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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANITA ALVAREZ, COOK :

4 COUNTY STATE'S ATTORNEY :

5 Petitioner :

6 v. : No. 08-351

7 CHERMANE SMITH, ET AL. :

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9 Washington, D.C.

10 Wednesday, October 14, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15 APPEARANCES:

16 PAUL CASTIGLIONE, ESQ., Assistant State's Attorney,
17 Chicago, Ill.; on behalf of the Petitioner.

18 WILLIAM M. JAY, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington,
20 D.C.; on behalf of the United States, as amicus
21 curiae, supporting the Petitioner.

22 THOMAS PETERS, ESQ., Chicago, Ill.; on behalf of the
23 Respondents.

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Official - Subject to Final Review

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL CASTIGLIONE, ESQ.	
4	On behalf of the Petitioner	3
5	WILLIAM M. JAY, ESQ.	
6	On behalf of the United States, as amicus	
7	curiae, supporting the Petitioner	23
8	THOMAS PETERS, ESQ.	
9	On behalf of the Respondents	33
10	REBUTTAL ARGUMENT OF	
11	PAUL CASTIGLIONE, ESQ.	
12	On behalf of the Petitioner	59
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

Official - Subject to Final Review

1
2
3
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5
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8
9
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15
16
17
18
19
20
21
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-351, Alvarez v. Smith.

Mr. Castiglione.

ORAL ARGUMENT OF PAUL CASTIGLIONE

ON BEHALF OF THE PETITIONER

MR. CASTIGLIONE: Mr. -- excuse me.

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

Despite the holding in Von Neumann that the civil forfeiture hearing itself is all the process that is due for the seizure of personal property, the Seventh Circuit struck down Illinois's Drug Asset Forfeiture Procedure Act specifically because it does not require an additional adversarial hearing that takes place post-seizure but before the forfeiture hearing.

As far back as this Court's decision in Gelston v. Hoyt and Slocum v. Mayberry, this Court has recognized that the civil forfeiture hearing itself is the single unitary hearing, where all persons having an interest in the property are present and the following questions are resolved: One --

JUSTICE SOTOMAYOR: Is there any other area -- is there any other area of law where we permit a

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1 prejudgment attachment and/or seizure of property
2 without a neutral magistrate reviewing the reason for
3 that seizure?

4 We don't permit a pretrial attachment, do
5 we, except in some narrow circumstances?

6 MR. CASTIGLIONE: Except in some narrow
7 circumstances, and I note -- and certainly in
8 garnishment cases and in replevin cases that you would
9 have to have that type of hearing. But the interests
10 are different here. The State's interests in the -- in
11 the seized property takes --

12 JUSTICE SOTOMAYOR: But that's --

13 MR. CASTIGLIONE: I'm sorry.

14 JUSTICE SOTOMAYOR: I don't deny that
15 there's a State interest. The question is who tests
16 that interest? In what timeframe? Meaning you can
17 assert an interest, but someone has to determine whether
18 it really exists or not.

19 MR. CASTIGLIONE: Your Honor, historically,
20 that has always been at the civil forfeiture hearing,
21 and that's going -- as I say, going back to Gelston,
22 because what -- what Gelston recognized is that --

23 JUSTICE GINSBURG: Mr. Castiglione, you have
24 been asked to address the mootness question, both
25 counsel.

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1 MR. CASTIGLIONE: Yes, Your Honor.

2 JUSTICE GINSBURG: Have forfeiture
3 proceedings occurred in the plaintiffs' cases? Is there
4 any lingering question concerning the status of the
5 property?

6 MR. CASTIGLIONE: No -- Your Honor, the
7 forfeiture cases have concluded, it's true. We --

8 JUSTICE GINSBURG: Have concluded?

9 MR. CASTIGLIONE: They have concluded.
10 The -- there are three -- three of the Respondents
11 sought the return of cars. Three had cash seized. In
12 the three car cases, the cars had actually been
13 returned. In two of the cash cases, the Respondents
14 defaulted, and in one of the cash cases, the -- the
15 State and the Respondent reached an agreement. So those
16 cases are over.

17 But we would submit, Your Honor, that this
18 case is not moot because, subsequent to the Seventh
19 Circuit decision in this case, the plaintiffs filed an
20 amended motion for class certification, and that's at
21 Docket 49, Docket Number 49 of the Northern District
22 docket, filed on June 19, 2008, specifically asking for
23 damages and restitution, in addition to declaratory and
24 injunctive relief.

25 JUSTICE ALITO: Well, has there ever been a

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1 case in which this Court has considered the merits of a
2 dispute where the individual claims of the named
3 plaintiffs expired before we heard argument and a -- and
4 a class had not yet been certified?

5 MR. CASTIGLIONE: That is not the case here,
6 Your Honor. At least one of the -- one of the
7 Respondents, Tyhesha Brunston, her forfeiture case ended
8 in 2009, so at the time the amended motion for class
9 certification was filed asking for damages and
10 restitution.

11 JUSTICE ALITO: No, but that wasn't my
12 question. The class has not yet been certified, has it?

13 MR. CASTIGLIONE: No, it has not, Your
14 Honor.

15 JUSTICE ALITO: And the -- the claims of all
16 the named plaintiffs are -- have expired?

17 MR. CASTIGLIONE: Well, the injunctive
18 claims may have expired, with the possible exception of
19 the two Respondents whose -- whose cash cases were
20 defaulted. But, no, the damage claims, I think were --

21 JUSTICE GINSBURG: There were no damage
22 claims when the final judgment was entered in the
23 district court?

24 MR. CASTIGLIONE: That's correct, Your
25 Honor.

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1 JUSTICE GINSBURG: So it was a final
2 judgment, and it went up on appeal. And at what point
3 did they seek -- I mean, while the case was in the court
4 of appeals, the final judgment dismissing the case,
5 there was nothing for the district judge to do.

6 MR. CASTIGLIONE: Well, but after the
7 Seventh Circuit reversed the district judge's decision
8 granting the motion to dismiss, upon -- upon remand, the
9 plaintiffs -- then, at that point, asked for the
10 certification of the damage class and a restitution
11 class and expressly stated that they wished to pursue
12 the claim, a claim for damages and restitution.

13 JUSTICE SCALIA: It wasn't granted then, and
14 it still hasn't been granted.

15 MR. CASTIGLIONE: That's true, Your Honor.

16 JUSTICE SCALIA: So you have nobody before
17 this Court with a live claim, neither the original named
18 plaintiffs nor a certified class. So who's here?

19 MR. CASTIGLIONE: I -- for -- for mootness
20 purposes, Your Honor, I think the -- the fact that
21 plaintiffs have asked for damages and have filed a
22 pleading asking --

23 JUSTICE GINSBURG: They did not ask for
24 damages originally.

25 MR. CASTIGLIONE: No, they did not.

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1 JUSTICE GINSBURG: So as the case comes to
2 us, we have a district court final judgment dismissing
3 the case. The case is only for injunctive relief. It
4 goes to the Seventh Circuit. It's in that shape. We
5 are taking the case from the Seventh Circuit.

6 MR. CASTIGLIONE: Yes.

7 CHIEF JUSTICE ROBERTS: I -- I suppose, if
8 the case is moot, then you are entitled to a Munsingwear
9 order.

10 MR. CASTIGLIONE: I --

11 CHIEF JUSTICE ROBERTS: So there is no
12 controlling authority.

13 MR. CASTIGLIONE: We would -- that's our
14 position, Your Honor.

15 CHIEF JUSTICE ROBERTS: And then I suppose
16 the district court doesn't know whether to award damages
17 or not until it gets a final decision from -- or a
18 decision from the Seventh Circuit or this Court.

19 MR. CASTIGLIONE: That's correct, Your
20 Honor. I mean, the -- whether or not a damage claim
21 could go forward would depend on the -- on the validity
22 of the Seventh Circuit decision.

23 And it's our view, Justice Scalia, that the
24 -- when -- the -- upon -- even though they did not
25 formally amend the complaint -- that's true; we

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1 acknowledge that -- but in the -- in the motion for
2 class -- in the amended motion for class cert, I think
3 the assertion of the claim for damages, at least for
4 mootness purposes, is enough to give this Court
5 jurisdiction over -- over those claims.

6 JUSTICE GINSBURG: It had been there
7 originally, but the problem is it wasn't there. The
8 case comes to us on a complaint that is simply for
9 injunctive relief. And that is moot.

10 MR. CASTIGLIONE: That -- with the possible
11 exception of the two Respondents whose claims defaulted,
12 Your Honor, in that it's unclear what it -- to the
13 extent they were seeking the return of their property,
14 their situation has not changed. Their property never
15 was returned.

16 JUSTICE SCALIA: What were they seeking to
17 have enjoined?

18 MR. CASTIGLIONE: They were seeking, Your
19 Honor -- they were asking the court to declare that the
20 Illinois statute was unconstitutional for not providing
21 an interim hearing, and an injunction preventing --
22 preventing Illinois from enforcing the statute.

23 JUSTICE SCALIA: But since they defaulted in
24 the -- in the final hearing, how can -- can they
25 possibly have any claim left with regard to an interim

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1 hearing?

2 MR. CASTIGLIONE: Well, I just think the
3 nature of their claim hasn't changed. To the extent
4 they were seeking the return of their property through
5 such an injunction, that hasn't changed for those two
6 plaintiffs, Yunker and Williams. But we rest our
7 response, Your Honor --

8 JUSTICE SOTOMAYOR: So am I forgetting, but
9 didn't this start out as a class action and wasn't the
10 claim -- wasn't the class action denied?

11 MR. CASTIGLIONE: It was denied as moot,
12 that's correct, Your Honor.

13 JUSTICE SOTOMAYOR: And you didn't appeal
14 that?

15 MR. CASTIGLIONE: Well, we didn't -- we
16 didn't appeal at all. The plaintiffs appealed the
17 district court's order, which it was a single order that
18 granted -- I'm sorry -- that granted our motion to
19 dismiss and denied plaintiffs' motion for class
20 certification as moot. That was the order.

21 JUSTICE GINSBURG: And the plaintiffs -- the
22 plaintiffs didn't appeal the denial of certification.

23 MR. CASTIGLIONE: The two -- well, no, Your
24 Honor, they did not. They appealed the order -- they
25 appealed the denial of the motion to dismiss -- I'm

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1 sorry -- the granting of the motion to dismiss.

2 JUSTICE GINSBURG: Well, maybe we should --
3 we should ask the plaintiffs about that. But you're
4 saying that the two cases that were defaulted are not
5 moot? Isn't the default the end of it?

6 MR. CASTIGLIONE: I'm saying they may not be
7 moot, Your Honor, in that the claim for relief -- they
8 defaulted before, in at least one of the cases, before
9 the complaint was even filed. So nothing has really
10 changed in the status of their case. I believe Mr.
11 Williams, nothing has changed in his case from the time
12 the complaint was filed.

13 JUSTICE GINSBURG: You said in your opening
14 that there is just the one proceeding and that's the
15 petition for forfeiture. But in your brief you
16 suggested that there is a means that these plaintiffs
17 could get back their property pending the ultimate
18 forfeiture proceeding. You mentioned the Slocum type
19 hearing, a petition for return of their property. So I
20 don't understand their argument that there's one and
21 only procedure, the forfeiture procedure, when on the
22 other hand you are telling us that there is a means.

23 MR. CASTIGLIONE: Well, maybe I can explain,
24 and I think it also goes to the -- what is good -- why
25 the 8,850 -- the use in 8,850 of the Barker speedy trial

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1 factors makes sense. The one hearing where these issues
2 are resolved is a civil forfeiture hearing, it's true.
3 But I think what Slocum does, just in a similar way to
4 how speedy trial factors operate, it gives the claimant
5 an opportunity to come in and ask the court to tell the
6 government to fish or cut bait. So you either file an
7 action or release the property. I think it operates
8 much the same way that the speedy trial factors would
9 operate in a criminal case.

10 JUSTICE SCALIA: And they can do that before
11 the -- before the time period has expired.

12 MR. CASTIGLIONE: Absolutely, Your Honor.
13 They can certainly do that. That's a remedy that's
14 available up until the forfeiture case is filed and --

15 CHIEF JUSTICE ROBERTS: But surely your
16 position is going to be that the statutory procedure
17 preempts and takes the place of any Slocum hearing,
18 isn't it? I mean, somebody comes in and files a
19 petition saying, here I'm raising this right under an
20 early 19th century procedure, and you're not going to
21 say, okay, here's our position or here's the property.
22 You are going to say, wait until the forfeiture
23 proceeding that is provided under Illinois law.

24 MR. CASTIGLIONE: Well, what Slocum does,
25 Your Honor, we think -- we believe that Illinois has

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1 recognized for at least over 50 years that a property
2 owner has a common law right to come in.

3 JUSTICE STEVENS: But that was before the
4 statute was enacted.

5 MR. CASTIGLIONE: That's certainly true,
6 Your Honor.

7 JUSTICE SCALIA: The statute's a dead letter
8 if you allow a Slocum action. All you -- all you need
9 is a Slocum action and the fact that the statute says
10 you have to wait, that the government has 40 days, is
11 meaningless.

12 MR. CASTIGLIONE: Well, Slocum I think is a
13 way of getting into court, getting the government --

14 JUSTICE SCALIA: Exactly. It's a way of
15 defeating the statute.

16 MR. CASTIGLIONE: Well, once -- once the
17 government does act, Your Honor, then at that point I'd
18 say if in fact the government's being -- once the
19 government files a forfeiture action, if the
20 government's dilatory, there's remedies under Illinois
21 law, our Code of Civil Procedure, or even perhaps a
22 motion to dismiss for --

23 JUSTICE SCALIA: But the statute says the
24 government isn't dilatory until, until the time period,
25 40 days. It has 40 days. What does that mean if it

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1 doesn't mean that the government has 40 days?

2 MR. CASTIGLIONE: I think -- I think
3 certainly, Your Honor, the government does have the time
4 periods. Yes, I agree with that. The government
5 certainly has the time periods. But if the case were to
6 somehow to fall through the cracks and nothing would
7 happen, I think what the common law remedies provide is
8 a safety net for property owners to be able to get into
9 court.

10 JUSTICE SCALIA: Before the 40 days?

11 MR. CASTIGLIONE: No, I would say after the
12 40. I would say --

13 JUSTICE SCALIA: Okay. Well, that's a
14 different story. These people are asking for a hearing
15 before the elapsing of the 40 days, and if all you say
16 that Slocum provides is a hearing after the 40 days
17 have elapsed and nothing has occurred, that doesn't
18 satisfy what they are asking for.

19 MR. CASTIGLIONE: Well, I would say Slocum
20 provides a hearing after 40 days, Your Honor. IF the
21 government does nothing, it's a way of getting into
22 court.

23 JUSTICE SCALIA: It doesn't have to do
24 anything for 40 days, is what the statute says.

25 MR. CASTIGLIONE: And we don't dispute that.

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1 JUSTICE SCALIA: But you say if it -- you
2 don't dispute that doesn't have to do anything, but you
3 -- you assert that if it does nothing you can bring a
4 Slocum action. I mean, which is it? One or the other?

5 MR. CASTIGLIONE: Well, Slocum is an
6 equitable remedy. If someone can establish -- I don't
7 think before the time has run out in our procedures one
8 could probably establish that, but it's possible if a
9 case were to -- were to fall through the cracks, and it
10 gives --

11 CHIEF JUSTICE ROBERTS: Well, Slocum then is
12 the answer to a very different case. It's a case where
13 you have a class action of people whose cases fell
14 through the cracks and never got the proceedings they
15 were entitled to. It doesn't seem at all responsive to
16 a claim that they are entitled to procedures before it
17 falls through the cracks.

