12 floating 50:9 FLORIDA 1:4 flow 56:22 focus 55:6 followed 7:13 19:13 following 50:16 force 16:4 forcing 16:11 forget 4:24 form 21:10 23:6 27:22 28:9 former 13:10 fought 27:13 found 3:17 21:7 22:11 23:14,17	49:5 52:8 four 57:12 free 4:9,12 friends 54:4 friend's 37:6 front 25:12 full 6:7 9:11 53:7 59:24 60:10 fully 26:8 fundamental 26:11 28:22 fundamentally 60:9 further 51:21 future 32:19	general 1:20 12:23 26:24 27:17 44:14 generally 55:8 getting 18:4,4 25:23 33:24 46:25 51:6,14 53:12 54:7 60:5 GINSBURG 9:25 15:24 16:19 17:5,11 17:17,21 32:1 32:24 33:23 34:5,18,25 35:9 38:22 48:9,15 51:25 52:6,15,25 53:3,6,14,16 58:23 give 14:4 25:23 giving 20:21 go 15:2,6 18:20 22:17,25 26:2 36:8 47:6 50:11 51:5,11 53:22 goes 27:5 33:19 41:2 44:14 54:13 58:5 going 5:3 10:7 16:1,2 21:22 21:23 23:19 28:23,25 37:9 37:13 38:24 39:3 43:14,22 50:18 51:13 54:1,3 57:5,21 57:23 58:14 good 14:6 32:11 50:14 51:1 gotten 17:6 37:20 42:18 56:16 govern 5:24 government 16:12 18:9	20:21 25:7 governmental 28:25 governments 9:10 13:2,23 60:10 Government's 27:12 graduated 17:7 17:12 graduates 16:23 grates 49:16 grossly 49:22,24 ground 14:9,15 14:16 31:19 50:11 group 14:25 guess 7:8 38:12 38:16 45:13 guilty 48:25 49:4 Gynecologists 19:9	Hens 34:4 Hensley 34:7 35:7 52:10 53:13 Hewitt 28:14 hidden 33:2,5 hiding 33:11 hindsight 35:4 hit 49:15 hoc 4:18 hold 11:19 45:18 holding 39:11 59:18,22 Honor 29:19 30:3,11 34:23 35:6 36:17 37:16 38:8,18 39:20,24 40:19 40:23 41:12,25 45:2,6,10,16 47:21 48:14,16 50:22 51:10 52:3 53:2,5 55:14 56:7,19 57:3,11 58:18 hope 35:17 horrible 10:20 18:1,1 horrifying 14:24 hours 7:11 36:20,21 38:11 hypothetical 12:20 38:2 41:14 42:1 54:17
	<hr/> G <hr/> G 3:1 Gagne 22:3 48:19 Galanter 1:23 2:10 29:7,8,10 29:19 30:2,11 30:16,20,25 31:8,23 33:8 34:3,7,13,22 35:6,17 36:1,4 36:6,17,25 37:16,24 38:2 38:7,18 39:8 39:20,24 40:3 40:7,18,23 41:12,20,25 42:21 43:2,4 44:4,21 45:2,6 45:9,16,22,25 46:4,11,19 47:2,10,21,25 48:13,16 50:2 50:22 51:10,13 51:17,22 52:3 52:8,19 53:2,5 53:11,15,18 54:10,24 55:13 55:20 56:7,12 56:19 57:2,11		<hr/> H <hr/> Hair 32:15 Hampden 55:24 hand 18:20,20 hands 50:24 Hanrahan 28:13 55:24 happen 19:18 happened 19:19 19:20,21 44:7 happens 38:10 57:7 happy 12:13 hard 14:14 harm 36:15 hear 3:3 18:12 28:5 29:7 heard 55:11 hearing 7:11 38:14 55:14 heavier 55:6 held 3:10 4:11 18:18 51:3	<hr/> I <hr/> ignore 43:23 illegal 29:13 illegality 51:8 ill-prepared 7:12 immediately 57:24 impact 28:2 importance 9:18 important 13:14

17:15 25:21 importantly 53:22 impose 16:8,14 44:25 60:9 imposing 22:9 impression 4:12 incentive 58:6 included 45:1 including 21:4 37:15 incorrect 40:14 incredibly 58:16 incurred 59:2 indemnity 49:8 indicating 7:3 individual 7:16 7:23,24 13:6 58:11 ineligible 55:9 informed 38:17 infringed 4:9 injunction 3:11 4:3,7,19 5:7,11 5:21,23,24 6:1 7:11 8:2,10,18 8:19 9:8,24 10:2 11:15 13:4 14:6 15:4 15:8 18:21 19:2,6,10,17 20:5,13 22:21 22:23 23:10,15 23:24 24:9 25:4,18 27:20 28:8 29:15,18 30:3,6,15 31:1 31:10,16,17,18 31:19,21 32:22 33:10,25 34:6 34:11 35:3,11 35:22,23 36:12 36:19,22,24 37:3,8,12,23 39:7,16 40:8 41:3,5,17,19 42:4,7,11,15	43:19,25 47:11 47:15 49:15 50:23 51:16,24 52:2 54:4,7,9 55:7 56:17,20 58:4 59:2,6,8 59:23 60:2 injunctions 25:21 26:22 27:4 28:1 31:12,13,13 54:25 55:1 60:8 injuries 55:7 innocent 18:8 24:20 insist 14:6 instance 9:16 12:7 instances 4:14 intended 49:19 55:4 intention 50:16 50:17 interest 33:24 interested 27:6 interesting 33:20 43:9 interference 29:15 interfering 46:7 interim 3:21 8:21 11:25 17:3,3 23:6 27:23 interlocutory 29:2 interpretations 49:23 interpreted 12:5 50:4 intervening 32:14 invalid 29:24 invested 13:9 involved 5:7 15:3 23:1	27:12 involves 16:20 involving 60:7 irreparable 36:15 55:6 issuance 5:22 20:4 issue 4:1 9:4 11:5,5 15:12 17:15 20:12 21:15,19 22:13 22:25 26:17,25 33:18 41:17,24 issued 8:2 14:18 42:4 issues 15:15 33:20 38:14 issuing 4:19	9:25 10:13 11:2,9,13,18 11:21 12:1,11 12:25 13:15 14:2,3,22 15:13,24 16:19 17:5,11,17,21 17:24 18:11,16 18:23 19:1,16 20:4,18 21:1 21:14 22:14 23:8,14,22 24:1,4,7,13,18 24:24,25 25:2 25:10,17 26:2 26:13 27:3,8 28:4 29:5,10 29:17,23 30:7 30:14,18,22 31:3,15 32:1 32:24 33:23 34:5,10,18,25 35:9,21 36:2,5 36:10,14,20 37:4,17,22,25 38:6,9,22 39:14,23,25 40:5,10,21 41:1,14,21,23 42:1,6,9,10,13 42:24 43:3,5 44:19 45:1,4,7 45:12,20,23 46:1,5,16,23 47:4,16,23 48:9,15,22 49:18,21,25 50:8 51:5,12 51:15,20,25 52:6,15,25 53:3,6,14,16 53:25 54:6,20 55:10,17 56:4 56:9,15,23 57:9 58:19,23 60:13 justification	16:11 21:5 26:23 justified 47:18 justify 22:24
K				
keep 8:12 9:3 Kennedy 8:25 9:13 14:2 27:3 27:8 40:21 42:10 kind 5:6 12:3 17:14 20:20 38:4,12 46:7 55:2,4 56:24 kinds 31:14 50:12 55:23 Klan 14:24 Klux 14:24 knew 10:5 51:18 know 5:13,13 11:22 12:12 13:17 30:18 37:11,13,22 49:7 54:2,20 60:4,7 knowing 51:11 51:12 Ku 14:24				
L				
language 50:1,2 53:24 large 27:2 largely 21:25 late 40:11 Laughter 18:25 law 8:24 9:11,12 11:14 15:12,15 15:20 16:21 18:20,22 19:7 19:12,18,25 20:1,7,9,15,18 20:23 21:2,7 21:13 22:12 24:5 26:25 28:12 38:3 40:2,4,4,6,8,14				