18 MR. CASTIGLIONE: Well, our position, Your
19 Honor, is that the statute, the regime that Illinois has
20 adopted with the time periods, does comply with due
21 process. It provides a way of dealing with some number
22 of the issues Respondents have raised.

23 JUSTICE STEVENS: But isn't the basic
24 argument that you make that a forfeiture hearing is all
25 the process that is due?

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1 MR. CASTIGLIONE: Yes, Your Honor.

2 JUSTICE STEVENS: Now, let me ask you this
3 question. Suppose your statute said there shall be a
4 forfeiture hearing with all the procedures you want, but
5 the forfeiture hearing shall take place 1 year after the
6 seizure. Would that be adequate?

7 MR. CASTIGLIONE: Under this Court's
8 decision in FDIC v. Mallen, I don't think you would look
9 to the outer limits, Your Honor. But I think --

10 JUSTICE STEVENS: I'm saying the minimum.
11 The hearing will take place 1 year after the seizure,
12 nothing earlier or nothing later. Would that be
13 constitutional?

14 MR. CASTIGLIONE: Again, applying -- well,
15 if it is possible for the States to do it in a shorter
16 fashion --

17 JUSTICE STEVENS: Clearly it's possible to
18 do it in less than a year.

19 MR. CASTIGLIONE: And if the State's
20 practice were to do so, then I would say --

21 CHIEF JUSTICE ROBERTS: Well, there is no
22 practice, no background practice. This is just a new
23 statute. So let's -- you have to have a forfeiture
24 hearing, and you describe it, that shall take place 6
25 months or a year later. Would that be constitutional?

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1 MR. CASTIGLIONE: Well, that's shorter than
2 the time period that this Court found complied with due
3 process in 8,850.

4 JUSTICE STEVENS: Well, I understand what
5 the Court has held. I'm asking your view of that
6 hypothetical statute.

7 MR. CASTIGLIONE: I think --

8 JUSTICE STEVENS: And if you agree that it's
9 unconstitutional, then you have to agree that time is
10 relevant to the question whether the forfeiture hearing
11 --

12 MR. CASTIGLIONE: I would not -- I would not
13 agree that it's unconstitutional.

14 JUSTICE STEVENS: So you would then say it
15 would be constitutional to say 1 hearing, 1 year later?

16 MR. CASTIGLIONE: I think facially it is.

17 JUSTICE SCALIA: 10 years?

18 MR. CASTIGLIONE: Well, I think again I go
19 back to FDIC v. --

20 JUSTICE SCALIA: 10 years?

21 MR. CASTIGLIONE: I would say 10 years
22 without any judicial intervention --

23 JUSTICE SCALIA: You have given up the
24 position, then. You've said time does matter. So we
25 are just arguing over what the time is, whether it's 10

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1 years, 1 year, or 40 days, right?

2 MR. CASTIGLIONE: Well, 40 days I think is
3 consistent, is I think a reasonable --

4 JUSTICE SCALIA: It may be, but that's a
5 different argument. It's -- it's not an absolute.
6 It's -- we have to consider whether the time period is
7 reasonable, right?

8 MR. CASTIGLIONE: If -- I would say this.
9 If the statute said you can't come in, the State said
10 you can't proceed for 10 years and no one has any,
11 property owner or interest owner, has no way of going
12 into court, that probably would be --

13 JUSTICE ALITO: Let me say this about the
14 government's interest involved here and the practicality
15 of the situation, and I want to put aside the innocent
16 owner defense, which I hope to ask your adversary about.
17 But putting that aside, let's take what I envision as
18 sort of the typical case where the police officer
19 arrests someone in a vehicle for a drug offense and
20 without a warrant and then has to file a complaint in
21 court.

22 What is the government -- what is the burden
23 on the government, and what would be the burden on
24 Chicago or the State of Illinois in a requirement that
25 within some reasonably brief period of time after that

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1 that there must be the equivalent of the filing of a
2 complaint in court, just as you would for the arrest of
3 an individual without a warrant, where the only issue
4 would be whether there was probable cause for the
5 seizure, not whether there is some innocent owner
6 defense, but just whether there is probable cause?

7 MR. CASTIGLIONE: I think there are several
8 burdens. One, I think that hearing would be duplicative
9 of the ultimate forfeiture hearing. I think if it's an
10 adversarial hearing it might be a way of doing, like, a
11 -- like, almost back door discovery in, you know, the
12 attendant criminal case if we had to do an adversarial
13 hearing in a civil forfeiture case. I think it
14 disregards the State's interest, Your Honor, in -- in
15 promoting informal negotiation and settlement. And
16 that's something I had hoped to talk about.

17 JUSTICE BREYER: I mean, he was just talking
18 about probable cause. How could that be -- well, I
19 thought this case, though I grant you I could well be
20 wrong, is not about a final forfeiture hearing where you
21 have to show that it's more probable than not that the
22 car was used for drugs. But under the Illinois law,
23 just as Justice Alito said, you can seize a car without
24 a warrant.

25 MR. CASTIGLIONE: Yes.

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1 JUSTICE BREYER: And there are lists of
2 circumstances. But in the Florida statute that Justice
3 Thomas wrote about, it said that a person whose car it
4 is is entitled to a hearing, I thought in a brief time,
5 to see if there was probable cause, just as a person
6 arrested. You have to bring them before a magistrate
7 within a short time to see if there's probable cause.
8 Now, how do you do that in Chicago?

9 MR. CASTIGLIONE: Well, first of all,
10 Justice Breyer, we say the complete deprivation of one's
11 liberty is not the same as the deprivation of property.
12 The way we do it under our statute, the way we deal with
13 this issue, is there is -- the statutory regime really
14 has two concepts, one for property, seized property,
15 that -- whose value exceeds 20,000 and one where --

16 JUSTICE BREYER: So you're saying the answer
17 to the question is there is no way? A person who doubts
18 this probable cause has no way. He has to wait 6 months
19 until there's a forfeiture hearing. He's out of luck
20 because then it merges with the merits.

21 MR. CASTIGLIONE: It does merge with the
22 merits. That's historically --

23 JUSTICE BREYER: Okay. That is your answer.
24 There is no way.

25 MR. CASTIGLIONE: Well, there is still a --

Official - Subject to Final Review

1 JUSTICE BREYER: And I don't see why you win
2 this case.

3 MR. CASTIGLIONE: -- formal hearing.

4 I'm sorry, Your Honor?

5 JUSTICE BREYER: I mean, is there a way or
6 not? You have pointed to three statutes. Do they give
7 him any way?

8 MR. CASTIGLIONE: Those statutes are a way
9 to getting into -- getting into court, to expedite the
10 hearing. And once the hearing is filed, Your Honor, it
11 is certainly possible to -- you know, to move to
12 expedite the trial.

13 JUSTICE GINSBURG: How do you get an
14 expedited hearing? I thought -- I thought for property
15 under 20,000, the State -- the time before the
16 forfeiture proceeding could be 187 days.

17 MR. CASTIGLIONE: 45 of those days, Your
18 Honor, is what would be the property owner deciding
19 whether to file a claim. And if -- I mean, one
20 possibility is at section 6 of our statute, which is
21 actually nonjudicial in rem forfeitures. If one were to
22 simply file, a property owner, or simply file a claim
23 but not a cash bond, then there wouldn't be a judicial
24 proceeding. It would just be informal negotiations with
25 the State's attorney. One could always go to court by

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1 filing a cash bond.

2 JUSTICE GINSBURG: And the bond is for
3 costs, not to get your car bought.

4 MR. CASTIGLIONE: The bond is for costs,
5 right. But the --

6 JUSTICE GINSBURG: Is there -- is there any
7 procedure for putting up a bond for the car so you can
8 get the car back, for the full value of the car?

9 MR. CASTIGLIONE: There isn't, Your Honor.
10 I would briefly address that. I know I have 1 minute
11 remaining and I would like to -- to reserve the time for
12 rebuttal, but I would like to answer this question.

13 No, Your Honor. For bond, about 80 to 85
14 percent of our cases are cash, seizures of cash, and as
15 the Seventh Circuit recognized, posting a cash bond for
16 cash is an absurdity.

17 With respect to cars, Your Honor, the
18 problem is the State's duty is to be able to preserve
19 and prevent the destruction or dissipation of the
20 property prior to the forfeiture hearing. If we bond it
21 out, we can't guarantee that at the ultimate forfeiture
22 hearing, that property would be -- would be preserved.

23 Your Honor, I would like -- if I may, I
24 would like to reserve the remainder of my time.

25 CHIEF JUSTICE ROBERTS: We will afford you

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1 additional time because the Court's questions have
2 intruded upon your rebuttal time.

3 MR. CASTIGLIONE: Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Mr. Jay.

5 ORAL ARGUMENT OF WILLIAM M. JAY

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE,

8 SUPPORTING THE PETITIONER

9 MR. JAY: Mr. Chief Justice, and may it
10 please the Court:

11 I would like to begin, if I may, with the
12 colloquy that Justice Stevens and Justice Scalia had
13 with my co-counsel about the hypothetical where the
14 State mandates a minimum time --

15 CHIEF JUSTICE ROBERTS: Well, I would think
16 you would begin with the mootness question.

17 MR. JAY: I would be happy to begin with the
18 mootness question, Your Honor. And I -- although I
19 think that it's, to some degree, a question for the
20 Respondents, what precisely they are seeking. Because
21 there are two Respondents, Yunker and Williams, who have
22 lost their property. The property is in the possession
23 of the State. And if their position is that unless a
24 hearing is held within 10 days, which is what they
25 originally asked for in their complaint, a probable

Official - Subject to Final Review

1 cause hearing within 10 days, if after that no
2 forfeiture is possible because timely post-deprivation
3 process has not been afforded, if that is their claim,
4 then it appears their claim is still alive because the
5 State still has their property.

6 If, however, their claim expires when the
7 forfeiture proceeding is actually held, then that
8 proceeding is over and we agree that their injunctive
9 claims are moot.

10 JUSTICE SCALIA: What were they seeking to
11 enjoin?

12 MR. JAY: It's not -- it's not entirely
13 clear from their complaint, Your Honor. They were --
14 they were asking for the imposition of this 10-day
15 hearing requirement and they were contending -- now,
16 each of these was filed after the 10 days had run. The
17 most recent seizure had occurred 2 months before the
18 class action complaint was filed in district court.

19 So it appears they were contending that they
20 wanted the forfeiture proceeding stopped because a
21 hearing had not been held within 20 days. So the
22 complaint doesn't make perfectly clear what kind of
23 injunction they were seeking except that they wanted the
24 imposition of this 10-day procedure.

25 JUSTICE SOTOMAYOR: What did the Illinois

Official - Subject to Final Review

1 court do? Didn't it remand for an appropriate hearing
2 to be given?

3 MR. JAY: Your Honor, the Seventh Circuit
4 remanded for the district court to fashion -- to fashion
5 some kind of procedure, that's right. And after that
6 remand order the plaintiffs, interpreting what the
7 Seventh Circuit had said, filed the amended motion for
8 class certification that Mr. Castiglione referred to,
9 and in that they said they wanted a class certified to
10 pursue damages for the time that their property was
11 detained, and they wanted the court to certify a class
12 of anyone who had had their property held for more than
13 7 days this time without -- without a proper hearing.

14 JUSTICE BREYER: Am I right and what is the
15 rationale supporting it for the following: My car was
16 parked on the street. There happened to be some big
17 drug crime nearby and the policeman took my car. In my
18 opinion there was no probable cause. I would like my
19 car back.

20 Now, I take it that in Illinois there is no
21 proceeding, as there was in Florida, so that I can claim
22 there was no probable cause, and I -- none at all. I
23 never get that determination made, and moreover I have
24 to wait, for 6 months possibly, before I get a different
25 determination made, which is whether they had -- more

Official - Subject to Final Review

1 likely than not, whether that's entitled to forfeiture
2 on the merit.

3 Is that the law? If anything like it is the
4 law, what is the constitutional justification for it?

5 MR. JAY: Well, let me begin, Your Honor, by
6 pointing out that it's not the law, because the State's
7 ultimate burden at the hearing is not preponderance of
8 the evidence; it's probable cause. It's -- it's
9 precisely the same burden that --

10 JUSTICE BREYER: You mean they can keep my
11 car even if it's more likely than not that it was never
12 involved?

13 MR. JAY: When the State shows probable
14 cause, the burden shifts to the claimant to prove by a
15 preponderance -- so the ultimate burden is by a
16 preponderance.

17 JUSTICE BREYER: But it's still -- okay,
18 fine. Thank you. That is the -- that's a burden of
19 proof thing at the final thing. That's not the thrust
20 of my question.

21 The thrust of my question is: Do I have to
22 wait for up to 6 months before I have any magistrate,
23 any neutral official, pass on my claim there was no
24 probable cause to take my car?

25 MR. JAY: And Justice Breyer --

Official - Subject to Final Review

1 JUSTICE BREYER: And the Florida statute, by
2 the way, doesn't do that. It says of course you get a
3 hearing on probable cause.

4 MR. JAY: The Florida statute --

5 JUSTICE BREYER: Am I right?

6 MR. JAY: The Florida statute -- you are
7 correct -- unique as far as I know among all the
8 statutes legislated by the 50 States that use asset
9 forfeiture or the Federal Government, does provide an
10 adversarial probable cause hearing within the --

11 JUSTICE BREYER: Okay. So nobody gives you
12 -- they go around taking cars even without probable
13 cause. There is no way to do -- it happens in every
14 State.

15 What is the constitutional justification for
16 making a person wait for 6 months before he gets a
17 neutral judicial official to say whether there was even
18 cause to take his car?

19 MR. JAY: The constitutional justification,
20 Justice Breyer, requires that a reviewing court look at
21 each step in the process, and it's not just a matter of
22 6 months from beginning to end. That process in
23 Illinois and in many other systems has different steps.

24 The first step is investigation and notice.
25 The -- and then the second step is deciding whether to

Official - Subject to Final Review

1 pursue this. The third step is completely in the hands
2 of the claimant, where the claimant decides whether to
3 pursue a judicial hearing. And the fourth --

4 JUSTICE SOTOMAYOR: I'm sorry. You take the
5 car and then you investigate?

6 MR. JAY: Your Honor, there is more to
7 investigate than just the probable cause to seize. In
8 many cases, the probable cause to believe the car is
9 forfeitable is ironclad, but there is more to
10 investigate because, for example, an innocent owner in
11 Illinois by a statute is entitled not to have her car or
12 her gun or her personal -- other personal property -- it
13 could be currency -- forfeited. And that --

14 JUSTICE SOTOMAYOR: But you are sort of
15 begging the question. You are saying to me that initial
16 period is for the government to figure out if it made a
17 mistake or not, and we're entitled to that time. You're
18 not entitled, meaning you property owner, to go to a
19 neutral magistrate who will make that decision without a
20 personal interest in the outcome, because the person who
21 seized does have an interest of some sort. Many local
22 police departments do in seizing property, because they
23 keep the proceeds.

24 So what you're saying is that
25 constitutionally it's okay for the party holding on to

Official - Subject to Final Review

1 property without a warrant to decide whether or not it
2 wants to give something back, whether or not there is
3 --there is a viable defense. I'm a little confused.