41:3,7,8,10,12 47:17 49:1,6 58:13 60:4 laws 13:24 leading 34:14 leave 50:8 left 29:14,17 legal 4:15 5:10 5:10,15 7:9 11:1,2,3,7,10 11:14,17 12:6 12:9 28:5 29:23,24,25 33:18 34:16 38:20 55:25 60:11 legally 25:14 42:15,18 letter 6:23 7:3 46:20 58:11 59:12,13 let's 24:13 31:18 33:23 42:25 ley 34:4 liability 9:6 13:6 18:19,19 29:3 liable 13:3 light 4:21,23 likelihood 16:17 23:19,21 line 32:3 34:1 literal 50:1 litigate 15:7 54:19 litigated 60:6 litigating 23:1 litigation 3:22 4:1 8:17 9:3,17 12:22,24 13:8 14:18,20 16:4 18:2 22:17 26:4 40:19 53:21 54:13 59:4 live 7:14 local 9:10 13:23 16:12 18:8	60:10 locality 13:2 long 8:18 46:18 longer 23:16 look 34:23 35:7 43:7 52:11 53:23 looking 43:17 looks 5:2 lose 13:4 23:19 34:9 37:9 58:8 loss 13:18 lost 16:5 29:18 29:20,25 32:8 32:23 33:25 34:5,12 35:3,3 35:21,24 39:6 lot 15:14 27:12 54:1 56:21 Lots 27:13 <hr/> M M 1:23 2:10 29:8 Maher 48:19 main 34:19,19 majority 20:10 20:11 manager 7:24 mark 24:1 material 44:10 materialize 59:23 materially 44:17 matter 1:13 5:15 5:25 8:18 9:12 10:23 25:6 52:22 60:16 matters 27:9 Mayer 22:2 mean 8:8 10:1 10:10 12:6 13:2 17:24 18:3 20:14 24:7,8 30:22 36:11 37:22 38:6 40:20	42:21 45:19 46:15,22 47:5 47:6 49:8 51:7 57:1 60:8 meaning 17:1 means 31:4 44:23 56:6 mechanism 55:3 mentioning 53:25 meritorious 8:17 merits 3:19 8:20 12:6,10 14:19 15:21 16:5,18 17:20 20:9 23:7 27:21 35:13 36:16 41:16,22 42:2 48:18,20 59:20 59:24 MICHAEL 1:3 middle 14:15 midlevel 58:10 midway 14:8 mill 19:9 MILLE 20:25 21:3 Millett 1:19 2:6 18:12,12,13,16 19:4,19 20:8 21:20 23:3,11 23:17,25 24:3 24:6,10,15,23 25:5,13,20 26:8,16 27:7 27:11 28:4,7 29:6 mind 23:23 50:10 minimis 4:13 minute 28:1 minutes 58:20 mirror 59:4 money 37:1 months 29:20 moot 8:4 9:1	12:15 13:5,7,8 17:7,14 54:15 mooted 8:6 mootness 12:12 morning 18:24 moved 57:6 multiple 53:21 multiplying 49:8 <hr/> N N 2:1,1 3:1 nail 37:8 naked 46:13 58:14 name 24:2 narrow 19:5 narrowed 47:3 47:14 necessarily 20:15 need 8:12 17:15 35:10 48:18,20 54:18 needed 36:18 negotiate 57:16 never 7:13 9:15 12:18 19:2,4 21:14 33:22 42:18 56:5 58:5 New 48:13 notice 5:25 56:24,25 57:4 59:14 notion 48:17 58:10 novo 40:9 nude 4:15 44:5 45:10 46:21 47:20 48:1,7 57:6,10,13,20 59:13 nudity 3:13 4:8 4:12,16 6:20 7:4 13:13 32:5 32:15 48:2	57:14 59:15 <hr/> O O 2:1 3:1 objective 51:6 obligates 25:14 27:22 obligation 25:25 Obstetricians 19:8,8 obtain 3:11 9:22 31:10 44:16 45:16,17 48:19 54:3 obtained 30:12 37:3 47:11 obtaining 60:1 obtains 26:25 obviously 28:8 34:3 35:9 40:3 46:22 occasionally 48:6 occurring 7:10 officer 13:6 official 4:25 5:5 6:8 58:10 officials 13:12 29:13 off-the-cuff 38:16 oh 5:13 15:13 17:21 33:4 54:10 okay 22:14 36:5 41:16 43:25 one-time 16:2 ongoing 3:22 13:7 14:18 operating 39:2 operative 5:21 5:25 opinion 20:9 48:4 opponents 47:8 60:3 opportunity
---	---	--	---	--