4 MR. JAY: Let me respond to that in a couple
5 of steps. And the first is to respond to your point
6 about the incentives that local police departments may
7 face. There is no incentive to -- to hold property
8 longer than necessary because while the property is
9 being held there is no ability to access that property.
10 If it's currency, for example -- as Mr. Castiglione
11 pointed out, 85 percent of their seizures are -- the
12 currency is held in a suspense account and is not
13 accessible by the -- by the seizing government at all.
14 So the government has no interest in delaying longer
15 than necessary, especially for cars. The government has
16 to take care of the car, maintain it in a lot, you know,
17 preserve it from -- from harm.

18 Second, on the basic question of what is the
19 government doing during this time. The government has a
20 due process obligation, especially in an in rem
21 proceeding like this one, which deals with a piece of
22 property to which there may be competing claims. The
23 government has a -- itself has a due process obligation
24 to notify everyone who has a claim to this property that
25 it is in the government's custody and that there will be

Official - Subject to Final Review

1 a proceeding to adjudicate the competing claims to it.

2 I mean, this Court in Robinson v. Hanrahan,
3 decision in 1972, held that Illinois under its
4 forfeiture statute had violated due process by not
5 providing notice to the owner, to the registered owner
6 of a car, because it sent notice to that owner at his
7 address when in fact he was in the custody of the State
8 of Illinois in a criminal proceeding.

9 The State has an obligation to notify -- to
10 investigate, especially after a seizure, even if it is a
11 car which only a minority of seizures are, even if it is
12 a car. Identifying the driver is not enough to identify
13 who has a claim to that car. There may be a registered
14 owner. There may be -- there may be a security
15 interest. In currency cases it's even more difficult,
16 because on the face of currency there is no indication
17 who owns the currency.

18 JUSTICE STEVENS: May I just get you to
19 answer what I thought you were going to do at the
20 beginning of the argument. How do you answer my
21 hypothetical? You have a forfeiture hearing, but you
22 have a provision that it shall not take place for 6
23 months.

24 MR. JAY: And that, of course, as I think
25 the hypothetical recognizes, Justice Stevens, is

Official - Subject to Final Review

1 different from a statute like we have here where there
2 is a maximum time, but it may well take place --

3 JUSTICE STEVENS: I understand it's
4 different. I am just curious to know what your answer
5 is?

6 MR. JAY: My answer, Justice Stevens, is
7 that it might well be unconstitutional as applied. And
8 the Court in 8,850 said --

9 JUSTICE STEVENS: Wouldn't it be
10 unconstitutional on its face?

11 MR. JAY: It wouldn't be unconstitutional on
12 its face, Justice Stevens, because sometimes the State
13 has a valid interest in holding property for more than a
14 year, as Mr. Castiglione said. In 8,850 itself, the
15 property was held for 18 months. The Court has said in
16 any due process case --

17 JUSTICE STEVENS: Would that justify a
18 statute that says in all cases it shall be held for at
19 least 18 months without telling the owner?

20 MR. JAY: I think, Your Honor, that if the
21 State responded to an 8,850 defense and said -- and said
22 nothing other than the statute says 18 months or
23 10 years, and -- you know, and we have done nothing
24 during that time, I think that it would be
25 unconstitutional as applied.

Official - Subject to Final Review

1 But as a practical matter, States and the
2 Federal Government are not sitting around doing nothing
3 after seizing property. They are actively investigating
4 who has a claim, they are notifying all claimants, they
5 are allowing -- allowing those claimants to file claims
6 if they wish. A majority of all seizures are
7 uncontested.

8 And then whenever a claimant wants one, that
9 claimant is entitled to an in rem judicial hearing,
10 where all -- all claimants come into court and have --
11 have the government's right to seize the property
12 adjudicated and also the affirmative defenses, such as
13 the innocent owner defense. Now --

14 JUSTICE SCALIA: Suppose a situation in
15 which the property taken is really essential to the --
16 to the living of the person from whom -- who owns it --
17 a car and the person needs a car to get to work every
18 day. And -- and there is really no reason why the --
19 why the government has to wait that long.

20 Is there no procedure by which he can say,
21 you know, do it quickly? You don't have to wait so
22 long. I'm the owner. I'm the only owner. I can -- I
23 can prove that. Let's have a quick hearing.

24 MR. JAY: I think that as the Federal
25 framework reflects, that is the kind of situation that

Official - Subject to Final Review

1 is -- that can be addressed by legislation and the
2 Federal hardship provision, 18 U.S.C. 983(f), is a good
3 way of illustrating that; that the government has
4 competing interests in all these cases that compete with
5 the claimant's interests and in cases such as currency,
6 where the government can't be secured against the
7 possibility that the property will disappear, then --
8 then there is no hardship exception. But the
9 government -- the Congress, after extensive study, has
10 made a hardship provision for other forms of personal
11 property.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 JUSTICE GINSBURG: There is no -- there is
14 no hardship under the -- Illinois statute, there is no
15 provision comparable to the Federal legislation for
16 hardship, is there?

17 MR. JAY: You are correct, Justice Ginsburg,
18 that there is no statutory --

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Peters.

21 ORAL ARGUMENT OF THOMAS PETERS

22 ON BEHALF OF THE RESPONDENTS

23 MR. PETERS: Mr. Chief Justice, and may it
24 please the Court:

25 This case is not moot. It's not moot

Official - Subject to Final Review

1 because at the time that the plaintiffs filed the case
2 they clearly had standing. They immediately moved for
3 class certification. And although their motion for
4 class certification was denied, it was denied because
5 the merits of the case were simultaneously denied. And,
6 in fact, this Court has addressed a situation remarkably
7 similar to this in United States Parole Commission v.
8 Geraghty.

9 In the Geraghty case, the class was not
10 certified. It was denied, as it was here. The case
11 became moot because the plaintiff in that case was a
12 Federal prisoner, had been released on parole, and
13 nonetheless the Court allowed the case to proceed. And
14 the reason the Court allowed the case to proceed, as I
15 understand it, is that the "capable of repetition yet
16 evading review" doctrine was invoked. Once that
17 document is invoked, the claim -- the standing relates
18 back to the time of the filing of the complaint. At the
19 time of the filing of the complaint there was standing,
20 and the --

21 JUSTICE SCALIA: You say it was likely to --
22 these same named plaintiffs were likely, likely, to face
23 this same situation again?

24 MR. PETERS: No, that's not what I'm saying,
25 Your Honor. What I'm suggesting --

Official - Subject to Final Review

1 JUSTICE SCALIA: Well, if you are relying
2 on -- on, you know, "capable of repetition yet evading
3 review," that's -- that's the test, whether -- whether
4 indeed these people stand a chance of having the same
5 thing happen.

6 MR. PETERS: I respectfully beg to differ,
7 Your Honor. With respect to class actions and cases
8 where the plaintiff has timely requested to certify a
9 class, the "capable of repetition" relates to the class.
10 There is right now today a class of people in the city
11 of Chicago who have their cars impounded. That -- their
12 claims are repeating daily.

13 JUSTICE SCALIA: You are begging the
14 question. That is, you are assuming that the class is a
15 valid class. It hasn't been certified. How -- how can
16 you make that, that argument, when there is no class?

17 MR. PETERS: Well, I -- I can make that
18 argument --

19 JUSTICE SCALIA: Just an asserted class on
20 your part. There is no class.

21 MR. PETERS: Yes, and that was also true in
22 Geraghty, Your Honor. There were -- the motion for --

23 JUSTICE SOTOMAYOR: No, it wasn't. The
24 appeal in Geraghty included an appeal of the denial of
25 class certification.

Official - Subject to Final Review

1 MR. PETERS: Yes, it did, Your Honor.

2 JUSTICE SOTOMAYOR: So both issues, both the
3 merits and the denial of the class certification, were
4 still active before the Court. Here you didn't appeal
5 the dismissal of the class certification or the mootness
6 of it.

7 MR. PETERS: Well, we couldn't, Your Honor,
8 because it was inextricably linked to the merits. In
9 Geraghty --

10 JUSTICE SOTOMAYOR: But in many appeals
11 parties plead in the alternative and say, if you -- if
12 we win on the merits, reverse the dismissal of the class
13 certification because we still want to proceed as a
14 class. You didn't do that. You waited for the merits
15 to be adjudicated and then filed a new class action.
16 It's a very different procedural step.

17 MR. PETERS: I don't think that it is
18 significantly different when one considers the concerns
19 that animated the Court's decision in Geraghty. The
20 concerns that were at issue in that case were the fact
21 that the plaintiff was representing a class that was
22 going to continue to exist and that as to that class
23 there was constantly going to be a claim repeating; and
24 that that person, even though the class was denied -- in
25 that case it truly, it was denied on the merits, because

Official - Subject to Final Review

1 he had an opportunity to litigate the merits. We did
2 not have a -- an opportunity to litigate the merits of
3 the Rule 23 issue.

4 JUSTICE GINSBURG: Mr. Peters, I think the
5 Court in Geraghty said it split the interests. And they
6 said his interests in challenging the denial of class
7 action status continued even though he was no longer
8 incarcerated.

9 So they were concentrating on his right to
10 appeal the denial of class action certification. And
11 that's what you don't have here. And that is what
12 distinguishes this case from Geraghty.

13 MR. PETERS: I -- I certainly agree that it
14 is not an identical situation, Your Honor. But I
15 think -- as I said before, I think again that the
16 concerns that caused the Court to reach that position in
17 Geraghty are in fact the same because in this case
18 the -- there is a continuing activity with respect to
19 the class. There is some -- there are a group of people
20 who are aggressively pursuing the rights of that class.
21 There is a live controversy between the government and
22 that class.

23 So in all of those respects, which are
24 similar to what --

25 JUSTICE GINSBURG: But we must take it as it

Official - Subject to Final Review

1 came into the Seventh Circuit, which is no appeal from
2 the denial of class certification. So we have
3 individual plaintiffs who are seeking to overturn the
4 denial of injunctive relief. And that's all that's
5 before the Seventh Circuit.

6 MR. PETERS: That was -- that was all that
7 was before the Seventh Circuit because I don't -- it
8 seems to me that it is just sort of a gratuitous gesture
9 to say, I am appealing the denial of the class
10 certification ruling, when the class certification
11 ruling is itself based entirely on the denial of the
12 merits.

13 If there had not -- if there had been any
14 inkling, any ruling that suggested that the Rule 23
15 aspect, the class aspect, was being denied on
16 class-related grounds, then of course there would be an
17 appeal. But --

18 JUSTICE SCALIA: As it turns out it -- it
19 wouldn't have been gratuitous.

20 (Laughter.)

21 MR. PETERS: Well -- I understand Your
22 Honor's position.

23 JUSTICE BREYER: But if I have a different
24 position, which is I would like to see if it's practical
25 to decide this case now, two things stand in the way in

Official - Subject to Final Review

1 my mind which I would like you to address. The first
2 is, your opponents are saying, no, you shouldn't really
3 address this issue now because there are three Illinois
4 statutes which actually give them, anyone who wants it,
5 a right to a hearing at least on probable cause. And
6 that's a matter of Illinois law. And although the
7 statutes don't seem to say it, they might.

8 And the second is that this seems mixed up
9 in my mind -- not necessarily your fault; it may be my
10 mind -- but it seems to me there are two quite separate
11 questions: When you are entitled to a final hearing of
12 whether forfeiture is right or wrong; and whether you
13 are entitled to a preliminary hearing on whether there
14 was probable cause under the statute to obtain the car.

15 Now, that latter question I think might be
16 impractical in many cases to work out until there's been
17 a trial of an individual who's accused of a crime, which
18 may be much later.

19 But the former question is where I think you
20 have a point, that there are five instances here in this
21 statute where a policeman could seize a car without a
22 warrant and he has to have probable cause under most of
23 them nonetheless. So your clients might say: He did
24 not have probable cause; I want a neutral magistrate to
25 contest it.

Official - Subject to Final Review

1 Now, in my mind that reaches -- that's a
2 different question than the final hearing about who's
3 entitled to the car. And I also see the three statutes
4 and now I see a case where here in front of me
5 everything is mixed up. So I think -- perhaps I'm just
6 seeing it that way, but those issues are mixed up
7 confused and not separated out, and so why don't we
8 wait? What's your answer now?

9 MR. PETERS: I think that -- that waiting
10 would be the prudent thing to do. And it's
11 unquestionably true that what we're suggesting with
12 respect to the preliminary hearing is not identical to
13 the final hearing. The final hearing is -- is on the
14 merits to decide where the property is going to, finally
15 and ultimately. The hearing we are talking about is a
16 conditional release hearing, similar to what happens in
17 Krimstock, similar to what happens under the Civil Asset
18 Forfeiture Review Act.

19 CHIEF JUSTICE ROBERTS: Well, but then if
20 it's -- if it's money that is being conditionally
21 released, there is no security for the government. If
22 it turns out later on it shouldn't have been released,
23 it's probably gone.

24 MR. PETERS: Well, there -- there could be
25 grounds -- there could be ways of getting security for

Official - Subject to Final Review

1 it. I mean, perhaps a person would post some other
2 collateral because they desperately needed the cash at
3 that moment. I certainly agree with Your Honor that the
4 bond procedure is much more in tune with and much more
5 likely to work with cars than with other property.

6 JUSTICE ALITO: May I ask you exactly what
7 your think needs to take place at this hearing? And the
8 hearing you think has to take place within 10 days? Is
9 that your --

10 MR. PETERS: No, Your Honor. In the
11 complaint we did reference 10 days and the reason we did
12 that is because we thought that that was an appropriate
13 time.

14 JUSTICE ALITO: Well, whatever the period
15 is: 10 days, 14 days, whatever. Some short period.

16 MR. PETERS: Yes.

17 JUSTICE ALITO: I have two questions. Must
18 it be an adversarial hearing and must the State disprove
19 the innocent owner defense?

20 MR. PETERS: No, and no. I think that
21 the -- with respect to whether it's an adversarial
22 hearing, I -- what we envision is a hearing similar to
23 what happened in Krimstock where basically the
24 government's burden is met by having police reports
25 which on their face establish probable cause to at least

Official - Subject to Final Review

1 seize the car.

2 JUSTICE ALITO: Well, but my understanding
3 of Krimstock is that a lot of those seizures, and others
4 know more about this than I do, were for DWI, and that
5 it is possible to assert an innocent owner defense
6 there. And that's where I see a great impracticality in
7 this. I -- I don't see how you can expect the State to
8 come into court within such a short period and have any
9 burden of contesting an innocent owner defense without
10 compromising a criminal investigation.

11 MR. PETERS: Well, if there was -- my answer
12 to that, I think, Your Honor, is in two parts. One is
13 the Federal Government is already doing something like
14 that with the CAFRA. There are hardship provisions and
15 part of the hearing could include showing by the car
16 owner or the property owner that they are in fact likely
17 to prevail as an innocent owner.

18 JUSTICE GINSBURG: I thought that -- I
19 thought the government said it doesn't apply to cash.
20 So that -- which we are told is 85% of the seizures
21 involved.

22 MR. PETERS: The CAFRA doesn't involve cash.

23 JUSTICE GINSBURG: Right.

24 JUSTICE ALITO: Let me give you this example
25 which is pretty much based on something that you -- you

Official - Subject to Final Review

1 wrote in your own brief. Joe is arrested on a drug
2 offense driving a car and there are drugs in the car.
3 But Joe isn't the owner of the car; John is the owner of
4 the car. Then John comes in 10 days later or 14 days
5 later and says well, you know, I never had any inkling
6 that Joe was using the car to deal in drugs, and had no
7 reason to know that. And you think that within a short
8 period of time the State has to disprove that, you know,
9 that John didn't have --

10 MR. PETERS: No, Your Honor.

11 JUSTICE ALITO: -- reason to believe that
12 Joe was involved in drug dealing?

13 MR. PETERS: No, Your Honor. I think the
14 burden will be on the property owner to establish first
15 that that the person is the owner of the property, and
16 second to establish the some yet-undefined degree that
17 they have a likely innocent owner defense.

18 JUSTICE SCALIA: I thought you said -- I
19 thought you said the innocent owner defense didn't have
20 to be inquired into in the probable cause here. I
21 thought that was yo uri position.

22 MR. PETERS: It -- it -- it is not ordered
23 by the Seventh Circuit but I -- we would believe that an
24 innocent owner --

25 JUSTICE SCALIA: Okay, you want --

Official - Subject to Final Review

1 MR. PETERS: -- argument should be included.

2 JUSTICE SCALIA: Okay. That makes it
3 harder. You are challenging this -- this statute on its
4 face, isn't that right?

5 MR. PETERS: No, Your Honor.

6 JUSTICE SCALIA: No?

7 MR. PETERS: As applied.

8 JUSTICE SCALIA: Just as applied?

9 MR. PETERS: Yes, we made that clear in the
10 complaint. There has never been any argument --

11 JUSTICE SCALIA: No, how can you have an --

12 MR. PETERS: There is no until this Court.

13 JUSTICE SCALIA: How can you have an
14 as-applied challenge to an entire class?

15 MR. PETERS: Well, first of all, Your Honor,
16 what we suggest, the order of the Seventh Circuit does
17 not invalidate any provision of this Act and in fact
18 it's entirely consistent with section 2 of the Act which
19 incorporates by reference the Federal remedies which
20 include interim remedies. So it is not how the Act on
21 its face is written. It is how it is being applied to
22 these people. And in addition to that, we are not
23 suggesting --

24 JUSTICE SCALIA: Why -- why -- to -- to have
25 an as-applied challenge, regardless of whether the

Official - Subject to Final Review

1 Illinois law provides a -- a remedy, wouldn't you be
2 able to individually assert under section 1983
3 unconstitutional action?

4 I mean, isn't there a Federal remedy? If
5 all you're concerned about is as-applied, you mean you
6 are being treated unconstitutionally by a State and you
7 have no remedy?

8 MR. PETERS: There is a Federal remedy, Your
9 Honor, but that is not --

10 JUSTICE SCALIA: Why isn't that enough?

11 MR. PETERS: That is certainly not enough,
12 Your Honor, for the following reasons: It is largely
13 impractical for most people -- many of the people who
14 are involved in drug forfeiture procedures are people
15 with modest to low incomes, probably little to no access
16 to attorneys. The likelihood of them understanding,
17 first of all, that they may have this right, then
18 contacting an attorney and getting an attorney to
19 litigate --

20 JUSTICE SCALIA: But they will know about
21 the probable cause hearing that you want to -- that you
22 want set up, right?

23 MR. PETERS: If -- this is why it should be
24 a class, and it clearly applies to a large class of
25 people.

Official - Subject to Final Review

1 JUSTICE SCALIA: Which -- which is why you
2 are asking for a facial challenge. You want these
3 hearings in all cases --

4 MR. PETERS: No, Your --

5 JUSTICE SCALIA: -- regardless of what the
6 individual circumstances are, isn't that so?

7 MR. PETERS: No, that is not so.

8 JUSTICE SCALIA: It is not so?

9 MR. PETERS: Yes.

10 JUSTICE SCALIA: Well, what are the
11 individual circumstances of all the other people are in
12 the class? We don't know what they are. We don't know
13 whether it's a car that has been taken, whether it's
14 money that has been taken, whether they are
15 millionaires, whether they need a car, we know nothing
16 about them.

17 MR. PETERS: That's correct, Your Honor.

18 But that's a function of the fact that this case came to
19 the Court without the benefit of discovery, without
20 having an opportunity to identify.

21 But what I would -- what I would suggest to
22 Your Honor is this: We are not suggesting that every
23 single person who has a piece of property taken is
24 necessarily entitled to this hearing. If, for example,
25 the police seize my favorite baseball card, I would not

Official - Subject to Final Review

1 be entitled to a hearing under the Mathews criteria
2 because my favorite baseball card does not justify
3 putting the government through the expense. On the
4 other hand, there are categories of people. They seized
5 \$5,000. There is some limit below which the hearings
6 may not apply.

7 CHIEF JUSTICE ROBERTS: What if -- what
8 about your innocent owner, or the hearing you are
9 seeking, you establish, well, I was going to sell my
10 baseball card to give me the money to, to survive, to
11 get food.

12 That was my -- I mean, what happens then?

13 MR. PETERS: There would have to be -- first
14 of all, we don't know how that would administratively be
15 handled because of the posture of the case, but my
16 suggestion, Mr. Chief Justice, would be this: That the
17 likely result in a case -- in this case, is that there
18 should be hearings for all car owners and that there
19 should be a baseline dollar value below which a person
20 is not entitled to a hearing.

21 CHIEF JUSTICE ROBERTS: So just to get back
22 to the cars, I thought your answer to Justice Alito was
23 a little abstract. In the absolute concrete case, where
24 the drug -- the suspect is driving the car, there are
25 drugs in the car.

Official - Subject to Final Review

1 At your hearing, the -- it's not registered
2 to him. The registered owner comes in and says, that's
3 my car, I had no idea it was being used for drugs.

4 Who wins, the state or the registered owner?

5 MR. PETERS: Well, in -- in those
6 circumstances -- and that's the only car, I would say,
7 most likely, the property should be returned to the car
8 owner.

9 However, I would add that, if the government
10 has some concerns about, for example, that they need
11 additional time to investigate this innocent owner
12 claim, then by having the hearing in front of a neutral
13 and detached --

14 CHIEF JUSTICE ROBERTS: But aren't they
15 always going to say that? They are going to say, well,
16 we don't know if the registered owner is involved in the
17 drug conspiracy. We don't know how closely he is tied
18 with the owner, so it's reasonable to assume he knew
19 what was going on, and besides, we have a lot of other
20 bigger fish to fry during this period.

21 We are trying to find out the scope of the
22 conspiracy. We are trying to find out where the sales
23 were going to take place. Why do you force us to -- to
24 focus our energies on the relationship between a
25 registered owner and the guy driving the car?

Official - Subject to Final Review

1 MR. PETERS: Well, I don't think that that
2 is likely to happen, and I think what is going on in New
3 York is proof that that is not how it works, and I
4 think --

5 JUSTICE ALITO: Well, the situation is much
6 worse than that, that they don't have the -- that they
7 need time to investigate. They may have the registered
8 owner under investigation.

9 They may think he is involved in the drug
10 conspiracy as well. They may have him on wire taps.
11 They may be preparing to arrest him. Now, you want to
12 force them to come into court within 10 or 14 days and
13 disclose the details of a -- of a pending criminal
14 investigation and prepare to -- it makes a great --

15 MR. PETERS: No, Your Honor. I'm not
16 suggesting that at all.

17 JUSTICE ALITO: Well, then I don't
18 understand how this -- how you can possibly have the
19 innocent owner issue adjudicated at this quick hearing.

20 I can understand the argument that you have
21 to have the filing of the equivalent of a complaint,
22 when you -- that has to be filed when someone's arrested
23 without a warrant, where it's not adversarial and you
24 establish probable cause for the seizure.

25 But when you start to go beyond that in drug

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1 forfeiture cases, at least, not -- not DWI cases, I just
2 don't see how that's workable.

3 JUSTICE SOTOMAYOR: Counsel, can you
4 unpackage for me this hearing? Because there is a
5 confusion in it that appears, both in your papers and in
6 this argument.

7 There is a probable cause component, which
8 is the police coming before a neutral magistrate and
9 saying, this is the reason I seized. I have probable
10 cause to believe that this car was involved in an
11 illegal activity, and this is why.

12 And then there is what sounds like, to me, a
13 sort of remission type component to the hearing you are
14 looking at, which is a magistrate saying, okay, you have
15 probable cause, but there's no reason for the seizing
16 authorities to keep the car because you can post a bond
17 instead, or something else should be done to mitigate
18 the damage to you during this process of forfeiture.

19 Am I correct that there are two components
20 to your request? And if there are, I understand the
21 probable cause component, but I'm not sure how you get
22 to the second component of how and why due process would
23 require the State to have a -- I'm calling it
24 remission -- but a remission-like proceeding?

25 Am I correct? Am I understanding what --

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1 what it is you're --

2 MR. PETERS: Yes, Your Honor, but let me go
3 back in response to your question -- and I think, in
4 part, to Justice Alito's.

5 The Seventh Circuit hasn't ordered any
6 specific hearing, so I am, at this point, advising the
7 Court of what I think this hearing should look like.

8 It could well be, upon remand and discovery,
9 that what I am suggesting the -- the hearing should look
10 like, it may -- it may not look like that at all. It
11 could be that --

12 JUSTICE GINSBURG: Isn't that one of the
13 problems with the Seventh Circuit decision? It covers
14 the waterfront. It covers cash, as well as any
15 property. It is not concentrated on cars.

16 And what your complaints ask for -- you said
17 it was as applied, but you are asking for a declaration
18 that defendants must hold a post-seizure probable cause
19 hearing within 10 business days, and you are asking the
20 Court to enjoin the defendants' current practice of
21 seizing property and retaining custody without a
22 judicial determination and probable cause.

23 That sounds, to me, like a facial challenge
24 to the statute, and you are asking for a declaration
25 that the statute is invalid, not as applied to any

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1 particular person.

2 MR. PETERS: I think it's invalid as applied
3 to categories of people, but I would continue to
4 maintain --

5 JUSTICE SCALIA: You think -- you think it's
6 unconstitutional as applied to everybody who is not
7 given this -- this preliminary hearing. That's --
8 that's what the complaint says.

9 Your -- the class you want certified is the
10 class of everybody who has not been given a preliminary
11 hearing. I don't know the difference between that and
12 saying that this statute is unconstitutional, as
13 applied.

14 I mean, just -- just because you don't say
15 in your complaint, this is a facial challenge, it
16 amounts to a facial challenge. You say, everybody who
17 has not been given a preliminary hearing is entitled to
18 relief because the statute is bad as to all of them.

19 MR. PETERS: The Seventh Circuit, however,
20 did not endorse completely what we alleged in the
21 complaint. We, of course, in the complaint, like most
22 complaints, ask for as much as you think you might be
23 able to get.

24 But the Seventh Circuit did not order
25 hearings across the board for every single person whose

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1 property is taken. And I'm not suggesting that every
2 single person whose property is taken will necessarily
3 be entitled to a hearing.

4 There are --

5 JUSTICE BREYER: Go ahead. Finish.

6 MR. PETERS: There are going to be
7 circumstances when the value of the property is de
8 minimus, as compared to the cost of the hearing.

9 JUSTICE SCALIA: That is not the class you
10 asked to be certified. You asked to certify everybody
11 who had been denied a preliminary hearing.

12 MR. PETERS: Yes, I -- I did, Your Honor,
13 and in that regard, I was mistaken, but the Seventh
14 Circuit corrected my mistake and only ordered a remand
15 for a determination as to who it would be, who would be
16 entitled to --

17 JUSTICE GINSBURG: Where -- where does it --

18 JUSTICE SCALIA: It doesn't change this --
19 this action from a class action -- from a facial
20 challenge into a nonfacial challenge. They can't change
21 your complaint.

22 You were either asking this to be struck
23 down on its face, or you weren't. And what -- what the
24 Seventh Circuit did doesn't change that.

25 MR. PETERS: Well, Your Honor, I think what

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1 the Seventh Circuit did does change it because, now, the
2 ruling is what was determined by the Seventh Circuit,
3 and the Seventh Circuit did not say that every single
4 person is entitled to a hearing.

5 JUSTICE BREYER: Well, can I get to the
6 merits for a second?

7 MR. PETERS: Yes, sir.

8 JUSTICE BREYER: And get back to what
9 Justice Alito and Justice Sotomayor were asking. This
10 statute gives a policeman the right to seize some
11 property without a warrant if it's a circumstance where
12 you can seize a person without a warrant.

13 That is basically what it says, doesn't it?

14 MR. PETERS: Yes.

15 JUSTICE BREYER: All right. In that kind of
16 situation, I would think maybe you are entitled to a
17 quick hearing where the only subject would be: Was that
18 language carried out? Was that policeman right? Was
19 there probable cause, or wasn't there?

20 Now, if that's the issue, I don't see why
21 you give up at all on the baseball card. I mean, if
22 somebody comes into my house and takes a baseball card
23 and he's supposed to have probable cause and he doesn't,
24 I don't see why I can't go get a judge or a magistrate,
25 determine whether he had my baseball card, and pretty

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1 quickly, too.

2 JUSTICE SCALIA: Some of them are worth a
3 lot of money. Yeah.

4 JUSTICE BREYER: If you go to the other,
5 which is whether there is an innocent owner or whether
6 in fact you should give bail to the property -- I mean,
7 that's -- I know we give bail to people, but I don't
8 know that we give bail to property. Maybe real
9 property, but that seems a much more complex argument.

10 So I want to know: What's your authority
11 that we should give bail to the property and have a
12 hearing on that? And why do you give up in respect to
13 baseball cards or anything in effect of the first?

14 MR. PETERS: Well, I would not like to give
15 up my favorite baseball card, but the reason that I said
16 that, Your Honor, is this. The Mathews criteria which
17 we are espousing here require a cost-benefit analysis,
18 and if the value of the property under that -- using
19 that criteria does not warrant a hearing, then as to
20 that property, there shouldn't be a hearing. So there
21 doesn't have to be a hearing in every case. There may
22 --

23 CHIEF JUSTICE ROBERTS: So to answer -- so
24 it's as applied in every case, which I think ties in a
25 little bit to the mootness question that we began with.

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1 Because it focuses on the circumstances of the
2 individual claimants, and if the individual claimants
3 have already had their property returned, I think it
4 accentuates the mootness issue.

5 MR. PETERS: I -- I continue to maintain,
6 Your Honor, that the -- as long as there was standing
7 when the case was filed, and as long as there is a live
8 class that could be represented by these class, or
9 putative class --

10 JUSTICE SCALIA: My potential class, you
11 should call it.

12 MR. PETERS: Potential class. Yes, Your
13 Honor.

14 Then there is standing on -- and I believe
15 that the standing can be established through the Garrity
16 decision. I agree that it is not literally identical to
17 Garrity, but I think the underlying circumstances that
18 animated the Court's decision in that case are the same,
19 and that therefore these people maintain standing.

20 If, however, in response to the question
21 that you asked Mr. Castiglione, if the case became moot
22 as a result of the return of the property, then it
23 wouldn't be a Munsingwear situation. It would be a
24 Bancorp v. Bonner situation, because if it became moot
25 as a result of the settlement of the case after the

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1 Seventh Circuit's decision, then the Seventh Circuit's
2 decision should stay in place.

3 So if -- I do not agree that the case is
4 moot, but if hypothetically the case were moot, then we
5 are not in a Munsingwear situation. We are in a Bancorp
6 situation, because the moot --

7 CHIEF JUSTICE ROBERTS: Well, that's an
8 interesting -- that's an interesting question. I mean,
9 is it becoming moot through their voluntary cessation or
10 activity when the State law requires them to take
11 particular action?