9:11 60:11 oppose 25:8 opposed 37:10 opposing 3:25 opposite 38:19 opposition 26:6 33:16 oral 1:13 2:2,5,9 3:6 18:13 29:8 order 5:6,7 6:21 7:24 11:5,6 29:2 44:7,11 44:13,19,21,22 45:3 46:25 48:19,21 50:7 50:15 52:14 ordering 9:9 orders 31:14 39:10 55:23 ordnance 32:5 32:11 ought 50:20 outside 15:2 28:9	5:25 9:18 12:5 20:20 21:15,17 23:4 25:22 37:20 51:2 52:9,12,13,24 53:12 56:1 party 3:21 9:23 10:17 12:19 14:21 15:18 20:21 21:21 24:11,12 28:16 28:17 34:4 42:5,8 43:6 47:7,13 48:21 49:4 50:20 55:9 56:2,10 PATRICIA 1:19 2:6 18:13 pay 16:12 18:2 22:11 23:12 37:10 43:16 48:23 49:2,3 49:12,16 58:8 58:25 60:3 pays 49:10 peace 7:18 10:5 32:7 penalized 13:25 penny 35:1 people 6:13 8:11 33:5 43:14 45:4 48:25 perception 4:20 perfectly 13:24 perform 6:24 performance 7:19 32:14 period 9:1 permanent 3:15 12:14 28:10 29:18,21 31:13 31:16,21 32:8 32:23 36:18,24 39:16 47:11 51:8 54:3 55:1 permission 6:19 6:24	permit 11:11 21:7 permits 51:3 permitted 32:14 33:11 person 18:6 22:21 24:20 39:21 42:15 49:6 57:25 persons 58:16 perspective 37:6 Petitioners 1:6 1:18,22 2:4,8 2:14 3:7 18:15 33:21 58:22 Petitioner's 58:4 phrase 52:1 pieces 4:1 pint 13:1 place 7:11 8:10 placed 31:12 plaintiff 9:23 10:8 15:17,23 15:25 16:9,10 17:13 20:22 21:12,12 25:16 26:23 27:16 51:3 54:7 59:5 60:1 plaintiffs 3:10 3:14,16,17 7:15,25 13:15 28:23 44:25 52:12 56:3 59:1,7,19 plaintiff's 10:11 15:25 planned 39:4 plan's 4:12 play 6:19,24 7:4 33:11 58:5 playing 23:15 plays 6:12 33:1 39:4,11 please 3:9 18:17 29:11 plenty 15:15	point 8:17 11:22 12:21 20:19 23:22 24:6 31:24 33:9,19 41:16,17 42:22 43:2,9,10 44:15 55:19 56:24 58:24 59:10 points 3:24 43:10 policies 40:24 political 5:1,2 48:7 poses 12:20 position 15:18 15:25 27:8 39:21 40:1 60:11 possibility 6:15 possible 37:14 53:13 post 4:18 power 21:24 practical 9:17 56:17 practice 49:9 precedent 22:2 precipitated 26:3 precise 59:5 precisely 16:1 preclude 32:19 predicted 4:7 16:16 17:2 prediction 8:2 8:20 14:18 16:6 59:22 preliminary 3:11 4:3,7 5:7 5:11,21,23 7:10 8:2,10,18 8:19 9:7,7,24 10:1,2,9 11:15 12:15 13:4 14:6,17 18:20 19:2,6,10,17	19:23 20:5,12 22:20,23 23:10 23:15,24 25:4 25:18,21 26:7 26:21 27:20 28:1,8 29:14 30:3,6,15 31:1 31:10,12,12,16 31:17,18 32:22 33:9,25 34:6 34:11 35:2,11 35:22,23 36:11 36:12,22 37:3 37:8,12,23 39:7,15 40:8 41:3,5,17,19 42:4,7,11,15 43:19 49:15 50:23 51:6,15 52:2 54:7,9,12 54:25 55:7 56:16,20 58:4 59:2,6,8,23 60:2,7 premise 39:2 40:14 presentation 38:13 presents 33:20 press 33:21 pressure 9:16 Presumption 23:18 pretty 43:21,22 prevail 10:18,25 10:25 12:5,6 12:14 14:14 17:2 24:12 32:9 37:10 55:15 prevailed 16:24 17:1 30:23 46:24,24 47:8 55:12,18 prevailing 3:11 3:18,21 9:23 10:17 12:5,19