12 MR. PETERS: What I'm saying, Your Honor, is
13 if we're -- we're defining mootness as the ultimate
14 return of the property, then the property was returned
15 pursuant to settlement in four of the cases. The
16 plaintiffs agreed, we will pay \$400 instead of \$20,000,
17 you return our car. The car was returned.

18 So if the case was settled and became moot
19 because of the settlement, it is not a situation in
20 which the Court can adopt the Munsingwear position. It
21 really is a Bancorp situation, and the Seventh Circuit's
22 decision remains --

23 JUSTICE STEVENS: Don't some of all these
24 problems really arise out of the fact that the effect of
25 the court of appeals decision basically was to overrule

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1 the motion to dismiss? Left everything open on remand,
2 so if we said it is moot, you'll just get another
3 plaintiff and bring another lawsuit, which is what you
4 do if the Court -- we are trying to get into the case
5 much earlier than we should, it seems to me. Just let
6 the proceedings go ahead on remand and find out what all
7 these factual answers -- these questions should be
8 answered.

9 MR. PETERS: I certainly agree with that,
10 Your Honor, the -- there are many --

11 JUSTICE STEVENS: The mootness -- the
12 mootness decision won't really decide anything. You'll
13 say you got to file another lawsuit and start over
14 again. But if you just say, we -- in my judgment, we
15 ought to dismiss -- this writ is improperly granted, and
16 let the record be developed and the case go by and we
17 could decide the issues.

18 MR. PETERS: That, it seems to me, is a very
19 wise choice of action.

20 JUSTICE GINSBURG: But you said -- you said
21 that --

22 MR. PETERS: For obvious reasons. But
23 beyond that --

24 JUSTICE GINSBURG: You said the Seventh
25 Circuit -- your complaint, you say, is -- you asked for

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1 the universe, every kind of property of due process
2 hearing within ten days or a short period. But you said
3 the Seventh Circuit narrowed the relief. And I'm
4 looking at the Seventh Circuit decision, and I really
5 don't see what was narrowed. I think they left
6 everything open for the district Court. Where -- where
7 is there any narrowing?

8 MR. PETERS: Well, the narrowing, as I
9 perceive it, Your Honor, is this. I believe the Court
10 said at different times whether an appropriate remedy
11 can be fashioned. The Court did not say for whom. It
12 didn't say it must be for everybody. It didn't say what
13 would be necessary to trigger the right to the hearing.
14 It didn't say how much time would elapse.

15 It left -- it did leave, in that sense,
16 everything open, but by leaving everything open it also
17 allows the Court to narrow the categories of people who
18 would be entitled to this hearing that -- in such a way
19 that it would be an effective practical remedy.

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

21 MR. PETERS: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Castiglione, why
23 don't you take three minutes?

24 REBUTTAL ARGUMENT OF PAUL CASTIGLIONE

25 ON BEHALF OF THE PETITIONER

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1 MR. CASTIGLIONE: Thank you, Your Honor.

2 Well, Your Honor, initially, two of the
3 claimants here lost their property and defaulted. Three
4 had their property returned. This is not a case where
5 the matter -- the underlying matter is concluded by
6 voluntary cessation.

7 JUSTICE SCALIA: I thought they didn't. I
8 thought some didn't have it returned, but there was a
9 settlement.

10 MR. CASTIGLIONE: One did, Your Honor, but
11 it wasn't in response to the Federal litigation, so our
12 position would be this is moot. This is really --
13 Munsingwear would apply.

14 JUSTICE SCALIA: The mootness was not a
15 result of any settlement between the city and --

16 MR. CASTIGLIONE: That's correct. Well, I
17 mean -- it settled because of the --

18 JUSTICE SCALIA: Your -- your friend said
19 the opposite. I mean.

20 MR. CASTIGLIONE: Well, it settled, Your
21 Honor, just as through the normal course. It was not a
22 response to the Federal litigation that was going on
23 independently.

24 JUSTICE SCALIA: I don't understand.

25 MR. CASTIGLIONE: Well, I'm --

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1 JUSTICE SCALIA: They got all of their
2 property back?

3 MR. CASTIGLIONE: Oh, no, no. In those
4 cases, yes, Your Honor. The private -- the hearing --
5 the cases went to hearing and the three -- with the
6 three car owners and they ultimately received their cars
7 back.

8 JUSTICE SCALIA: I don't understand. They
9 got their cars back, right?

10 MR. CASTIGLIONE: Yes.

11 JUSTICE SCALIA: The people who had money at
12 stake, what happened to the money?

13 MR. CASTIGLIONE: Two of them default -- two
14 defaulted and one reached a settlement with the State.

15 JUSTICE SCALIA: A settlement. So you have
16 at least one case where the mootness is attributable to
17 a settlement. You have at least one Plaintiff, and you
18 can't get the kind of remand for mootness that you are
19 asking for.

20 MR. CASTIGLIONE: No, I understand, Your
21 Honor. I'm just making the point that if this case --
22 if the Court finds it's moot, that we would want --
23 would ask for an entry of an order of vacating the
24 orders below pursuant to -- pursuant to Munsingwear.

25 JUSTICE SCALIA: But we don't do Munsingwear

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1 orders where the mootness is a result of the settlement.

2 MR. CASTIGLIONE: Our position, Your Honor,
3 is that the settlement wasn't in response. We didn't
4 settle the Federal -- we didn't settle the Federal
5 litigation. The -- the underlying forfeiture case was
6 resolved.

7 CHIEF JUSTICE ROBERTS: I thought your
8 answer is that they didn't also.

9 MR. CASTIGLIONE: They all didn't settle.
10 That's right. I -- that's a better answer, I think,
11 Your Honor.

12 JUSTICE STEVENS: Well, what good would a
13 Munsingwear order do, anyway? They'll just file another
14 lawsuit, won't they?

15 MR. CASTIGLIONE: They could. They
16 certainly could, if you -- they have the right to do
17 that, Your Honor.

18 JUSTICE STEVENS: And then if the district
19 judge said: Having read this opinion, which was vacated
20 so it's -- well, I guess it states a cause of action. I
21 will deny the motion to dismiss? We would be exactly
22 where we are now.

23 MR. CASTIGLIONE: We -- and we would, there
24 is no doubt about that.

25 JUSTICE SOTOMAYOR: Can I just get

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1 clarification?

2 Under your State law, there is no way for an
3 owner to come in and challenge probable cause, deceit?
4 Not a defense, but the example Judge Breyer said, my car
5 was just sitting there.

6 MR. CASTIGLIONE: There is not, Your Honor.
7 I mean, the forfeiture --

8 JUSTICE SOTOMAYOR: All right. And second,
9 is there any procedure under your State law to do the
10 second half of what your adversary said he was looking
11 for, a remission-type proceeding that would balance the
12 government's need to hold the property and the
13 individual's need for it, and whether there was a bond
14 that could be posted or not?

15 MR. CASTIGLIONE: And that's the -- we --
16 although it doesn't provide for a bond, Your Honor, we
17 indicated there are problems with bonds, certainly for
18 cash and for -- and for other personal property that --

19 JUSTICE SOTOMAYOR: Well, that may be part
20 of the math of this issue, that once you prove probable
21 cause, giving away -- giving back money just never would
22 probably be rational to hold a hearing about, but that
23 might not be true for real property, correct?

24 Under -- even under Mathews, under a Mathews
25 analysis.

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1 MR. CASTIGLIONE: I'm not sure I understand
2 Your Honor's question.

3 JUSTICE SOTOMAYOR: If you apply a Mathews
4 analysis, the multifaceted item would say for the
5 seizure of cash, maybe only the hearing has to address
6 probable cause, but for real property it has to go
7 further. Not real property, in the sense of real
8 personal property. It has to go further, because there
9 has to be some sort of the protection of the interest of
10 the individual, pending --

11 MR. CASTIGLIONE: Let me attempt to address
12 that. We -- the statute does contemplate, Your Honor,
13 Section -- especially Section 6 of DAFPA, nonjudicial
14 remedies, and then essentially if the amount of property
15 is under 20,000 or if we are dealing with a car, which
16 falls under Section 6, those cases are routinely dealt
17 with by negotiation, Your Honor.

18 And I think that's the best way to deal with
19 hardship -- the hardship examples given is that: Both
20 through negotiation and a speedy hearing.

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
22 The case is submitted.

23 (Whereupon, at 11:09 a.m., the case in the
24 above-entitled matter was submitted.)

25

A				
ability 29:9	adjudicate 30:1	amended 5:20	argument 1:13	61:16
able 14:8 22:18	adjudicated	6:8 9:2 25:7	2:2,10 3:4,7	authorities
45:2 52:23	32:12 36:15	amicus 1:20 2:6	6:3 11:20	50:16
above-entitled	49:19	23:7	15:24 18:5	authority 8:12
1:12 64:24	administrativ...	amount 64:14	23:5 30:20	55:10
absolute 18:5	47:14	amounts 52:16	33:21 35:16,18	available 12:14
47:23	adopt 57:20	analysis 55:17	44:1,10 49:20	award 8:16
Absolutely	adopted 15:20	63:25 64:4	50:6 55:9	a.m 1:14 3:2
12:12	adversarial 3:16	and/or 4:1	59:24	64:23
abstract 47:23	19:10,12 27:10	animated 36:19	arrest 19:2	
absurdity 22:16	41:18,21 49:23	56:18	49:11	B
accentuates	adversary 18:16	ANITA 1:3	arrested 20:6	back 3:18 4:21
56:4	63:10	answer 15:12	43:1 49:22	11:17 17:19
access 29:9	advising 51:6	20:16,23 22:12	arrests 18:19	19:11 22:8
45:15	affirmative	30:19,20 31:4	aside 18:15,17	25:19 29:2
accessible 29:13	32:12	31:6 40:8	asked 4:24 7:9	34:18 47:21
account 29:12	afford 22:25	42:11 47:22	7:21 23:25	51:3 54:8 61:2
accused 39:17	afforded 24:3	55:23 62:8,10	53:10,10 56:21	61:7,9 63:21
acknowledge	aggressively	answered 58:8	58:25	background
9:1	37:20	answers 58:7	asking 5:22 6:9	16:22
act 3:15 13:17	agree 14:4 17:8	anyway 62:13	7:22 9:19	bad 52:18
40:18 44:17,18	17:9,13 24:8	appeal 7:2 10:13	14:14,18 17:5	bail 55:6,7,8,11
44:20	37:13 41:3	10:16,22 35:24	24:14 46:2	bait 12:6
action 10:9,10	56:16 57:3	35:24 36:4	51:17,19,24	balance 63:11
12:7 13:8,9,19	58:9	37:10 38:1,17	53:22 54:9	Bancorp 56:24
15:4,13 24:18	agreed 57:16	appealed 10:16	61:19	57:5,21
36:15 37:7,10	agreement 5:15	10:24,25	aspect 38:15,15	Barker 11:25
45:3 53:19,19	ahead 53:5 58:6	appealing 38:9	assert 4:17 15:3	baseball 46:25
57:11 58:19	AL 1:7	appeals 7:4	42:5 45:2	47:2,10 54:21
62:20	Alito 5:25 6:11	36:10 57:25	asserted 35:19	54:22,25 55:13
actions 35:7	6:15 18:13	APPEARAN...	assertion 9:3	55:15
active 36:4	19:23 41:6,14	1:15	asset 3:14 27:8	based 38:11
actively 32:3	41:17 42:2,24	appears 24:4,19	40:17	42:25
activity 37:18	43:11 47:22	50:5	Assistant 1:16	baseline 47:19
50:11 57:10	49:5,17 54:9	applied 31:7,25	1:18	basic 15:23
add 48:9	Alito's 51:4	44:7,8,21	assume 48:18	29:18
addition 5:23	alive 24:4	51:17,25 52:2	assuming 35:14	basically 41:23
44:22	alleged 52:20	52:6,13 55:24	as-applied 44:14	54:13 57:25
additional 3:16	allow 13:8	applies 45:24	44:25 45:5	becoming 57:9
23:1 48:11	allowed 34:13	apply 42:19 47:6	attachment 4:1	beg 35:6
address 4:24	34:14	60:13 64:3	4:4	began 55:25
22:10 30:7	allowing 32:5,5	applying 16:14	attempt 64:11	begging 28:15
39:1,3 64:5,11	allows 59:17	appropriate	attendant 19:12	35:13
addressed 33:1	alternative	25:1 41:12	attorney 1:4,16	beginning 27:22
34:6	36:11	59:10	21:25 45:18,18	30:20
adequate 16:6	Alvarez 1:3 3:4	area 3:25,25	attorneys 45:16	behalf 1:17,20
	amend 8:25	arguing 17:25	attributable	1:22 2:4,6,9,12

3:8 23:6 33:22 59:25 believe 11:10 12:25 28:8 43:11,23 50:10 56:14 59:9 benefit 46:19 best 64:18 better 62:10 beyond 49:25 58:23 big 25:16 bigger 48:20 bit 55:25 board 52:25 bond 21:23 22:1 22:2,4,7,13,15 22:20 41:4 50:16 63:13,16 bonds 63:17 Bonner 56:24 bought 22:3 Breyer 19:17 20:1,10,16,23 21:1,5 25:14 26:10,17,25 27:1,5,11,20 38:23 53:5 54:5,8,15 55:4 63:4 brief 11:15 18:25 20:4 43:1 briefly 22:10 bring 15:3 20:6 58:3 Brunston 6:7 burden 18:22,23 26:7,9,14,15 26:18 41:24 42:9 43:14 burdens 19:8 business 51:19	42:22 call 56:11 calling 50:23 capable 34:15 35:2,9 car 5:12 19:22 19:23 20:3 22:3,7,8,8 25:15,17,19 26:11,24 27:18 28:5,8,11 29:16 30:6,11 30:12,13 32:17 32:17 39:14,21 40:3 42:1,15 43:2,2,3,4,6 46:13,15 47:18 47:24,25 48:3 48:6,7,25 50:10,16 57:17 57:17 61:6 63:4 64:15 card 46:25 47:2 47:10 54:21,22 54:25 55:15 cards 55:13 care 29:16 carried 54:18 cars 5:11,12 22:17 27:12 29:15 35:11 41:5 47:22 51:15 61:6,9 case 3:4 5:18,19 6:1,5,7 7:3,4 8:1,3,3,5,8 9:8 11:10,11 12:9 12:14 14:5 15:9,12,12 18:18 19:12,13 19:19 21:2 31:16 33:25 34:1,5,9,10,11 34:13,14 36:20 36:25 37:12,17 38:25 40:4 46:18 47:15,17	47:17,23 55:21 55:24 56:7,18 56:21,25 57:3 57:4,18 58:4 58:16 60:4 61:16,21 62:5 64:22,23 cases 4:8,8 5:3,7 5:12,13,14,16 6:19 11:4,8 15:13 22:14 28:8 30:15 31:18 33:4,5 35:7 39:16 46:3 50:1,1 57:15 61:4,5 64:16 cash 5:11,13,14 6:19 21:23 22:1,14,14,15 22:16 41:2 42:19,22 51:14 63:18 64:5 Castiglione 1:16 2:3,11 3:6,7,9 4:6,13,19,23 5:1,6,9 6:5,13 6:17,24 7:6,15 7:19,25 8:6,10 8:13,19 9:10 9:18 10:2,11 10:15,23 11:6 11:23 12:12,24 13:5,12,16 14:2,11,19,25 15:5,18 16:1,7 16:14,19 17:1 17:7,12,16,18 17:21 18:2,8 19:7,25 20:9 20:21,25 21:3 21:8,17 22:4,9 23:3 25:8 29:10 31:14 56:21 59:22,24 60:1,10,16,20 60:25 61:3,10	61:13,20 62:2 62:9,15,23 63:6,15 64:1 64:11 categories 47:4 52:3 59:17 cause 19:4,6,18 20:5,7,18 24:1 25:18,22 26:8 26:14,24 27:3 27:10,13,18 28:7,8 39:5,14 39:22,24 41:25 43:20 45:21 49:24 50:7,10 50:15,21 51:18 51:22 54:19,23 62:20 63:3,21 64:6 caused 37:16 century 12:20 cert 9:2 certainly 4:7 12:13 13:5 14:3,5 21:11 37:13 41:3 45:11 58:9 62:16 63:17 certification 5:20 6:9 7:10 10:20,22 25:8 34:3,4 35:25 36:3,5,13 37:10 38:2,10 38:10 certified 6:4,12 7:18 25:9 34:10 35:15 52:9 53:10 certify 25:11 35:8 53:10 cessation 57:9 60:6 challenge 44:14 44:25 46:2 51:23 52:15,16 53:20,20 63:3	challenging 37:6 44:3 chance 35:4 change 53:18,20 53:24 54:1 changed 9:14 10:3,5 11:10 11:11 CHERMANE 1:7 Chicago 1:17,22 18:24 20:8 35:11 Chief 3:3,10 8:7 8:11,15 12:15 15:11 16:21 22:25 23:4,9 23:15 33:12,19 33:23 40:19 47:7,16,21 48:14 55:23 57:7 59:20,22 62:7 64:21 choice 58:19 Circuit 3:14 5:19 7:7 8:4,5 8:18,22 22:15 25:3,7 38:1,5,7 43:23 44:16 51:5,13 52:19 52:24 53:14,24 54:1,2,3 58:25 59:3,4 Circuit's 57:1,1 57:21 circumstance 54:11 circumstances 4:5,7 20:2 46:6 46:11 48:6 53:7 56:1,17 city 35:10 60:15 civil 3:12,20 4:20 12:2 13:21 19:13 40:17 claim 7:12,12,17
<hr/> C <hr/> C 2:1 3:1 CAFRA 42:14				

8:20 9:3,25 10:3,10 11:7 15:16 21:19,22 24:3,4,6 25:21 26:23 29:24 30:13 32:4 34:17 36:23 48:12 claimant 12:4 26:14 28:2,2 32:8,9 claimants 32:4,5 32:10 56:2,2 60:3 claimant's 33:5 claims 6:2,15,18 6:20,22 9:5,11 24:9 29:22 30:1 32:5 35:12 clarification 63:1 class 5:20 6:4,8 6:12 7:10,11 7:18 9:2,2 10:9 10:10,19 15:13 24:18 25:8,9 25:11 34:3,4,9 35:7,9,9,10,14 35:15,16,19,20 35:25 36:3,5 36:12,14,15,21 36:22,24 37:6 37:10,19,20,22 38:2,9,10,15 44:14 45:24,24 46:12 52:9,10 53:9,19 56:8,8 56:9,10,12 class-related 38:16 clear 24:13,22 44:9 clearly 16:17 34:2 45:24 clients 39:23 closely 48:17	Code 13:21 collateral 41:2 colloquy 23:12 come 12:5 13:2 18:9 32:10 42:8 49:12 63:3 comes 8:1 9:8 12:18 43:4 48:2 54:22 coming 50:8 Commission 34:7 common 13:2 14:7 comparable 33:15 compared 53:8 compete 33:4 competing 29:22 30:1 33:4 complaint 8:25 9:8 11:9,12 18:20 19:2 23:25 24:13,18 24:22 34:18,19 41:11 44:10 49:21 52:8,15 52:21,21 53:21 58:25 complaints 51:16 52:22 complete 20:10 completely 28:1 52:20 complex 55:9 complied 17:2 comply 15:20 component 50:7 50:13,21,22 components 50:19 compromising 42:10 concentrated 51:15	concentrating 37:9 concepts 20:14 concerned 45:5 concerning 5:4 concerns 36:18 36:20 37:16 48:10 concluded 5:7,8 5:9 60:5 concrete 47:23 conditional 40:16 conditionally 40:20 confused 29:3 40:7 confusion 50:5 Congress 33:9 consider 18:6 considered 6:1 considers 36:18 consistent 18:3 44:18 conspiracy 48:17,22 49:10 constantly 36:23 constitutional 16:13,25 17:15 26:4 27:15,19 constitutionally 28:25 contacting 45:18 contemplate 64:12 contending 24:15,19 contest 39:25 contesting 42:9 continue 36:22 52:3 56:5 continued 37:7 continuing 37:18 controlling 8:12 controversy	37:21 COOK 1:3 correct 6:24 8:19 10:12 27:7 33:17 46:17 50:19,25 60:16 63:23 corrected 53:14 cost 53:8 costs 22:3,4 cost-benefit 55:17 counsel 4:25 33:12,19 50:3 59:20 64:21 COUNTY 1:4 couple 29:4 course 27:2 30:24 38:16 52:21 60:21 court 1:1,13 3:10,19 6:1,23 7:3,17 8:2,16 8:18 9:4,19 12:5 13:13 14:9,22 17:2,5 18:12,21 19:2 21:9,25 23:10 24:18 25:1,4 25:11 27:20 30:2 31:8,15 32:10 33:24 34:6,13,14 36:4 37:5,16 42:8 44:12 46:19 49:12 51:7,20 57:20 57:25 58:4 59:6,9,11,17 61:22 court's 3:18 10:17 16:7 23:1 36:19 56:18 covers 51:13,14 co-counsel 23:13	cracks 14:6 15:9 15:14,17 crime 25:17 39:17 criminal 12:9 19:12 30:8 42:10 49:13 criteria 47:1 55:16,19 curiae 1:21 2:7 23:7 curious 31:4 currency 28:13 29:10,12 30:15 30:16,17 33:5 current 51:20 custody 29:25 30:7 51:21 cut 12:6 <hr/> D D 3:1 DAFPA 64:13 daily 35:12 damage 6:20,21 7:10 8:20 50:18 damages 5:23 6:9 7:12,21,24 8:16 9:3 25:10 day 32:18 days 13:10,25 13:25 14:1,10 14:15,16,20,24 18:1,2 21:16 21:17 23:24 24:1,16,21 25:13 41:8,11 41:15,15 43:4 43:4 49:12 51:19 59:2 de 53:7 dead 13:7 deal 20:12 43:6 64:18 dealing 15:21 43:12 64:15
--	--	--	---	---

deals 29:21	34:10 36:24,25	8:2	E	establish 15:6,8
dealt 64:16	38:15 53:11	disprove 41:18	E 2:1 3:1,1	41:25 43:14,16
deceit 63:3	deny 4:14 62:21	43:8	earlier 16:12	47:9 49:24
decide 29:1	Department	dispute 6:2	58:5	established
38:25 40:14	1:19	14:25 15:2	early 12:20	56:15
58:12,17	departments	disregards	effect 55:13	ET 1:7
decides 28:2	28:22 29:6	19:14	57:24	evading 34:16
deciding 21:18	depend 8:21	dissipation	effective 59:19	35:2
27:25	deprivation	22:19	either 12:6	everybody 52:6
decision 3:18	20:10,11	distinguishes	53:22	52:10,16 53:10
5:19 7:7 8:17	describe 16:24	37:12	elapse 59:14	59:12
8:18,22 16:8	desperately 41:2	district 5:21	elapsed 14:17	evidence 26:8
28:19 30:3	Despite 3:11	6:23 7:5,7 8:2	elapsing 14:15	exactly 13:14
36:19 51:13	destruction	8:16 10:17	enacted 13:4	41:6 62:21
56:16,18 57:1	22:19	24:18 25:4	ended 6:7	example 28:10
57:2,22,25	detached 48:13	59:6 62:18	endorse 52:20	29:10 42:24
58:12 59:4	details 49:13	docket 5:21,21	energies 48:24	46:24 48:10
declaration	detained 25:11	5:22	enforcing 9:22	63:4
51:17,24	determination	doctrine 34:16	enjoin 24:11	examples 64:19
declaratory	25:23,25 51:22	document 34:17	51:20	exceeds 20:15
5:23	53:15	doing 19:10	enjoined 9:17	exception 6:18
declare 9:19	determine 4:17	29:19 32:2	entered 6:22	9:11 33:8
default 11:5	54:25	42:13	entire 44:14	excuse 3:9
61:13	determined 54:2	dollar 47:19	entirely 24:12	exist 36:22
defaulted 5:14	developed 58:16	door 19:11	38:11 44:18	exists 4:18
6:20 9:11,23	differ 35:6	doubt 62:24	entitled 8:8	expect 42:7
11:4,8 60:3	difference 52:11	doubts 20:17	15:15,16 20:4	expedite 21:9,12
61:14	different 4:10	driver 30:12	26:1 28:11,17	expedited 21:14
defeating 13:15	14:14 15:12	driving 43:2	28:18 32:9	expense 47:3
defendants	18:5 25:24	47:24 48:25	39:11,13 40:3	expired 6:3,16
51:18,20	27:23 31:1,4	drug 3:14 18:19	46:24 47:1,20	6:18 12:11
defense 18:16	36:16,18 38:23	25:17 43:1,12	52:17 53:3,16	expires 24:6
19:6 29:3	40:2 59:10	45:14 47:24	54:4,16 59:18	explain 11:23
31:21 32:13	difficult 30:15	48:17 49:9,25	entry 61:23	expressly 7:11
41:19 42:5,9	dilatory 13:20	drugs 19:22	envision 18:17	extensive 33:9
43:17,19 63:4	13:24	43:2,6 47:25	41:22	extent 9:13 10:3
defenses 32:12	disappear 33:7	48:3	equitable 15:6	
defining 57:13	disclose 49:13	due 3:13 15:20	equivalent 19:1	F
degree 23:19	discovery 19:11	15:25 17:2	49:21	face 29:7 30:16
43:16	46:19 51:8	29:20,23 30:4	especially 29:15	31:10,12 34:22
delaying 29:14	dismiss 7:8	31:16 50:22	29:20 30:10	41:25 44:4,21
denial 10:22,25	10:19,25 11:1	59:1	64:13	53:23
35:24 36:3	13:22 58:1,15	duplicative 19:8	espousing 55:17	facial 46:2 51:23
37:6,10 38:2,4	62:21	duty 22:18	ESQ 1:16,18,22	52:15,16 53:19
38:9,11	dismissal 36:5	DWI 42:4 50:1	2:3,5,8,11	facially 17:16
denied 10:10,11	36:12	D.C 1:9,20	essential 32:15	fact 7:20 13:9,18
10:19 34:4,4,5	dismissing 7:4		essentially 64:14	30:7 34:6

36:20 37:17 42:16 44:17 46:18 55:6 57:24 factors 12:1,4,8 factual 58:7 fall 14:6 15:9 falls 15:17 64:16 far 3:18 27:7 fashion 16:16 25:4,4 fashioned 59:11 fault 39:9 favorite 46:25 47:2 55:15 FDIC 16:8 17:19 Federal 27:9 32:2,24 33:2 33:15 34:12 42:13 44:19 45:4,8 60:11 60:22 62:4,4 fell 15:13 figure 28:16 file 12:6 18:20 21:19,22,22 32:5 58:13 62:13 filed 5:19,22 6:9 7:21 11:9,12 12:14 21:10 24:16,18 25:7 34:1 36:15 49:22 56:7 files 12:18 13:19 filing 19:1 22:1 34:18,19 49:21 final 6:22 7:1,4 8:2,17 9:24 19:20 26:19 39:11 40:2,13 40:13 finally 40:14 find 48:21,22 58:6 finds 61:22	fine 26:18 Finish 53:5 first 3:4 20:9 27:24 29:5 39:1 43:14 44:15 45:17 47:13 55:13 fish 12:6 48:20 five 39:20 Florida 20:2 25:21 27:1,4,6 focus 48:24 focuses 56:1 following 3:22 25:15 45:12 food 47:11 force 48:23 49:12 forfeitable 28:9 forfeited 28:13 forfeiture 3:12 3:14,17,20 4:20 5:2,7 6:7 11:15,18,21 12:2,14,22 13:19 15:24 16:4,5,23 17:10 19:9,13 19:20 20:19 21:16 22:20,21 24:2,7,20 26:1 27:9 30:4,21 39:12 40:18 45:14 50:1,18 62:5 63:7 forfeitures 21:21 forgetting 10:8 formal 21:3 formally 8:25 former 39:19 forms 33:10 forward 8:21 found 17:2 four 57:15 fourth 28:3 framework	32:25 friend 60:18 front 40:4 48:12 fry 48:20 full 22:8 function 46:18 further 64:7,8 <hr/> G <hr/> G 3:1 garnishment 4:8 Garrity 56:15 56:17 Gelston 3:19 4:21,22 General 1:19 Geraghty 34:8,9 35:22,24 36:9 36:19 37:5,12 37:17 gesture 38:8 getting 13:13,13 14:21 21:9,9 40:25 45:18 Ginsburg 4:23 5:2,8 6:21 7:1 7:23 8:1 9:6 10:21 11:2,13 21:13 22:2,6 33:13,17 37:4 37:25 42:18,23 51:12 53:17 58:20,24 give 9:4 21:6 29:2 39:4 42:24 47:10 54:21 55:6,7,8 55:11,12,14 given 17:23 25:2 52:7,10,17 64:19 gives 12:4 15:10 27:11 54:10 giving 63:21,21 go 8:21 17:18 21:25 27:12 28:18 49:25	51:2 53:5 54:24 55:4 58:6,16 64:6,8 goes 8:4 11:24 going 4:21,21 12:16,20,22 18:11 30:19 36:22,23 40:14 47:9 48:15,15 48:19,23 49:2 53:6 60:22 good 11:24 33:2 62:12 government 12:6 13:10,13 13:17,19,24 14:1,3,4,21 18:22,23 27:9 28:16 29:13,14 29:15,19,19,23 32:2,19 33:3,6 33:9 37:21 40:21 42:13,19 47:3 48:9 government's 13:18,20 18:14 29:25 32:11 41:24 63:12 grant 19:19 granted 7:13,14 10:18,18 58:15 granting 7:8 11:1 gratuitous 38:8 38:19 great 42:6 49:14 grounds 38:16 40:25 group 37:19 guarantee 22:21 guess 62:20 gun 28:12 guy 48:25 <hr/> H <hr/> half 63:10 hand 11:22 47:4	handled 47:15 hands 28:1 Hanrahan 30:2 happen 14:7 35:5 49:2 happened 25:16 41:23 61:12 happens 27:13 40:16,17 47:12 happy 23:17 harder 44:3 hardship 33:2,8 33:10,14,16 42:14 64:19,19 harm 29:17 hear 3:3 heard 6:3 hearing 3:12,16 3:17,20,21 4:9 4:20 9:21,24 10:1 11:19 12:1,2,17 14:14,16,20 15:24 16:4,5 16:11,24 17:10 17:15 19:8,9 19:10,13,20 20:4,19 21:3 21:10,10,14 22:20,22 23:24 24:1,15,21 25:1,13 26:7 27:3,10 28:3 30:21 32:9,23 39:5,11,13 40:2,12,13,13 40:15,16 41:7 41:8,18,22,22 42:15 45:21 46:24 47:1,8 47:20 48:1,12 49:19 50:4,13 51:6,7,9,19 52:7,11,17 53:3,8,11 54:4 54:17 55:12,19 55:20,21 59:2
--	---	--	--	--