<hr/> P <hr/>				
P 3:1 page 2:2 4:10 33:16 59:20 pages 28:18 paid 18:5 parade 45:18 parades 57:8 park 7:23 parsed 34:15 parsing 34:18 52:23 part 6:5 24:16 31:10 40:19 47:22 48:7 52:1 53:4,9 54:18 56:13 particular 7:18 12:3 13:19 particularly 54:14 parties 3:12,18				

14:20 15:17 24:11 28:16,17 31:24 34:2,4 37:19 41:10 42:5,8 43:6 47:7,13 48:21 50:11,13,20 52:9,12,13 55:9,22 56:1,9 prevails 31:3,4 44:15 prevent 8:3 13:6 13:8 17:14 previous 6:12 57:12 principle 47:17 prior 59:11 private 12:22 26:23 27:16,17 probability 35:12 Probably 36:25 problem 28:16 46:16 problems 37:5 40:20 Procedure 5:20 proceedings 8:9 38:8 proceeds 41:15 process 24:17 produced 4:2 product 11:24 program 16:23 prohibited 29:15 44:22,24 46:2 prohibition 32:16 46:6 promote 22:17 propose 9:14 proposing 13:23 14:3 proposition 47:24 protect 8:14 protected 44:8	48:2 57:15 protection 1:5 33:7 protest 29:13,16 32:16 33:14,15 47:12 57:5,10 57:20 59:12 protested 57:13 protests 39:12 proven 14:19 provide 21:11 27:22 44:20 providing 12:10 provision 8:16 10:15 public 33:2 38:24 purpose 8:15 16:13 21:13 purposes 9:18 53:23 55:2 pursue 12:13 13:19 pursuing 13:1 pushing 58:6 put 6:19 7:25 32:2 33:1,11 43:14 puts 53:9 putting 23:23 43:20 54:25 p.m 60:15 <hr/> Q <hr/> qualify 31:7 question 9:2 13:3 19:18 20:7,8 22:4 28:22 47:6 49:18 50:25 54:21 questions 19:24 40:4 quickly 57:6 quote 6:7 59:19 <hr/> R <hr/> R 3:1	rated 36:8 reaction 3:24 reading 10:24 39:9 real 9:18 54:18 reality 21:21 really 3:25 5:6 13:18 15:5 22:8 39:4 49:5 50:13,19 55:15 reason 4:19 6:15 22:3 24:12 25:23 43:7 reasonable 34:14,24 36:9 reasonably 35:22 reasoning 22:20 22:22 reasons 48:7 REBUTTAL 2:12 58:21 received 17:3 59:6,13,14 reciprocal 47:5 recognition 53:24 recognize 6:17 recognized 22:2 31:11 32:21 recognizes 27:15 record 4:22,24 5:5 6:3 7:9 43:8 records 34:16 reduced 52:22 59:4 reflect 55:2 refusal 33:13 regarding 33:18 register 57:23 registered 58:1 regulations 29:22,24 57:9 57:12 reinjected 7:21	rejected 4:3 related 35:7,10 35:19 36:11,12 relationship 44:18 56:1 relatively 54:13 relevant 28:20 relied 6:7 relief 3:15 11:16 12:10 21:11,11 23:6,6 25:15 25:24 27:23,23 28:10,10 29:21 30:4,12 44:17 47:18,18 48:19 51:7,8,21,23 54:15,16 55:18 55:21 57:19 religious 57:8 remainder 59:3 59:9 remained 7:14 remaining 58:20 remedy 50:24 remember 26:22 28:23 33:10 39:12 reminder 17:22 removal 25:8 removed 45:9 repeat 16:3 repeatedly 18:18 21:4 repetition 15:19 17:9 27:15 57:25 reply 6:7 representation 34:21 represented 40:14 repudiate 32:22 repudiated 37:18,25 38:1 repudiation 38:5,17 request 7:3	requesting 