59:13,18 61:4 61:5 63:22 64:5,20 hearings 46:3 47:5,18 52:25 held 17:5 23:24 24:7,21 25:12 29:9,12 30:3 31:15,18 historically 4:19 20:22 hold 29:7 51:18 63:12,22 holding 3:11 28:25 31:13 Honor 4:19 5:1 5:6,17 6:6,14 6:25 7:15,20 8:14,20 9:12 9:19 10:7,12 10:24 11:7 12:12,25 13:6 13:17 14:3,20 15:19 16:1,9 19:14 21:4,10 21:18 22:9,13 22:17,23 23:3 23:18 24:13 25:3 26:5 28:6 31:20 34:25 35:7,22 36:1,7 37:14 41:3,10 42:12 43:10,13 44:5,15 45:9 45:12 46:17,22 49:15 51:2 53:12,25 55:16 56:6,13 57:12 58:10 59:9 60:1,2,10,21 61:4,21 62:2 62:11,17 63:6 63:16 64:12,17 Honor's 38:22 64:2 hope 18:16 hoped 19:16	house 54:22 Hoyt 3:19 hypothetical 17:6 23:13 30:21,25 hypothetically 57:4 <hr/> I <hr/> idea 48:3 identical 37:14 40:12 56:16 identify 30:12 46:20 Identifying 30:12 Ill 1:17,22 illegal 50:11 Illinois 9:20,22 12:23,25 13:20 15:19 18:24 19:22 24:25 25:20 27:23 28:11 30:3,8 33:14 39:3,6 45:1 Illinois's 3:14 illustrating 33:3 immediately 34:2 imposition 24:14,24 impounded 35:11 impractical 39:16 45:13 impracticality 42:6 improperly 58:15 incarcerated 37:8 incentive 29:7 incentives 29:6 include 42:15 44:20 included 35:24	44:1 incomes 45:15 incorporates 44:19 independently 60:23 indicated 63:17 indication 30:16 individual 6:2 19:3 38:3 39:17 46:6,11 56:2,2 64:10 individually 45:2 individual's 63:13 inextricably 36:8 informal 19:15 21:24 initial 28:15 initially 60:2 injunction 9:21 10:5 24:23 injunctive 5:24 6:17 8:3 9:9 24:8 38:4 inkling 38:14 43:5 innocent 18:15 19:5 28:10 32:13 41:19 42:5,9,17 43:17,19,24 47:8 48:11 49:19 55:5 inquired 43:20 instances 39:20 interest 3:22 4:15,16,17 18:11,14 19:14 28:20,21 29:14 30:15 31:13 64:9 interesting 57:8 57:8 interests 4:9,10	33:4,5 37:5,6 interim 9:21,25 44:20 interpreting 25:6 intervention 17:22 intruded 23:2 invalid 51:25 52:2 invalidate 44:17 investigate 28:5 28:7,10 30:10 48:11 49:7 investigating 32:3 investigation 27:24 42:10 49:8,14 invoked 34:16 34:17 involve 42:22 involved 18:14 26:12 42:21 43:12 45:14 48:16 49:9 50:10 ironclad 28:9 issue 19:3 20:13 36:20 37:3 39:3 49:19 54:20 56:4 63:20 issues 12:1 15:22 36:2 40:6 58:17 item 64:4 <hr/> J <hr/> Jay 1:18 2:5 23:4,5,9,17 24:12 25:3 26:5,13,25 27:4,6,19 28:6 29:4 30:24 31:6,11,20 32:24 33:17	Joe 43:1,3,6,12 John 43:3,4,9 judge 7:5 54:24 62:19 63:4 judge's 7:7 judgment 6:22 7:2,4 8:2 58:14 judicial 17:22 21:23 27:17 28:3 32:9 51:22 June 5:22 jurisdiction 9:5 Justice 1:19 3:3 3:10,24 4:12 4:14,23 5:2,8 5:25 6:11,15 6:21 7:1,13,16 7:23 8:1,7,11 8:15,23 9:6,16 9:23 10:8,13 10:21 11:2,13 12:10,15 13:3 13:7,14,23 14:10,13,23 15:1,11,23 16:2,10,17,21 17:4,8,14,17 17:20,23 18:4 18:13 19:17,23 20:1,2,10,16 20:23 21:1,5 21:13 22:2,6 22:25 23:4,9 23:12,12,15 24:10,25 25:14 26:10,17,25 27:1,5,11,20 28:4,14 30:18 30:25 31:3,6,9 31:12,17 32:14 33:12,13,17,19 33:23 34:21 35:1,13,19,23 36:2,10 37:4 37:25 38:18,23 40:19 41:6,14
--	---	---	---	--

41:17 42:2,18 42:23,24 43:11 43:18,25 44:2 44:6,8,11,13 44:24 45:10,20 46:1,5,8,10 47:7,16,21,22 48:14 49:5,17 50:3 51:4,12 52:5 53:5,9,17 53:18 54:5,8,9 54:9,15 55:2,4 55:23 56:10 57:7,23 58:11 58:20,24 59:20 59:22 60:7,14 60:18,24 61:1 61:8,11,15,25 62:7,12,18,25 63:8,19 64:3 64:21 justification 26:4 27:15,19 justify 31:17 47:2	L	59:4 63:10 lost 23:22 60:3 lot 29:16 42:3 48:19 55:3 low 45:15 luck 20:19	merge 20:21 merges 20:20 merit 26:2 merits 6:1 20:20 20:22 34:5 36:3,8,12,14 36:25 37:1,2 38:12 40:14 54:6 met 41:24 millionaires 46:15 mind 39:1,9,10 40:1 minimum 16:10 23:14 minus 53:8 minority 30:11 minute 22:10 minutes 59:23 mistake 28:17 53:14 mistaken 53:13 mitigate 50:17 mixed 39:8 40:5 40:6 modest 45:15 moment 41:3 money 40:20 46:14 47:10 55:3 61:11,12 63:21 months 16:25 20:18 24:17 25:24 26:22 27:16,22 30:23 31:15,19,22 moot 5:18 8:8 9:9 10:11,20 11:5,7 24:9 33:25,25 34:11 56:21,24 57:4 57:4,6,9,18 58:2 60:12 61:22 mootness 4:24 7:19 9:4 23:16	23:18 36:5 55:25 56:4 57:13 58:11,12 60:14 61:16,18 62:1 morning 3:4 motion 5:20 6:8 7:8 9:1,2 10:18 10:19,25 11:1 13:22 25:7 34:3 35:22 58:1 62:21 move 21:11 moved 34:2 multifaceted 64:4 Munsingwear 8:8 56:23 57:5 57:20 60:13 61:24,25 62:13
justification 26:4 27:15,19 justify 31:17 47:2	K	M	N	
keep 26:10 28:23 50:16 kind 24:22 25:5 32:25 54:15 59:1 61:18 knew 48:18 know 8:16 19:11 21:11 22:10 27:7 29:16 31:4,23 32:21 35:2 42:4 43:5 43:7,8 45:20 46:12,12,15 47:14 48:16,17 52:11 55:7,8 55:10 Krimstock 40:17 41:23 42:3	language 54:18 large 45:24 largely 45:12 Laughter 38:20 law 3:25 12:23 13:2,21 14:7 19:22 26:3,4,6 39:6 45:1 57:10 63:2,9 lawsuit 58:3,13 62:14 leave 59:15 leaving 59:16 left 9:25 58:1 59:5,15 legislated 27:8 legislation 33:1 33:15 letter 13:7 let's 16:23 18:17 32:23 liberty 20:11 likelihood 45:16 limit 47:5 limits 16:9 lingering 5:4 linked 36:8 lists 20:1 literally 56:16 litigate 37:1,2 45:19 litigation 60:11 60:22 62:5 little 29:3 45:15 47:23 55:25 live 7:17 37:21 56:7 living 32:16 local 28:21 29:6 long 32:19,22 56:6,7 longer 29:8,14 37:7 look 16:8 27:20 51:7,9,10 looking 50:14	M 1:18 2:5 23:5 magistrate 4:2 20:6 26:22 28:19 39:24 50:8,14 54:24 maintain 29:16 52:4 56:5,19 majority 32:6 making 27:16 61:21 Mallen 16:8 mandates 23:14 math 63:20 Mathews 47:1 55:16 63:24,24 64:3 matter 1:12 17:24 27:21 32:1 39:6 60:5 60:5 64:24 maximum 31:2 Mayberry 3:19 mean 7:3 8:20 12:18 13:25 14:1 15:4 19:17 21:5,19 26:10 30:2 41:1 45:4,5 47:12 52:14 54:21 55:6 57:8 60:17,19 63:7 meaning 4:16 28:18 meaningless 13:11 means 11:16,22 mentioned 11:18	merge 20:21 merges 20:20 merit 26:2 merits 6:1 20:20 20:22 34:5 36:3,8,12,14 36:25 37:1,2 38:12 40:14 54:6 met 41:24 millionaires 46:15 mind 39:1,9,10 40:1 minimum 16:10 23:14 minus 53:8 minority 30:11 minute 22:10 minutes 59:23 mistake 28:17 53:14 mistaken 53:13 mitigate 50:17 mixed 39:8 40:5 40:6 modest 45:15 moment 41:3 money 40:20 46:14 47:10 55:3 61:11,12 63:21 months 16:25 20:18 24:17 25:24 26:22 27:16,22 30:23 31:15,19,22 moot 5:18 8:8 9:9 10:11,20 11:5,7 24:9 33:25,25 34:11 56:21,24 57:4 57:4,6,9,18 58:2 60:12 61:22 mootness 4:24 7:19 9:4 23:16	23:18 36:5 55:25 56:4 57:13 58:11,12 60:14 61:16,18 62:1 morning 3:4 motion 5:20 6:8 7:8 9:1,2 10:18 10:19,25 11:1 13:22 25:7 34:3 35:22 58:1 62:21 move 21:11 moved 34:2 multifaceted 64:4 Munsingwear 8:8 56:23 57:5 57:20 60:13 61:24,25 62:13
justification 26:4 27:15,19 justify 31:17 47:2	K	M	N	
keep 26:10 28:23 50:16 kind 24:22 25:5 32:25 54:15 59:1 61:18 knew 48:18 know 8:16 19:11 21:11 22:10 27:7 29:16 31:4,23 32:21 35:2 42:4 43:5 43:7,8 45:20 46:12,12,15 47:14 48:16,17 52:11 55:7,8 55:10 Krimstock 40:17 41:23 42:3	language 54:18 large 45:24 largely 45:12 Laughter 38:20 law 3:25 12:23 13:2,21 14:7 19:22 26:3,4,6 39:6 45:1 57:10 63:2,9 lawsuit 58:3,13 62:14 leave 59:15 leaving 59:16 left 9:25 58:1 59:5,15 legislated 27:8 legislation 33:1 33:15 letter 13:7 let's 16:23 18:17 32:23 liberty 20:11 likelihood 45:16 limit 47:5 limits 16:9 lingering 5:4 linked 36:8 lists 20:1 literally 56:16 litigate 37:1,2 45:19 litigation 60:11 60:22 62:5 little 29:3 45:15 47:23 55:25 live 7:17 37:21 56:7 living 32:16 local 28:21 29:6 long 32:19,22 56:6,7 longer 29:8,14 37:7 look 16:8 27:20 51:7,9,10 looking 50:14	M 1:18 2:5 23:5 magistrate 4:2 20:6 26:22 28:19 39:24 50:8,14 54:24 maintain 29:16 52:4 56:5,19 majority 32:6 making 27:16 61:21 Mallen 16:8 mandates 23:14 math 63:20 Mathews 47:1 55:16 63:24,24 64:3 matter 1:12 17:24 27:21 32:1 39:6 60:5 60:5 64:24 maximum 31:2 Mayberry 3:19 mean 7:3 8:20 12:18 13:25 14:1 15:4 19:17 21:5,19 26:10 30:2 41:1 45:4,5 47:12 52:14 54:21 55:6 57:8 60:17,19 63:7 meaning 4:16 28:18 meaningless 13:11 means 11:16,22 mentioned 11:18	N N 2:1,1 3:1 named 6:2,16 7:17 34:22 narrow 4:5,6 59:17 narrowed 59:3,5 narrowing 59:7 59:8 nature 10:3 nearby 25:17 necessarily 39:9 46:24 53:2 necessary 29:8 29:15 59:13 need 13:8 46:15 48:10 49:7 63:12,13 needed 41:2 needs 32:17 41:7 negotiation 19:15 64:17,20 negotiations 21:24 neither 7:17 net 14:8	

Neumann 3:11	34:16 63:20	63:3	27:16 28:20	plaintiffs 5:3,19
neutral 4:2	one's 20:10	owners 14:8	32:16,17 36:24	6:3,16 7:9,18
26:23 27:17	open 58:1 59:6	47:18 61:6	41:1 43:15	7:21 10:6,16
28:19 39:24	59:16,16	owns 30:17	46:23 47:19	10:19,21,22
48:12 50:8	opening 11:13	32:16	52:1,25 53:2	11:3,16 25:6
never 9:14 15:14	operate 12:4,9		54:4,12	34:1,22 38:3
25:23 26:11	operates 12:7	P	personal 3:13	57:16
43:5 44:10	opinion 25:18	P 3:1	28:12,12,20	plead 36:11
63:21	62:19	PAGE 2:2	33:10 63:18	pleading 7:22
new 16:22 36:15	opponents 39:2	papers 50:5	64:8	please 3:10
49:2	opportunity	parked 25:16	persons 3:21	23:10 33:24
nonfacial 53:20	12:5 37:1,2	parole 34:7,12	Peters 1:22 2:8	point 7:2,9
nonjudicial	46:20	part 35:20 42:15	33:20,21,23	13:17 29:5
21:21 64:13	opposite 60:19	51:4 63:19	34:24 35:6,17	39:20 51:6
normal 60:21	oral 1:12 2:2 3:7	particular 52:1	35:21 36:1,7	61:21
Northern 5:21	23:5 33:21	57:11	36:17 37:4,13	pointed 21:6
note 4:7	order 8:9 10:17	parties 36:11	38:6,21 40:9	29:11
notice 27:24	10:17,20,24	parts 42:12	40:24 41:10,16	pointing 26:6
30:5,6	25:6 44:16	party 28:25	41:20 42:11,22	police 18:18
notify 29:24	52:24 61:23	pass 26:23	43:10,13,22	28:22 29:6
30:9	62:13	PAUL 1:16 2:3	44:1,5,7,9,12	41:24 46:25
notifying 32:4	ordered 43:22	2:11 3:7 59:24	44:15 45:8,11	50:8
number 5:21	51:5 53:14	pay 57:16	45:23 46:4,7,9	policeman 25:17
15:21	orders 61:24	pending 11:17	46:17 47:13	39:21 54:10,18
	62:1	49:13 64:10	48:5 49:1,15	position 8:14
O	original 7:17	people 14:14	51:2 52:2,19	12:16,21 15:18
O 2:1 3:1	originally 7:24	15:13 35:4,10	53:6,12,25	17:24 23:23
obligation 29:20	9:7 23:25	37:19 44:22	54:7,14 55:14	37:16 38:22,24
29:23 30:9	ought 58:15	45:13,13,14,25	56:5,12 57:12	43:21 57:20
obtain 39:14	outcome 28:20	46:11 47:4	58:9,18,22	60:12 62:2
obvious 58:22	outer 16:9	52:3 55:7	59:8,21	possession 23:22
occurred 5:3	overrule 57:25	56:19 59:17	petition 11:15	possibility 21:20
14:17 24:17	overturn 38:3	61:11	11:19 12:19	33:7
October 1:10	owner 13:2	perceive 59:9	Petitioner 1:5	possible 6:18
offense 18:19	18:11,11,16	percent 22:14	1:17,21 2:4,7	9:10 15:8
43:2	19:5 21:18,22	29:11	2:12 3:8 23:8	16:15,17 21:11
officer 18:18	28:10,18 30:5	perfectly 24:22	59:25	24:2 42:5
official 26:23	30:5,6,14	period 12:11	piece 29:21	possibly 9:25
27:17	31:19 32:13,22	13:24 17:2	46:23	25:24 49:18
Oh 61:3	32:22 41:19	18:6,25 28:16	place 3:16 12:17	post 41:1 50:16
okay 12:21	42:5,9,16,16	41:14,15 42:8	16:5,11,24	posted 63:14
14:13 20:23	42:17 43:3,3	43:8 48:20	30:22 31:2	posting 22:15
26:17 27:11	43:14,15,17,19	59:2	41:7,8 48:23	posture 47:15
28:25 43:25	43:24 47:8	periods 14:4,5	57:2	post-deprivati...
44:2 50:14	48:2,4,8,11,16	15:20	plaintiff 34:11	24:2
once 13:16,16	48:18,25 49:8	permit 3:25 4:4	35:8 36:21	post-seizure
13:18 21:10	49:19 55:5	person 20:3,5,17	58:3 61:17	3:17 51:18