6:24 59:12 requests 27:4 require 37:7,14 required 50:6 requirement 44:25 requires 60:2 reserve 17:22 18:10 reserved 22:3 resist 21:10 resolution 10:12 25:14,21 27:21 28:15 resolve 21:22 48:20 resolved 12:18 20:5,6,8 resolves 12:10 19:17 26:25 resources 9:20 respect 20:18 47:10 Respectfully 11:7 Respondents 1:24 2:11 29:9 29:12 response 6:6 44:3 59:13 responsibility 12:9 responsible 22:5 rest 18:2 restrictive 4:10 4:14 result 13:17 19:14 33:13 35:15 results 19:6 resume 23:23 reverse 32:22 33:17 40:10 reversed 31:18 37:18 40:9 reverses 42:8
--	---	--	---	---

review 5:24 15:19 17:9 27:16 34:16 40:4,9 57:25 reviewing 40:12 reviews 39:18 revisit 29:2 33:17 reward 8:16 riding 14:25 right 11:4,19,23 15:5 20:19 21:3 22:11,19 23:2,5,11,12 24:21 34:2 39:3,15 41:4 46:13 47:19 48:7 51:9 56:21 57:22 59:3,12 rights 10:11 14:25 16:13,14 16:15 22:24 32:4 49:12,14 50:5 54:1,2 55:4,5 58:12 risk 37:9 ROBERTS 3:3 8:7 12:11,25 13:15 18:11,23 19:1 21:14 28:4 29:5,17 29:23 30:7 36:14 37:4 38:9 44:19 46:23 47:4 51:5,12,15,20 54:20 55:17 56:23 57:9 58:19 60:13 rule 5:20 9:14 9:15 13:23 14:3,13 22:15 22:16 31:9 33:21 40:20 58:4 ruled 32:8 39:16	Rules 5:20 ruling 19:7,11 19:14 20:1 32:22 38:15 40:8 rulings 3:21 run 27:25 58:2 running 37:9 runs 21:12 25:15 <hr/> S S 2:1 3:1 sake 23:2 save 37:13 saying 14:2 36:16 46:21 56:12 58:11 says 10:14,16,21 15:3 27:18 33:17 38:4 41:3,4,6 42:3 52:11 say's 38:11 Scalia 3:23 11:18,21 17:24 19:16 20:4 23:22 24:1,4 24:18,25 30:14 30:18,22 31:3 35:21 36:2,5 36:10 37:22,25 38:6 41:14,21 42:6 45:1,4,7 45:12,20,23 46:1,5,16 48:22 49:21 56:4,9 scenario 12:8 school 16:21 scope 47:14 screen 44:9,11 44:12,20 45:1 45:3,5,15,21 45:21,24,25 46:2,8,18,20 47:1,12	se 33:21 40:20 58:4 season 27:4 Second 48:3 59:17 SECRETARY 1:3 Section 17:1 58:15 secure 38:24 secured 55:18 see 14:15 31:6 33:5 35:4,7 43:15,15 48:22 seek 54:17 seeking 11:17 29:21 35:23 seeks 51:8 Seitz 1:17 2:3,13 3:5,6,8,23 4:6 5:9,15,18 6:5 6:23 7:1,8,22 8:6,15 9:5,21 10:8,25 11:7 11:10,16,20,24 12:4,18 13:11 13:21 14:12 15:11,16 16:8 16:25 17:8,13 17:19,22 18:7 58:20,21,23 59:1 seizure 19:9 sending 58:10 sense 14:6 28:8 55:18 sent 46:20 separate 5:6 SETH 1:23 2:10 29:8 setting 12:22,23 15:12 settle 20:21 settlement 7:2 21:18 22:15,16 22:22 24:14,16 24:17	settlements 22:17 24:15,19 settling 24:21 28:15 sheriff 15:3 shirt 45:19 short 35:10 56:24,25 57:4 show 22:7 32:2 36:15 48:10 59:19 showed 57:1 shown 35:12 shows 42:3 56:5 side 15:14 22:6 26:6,21 35:25 38:12 45:13 48:23 49:1,10 49:12,16 52:5 54:5 55:11 56:5,10 side's 49:2 significant 9:5 13:21 27:25 47:8 significantly 4:8 similar 16:15 59:13 simply 8:12 