remanded 25:4	5:15	33:19 40:19	scope 48:21	settled 57:18
remarkably 34:6	Respondents 1:23 2:9 5:10	47:7,21 48:14	second 27:25	60:17,20
remedies 13:20 14:7 44:19,20 64:14	5:13 6:7,19 9:11 15:22 23:20,21 33:22	55:23 57:7 59:20,22 62:7 64:21	29:18 39:8 43:16 50:22 54:6 63:8,10	settlement 19:15 56:25 57:15,19 60:9,15 61:14 61:15,17 62:1 62:3
remedy 12:13 15:6 45:1,4,7,8 59:10,19	response 10:7 51:3 56:20 60:11,22 62:3	Robinson 30:2	section 21:20 44:18 45:2 64:13,13,16	Seventh 3:13 5:18 7:7 8:4,5 8:18,22 22:15 25:3,7 38:1,5,7 43:23 44:16 51:5,13 52:19 52:24 53:13,24 54:1,2,3 57:1,1 57:21 58:24 59:3,4
remission 50:13 50:24	responsive 15:15	ruling 38:10,11 38:14 54:2	secured 33:6	
remission-like 50:24	rest 10:6	run 15:7 24:16	security 30:14 40:21,25	
remission-type 63:11	restitution 5:23 6:10 7:10,12	<hr/> S <hr/>	see 20:5,7 21:1 38:24 40:3,4 42:6,7 50:2 54:20,24 59:5	
repeating 35:12 36:23	result 47:17 56:22,25 60:15 62:1	S 2:1 3:1	seeing 40:6	
repetition 34:15 35:2,9	retaining 51:21	safety 14:8	seek 7:3	shape 8:4
replevin 4:8	return 5:11 9:13 10:4 11:19 56:22 57:14,17	sales 48:22	seeking 9:13,16 9:18 10:4 23:20 24:10,23 38:3 47:9	shifts 26:14
reports 41:24	returned 5:13 9:15 48:7 56:3 57:14,17 60:4 60:8	satisfy 14:18	seize 19:23 28:7 32:11 39:21 42:1 46:25 54:10,12	short 20:7 41:15 42:8 43:7 59:2
represented 56:8	reverse 36:12	saying 11:4,6 12:19 16:10 20:16 28:15,24 34:24 39:2 50:9,14 52:12 57:12	seized 4:11 5:11 20:14 28:21 47:4 50:9	shorter 16:15 17:1
representing 36:21	reversed 7:7	says 13:9,23 14:24 27:2 31:18,22 43:5 48:2 52:8 54:13	seizing 28:22 29:13 32:3 50:15 51:21	show 19:21
request 50:20	review 34:16 35:3 40:18	Scalia 7:13,16 8:23 9:16,23 12:10 13:7,14 13:23 14:10,13 14:23 15:1 17:17,20,23 18:4 23:12 24:10 32:14 34:21 35:1,13 35:19 38:18 43:18,25 44:2 44:6,8,11,13 44:24 45:10,20 46:1,5,8,10 52:5 53:9,18 55:2 56:10 60:7,14,18,24 61:1,8,11,15 61:25	seizure 3:13 4:1 4:3 16:6,11 19:5 24:17 30:10 49:24 64:5	showing 42:15
requested 35:8	reviewing 4:2 27:20		seized 4:11 5:11 20:14 28:21 47:4 50:9	shows 26:13
require 3:15 50:23 55:17	right 12:19 13:2 18:1,7 22:5 25:5,14 27:5 32:11 35:10 37:9 39:5,12 42:23 44:4 45:17,22 54:10 54:15,18 59:13 61:9 62:10,16 63:8		seizing 28:22 29:13 32:3 50:15 51:21	significantly 36:18
requirement 18:24 24:15	rights 37:20		seizure 3:13 4:1 4:3 16:6,11 19:5 24:17 30:10 49:24 64:5	similar 12:3 34:7 37:24 40:16,17 41:22
requires 27:20 57:10	ROBERTS 3:3 8:7,11,15 12:15 15:11 16:21 22:25 23:4,15 33:12		seizure 3:13 4:1 4:3 16:6,11 19:5 24:17 30:10 49:24 64:5	simply 9:8 21:22 21:22
reserve 22:11,24			seizures 22:14 29:11 30:11 32:6 42:3,20	simultaneously 34:5
resolved 3:23 12:2 62:6			sell 47:9	single 3:21 10:17 46:23 52:25 53:2 54:3
respect 22:17 35:7 37:18 40:12 41:21 55:12			sense 12:1 59:15 64:7	sir 54:7
respectfully 35:6			sent 30:6	sitting 32:2 63:5
respects 37:23			separate 39:10	situation 9:14 18:15 32:14,25 34:6,23 37:14 49:5 54:16 56:23,24 57:5 57:6,19,21
respond 29:4,5			separated 40:7	
responded 31:21			set 45:22	
Respondent			settle 62:4,4,9	

Slocum 3:19 11:18 12:3,17 12:24 13:8,9 13:12 14:16,19 15:4,5,11	63:2,9 stated 7:11 states 1:1,13,20 2:6 16:15 23:6 27:8 32:1 34:7 62:20	study 33:9 subject 54:17 submit 5:17 submitted 64:22 64:24 subsequent 5:18 suggest 44:16 46:21 suggested 11:16 38:14 suggesting 34:25 40:11 44:23 46:22 49:16 51:9 53:1 suggestion 47:16 supporting 1:21 2:7 23:8 25:15 suppose 8:7,15 16:3 32:14 supposed 54:23 Supreme 1:1,13 sure 50:21 64:1 surely 12:15 survive 47:10 suspect 47:24 suspense 29:12 systems 27:23	40:15 taps 49:10 tell 12:5 telling 11:22 31:19 ten 59:2 test 35:3 tests 4:15 Thank 23:3 26:18 33:12,19 59:20,21 60:1 64:21 thing 26:19,19 35:5 40:10 things 38:25 think 6:20 7:20 9:2 10:2 11:24 12:3,7,25 13:12 14:2,2,7 15:7 16:8,9 17:7,16,18 18:2,3 19:7,8,9 19:13 23:15,19 30:24 31:20,24 32:24 36:17 37:4,15,15 39:15,19 40:5 40:9 41:7,8,20 42:12 43:7,13 49:1,2,4,9 51:3 51:7 52:2,5,5 52:22 53:25 54:16 55:24 56:3,17 59:5 62:10 64:18 third 28:1 Thomas 1:22 2:8 20:3 33:21 thought 19:19 20:4 21:14,14 30:19 41:12 42:18,19 43:18 43:19,21 47:22 60:7,8 62:7 three 5:10,10,11 5:12 21:6 39:3 40:3 59:23	60:3 61:5,6 thrust 26:19,21 tied 48:17 ties 55:24 time 6:8 11:11 12:11 13:24 14:3,5 15:7,20 17:2,9,24,25 18:6,25 20:4,7 21:15 22:11,24 23:1,2,14 25:10,13 28:17 29:19 31:2,24 34:1,18,19 41:13 43:8 48:11 49:7 59:14 timeframe 4:16 timely 24:2 35:8 times 59:10 today 35:10 told 42:20 treated 45:6 trial 11:25 12:4 12:8 21:12 39:17 trigger 59:13 true 5:7 7:15 8:25 12:2 13:5 35:21 40:11 63:23 truly 36:25 trying 48:21,22 58:4 tune 41:4 turns 38:18 40:22 two 5:13 6:19 9:11 10:5,23 11:4 20:14 23:21 38:25 39:10 41:17 42:12 50:19 60:2 61:13,13 Tyhesha 6:7 type 4:9 11:18 50:13
split 37:5 split 37:5 stake 61:12 stand 35:4 38:25 standing 34:2,17 34:19 56:6,14 56:15,19 start 10:9 49:25 58:13 state 4:15 5:15 18:9,24 21:15 23:14,23 24:5 26:13 27:14 30:7,9 31:12 31:21 41:18 42:7 43:8 45:6 48:4 50:23 57:10 61:14	statute 9:20,22 13:4,9,15,23 14:24 15:19 16:3,23 17:6 18:9 20:2,12 21:20 27:1,4,6 28:11 30:4 31:1,18,22 33:14 39:14,21 44:3 51:24,25 52:12,18 54:10 64:12 statutes 21:6,8 27:8 39:4,7 40:3 statute's 13:7 statutory 12:16 20:13 33:18 stay 57:2 step 27:21,24,25 28:1 36:16 steps 27:23 29:5 Stevens 13:3 15:23 16:2,10 16:17 17:4,8 17:14 23:12 30:18,25 31:3 31:6,9,12,17 57:23 58:11 62:12,18 stopped 24:20 story 14:14 street 25:16 struck 3:14 53:22	T T 2:1,1 take 16:5,11,24 18:17 25:20 26:24 27:18 28:4 29:16 30:22 31:2 37:25 41:7,8 48:23 57:10 59:23 taken 32:15 46:13,14,23 53:1,2 takes 3:16 4:11 12:17 54:22 talk 19:16 talking 19:17	take 16:5,11,24 18:17 25:20 26:24 27:18 28:4 29:16 30:22 31:2 37:25 41:7,8 48:23 57:10 59:23 taken 32:15 46:13,14,23 53:1,2 takes 3:16 4:11 12:17 54:22 talk 19:16 talking 19:17	

typical 18:18	vacating 61:23	19:10 20:12,12	years 13:1 17:17	23 2:7 37:3
<hr/> U <hr/>	valid 31:13	20:17,18,24	17:20,21 18:1	38:14
ultimate 11:17	35:15	21:5,7,8 27:2	18:10 31:23	<hr/> 3 <hr/>
19:9 22:21	validity 8:21	27:13 33:3	yet-undefined	3 2:4
26:7,15 57:13	value 20:15 22:8	38:25 40:6	43:16	33 2:9
ultimately 40:15	47:19 53:7	59:18 63:2	yo 43:21	<hr/> 4 <hr/>
61:6	55:18	64:18	York 49:3	40 13:10,25,25
unclear 9:12	vehicle 18:19	ways 40:25	Yunker 10:6	14:1,10,12,15
unconstitutio...	viable 29:3	Wednesday	23:21	14:16,20,24
9:20 17:9,13	view 8:23 17:5	1:10	<hr/> \$ <hr/>	18:1,2
31:7,10,11,25	violated 30:4	went 7:2 61:5	\$20,000 57:16	45 21:17
45:3 52:6,12	voluntary 57:9	weren't 53:23	\$400 57:16	49 5:21,21
unconstitutio...	60:6	we're 28:17	\$5,000 47:5	<hr/> 5 <hr/>
45:6	Von 3:11	40:11 57:13,13	<hr/> 0 <hr/>	50 13:1 27:8
uncontested	<hr/> W <hr/>	WILLIAM 1:18	08-351 1:6 3:4	59 2:12
32:7	wait 12:22 13:10	2:5 23:5	<hr/> 1 <hr/>	<hr/> 6 <hr/>
underlying	20:18 25:24	Williams 10:6	1 16:5,11 17:15	6 16:24 20:18
56:17 60:5	26:22 27:16	11:11 23:21	17:15 18:1	21:20 25:24
62:5	32:19,21 40:8	win 21:1 36:12	22:10	26:22 27:16,22
understand	waited 36:14	wins 48:4	10 17:17,20,21	30:22 64:13,16
11:20 17:4	waiting 40:9	wire 49:10	17:25 18:10	<hr/> 7 <hr/>
31:3 34:15	want 16:4 18:15	wise 58:19	23:24 24:1,16	7 25:13
38:21 49:18,20	36:13 39:24	wish 32:6	31:23 41:8,11	<hr/> 8 <hr/>
50:20 60:24	43:25 45:21,22	wished 7:11	41:15 43:4	8,850 11:25,25
61:8,20 64:1	46:2 49:11	work 32:17	49:12 51:19	17:3 31:8,14
understanding	52:9 55:10	39:16 41:5	10-day 24:14,24	31:21
42:2 45:16	61:22	workable 50:2	10:03 1:14 3:2	80 22:13
50:25	wanted 24:20,23	works 49:3	11:09 64:23	85 22:13 29:11
unique 27:7	25:9,11	worse 49:6	14 1:10 41:15	85% 42:20
unitary 3:21	wants 29:2 32:8	worth 55:2	43:4 49:12	<hr/> 9 <hr/>
United 1:1,13,20	39:4	wouldn't 21:23	18 31:15,19,22	983(f) 33:2
2:6 23:6 34:7	warrant 18:20	31:9,11 38:19	33:2	
universe 59:1	19:3,24 29:1	45:1 56:23	187 21:16	
unpackage 50:4	39:22 49:23	writ 58:15	19 5:22	
unquestionably	54:11,12 55:19	written 44:21	19th 12:20	
40:11	Washington 1:9	wrong 19:20	1972 30:3	
uri 43:21	1:19	39:12	1983 45:2	
use 11:25 27:8	wasn't 6:11 7:13	wrote 20:3 43:1	<hr/> 2 <hr/>	
U.S.C 33:2	9:7 10:9,10	<hr/> X <hr/>	2 24:17 44:18	
<hr/> V <hr/>	35:23 54:19	x 1:2,8	20 24:21	
v 1:6 3:4,19,19	60:11 62:3	<hr/> Y <hr/>	20,000 20:15	
16:8 17:19	waterfront	Yeah 55:3	21:15 64:15	
30:2 34:7	51:14	year 16:5,11,18	2008 5:22	
56:24	way 12:3,8	16:25 17:15	2009 1:10 6:8	
vacated 62:19	13:13,14 14:21	18:1 31:14		
	15:21 18:11			