16:9 16:16 22:16,18 32:23 37:20 55:22 60:6 single 17:12 situation 8:11 9:21,22 12:12 15:9,19 17:8 20:2 21:8 26:18,19 56:18 58:17 situations 3:18 13:25 54:1 skimpy 43:12 slipped 54:22 Sole 1:3 3:4 Solicitor 1:19 somebody 22:18 24:8 48:23	sorry 45:22 sort 3:25 20:14 48:18 57:1 sought 30:13 47:11 51:21,22 52:20,21 54:15 54:16 57:19 SOUTER 4:17 5:13,16 6:2,21 6:25 7:5,17 8:4 22:14 23:8,14 24:7,13 55:10 South 14:25 Speaking 50:2 split 52:6 stage 7:18 30:3 30:6,10 31:17 31:21 33:10 36:22,24 37:14 42:12 55:7 stake 54:2 standard 28:6 standards 42:22 start 5:10 39:1 state 4:9,13,25 6:8,8,18 7:3,13 9:9,10 13:12 13:23 16:12 18:8 29:13,15 43:11,20,21 44:22,24 46:2 46:6,16,17,23 53:17,19 56:20 56:23 57:17 58:10 60:2,3,9 statement 4:18 5:4,5,17 statements 5:19 states 1:1,14,21 2:7 5:12,22 18:14 27:11 37:7 58:5 State's 3:13 6:15 11:11 stating 21:4 status 3:21 9:23 12:19 55:9
---	---	--	---	--

56:2	24:11	T	14:22,24 17:8	43:19 54:22
statute 10:14	succeeded 30:7	T 2:1,1	20:1 21:20,20	55:10 56:13,16
12:2 25:1	52:16	table 36:16	22:6 24:17	TROs 30:17
49:20 50:5	success 8:20	take 29:1,1	25:5,6 31:1,4	31:11 55:1,8
53:4,8	16:17 34:15	45:13 48:16	33:19 36:2	56:14
stay 25:8 27:18	35:12 59:20	taken 45:14	37:17 40:5	true 4:25 12:7
33:23 44:12	successful 30:9	takes 8:10	42:25 44:14	30:11 51:10
stays 29:2	35:15 47:14	talking 18:4	47:25 50:22	60:8
steel 19:9	sufficient 22:23	22:9	53:22,24 54:10	trump 49:25
step 48:17	55:25	Teachers 28:13	54:11,24 55:8	trying 22:1
Stevens 25:2,10	sufficiently	team 18:24	58:11	TT 20:25 21:3
25:17 26:2,13	35:19 55:24	tearing 50:18	thinks 39:18	Tuesday 1:11
34:10 39:14,23	suggest 39:21	tee 45:18	Thornburgh	Tunic 48:5
39:25 40:5,10	40:18 42:9	telephonic 6:14	19:7,22	Turned 16:6
41:23 42:9	48:1	7:12	thought 12:1	two 3:18 4:1
47:16,23 49:18	suggested 48:20	tell 25:7 28:24	15:9 32:3,24	20:20 21:5
49:25 56:15	53:13 55:23	44:15	35:13 38:23,23	23:4 26:10
stipulated 7:2	suggesting	telling 14:11	39:15 41:1,2,9	30:21,22 37:16
stipulation	13:16 14:5	52:18	41:14 43:18	50:4 54:5
57:14	30:16 31:8,9	temporarily	55:17	type 11:16
stop 43:20	33:12 41:13	10:9	three 23:3 57:2	T.A 1:8
stories 57:3	55:22 56:8,14	temporary 4:19	58:20	
streets 48:13	suggests 5:2	term 28:18,19	threshold 55:21	U
stress 35:20	suit 20:20 28:21	terms 7:1 58:9	time 6:20 9:1	ultimately 49:5
structural 30:20	43:12 44:1	test 24:10 28:5	16:24 17:23	unable 59:19
structure 14:9	summary 4:11	testimony 6:6,8	25:7 28:11,20	unanimously
stuck 24:20	7:14,18 59:18	6:10,15 7:12	35:11,15 46:20	21:4
student 16:20,21	superior 20:16	33:12	50:16 59:11	Unclean 50:24
16:23,24,25	support 7:6 41:8	Texas 28:13	times 39:19	unconstitutio...
17:2,6,7	47:23	text 40:24	46:22 57:12	4:16 11:12
subject 23:15	supporting 1:22	Thank 18:11	timing 59:11	undercut 22:15
34:16 58:13,14	2:8 18:15	29:4,5 58:18	told 29:13 44:10	underlying 4:15
subjected 23:24	suppose 10:3	58:19 60:12,13	57:4,10,17	11:10,17 40:25
46:14	33:25	theories 38:21	tomorrow 15:4	47:17,22 51:7
submission 9:14	Supreme 1:1,14	theory 21:17	15:5	understand 4:18
submit 36:22	sure 7:20 13:1	they'd 12:13	tools 17:13	26:15 38:25
submitted 60:14	43:13 44:6	thing 10:2 20:15	tooth 37:7	39:22
60:16	surely 56:4	35:10 43:5	totally 15:20	understood
subsequent	surprised 42:19	47:6 49:10,13	town 15:4	21:15 59:21
14:20 39:9	43:3	50:9	trade-off 25:23	underworld
subsequently	surveys 48:5	things 8:8 28:9	transient 28:8	18:6
5:17	swimming 43:12	36:18 37:16	treasury 60:3	unfair 49:22,24
substance 23:1	44:1	49:22 50:12	treated 39:12	60:9
substantial	switching 47:6	55:8	tried 24:23	unfortunate
16:17 23:18,21	symbol 32:7	think 4:6,22	57:16	58:6
55:4	systemic 14:5	5:18 6:22 12:4	TRO 10:15	United 1:1,14,21
substantially		12:20 14:3,12	30:14,23 31:6	2:7 18:14

27:11 unlucky 49:14 unrelated 35:8 52:11 unsupportable 42:16,18 unusual 20:2 53:20 use 17:14 45:25 46:1 usual 49:9 utility 27:2 utilizing 17:10	22:12 28:12 violators 9:11 16:14 VIRGINIA 1:17 2:3,13 3:6 58:21 voluntarily 54:8 voluntary 24:18 24:22 voting 27:13,25 28:2	57:17 went 10:4 29:12 46:12 50:15 57:18 weren't 44:6 57:5,10 Weyer 33:10 we'll 3:3 15:6,6 18:12 29:7 32:15 49:12,15 we're 9:13 10:6 10:6 14:5 16:2 18:4,6 21:22 21:23 30:16 31:8 37:13 42:5 43:13 56:13 we've 4:25 Williamsburg 48:11 win 3:19 34:8 35:13 36:9 41:21 winner 52:16 wins 49:1 witness 7:13 won 11:6 28:21 28:21 34:1,19 36:1,23 43:25 wonder 43:6 50:9 wonderful 10:21 word 12:5 50:11 51:19 words 40:21 44:1 work 4:21 27:17 34:11,14 36:14 world 28:9 worth 31:5 wouldn't 21:19 23:22 25:18 31:6 46:19 56:4 57:18 write 26:10 36:21 writing 37:1	written 15:10 25:1 wrong 4:22 10:24 16:7 23:13 32:25 35:4 38:4,10 38:15,20 39:5 39:18 40:22,24 41:2,6,8 42:14 wrote 6:23 48:4 49:19 59:12 Wyner 1:8 3:4 Wyner's 58:16	15:10 54:1 1998 7:2 50:3 58:15
V	W		X	
v 1:7 valid 13:24 41:18 60:4 validity 40:16 value 12:23 25:22 30:24 various 49:23 52:24 versus 3:4 19:7 22:2 27:14 28:13 34:7 48:5,19 55:24 victims 16:15 view 33:2,5 38:25 40:16 43:9,10,10 55:13 vigorously 26:6 vindicated 26:9 violate 3:13 32:11 49:6 violated 8:23 10:10 20:23 23:7 24:4 32:5 49:1 violating 58:13 violation 9:9 16:16 18:9,20 18:22 21:2 30:4 44:12 violator 10:21 10:21 21:6	W 1:3 want 8:11 10:22 11:3 14:4,10 15:4,7 22:16 22:17,25 25:6 26:24 27:16,19 32:7 33:4,6 43:14,19 44:1 44:2 45:4 49:3 59:10,17,25 wanted 10:5,19 13:18 15:1 16:1 17:7 32:2 32:25 33:4,5 38:23 39:1 44:5,5,5 45:11 46:7 wants 16:10 20:22 22:18,21 war 39:12 warrant 56:1 Washington 1:10,17,20,23 wasn't 8:4 20:4 35:14 38:20 39:1 53:14 waste 9:20 way 10:9,24 14:10 25:1 26:5 55:13 weaker 49:19 wear 43:11 45:18 week 32:6 57:5		x 1:2,9	
			Y	
			yeah 6:25 7:17 10:4 11:2,13 17:21 years 21:5 33:12 50:4 York 48:14	
			Z	
			Zapper 48:5	
			0	
			06-531 1:7 3:4	
			1	
			11 28:18 11:20 1:15 3:2 12 28:19 12:19 60:15 13 30:12 14 6:16 11:4 14th 6:11 51:19 51:21 17 1:11 18 2:8 18a 4:10 19a 4:10 19(a) 17:1 1970 50:3 1976 50:4 1983 10:15	
				2
				20-some 29:19 2000 6:18,23 59:12,15 2001 6:21 2003 30:12 59:11,14 2007 1:11 24 7:11 38:11 24-hour 38:16 29 2:11
				3
				3 2:4 34a 59:20
				4
				4a 33:16
				5
				58 2:14
				6
				6 48:15 65 5:20 65(a)(3) 17:19